Chapter 7

The Government’s Proposed Review
of Australia’s Contract Law:
An Interim Positive Response*

Luke Nottage

1 Introduction

This chapter outlines and responds to a thought-provoking ‘Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ (DP). It focuses on eight sets of questions posed in the DP, addressed respectively in eight Parts below, followed by the general conclusion that the preliminary public consultation process has already uncovered sufficient evidence for the Australian government now to initiate a proper law reform project.

The DP was released on 22 March 2012 by the Australian Attorney-General’s Department (AGD), as part of its project aimed at ‘Improving Australia’s Law and Justice Framework’. It has generated significant controversy among those more comfortable with existing domestic law, making it uncertain whether the government will proceed with any reforms whatsoever. By 7 September 2013, the date called for Australia’s general election, the AGD had still not released any follow-up report or analysis of the 53 publically available Submissions and other responses to the DP, including an online survey and views expressed at invitation-only Forums held in Melbourne and Sydney over 2012.1 The AGD has

---

* This chapter is an updated and expanded version of a Submission (finalised on 16 July 2012, available at <http://ssrn.com/abstract=2111826> accessed 1 September 2013) for the Australian government’s consultation on contract law reform, elaborated after the workshop hosted by Griffith University (in Ubud, 1–2 May 2013). I am grateful for the helpful discussions and views expressed at that workshop as well as at three research events related to the government’s consultation, held in Sydney over June–July 2012.

1 For readers outside Australia and the common law tradition: the AGD is similar to a Ministry of Justice found in other countries. The DP and related material (including most of the Submissions in response to the DP) can be found at: Attorney-General’s Department, Australian Government, Review of Australian Contract Law (20 July 2012) available at <http://www.ag.gov.au/consultations/pages/ReviewofAustraliancontractlaw.aspx> accessed 1 September 2013. A numbered list of the Submissions, referred to accordingly throughout this chapter, is added as an Appendix to my original Submission (available at http://ssrn.com/abstract=2111826).
also meanwhile embarked, since December 2012, on a public consultation on reforming private international law in Australia – another area based primarily on a burgeoning corpus of case law. The main background to both initiatives is the National Partnership Agreement to Deliver a Seamless National Economy, reached in 2009 by the federal, state and territory governments, which includes the aim of ‘reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions’.

Although contract law reform is unlikely ever to become a high priority in Australia, this chapter analyses the DP in light of the public Submissions to highlight especially:

- additional problem areas and hence ‘drivers for reform’ for contract law reform in Australia (including consumers and some parts of the legal profession), as well as the ten helpfully identified by the DP;
- the direct and opportunity costs incurred by complex domestic contract law, and their disproportionate impact on certain groups;
- the growing disparities with the contract law regimes found in Australia’s major trading partners nowadays (especially now that some are engaging in comprehensive contract law reforms of their own) or at the international level;
- how best to conceptualise and address challenges involved even in a ‘Restatement’ approach to reforming Australian contract law.

Reform initiatives may indeed promise fewer directly-measurable benefits than in the European Union (EU, with significant divergences in contract law rules and broader legal culture across member states) and even the United States (US, because its highest court does not bind state courts on contract law issues – unlike the High Court of Australia). Yet contract law initiatives in Australia can also be carried out at lower cost, learning from the harmonisation processes as well as the results or legal norms generated by comprehensive national and international reform projects, particularly over the last decade. In addition, reform of Australian contract law highlights major questions of distributive justice and ‘nation-building’ in a broader sense, not just issues of aggregate economic

---


efficiency which have figured prominently in the Australian government’s reform agenda so far. On balance, therefore, it is high time for the Australian government to proceed with a more detailed inquiry into various means of addressing some significant problems with Australian contract law, under the leadership of the Australian Law Reform Commission (ALRC).

2 Problems and Drivers of Reform in Australian Contract Law

The DP begins by asking what the main problems are for ‘users’ (and non-users) of Australian Consumer Law (ACL), and hence what ‘drivers of reform’ are the most important for contract law. The Paper lists the following ten drivers, which do indeed highlight most – but not all – of the challenges affecting Australian contract law:

- accessibility;
- certainty;
- simplification;
- setting acceptable standards of conduct;
- supporting innovation;
- compatibility for e-commerce;
- elasticity (that is, to support more ‘relational contracts’);
- suitability for small and medium-sized businesses (SMEs);
- harmonisation; and
- internationalisation.

Accessibility, Certainty and Simplification through Harmonisation

Most problematic is probably ‘accessibility’, and the related difficulty of a lack of ‘certainty’, generating a need for ‘simplification’ and better ‘harmonisation’ of contract law even within Australia. Even as an immigrant to Australia in 2001, from New Zealand (a country also still firmly within the English variant of the

4 See the DP: Attorney-General’s Department (n 1) 3–6.

5 ‘Relational contracts’ comprise longer-term or other more complex contractual relationships, lying at the other end of a spectrum from ‘discrete’ contracts (such as one-off sales of goods) characterised by a simpler set of norms. See, for example, Ian Macneil, ‘Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law’ (1978) 72 Northwest University Law Review 854. In its Submission in response to the DP (No 9), the Australian Newsagents Federation gives the example of the long-term contracts that its members conclude with large newspaper publishers. The Submission of Dr Jenny Buchan (No 13) highlights franchise contracts.

common law tradition) and with a doctorate in comparative contract law, it took me several years of researching and teaching Australian contract law to discern sufficiently many of the ways its case law-driven principles have evolved and apply in practice. Other academics in Australia also find its contract law to be unnecessarily complex and confusing in various significant respects. Problems are compounded for those who do not need to research Australian contract law principles on a regular basis, including many Australian solicitors (many of whom remain in sole practices or small firms, or work as in-house counsel) and even some barristers. Local lawyers do mostly get by, of course, thanks largely to standardised contract forms (for example for residential property transactions or certain financial products). Yet the difficulty in keeping up with developments in the voluminous Australian case law limits their ability to negotiate and draft contracts more effectively, and causes extra costs and delays when disputes end up in court. This becomes particularly problematic when the amounts under the contract or claimable in damages are small, or involve cross-border transactions.

Foreign lawyers encounter even more impediments in determining Australian contract law, when advising their clients overseas wishing to deal with Australian parties. This problem is exacerbated by an apparent tendency for local legal advisors generally to urge the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in cross-border sales contracts, partly due to

---

8 See, for example, the Submissions by Prof Philip Clarke and Dr Julie Clark (No 18), Prof Andrew Stewart (No 50, appending his article, ‘What’s Wrong with the Australian Law of Contract?’ (2012) 29 Journal of Contract Law 75, which focuses on uncertainties regarding principles of contract interpretation and the possible contours of a duty of good faith in Australian contract law) and Prof Dan Svantesson (No 52). See also the Submission by Dr May Fong Cheong and Dr Pei Meng Teng (No 16, focusing on contracts for the benefit of third parties).
10 The Submission by the Australian Society of Authors (ASA, No 10), for example, highlights the practical problems in enforcing such contractual rights.
to persistent misunderstandings of the CISG.\textsuperscript{11} They encourage clients instead to seek specification of a domestic law – including perhaps Australian contract law – to govern such relationships.\textsuperscript{12} Yet reaching agreement on an acceptable governing law becomes more difficult without ready access to clear statements of Australian contract law principles.

Several submissions in response to the DP seem to acknowledge the challenges of accessing and interpreting Australian contract law, especially for SMEs. The Australian Copyright Council, for example, mentions that creators of copyrighted works often copy over terms seen elsewhere without understanding their meaning.\textsuperscript{13} Presumably these can later give rise to disputes and the problem could be reduced – although probably never completely avoided – by making Australian contract law principles more understandable and readily available. The Australian Society of Authors complains about Amazon Kindle requiring Australian authors and publishers to agree that the law of a US state shall govern their contract, to the express exclusion of the CISG,\textsuperscript{14} suggesting that ‘multilateral or bilateral agreements on contract principles’ may provide a useful alternative. So too, presumably, would be a more accessible and clearer statement of Australian contract law, as an alternative to US law – at least in contract negotiations with a smaller commercial entity than Amazon. The Civil Contractors Federation complains that its members (diverse firms often dealing with state and local governments) contract ‘on the basis of what they understand to be the basis of the agreement only to find that later a different interpretation or view is taken of a clause in the contract’.\textsuperscript{15} Consult Australia

\textsuperscript{11} For example, the submission in response to the DP from the Australian Corporate Lawyers Association (ACLA, No 7, 4) includes the remarkable assertion that under the CISG ‘the ability to return goods not fit for purpose would be removed’. Compare, for example, CISG arts 35(2)(a) and 49 (although CISG art 25 does generally make it harder for a buyer to avoid the contract for minor breaches, compared to a seller under Australian sale of goods legislation relying on an implied ‘condition’ of fitness for purpose).

\textsuperscript{12} Luke Nottage, ‘Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealand’s View from Australia and Japan’ (2005) 36 Victoria University of Wellington Law Review 815; Lisa Spagnolo, ‘the Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers’ (2009) 10 Melbourne Journal of International Law 141. Even if the CISG is not excluded, its scope is expressly limited (for example in Art 4 as to matters of contractual validity). Another contract law regime needs to apply to govern such matters, preferably by express specification in the sales contract following diligent research and negotiation by the parties and their legal advisors. See also generally Schwenzer, in this volume.

\textsuperscript{13} Submission No 6, 3.

\textsuperscript{14} Submission No 10, 5. Curiously, the Society seems to assume that the CISG would otherwise apply, even though it would not – for such a contract of services, rather than a sale of goods. This therefore provides another example of a fundamental misunderstanding of the CISG among the Australian business community.

\textsuperscript{15} Submission No 17, 6. The Federation does acknowledge, however, that this is arguably ‘an inherent feature of a common law system which relies heavily on the courts for
(a peak association for consultants in the building industry) specifically draws attention to the need for considering accessibility of contract law, remarking that: 16

Many smaller businesses don’t have the means to obtain legal advice, and will read and analyse the contract without legal training, and therefore use the plain English meaning of terms within that contract.

Other Submissions highlighting the costs of accessing accurate legal information for drafting contracts and enforcing rights come from the Information Technology Contract and Recruitment Association Ltd, Dr Cyril Jankoff (the ‘risk doctor’ consultant on contracts), the Licencing Executives Society (Australia and New Zealand), the Hon Paul Lynch MP (on behalf of his constituents), the New South Wales (NSW) Small Business Commissioner, the Small Business Development Corporation (SMBC, within the Western Australian government – drawing on original survey evidence) and the SME Association of Australia. 17

Submissions from the legal profession were generally more sanguine about the accessibility of Australia’s contract law, but most conceded that there were areas of uncertainty where the law might usefully be simplified or harmonised. Australia’s main association for in-house lawyers urged consideration of ‘centralisation, so that contract law is accessible in one location’, as well as removal of some ambiguity and in particular more uniformity among different legislative regimes impacting on domestic contract law. 18

The Submission from the Law Society of NSW – Young Lawyers highlighted several common misunderstandings, as well as overlapping doctrines and some inconsistencies among the states and territories that increase the costs of providing accurate legal advice – especially for general practitioners. 19

The Law Council of Australia (LCA) identified many more (in fact, 19) ‘areas of contract law which … potentially warrant some form of further attention’, while cautioning that the basic principles were generally sound – with problems arising more from increasingly complicated factual scenarios and the impact of legislative interpretation’. Contractual interpretation disputes are also presumably exacerbated because of another major concern raised by the Federation: the plethora of ‘standard’ contracts used by government procurers in Australia.

16 Submission No 21, 4, 23. This association also points to ‘the quality of legal practitioners’ purporting to advise on relevant contract law issues in the consulting industry (at 29).

17 Respectively, Submissions No 30, 32, 36, 40, 43, 47 and 48.

18 ACLA Submission (No 7) 2–3. ACLA identified ambiguity in the case law as to what material can be used when interpreting written contracts (as well as a duty of good faith), but highlighted the following areas of incomplete or inadequate legislative intervention: third-party rights, proportionate liability, writing requirements, capacity of minors, frustration, sale of goods, consumer protection legislation, and unfair terms.

19 Submission No 44, 3–4.
requirements (particularly consumer legislation). The LCA was also concerned that ‘further legislation could, rather than simplifying contract law, potentially increase uncertainty and costs, particularly in the short term’. King & Wood Mallesons doubted whether accessibility would in practice be able to drive reform, given the arguably ‘different needs of each contract party’ as well as the pressures that underlie and generate specific legislative interventions. However, this major international law firm did suggest further evidence-gathering and consultation about simplifying existing legislation, and targeted intervention in seven areas arguably involving uncertain or outdated case law. Herbert Smith Freehills also asserted more definitively that ‘domestic contract law works well and is well understood’, although international contracting needed enhanced support – primarily by Australia engaging better with existing and emerging international regimes.

The Chief Justice of NSW went further by arguing that ‘codification’ – one option mooted briefly in the AGD’s DP (as discussed in Part 6 below) – was ‘a flawed proposal’. One argument presented was that codification would never make contract law accessible to the lay public and would not likely make it simpler even for the legal profession. Chief Justice Bathurst also disagreed with many other Submissions regarding areas of ambiguity and reform in the case law. However, he did acknowledge that ‘remedial legislation’ might be conceivable in some areas, giving ‘internet contracting’ as a good example. Another senior jurist emphasised that the proliferation of judgments freely available over the internet has made it difficult (absent clear authority from the High Court of Australia) ‘to assess what precedential value is likely to be attributed to particular judgments in future proceedings’.

20 Submission No 35, 4–5.
21 Submission No 34, 3–5. The specified areas include: frustration, privity, capacity, mistake, illegality, consideration, and formal requirements (writing requirements and deeds). King & Wood Mallesons objected however to reformers adopting such concepts as unconscionability or good faith, arguing that they ‘add to uncertainty and costs and result in more disputation’ (at 6).
22 Submission No 26, 1–2. See also, by a partner in charge of the firm’s international dispute resolution group in Sydney, Robertson (n 5). He too urges better engagement with international contract law instruments, acknowledging the ‘fundamental importance of the principle of good faith’ (at 20) – but without venturing an opinion on that principle’s applicability to domestic contract law.
23 Hon TF Bathurst, Submission No 11, 4–5.
24 By contrast, he argued that admissibility of extrinsic evidence for contractual construction was ‘tolerably clear’ and that the question of good faith has not ‘created uncertainty or concern amongst the commercial community such as to provide an imperative for clarification for codification’ (at 14–15). Cf, for example, Stewart (n 8) 82–87; generally Wilson, in this volume.
25 Hon Geoff Lindsay SC (sworn in as a Justice of the NSW Supreme Court on 6 August 2012), Submission No 38, 13.
Additional Drivers of Reform

Curiously, however, the DP left out another important driver for reform: ‘consumers’. Admittedly, Australia largely completed in 2010 a re-harmonisation of consumer (contract) law nation-wide, clarifying and significantly improving standards of fair dealing with consumers. But the new ACL ended up with various (in fact more) definitions of ‘consumer’.26 Some are more expansive than the intuitive definition largely adopted in European law (viz individuals contracting for a non-business purpose) and therefore include business-to-business (B2B) transactions, between SMEs and even large firms. Examples include ‘consumer’ guarantees for many transactions up to A$40,000 – as well as the prohibitions on misleading conduct mentioned in the DP.27 But some definitions are less extensive, with carve-outs for entire sectors (notably insurance contracts) or for other special-interest groups (engineers and architects regarding the ‘fitness for purpose’ statutory guarantee).28 Consumers in such contractual relationships need to revert to background contract law for minimum standards of protection. As such, they too should be considered and consulted as part of the AGD’s ‘Review of Australian Contract Law’. The LCA’s Submission, for example, also emphasises ‘that a consideration of the rights of consumers is as important as the need to facilitate domestic and international trade and investment’.29

More generally, many concepts in the ACL will inevitably be interpreted in light of general contract law principles, even when (re)stated in legislative form. Jurists in Australia prefer to analogise to what they know rather than to reinvent the wheel – even when seemingly given statutory licence to do so, as evidenced by case law involving relief against unconscionable conduct provided by the


27 At para 3.9. See ACL, ss 3, 18.


29 Submission No 35, 5. See also Submission No 22 from the Consumer Action Law Centre.
predecessor to the ACL.30 Further, from a comparative perspective, Australian contract law comes across as having a rather ‘classical’ (or nineteenth-century) ‘vibe’.31 It still seems to take one-off transactions as the norm for a (largely implicit) theory of contract law that gives high priority to a particular and strong view of party autonomy. However, the ‘Mason Court’ did prod contract law towards a more ‘neo-classical’ model in various areas from the mid-1980s through to the late 1990s, for example regarding equitable doctrines of promissory estoppel or unconscionable bargains.32

The Australian government’s Review since 2012 provides an opportunity to move Australian contract law at least towards the more thoroughgoing neo-classical model characteristic of the Restatement (Second) of Contracts (1979) and, for example, the Uniform Commercial Code (UCC) Article 2 on Sales in the US.33 It may even lead to Australian contract law adopting more flexible doctrines characteristic of a ‘relational contract’ model, which instead takes a complex contractual relationship (with many more norms that simply party autonomy or ‘consent’) as an empirical and normative starting point for contract law rules.34 At least in part, such a shift away from classical contract law principles may benefit consumers and other vulnerable groups in contractual relationships.35

This issue is highlighted also by the Submission on the DP made by the Redfern Legal Centre, a non-profit community-based legal advice centre. It notes that ‘changes to contract law as a whole would have a significant impact’ on its clientele, including consumers, vulnerable individuals and workers (independent contractors as well as employees). Their everyday contracts are often unwritten or conducted on the basis of adverse standard-form contracts which cannot be properly negotiated, which they usually cannot enforce properly anyway due to the high cost of litigation.36 The Centre draws attention to a recent report by Community Law Australia entitled ‘Unaffordable and Out of Reach: The Problem of Access 30

---

30 Nyuk Nin Nahan and Eileen Webb, ‘Unconscionable Conduct in Consumer and Business Transactions’ in Justin Malbon and Luke Nottage (eds), Consumer Law and Policy in Australia and New Zealand (Federation Press 2013). Another example is the persistent tendency of Australian courts to the interpret CISG in light of domestic sale of goods law principles: see Spagnolo (n 12) and Submission No 55 (Zeller).

31 For readers outside Australia: the ‘vibe’ is the punch-line from a well-known Australian comedy movie about a family that contests (ultimately through the courts) the government’s attempted compulsory acquisition of their home. See <http://www.youtube.com/watch?v=ITU6LHRkf> accessed 1 September 2013.

32 See generally Nahan and Webb (n 30); Wilson, in this volume.

33 See generally Hyland, in this volume.

34 See (n 5).

35 Generally, on vulnerable groups in contemporary Australian society, see Therese Wilson, ‘Vulnerable and Disadvantaged Consumers’ in Justin Malbon and Luke Nottage (eds), Consumer Law and Policy in Australia and New Zealand (Federation Press 2013).

36 Submission No 46. The Centre acknowledges (at 7) that sector-specific ombudsman schemes help alleviate access to justice, but they ‘have their own issues to be monitored’.
to the Australian Legal System’, which certainly contains some startling statistics relevant especially to everyday disputes.37 The Centre adds that simplification of Australian laws has often been discussed without reform eventuating, and indeed acknowledges that:38

The law in relation to formation of contracts, the enforcement of them, the remedies available where the contracts or the circumstances are unjust, and the enforcement of contracts, is complex, but this might be seen to be for good reason. Each time a set of rules to regulate behaviour is put in place, it is found that unscrupulous dealers will use these rules to the disadvantage of those they seek to exploit. In more innocent situations, the rules can still operate harshly. For instance, in the process of negotiation the parties may have recorded some things in writing but not all encompassing terms. The common law, equity, and consumer protection legislation, all attempt to provide mechanisms, to balance certainty and rules, with safety valves where those rules themselves become unjust.

In other words, greater certainty is not always a panacea for consumers. Yet providing better knowledge of clearer contractual rights (and therefore more capacity to incorporate them into contracts or otherwise enforce those rights) can assist consumers as well as SMEs in dealing with larger entities, which otherwise may use their greater commercial negotiating power to avoid legal obligations.39 To my mind, the best compromise involves regulation (including statutory interventions) setting minimum standards of protection, where there exist informational and other market failures or serious violations of other community norms,40 while clarifying the background law and therefore contractual stipulations so the latter can be properly negotiated and subsequently enforced.

As well as consumers, a second additional driver for reform should be those involved in promoting Australian courts, not just international commercial
arbitration (ICA) venues as mentioned in the DP, as a ‘regional hub’ for dispute
resolution services. The 2010 amendments to the International Arbitration Act 1974
(Cth) (IAA) mark a significant step towards making Australia more competitive
with the now well-established Asia-Pacific venues for ICA (namely Singapore and
Hong Kong/China). But these reforms were somewhat conservative and belated,
and case law is already revealing teething problems.42

Aligning our contract law more closely with international standards provides
another way for Australia to signal commitment to ‘trying harder’ to attract not
only ICA cases to our shores, but also to promote Australian courts as a preferred
regional forum (rather than, say, London) if parties do not or cannot agree on
submitting their contractual disputes to arbitration. Experience abroad (for example
London and New York) suggests that a vibrant ICA culture goes alongside a court
system that is also often selected as a forum for resolving cross-border disputes. It
follows that those promoting Australian court services, as well as ICA services,43
should also be engaged in this ‘Review of Australian Contract Law’. However, the
judiciary has not commented on this aspect of the AGD’s DP.44

More generally, Australia’s legal profession – especially the now numerous
large and internationally competitive law firms – should be involved as a potentially
significant driver for reform. This is particularly true in light of another wave of
internationalisation in recent years. For example, Allen & O’Ha Robertson is now
allied with Linklaters (a top-tier UK-based international law firm), Blake Dawson
has merged into Ashurst (a somewhat smaller UK-based firm but also with a strong
presence in some Asian markets), Mallesons has combined with King & Wood
(a leading Chinese law firm) under a ‘Verein’ arrangement governed by Swiss law,
and Freehills has merged fully with Herbert Smith. Various other international firms
have recently established themselves (including Allen & Overy, Clifford Chance,
Clyde & Co) or expanded (including Norton Rose Fulbright, K&L Gates) in the
Australian market – partly to take advantage of Australia’s mining boom, as well

41 At para 2.11. The DP does add (at para 5.11) the potential for a more internationalised
Australian contract law to increase the regional attractiveness of Australia for court-based
dispute resolution as well as ICA.

of International Arbitration 465-494.

43 The Institute of Arbitrators and Mediators Australia (focused on domestic dispute
resolution) did make a Submission (No 31), but requested the AGD to keep it confidential.
Equally curiously, the Australian Centre for International Commercial Arbitration did not
make any Submission.

44 Cf Submissions No 11 (Bathurst CJ, generally negative towards the AGD’s
proposal) and 38 (Lindsay J, more positive). A recently retired Federal Court judge, the
Hon Kevin Lindgren AM QC, has added a brief Submission (No 37) focused on a narrow
point about constitutional issues that would arise if that Court were to be given jurisdiction
regarding certain contractual disputes: see Part 7 below.
as burgeoning economic and legal relations with Asia. These new international partners should create long-term incentives for thousands of Australian lawyers – and, indirectly, their clients – to reassess principles of contract law in Australia that have long been taken for granted, but which may be increasingly out-of-line with contract law abroad (as discussed further at Parts 4 and 5, below).

Diminishing their appetite for contract law reform, however, such large international law firms do tend to act for larger clients. The latter in turn will have stronger negotiating power when concluding contracts with counterparties, and may often therefore prefer to entrench such a commercial advantage through careful contract drafting. Thus, larger corporate clients – and their lawyers – may tend to dislike more open-ended contract law principles, such as good faith. These clients will also tend to be able to better afford the services of large international law firms, in negotiating, drafting and enforcing contracts. Admittedly, since the Global Financial Crisis of 2008 even larger corporate clients and international law firms are increasingly looking for ways to reduce legal fees, and simplifying contract law rules may assist in that respect. In the short term, however, they will probably be quite concerned about the direct and indirect costs of transitioning from existing contract law (despite its flaws) to a new regime. It is therefore perhaps unsurprising that only two international law firms made (quite lukewarm) public Submissions in response to the AGD’s DP.46

Nonetheless, even in 1994 a survey of NSW barristers identified several areas of law where practitioners had significant doubts about whether Australian contract law principles were as they should be. In particular, 77 per cent of respondents thought that the law should allow nominated third-party beneficiaries to claim under a contract, and 68 per cent thought that the law of mistake ought to reflect a more open-ended approach (allowing a significant creative role for judges) rather than concentrating on the ‘will’ or intentions of the parties. Around half considered that Australian contract law should imply a term when reasonable (rather than when the court believes the parties would have agreed to the term), and should allow for obligations to arise in contract from reliance or financial interdependence (rather than only where promises are exchanged for consideration) – even though significantly larger majorities did consider that these propositions did not reflect the law at the time.47 It would be useful to conduct a similar empirical study, comparing practitioners’ views nowadays as

45 This is particularly true in the US, where the market for legal services (and legal education) has come under great stress: Steven Harper, The Lawyer Bubble: A Profession in Crisis (Basic Books 2013). But this in turn has led to US firms seeking overseas partners, including law firms in Australia.

46 No 26 (Herbert Smith Freehills) and No 34 (King & Wood Mallesons).

47 Cf John Gava and Peter Kincaid, ‘Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia’ (1996) 10 Journal of Contract Law 141, 154–55. However, those authors considered that these and other empirical results instead indicated considerable satisfaction for a more classical (will- or intention-based)
to what the law is and how it should be, also involving solicitors and in-house counsel (or indeed businesspeople more generally) and across different parts of Australia.

3 Costs or Difficulties for Businesses Arising from Domestic Contract Law

In response to the second question posed in the AGD’s DP, considerable problems do appear to exist in accessing, understanding and especially in applying contract law, which remains one of increasingly few fields in Australia still dominated mostly by case law.48 These problems increase out-of-pocket and other transaction costs for businesses – as well as consumers – although many agree that more systematic research is needed to gauge their extent and full implications.49 Several difficulties are identified throughout the DP, and by subsequent public Submissions, but they can be usefully grouped into the following six categories:

1. differences even when all or most jurisdictions within Australia have contract law statutes (as with writing requirements for enforcing contracts);50
2. differences among jurisdictions where statutes apply (albeit usually with variation in drafting) and those where (almost) nothing has been enacted (as with contracts for the benefit of third parties – with legislation in effect only in Queensland, Western Australia and the Northern Territory);51
3. areas where statutes impacting on contracts may exhibit some differences, and/or be questionable in their policy rationale or practical application (as with recent legislation concerning proportionate liability claims);52
4. situations where the High Court has given a supposedly binding precedent for lower courts, but with different judgments, which make it hard to discern one ratio decidendi or to anticipate how the Court will rule in a different sub-category of cases (as with its decision on contracts for the model of contract, compared to the tendency of some influential Australian judges at that time.

48 On the ‘age of statute’, another key feature of the contemporary legal landscape in Australia, see generally Submission No 38 (Lindsay J).
49 See for example Submissions No 54 (Sydney Law School academics) and No 26 (Herbert Smith Freehills).
51 See, for example, Cheong and Tan (Submission No 16). Curiously, moreover, the Contracts (Review) Act 1980 (NSW) – mentioned in several Submissions (for example No 3) – remains on the statute book despite enactment of the ACL and the Inter-Governmental Agreement, which requires states to repeal inconsistent legislation.
52 See also for example Nick Seddon and Saul Fridman, ‘Misleading Conduct and Contributory Fault – Inconsistency under the Uniform Australian Consumer Law’ (2012) 20 Australian Journal of Competition and Consumer Law 87.
benefit of third parties, in an insurance context now already covered by legislative amendments);  

5. situations where the High Court has not attempted to rule definitively, including:  
   – the extent to which there may be a general duty for parties to act in good faith even in the performance of contractual obligations;  
   – aspects of the doctrine of consideration, for example whether a ‘practical benefit’ overcomes the ‘pre-existing duty rule’, allowing enforcement of one party’s promise to pay more to obtain the same performance originally promised by the other party; and  
   – incorporation by conduct of terms from successive earlier oral contracts;  

6. situations where the High Court has provided a binding ratio or persuasive obiter dicta, but the rule seems to be outdated by international and comparative law standards, including refusals to allow:  
   – subsequent conduct to be used to interpret what the parties originally intended; and  
   – pure commercial impracticability to trigger ‘frustration’ of contract (and insistence that the only relief available is automatic termination of the contract);  
   – in contrast for example to the UNIDROIT Principles of International Commercial Contracts (UPICC).  

Admittedly, many of these problems can be minimised by careful advance planning and drafting (for example, by structuring the contract to bring in ‘third’ parties),

55 See Carter (n 50) paras 6–48, 10–18.  
57 See respectively art 4.3(c) and arts 6.2.1–6.2.3, available at <http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf> accessed 1 September 2013. Several Submissions (for example Nos 9, 35) indicate that ‘hardship’ rules may be a useful reform to the Australian law on frustration of contract (see also Robertson (n 5) 15, in relation to international contracts). However, the Chief Justice of NSW is opposed, arguing for example that on this point ‘no crisis in Australian contract law or impetus among the commercial community exists to justify such a significant reform’ (Submission No 11, 14).
albeit at the loss of some flexibility (for example, tax implications). However, not
all fall in this category (for example, in some civil law tradition systems, good
faith obligations cannot be completely contracted out). The uncertainties and
complexity also favour large and/or repeat contractors, more likely to have cost-
effective access to in-house counsel or outside lawyers, as well as large law firms
(able to provide more authoritative initial advice and litigation support).

In other words, the costs actually or potentially imposed on some contracting
parties (including those who do not contract or do so sub-optimally) are likely
to be higher for SMEs and consumers, whereas the legal profession is likely to
benefit from high or growing complexity in a contract law system. It is perhaps no
coincidence that Australia’s law firms and legal profession generally have expanded
considerably since the 1980s,58 along with growth for example of the internet and
therefore hitherto completely unreported judgments in contract law. If the AGD’s
‘Review of Australian Contract Law’ succeeds in diminishing uncertainties, this
may significantly reduce the contribution of lawyers’ legal services to the economy.59
Some law firms, such as the large ones that have recently merged with international
firms (mentioned in Part 1 above), might instead benefit from reforms prompted
by this Review, if it brings Australian contract law into closer alignment with
the regimes found or evolving abroad. Simplification and harmonisation should
generate further advantages to other (non-law) firms and hence contributions to the
economy in that way. However, the net aggregate economic effect will be difficult to
ascertain precisely – making this sort of reform project hard to ‘sell’ to an electorate.

The government must also be aware that this project involves questions of
‘distributive’ justice, as well as a collective action problem that may impede reform:
one group (the legal profession overall) may be more clearly disadvantaged,
whereas a larger but more diffuse group (SMEs and so on) will likely benefit.60
Perhaps one way forward is to involve the Productivity Commission (PC),
associated with the federal Treasury. The PC was able to come up with a net
economic benefit figure for ACL-like reforms for its 2008 Report that reviewed
ACL and policy more generally. This amount (A$1.5–4.5 billion) was often
highlighted in the subsequent political process.61 However, the methodology and

---

58 Cf generally Bruce Aronson, ‘The Growth of Corporate Law Firms and the
59 Even in 2007–08, legal services directly contributed A$11 billion to the
Lookup/8667.0Main+Features12007-08?OpenDocument> accessed 1 September 2013.
There are also indirect contributions for example through legal education through universities,
which is now the main route into the legal profession, and where there is growing pressure
to attract full fee paying students both locally and from abroad. See generally Douglas,
Nottage and Tellier (n 9).
60 See also Spagnolo (n 12) 635.
61 See Productivity Commission, Australian Government, Review of Australia’s
consumer/docs/finalreport/keypoints> accessed 1 September 2013.
estimates were very rough, and will be difficult to replicate given that contract law statutes are much less pervasive in the first place. Also desirable would be other quantitative (for example survey-based) studies and qualitative (interview-based) research – for which the PC is not as well qualified or staffed – regarding the likely ‘winners’ and ‘losers’ from various types of contract law reform.62

4 Adjusting Australian Contract Law to the Digital Economy

A traditionalist view on e-commerce has been that contract law, rooted in party autonomy, is able to invent new types of agreed solutions whatever the technological developments may be – just as it did in past eras. But a closer historical analysis shows how technological change (for example in the late nineteenth century) in fact significantly impacted on specific doctrines and the overall ‘vibe’ of contract law (viz a more laissez-faire ‘classical’ approach) in both England and the US.63 As the DP suggests, we should approach today’s explosion in e-commerce with the working hypothesis that internet-based technologies are already having, and will continue to have, significant reciprocal influences on contract law and practice.

For example, one reason behind enactment of the ACL is a proliferation in standard-form contract terms copied and pasted onto Australian supplier websites – probably from legal systems abroad with fewer mandatory consumer protections – as well as such terms being asserted via websites from suppliers abroad even when selling to Australian consumers.64 Similar problems can arise in certain B2B situations, such as mandatory consumer guarantees provided by the ACL.

One response is to clarify when and how mandatory provisions of Australian contract law can apply even despite contrary choice of law by the parties. (The DP mentions this problem in the context of choice of courts,65 but not regarding the ACL.) Section 67 requires an Australian court or tribunal to apply the ACL guarantees despite any election of non-Australian law, if the objective governing or proper law would otherwise have been Australian law pursuant to Australian

62 For an interest group analysis of different constituencies impacted by Japan’s ongoing contract law reforms, see Souichirou Kozuka and Luke Nottage, ‘Policy and Politics in Contract Law Reform in Japan’ in Maurice Adams and Dirk Thilbaut (eds), Methodology of Comparative Private Law (Hart 2013).

63 PS Atiyah, The Rise and Fall of Freedom of Contract (Clarendon Press 1979);


65 At para 3.12.
private international law principles. Those principles also derive from case law and therefore have their own problems regarding accessibility and application, but in cross-border sales transactions they generally lead to application of the law of the supplier. Thus, if the contract is silent on the governing law or provides for the law of the overseas supplier, the latter usually applies and ACL protections are lost for the Australian party. If the contract also provides for a foreign court as the forum, then the Australian court may also have to stay its own proceedings. However, courts in practice quite often exercise jurisdiction if a claim of misleading or deceptive conduct is raised under ACL s 18 (or its predecessor, s 52 of the TPA), even in B2B contexts.\(^{66}\)

The AGD’s present ‘Review of Australian Contract Law’, in conjunction with its subsequently announced consultation on reforming private international law,\(^{67}\) should consider whether this policy outcome is satisfactory, particularly in the e-commerce context, as well as potential alternatives. One reform option would be amend ACL s 67, at least for ‘true’ consumer transactions (that is, individuals purchasing for non-business purposes), to state that the Australian legislation governs in all cases and that only Australian courts (or perhaps arbitrators) ever have jurisdiction. Another possibility (or exception to this new rule) would be to allow overseas suppliers to instead opt-in to a separate regime when dealing with Australian ‘consumers’ (as outlined further in Parts 4 and 7 below).\(^{68}\) Law reform should also specify what law applies regarding other parts of the ACL, such as s 18. In addition, this Review should take the opportunity to clarify the situation under the ACL (and other statutes raising issues of allegedly mandatory law) when parties have chosen international commercial arbitration (even abroad) in lieu of courts, to resolve their contract-related disputes.\(^{69}\)


\(^{67}\) See (n 2). See also Keyes, in this volume.

\(^{68}\) A further possibility is for legislation to direct the forum always to apply the substantive law ‘most favourable to the consumer’. This alternative choice of law rule is contained in a Brazilian-Argentinean-Paraguayan proposal for a draft Organization of American States (OAS) Inter-American Convention (CIDIP VII-Part II). It is also now urged more generally by the International Law Association through its Committee for the International Protection of Consumers, namely in Resolution 4/2012 adopting the ‘Sofia Statement on the Development of International Principles of Consumer Protection’. See further Luke Nottage, ‘Reforming Private International Law - Finally ‘Australia in the Asian Century’?’ (21 November 2012) http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_international.html> accessed 1 September 2013.

\(^{69}\) Unfortunately neither the IAA nor the ACL amendments in 2010 clarify this problem, which would also facilitate the task of arbitrators considering which laws to apply to the underlying contract dispute. Cf Luke Nottage and Richard Garnett, ‘The Top 20 Things to Change In or Around Australia’s International Arbitration Act’ in Luke Nottage and Richard Garnett (eds), International Arbitration in Australia (Federation Press 2010) 152–56.
Costs and Difficulties for Businesses Due to Differences between Australian and Foreign Contract Law

Again, even for a body like the PC, comprised mainly of economists, this question posed in the DP regarding costs (from having a substantively different national contract law) is very difficult to quantify. The sort of study cited in the DP regarding correlations between cross-border trade and similarities in legal systems, among developed countries, needs to allow for complex issues of causality. But care also needs to be taken with critical European studies, which may well be reacting to over-generalisations from reformers like the European Commission that has traditionally invoked the intuition that differences in contract laws of trading partners significantly impede cross-border trade and investment flows.

The Commission still draws on similar economic arguments, in proposing now an opt-in Common European Sales Law (CESL), although it now has more direct jurisdiction to promote such law reforms.

However, compared especially now to the EU, Australia faces an extra difficulty in that its private international law rules are not clearly stated or readily accessible either. This makes it more uncertain or costly to determine what country’s contract law will apply in the first place. Law and Justice Ministers in Australia have now recognised this problem too, so the AGD has commenced a consultation to recommend ways of clarifying, restating or improving Australia’s private international law principles. Nonetheless, as now quite widely recognised in Europe, greater efficiencies are likely to arise if substantive contract law principles can be harmonised or unified anyway.

Australia should also take comfort that many of our major trading partners have embarked on large-scale reforms to contract law regimes over the last decade or so, usually appealing in part to that very intuition. The DP does not mention these reform initiatives abroad except in the context of recent European developments towards an opt-in CESL, which some see as a stepping-stone towards a binding European Contract Law Code. These developments build not only on earlier

---

70 See DP: Attorney-General’s Department (n 1) para 4.7 n 23.
73 See (n 2).
74 See the DP: Attorney-General’s Department (n 1) para 5.8ff.
initiatives,\(^{75}\) including specific consumer contract law protection measures, but also large-scale reforms to the Dutch Civil Code in 1992 and the German Law of Obligations in 2002.\(^{76}\) Those, in turn, have helped prompt contract law reform projects in France\(^{77}\) as well as Japan (from 2006, accelerating from 2009\(^{78}\)) and Korea. The US also attempted a large-scale reform of UCC Article 2 on Sales, but this largely stalled a decade ago due partly to the sorts of distributive justice and collective action problems outlined above in Part 2.

Thus, Australian business is likely not only to be suffering from higher transaction costs from a contract law formulation and doctrinal structure differing significantly from those of its major trading partners, mainly now in the Asia–Pacific (not the UK).\(^{79}\) In addition, Australian business is presently facing a growing challenge prompted by wide-ranging amendments to contract law principles within most of those jurisdictions. Now is therefore a particularly good opportunity to begin aligning Australia’s contract law regime with those currently being reformed by many trading partners.

6 Costs and Benefits of Internationalising Australian Contract Law

Similar difficulties arise in identifying and especially quantifying costs and benefits from ‘internationalising’ Australian contract law, in the sense used in the DP – namely aligning it more closely with EU law (including also the semi-official opt-in Principles of European Contract Law (PECL)), as well as CISG and UPICC. Yet a key benefit is that the CISG, which inspired UPICC (which in turn inspired PECL and other EU contract law initiatives) have all played a major role already in reform discussions in countries such as Germany, Japan and Korea (as well as the US and China, to a lesser extent). Engaging more fully with these international instruments, in a process of reviewing Australian contract law, therefore has the further advantage of allowing easier access to contract law developments within our major trading partners.\(^{80}\) It can reduce ‘search costs’ in

\(^{75}\) Nottage (n 71); Hector MacQueen, ‘Europeanisation of Contract Law and the Proposed Common European Sales Law’ in Larry DiMatteo, Qi Zhou and Severine Saintier (eds), \textit{Commercial Contract Law: Transatlantic Perspectives} (Cambridge University Press 2013).


\(^{78}\) Kozuka and Nottage (n 62).

\(^{79}\) As well illustrated by the DP: Attorney-General’s Department (n 1) 3, Table 2.

\(^{80}\) This does not require Australia to abandon ‘the mother country’, namely England and its legal system. As pointed out by Douglas J (n 54) 349, due to a shared legal culture,
identifying and comparing provisions, and reduce the risks of selecting contract
law rules based on inadequate policy considerations as well as risks of poor
drafting when transposing the better rules into Australian law. Whatever route is
taken by contract law reformers in Australia, it is important for the drafters not to
‘fiddle’ too much with tried-and-tested formulations abroad.81

Such international engagement would also have the benefit of arresting a
disturbing tendency for some Australian law firms to routinely ‘opt-out’ of CISG,
especially in the standard-form contracts provided to their clients as the basis for
further commercial negotiations. Such blanket advice risks a claim of professional
negligence, especially if the firm is advising a seller of goods rather than a buyer.
It persists probably due to fear of the unknown and some rough intuition (perhaps
more plausible for large commercial law firms and their client base) that Australia’s
domestic contract law remains more ‘certain’.82

Yet, as an experienced Australian practitioner has pointed out in the context
of the AGD’s consultation, there has been ‘an exponential growth in the number
of reported cases involving the CISG’.83 The Submission by Professor Bryan
Horrigan, Dr Emmanuel Laryea and Dr Lisa Spagnolo argues that the CISG enjoys
both substantive and procedural efficiencies, and that exclusion of the CISG is
largely due to ‘unfamiliarity, reluctance and learning costs, and a consequent
interest in maintaining the status quo of selecting domestic law’, underpinned
institutions and language, English law is likely to remain a major reference point – and it too
exerts a major influence on European and international instruments. But Australian jurists
need to appreciate that English law is already being exposed to greater internationalisation,
and that this will affect Australian law both directly (through links to the UK) and indirectly.

81 There are many examples of Australian legislation based on foreign models where
(even subtle) rewording has or is likely to cause confusion. One recent example can be found
in the ACL’s ss 23–28 on unfair terms in consumer contracts, which differ significantly from
the 1993 EC Directive’s wording. See generally Nyuk Nin Nahan and Eileen Webb, ‘Unfair
Contract Terms in Consumer Contracts’ in Justin Malbon and Luke Nottage (eds), Consumer
Law and Policy in Australia and New Zealand (Federation Press 2013). Another is s 18A
of the SAA, which added a gloss to the 1985 United Nations Commission on International
Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, but failed
to transpose directly a test from English case law regarding bias of judges or arbitrators.
See Garnett and Nottage (n 42) 976. An older example is the slightly different wording of
the ‘development risks’ defence to strict product liability (now found in ACL s 142(c)),
Liability and Safety Regulation’ in Justin Malbon and Luke Nottage (eds), Consumer Law
and Policy in Australia and New Zealand (Federation Press 2013) 207.
82 Nottage (n 12).

83 Robertson (n 5) 13. He also agrees that a ‘failure to understand the way in which
CISG applies, and the practice of unthinkingly opting out of its provisions, may well lead
to malpractice claims’. The expansion of case law (and commentaries) analysing the CISG
was also important for Japan in acceding, somewhat belatedly, to the CISG: see Noboru
of Japanese Law 207.
by ‘institutional behaviours entrenched within legal practice’. But these patterns are increasingly under threat as foreign counterparties (for example from China) become familiar with the CISG and insist on maintaining it as the main governing law in international sales. Their Submission also adds that lawyers abroad seem ‘less likely to exclude CISG when it is similar to domestic contract law’, pointing to the example of Germany (where exclusion is no longer standard practice, following reforms in 2002 to its domestic contract law).

Nonetheless, the notion that the CISG remains too uncertain is still often heard from England, which refuses even to accede to the Convention partly on the hypothesis that English contract law (and therefore London as a dispute resolution forum) is selected precisely because it is more predictable — and that this is what parties overwhelmingly want in their contractual relationships. Yet there is little evidence for that argument. The main reason why the Commercial Court is so active in cross-border disputes instead relates to procedural law aspects: English law allows ready assumption of jurisdiction along with world-wide freezing orders and anti-suit injunctions. Anyway, the argument is difficult to advance in the Australian context because Australia’s contract law is still largely based on English law (especially since some law firms routinely try to exclude the CISG), yet forums in Australia and its substantive law are infrequently chosen by parties to resolve cross-border contractual disputes. Aligning domestic contract law more closely — and not necessarily identically — with such international instruments, as well as the laws of Australia’s major contemporary trading partners, seems a more promising approach to promoting Australia as a venue for international dispute resolution.


85 Submission No 29, 23.

86 Nottage (n 56). See also Stefan Vogenauer and Christopher Hodges (eds), Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law (Hart 2011), which surveyed European businesses and found they preferred, for cross-border contracting other than their own law, Swiss law (29 per cent) over English law (23 per cent), followed by US law (14 per cent). Compared to English law, Swiss law and even US law have some very different features — for example, recognising a general duty of good faith in the performance of contracts.

87 As emphasised by University of Cambridge Professor Richard Fentiman, ‘International Commercial Litigation: the London Experience’ (Presentation to the International Law Association – Australian Branch, Sydney, 9 July 2012). See also Submission No 25 (Doris).

88 Cf the Submission by Herbert Smith Freehills (No 26) 2, arguing that: ‘A wholesale re-write of a well understood common law contract regime would make Australia less attractive to international parties in terms of choice of law and forum and a less attractive place for international parties to do business’.
Scepticism and a lack of knowledge about CISG (and related international instruments), at the contract negotiation and drafting stages, also generate another Catch-22 situation. Few CISG cases are litigated in Australian courts and, when they are, the barristers and judges struggle to apply CISG principles in an internationalist spirit. This further undercuts Australia’s efforts to promote itself as a dispute resolution hub.

A comprehensive governmental ‘Review of Australian Contract Law’ has the benefit of possibly reversing these trends. For example, if an Australian trader currently proposes in contract negotiations to exclude the CISG in favour of Australian domestic contract law, the counterparty (say in China) is most likely to respond by proposing instead its own contract law (Chinese law) or by conceding this point in exchange for something else (such as agreement to arbitrate with the seat in China). Neither option may be objectively desirable for the Australian side, delays and transaction costs will escalate, and in extreme circumstances the deal may even fall through. If Australian contract law becomes more closely aligned with international instruments like the CISG, such problems should diminish.

More generally, given the sophisticated contract law reform initiatives underway in countries like Japan and Korea, a more intangible benefit would be to reiterate commitment to ‘Australia in the Asian Century’. The Australian government released a White Paper on this topic in November 2012 (six months after initiating the AGD’s contract law consultation), prompted by the view that:

The scale and pace of Asia’s transformation is unprecedented and the implications for Australia are profound. Australia’s geographic proximity, depth of skills, stable institutions and forward-looking policy settings place it in a unique position to take advantage of the growing influence of the Asian region.

If Australia wants to be taken seriously in Asia, it would be helpful to demonstrate that it is no longer an antipodean outpost of the English common law tradition. A few Asian jurisdictions do follow that tradition (notably in South Asia, Singapore, Malaysia and Hong Kong – until it reverts fully to China), but most do not. Australia’s legal system is arguably already developing some hybrid features, while its society is already thoroughly multicultural – with a large and growing proportion of residents of Asian origin.

---

89 For a comprehensive analysis, see Spagnolo (n 84). See also Submission No 55 (Zeller).
90 See also, in EU cross-border contracting practice, MacQueen (n 75) 537.
92 As highlighted in the DP: Attorney-General’s Department (n 1) Table 2, para 4.9.
93 Submission No 38 (Lindsay J).
94 Of permanent settlers arriving over 2004–5, 15 per cent were from the UK and 14 per cent from New Zealand, but 9 per cent were from China and 8 per cent from India. The
7 Costs and Benefits of Restatement, Simplification or Substantial Reform of Contract Law

The DP then asks for views on a spectrum of possible reform options, ranging from maintaining the status quo, through to:

- a ‘Restatement’ of existing law (in more accessible format);
- ‘Simplification’ (to clarify specific areas of law); and even
- wide-ranging ‘Reform’ (making ‘significant changes’ to the content of Australian contract law – noting that this ‘could be implemented without codification, but the more far-reaching the reform the lower the cost of combining it with a general codification of contract law as a whole’).
The DP also acknowledges that the pace of change is another variable: reforms could be implemented in one legislative package or in several phases.

In my view, shared by many others making public Submissions in response to the DP,99 a Restatement would be a useful first step. It would be much simpler (and therefore quicker and cheaper) to generate than in the US, thanks to the unifying influence of the High Court of Australia as well as (relatedly) the existence of widely-acknowledged authoritative commentaries.100 In addition, costs can be minimised by learning from the modus operandi and outputs of other national and international bodies that have generated restatements of contract law, such as the American Law Institute (ALI) and International Institute for the Unification of Private Law (UNIDROIT).101

Further, to maximise net benefits a Restatement could be attempted on a regional or at least Trans-Tasman basis.102 Indeed, previously I have proposed an Asia–Pacific analogue to the ALI to generate a regional ‘Restatement of Product Liability Law’, given that Australia and so many other economies in the region have now amended their civil liability rules for product defects based on similar (EU law-inspired) legislation.103 For some years there has also been talk and some preliminary research towards developing ‘Principles of Asian Contract Law’.104 These would also help highlight important issues when attempting to restate ‘Principles of Australian Contract Law’ – or ‘Principles of Antipodean Contract Law’, if we take seriously the Memorandum of Understanding between Australia and New Zealand to try to harmonise business law in both countries, and provided we can interest law reformers in New Zealand to cooperate (and share in the costs involved) in this endeavour. If done on a Trans-Tasman or broader pan-Asian basis, we could end up with a Restatement that restates the common principles

99 See, for example, Submission No 7 (ACLA); No 23 (CPA Australia) 2 (suggesting that a Restatement would be a ‘highly valuable education resource … as there is an absence of a single authoritative source to which business professionals may refer even in such areas where the law is relatively settled’); No 36 (LESanZ); No 38 (Lindsay J); No 34 (King & Wood Mallesons); No 44 (Law Society of NSW Young Lawyers); No 47 (SBDC: albeit noting that SMEs will also incur costs in becoming familiar with any such new instrument); No 54 (‘Sydney Law School academics’: but including 5 from outside Sydney Law School).

100 See, for example, Carter (n 50), and indeed a much more succinct version for law students: JW Carter, Carter’s Guide to Australian Contract Law (LexisNexis 2007).

101 Several eminent jurists in Australia have been or are involved in such organisations: see listings for example at <http://www.ali.org/> accessed 1 September 2013.


The Government’s Proposed Review of Australia’s Contract Law

across jurisdictions, but which adds commentaries (as done carefully in the US Restatements) noting where there are still divergences in national case law or legislation (including New Zealand’s distinctive contract law statutes). However, any Restatement project for Australia is still likely to be time-consuming. Further, it is likely to become quite political, if US experience is anything to go by – especially in the ALI, but also the stalled attempt at a comprehensive reform of UCC Article 2 on Sales. Part of the difficulty experienced in the US, and other jurisdictions reviewing contract law principles (like Japan and the EU), arises precisely because the law subject to scrutiny is unclear and so cannot be easily or unambiguously ‘re-stated’. Political or ideological debates therefore tend to emerge, especially when traditionally mandatory contract law principles come to be investigated, such as contractual unfairness in situations involving parties of different types or with disparate bargaining power. Even the UPICC has been described as sometimes more of a ‘pre-statement’ (what the law should be), rather than a simply a formulation of universally-accepted principles of international commercial contract law.

A Restatement project is also insufficient in situations where the law is clear, but out of line with international and foreign contract law principles (for example the use of subsequent conduct to interpret contracts, mentioned above at Part 2). A similar problem arises if the project instead or additionally focuses on Simplification (of technical language or concepts, or distilling principles from complex and lengthy judgments). Both types of project certainly remain very useful and should generally be pursued. But the Australian government should be prepared for – and not shy away from – engagement in some significant statutory Reform in contract law, even though this will mean incurring greater costs – through the legislative process – than (narrower) Simplification or (more comprehensive but possibly less controversial) Restatement initiatives.

However, it seems premature at this stage to propose codification, even though a few Submissions have done so in response to the DP. As it is formally as well as often ideologically opposed to the common law tradition, codification becomes an easy target for those (few) who seem essentially happy about the

105 See Bigwood, in this volume.
108 See, for example, Collins (n 95); Hesselink (n 95); Kozuka and Nottage (n 62).
109 Klaus Peter Berger (ed), The Practice of Transnational Law (Kluwer 2001).
110 Notably Submission No 49 (Steinwall, presently an in-house counsel and a well-known expert on consumer and trade practices law), but also No 43 (NSW Small Business Commissioner, albeit more tentatively) and No 52 (Svantesson).
111 See generally Bigwood, in this volume.
status quo.\textsuperscript{112} Instead, the most promising and feasible way forward in Australia is to assemble in one overarching Contract Law Act:

- harmonised versions of existing Australian statutory interventions (covering for example writing requirements, domestic sale of goods, international sale of goods, aspects of e-contracting, privity, frustration of contracts, and capacity of minors);
- targeted reforms where the case law remains persistently uncertain (for example, contract interpretation and good faith) or undeveloped (e-commerce, or perhaps unfair contract terms beyond the business-to-consumer (B2C) context);\textsuperscript{113} and
- an interpretive provision (along the lines of CISG Article 7) requiring the Act to be interpreted in light of its general principles.

The last-mentioned feature may be the most radical, as it bears parallels with how civil law tradition jurists are trained to approach a code – namely, on the assumption that it does or should not have ‘gaps’, so any apparent lacuna can be filled by abstracting more general principles from other parts of the code. The proposed interpretative provision might therefore be omitted initially, when the Contract Law Act still has fewer component parts. A separate interpretive principle might also need to be retained for the part on international sales (primarily incorporating CISG, and any future more comprehensive UN treaty on international contracts that Australia might accede to),\textsuperscript{114} as we can expect some different principles to apply in cross-border contexts.\textsuperscript{115}

Additional parts could be gradually added to this Contract Law Act, beginning with less controversial aspects (such as rules on formation of contract),\textsuperscript{116} drawing also on parallel work elaborating a Restatement of Australian law.\textsuperscript{117} Eventually, the Act may in fact come to resemble a Contract Law Code, not just in its coverage but also in the way it is supposed to be interpreted. But it would not have to, in order to generate significant net benefits, and the process would anyway be a very protracted one. Various Submissions noted that even the Restatement projects in the US took a very long time,\textsuperscript{118} although it should not be forgotten that the first

\textsuperscript{112} Notably Submission No 11 (Bathurst CJ).
\textsuperscript{113} The latter issue is frequently raised in Submissions (for example Nos 2, 6, 8, 9, 13, 17, 21, 41, 43, 47 and 48) although some complaints over one-sided terms may simply reflect normal commercial imbalances in negotiating power.
\textsuperscript{114} See further Schwenzer, in this volume.
\textsuperscript{116} See also for example Submission No 15 (Cheong) 2–7; No 39 (Lockwood).
\textsuperscript{117} For a quite similar dual-track proposal, see Submission 50 (Stewart (n 8)). Cf also the multi-pronged approach mentioned in Submission No 29 (Hortigan and others).
\textsuperscript{118} Submission No 53 (Swain and Gaskell) 6.
Restatement of the Law of Contracts (1932) also contributed to a major legislative
codification in the form of the UCC.

Whatever approach or combination of approaches to reform may be adopted,
Australia’s contract law (re)formulations should take into account existing empirical
studies,119 and commission or encourage new ones, as to the real (and reasonable)
expectations of contracting parties – not just as viewed through the eyes of the
courts or doctrinal scholars commenting on their judgments. Also useful for this
‘Review of Australian Contract Law’, and on-going studies, is the survey-based
research by Professors Fred Ellinghaus and Ted Wright. This suggested significant
advantages for contract law problem-solving from more succinct formulations
of rules, as under UPiCC or even (albeit more controversially) the 1992 draft
Contract Law Code mooted by the Victorian Law Reform Commission.120

8 Implementation of Any Reform of Australian Contract Law

In response to the DP’s more specific questions as to how to implement amendments
to Australian contract law, the largest technical impediment is that the Constitution
does not give jurisdiction to the Commonwealth regarding general private law.121
One possibility is that States and Territories expressly give up (or ‘refer’) their
powers in this field, as they did for example recently regarding consumer credit,
but this seems unlikely in a major area of private law. After all, major statutory
tort reform’ across Australia from 2002 did not proceed on that basis.122

If no referral is made, an innovative compromise is proposed by a recently
retired Federal Court judge. The Hon Kevin Lindgren AM QC suggests drawing on
the powers under the Constitution for the Commonwealth to regulate corporations
and ‘trade and commerce’, to give partial jurisdiction to the Federal Court by
enacting a provision along the lines that ‘a corporation must not, in trade or
commerce, engage in conduct that constitutes a breach or wrongful repudiation of
a contract that is binding on the corporation within the meaning of the unwritten
law from time to time’.123 Such ‘unwritten law’ would remain the general contract
law elaborated by State and Territory courts. Remedies for a contravention of

119 In New Zealand (comparing Japan and so on), see for example Nottage (n 56).
121 See especially Submissions No 3 (Australian Academy of Law: comprising
professors, (ex-)judges and senior practitioners); No 44 (Young Lawyers) 22–24; No 51
(Street SC).
122 See generally Kellam and Nottage (n 103), and (on consumer credit reforms)
Justin Malbon and Luke Nottage (eds), Consumer Law and Policy in Australia and New
Zealand (Federation Press 2013).
123 Submission No 37 (Lindgren), noting that a precedent can be found in ACL s 20
(formerly TPA s 51AA: see generally Nahan and Webb (n 30)).
this provision (namely, breach or repudiation of contract) could be added to this
 provision (perhaps inspired by the Contractual Remedies Act 1979 (New Zealand)
 and/or CISG124) and thus become regulated by federal law too, or that aspect
could remain covered by State or Territory law. However, this provision would
not generally cover other disputes such as mistake or frustration of contract, as the
Constitution requires the Commonwealth to legislate a right or duty.125

Alternatively or in addition, an ‘Application Legislation’ model could be useful
for significant statutory Reform (for example concerning third-party beneficiary
contracts or a general principle of good faith), initiatives for Simplification
(particularly of existing statutes), and potentially the overarching Contract Law
Act project (proposed in Part 6 above). This model was adopted to harmonise the
ACL nation-wide over 2010.126 An inter-governmental agreement for each state
or territory (including possibly New Zealand), to implement identical legislation
to Australian federal law and any subsequent amendments, need not necessarily
involve all jurisdictions committing to this procedure at the outset, even though
this occurred for the consumer law reforms within Australia.

A Restatement project could proceed in parallel, under the auspices of an
‘Australian [and New Zealand] Law Institute’.127 As mentioned in Part 6 above,
one advantage would be to help identify areas that might benefit from further
legislative reform, providing policy or empirical foundations for law-makers.
Secondly, a Restatement could add persuasive authority for Australian courts
interpreting and applying contract law principles – especially where clear
direction is lacking from superior courts. This is primary motivation behind US
Restatements generated by the ALI.

Thirdly, and most intriguingly, a suite of Restatements could be made available
to contracting parties on an opt-in basis. Australia could enact conflict of laws
statutes allowing parties the following options, perhaps initially only if they consent
in writing, depending on whether the transaction is (a) domestic or international
and (b) between businesses (B2B) or between a business and a consumer (B2C):

<table>
<thead>
<tr>
<th></th>
<th>Domestic contracts</th>
<th>International contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>B2B</td>
<td>PACL</td>
<td>UPICC</td>
</tr>
<tr>
<td>B2C</td>
<td>n/a (ACL)</td>
<td>CESL (with minimal amendments)</td>
</tr>
</tbody>
</table>

124 See further Bigwood, in this volume.

125 R v Court of Conciliation and Arbitration, ex p Barrett (1945) 70 CLR 141.

126 Malbon and Nottage (n 122). See also Submission No 18 (Clarke and Clarke).

127 Membership could be drawn in part from the Australian Academy of Law
(established in 2007): see generally <http://www.academyoflaw.org.au> accessed 1
September 2013.
For domestic B2B contracts, parties could choose ‘Principles of Australian [or Antipodean] Contract Law’ (PACL), a Restatement elaborated from Australia’s general law of contract. The statute authorising this election should clearly state that such election excludes the application of any allegedly mandatory principles of domestic Australian common law or equity (but perhaps not, at least initially, domestic statutory requirements). If this seems initially too risky, the legislation might specify that parties could allow for the application of such mandatory rules (such as unconscionability) instead of comparable provisions in the Principles otherwise generally elected by the parties. For B2C transactions, however, an optional instrument such as PACL should not be allowed as consumer contract law has recently been reformed and harmonised through the ACL, following extensive consultation.\(^{128}\)

For international B2B contracts, the conflict of laws statute should clearly authorise commercial parties to opt-in to UPICC, the primary international instrument designed precisely for this purpose. Again, the statute would need to clarify the role (if any) left for Australian domestic law principles (such as unconscionability).

By contrast, something like CESL is a preferable option to be made available in cross-border B2C contracts (especially for overseas suppliers to Australian consumers). It was designed in the EU primarily for cross-border B2C transactions,\(^{129}\) and CESL therefore contains significantly more protective and flexible provisions compared to UPICC.\(^{130}\) Due to the EU’s incomplete harmonisation of mandatory consumer laws, various member states impose different provisions, creating uncertainties for suppliers as well as consumers in cross-border sales; these can be avoided by allowing the parties instead to opt-in to CESL, which includes adequate protections for consumers. The same approach can apply when it comes to international traders considering dealing with Australian consumers. However, Australia’s private international law statutes authorising such an option (to the exclusion of Australian domestic law, including the ACL) would need to include

---

128 Nottage and Malbon (n 26).

129 The English and Scottish Law Commissions have suggested making it available also for domestic sales: see Eric Clive, ‘A General Perspective on the European Commission’s Proposal for a Regulation on a Common European Sales Law’ (2012) 19 Maastricht Journal of European and Comparative Law 120, 126. That seems inadvisable for Australia given that the ACL now provides a very comprehensive and familiar regime for consumers, which also includes protections in some B2B transactions. CESL is also available to B2B transactions, but only if at least one party is a (defined) SME.

130 Another advantage to allowing an opt-in to a CESL-like instrument is that it will familiarise Australian jurists and policy-makers with international rules regulating matters such as the validity of contracts, presently excluded (by Article 4) from CISG. This should make it easier for Australia to accede to any ‘CISG+’ treaty that may emerge from UNCITRAL (as discussed further by Schwenzer, in this volume, and in special issue (2013) 58(4) of the Villanova Law Review, available at <http://lawweb2009.law.villanova.edu/lawreview/?page_id=1879> accessed 2 September 2013. Cf Spagnolo (n 84) 637–41.
some amendments to CESL, and should also consider adding rules not presently found in the instrument.

At present, Australian private international law remains uncertain as to the extent to which parties can fully adopt UPICC or other lex mercatoria to exclusively govern their contracts. On the other hand, it is very plain that parties to arbitration agreements in Australia cannot elect the lex mercatoria to govern that sort of contract; a (national) law must be applied to determine questions as to the validity and scope of arbitration agreements. Legislative amendment is certainly needed to expand party choice in this latter respect.

Lastly, the government should consider supporting free or subsidised provision of standard-form terms and contracts. This option did not prove popular in the EU, seemingly due to collective action problems among industry members and associations, but in Australia it might be possible to involve also for example the pro bono departments of large law firms. Some support for developing standard-form contracts has also been expressed in response to the DP, particularly on the part of SMEs. However, many Submissions urge more ambitious reforms, including some legislative amendments and restatement projects. The latter can anyway assist in generating appropriate standard-form terms, particularly in light of any mandatory provisions of Australian contract law.

9 Next Steps

As outlined above, the DP and public responses to it already provide a prima facie case to proceed to the next stage. In particular, many Submissions agree that the ALRC is the most appropriate body to take charge now of the project of considering and recommending specific reforms of Australian contract law.

---

131 In particular, for example, it will not be appropriate for Australia’s version to require at least one of the parties to be from a state within the EU. Also deserving scrutiny are some particular problems regarding the drafting of certain CESL provisions: see for example Submission No 25 (subsequently published as Martin Doris, ‘Promising Options, Dead Ends and the Reform of Australian Contract Law’ (2014) 34(1) Legal Studies 24-46; MacQueen (n 75).

132 Such as expanding coverage to all services (CESL only includes those related to delivery of the goods, for example installation and maintenance), and perhaps stating rules on minors or capacity and illegal contracts.

133 Nottage (n 115). See also Robertson (n 5) 17–18 (and 6–8, on the lex mercatoria more generally).

134 Submission No 25 (Doris) 13.

135 See, for example, Submission No 14 (Caroll).

136 See, for example, Submissions No 12 (Bowrey: noting overlaps anyway with the ALRC’s project on copyright law issues), No 34 (King & Wood Mallesons: albeit recommending an incremental approach focusing on discrete problems requiring Simplification), and No 35 (LCA). See also Paul Finn, ‘Internationalisation or Isolation:...
The ALRC can draw for example on its early work on ‘legal risk in international transactions’,\textsuperscript{137} as well as the Victorian Law Reform Commission’s 1992 Discussion Paper outlining a draft Australian Contract Code.\textsuperscript{138} The ALRC can also coordinate with other state or territory law reform bodies,\textsuperscript{139} perhaps allowing them to take the lead on certain reform topics.

The New Zealand Law Commission has also published significant reports on aspects of contract law reform, and so should be closely consulted. These reports include a review of the operation of New Zealand’s statutory interventions made already especially over the 1970s–80s (for example on contractual remedies, and to allow third-party beneficiaries to enforce contracts) as well as a proposal to liberalise writing requirements for enforcing various types of contracts.\textsuperscript{140} Ideally, there should be a joint reference to both Law Commissions – as occurred recently with the Productivity Commissions in both countries – for a joint study into new ways of ‘Strengthening Economic Relations Between Australia and New Zealand’.\textsuperscript{141}

In addition, as mentioned above at Part 3, Australia’s PC (or PCs jointly) might provide valuable input on quantitative estimations of costs and benefits of various types of contract law reforms. However, Law Commissions should take the lead as they are better placed to conduct or coordinate other types of empirical work, as well as of course the difficult doctrinal research required in any sustained review of this area of law.\textsuperscript{142} They are also better placed to investigate and assess also the

\begin{itemize}
\item The Australian Cul De Sac? The Case of Contract Law’ in Elise Bant and Matthew Harding (eds), Exploring Private Law (Cambridge University Press 2010).
\item See <http://www.austlii.edu.au/au/other/alrc/publications/reports/80/ALRC80.html> accessed 1 September 2013 (albeit mostly focused on procedural rather than substantive law topics).
\item 138 It can be accessed via a website by Professors Ellinghaus and Wright for their ‘Global Law of Contract’ Project, which also provides a ‘Concordance’ of contract law rules from PECL, the US Restatement (Second), Chinese and Russian law codifications: <http://www.newcastle.edu.au/school/law/research/global-law-of-contract/> accessed 1 September 2013.
\item 139 Submission No 54 (Sydney Law School academics).
\item 141 See Productivity Commission, Australian Government and New Zealand Productivity Commission, Strengthening Economic Relations Between Australia and New Zealand: A Joint Study (13 December 2013) <http://transstasman-review.pc.gov.au/> accessed 1 September 2013. Law Commissions and similar law reform bodies in other jurisdictions, particularly within the common law tradition, should also be consulted. An example is the British Columbia Law Institute, which released in 2011 a proposal to reform the law generally concerning unfair contracts: see Bigwood, in this volume.
\item 142 Cf, for example, Submission No 41 (MBA: proposing a referral to the ALRC only after the PC); Robertson (n 5) 24 (suggesting a joint reference to the ALRC and the PC).
\end{itemize}
socio-political dimensions to law reform, even in this field, including implications of multiculturalism and Australia’s engagement with Asia more broadly (as mentioned in Part 5 above).

The fact that the Commonwealth has no direct and express power to legislate on contract law generally, under the Australian Constitution, is no impediment to the ALRC now taking the lead in considering specific reforms in this field. After all, as mentioned in Part 7 above, the DP has already generated an interesting proposal to enact Commonwealth legislation impacting on contractual remedies and giving jurisdiction (exclusively or concurrently) to the Federal Court.\textsuperscript{143}

Anyway, there already exists some federal legislation dealing with specific aspects of contract law, such as the Insurance Contracts Act 1984 (Cth). Most importantly, the federal AGD has already initiated a preliminary consultation, pursuant to a mandate from the Council of Australian Government (COAG). It is time now to acknowledge simply that the AGD’s consultation has generated sufficient feedback to justify proceeding to the next stage, and that the ALRC is the more appropriate specialist body to consider now more detailed reforms. That is precisely why the ALRC was set up.\textsuperscript{144}

Unfortunately, there has been a growing tendency to sideline the ALRC in recent years, as evident from reforms to consumer law (directed primarily by the federal Treasury) and international arbitration (by the federal AGD). Some say that this is because the ALRC’s recommendations are not (or not quickly) implemented, but there is little hard evidence of this (in comparison, for example, with the PC). A more important reason may be that politicians are increasingly wary of losing control by referring matters from line ministries (or offshoots like the PC) to a body like the ALRC that is independent of the executive branch and instead advises Parliament. Yet such independence is a valued feature, particularly for a long-term project like contract law reform.

After almost 18 months since releasing the DP, it is high time for the federal Attorney-General to let go and refer the matter into the primary charge of the ALRC, which should be given sufficient time and resources to conduct a proper inquiry or consultation with other relevant bodies. In addition, as part of its broader responsibility for the justice system nation-wide, COAG should provide resources to establish an ‘Australian [and New Zealand] Law Institute’, with the initial task of working with the ALRC on this particular Restatement project.\textsuperscript{145}

\textsuperscript{143} Submission No 37 (Lindgren).


\textsuperscript{145} Cf Submission No 50 (Stewart (n 8)), suggesting that all aspects of contract law reform should proceed under the aegis of COAG. See also Submission No 5 (ACCI), one of very few Submissions generally negative about any form of reform, suggesting that if however ‘matters are to be progressed beyond this point, they should be progressed through the existing COAG structure and its various select councils’.
10 Conclusion

Many public responses to the AGD’s DP have pointed out that further research is needed into the pros and cons, as well as the format, of various possible reforms to Australian contract law; but almost all agree that more detailed investigation is worthwhile. Admittedly, one commentator has emphasised that generally change ‘should only occur if the benefits of change clearly outweigh the costs’, and that ‘any regulatory response should be proportionate to the issue addressed’.146 The point is elaborated in one Submission made by that commentator jointly with full-time legal academics (including myself) as well as another by his law firm,147 by reference to the Australian government’s Best Practice Regulation Handbook.148

However, the framing of the AGD’s DP and its consultation process so far seem to have complied with such ‘best practice’, at least to the extent of now allowing the contract law reform project to proceed to the next stage, namely a detailed inquiry led by the ALRC along the parallel lines outlined above (especially in Parts 6–8). Anyway, as mentioned in Part 5 above, contract law reform in Australia – as elsewhere – is not just matter of economic efficiency, implicating a narrower view of ‘cost-benefit’; it is also deeply entwined with the existing legal system, and involves broader socio-political issues implicating other non-economic values.149 Legislative amendment will implicate ‘nation-building’ (and now international relations), not just efficiency gains from ‘clarifying’ existing law and from ‘unifying’ or harmonising it nationally (or now internationally).150 History also suggests that ‘legal values’ and doctrines peculiar to the legal system will and should not be simply displaced by either economics or politics.151

Admittedly, the case for reforming Australian contract law should not be overstated or idealised. First, globalisation does create challenges as well as opportunities for national law reform projects nowadays, exacerbating a tendency

146 Robertson (n 5) 24.
147 See, respectively, Submission No 54 (Sydney Law School academics) and No 26 (Herbert Smith Freehills).
148 See Department of Finance and Deregulation, Australian Government, Australia’s Best Practice Regulation Requirements <http://www.finance.gov.au/obpr/proposal/gov-requirements.html> accessed 1 September 2013. Note that there are somewhat different ‘best practice’ requirements for regulatory impact assessments by Coag, or state and territory governments or agencies.
149 See also generally Michael Sandel, What Money Can’t Buy: The Moral Limits of Markets (Farrar, Straus and Giroux 2012).
150 Cf Maillet (n 96) in relation to codification in France; and the quite similar three goals of Japan’s present reforms of its Civil Code, outlined in Kozuka and Nottage (n 62) and by Sono, in this volume, chapter 6.
already for contract law and practice to fragment into specific sub-fields.\textsuperscript{152} Yet this should not be over-emphasised or necessarily acclaimed, even in cross-border contexts.\textsuperscript{153} Secondly, empirical studies continue to show how the impact of contract law norms is not as direct as jurists tend to assume, thus lessening the purported benefits from reform. Other factors, including institutional and procedural law mechanisms for resolving disputes, are also very important.\textsuperscript{154} However, improvements in these mechanisms (including access justice for consumers and another round of commercial arbitration law reforms) can be addressed in tandem with contract law reform, particularly in the contemporary Australian context.

Another key point is not to let any one group hijack the reform agenda. This includes legal academics, either those with a propensity towards overly ‘elegant solutions’ (which may not work well in practice)\textsuperscript{155} or those with very strong political views (as some perceive in the EU setting).\textsuperscript{156} However, strong leadership by key professors appears to have been crucial in advancing contract law reform in Europe (nationally and at the EU level), Japan and in international forums (such as UNCITRAL, and especially UNIDROIT). By contrast, the over-politicisation of the law reform process in the US resulted in the failed attempt to revise comprehensively the UCC’s provisions on sales law.\textsuperscript{157}

Australia is well placed to find a good balance, if it now proceeds to examine contract law reforms more closely under the leadership of the ALRC. After all, its Commissioners usually comprise senior professors (often with practical experience) as well as judges and other senior legal practitioners, and the ALRC has well-established and effective mechanisms for consultations with both expert groups and the general public. So far, however, no one (professor or otherwise) has publically stepped out as willing to take up the challenge of exploring specific ways to ensure Australian contract law meets the economic and socio-political needs of the twenty-first century.

\textsuperscript{152} See Micklitz, in this volume.
\textsuperscript{153} Robertson (n5) 20.
\textsuperscript{154} Submission No 25 (Doris) 24. See also generally Gava (n 151); Nottage (n 56), with further references.
\textsuperscript{155} Submission No 25 (Doris) 5.
\textsuperscript{156} Submission No 53 (Swain and Gaskell).
\textsuperscript{157} Compare Hyland (n 107) with Kozuka and Nottage (n 62) and Nottage (n 71), with further references.