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LAW WARS: AUSTRALIAN CONTRACT LAW REFORM  
vs. CISG vs. CESL

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I. INTRODUCTION

IT is an interesting time to be an academic in the field of contract law in Australia. From our remote island, we look to the changes taking place in European contract law. We look to the development of Asian initiative in the Principles of Asian Contract Law (PACL), the worldwide growth and influence of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and UNIDROIT Principles, and the Swiss Proposal before the United Nations regarding the CISG. From the perspective of Australian lawyers, even those who primarily are interested only in domestic contract law, all of this has recently become more than a passing interest since Australia is potentially about to begin its own reform process. Accordingly, now, for the first time, Australian governments are considering the spread of uniform law in the context of potential reform of Australian law. This paper considers briefly the Australian background, the status of the current reform process, and the possible influences of uniform law and harmonization efforts on the Australian position.

II. AUSTRALIAN BACKGROUND

Australia operates on the basis of a federal system which unified prior colonies of the British Empire in 1900. Under the Australian Federal Constitution, specific areas of law are reserved to the national federal legislature, while some matters are said to be governed concurrently with the provinces (states). Residual concerns not specified in the Federal Constitution are matters of state law. Contract law falls into this category.

Accordingly, Australian contract law, which was based on the common law of England, has since federation been subjected to piecemeal (and differing) legislative reform in each state, and to divergent court decisions in each state. Naturally, this has resulted in a number of divergences between the law of contract in the different states. It would be wrong to overstate the significance of these differences. Nonetheless, they do result in unnecessary compliance and information costs. Furthermore, even where the substance of the law is exactly the same, the simple fact of multiple sources of law—both legislative and judicial case law—creates costs for those who must deal with the law applicable to domestic contracts in Australia. Moreover, much of Australian domestic contract law has in-

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creasingly proved anachronistic and complex, creating further unnecessary transaction costs for commercial parties.

#### A. *Divergences in Australian Domestic Contract Law*

While perhaps not the “chaotic mess” characteristic of the situation that culminated in the publication of the Uniform Commercial Code (UCC) in the United States in 1952,<sup>1</sup> Australia’s various states have managed to develop a number of different rules in relation to contract. Unfortunately, unlike the United States, we do not have a body in the nature of the American Law Institute (ALI). It is also probably relevant that we only have six states and two mainland territories, whereas the variations leading to the UCC were spread across fifty states.

It is interesting that the ALI noted that the main defects in American law at that time were “uncertainty and complexity.”<sup>2</sup> Again, a federal system, indeed, one which strongly influenced Australia’s constitutional structure, had created a recipe for divergence. The answer in that case had been to harmonize by codification, driven by an independent non-profit and well-respected scholarly organization.<sup>3</sup>

Australian jurisdictions differ in many regards:

- *Degrees of Legislation*: Some have contract law statutes, others do not (for example, writing requirements).
- *Privity*: Following from the High Court decision in *Trident*<sup>4</sup> almost thirty years ago, the rules relating to third party benefit remain confusing and in need of harmonization. Some jurisdictions within Australia (Queensland, Western Australia, Northern Territory) have now eroded the privity rule, and now recognize contracts for the benefit of third parties in some circumstances by means of statute,<sup>5</sup> but these reforms are not uniform, and the circumstances in which they apply are confusing.<sup>6</sup> Moreover, other jurisdictions continue to rely upon the slow, confusing, and limited common law

1. See Larry A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC*, in CISG VS. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 25, 27, 32 (Ulrich Magnus ed., 2012).

2. See *id.* at 27.

3. See *id.* at 27–28.

4. *Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd.* (1988) 165 CLR 107 (Austl.).

5. See, e.g., *Property Law Act 1974* (NT) s 56 (Austl.); *Property Law Act 1974* (Qld) s 55 (Austl.); *Property Law Act 1969* (WA) s 11 (Austl.).

6. See Bryan Horrigan, Emmanuel Laryea & Lisa Spagnolo, Submission in Response to Federal Attorney-General’s Discussion Paper ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ § 1.1.2. (July 20, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissiontotheReviewofAustralianContractLaw/Submission%20035%20-%20Contract%20Law%20Review%20-%20Horrigan%20Laryea%20Spagnolo.pdf>.

developments, which on the whole do not reflect modern commercial realities.<sup>7</sup> Only for insurance contracts is there federal legislation to enable third party beneficiaries to take enforcement action.<sup>8</sup>

- *Capacity*: “The law relating to the capacity of natural persons to enter into, or be bound by contracts they enter into, vary greatly among the jurisdictions in Australia.” Specifically, “[t]he categories of incapacity are minority, mental incapacity, and intoxication. Of these, minority is the main issue . . . [and] the effect of a contract with a minor and the consequences for the parties vary greatly among the jurisdictions.”<sup>9</sup> The reason is that “[t]he law on minority consists of a combination of common law (inconsistently applied) and state and territory legislation of varying content.”<sup>10</sup> While “capacity may not be an issue in business to business (B2B) contracts . . . it can be an issue in business to consumer (B2C) contracts. In online B2C contracts, where the parties may be located in different jurisdictions, difficult issues may arise.”<sup>11</sup>
- *Proportionate Liability*: This differs across the various jurisdictions.
- *Inconsistent Legislation*: Some retain inconsistent legislation, or have not enacted legislation despite agreement between the jurisdictions to act in a uniform manner.<sup>12</sup>

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7. Following from the *Trident* case, where limited third party rights were recognized for an insurance contract. However, reasons for the High Court decision varied in their scope and basis, and the law still remains underdeveloped and uncertain.

8. See *Insurance Contracts Act 1984* (Cth), s 48 (Austl.).

9. Horrigan, Laryea & Spagnolo, *supra* note 6, § 1.1.4.

10. See *id.* The Submission further notes:

NSW has a comprehensive statute, the *Minors (Property and Contracts) Act 1970* (NSW). Victorian law needs to be gleaned from the *Age of Majority Act 1977* (Vic) and some provisions in *Goods Act 1958* (Vic) and the *Supreme Court Act 1986* (Vic). Queensland’s law consist of *Law Reform Act 1995* (QLD), and the common law. In SA, the law is to be found in *Age of Majority (Reduction) Act 1971* (SA) and the *Minors’ Contracts (Miscellaneous Provisions) Act 1979* (SA). WA’s law comprises *Age of Majority Act 1972* (WA) and the *Statute of Frauds (Amendment) Act 1828* (UK) (“*Lord Tenterden’s Act*”) in its original form as imperial legislation. Tasmania, ACT and NT all have a combination of statutes and the common law.

*Id.*

11. *Id.* § 1.1.5.

12. Two examples should suffice: NSW “curiously” retains the *Contracts Review Act 1980* despite the fact that an agreement was reached between states to repeal all inconsistent legislation upon enactment of the ACL. See Luke Nottage, The Government’s Proposed “Review of Australian Contract Law”: A Preliminary Positive Response 5 (July 16, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%2008%20-%20Contract%20Law%20Review%20-%20Dr%20Luke%20Nottage.pdf>.

Also, despite agreement five years ago amongst the State Attorneys General (SCAG) to implement the ECC, the process is still incomplete, with Queensland still not having yet passed the legislation to update its ETA.

B. *Complex and Antiquated Australian Contract Law*

Australia's sales laws imply certain non-mandatory terms concerning domestic commercial sales law contracts, such as the need for goods to meet their description, merchantable quality, and fitness for purpose.<sup>13</sup> These laws, however, date from the early 19th century.<sup>14</sup> Even this is painting far too kind a picture, because the provisions of those laws were themselves drawn from the English legislation with its origins at the time of the industrial revolution. It goes without saying that commercial domestic sales laws in Australia are rather antiquated.

Overlaid onto this regime is the *Australian Consumer and Competition Act 2010*, which incorporates the Australian Consumer Law (ACL). This is a far-reaching federal statute, which implements Australia's competition law, but which also contains consumer protection measures, including rules on misleading conduct in all trade and commerce, and rules on unconscionable conduct. The law also provides for mandatory implied terms, for example warranting quality, in relation to consumer contracts. Recently updated, the law maintains the basic structures in relation to implied terms present in its predecessor from 1974,<sup>15</sup> with a few tweaks.<sup>16</sup>

Australia suffers from many legislative and common law overlaps. The existence of legislation often will not prevent application of the common law, resulting in a range of remedies pursuant to statute and common law (including equitable relief). This can seriously compound the complexity of the law related to, for example, enforceability of contracts of indemnity and guarantees, which can not only be rendered unenforceable on grounds of unconscionable conduct under common law (particularly on the basis of equitable relief), but also on statutory grounds arising pursuant to the new legislative definition of unconscionability.<sup>17</sup>

The High Court of Australia has not helped clarify many areas where this would be desirable. In matters of state law, unlike the US Supreme Court, the Australian High Court has the capacity to resolve differences between the case law in various jurisdictions, or to clarify areas in which confusion has arisen. However, for many reasons, it frequently fails to do so.

One such area is the parol evidence rule, which has remained stuck in a time warp in Australia, despite its progression in the U.K. While the House of Lords under Lord Hoffman has broadened the test, Australia still requires "ambiguity" to exist before extrinsic evidence is admissible to interpret the intention of the parties. The High Court has consistently said that a time will come when this rule will be revisited, amid attempts by

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13. As this is a matter of state law, a different statute applies in each state and territory.

14. See *Sale of Goods Act 1896* (Tas) (Austl.).

15. See *Trade Practices Act 1974* (Cth) (Austl.) (repealed 2011).

16. One was the change from "merchantable quality" to "acceptable quality."

17. See Horrigan, Laryea & Spagnolo, *supra* note 6, § 2.10.

lower courts to forge ahead and recognize the utility of extrinsic evidence such as conversations. However, the High Court has been saying this for almost thirty years, and as recently as last year, repeated its mantra of preventing further development until it had re-examined the issue, simultaneously refusing to take on a case which raised just such a question.<sup>18</sup> The High Court has also failed to clarify whether a general duty to perform contractual obligations in good faith exists,<sup>19</sup> whether terms of earlier contracts can be incorporated into later contracts by conduct,<sup>20</sup> and what will suffice for consideration.

The “prior legal duty” or “existing legal duty” rule states that where an obligation is already owed, that obligation cannot be offered as good consideration to support a new promise. To overcome this strict rule, the “practical benefit” exception eliminates the effect of the prior legal duty rule in certain circumstances. However, this rule, originally developed in the U.K.,<sup>21</sup> is troublesome to say the least. Furthermore, it has been modified where applied in Australia,<sup>22</sup> and is not applied consistently throughout all Australian jurisdictions. It appears that New South Wales’ courts are more willing to find the exception exists, but courts in other jurisdictions are less willing, and in any event the rule is very uncertain, and theoretically hard to justify.

Indeed, given the growth in equitable concepts of estoppel, the entire concept of consideration may need a more major overhaul, as it has caused serious problems in variations of contract, where often commercial practices are such that modifications lack consideration.

It should be noted that consideration is not a requirement of contract in the CISG or in civil law jurisdictions. Thus, the problem posed by the existing legal duty rule in Australia (and some other common law jurisdictions) does not arise in contracts governed by the CISG or the contract law of civil law jurisdictions.

As Luke Nottage discusses in his submission to the Attorney-General’s Department, High Court rulings in the area of contract law often seem

18. See *Western Export Servs., Inc. v Jireh International Pty. Ltd.* [2011] HCA 45 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2011/45.html>.

19. See AUSTRALIAN ATTORNEY-GENERAL’S DEP’T, IMPROVING AUSTRALIA’S LAW AND JUSTICE FRAMEWORK: A DISCUSSION PAPER TO EXPLORE THE SCOPE FOR REFORMING AUSTRALIAN CONTRACT LAW 8 (2012) [hereinafter ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER], available at <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf>; see also Horrigan, Laryea & Spagnolo, *supra* note 6, at 18 n.57 (“High Court expressly declined to address the status, content, and limits of good faith under Australian contract law in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*”). No suitable test case for revisiting such issues had reached the High Court by mid-2012.

20. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 8.

21. See *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, [1991] 1 Q.B. 1 (Eng.).

22. See *Musumeci v Winadell Pty Ltd.* [1994] 34 NSWLR 723 (Austl.).

antiquated in many respects by comparison with international standards.<sup>23</sup> One such finding is the refusal of the High Court to recognize the admissibility of subsequent conduct as evidence of what parties originally intended in relation to the interpretation of contractual terms,<sup>24</sup> the requirement of impossibility rather than commercial impracticability to trigger frustration, and “insistence that the only relief available is automatic termination of the contract” should frustration be found.<sup>25</sup>

In Australia, there has been an unfortunate tendency for multiple judgements even amongst majority and minority decisions in the High Court. The result has been, even in decisions meant to “clarify” previously confusing areas of law, or where the law has been advanced to a degree, such as the incremental recognition of third party enforcement in *Trident*, a confusing array of reasoning and lack of direction in the law.<sup>26</sup> In other words, more complexity. This can lead to injustice, with parties able to behave opportunistically.<sup>27</sup>

There is one respect in which Australian law is certainly *not* antiquated. Electronic Transactions Acts have been enacted in each of the states and territories except for Queensland, which reflect the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).<sup>28</sup> Furthermore, it is anticipated at the time of writing that Queensland is about to introduce a bill to enact the latter. This means that Australia is one of the jurisdictions at the forefront of modernization in relation to electronic transactions. Ironically, this does not address the many fundamental problems already indicated, although it gives some indication that where a need for reform is perceived, Australian lawmakers can implement change, albeit slowly and not always uniformly.

### III. AUSTRALIAN REFORM AGENDA

#### A. *Preface to 2012: The Profession*

Until recent times, despite these problems, there has been little appetite for law reform for Australian contract law. The legal profession has appeared content to live with anachronism, complexity, and divergence, in an attitude of “if it ain’t broke, don’t fix it!” Undoubtedly, the successive waves of legislative reform in relation to specific subject matters—consumer law, credit codes, tenancies, securities law—were enough to keep

23. See generally Nottage, *supra* note 12.

24. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 8.

25. See Nottage, *supra* note 12, at 5.

26. See Horrigan, Laryea & Spagnolo, *supra* note 6, § 1.1.2 (explaining situation for other jurisdictions that have not implemented statutes dealing with privity rule remains confusing, and federal legislation only removes uncertainty in *Trident* for insurance contracts).

27. See *id.* § 1.1.1.

28. See G.A. Res. 60/21, U.N. Doc. A/RES/60/21, (Dec. 9, 2005).

both the profession and academics well-occupied, and most probably have dampened the capacity for change to something as fundamental as contract law.

In particular, despite the pivotal role played by key Australians in the development of uniform law at the international level—first, in relation to the CISG, then the UNIDROIT Principles—it has been interesting to note the time warp in the Australian legal profession’s recognition of the importance and utility of the CISG. Likewise, while case numbers slowly grow in frequency in Australia, the judiciary has consistently shown a lack of understanding or interest in the correct application of the CISG. Frequently, counsel fail to plead the CISG where it is the applicable law, and it is overlooked by the court. The profession still maintains the practice of routinely excluding the CISG in drafting contracts. This is almost poignant, given the widespread participation of many Australian teams in the Vis Moot, and the tremendous success which Australian law schools enjoy in the Moot. This author has previously explained this lack of uptake on a number of bases, including failure to include the CISG in general contract law curricula, and on law firm culture as a group dynamic, influencing young lawyers against advising the use of the CISG.

Around 2010, a number of senior judicial officers and academics began to point out the lack of engagement of the profession in Australia with international law. Justice Paul Finn, a judge of the Australian Federal Court and academic who has been instrumental in the UNIDROIT movement,<sup>29</sup> Justice Michael Kirby of the Australian High Court,<sup>30</sup> and Chief Justice Robert French of the Australian High Court<sup>31</sup> each remarked in different papers on Australia’s “isolationist” legal attitude. The current author’s own summary of the manner in which the CISG had been received in Australia was published in 2009.<sup>32</sup> These laments were picked up in academic and extra-curial commentary, but little progress seemed apparent.

Since that time, Australian law firms, themselves with high hopes of expanding into Asia and beyond, have increasingly merged with global law firms. Almost all of the former “big four” firms have merged; Linklaters with the former Allens Arthur Robinson, King & Wood with the former

29. See Paul Finn, *Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract*, in *THE INTERNATIONALISATION OF LAW: LEGISLATING, DECISION-MAKING, PRACTICE AND EDUCATION* 145 (Mary Hiscock & William Van Caenegem eds., 2010).

30. See Justice Michael Kirby, *Overcoming Australia’s Equity Isolationism*, 3 J. EQ. 1 (2009) (Austl.).

31. See Robert French, Chief Justice, High Court of Austl., Speech at Supreme Court of New South Wales Annual Conference: International Law and Australian Domestic Law 6–8 nn.9–11, 13 (Aug. 21, 2009), available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf>.

32. See Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELBOURNE J. OF INT’L LAW 141 (2009).

Mallesons, Ashurst with Blake Dawson, and Herbert Smith with Freehills. Allen & Overy, Clifford Chance, and Norton Rose have all entered the Australian market.<sup>33</sup> Australia seemed to have escaped the global financial crisis relatively unscathed, but it was felt amongst the legal profession. The face of the profession has changed under pressure from slowing economic activity, a booming mining industry, and large growth in trade with Asia.

### B. *Events of 2012*

Somewhat surprisingly, on March 22, 2012, the Australian Federal Attorney-General issued a discussion paper canvassing the possibility of reforming Australian contract law. The stated aim of the discussion paper was to assist the Australian government “[to] explor[e] the scope for reforming Australian contract law” to make it simpler, fairer, and more efficient.<sup>34</sup>

The discussion paper refers to reasons for considering reform of Australian domestic contract law, including problems with:

- accessibility;
- certainty;
- simplification;
- setting standards of conduct;
- supporting innovation;
- e-commerce;
- supporting relational contracts;
- small and medium-sized businesses;
- internal harmonisation; and
- internationalisation.

The possibility of a codified law modernized to reflect international trends was mooted. The discussion paper noted the judicial and academic criticisms mentioned above. A number of “infolets” were issued, each detailing specific areas of potential reform, including one of which referred comprehensively to the UNIDROIT Principles. The CISG’s role in Australia was also noted. Specifically, the discussion paper called for submissions from academics, the profession, and others on the following questions:

1. What are the main problems experienced by users of Australian contract law? Which drivers of reform are the most important for contract law? Are there any other drivers of reform that should be considered?
2. What costs, difficulties, inefficiencies, or lost opportunities do businesses experience as a result of the domestic operation of Australian contract law?

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33. See Nottage, *supra* note 12, at 4.

34. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19.

3. How can Australian contract law better meet the emerging needs of the digital economy? In what circumstances should online terms and conditions be given effect?
4. To what extent do businesses experience costs, difficulties, inefficiencies, or lost opportunities as a result of differences between Australian and foreign contract law?
5. What are the costs and benefits of internationalising Australian contract law?
6. Which reform options (restatement, simplification, or substantial reform of contract law) would be preferable? What benefits and costs would result from each?
7. How should any reform of contract law be implemented?
8. What next steps should be conducted? Who should be involved?

A number of months were allowed for submissions on the discussion paper, and submissions closed on July 20, 2012. The submissions received were predominantly from academics, non-lawyer professional/business groups, lawyer associations, and law firms (in that order).<sup>35</sup> There were fifty-eight written submissions and sixty-five online survey responses from the public.<sup>36</sup>

In June 2012 two open consultations forums were held and these were attended by representatives of peak bodies, as well as consumer, business, academic, legal, and professional stakeholders.<sup>37</sup> Five further consultations were held with individuals unable to attend the open sessions. Attendees from the legal profession were in general terms in favour of specific piecemeal reform, but opposed to a code, and not in favour of utilizing international instruments of harmonized law if reforms were to be implemented.

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35. Non-confidential submissions were published online on November 21, 2012. See *Submissions to the Review of Australian Contract Law*, ATTORNEY-GENERAL'S DEPARTMENT, <http://www.ag.gov.au/Consultations/Pages/SubmissionstotheReviewofAustralianContractLaw.aspx> (last visited Apr. 9, 2013). The Attorney-General's Department Report to Senate Standing Committee lists the authors of formal submissions. There were submissions from academics (16); non-lawyer professional/business associations (15); lawyer associations/peak bodies (9); lawyers/law firms (6) as well as corporations/in-house lawyers (2); government (2) and a further eight submissions. See ATTORNEY-GENERAL'S DEPARTMENT, REPORT TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS (2012) [hereinafter REPORT TO STANDING COMMITTEE], available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/estimates/sup\\_1213/ag/QoN\\_57-CLD.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/sup_1213/ag/QoN_57-CLD.pdf).

36. See REPORT TO STANDING COMMITTEE, *supra* note 35.

37. Notably, a few large law firms and legal professional associations participated in the process including Ashurst (formerly Blake Dawson Waldron), Herbert Smith Freehills (formerly Freehills), King & Wood Mallesons and the Law Council of Australia, Australian Academy of Law, Australian Business Lawyers and Advisers, Australian Corporate Lawyers Association, Australian Government Solicitor, and the NSW Young Lawyers. See *id.*

It is interesting to also reflect upon the nature of the written submissions. There were a number of submissions from non-legal professional bodies which were concerned with single points, such as the need to address fairness of contractual terms for the protection of their members.<sup>38</sup> Some called for specific harmonization legislation in respect of the divergent areas mentioned above.<sup>39</sup> Those that addressed the issue at all, tended to oppose federal codification generally on rather vague bases.<sup>40</sup>

As one would expect, the legal profession tended to be more specific. For example, the peak body representing in-house lawyers working for corporations in Australia mentioned the issues of divergence and the need for harmonization between the states in the areas discussed earlier.<sup>41</sup> It also called for simplification and centralization of contract law, but opposed internationalization along the lines of the CISG.

Codification or centralization of contract law at the federal level found more favour amongst academics. The Australian Academy of Law, comprised of academics and judges, simply pointed out that the process would be difficult due to overlaps, and would require extensive consultation (after arguing for rectification of divergences between states).<sup>42</sup> Many preferred codification and/or a soft law restatement of principles.<sup>43</sup>

Justice Bathurst in his personal submission expressed doubt that a national code would improve predictability, and argued it may lead to confusion and rigidity.<sup>44</sup> His Honour noted that any code would need to be interpreted and would become overlaid with case law in any event, thus

38. See Ass'n of Prof'l Eng'rs, Scientists & Managers, Austl., Review of Australian Contract Law (July 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%2009%20-%20Contract%20Law%20Review%20-%20APESMA.pdf>.

39. See, e.g., Austl. Bankers' Ass'n, Improving Australia's Law and Justice Framework—Discussion Paper Scope for Reforming Australian Contract Law 4 (Aug. 7, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20057%20-%20Contract%20Law%20Review%20-%20Australian%20Bankers%20Association.pdf>; Austl. Chamber of Commerce & Indus., Response to Attorney-General's Department Discussion Paper (July 27, 2012), available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20049%20-%20ACCI%20-%20for%20publication.pdf>.

40. See Austl. Bankers' Ass'n, *supra* note 39, at 3–4.

41. See Austl. Corporate Lawyers Ass'n, Improving Australia's Law and Justice Framework: Reforming Australian Contract Law 3 (July 20, 2012) [hereinafter ACLA], available at <http://www.acla.com.au/documents/item/1023>.

42. See generally Australian Academy of Law, Response to Attorney-General's Department Discussion Paper (July 23, 2012), <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw/Submission%20041%20-%20Contract%20Law%20Review%20-%20Australian%20Academy%20of%20Law.pdf>.

43. See, e.g., Horrigan, Laryea & Spagnolo, *supra* note 6, at 23; Nottage, *supra* note 12, at 12–14.

44. See Thomas Frederick Bathurst, *Codification of Contract Law—A Flawed Proposal*, CONT. L. REV. 1, 6–8 [hereinafter Bathurst Submission], available at <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralian->

becoming unpredictable. Further, a code could never be fully comprehensive without becoming far too detailed.

While these arguments are quite valid, in truth they are not reasons why a code should not be adopted *per se*. No one code can ever provide all the answers. Neither the common law nor a code can ever be totally predictable. The real question must be directed to whether a code can bring relative improvements in predictability, reduction of complexity, and gains in accessibility by comparison with what we have presently.

The argument attributes little weight to the benefit of reducing the number of sources of law (by comparison with various pieces of state and federal legislation, state case law and federal case law), and resultant improvement in the accessibility of the law. Of course, post-code, the law must continue to be developed by court interpretation, and must respond to sociological, economic, and technological change.<sup>45</sup> With respect, this fact cannot serve as an argument in favour of common law and against codification, since such adaptations must occur irrespective of whether the basic rule or principle derives from a case or legislative text—in other words, the law must grow in either case to fit new circumstances regardless of its form. However, even after the law continues to develop by means of judicial interpretation, one significant benefit of codification is the overall ordering of concepts within a single framework, to which cases themselves refer and to which those cases, regardless of court system, become referable, indexed, and more easily accessible.

This is not to say that such benefits are worth the transition costs of reform. However, a balanced perspective needs to be maintained between the costs and benefits of a single centralized consolidation, especially if a large part of the problem is the complexity and overlap of sources of laws and remedies across and within jurisdictions in Australia. If a code is aimed at removing existing problems of divergence, or more importantly, reforming the rules of contract law in a way the present system has been unable to achieve, then perhaps the price may be worth it.

As Australia debates and weighs its options in relation to “internationalizing” its domestic law of contract, various questions arise.

#### IV. DOES AUSTRALIAN NEED LAW REFORM?

The first question must be whether any reform to Australian contract law is necessary, useful, or even worthwhile. Clearly, the profession as a whole appears to think little needs to be done.

There can always be an easy argument against change. Every change involves costs. However, this must be weighed against the background of the ageing and complexity of certain parts of Australian contract law, and the areas in which divergences occur. Furthermore, as various jurisdic-

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ContractLaw/Submission%20055%20-%20Contract%20Law%20Review%20-%20Bathurst.pdf (last visited Mar. 14, 2013).

45. *See id.* at 6.

tions around the world adopt domestic laws that are based upon the same harmonized uniform models, Australian law may well increasingly stand out as different from the rest.

Difference in and of itself is not necessarily bad, and may even encourage some parties to select Australian law to govern their contracts. However, the reality is that difference involves learning costs and uncertainty. Coupled with the need to modernize and harmonize across the states, this may motivate any future reform of domestic contract law to seriously look at harmonized instruments as a basis for any new rules.

As some commentators observe, there are other reasons prompting a revisiting of Australian contract law. Nottage points out that consumer law growth is one driver, as well as the changes to the legal landscape through widespread mergers of large home-grown law firms with the major multinational legal firms and/or entry of those firms into the Australian law market, prompted by the mining boom and high levels of trade with Asia.<sup>46</sup>

There are significant complexities in Australian contract law which simply don't need to be there—as discussed earlier, for example, the need for consideration, the admissibility of various forms of evidence about intention, and divergence on questions of capacity, frustration, and third parties. There are issues which should be addressed and modernized—for example, consideration and good faith. However, it may be the case that some actors within the Australian law market also stand to benefit most from the maintenance of such divergence and complexity.

Australian legal practice has boomed in recent decades as the level of complexity in the law has increased. Obviously this is not solely attributable to growth in legal complexity alone, but as anticipated by several commentators, it is noteworthy that some of the most vocal opposition to simplification comes from law firms.<sup>47</sup> Like any economic actor, path dependent behaviour within law firms and opposition to change within the legal profession must be anticipated as a normal heuristic behaviour and group dynamic, even where the change would be substantively efficient for clients. Previously, the author has analysed exactly such behaviour at length in relation to choices to opt out of the CISG, despite its comparative efficiency.<sup>48</sup>

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46. See Nottage, *supra* note 12, at 4.

47. This was predicted in some submissions. See, e.g., Horrigan, Laryea & Spagnolo, *supra* note 6, § 1.8 (“For contract law . . . there are . . . conflicting economic interests . . . in relation to . . . reform . . . entail[ing] moral hazard issues and path dependent behaviours . . . [Thus] any change will . . . meet resistance from the bulk of the legal profession, irrespective of benefits to business.”); Nottage, *supra* note 12, at 7.

48. See Lisa Spagnolo, *Truth or Dare? The Interrelatedness of the Efficiency of the CISG, Influences on Lawyers' Choice of Law and Interpretation* 174, 189, 202–16 (Ph.D. Thesis, 2012) [hereinafter *Truth or Dare*]; see also Lisa Spagnolo, *Green Eggs & Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts* 6 J. PRIVATE INT'L LAW 417, 435–39, 445–53, 456 (2010)

Therefore, opposition from the profession is not altogether surprising given the learning costs involved for firms and the self-reinforcing risk-reward structures created by the complex environment, despite the fact that change may significantly improve the transaction costs and efficiency of doing business for their clients.<sup>49</sup> Costs of inefficiency are presently not borne by the profession, but by business which may contract sub-optimally as a result of inefficient laws, therefore there is little incentive for law firms to support change.<sup>50</sup>

Furthermore, the law market is one of specialist expertise, and lawyers control that expertise. Information asymmetry may have a powerful impact on the potential for any efficient reform.<sup>51</sup> Consequently, while loss of GDP contributions from legal services might be far outweighed by growth in general business contributions to GDP due to reforms,<sup>52</sup> the vocal and organized lobbying of the legal profession is likely to carry more weight in the reform process.

#### V. WHAT MODEL FOR AUSTRALIAN REFORM?

If Australian contract law should indeed be reformed, then the second question that arises is to which model should it look for inspiration? There are a number of competing models of harmonized laws on the market. Each has its advantages and disadvantages, and each is shaped by the times and institutional influences that led to its creation.<sup>53</sup>

Additionally, the CISG has clearly influenced law reform in many jurisdictions, and that influence has prompted the present Australian review. However, another influential harmonizing law reform is on the horizon—the Draft Common European Sales Law (CESL). Therefore, this paper asks a final question: Will the CISG still be able to influence non-European domestic law reform projects, such as the one being considered in Australia? Or—will CESL be more influential on future non-European law reform?

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[hereinafter *Green Eggs*] (discussing reasons for lawyer persistence in exclusion of CISG despite its efficiency at substantive and procedural levels compared with relative efficiency of alternative choices of law).

49. See *Truth or Dare*, *supra* note 48, at 202–16; see also *Green Eggs*, *supra* note 48, at 444–53.

50. See Nottage, *supra* note 12, at 6.

51. See *Truth or Dare*, *supra* note 48, at 196–202; see also *Green Eggs*, *supra* note 48, 439–44.

52. See Nottage, *supra* note 12, at 6.

53. See generally Sandeep Gopalan, *A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law*, 39 *GEO. J. INT'L L.* 327 (2008); see also Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 *INT'L REV. L. ECON.* 446, 479–84 (2005).

## A. CISG

Synchronizing Australian domestic law with the law applicable to international sales in Australia and with the law forming the basis for many domestic law reform initiatives throughout the world seems a sensible approach. It would minimize transaction costs and improve predictability for outcomes. It would also address a considerable problem in Australia—resistance to the use and application of the CISG by practitioners and courts. The negative attitude of the profession toward the CISG was noted by the Attorney-General’s Department.<sup>54</sup>

Some of the submissions indeed demonstrate disquiet about using the CISG as the basis for domestic law reform.<sup>55</sup> However, as might be expected given the low levels of familiarity with CISG in Australia, such concerns frequently demonstrate a level of ignorance about the CISG rather than any serious substantive problem with it. Indeed, it could not otherwise have already served as the model for reform in many jurisdictions.<sup>56</sup>

The rules in the CISG have been tried and tested and found generally successful enough to form the basis for domestic reform elsewhere. The CISG is the basis for domestic reforms including the African OHADA,<sup>57</sup> the Draft Common Frame of Reference (DCFR), the Draft European Union CESL Regulation, the modernized German Law of Obligations, the Contract Law of the People’s Republic of China, the law of Estonia and most modern Eastern European sales laws, as well as the Nordic sales legislation, and the New Draft Japanese Civil Code.<sup>58</sup> For commercial transactions, the CISG is an appropriate basis for reform in Australia. The

54. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 8.

55. See ACLA, *supra* note 41, at 4 (arguing that it would mean that goods could not be returned on basis of failure of fitness for purpose). This is incorrect. If the breach is a fundamental breach pursuant to Article 25 then the contract can be avoided. See *id.*

56. The CISG has had direct impact on domestic law in China, Germany, Scandinavia, Japan, Québec, Czech Republic, Russia, and Estonia. It has affected reforms in the Netherlands, Germany, Japan, Greece, and the African OHADA member states. It has had an indirect impact on the domestic law of Denmark, France, and Italy via the European Union Directive on certain aspects of the sale of consumer goods and associated guarantees. See Council Directive 99/44, 1999 O.J. (L 171) 12 (EC) (European Union Directive on Sale of Consumer Goods and Associated Guarantees).

57. See ORG. FOR THE HARMONIZATION OF BUS. LAW IN AFRICA (OHADA), DOING BUSINESS 2011: MAKING A DIFFERENCE FOR ENTREPRENEURS (2011), <http://www.eisourcebook.org/cms/Organisation%20for%20the%20Harmonization%20of%20Business%20Law%20in%20Africa.pdf>. In particular, see the section on sales, which the Swiss Proposal refers to as “practically a transcript” of the CISG. See U.N. G.A. Rep. of the Comm’n on Int’l Trade Law, *Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, 3, U.N. Doc. A/CN.9/758, 45th Sess. (May 8, 2012) [hereinafter *Swiss Proposal*]. However, the Swiss Proposal also notes modifications in the OHADA sales section, and that a further project on broader contract law drawing from UNIDROIT Principles seems to have stalled. See *id.* at 5–6.

58. See *Swiss Proposal*, *supra* note 57, at 3.

Attorney-General's discussion paper gives the impression that the department is aware of the CISG's influence elsewhere on reform projects, but is wary and seeking to test the waters.

### B. *UNIDROIT Principles*

Modelling Australian domestic law on the UNIDROIT Principles of Commercial Contracts would similarly align the domestic law with other reformed domestic laws that have drawn from UNIDROIT, including most relevantly for Australia, China. Naturally, since UNIDROIT is structured upon the CISG, this also largely achieves the alignment of laws applicable to domestic contracts with those applicable to international contracts within Australia.

Notably, the UNIDROIT Principles go further than the CISG, so modelling upon UNIDROIT Principles would introduce new concepts hitherto not known to Australian domestic law. They deal with validity, agency, contracts benefiting third parties, set-off, limitation periods, assignment, illegality, multi-party contracts, and contractual unwinding. UNIDROIT Principles are drafted by non-government representatives who are aiming for an "ideal" solution. Not being restricted by the need to represent national interests, obviously the UNIDROIT Principles have been capable of a more expansive reach. However, for nations uncomfortable with the CISG for its civilian overtones, some of these "ideal" solutions, while logically attractive, may nonetheless be a step too far.

The UNIDROIT Principles have rightfully had a significant influence on the Attorney-General's discussion paper, and have themselves formed the basis for an entire "infolet" attachment to the discussion paper.<sup>59</sup>

### C. *CESL*

The proposed Common European Sales Law (CESL) is "a major advancement of the idea of a European cont[r]act [sic] law."<sup>60</sup> It has been claimed that the CESL is "an attempt at harmonizing an increasing[ly] chaotic set of Directives."<sup>61</sup>

The proposed regulation of the European Union avoids the political minefields of a comprehensive civil code, or even general contract law, and instead targets consumer protection harmonization as well as online trading and related services.<sup>62</sup> Consequently, it attempts to provide for cross-border transactions by consumers and small-to-medium sized enterprises (SMEs), and can be applicable to all commercial transactions if the

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59. See generally ATTORNEY-GENERAL'S DEP'T, *THE UNIDROIT PRINCIPLES: LESSONS FOR AUSTRALIA?* (2012), <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/TheUNIDROITPrincipleslessonsforAustralia.pdf> (infolet attached to Attorney-General's discussion paper).

60. See DiMatteo, *supra* note 1, at 25.

61. See *id.* at 33.

62. See *id.*

adopting member state so wishes.<sup>63</sup> Nonetheless, its application is proposed as an “opt-in” regime; that is, parties will need to select CESL to govern their contract. The inclusion of a “review clause” in the CESL hints that it is a stepping-stone to a broader future contract code.<sup>64</sup>

Thus, like the CISG, it is an instrument aimed at harmonization. The CESL has been strongly influenced by the CISG,<sup>65</sup> as was its formative predecessor, the DCFR. Unlike the CISG, mandatory rules predominate the CESL. As one might expect, the CESL consumer provisions are mandatory, but additionally, the CESL cannot be opted into in part, even for non-consumer transactions.<sup>66</sup>

The CESL has its advantages and disadvantages, which are examined in far more detail elsewhere. Its interpretive sections build upon those in the CISG, in particular, autonomous interpretation, resort to general principles, and trade usages and practices. These sections of the CESL helpfully and expressly enunciate principles, and refer expressly to purposive interpretation “having regard to the nature and purpose of the contract,” something only implicit in the CISG.<sup>67</sup> The CESL’s reference to trade usages is not limited to international usages like the CISG, and CESL expressly refers to a “reasonableness” standard in its interpretive methodology.<sup>68</sup>

Much has been said about the CESL’s structure, which is complex because it attempts to regulate both B2B and B2C transactions separately when it might have been simpler to regulate them within a unified set of remedial provisions.<sup>69</sup> Many critics believe it was manifestly unwise to try to regulate both types of transactions in the one instrument at all, including the present writer. As Castellani notes:

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63. See *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, art. 13(a), COM (2011) 635 final (Nov. 10, 2011) [hereinafter *CESL*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

64. See *id.* art. 15.

65. See *Swiss Proposal*, *supra* note 57, at 5 (comparing CISG with CESL); see also DiMatteo, *supra* note 1, at 31 (arguing this is especially so in relation to formation of contract). The CISG directly influenced the Draft Common Frame of Reference for the European Union, especially IV.A on sales, but also II on contract formation, and III on obligations and remedies. See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar et al. eds., 2009); see also *id.* at 1329–30, § IV.A.-2:306 n.1 (discussing third party rights or claims based on industrial property or other intellectual property, which subsequently formed basis for CESL)

66. See *CESL*, *supra* note 63, art. 11.

67. See *id.* art. 5; see also *id.* arts. 1–4; DiMatteo, *supra* note 1, at 41.

68. Compare *CESL*, *supra* note 63, art. 5, with U.N. Comm’n on Int’l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 9, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter *CISG*], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

69. See DiMatteo, *supra* note 1, at 33.

Consumer protection rules should be of mandatory application in order to be effective, while rules applicable to business-to-business transactions need to be optional in order to ensure freedom of contract. This explains why the two sets of rules are usually kept separate. How the two goals could be pursued in the same instrument remains unclear given the optional nature of the [CESL].<sup>70</sup>

The idea of treating SMEs differently than larger business is not completely new to Australian “consumer” protection laws. Despite the obvious, inherent problem of defining an SME, the effect of drawing various lines often fails to deal with the underlying aim of correcting for various informational asymmetries or differences in bargaining power.<sup>71</sup> Furthermore, one must query the difficulty of isolating SMEs in an environment where corporate acquisition and restructuring are not at all uncommon. Nonetheless, it appears that the regulation of SMEs may in part be motivated by a desire to capture some B2B relationships within the CESL framework. Unfortunately, this would tend to encroach upon the B2B transactions harmonized under CISG, thereby increasing, rather than reducing, fragmentation.<sup>72</sup> The inclusion of “standard terms” as opposed to “negotiated terms” also presents considerable confusion, and the varying manner in which they are dealt with throughout the CESL is somewhat perplexing.<sup>73</sup>

Given that Australia presently implies terms into commercial and consumer sales under separate statutes, and relies upon common law for general rules of contract, it would be a vast and unwise step for Australia to adopt a combined and therefore problematic regime like the CESL. However, given that the CESL is the most recent harmonized regime in the area, there should be no doubt that it will be examined in the process of reform in Australia.

Significantly, as was noted in the Attorney-General’s discussion paper, optional regimes for contractual rules will often fail to succeed in Australia due to practitioner resistance.<sup>74</sup> The comment was originally made in relation to the CISG, which Australian practitioners frequently exclude.<sup>75</sup> However, one would imagine that the CESL model of opting in would be

70. Luca Castellani, *CISG in Time of Crisis: An Opportunity for Increased Efficiency*, in 4TH ANNUAL MAA SCHLECHTRIEM CONFERENCE: GLOBALIZATION VERSUS REGIONALIZATION 44 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2013).

71. See DiMatteo, *supra* note 1, at 25.

72. See CISG Advisory Council Declaration No. 1, The CISG and Regional Harmonization (Aug. 3, 2012), available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=217&sid=217>.

73. See Ingeborg Schwenzer, *CESL and CISG*, in 4TH ANNUAL MAA SCHLECHTRIEM CONFERENCE: GLOBALIZATION VERSUS REGIONALIZATION 109–11 (Ingeborg Schwenzer & Lisa Spagnolo, eds. 2013).

74. See ATTORNEY-GENERAL’S DEP’T DISCUSSION PAPER, *supra* note 19, at 20.

75. See *id.* at 17.

even less effective unless widespread support from lobby groups was garnered first, something that might be unlikely for any code resembling the CESL in Australia. Furthermore, the comment in the discussion paper makes it clear that the Attorney-General is well aware of the potential weakness in such a model.

The CESL as a consumer law regime has considerable potential to protect consumers (and SMEs). Like UNIDROIT Principles, it also goes far further than the CISG, but it does so by implementing provisions on issues with consent, unfair terms, pre-contractual disclosure requirements, and electronic contracts. The CESL is structurally challenging, very far reaching, and simultaneously, does not govern some areas which it might have dealt with (such as capacity, ownership, the concurrent possibility of tort/contract liability, or illegality).<sup>76</sup>

Above all else, the CESL is not a suitable regime for commercial transactions. Its far reaching provisions, significant intrusions into party autonomy, and pre-contractual disclosure requirements should be carefully weighed up in determining if it would be a suitable model for commercial transactions. Furthermore, even as a consumer-protective measure, its suitability should be measured against existing protections within the ACL. Finally, it must be doubted that even a suitably crafted opt-in structure would work within Australia.

A related issue for any reform structure—if it were to govern commercial transactions—is how it would operate alongside the CISG, the law in Australia for international sales. The Australian government has an international obligation to implement the CISG. Any design that covers both cross border and domestic sales, even if it allowed parties to “opt out,” would therefore involve a potential breach of this obligation.<sup>77</sup>

#### D. *Swiss Proposal*

The “Swiss Proposal” refers to a proposal put to the General Assembly of the United Nations on May 8, 2012 by the Swiss government concerning the CISG.<sup>78</sup> The proposal supports “future work in the area of international contract law.”<sup>79</sup>

Essentially, it suggests that, given the huge increase in the volume of world trade over the past thirty years, perhaps:

[The] time has come for UNCITRAL (i) to undertake an assessment of the operation of the [CISG] and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and (ii) to discuss whether further work both in these areas and in the broader context of general

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76. See Schwenger, *supra* note 73, at 101.

77. See Horrigan, Laryea & Spagnolo, *supra* note 6, § 7.7.

78. See generally *Swiss Proposal*, *supra* note 57.

79. *Id.* at 1.

contract law is desirable and feasible on a global level to meet those needs.<sup>80</sup>

The proposal draws attention to the fact that the CISG does not govern certain important areas, but leaves them to domestic law.<sup>81</sup> One such area is validity, another is ownership of goods. Naturally, the remaining differences in ascertaining the content of different domestic laws, and drafting standard terms to deal with them, involves transaction costs.

The proposal highlights a few key aspects for possible future work. First, the areas left of the CISG's coverage: agency, validity, battle of the forms, specific performance, applicable interest rates, mistake, fraud, duress, gross disparity, illegality, unfair terms, third party rights, set-off, assignment, and multi-party contracts.<sup>82</sup> The proposal also points out that regional harmonization efforts have the potential to cause fragmentation.<sup>83</sup>

Essentially then, the Swiss Proposal seeks support for the notion of extending the subject matter of the CISG to closely associated areas that were previously avoided in the belief that the work should be done in a different instrument, or that consensus was unlikely at the time. It does not seek to overhaul the structure of the CISG in any way that might jeopardize its, so far, largely successful operation around the world.

The proposal was considered in June–July 2012, and met with mixed responses. Therefore, the Swiss Proposal remains, although future directions for it have not yet been agreed upon. An UNCITRAL Expert Group Meeting held in February 2013 in Seoul, Korea, further discussed the issue.

## VI. PROCESS INTO THE FUTURE

Given Australia's resistance to reform in the past, it would be more surprising still if Australia moved to a national contract law code, let alone one based on any international instrument. While this author would most favour a slowly developed, centralized, and easily accessible contract code based on CISG, and drawing on UNIDROIT Principles where appropriate, as the solution most likely to lead to an efficient and modern law of contract for Australia, this outcome is unfortunately unlikely.

More likely is the potential for a gradual movement, perhaps with the issue of an initial persuasive "restatement of contract principles," in the hope that this will sway courts and practitioners to adjust to the potential for hard law changes in the future. The importance of building a wide consensus for harmonized change amongst powerful lobby groups such as practitioner bodies, law firms, and business and industry associations, has

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80. *Id.* at 2.

81. *See id.*

82. *See id.* at 6–7 n.3.

83. *See id.* at 7.

been proven time and again. One need only look at the failure of Revised Article 2 of the UCC, “which was published in 2003 and . . . soundly rejected by the [U.S.] states,”<sup>84</sup> or the recent success of Brazilian industry and professional groups in convincing the Brazilian government to accede to the CISG. Another possibility will be more modest hard law reforms implemented by cooperation in each of the states.

No decision has yet been made on whether reform of any type should take place. No comment has been made in relation to the submissions or public responses at all. The deafening silence has now continued for some nine months.

On October 16, 2012, in answer to a number of questions posed to the Minister in a parliamentary committee about the status of the review, the Minister presented a report on the review and simply stated, “[t]he Government will consider the feedback received during the review to determine the need for any reform and possible next steps.”<sup>85</sup>

As of January 18, 2013 there were still no further developments emanating from within the department.<sup>86</sup> Furthermore, at the time of writing, the Federal Attorney-General had resigned, and a new Attorney-General recently has begun his term in office. The department is continuing in its deliberations, and nothing is likely to be announced until later this year. Moreover, a federal election looms large in September 2013. Anyone still holding their breath might be well advised to stop.

## VII. CONCLUSION

One might expect that, one way or another, diversity between Australian states will be addressed, and furthermore, Australia may well move to some soft law implementation of a more international set of contract rules in place of the overly complex rules that exist today for domestic contracts. While one might logically expect the CISG and/or UNIDROIT Principles to be the primary influence on this development, this will depend on how far the federal government perceives a need for mandatory consumer protective measures beyond those in existence under the Australian ACL presently. Should it make this a priority, one can expect that

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84. See DiMatteo, *supra* note 1, at 35.

85. REPORT TO STANDING COMMITTEE, *supra* note 35, at 5. This was the Minister’s response to each and every one of the following questions posed in the Senate Standing Committee by Senator Brandis, including:

6. When will the review be finalised and released publicly?
7. Is an Australian contract code a possible outcome/recommendation of the review?
8. What is the view of the Department on the possibility of an Australian Contract code?
9. Does the Department subscribe to the view that a contract code will add complexity and inefficiency to contracts in Australia?

*See id.* at 1–2.

86. Email from Attorney-General’s Department, to the author and Luke Nottage (Jan. 18, 2013) (on file with author).

the CESL will be examined, although it may carry less influence given its many detractors.

If the government were to create a broad restatement of principles, the influence of the CISG and/or UNIDROIT Principles will have to be tempered by the need for the government to navigate the skepticism with which these have been received within Australia. However, if this process is conducted with a realist's eye to the competing economic pressures within the Australian legal environment, and the significant influence the CISG has already had on domestic law reform in so many countries, then one suspects that they will be given significant weight.

The Swiss Proposal may have some effect on this process. While on the one hand, it may eventually lead to the CISG being even more attractive as an international standard for law reform, on the other hand, it may add some (largely unjustified) gravitas to the numerous and vocal detractors within the Australian legal profession. It might wrongfully be perceived as demonstrating that there is something "wrong" with the CISG. In fact, the conservatism and simplicity that underscores its solutions are its strength to date. The CISG presents a well-accepted basis for reform. By comparison to the ambitious but highly criticized CESL, this means that, at least for commercial transactions, the CISG continues to provide a widely accepted modern standard and steady blueprint. The perception, therefore, would be wrong.

However, especially in a country like Australia, perception is reality. If the profession is already wary of the CISG on the ill-conceived basis that it is "vague" or "unknown," then inevitably, the news that it may be amended will make such detractors even more uncomfortable with using the CISG as a basis for domestic reform.

As yet, most at this stage have not learned of the Swiss Proposal. It is therefore of great importance that the Swiss Proposal is explained in a pragmatic and open way to audiences within Australia. Should the Australian government actively participate in the ongoing debate on the proposal, this may assist in disseminating appropriate information to prevent such a perception from arising.