

# Contract Codification in Australia: Is It Necessary, Desirable and Possible?

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## Abstract

In early 2012, the then Attorney-General published a discussion paper on codifying Australian contract law. This article examines whether such a course of action is necessary, desirable and possible. It concludes that many of the problems that are identified in the discussion paper can be more easily dealt with in other ways. A degree of scepticism is expressed about the desirability of codification. Some drawbacks are identified. The experience of codification in other jurisdictions suggests that codification will be possible. The process of producing a code will nevertheless be extremely difficult. This article concludes that, if the Australian Government is going to go down the route of a contract code, it should proceed with great caution.

## I Law Codes Ancient and Modern

In regard to the proposed Code generally, I must avow myself decidedly opposed to *all* codes. The laws owe much to the reverence which their antiquity inspires; and where, as in our case, they have in a succession of ages been adapted to the free institutions of the country, it were rash, as the Code proposes, to abolish them all by one declaration, and establish a new law. Time mellows and indeed forms laws.<sup>1</sup>

These were the words of Edward Sugden, a future Lord Chancellor, writing in the 1820s in response to a proposal of James Humphreys for a code of English real property law.<sup>2</sup> Sugden also described the proposed code as a ‘calamity’.<sup>3</sup> Some will view the idea of codifying Australian contract law in much the same light. Down the centuries, the stock argument of opponents of codification is that, even with its many imperfections, the existing system is preferable to the codified alternative.<sup>4</sup> Others will see codification as not merely an opportunity to clarify the

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<sup>1</sup> Edward Burtenshaw Sugden, *A Letter to James Humphreys, Esq: On His Proposal to Repeal the Laws of Real Property and Substitute a New Code* (J & W T Clarke, 2<sup>nd</sup> ed, 1826) 5.

<sup>2</sup> For details of the proposed legislation, see Bernard Rudden, ‘A Code Too Soon. The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance’ in Peter Wallington and Robert M Merkin (eds), *Essays in Memory of F H Lawson* (Butterworths, 1986) 101.

<sup>3</sup> *Ibid* 102.

<sup>4</sup> For distinguished support for this view of codification, see Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1, 99;

existing law, but also to change it. In March 2012, then Attorney-General Nicola Roxon announced the publication of *A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*,<sup>5</sup> admitting that the proposal to codify contract law would be controversial: 'I expect there to be both passionate reformers and trenchant defenders of the status quo.'<sup>6</sup> Following a change of government, it seems unlikely that a decision on contract codification will be taken any time soon. Now is therefore a very good time to take stock and consider whether contract codification in Australia is necessary, desirable and possible.

Enthusiastic neologist<sup>7</sup> Jeremy Bentham invented the word 'codification',<sup>8</sup> but the idea of a law code is very much older.<sup>9</sup> In the ancient world, law codes could be found across the Middle East and Asia.<sup>10</sup> The Romans were enthusiastic codifiers.<sup>11</sup> The first modern wave of codification began in the 18<sup>th</sup> century, in part inspired by the natural law movement.<sup>12</sup> The 19<sup>th</sup> century, which began with the French *Code Civile* and ended with the German *Bürgerliches Gesetzbuch* ('BGB'), was undoubtedly a golden age of codification.<sup>13</sup> Codification was regarded as not just intellectually attractive, but as an important element in nation building.<sup>14</sup> So popular did codification become that, by 1900, the majority of European states

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Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002) 8.

<sup>5</sup> Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012) <<http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustralcontractlaw.pdf>> ('Discussion Paper').

<sup>6</sup> Nicola Roxon, 'Time for the Great Contract Reform', *The Australian* (online), 23 March 2012, <<http://www.theaustralian.com.au/business/legal-affairs/time-for-the-great-contract-reform/story-e6frg97x-1226307655474#>>. See Attorney-General's Department, above n 5, i, for a similar statement.

<sup>7</sup> The Bentham Project at University College London has drawn up a list of words invented by Jeremy Bentham: UCL Bentham Project, *Neologisms of Jeremy Bentham* <<http://www.ucl.ac.uk/Bentham-Project/tools/neologisms>>.

<sup>8</sup> See Jeremy Bentham, *Papers Relative to Codification and Public Instruction* (J McCreery, 1817). Bentham had already used the term in a letter to his brother Samuel Bentham dated 20 August 1806 in J R Dinwiddy (ed), *The Collected Work of Jeremy Bentham, The Correspondence Volume 7: January 1802 to December 1808* (Clarendon, 1988) 368.

<sup>9</sup> Code is derived from the word 'codex', used to describe the ancestor of the modern book: Colin H Roberts and T C Skeat, *The Birth of the Codex* (Oxford University Press, 2004) 1.

<sup>10</sup> A selection of the earliest can be found in *Law Collections from Mesopotamia and Asia Minor* (Martha T Roth trans, Scholars Press, 2<sup>nd</sup> ed, 1997); *The Law Code of Manu* (Patrick Olivelle trans, Oxford University Press, 2004); *Dharmasūtras: The Law Codes of Ancient India* (Patrick Olivelle trans, Oxford University Press, 2009).

<sup>11</sup> Justinian's Code is perhaps the best known. The codes of Gregorius, Hermogenianus and Theodosius were also significant undertakings: see H F Jolowicz, *A Historical Introduction to the Study of Roman Law* (Cambridge University Press, 1952) 482–4, 489, 503–6.

<sup>12</sup> Franz Wieacker, *A History of Private Law in Europe* (Tony Weir trans, Oxford University Press, 1996) 257–75; Horst Klaus Lücke, 'The European Natural Law Codes: the Age of Reason and the Powers of Government' (2012) 31 *University of Queensland Law Journal* 7.

<sup>13</sup> For the background to these two codes, see Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Clarendon, 1989); Wieacker, above n 12, 269–73.

<sup>14</sup> Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea' (1995) 1 *European Review of Private Law* 95, 100–1.

were governed by codes.<sup>15</sup> England and Wales was, and remains, the major exception.<sup>16</sup>

The history of the common law is littered with codification proposals that failed to reach the statute books. Not all of these were as ambitious as Jeremy Bentham's complete code of the laws or 'pannomion'.<sup>17</sup> At times the English have flirted with at least partial codification. Significant codes were enacted in India in the 19<sup>th</sup> century,<sup>18</sup> and while there was no complete code of the sort favoured in continental Europe, the body of statutes on English contract law is often viewed as equivalent to a commercial code. Statutes on bills of exchange, partnership, sale of goods and marine insurance were in part the product of individual endeavour and partly the result of commercial lobbying.<sup>19</sup> Many of these would form the basis of subsequent Australian legislation. Professor William Hearn,<sup>20</sup> one of the four founding Chairs at The University of Melbourne, had more ambitious plans. He produced a code for Victoria on the civilian model in the 1880s, but momentum for the project was lost with his death.<sup>21</sup> There have been calls for reforming Australian contract law since the 1970s.<sup>22</sup> Until now, critics of the status quo have not managed to attract a sufficient groundswell of support to bring about major change. Because the Australian Law Reform Commission ('ALRC') has not, so far, worked on projects of this scale, there has been no obvious mechanism for

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<sup>15</sup> Olivia Robinson, T D Fergus and William Gordon, *European Legal History* (LexisNexis, 3<sup>rd</sup> ed, 2000) 268–84; Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Jan Arriens trans, Cambridge University Press, 2009) 452–62.

<sup>16</sup> Scotland and the Scandinavian countries have not enacted complete codes. On the former, see Niall R Whitty, 'A Token of Independence: Debates on the History and Development of Scots Law' in Hector L MacQueen, Antoni Vaquer and Santiago Espiau Espiau (eds), *Regional Private Laws and Codification in Europe* (Cambridge University Press, 2003) 60. On the latter, see K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Oxford University Press, 2<sup>nd</sup> ed, 1987) vol 1, 286, 290.

<sup>17</sup> For a brief account of these writers and their opponents, see Warren Swain, 'Codification of Contract Law: Some Lessons From History' (2012) 31 *University of Queensland Law Journal* 39, 40–4.

<sup>18</sup> Courtney Ilbert, 'Indian Codification' (1889) 5 *Law Quarterly Review* 347. One of the codes was the *Indian Contract Act 1872*. For a detailed account, see Stelios Tofaris, *A Historical Study in the Indian Contract Act 1972* (PhD Thesis, University of Cambridge, 2011). A major penal code was also enacted: see Wing-Cheong Chan, Barry Wright and Stanley Yeo, *Codification, Macaulay and the Indian Penal Code* (Ashgate, 2011).

<sup>19</sup> Lord Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *Law Quarterly Review* 570. For a contemporary account, see Anon, 'The Proposed Mercantile Code' (1885) 29 *Journal of Jurisprudence* 186.

<sup>20</sup> J A La Nauze, 'Hearn, William Edward (1826–1888)' in *Australian Dictionary of National Biography* (Melbourne University Press, 1972) vol 4; R J W Selleck, *The Shop: The University of Melbourne 1850–1939* (University of Melbourne Press, 2003) 300–3.

<sup>21</sup> Alex C Castles, *An Australian Legal History* (Lawbook Co, 1982) 481–5; J M Bennett, 'Historical Trends in Australian Law Reform' (1969–70) 9 *University of Western Australia Law Review* 211, 214–16.

<sup>22</sup> Earlier arguments for reform include: J G Starke, 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1978) 49 *Australian Law Journal* 234; Law Reform Commission of Victoria ('LRCV'), *An Australian Contract Code*, Discussion Paper No 27 (1992). The authors of the Victorian discussion paper, Ellinghaus and Wright, have played an important role in the debate surrounding contract codification in Australia. In his comprehensive work on future directions in law reform published in 1983, Michael Kirby makes no mention of the need to reform of the law of contract: Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983).

bringing about reform, even if the will had been there.<sup>23</sup> Attitudes may be shifting. The last decade has seen greater interest in codification in Europe than at any time since the 19<sup>th</sup> century. This may have had some influence. A number of more specifically Australian reasons to support codification of the law of contract were identified in the *Discussion Paper*. Some are more convincing than others.

## II Is a Contract Code Necessary?

The High Court of Australia recently stressed that the common law is uniform across all states and territories. This means that intermediate appellate courts and trial judges should not depart from the decisions of courts in other jurisdictions.<sup>24</sup> In theory, this ought to lead to consistent application of the common law.<sup>25</sup>

Legislation is another matter. In many cases the solutions adopted in and across the states and territories are very similar,<sup>26</sup> which is not to say that even minor differences cannot create complexity and uncertainty.<sup>27</sup> The significant variations in substance that exist are more serious. Western Australia, Queensland and the Northern Territory have all enacted legislation that has abrogated the common law doctrine of privity of contract.<sup>28</sup> In other states, the common law continues to apply. Within these jurisdictions it is necessary to utilise one of the established common law methods of avoiding privity or one of the specific statutory exceptions.<sup>29</sup> Generally, either of these routes allows a third party to enforce a contract made for their benefit. Judges have nevertheless expressed dissatisfaction with the privity doctrine.<sup>30</sup> Not only is it untidy, it runs the risk that novel situations will arise where the parties' intentions will not be fulfilled. There are other legislative differences. Only New South Wales has enacted comprehensive legislation on minors.<sup>31</sup> Other states and territories rely on a mixture of statute and common law.<sup>32</sup> New South Wales, Victoria and South

<sup>23</sup> Michael Tilbury, 'The History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 3, 17.

<sup>24</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2.

<sup>25</sup> Keith Mason has described this as a process of 'tightening of the screws': see Keith Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 19, 20.

<sup>26</sup> Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 78.

<sup>27</sup> For example the various Sale of Goods Acts: *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1895* (WA); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1954* (ACT); *Goods Act 1958* (Vic); *Sale of Goods Act 1972* (NT).

<sup>28</sup> *Property Law Act 1969* (WA) s 11; *Property Law Act 1974* (Qld) s 55; *Law of Property Act 2000* (NT) s 56.

<sup>29</sup> See, eg, *Insurance Contracts Act 1984* (Cth) s 48.

<sup>30</sup> *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 123 (Mason CJ and Wilson J), 168 (Toohey J). The decision concerned insurance contracts but the criticism of privity has also been applied more widely: *Barroora Pty Ltd v Provincial Insurance Ltd* (1992) 26 NSWLR 170, 177–8; *Co-operative Bulk Handling Ltd v Jennings Industries Ltd* (1996) 17 WAR 257, 266–7.

<sup>31</sup> *Minors (Property and Contracts) Act 1970* (NSW).

<sup>32</sup> Stewart, above n 26, 78. For example, Queensland is governed by a combination of the *Law Reform Act 1995* (Qld) and the common law.

Australia have statutes dealing with the consequences of a frustrated contract.<sup>33</sup> In other states the common law still applies. None of these are peripheral matters. Privity and frustration, in particular, are open to criticism, not just on the grounds of inconsistency between states, but as bad law.<sup>34</sup> It is not too difficult to mount a federalist defence of this position.<sup>35</sup> All the same, it has to be acknowledged that recent decades have seen centralisation in some areas.<sup>36</sup> National legislation has a mixed track record of success.<sup>37</sup> The Australian Consumer Law ('ACL') was only introduced indirectly.<sup>38</sup> While not entirely satisfactory,<sup>39</sup> the ACL at least shows that within a given area, complex national law-making is feasible. There are several examples of Commonwealth legislation of contract law.<sup>40</sup> There is something to be said for the domestic harmonisation of contract law. The present system increases uncertainty and transaction costs. Reform on these grounds is widely supported<sup>41</sup> by legal,<sup>42</sup> business<sup>43</sup> and academic respondents to the *Discussion Paper*.<sup>44</sup> A code would be one solution. Legislative harmonisation would provide another route. There are practical problems with this approach. It is

<sup>33</sup> *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic). For an account of the various pieces of legislation, see Andrew Stewart and J W Carter, 'Frustrated Contracts and Statutory Adjustment: the Case for a Reappraisal' (1992) 51 *Cambridge Law Journal* 66, 82–4. The legislation does not apply to all contracts and can be excluded by the parties: *Frustrated Contracts Act 1978* (NSW) s 6; *Frustrated Contracts Act 1988* (SA) ss 4(1)(b), 4(2); *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 35(3).

<sup>34</sup> Privity has been criticised for a very long time: Arthur Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 *Law Quarterly Review* 12; H C Gutteridge, 'Contract and Commercial Law' (1935) 51 *Law Quarterly Review* 91, 98. The main difficulty with frustration is not so much *when* a contract is frustrated but the consequences of that event, especially where money was paid or performance rendered. It is, however, fair to say that frustration has not generated much reported litigation.

<sup>35</sup> For a discussion of the federalist ideal, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

<sup>36</sup> Nicholas Aroney, Scott Prasser and Alison Taylor, 'Federal Diversity in Australia: a Counter-Narrative' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 272, 291–8.

<sup>37</sup> Reform of company law is perhaps the most glaring example: *New South Wales v Commonwealth of Australia* (1990) 169 CLR 482. I am grateful to Professor Ross Grantham for drawing this incident to my attention.

<sup>38</sup> Through the *Competition and Consumer Act 2010* (Cth).

<sup>39</sup> For a convincing argument that the ACL lacks balance and that in some respects it is weighted in favour of business see J W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221. There are other fundamental problems with the ACL, including the definition of 'consumer': see Aviva Freilich and Lynden Griggs, 'Just Who is the Consumer? Policy Rationales and a Proposal for Change' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013) ch 2.

<sup>40</sup> *Bills of Exchange Act 1909* (Cth); *Insurance Contracts Act 1984* (Cth). This legislation is mandated by the *Australian Constitution* s 51 (xiv), (xvi).

<sup>41</sup> Responses to the *Discussion Paper* are collected at: Attorney-General's Department, *Submissions to the Review of Australian Contract Law*: <<http://www.ag.gov.au/Consultations/Pages/SubmissionstotheReviewofAustralianContractLaw.aspx>> ('Responses'). Submissions are identified by author.

<sup>42</sup> The Law Society of New South Wales Young Lawyers, *Responses*, above n 41.

<sup>43</sup> Master Builders Australia; Real Estate Institute of Australia; Civil Contractors Federation; Consult Australia, *Responses*, above n 41.

<sup>44</sup> Australian Academy of Law, *Responses*, above n 41.

hard to see how Commonwealth legislation on contract law is mandated by the *Constitution*.<sup>45</sup> Such harmonising legislation would instead need to be adopted state by state.

The question of harmonisation is not confined to the domestic sphere. One of the issues raised by the *Discussion Paper* is the value of international harmonisation of Australian contract law.<sup>46</sup> It is suggested that differences between Australian law and that of major trading partners may be an obstacle to trade.<sup>47</sup> The barriers to harmonisation here are even more significant. The argument that this lends support for codification is also more tenuous.<sup>48</sup> It is unclear exactly what ought to be harmonised and by how much. If harmonisation of contract law is just a matter of the form that the law of contract takes then it is difficult to see that much will be achieved. Most of the examples of the contract law of major trading partners in the *Discussion Paper* may be codes, but share little else in common.<sup>49</sup>

The argument for full-scale substantive harmonisation is even weaker. Should Australia simply harmonise with China as its biggest trading partner? Even assuming that Australian contract law could be harmonised with the law of a society that is culturally and socially very different,<sup>50</sup> harmonising Australian contract law with any one jurisdiction may also ensure disharmony with others. A weaker version of harmonisation may be a more realistic prospect. Here the focus is more specific. It means identifying particularly troublesome instances of disharmony. The doctrine of consideration, which is absent from civilian legal systems, international conventions and Chinese law, is an obvious candidate for abolition.<sup>51</sup>

Even harmonisation in a weaker sense is of doubtful value given that there are already elements of internationalisation in Australian contract law. All Australian jurisdictions are signatories to the *United Nations Convention on Contracts for the International Sale of Goods*.<sup>52</sup> The CISG has been ratified across the world<sup>53</sup> and has a wide appeal in cases of sales of goods covered by the

<sup>45</sup> There are no obvious provisions that might apply to contract law generally under the *Australian Constitution*. I am grateful to Professors Aroney, Orr and Ratnapala for discussion on this point.

<sup>46</sup> Attorney-General's Department, above n 5, 6 [2.11].

<sup>47</sup> *Ibid* 12 [4.5].

<sup>48</sup> Very similar arguments have been made for a unified European private law. The empirical evidence to support claims in that context is inconclusive at best: Jan Smits (ed), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Europa Law, 2005); Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law — an Empirical Contribution to the Debate' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart, 2006) 105.

<sup>49</sup> Attorney-General's Department, above n 5, 13 [4.9].

<sup>50</sup> The most recent statement of Chinese Contract Law is *Contract Law 1999*. For a summary, see Guiguo Wang, 'The New Contract Law of China' (2000) 15 *Journal of Contract Law* 242. One significant development was that oral contracts became valid.

<sup>51</sup> Even this might be difficult because it would be necessary to decide on a new test for enforceability.

<sup>52</sup> Opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('CISG').

<sup>53</sup> As of 26 September 2013, 80 countries have adopted the CISG. The UK is the one major exception. For a list see *CISG: Table of Contracting States* <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>>.

Convention.<sup>54</sup> It may even fit commercial expectations better than sales law in the English and Australian tradition.<sup>55</sup> The CISG is not mandatory and, in this way, it reflects the traditional autonomy given to contractual parties. Anecdotal evidence suggests that the CISG is often excluded in Australia.<sup>56</sup> Even when the CISG is not excluded, it is often poorly applied by the Australian courts.<sup>57</sup>

Opt-in provisions also promote harmonisation. The parties are perfectly at liberty to choose to have their contract governed by the law of a particular jurisdiction<sup>58</sup> or the UNIDROIT Principles of International Commercial Contracts ('UPICC').<sup>59</sup> UPICC has several advantages for commercial parties. Once the parties opt in, with the exception of a few mandatory principles, the other principles can be excluded or modified in whole or in part.<sup>60</sup> Practices and usage of the parties are also accounted for.<sup>61</sup> The merit of UPICC has been recognised in Australia both on its own terms,<sup>62</sup> and as a possible model for reforming Australian contract law.<sup>63</sup> But as with the CISG, practitioners remain wary.<sup>64</sup>

International rules can certainly work. The carriage of goods by sea is a good example. Australia is a party to the Hague-Visby Rules 1968,<sup>65</sup> albeit as modified by legislation.<sup>66</sup> Yet, even here, complete uniformity has not proved possible. The Hamburg Rules 1978 and the Rotterdam Rules 2008 are not adopted

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<sup>54</sup> Not every type of sale of goods is covered: see CISG arts 2, 3.

<sup>55</sup> Luke Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan' (2005) 36 *Victoria University Wellington Law Review* 815, 818–30.

<sup>56</sup> *Ibid* 836; Attorney-General's Department, above n 5, 15 [5.4]; 17 [5.11]. For anecdotal evidence, see Bruno Zeller; Warren Swain and Nick Gaskell, *Responses*, above n 41; 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, 159–60.

<sup>57</sup> Spagnolo, above n 56, 167–207.

<sup>58</sup> The recent Oxford Civil Justice Survey suggests that England, Switzerland, Germany and the United States were the most popular choices for cross-border transactions: Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal-Studies, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law A Business Survey — Final Results* <<http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf>>.

<sup>59</sup> There are differences between UNIDROIT and Australian contract law. The former does not require consideration. For a discussion of UNIDROIT from the perspective of the common law tradition: see Michael Furmston, 'English View of the UNIDROIT Principles of International Commercial Contracts' (1998) 3 *Uniform Law Review* 419.

<sup>60</sup> UPICC arts 1.1, 1.5. This, again, is no different from the position at common law, under which the parties can modify or exclude general contract provisions — eg through exclusion clauses, liquidated damages clauses, entire agreement clauses, contractual rights to terminate, and interpretation clauses.

<sup>61</sup> *Ibid* art 1.9.

<sup>62</sup> Paul Finn, 'Symposium Paper: The UNIDROIT Principles: An Australian Perspective' (2010) 17 *Australian International Law Journal* 193, 196.

<sup>63</sup> Luke Nottage, 'Symposium Paper: Afterthoughts: International Commercial Contracts and Arbitration' (2010) 17 *Australian International Law Journal* 197, 204.

<sup>64</sup> Attorney-General's Department, above n 5, 17 [5.11].

<sup>65</sup> *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931) as amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature 23 February 1968, 1412 UNTS 127 (entered into force 23 June 1977).

<sup>66</sup> *Carriage of Goods by Sea Act 1991* (Cth). For details, see Martin Davies and Anthony Dickey, *Shipping Law* (Lawbook Co, 3<sup>rd</sup> ed, 2004) 169–76.

in Australia.<sup>67</sup> A full empirical investigation is needed to determine the extent to which Australian business opts in or out of international instruments and why this is so. A large-scale study in the United States suggests that both the CISG and UPICC are also under-utilised there.<sup>68</sup> On the current evidence, those commercial parties who might be thought to most favour a harmonised international contract code are not even enthusiastic for more limited internationalisation. If the needs of business are one of the motivations for codification then, rather than imposing a contract code, it is preferable to encourage greater use of the CISG and UPICC where they apply.<sup>69</sup>

The *Discussion Paper* highlights the need to ensure that Australian contract law ‘adapts to innovations in technology’.<sup>70</sup> Electronic communications fit uneasily with established contract law. The rules relating to contract formation are the best example.<sup>71</sup> Electronic transactions in Australia are governed by the various Electronic Transactions Acts.<sup>72</sup> In most states and territories, these were recently updated in line with the *United Nations Convention on the Use of Electronic Communications in International Contracts*, 2005.<sup>73</sup> Some significant questions remain to be settled, including the point at which an electronic acceptance becomes effective.<sup>74</sup> Contract law lies at the heart of e-commerce.<sup>75</sup> Analogies can certainly be drawn between the old rules of contract formation and electronic communications.<sup>76</sup> This approach has been criticised<sup>77</sup> but is not necessarily

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<sup>67</sup> *Convention on the Carriage of Goods by Sea*, opened for signature 31 March 1978, 1695 UNTS 3 (entered into force 1 November 1992); *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, opened for signature 11 December 2008, A/RES/63/122.

<sup>68</sup> Peter L Fitzgerald, ‘International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States’ (2008) 27 *Journal of Law and Commerce* 1.

<sup>69</sup> Donald Robertson, ‘The International Harmonisation of Australian Contract Law’ (2012) 29 *Journal of Contract Law* 1. For further practical and legal difficulties for Australian parties and lawyers involved in cross-border contracting see Dr Luke Nottage; Professor Mary Keyes, *Responses*, above n 41.

<sup>70</sup> Attorney-General’s Department, above n 5, 4 [2.7].

<sup>71</sup> Donal Nolan, ‘Offer and Acceptance in the Electronic Age’ in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010) 61.

<sup>72</sup> This legislation is based on the UNCITRAL Model Law on Electronic Commerce 1996: *Electronic Transactions Act 1999* (Cth); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Northern Territory) Act 2000* (NT); *Electronic Transactions Act 2000* (SA); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2003* (WA).

<sup>73</sup> Opened for signature 16 January 2006, UN Doc A/60/515 (entered into force 1 March 2013). Queensland is likely to update its legislation in the near future. I am grateful to my colleague, Dr Alan Davidson, for this information.

<sup>74</sup> Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press, 2009) 60; Eliza Mik, ‘Updating the Electronic Transactions Act?’ (2010) 26 *Journal of Contract Law* 184, 197.

<sup>75</sup> Michael Furnston and G J Tolhurst, *Contract Formation Law and Practice* (Oxford University Press, 2010) 6.01.

<sup>76</sup> *Olivaylle Pty Ltd v Flottweg AG (No 4)* 255 (2009) ALR 632, 642 [25].

<sup>77</sup> Simone Hill, ‘Flogging a Dead Horse — the Postal Acceptance Rule and Email’ (2001) 17 *Journal of Contract Law* 151.



problematic. It all comes down to the way the law is applied.<sup>78</sup> The postal rule was a product of its time<sup>79</sup> and is not necessarily a suitable model. The way in which contract law ought to adapt to electronic commerce is an important issue. Rather than becoming bound up in the debate about codification, it merits a separate inquiry.<sup>80</sup> Any reforms, for example in relation to the acceptance rule, could once again be achieved through legislation rather than full-scale codification.

### III Is a Contract Code Desirable?

While there is no overwhelming case for the proposition that a contract code is necessary, a code may nevertheless still be desirable. In Thomas More's *Utopia*, first published in 1516, the Utopians recognised the value of a code that was comprehensible to the ordinary citizen: 'it's quite unjust for anyone to be bound by a legal code which is too long for an ordinary person to read through, or too difficult for him to understand'.<sup>81</sup> Three hundred years later, Bentham made much the same point. He hoped that with greater knowledge<sup>82</sup> and understanding of the law it would be possible for the lay person to conduct their affairs without recourse to lawyers.<sup>83</sup> In 1877, in a letter to the famous American jurist Oliver Wendell Holmes, the great English contract lawyer Sir Frederick Pollock wrote that:

Laws exist not for the scientific satisfaction of the legal mind, but for the convenience of lay people who sue and are sued. Now to say that law is for practical purposes more certain without a code than with one seems to me sheer paradox.<sup>84</sup>

This remains a popular argument among those who favour codification.<sup>85</sup> Contract law should not be deliberately obtuse. But to suggest that a code will render it accessible to the wider public is rather optimistic.<sup>86</sup> According to the *Discussion*

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<sup>78</sup> Eliza Mik, 'The Effectiveness of Acceptances Communicated by Electronic Means' (2009) 26 *Journal of Contract Law* 68. Mik argues that the focus should shift towards the nature of the communication process.

<sup>79</sup> Simon Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *Oxford Journal of Legal Studies* 170.

<sup>80</sup> This might resemble the United Kingdom Law Commission advice paper: Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (2001) <[http://lawcommission.justice.gov.uk/docs/Electronic\\_Commerce\\_Advice\\_Paper.pdf](http://lawcommission.justice.gov.uk/docs/Electronic_Commerce_Advice_Paper.pdf)>.

<sup>81</sup> Thomas More, *Utopia* (trans with an introduction by Paul Turner) (Penguin, first published 1516, 1965) 106.

<sup>82</sup> This was a reflection of Bentham's wider belief in the importance of informing the public: see David Liberman, 'Economy and Polity in Bentham's Science of Legislation' in Stefan Collini, Richard Whatmore and Brian Young (eds), *Economy, Polity and Society: British Intellectual History 1750–1950* (Cambridge University Press, 2000) 107, 124.

<sup>83</sup> Philip Schofield, 'Jeremy Bentham: Legislator of the World' (1998) 51 *Current Legal Problems* 115, 133–7.

<sup>84</sup> Mark de Wolfe Howe (ed), *The Pollock-Holmes Letters* (Harvard University Press, 1941) vol 1, 8.

<sup>85</sup> Dame Mary Arden, 'Time for an English Commercial Code?' (1997) 56 *Cambridge Law Journal* 516, 532–3.

<sup>86</sup> Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5<sup>th</sup> ed, 2008) 804–5 describes this view as 'facile'. It may be significant that 46 per cent of adult Australians have poor literacy skills: Australian Bureau of Statistics, *Adult Literacy and Life Skills Survey* (ABS, 2006). For a contrary view, see Aubrey Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, 370–2.

*Paper*, ‘greater accessibility’<sup>87</sup> not only has intrinsic value but would also ensure that contract law was better able to ‘set acceptable standards of conduct’.<sup>88</sup> Whether or not the law of contract is really an effective mechanism for setting acceptable standards of conduct is a complex issue.<sup>89</sup> It is asking rather a lot, within the confines of a code, to lay down some community standard of fairness that reflects ‘the needs of different people from different cultural backgrounds or experiencing different cultures’.<sup>90</sup>

Even supposing the law of contract were rendered accessible by a code, this would be unlikely to alter the process of contracting very much. The average consumer is rarely in a position to negotiate rather than accept standard terms.<sup>91</sup> The fact that a code ensures that the rules relating to remedies for breach of contract are accessible does little to lessen the fact that they are difficult and expensive to pursue in practice.<sup>92</sup> Small- and medium-sized businesses are sometimes at a disadvantage when contracting as well.<sup>93</sup> They do not have the same access to legal advice as large corporations.<sup>94</sup> Small businesses may be more familiar with the rudimentary features of contract law than consumers and, as such, a code may make it easier for them to know where they stand and organise their dealings.<sup>95</sup> There are still limits to what a code can do.<sup>96</sup> Smaller businesses may often have no better, or not much better, negotiating strength or resources than consumers. Contract law may not even be the dominant factor and certainly not the only factor in determining how businesses behave. Commercial reputation and the preservation of longstanding relationships may matter much more.<sup>97</sup> Contracts are

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<sup>87</sup> Attorney-General’s Department, above n 5, 3 [2.2].

<sup>88</sup> *Ibid* 4 [2.5].

<sup>89</sup> There may be something in the view that it has a deterrent effect: Eric A Posner, *Law and Social Norms* (Harvard University Press, 2002) 148–68.

<sup>90</sup> Attorney-General’s Department, above n 5, [2.5]. This is different from the entirely legitimate concern that culture and language may create vulnerabilities in contracting: ALRC, *Multiculturalism and the Law*, Report No 57 (1992).

<sup>91</sup> For a recent perspective, see Omri Ben-Shahar (ed), *Boilerplate* (Cambridge University Press, 2007).

<sup>92</sup> This is a perennial problem in consumer law. For some recent research on this issue in England, see Office of Fair Trading, *Consumer Law and Business Practice: Drivers of Compliance and Non-Compliance* (Office of Fair Trading, 2010) <[http://www.oft.gov.uk/shared\\_oftr/reports/Evaluating-OFTs-work/OFT1225.pdf](http://www.oft.gov.uk/shared_oftr/reports/Evaluating-OFTs-work/OFT1225.pdf)>.

<sup>93</sup> The courts are well aware of this, as illustrated by the way in which the doctrine of economic duress is applied: Andrew Stewart, ‘Economic Duress — Legal Regulation of Commercial Pressure’ (1983–84) 14 *Melbourne University Law Review* 410. For a particularly clear example, see *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833.

<sup>94</sup> Some of the submissions on the *Discussion Paper* support this view. The response of the Small Business Development Corporation is particularly valuable because it includes a survey of small businesses in Western Australia: Small Business Development Corporation, *Responses*, above n 41.

<sup>95</sup> Attorney-General’s Department, above n 5, 5 [2.8].

<sup>96</sup> The idea that a simplified contract law will reduce market dominance by large companies seems rather optimistic. This suggestion was made by the Shadow Attorney-General of New South Wales, Paul Lynch MP, *Responses*, above n 41.

<sup>97</sup> See Stewart Macaulay, ‘Non-Contractual Relations and Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55. For an exploration of these themes, see Jean Braucher, John Kidwell and William C Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay* (Hart, 2013).

frequently the product of a complex mixture of factors rather than one-off events.<sup>98</sup> The suggestion that the existence of a contract code can have much impact on the operation of these relationships may be rather naïve.

The *Discussion Paper* speaks of the merits of improving certainty in contract law. The aim is laudable, but there are at least two problems. Even supposing a code could be drawn up that was simple enough for most people without legal training to understand, any code would still have to be interpreted by judges. This will not be an easy adjustment for judges schooled in the common law tradition.<sup>99</sup> There are also bound to be gaps in a code.<sup>100</sup> Some existing civil codes expressly prevent judicial innovation. Article 5 of the *Code Civile* is unequivocal. It states that: ‘Judges are forbidden to decide the cases submitted to them by laying down general rules.’ But even French judges have refused to confine themselves to the role of interpreter.<sup>101</sup> German judges have also taken advantage of the general clauses on public policy and good faith in order to innovate.<sup>102</sup> Faced with a new code of contract law, judges will do one of two things. They will seek to interpret the code and fill the gaps by drawing on their knowledge of the old common law of contract,<sup>103</sup> or, and this is less likely, they will genuinely start from scratch.<sup>104</sup> Neither approach is necessarily conducive to the creation of certainty. Initially a new code may generate more uncertainty than it avoids, as litigants test its boundaries.<sup>105</sup> Codification is unlikely to be cost-free for business, as standard forms will have to be redrafted.<sup>106</sup>

A second problem is more subtle. Legal uncertainty is a fact of life even in commercial law. Parties are adept at finding ways around it. Faced with a default rule in contract that is uncertain, commercial parties are likely to include an express provision in the contract.<sup>107</sup> There is no reason why certainty should

<sup>98</sup> For an important selection of literature on the relational theory of contracts, see David Campbell (ed), Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001).

<sup>99</sup> Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 145.

<sup>100</sup> This has been the experience in the *Code Civile*: see Eva Steiner, *French Legal Method* (Oxford University Press, 2002) 39.

<sup>101</sup> *Ibid.*

<sup>102</sup> Basil S Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (Hart, 2<sup>nd</sup> ed, 2006) 131–3, noting however that good faith does not allow the courts to reopen every contract and examine whether it is fair.

<sup>103</sup> There are a numerous examples of judges referring to the pre-code law; these include judges in India after the *Indian Contracts Act 1872*, in Germany after the BGB and in England post the *Law of Property Act 1925* (UK) 15 and 16 Geo 5, c 20 which was supposed to redraw the landscape of real property.

<sup>104</sup> For some of the problems facing judges in the context of gaps in Louisiana, a mixed legal system, see James L Dennis, ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1993) 54 *Louisiana Law Review* 1.

<sup>105</sup> A good example is provided by the *Bill of Sale Act 1878* (UK) 41 and 42 Vic, c 31: see E Cooper Willis, ‘Observations on the working of the *Bills of Sale Act 1878, Amendment Act 1882*’ (1887) 3 *Law Quarterly Review* 300. I am grateful to Ms Karen Fairweather for drawing the example to my attention. The *Insurance Contracts Act 1984* (Cth) provides a more recent Australian example: see Malcolm Clarke, ‘Doubts from the Dark Side — the Case against Codes’ [2001] *Journal of Business Law* 605, 610.

<sup>106</sup> The Australian Chamber of Commerce and Industry made this point in its submission, Australian Chamber of Commerce and Industry, *Responses*, above n 41.

<sup>107</sup> Iain MacNeil, ‘Uncertainty in Commercial Law’ (2009) 13 *Edinburgh Law Review* 68, 75.

always trump other values. One of the dangers of codification is that it can render the law unduly rigid. The experience of civilian legal systems suggests that this fear may be overstated,<sup>108</sup> but it is not entirely without some force.<sup>109</sup> A law of contract that is relatively certain may prove to be particularly attractive to commercial parties. It is one explanation for the attraction of the law of contract in England and the State of New York in choice of law clauses.<sup>110</sup> The position in Australia is more complex. Australian contract law places some value on fairness.<sup>111</sup> Equitable principles are widely recognised. These were particularly evident during the period in which Mason CJ led the High Court of Australia.<sup>112</sup> Recent events suggest that such values remain important.<sup>113</sup> The process of reconciling certainty and a degree of flexibility demanded by the dictates of fairness will not be easy. The *Discussion Paper* does not attempt to explain where the balance should be struck. Having conceded that ‘elasticity ... may help support relational contracts’, it simply states that principles like good faith may undermine certainty.<sup>114</sup>

#### IV Is a Contract Code Possible?

Writing in the 1870s, Sheldon Amos, the English jurist, remarked that, ‘[n]o one who has practically tried his hand at the Codification of the English Law can be unaware of the extraordinary difficulties by which the task is beset’.<sup>115</sup> The fact that Amos was a strong believer in the cause of codification makes his comments all the more pertinent. His remarks provide a fairly accurate summary of the last 200 years of codification. The BGB was the work of just 11 judges, officials and jurists, and took a mere 13 years to complete.<sup>116</sup> Given its scale, this was a truly remarkable achievement.

Some recent precedents are less happy. Re-codification in Quebec involved nearly 200 people at the outset. Many decades passed between the original reform proposals and the enactment of a new civil code.<sup>117</sup> The latest Dutch *Civil Code* took 45 years from the start of drafting before fully coming into force.<sup>118</sup> These codes are much more ambitious than any code proposed for Australia. Yet even

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<sup>108</sup> Steiner, above n 100, 33.

<sup>109</sup> *State Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd’s Rep 277, 289 (Kerr L J) cited by Treitel, above n 4, 5. Treitel concedes that codification might impede judicial development.

<sup>110</sup> Lord Steyn, ‘Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *Law Quarterly Review* 438.

<sup>111</sup> Paul Finn, ‘Commerce, the Common Law and Morality’ (1989–90) 17 *Melbourne University Law Review* 100.

<sup>112</sup> Ian Renard, ‘Fair Dealing and Good Faith’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 63, 69–83; Sir Anthony Mason, ‘The Impact of Equitable Doctrine on the Law of Contract’ (1998) 27 *Anglo-American Law Review* 1.

<sup>113</sup> The recent confirmation of the continued importance of equitable relief against penalties is a good example: *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

<sup>114</sup> Attorney-General’s Department, above n 5, 5 [2.9].

<sup>115</sup> Sheldon Amos, *An English Code* (Strahan & Co, 1873) 1.

<sup>116</sup> Zimmermann, above n 14, 119.

<sup>117</sup> Pierre Legrand, ‘Codification in Quebec’ (1993) 1 *Zeitschrift für Europäische Privatrecht* 574.

<sup>118</sup> Bea Verschraegen, ‘The Dutch Civil Code and its Precedents’ in Stefan Grundmann and Martin Schauer (eds), *The Architecture of European Codes in Contract Law* (Kluwer, 2006) 105.

contract codification gives cause for pessimism. A joint initiative by the English and Scottish Law Commissions produced an elegant code,<sup>119</sup> but it proved impossible to reach a consensus between the two bodies and the code remains no more than a proposal.<sup>120</sup> Recent European examples also suggest that codifying contract law will be a time-consuming process. The Commission on European Contract Law ('Lando Commission') was founded in 1982. It produced the Principles of European Contract Law ('PECL') in three parts. The first did not appear until 1995 and the last in 2003.<sup>121</sup> The Study Group on a European Civil Code was formed in 1998. Even with PECL as the foundation of the contract segment, a Draft Common Frame of Reference was not published until 2009.<sup>122</sup>

Because the common law is the same across Australia, the differences between states are much smaller than those between European countries.<sup>123</sup> Any differences are the product of legislation. Even if the current situation is not ideal, a stronger case would need to be made for a full-scale code. It is difficult to make such a case on the basis of harmonisation alone. A code might also be used to reform the law of contract.

The immediate hurdle faced by any would-be codifier of Australian contract law is the decision as to what to include and what to leave out. There may not even be a consensus on what is encompassed by Australian contract law.<sup>124</sup> Reforming contract law in isolation is also likely to prove unsatisfactory. There are too many troublesome boundaries with other legal categories.<sup>125</sup> The law of tort presents the most obvious,<sup>126</sup> but not the only, problem.<sup>127</sup> The content of the code will largely depend on whether the code is seen as a restatement of the existing law or as an opportunity to bring about more profound change. There is some academic support for treating the code as an opportunity to reform the law of contract. If this view prevails, some well-established doctrines are likely to come under scrutiny.

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<sup>119</sup> The code was drawn up by Harvey McGregor QC: Harvey McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (Guiffre, 1993).

<sup>120</sup> Hector MacQueen, 'Glory with Gloag or the Stake with Stair? T B Smith and the Scots Law of Contract' in Elspeth Reid and David Carey Miller (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, 2005) 138, 159–61. For accounts of these events from both sides, see L C B Gower, 'Reflections on Law Reform' (1973) 23 *University of Toronto Law Journal* 257, 264–5; T B Smith, 'Law Reform in a Mixed Civil Law and Common Law Jurisdiction' (1974–75) 35 *Louisiana Law Review* 927, 946–8.

<sup>121</sup> Ole Lando, 'Has PECL Been a Success or a Failure?' (2009) 17 *European Review of Private Law* 367.

<sup>122</sup> Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier, 2009).

<sup>123</sup> Although some of those at the forefront of the European codification movement have tried to downplay the differences between countries. On occasions they may even have a point: see Ole Lando, 'Liberal, Social and Ethical Justice in European Contract Law' (2006) 43 *Common Market Law Review* 817, 825.

<sup>124</sup> M P Ellinghaus, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13; John Gava, 'An Australian Contract Law — a Reply' (1998) 12 *Journal of Contract Law* 242.

<sup>125</sup> For a study addressing these issues in a European context, see Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe* (Sellier, 2004).

<sup>126</sup> Andrew Robertson, 'On the Distinction between Contract and Tort' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL Press, 2004) 87.

<sup>127</sup> Bailment, family law, employment law, property law and company law are just a few of the more obvious areas affected by the law of contract.

Consideration, which has always had an elusive quality,<sup>128</sup> is the most obvious candidate. It has been criticised in a general way for a long time.<sup>129</sup> Some of the applications of consideration, especially the rules of contract variation,<sup>130</sup> have also attracted hostility. At the same time, the complications caused by consideration should not be overstated,<sup>131</sup> especially where the contract is between commercial parties.<sup>132</sup> In Australia, some of the harsher edges of consideration have been smoothed away by the emergence of promissory estoppel.<sup>133</sup> Other potentially controversial matters include the rules of contractual interpretation, the role of good faith, and the scope of contractual damages. No doubt other examples would emerge during the codification process. None of this is to suggest that the current law in all of these areas is entirely satisfactory. It is not. But even this short list shows that any significant reforms will be far from easy. To assume that a code can necessarily produce a more satisfactory outcome than hundreds of years of common law development creates a paradox. A clean break with the past ignores the lessons of history. A code that continues with existing practice runs the risk of repeating its errors. This may be why even codified civilian systems allow some scope for judges to develop the law incrementally.

It will be hard to agree on the format of any contract code. To begin with, there is the question of length. An immediate tension arises between producing a code that is sufficiently general that it can be used by the ordinary person and sufficiently specific that it can deal with complexities in the law of contract when they arise.<sup>134</sup> The contract code produced for the LRCV by Ellinghaus and Wright contained just 27 articles.<sup>135</sup> This is much shorter than earlier codes. The *Indian Contract Act 1872* contains more than 200 subsections. Admittedly, the scope of the original Indian legislation was quite broad. It included quasi-contract, the sale of goods, bailment, agency, partnership and guarantees and indemnity.<sup>136</sup> The general contract provisions are much shorter, but these still run to just over 60 subsections. The legislation also includes illustrative examples. If longevity is

<sup>128</sup> S F C Milsom, *A Natural History of the Common Law* (Cambridge University Press, 2003) 45; David J Ibbetson, 'Consideration and the Theory of Contract in Sixteenth Century Common Law' in John Barton (ed), *Towards a General Law of Contract* (Dunker and Humblot, 1990) 67.

<sup>129</sup> Lord Wright, 'Ought the Doctrine of Consideration to be Abolished from the Common Law' (1936) 49 *Harvard Law Review* 1225; P S Atiyah, *Essays on Contract* (Oxford University Press, 1988) 179–243; G H Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *Australian Law Journal* 439.

<sup>130</sup> For a succinct account of some of the issues, see Treitel, above n 4, 11–46.

<sup>131</sup> J W Carter, *Contract Law in Australia* (LexisNexis, 6<sup>th</sup> ed, 2013) 148 [6.61] notes that it is more likely to cause 'inconvenience than injustice'. There is a degree of flexibility in the concept: 'It must be remembered that that which amounts, in legal theory, to consideration, is sometimes a real consideration and sometimes not. Consideration in law is sometimes the real purchase price of a promise, and sometimes it is a mere fiction devised to make a promise enforceable': *Bob Guinness Ltd v Salomonsen* [1948] 2 KB 42, 45.

<sup>132</sup> *The Eurymedon* [1975] AC 154, 167 (Lord Wilberforce); Steyn, above n 110, 437.

<sup>133</sup> *Legione v Hately* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 394; *Commonwealth v Verwayen* (1990) 170 CLR 385.

<sup>134</sup> This is of course not just a problem in reforming private law. It is a major difficulty when it comes to the reform of criminal law as well: J C Smith, 'An Academic Lawyer and Law Reform' (1981) 1 *Legal Studies* 119, 125.

<sup>135</sup> LRCV, above n 22.

<sup>136</sup> The law relating to sale of goods and partnership was put into separate statutes later on.

anything to go by, then the *Indian Contract Act* can be counted a success. It has also been used as a model for contractual reform elsewhere.<sup>137</sup>

Most modern codes prefer length over brevity. Harvey McGregor's contract code is 673 clauses long.<sup>138</sup> Despite being limited to contracts for the sale of goods, the CISG contains more than 100 articles. The UNIDROIT Principles are twice as long again, as are the Principles of European Contract Law.<sup>139</sup> The American *Restatement (Second) of Contracts* (1981) is shorter than the first, but still contains nearly 400 clauses. When the commentary is included, it runs to six volumes.<sup>140</sup> Many will find the argument that the general principles of contract can be reduced to 27 clauses unrealistic.

The high level of generality in the Ellinghaus and Wright code was quite deliberate.<sup>141</sup> It was the result of an important empirical study by its authors, which found that detailed rules gave no more predictable outcomes than broad principles.<sup>142</sup> The same research also found that broad principles gave greater predictability in easy cases, led to more just outcomes, were more accessible, and more efficient. A very general code has other advantages. A detailed code can run the risk that it turns out to be too rigid. It may lead to results that were not foreseen by those who drafted it. A general code gives more space for judicial innovation, which has to be set against greater uncertainty.

Ellinghaus and Wright emphasised that their code would be a break with the past. It was said that, 'Working with the Code will require a sympathetic approach and fresh way of thinking on the part of lawyers. It is essential that they be released from their familiarity with the terminology of the old apparatus'.<sup>143</sup> The same sentiments were also evident in art 3 of their original code: 'Neither past nor future decisions govern the application of the code.' The revised version states: 'Precedents do not determine the application of the Code.'<sup>144</sup> This goes to the core of the problem. A legal term-of-art 'precedent' has replaced everyday language. The idea that judges are able to start from scratch may work best, if at all, if the code explicitly abolishes the existing law. In the Ellinghaus and Wright code, for example, there is a simple statement of enforceability in place of the traditional rules of offer and acceptance and consideration. Article 6 states: 'A contract is

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<sup>137</sup> Eg in Jersey, Jersey Law Commission, *Report on the Law of Contract*, Topic Report No 10 (2004) 7; in Malaysia, see Dato Sethu, 'The History, Impact and Influence of the *Indian Contract Act 1872*' (2011) 28 *Journal of Contract Law* 31.

<sup>138</sup> McGregor, above n 119.

<sup>139</sup> The latter was heavily influenced by the former. For similarities between the Draft Common Frame of Reference (which is largely based on PECL) and UPICC, see Stefan Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law' (2010) 6 *European Review of Contract Law* 143.

<sup>140</sup> American Law Institute, 1982.

<sup>141</sup> LRCV, above n 22, 5 [13].

<sup>142</sup> M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of Their Utility* (Themis Press, 2005). For a summary of their findings, see M P Ellinghaus and E W Wright, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Rules? An Empirical Investigation' (2005) 11 *Texas Wesleyan Law Review* 399.

<sup>143</sup> LRCV, above n 22, 11 [30].

<sup>144</sup> Art 3. The revised code is found in N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire and Fifoot: Law of Contract* (LexisNexis, 10<sup>th</sup> ed, 2012) 56–8 [1.145].

made when one person makes a promise to another person in return for a promise or act by that person or another person.' This is a clear break with the past. But it is going to be difficult for judges, having applied the code once, to ignore past decisions when applying the code in future. A simple question, such as what amounts to a promise, may be too complex to resolve anew every time by resorting to everyday language. One of the advantages of a system that relies on precedent is that it saves judges time in answering these sorts of questions.<sup>145</sup>

The form, content and application of any code are not the only troublesome aspects of the whole process. It will also be necessary to come to a decision on the mechanics of codification. Codes are rarely the work of individuals.<sup>146</sup> Most are produced by a committee with all the strengths and weaknesses of those particular bodies.<sup>147</sup> But who should comprise the committee? One obvious difficulty in reforming Australian contract law is that there is no single body of specialists already in place who can take over the role of stating and reforming contract law. In the United States, the American Law Institute has traditionally performed the first function. Primary responsibility for drawing up a new version of the *Restatement* falls on a Reporter.<sup>148</sup> Having drafted a report, the Reporter then consults with Advisers. On the *American Restatement (Second) of Contracts* (1981), 12 specialist Advisers were used. A report was then submitted to the Council of the American Law Institute, a body made up of lawyers, judges and academics with more general interests. A draft was presented at the annual meeting of the American Law Institute and comments sought more broadly from members of the Institute. This method of reform has the great advantage that there is a vast range of legal expertise to be called upon. It is ideally suited to laying down an accurate version of the law as it stands.<sup>149</sup>

The process of reform calls for a different, albeit overlapping, set of skills. Codification is too important to be left to academics or even lawyers alone. It is certainly a mistake to assume that academics will adopt a position of scholarly neutrality. One might reasonably expect those involved to be enthusiastic about codification. Some participants in recent European codification have gone further and used codification as a means to pursue overtly political objectives,<sup>150</sup> whether those are the cause of further European integration<sup>151</sup> or social justice.<sup>152</sup> Contract

<sup>145</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 93–4.

<sup>146</sup> The Swiss *Civil Code* is the partial exception to this rule: Robinson, Fergus and Gordon, above n 15, 282.

<sup>147</sup> C Northcote Parkinson, *Parkinson's Law* (Penguin, first published 1958, 2002) 40–7.

<sup>148</sup> For an account of the process, see E Allan Farnsworth, 'Ingredients in the Redaction of The Restatement (Second) of Contracts' (1981) 81 *Columbia Law Review* 1.

<sup>149</sup> More non-lawyers have been consulted in recent American Law Institute Restatements than in the past: see M Traynor, 'The First Restatements and the Vision of the American Law Institute Then and Now' (2007) 32 *Southern Illinois University Law Journal* 145, 168–9.

<sup>150</sup> Martijn Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675.

<sup>151</sup> Arthur Hartkamp, 'Perspectives for the Development of a European Civil Code' in Mauro Bussani and Ugo Mattei (eds), *The Common Core of European Civil Law* (Kluwer, 2003) 67, 78.

<sup>152</sup> Gert Bruggemeier et al, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653; Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008). This approach is at least transparent. For a powerful argument against the notion of social justice, see Friedrich A Hayek, *Law Legislation and Liberty Volume 2: The Mirage of Social Justice* (Chicago University Press, 1978) 97: 'the phrase social justice is not,



codes have succeeded best when commercial parties are fully involved in the process. The United States *Uniform Commercial Code*<sup>153</sup> was heavily influenced by the needs of business.<sup>154</sup> Consumers will also need to be consulted. As with businesses, consumers are not a homogenous category.<sup>155</sup> Reconciling these different interests will not be easy. Business and consumer groups may, for example, have unrealistic expectations about the extent to which contract law can be simplified. The legal profession is likely to be more sceptical.<sup>156</sup>

However the process works, if any code is going to enjoy legitimacy then there needs to be genuine consultation. It was disappointing that the period for comments on the *Discussion Paper* was so short.<sup>157</sup> The best option would be for an extended period of consultation to be overseen by the ALRC rather than the office of the Attorney-General.<sup>158</sup> Law reform commissions have several advantages over other bodies involved in law reform.<sup>159</sup> Unfortunately, politicians are often reluctant to cede control of the law reform agenda. The ALRC has not taken part in a number of recent major reforms.<sup>160</sup> Once politicians become involved, it is difficult for them to admit that the project may be difficult or impossible to complete. There is an understandable tendency to pay attention to positive voices. One of the criticisms that can be levelled at the codification process in Europe is that little account has been taken of dissenters. Facts that fail to fit the codification agenda have been ignored.<sup>161</sup>

A contract code need not set the law in aspic. It can be updated. While this process is usually more straightforward than creating the initial code, it can also be troublesome. The most obvious difficulty is working out the review process. Should the code be updated automatically after a certain period of time, or should it be changed when a problem has arisen? The period between the first *American Restatement of the Law of Contract* and the second was 50 years. That seems too

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as most people probably feel, an innocent expression of good will towards the less fortunate, but it has become a dishonest insinuation that one ought to agree to a demand of some special interest which they can give no reason for it'.

<sup>153</sup> The *Uniform Commercial Code* was published in 1952 and soon adopted by most state legislatures: Robert Braucher, 'The Legislative History of the Uniform Commercial Code' (1964) 2 *American Business Law Journal* 137.

<sup>154</sup> Frederick K Beutel, 'The Proposed Uniform [?] Commercial Code Should Not Be Adopted' (1952) 61 *Yale Law Journal* 334, 335; Grant Gilmore, 'The Uniform Commercial Code: A Reply to Professor Beutel' (1952) 61 *Yale Law Journal* 364, 365–6.

<sup>155</sup> One of the criticisms of attempts to update the *Uniform Commercial Code* is that those involved in the process had little grasp of the difficulties facing low-income consumers: Gail Hillebrand, 'What's Wrong with the Uniform Law Process?' (2001) 52 *Hastings Law Journal* 631, 638–40.

<sup>156</sup> This is very much the impression gained from the responses to the *Discussion Paper*: see *Responses*, above n 41.

<sup>157</sup> The *Discussion Paper* was released in March 2012; the deadline for submissions was 20 July 2012.

<sup>158</sup> For support for this view, see Sydney Law School Academics (and others); Alexander W Street QC, *Responses*, above n 41.

<sup>159</sup> Peter Handford, 'The Changing Face of Law Reform' (1999) 73 *Australian Law Journal* 503, 507–10.

<sup>160</sup> For example, it was not involved in those reforms that eventually became the Australian Consumer Law.

<sup>161</sup> This point is made forcibly by Roger Halson and David Campbell, 'Harmonisation and its Discontents: A Transaction Costs Critique of a European Contract Law' in James Devenney and Mel B Kenny (eds), *The Transformation of European Private Law* (Cambridge University Press, 2013) 100. See also, Mel Kenny, 'The 2003 Action Plan on European Contract Law: Is the Commission Running Wild?' (2003) 28 *European Law Review* 538.

long. As the *Uniform Commercial Code* shows, the process of updating can itself cause fierce disagreements.<sup>162</sup> Then there is the question of who is to carry out the review.

## V A Contract Code for Australia?

The creation of a contract code would not be impossible. All the evidence across the last 200 years shows that ambitious projects can succeed. Rather than full-scale codification, there is a certain amount of support for the idea of a restatement of Australian contract law.<sup>163</sup> Restatements can be extremely valuable. They derive authority from the standing of those involved in the process.<sup>164</sup> A restatement can do more than restate. There is some disagreement on the extent to which the various American restatements have introduced progressive reform.<sup>165</sup> One leading American legal historian has argued that the restatements were ‘reforms that did not reform’.<sup>166</sup> At a basic level, the fact that a restatement may be forced to make a choice between conflicting rules involves a reform for somebody. The case for a restatement in Australia is rather less compelling than in the United States. There are many fewer jurisdictions and a unified common law. There is no equivalent body to the American Law Institute, which could carry out the task of producing a restatement.<sup>167</sup> The law of contract is also fairly stable. Some of the function of stating the law can be done just as well by the writers of legal treatise, albeit that these works only carry the authority of the individual authors rather than a larger body.<sup>168</sup>

Even within common law legal systems there is strong judicial support for a more radical option. Lord Scarman, Kirby J and Arden LJ have all put the case for codes.<sup>169</sup> It is probably no coincidence that at one point all three had headed either the English or Australian Law Reform Commissions. Codes tend to be supported by those who favour going further than a restatement of the existing law, and who actually want to change the law more radically. This makes it particularly glib to

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<sup>162</sup> Richard E Speidel, ‘Revising UCC Article 2: A View from the Trenches’ (2001) 52 *Hastings Law Journal* 607.

<sup>163</sup> Bryan Horrigan et al; Australian Academy of Law, *Responses*, above n 41.

<sup>164</sup> For a recent example, see Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012). This restatement is on a smaller scale than those produced by the American Law Institute, and is the work of a much smaller group. As such, it might be a more realistic model for an Australian restatement of contract law, were it seen to be desirable.

<sup>165</sup> N E H Hull, ‘Restatement and Reform: A New Perspective on the Origins of the American Law Institute’ (1990) 8 *Law and History Review* 55; G Edward White, ‘The American Law Institute and the Triumph of Modernist Jurisprudence’ (1997) 15 *Law and History Review* 1.

<sup>166</sup> Laurence M Friedman, *A History of American Law* (Simon and Schuster, 3<sup>rd</sup> ed, 2005) 304.

<sup>167</sup> As currently constituted, the Australian Academy of Law would not have the resources for such a project.

<sup>168</sup> Treatises fulfil other functions as well. They also provide a critique of the existing law. The leading contract textbooks are frequently cited by the courts. See, eg, Carter, above n 131; Seddon, Bigwood and Ellinghaus, above n 144.

<sup>169</sup> Lord Scarman, *Codification and Judge-Made Law* (Birmingham University Press, 1966); Mary Arden, ‘Time for an English Commercial Code?’ (1997) 56 *Cambridge Law Journal* 516; Michael Kirby, ‘Foreword’ in Ellinghaus, Wright and Karras above n 142, v–viii.

suggest that the objections to codification are ‘misguided and exaggerated’.<sup>170</sup> In fact, much of the evidence points in the other direction. Many of the arguments made in favour of codification are built on untested idealism.<sup>171</sup> The harmonisation argument does carry some weight. Nevertheless, these results could be achieved more easily in other ways. It is perfectly possible to favour substantive reform and be sceptical about the merits of codifying contract law.<sup>172</sup> The evidence of the last 30 or so years does not suggest that Australian judges are incapable of reforming contract doctrine, although it can be argued that the pace of innovation in the High Court may have slowed in recent years.<sup>173</sup>

There are considerable obstacles in the way of a successful code. A few have been highlighted. Lessons can certainly be learnt from other jurisdictions.<sup>174</sup> What may seem attractive in the context of an academic seminar may be a rather different proposition in practice. There is no guarantee that the outcome of such deliberations will be satisfactory. There was some heavyweight criticism of codification from the Chief Justice of New South Wales, Bathurst CJ.<sup>175</sup> Some of the other experienced practitioners and academics who responded to the consultation were also sceptical about the project.<sup>176</sup> If, as has been suggested, the whole exercise is likely to be driven by bureaucrats, politicians and ‘stakeholders’, rather than the ALRC in consultation with experts, there are further grounds to fear the worse.<sup>177</sup> It is only necessary to look across the Tasman Sea. The New Zealand contract statutes, which share some of the features of a code, are not usually regarded as an unqualified success.<sup>178</sup> It would be going too far to describe the idea of a contract code for Australia as a ‘calamity’, but it is something that should be approached with the upmost caution. To go into the process without recognising the pitfalls involved will produce an outcome that is not only unsatisfactory, but may leave us with a body of contract doctrine which may be little better or even worse than that it is intended to replace.

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<sup>170</sup> Dan Svantesson, ‘Codifying Australia’s Contract Law — Time for a Stocktake in the Common Law Factory’ (2008) 20 *Bond Law Review* 1.

<sup>171</sup> This is not to denigrate Ellinghaus and Wright’s extremely valuable empirical research, but merely to ponder whether the same results would occur in a real-life situation.

<sup>172</sup> Professor Andrew Burrows, who was also Chair of the English Law Commission, is a sceptic: Andrew Burrows, ‘Legislative Reform of Remedies for Breach of Contract: The English Perspective’ (1997) 1 *Edinburgh Law Review* 155, 156.

<sup>173</sup> Andrew Stewart and J W Carter, ‘The High Court and Contract Law in the New Millennium’ (2003) 6 *Flinders Journal of Law Reform* 185.

<sup>174</sup> For a useful recent analysis of further lessons from Europe, see Martin Doris, ‘Promising Options, Dead Ends and Reform of Australian Contract Law’ (2013) 33 *Legal Studies* 1.

<sup>175</sup> See *Responses*, above n 41.

<sup>176</sup> For cautious or sceptical voices, see Australian Corporate Lawyers Association; Herbert Smith Freehills; King and Wood Mallesons; Sydney Law School Academics (and others); Warren Swain and Nick Gaskell, *Responses*, above n 41. Of course this sample may not reflect wider opinion. For a measured, but more positive, response see Dr Luke Nottage, *Responses*, above n 41.

<sup>177</sup> Stewart, above n 26, 90.

<sup>178</sup> David McLauchlan, ‘Contract and Commercial Law Reform in New Zealand’ (1984) 11 *New Zealand Universities Law Review* 36; F G Barton, ‘The Effect of the Contract Statutes in New Zealand’ (2000) 16 *Journal of Contract Law* 233; John Farrar, ‘The Codification of Commercial Law’ in Jeremy Finn and Stephen Todd (eds), *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis, 2008) 49.

