CODIFYING CONTRACT LAW IN AUSTRALIA: ISSUES AND OBSTACLES

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To Joan Butler, in loving memory

A NOTE ON STYLE

As can be seen upon examining each of the papers which form part of this thesis, each paper is presented in a distinct style. This is due to each paper being presented, so far as is possible, in the house style of the journal in which it will be published.

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ABSTRACT

In March 2012, the Commonwealth Attorney-General's Department issued a brief but wide-ranging discussion paper which explored the possibility of codifying or otherwise significantly reforming Australian contract law. Though the 2012 Discussion Paper attracted 58 insightful and closely-argued submissions along with a number of thoughtful papers, there nonetheless remains a clear disjunct between the significance and scope of the questions raised by the discussion paper and the response which it attracted. Indeed, though the notion of codifying Australian contract law has been mooted several times in the past fifty years, the merit of such a reform has rarely been the subject of sustained and detailed analysis. This thesis seeks to go some way towards filling this gap. It grapples with a wide range of important issues thrown up by the question of whether the Australian law of contract ought to be codified, with the aim of arriving at a concluded view as to whether that significant step ought to be taken. It shows that there are strong reasons to conclude that the Australian law of contract ought not to be codified. It shows that many of the traditional arguments proffered in favour of the codification of Australian contract law – including the notion that such a reform would promote 'certainty' in the law and amount to an ideal mechanism for substantive law reform – begin to break down upon sustained scrutiny. It further shows that there are a number of serious cultural, practical, and theoretical hurdles which would have to be overcome if codification were to be successful. These hurdles are all the more imposing for having been paid too little attention by the proponents of reform. The result is that, in addition to the serious difficulties which attend the positive case for codification, there is also a strong negative case which has received too little serious attention.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or award in any university or other institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made herein. I undertake that no part of the work will be used in a submission for any other degree or diploma in any university or other institution without the prior approval of the University of Adelaide.

I give consent to this copy of my thesis being made available for loan and photocopying upon being deposited in the University Library, subject to the requirements of the *Copyright Act 1968* (Cth). I give permission for the digital version of this thesis to be made available on the internet, via the University's digital research repository, the Library catalogue, and also through internet search engines, unless permission has been granted by the University to restrict access to this work. I acknowledge that copyright of published works contained within this thesis resides with the copyright holder(s) of those works.

The first paper in this thesis was published in 2018 in the *Journal of Contract Law*:

> John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* 146.

The second paper in this thesis was published in 2018 in the *Commercial Law Quarterly*:

> John Eldridge, ''Surrounding Circumstances' in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3.

That paper draws upon some material published in the *Australian Law Journal* in 2018:

> John Eldridge, '*Cherry v Steele-Park*' (2018) 92 *Australian Law Journal* 249.

The third paper in this thesis was published in 2018 in the *Journal of Business Law*:

> John Eldridge, 'The New Law of Penalties: Mapping the Terrain' [2018] *Journal of Business Law* 637.

The fourth paper in this thesis will be published in 2019 in the *Edinburgh Law Review*:

> John Eldridge, 'Contract Codification: Cautionary Lessons from Australia' (2019) *Edinburgh Law Review* (forthcoming).

The fifth paper in this thesis will be published in 2019 in the *Australian Law Journal*:

> John Eldridge, 'Reforming the Australian Law of Contract: Some Practical Next Steps' (2019) 93 *Australian Law Journal* (forthcoming).

Each of these papers contains original research I conducted during the period of my Higher Degree by Research candidature and is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis. I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

Signed – Date: 18 February, 2019

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Given the nature of this thesis – which is made up of a series of linked publications – thanks are due to the anonymous peer reviewers who refereed the papers. The editors of each of the journals in which the papers will appear also made a number of valuable comments. Brendan Hord was retained to copyedit the final document – he was provided with a copy of the Australian Standards for Editing Practice.

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CONTEXTUAL STATEMENT

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I INTRODUCTION

Contract law seldom captures the interest of policymakers. Though it undergirds much economic activity, appetite for its reform and development has for the most part been limited and sporadic.[1]

March 2012 saw contract law take a respite from anonymity. In a brief but wide-ranging discussion paper, the then Commonwealth Attorney-General, Nicola Roxon, issued a discussion paper which, among other things, canvassed the possibility of codifying Australian contract law so as to achieve a range of ostensibly worthwhile objectives ('the 2012 Discussion Paper').[2]

Though the 2012 Discussion Paper attracted 58 insightful and closely-argued submissions along with a number of thoughtful papers,[3] there is nonetheless a clear disjunct between the significance and scope of the questions raised by the discussion paper and the response which it attracted. Indeed, though the notion of codifying Australian contract law has been mooted several times in the past fifty years, the merit of such a reform has rarely been the subject of sustained and detailed analysis.

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[1] For a recent contract law reform proposal which was met with muted enthusiasm by the Commonwealth, see Attorney-General's Department (Cth), *Australian Government Response: 'Harmonisation of legal systems within Australia and between Australia and New Zealand'* (2008).

[2] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012). The subject matter of the discussion paper was canvassed by the Attorney General in: Nicola Roxon, 'Time for the great contract reform', *The Australian*, 23 March 2012, 30. Roxon's initiative built on earlier suggestions for reforms canvassed in 2011 by her predecessor, Robert McClelland. McClelland was extremely optimistic as to the speed with which reform could be achieved. See the (sceptical) discussion in: Andrew Stewart, 'What's Wrong with the Australian Law of Contract' (2012) 29 *Journal of Contract Law* 74, 74-75.

[3] See, eg, Andrew Stewart, 'What's Wrong with the Australian Law of Contract' (2012) 29 *Journal of Contract Law* 74; Warren Swain 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland Law Journal* 39; Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131; Martin Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law' (2014) 34 *Legal Studies* 24; Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014); Luca Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, Or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry' (2015) 34 *University of Queensland Law Journal* 99.

This thesis seeks to go some way towards filling this gap. It grapples with a wide range of important issues thrown up by the question of whether the Australian law of contract ought to be codified, with the aim of arriving at a concluded view as to whether that significant step ought to be taken. The five papers completed in the course of this thesis, taken together, show that there are strong reasons to conclude that the Australian law of contract ought not to be subject to a reform of this type. As will be seen, many of the traditional arguments proffered in favour of the codification of Australian contract law fail to withstand sustained scrutiny. In short, it will be seen that the affirmative case for codification breaks down under close examination.

It will further be seen that there are, in any event, a number of serious hurdles which would have to be overcome in order to codify Australian contract law. These hurdles are all the more imposing for having been paid too little attention by the proponents of reform. The result is that, in addition to the serious difficulties which attend the positive case for codification, there is also a strong negative case which has received too little serious attention.

This thesis is presented not as a conventional dissertation, but instead as a series of related papers which together develop and sustain a coherent argument. One consequence of presenting the thesis in this way is that each of the five papers can be read and appreciated as a freestanding work of scholarship. It is thus not necessary here to engage in a lengthy examination of the legal and historical backdrop against which the Australian contract codification debate must be understood – where necessary, that task is taken up in the papers themselves.[4]

It is helpful, however, to give an overview of the argument which emerges in the course of the thesis, and to explain how each of the papers is linked to the debate respecting contract codification. It is also necessary to consider at the outset how the terms 'codification' and 'code' ought to be understood for the purposes of this thesis, and to offer a brief overview of the principal contributions which this thesis makes to the codification debate. Finally, it is

[4] A further consequence of presenting the thesis as a series of discrete papers is that the papers do overlap to some small degree. Indeed, it is necessary, if each paper is to be capable of being understood as a freestanding work of scholarship, for some background material to be re-traversed in brief form in each paper.

necessary to say something as to the methodology which this thesis employs, along with its boundaries and scope.

II Defining 'Codification'

There has long been a clash of ideas in respect of codification.[5] It is therefore unsurprising that there exists a vast literature, spanning years and jurisdictions, in which the merits and demerits of particular codification proposals are subjected to close examination.[6] There also exist writings which examine codification from a theoretical standpoint, and which seek to derive insights applicable to codes and codification generally.[7] Thus, while any serious discussion of 'codification' must obviously proceed by reference to some understanding of what that term connotes, setting out a clear definition of 'codification' is by no means straightforward.

In seeking to define 'codification', a number of relatively uncontroversial observations might be made at the outset. First, 'codification' is a term apt to embrace a *process*. Indeed, it most naturally refers to the mechanism by which a 'code' is enacted, drafted or instituted. Though part of the debate respecting codification is concerned with the process by which codes are drafted and enacted, a still greater part is concerned with the merits and demerits of 'codes' once enacted and in operation. It follows that any detailed discussion of 'codification' will

[5] For a recent examination of the historical contest in respect of contract codification and its principal belligerents, see: Warren Swain 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland Law Journal* 39.

[6] For just some of the many constituents of this genre, see, eg, M D Chalmers, 'Codification of Mercantile Law' (1902) 2 *Canadian Law Review* 146; Mackenzie Chalmers, 'An Experiment in Codification' (1886) 2 *Law Quarterly Review* 125; Mackenzie Chalmers, 'Codification of Mercantile Law' (1903) 19 *Law Quarterly Review* 9; Aubrey Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361; Edith Palmer, 'The Austrian Codification of Conflicts Law' (1980) 28 *American Journal of Comparative Law* 197; Mathias Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 *American Journal of Comparative Law* 95; Ole Lando, 'Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law' (1993) 1 *European Review of Private Law* 157; Mary Arden, 'Time for an English Commercial Code?' [1997] *Cambridge Law Journal* 516; PB Maggs, 'The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code' (1999) 44 *McGill Law Journal* 281.

[7] See, eg, Leslie Scarman, 'Codification and Judge Made Law: A Problem of Coexistence' (1967) 42 *Indiana Law Review* 355; S Herman, 'The Fate and Future of Codification in America' (1996) 40 *American Journal of Legal History* 408; Arthur von Mehren, 'Some Reflections on Codification and Case Law in the Twenty First Century' (1997) 31 *University of California Davis Law Review* 659; Gunther Weiss, 'The Enchantment of Codification in the Common Law World' (2000) 25 *Yale Journal of International Law* 435.

necessarily embrace not just an assessment of the process of codification, but of the family of legal instruments which might be said to fall within the category of 'codes'.

An equally uncontroversial proposition is that both 'codification' and 'code' are terms capable of taking on a great many different meanings. One might, for instance, speak of 'codification' as a process initiated and directed not by a body politic, but by private individuals – parties to a contract, for instance, might be said to have sought by express provision in their contract to 'codify' the remedies available for breach.[8] As this example ought to make clear, not all of the meanings of 'codification' or 'code' are relevant to a thesis such as this.

Beyond uncontroversial observations such as these, the task of giving meaning to the terms under discussion here becomes far more challenging. Perhaps the most obvious way of proceeding is to look to examples of instruments and reform initiatives which have been characterised as 'codes' or exercises in 'codification', and to seek to identify the underlying elements which such reforms have in common. At least in the present context, one might further seek to focus upon codification initiatives which have been concerned with the law of contract. Taking that approach, a great number of examples present themselves.[9] One might look, for instance, to the experience of contract codification in India, which saw the enactment of a lengthy and detailed code under the guidance of Mackenzie Chalmers – a form of which continues in force to this day.[10] Alternatively, one might instance the 'partial codification' of contract law in New Zealand, under which limited parts of the law of contract were codified through the enactment of a series of statutes on specific subjects.[11] To consider a reform

[8] See, eg, the argument put in: *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574. A contract which seeks to 'codify' the parties' common law rights might be distinguished from one which seeks merely to circumscribe or exclude particular common law rights. One might also point to other special settings within which such terms might be used. Some, for instance, might describe the process by which customary rules are embodied in a formal instrument as being a process of 'codification'. See, eg: T W Bennett and T Vermeulen, 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206; Timothy Meyer, 'Codifying Custom' (2012) 160 *University of Pennsylvania Law Review* 995.

[9] The examples set out here are, of course, not intended to be an exhaustive survey of the reforms which might be said to fall into this category. As will be explained below, the methodology adopted in this thesis means it is not necessary to traverse the field of historical examples in exhaustive detail (and indeed, there is good cause to doubt whether such an exercise would even be possible within the scope of this project).

[10] For a detailed discussion of contract codification in India, see: Stelios Tofaris, *A Historical Study in the Indian Contract Act 1872* (PhD Thesis, University of Cambridge, 2011).

[11] For the original New Zealand statutes, see: *Contracts (Privity) Act 1982* (NZ); *Contractual Mistakes Act 1977* (NZ); *Contractual Remedies Act 1979* (NZ); *Frustrated Contracts Act 1944* (NZ); *Illegal Contracts Act 1970* (NZ); *Minors' Contracts Act 1969* (NZ). These statutes (along with some other instruments) have recently been consolidated in the *Contract and Commercial Law Act 2017* (NZ). Calls for such a consolidating statute had

demarcated not by jurisdiction but by subject-matter, one might instance the sale of goods legislation, which originated in Victorian Britain but came to be widely adopted across the Commonwealth.[12] Equally, one might point to one of the many contract codification initiatives which were ultimately not successful.[13] One notable example of such a reform is the abortive attempt at codification of the British law of contract in the early years of the Law Commission. This project – carried out under the auspices of both the Law Commission and the Scottish Law Commission – resulted in a detailed draft code, prepared by the late Harvey McGregor QC. Though the skill with which the draft code was prepared serves as a remarkable example for would-be reformers, disagreements between the two Commissions resulted in the project's abandonment.[14]

The identification of the elements common to each of these reforms is by no means straightforward. Though each might fairly be described as an example of 'codification', they are each nonetheless distinctive. The abortive British code of the mid-twentieth century, for instance, was a detailed and exhaustive statement of the whole of the law of contract, whereas the New Zealand experience of codification is instead one under which only limited parts of contract law have been embodied in statute. The experience of 'codification' in these two

been made for some time. See, eg: Thomas Gibbons, 'A Contracts (Consolidation) Act for New Zealand' (2003) 11 *Waikato Law Review* 13. For some important writings on the New Zealand Contract statutes, see: J W Carter and John Ren (eds) *Coote on the New Zealand Contract Statutes* (Thomson Reuters, 2017). For discussion of the New Zealand experience of 'partial codification', see: Rick Bigwood, 'The Partial Codification of Contract Law: Lessons from New Zealand' in Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014); F G Barton, 'The Effect of the Contract Statutes in New Zealand' (2000) 16 *Journal of Contract Law* 233; David McLauchlan, 'Contract and Commercial Law Reform in New Zealand' (1984) 11 *New Zealand Universities Law Review* 36.

[12] For a discussion of the sale of goods legislation and other contemporaneous reforms, see: Alan Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *Law Quarterly Review* 570. It should be noted that while the various versions of the sale of goods legislation share many core features, there are nonetheless some variations from jurisdiction to jurisdiction. The British statute, for instance, included some provisions directed specifically to matters of Scots law. For an example in the original British statute, see: *Sale of Goods Act 1893* (UK) s 40. For an example of an Australian statute which broadly follows the British statute, see: *Sale of Goods Act 1895* (SA).

[13] There are also Australian examples which fall within this category, each of which are discussed in detail throughout this thesis.

[14] Though a reference to a 'British' law of contract may seem inherently misconceived, it is – as will become plain in the course of the discussion below – used here advisedly. For the abortive British code, see: Harvey McGregor, *Contract Code: Drawn Up on Behalf of the English Law Commission*, (Guiffré,1993). For an overview of the nature and fate of McGregor's code, see: F M B Reynolds, 'Contract: Codification, Legislation and Judicial Development' (1995) 9 *Journal of Contract Law* 11, 13-17; S Waddams, 'Codification, Law Reform and Judicial Development' (1996) 9 *Journal of Contract Law* 192.

jurisdictions was thus radically different. Similarly, the sale of goods legislation differs from each of the other examples above insofar as it seeks to make special provision for a particular *species* of contract. While the Indian Contract Act is similar to the proposed British code insofar as each encompasses the whole of the law of contract, the two instruments nonetheless differ significantly in their substantive content.[15]

The diversity of the reforms which fall under the umbrella of 'codification' poses some difficulty for those who seek to assess the case for 'codifying' the Australian law of contract. On the one hand, it is simply impossible to undertake such an inquiry without seeking to proffer some definition of what such a reform should be understood to involve. At the same time, one ought to be cautious not to adopt an unduly narrow definition of 'codification' in this setting. Indeed, one might well think that the value of a thesis such as this would be considerably reduced if it were to proceed upon a highly specific understanding of what 'codification' entails. Such a thesis would, after all, be vulnerable to the criticism that its conclusions might well have been different had it adopted a more expansive conception of the possible avenues of reform.

'Codification' and 'code' are accordingly employed in this thesis in a broad sense, which seeks to encompass reforms which differ from one another in significant respects. In discussing 'codification' of the law of contract, this thesis means to refer to any reform aimed at the enactment of a binding, statutory instrument which constitutes the key source of law in respect of a particular legal domain. A similar definition is provided by Catherine Skinner:

> [A]n instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field. And codification is the process of drafting and enacting such an instrument. A code by this definition is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law. Thus it has an organising and indexing role than an ordinary statute does not share.[16]

[15] For just one example of the relevant divergences, see the comparative analysis of the treatment of indemnities under the Indian Contract Act in: Wayne Courtney, 'Indemnities and the Indian Contract Act 1872' (2015) 27 *National Law School of India Review* 66.

[16] Catherine Skinner, 'Codification and the Common Law' (2009) 11 *European Journal of Law Reform* 225, 228. For a discussion of the various different senses in which 'codification' might be understood, see: Shona Wilson Stark, *The Work of the British Law Commissions: Law Reform … Now?*, (Hart Publishing, 2017) 157-9.

Such an approach has a number of strengths. First, as noted above, it maximises the utility of the conclusions at which the thesis arrives. Indeed, the definition proffered here is sufficiently broad to encompass the New Zealand, British and Indian experiences of contract codification. Though the Indian Contract Act and the code of British contract law drafted by Harvey McGregor differ in their detail, each is – or was intended to be – a binding statutory instrument which constitutes the key source of law in respect of a particular legal domain. The New Zealand experience of contract codification, along with the sale of goods legislation, can also be said to conform to this definition, provided a suitably sophisticated notion of 'legal domain' is adopted.[17] Second, it means it is not necessary to devote a great deal of space to the task of explaining why a particular, narrow conception of 'codification' has been preferred over others which might also have reasonably been selected.[18]

Of course, the difficulty posed by such an approach is that it makes it necessary to ensure that the arguments advanced throughout this thesis have broad relevance, rather than being applicable only to particular types of code. On a small number of occasions in this thesis, a point is made which is explicitly acknowledged as being applicable only to particular types of code.[19] For the most part, however, the arguments set out in this thesis are equally applicable to each of the different 'models' of codification which might be said to exist. The points made in the fifth paper in respect of 'harmonisation' for instance, are applicable in equal measure to any code which falls within the scope of the definition proffered here.[20]

Before turning to a consideration of the argument and structure of this thesis, it is important to identify explicitly some notable types of instrument which *do not* fall within the scope of the definition of 'code' adopted here. A non-binding restatement is perhaps the most obvious

[17] In respect of the New Zealand reforms, for instance, one might conceive of the relevant 'domain' as being a sub-domain of the law of contract as a whole. Similarly, in respect of the sale of goods legislation, the relevant 'domain' might be said to be the law respecting contracts for the sale of goods.

[18] This is not to suggest, of course, that the adoption of a narrow definition of codification is necessarily unworkable. Indeed, in some settings, there might be a compelling case for the adoption of a restrictive definition.

[19] An example can be seen in the fourth paper, which acknowledges that the difficulty of drawing boundaries around 'the law of contract' is one which does not arise to the same extent when seeking to codify only part of the law.

[20] It would thus be misconceived to criticise this thesis for its omission of a detailed traversal of *all* historical exercises in contract codification. The methodology utilised here has been taken up precisely because its breadth of application renders an exhaustive historical survey otiose.

species of instrument excluded from the definition set out above. In addition to the well-known restatements published by the American Law Institute, non-binding restatements have, in recent years, played an increasingly prominent role in English law.[21] Their exclusion from the definition of 'code' in this thesis should therefore not be understood to imply that such restatements are academically or practically insignificant. The metes and bounds of the present inquiry are to a great extent a product of the exigencies of space – though an examination of the desirability of a non-binding restatement of the Australian law of contract would doubtless be a profitable inquiry, the extension of this thesis to encapsulate such a question would also necessitate the answering of a range of related questions which cannot be accommodated within the limits of this project.[22] A similar point might be made in respect of the exclusion of other non-binding international instruments or model laws. At the same time, it must be stressed that this thesis does not ignore the existence of restatements, international instruments or model laws in the course of its analysis – indeed, as will be seen, the thesis draws upon a great many instruments of the types instanced here in the course of its analysis.[23]

III The Argument and its Structure

The first paper in this thesis is focused on the question of whether the adoption of a contract code would promote 'certainty'.[24] As the paper explains, this task is complicated by the

[21] For the recent English restatements of the law of contract, see: Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016); Neil Andrews, *Contract Rules: Decoding English Law* (Intersentia, 2016). The English law of unjust enrichment has also been the subject of a recent restatement. See: Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012). For a discussion of the impact of the latter restatement, see: Kit Barker, 'Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales' (2014) 34 *Oxford Journal of Legal Studies* 155.

[22] The most obvious ancillary question would be a comparative one – namely that of whether the drafting of a non-binding restatement of the Australian law of contract would be more or less desirable than the enactment of a binding code. More generally, it might be sought to 'rank' the relative desirability of the maintenance of the status quo, the drafting of a non-binding restatement, and the enactment of a binding code. Though these are the most obvious questions which would arise, other more subtle difficulties would also present themselves. One question which has never been adequately addressed is that of what it is that separates a 'restatement' from an authoritative reference work. The question might be posed in more general terms as being that of what are the definitional characteristics of a 'restatement'. Why, for instance, is a major reference work such as *Contract Law in Australia* not generally said to be a 'restatement' of the Australian law of contract? See: J W Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018).

[23] The fourth paper, for instance, draws lessons from the drafting process employed in the preparation of Professor Burrows' restatements. The fifth paper addresses international instruments and model laws at some length.

[24] This paper was published in 2018: John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* 146.

terminological confusion apparent in much of the literature, along with a widespread tendency towards exploring questions of 'certainty' without first explicitly defining what this concept entails. In light of the absence of an established conception of 'certainty' in the codification literature, the paper considers what insights might be derived from a range of more general writings on the subject of 'certainty'. Though a consideration of that literature highlights a number of important points, it will nonetheless be seen that none of the existing frameworks are capable of being directly transposed to the present context.

Accordingly, the paper posits its own framework. It is suggested that the general notion of 'certainty' in this setting is capable of being divided into two interrelated concepts. The first can be deemed 'legal certainty', and concerns the confidence with which the content and scope of substantive legal principles can be stated. The second is best termed 'accessibility', as it concerns the ease with which the law's 'users' can ascertain with accuracy the way in which particular real-world questions would be resolved if they were to be submitted to formal adjudication.

After developing this distinction, the paper proceeds to analyse each of these concepts in turn. That analysis first casts serious doubt on the notion that the codification of the Australian law of contract would usher in a materially greater degree of 'legal certainty'. Having thus traced the difficulties as stemming from underlying approaches to appellate decision-making, it is difficult to see how codification could operate to resolve them.

The paper then turns to a consideration of 'accessibility'. The first point made in this respect is that care must be taken to ensure that the importance of legal 'accessibility' is not overstated. There is, as is well-known, a rich literature which explores the question of the degree to which the positive rules of contract law 'matter' to the law's users.[25] The paper canvasses this scholarship with a view to identifying its ramifications for the codification debate. As will be seen, though there are good reasons for attaching normative importance to 'accessibility', there is a clear disjunct between the conclusions to be drawn from the empirical scholarship and the zeal exhibited in respect of 'accessibility' by the proponents of codification.

[25] A leading example is the scholarship of Stewart Macaulay. For an overview, see: Jean Braucher, John Kidwell and William C Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart Publishing, 2013). For Macaulay's seminal work, see: Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55.

The paper then moves on to examine the many factors which militate against codification having a positive impact upon 'accessibility', with particular attention being paid to the significance of those dimensions of 'accessibility' – such as the high fixed costs of access to justice – which are very unlikely to be impacted by such a reform. The paper shows, in sum, that there is significant cause to doubt the claim that the codification of Australian contract law would promote its 'accessibility'.

The second paper is not directly concerned with codification, but instead develops a point adverted to in the first paper.[26] It is concerned with a controversy which has emerged in recent years as to whether it is necessary to point to 'ambiguity' as a precondition for the use of evidence of 'surrounding circumstances' as an aid to the construction of a contract. Though this question is fundamental and of some considerable importance, the task of answering it is far from straightforward. The object of the second paper is to give a brief overview of the nature of the difficulty in respect of this question, and to consider a number of recent developments both in the High Court and in intermediate appellate courts. In doing so, it seeks to offer an assessment of the present state of the law and a view as to its likely future development.

Given the second paper is not directly concerned with codification, it is important to explain its connection with the central argument developed throughout this thesis. That connection, put simply, is that the second paper seeks to substantiate several of the key observations made in the first paper. Indeed, the second paper is intimately connected with the first insofar as it demonstrates that 'legal uncertainty' in the Australian law of contract, in the sense defined in the first paper, stems at least in part from the judicial technique of the High Court of Australia, which has, put simply, failed to deliver the leadership and clarity in this arena which might be expected of an apex court.[27] There is no basis for concluding that this driver of 'legal uncertainty' would be affected by the adoption of a contract code. Indeed, insofar as the uncertainty which attends the Australian law of contract stems from a want of leadership on

[26] This paper was published in 2018: John Eldridge, ''Surrounding Circumstances' in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3.

[27] In this, the paper builds on earlier work which has arrived at similar conclusions. See, eg: Andrew Stewart and J W Carter, 'The High Court and Contract Law in the New Millennium' (2003) 6 *Flinders Journal of Law Reform* 185.

the part of the High Court, there is every reason to think that this driver of uncertainty would manifest itself in the High Court's interpretation and application of a code.

The third paper is concerned with recent developments in the law respecting contractual penalties in both Australia and England.[28] The paper traverses a wide range of matters in respect of the recent changes in the rule's scope and substance, and identifies a number of important open questions. It also suggests means by which some of these questions might be resolved.

Given the third paper is not directly concerned with codification, it must again be stressed that it is nonetheless closely connected with the central argument developed throughout this thesis. The relevance of the third paper to the question of codification is again its highlighting of the way in which legal uncertainty in the Australian law of contract is in many cases driven not by difficulties peculiar to the common law, but instead by a want of judicial leadership. As is seen in the third paper, the uncertainty and difficulty in the sphere of penalties derives in large measure from a number of recent judicial decisions which have confounded lower courts and commentators alike. The final section of the third paper explicitly engages with these questions, and links the subject matter of that paper to the broader debate respecting the Australian law of contract and the role of the High Court in its development.[29]

In the fourth paper, the focus shifts so as to illuminate the barriers to codification and the challenges and difficulties posed by such a reform.[30] The paper, which examines the Australian experience in respect of contract codification for a British audience, seeks to identify and examine two challenges inherent in contract codification which have been given too little attention by the proponents of reform in Australia. It proceeds in three parts. It first gives a critical overview of the history of Australian contract codification initiatives. Against this

[28] This paper was published in 2018: John Eldridge, 'The New Law of Penalties: Mapping the Terrain' [2018] *Journal of Business Law* 637.

[29] It might also be noted that though the difficulties surrounding contractual interpretation and relief against penalties have been singled out for detailed examination in this thesis, the making of that choice should not be taken to suggest that there do not exist other examples which might be thought to substantiate the points made in the first paper regarding judicial leadership. The approach taken here is one of depth in preference to breadth – rather than traversing a great number of examples in light detail, a smaller number of examples have been examined at length.

[30] This paper will be published in 2019: John Eldridge, 'Contract Codification: Cautionary Lessons from Australia' (2019) 23 *Edinburgh Law Review* (forthcoming).

backdrop, it then proceeds to examine two difficulties which must necessarily beset any contract codification project.

The first species of difficulty arises from the conceptual and cultural dimensions of codification. As the paper shows, building support for a contract code is made especially challenging by the continued lack of agreement as to contract law's proper purpose. After offering a very brief overview of the nature and extent of the continuing controversy, the paper explains that these unresolved theoretical questions have real ramifications for the way in which the codification process ought to be carried out, and the nature and content of any code. In addition to this conceptual challenge, the successful implementation of a contract code is made difficult by the lack of enthusiasm typically evinced for codifying instruments on the part of practitioners and judges. As the paper explains, much has been written in respect of common lawyers' tendency to view statute as an extraneous incursion upon the common law. Comparatively little, however, has been said about the degree to which codes are susceptible to being undermined by judicial and professional resistance. It is suggested that the proponents of codification ought to do far more to engage with stakeholders in the judiciary and the profession.

Finally, the paper moves on to an examination of the second type of difficulty, which is that encountered in seeking to identify a core body of rules and principles which together constitute 'contract law'. Any contract code must grapple not only with contract's intersection with other bodies of law, but with the divisions and fault lines internal to the law of contract. As the paper demonstrates, proponents of codification in Australia have too often sought to treat the law of contract as a monolithic and internally homogenous legal structure. In consequence of this, codification proposals have tended to elide important distinctions within the law of contract, and to pay too little attention to the important question of how any contract code will interact with other spheres of law with which the law of contract overlaps.[31] It is concluded that until an appropriate degree of sophistication is brought to the challenges posed in this area, contract codification is unlikely to proceed successfully.

[31] Any of a great number of examples might be proffered here. Does, for instance, the doctrine of undue influence form part of the law of contract? Or is it instead a general equitable doctrine that may, in some cases, apply to vitiate a contract?

The fifth and final paper in this thesis seeks to identify some practical next steps which might be taken by way of reform of the Australian law of contract.[32] It seeks in particular to identify those reforms which are sufficiently uncontroversial as to attract support on the part of government.

In the course of its analysis, the paper also grapples with the question of whether the more radical options set out in the 2012 discussion paper – including the prospect of codification – were ever suitable responses to the challenges facing the Australian law of contract. In the course of that discussion, the paper makes and defends a point which is of some considerable importance. This point, put simply, is that though many would-be reformers of the Australian law of contract have advanced their proposals through the rubric of codification, it must be remembered that there remain a number of other mechanisms for substantive reform which, while promising, have been paid relatively little attention of late. It is consequently necessary to uncouple questions of substantive law reform from the question of whether the law ought to be codified. Though there may well exist scenarios in which a body of law is in need of such thoroughgoing and fundamental substantive reform that codification is the only sensible means by which reform can be effected, there has been no serious effort made to demonstrate that this is so in respect of the Australian law of contract.

The final paper proceeds in two broad parts. The first offers up a short overview of past contract law reform initiatives in Australia. Against that backdrop, the second part proceeds to identify and assess several key opportunities for reform. As is explained, each of those potential reforms can be seen as steps towards an overarching goal – namely that of creating a 'uniform' law of contract within Australia, free of the inconsistencies and irregularities which, while minor, are nonetheless productive of considerable inconvenience.

An important caveat ought to be made in respect of the examples of potential reforms – in respect of privity, contractual capacity and frustration – singled out for discussion in the final paper. As is explicitly noted in the paper itself, it is by no means suggested that the reforms instanced there are the *only* reforms, or even the most important reforms, which might be attempted in the law of contract today. Indeed, some may object that some of the reform opportunities singled out in the final paper – such as harmonisation of statutes which make

[32] John Eldridge, 'Reforming the Australian Law of Contract: Some Practical Next Steps' (2019) 93 *Australian Law Journal* (forthcoming).

special provision for the adjustment of rights in respect of frustrated contracts – are of relatively little commercial significance, and therefore cannot be said to amount to a law reform priority.[33] Yet the common thread which unites the examples cited in the final paper is not their importance - it is instead that they are each likely to be relatively *uncontroversial*.[34] As the paper explains, its object is not to set out an exhaustive list of all potential reforms of the Australian law of contract, but instead to offer up a number of clear examples of attractive and uncontroversial reforms which might readily be undertaken. In doing so, it serves up a reminder that worthwhile statutory reforms of the law of contract can be undertaken without any necessity of embarking upon a wide-ranging codification exercise.

IV The Principal Contributions of this Thesis

In light of the long history of the debate respecting codification, it might be thought that the resolution of the question of whether the Australian law of contract ought to be codified is simply a matter of attending closely to the existing literature. Yet as will become apparent upon a consideration of the papers which constitute this thesis, such a view would be misconceived.

Though the literature in respect of codification is vast, its constituent writings are for the most part preoccupied with the challenges and imperatives of the particular codification proposals with which they are concerned. Since the bulk of these writings concern proposals which are at a far jurisdictional remove from Australia, they largely fail to take account of the objectives and challenges peculiar to the reform of the Australian law of contract.[35] It follows that if the insights which these writings promise are to be brought to the fore, they must be supplemented

[33] Though it might be conceded that the reform opportunities instanced in the final paper are not first-order priorities, it would be quite wrong to think them wholly devoid of practical importance. Indeed, the doctrine of frustration has commanded the attention of some of the law of contract's most esteemed scholars. See, eg: G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994).

[34] It is, of course, not suggested that the reforms singled out in the final paper would be *wholly* uncontroversial. Some resistance and objection must be expected even in respect of the most anodyne of reforms.

[35] There is a considerable body of writing which debates the existence and nature of a distinctively 'Australian' contract law. See, eg, Anthony Mason, 'Australian Contract Law' (1988) 1 *Journal of Contract Law* 1; 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.

by analysis informed by the legal, social, and economic context of twenty-first century Australia. It is this gap which this thesis fills.

While there is little to be gained from embarking here upon an exhaustive survey of the arguments which have been advanced in the codification debate, it is nonetheless worth setting out clearly the principal contributions which this thesis makes to the literature. The points identified here cannot be taken to be an exhaustive statement of the scholarly contribution made by the papers which comprise this thesis.[36] The points set out here must also be read in conjunction with the more elaborate discussions which follow in the substantive papers.[37] Even so, the points below serve to highlight the key contributions which this thesis makes to the codification debate.

First, this thesis makes a contribution to the understanding of how the 'success' of a contract codification exercise ought to be understood and ascertained. As is illustrated in the first paper, much of the existing literature in respect of codification discusses the objectives or anticipated dividends of codification in terminology which wants for rigorous definition or interrogation. A clear example of such a tendency can be seen in the 2012 Discussion Paper itself, which sets out what are suggested to be the principal 'drivers of reform' in connection with contract law. These drivers are themselves drawn in part from the principles articulated in the Commonwealth's 2009 *Strategic Framework for Access to Justice*,[38] and are said to be:[39]

- Accessibility
- Certainty
- Simplification and removal of technicality

[36] To give just two examples not instanced in the course of the points made here, papers two and three each make a number of contributions to the literature on contractual interpretation and penalties. Though these contributions ought not to be ignored, they can be put to one side in identifying the principal contributions which the thesis as a whole (including papers two and three) makes to the literature respecting contract codification.

[37] The exact scope of each contribution, and its relationship with the existing literature, can be made clear only upon a full consideration of the context in which each point is developed. That context emerges upon a consideration of the substantive papers.

[38] Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

[39] This is an abbreviated form of the factors which are set out in the Discussion Paper. See: Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012), 3-6.

- Setting acceptable standards of conduct[40]
- Supporting innovation
- Maximising participation in the digital economy
- Suitability for small and medium sized-business
- Elasticity[41]
- Harmonisation
- Internationalisation[42]

Though there is nothing inherently objectionable in the choice of these reform 'drivers', it is nonetheless clear that – at least in the absence of considerable exegesis – they leave much to be desired as metrics of a code's success or failure. In addition to their obvious and considerable overlap, the precise meaning of many of the 'drivers' set out above is far from clear. What, for instance, ought to count as 'innovation' in this context? When can a rule or principle be said to involve 'technicality'? Is it necessary, when determining whether a code is a success, to inquire into whether the 'technicality' of a rule contained therein is *warranted*?

Of course, any of a great number of other potential metrics might conceivably be utilised in judging codification exercises and their resultant codes. If the existence (or incidence) of academic criticism is to be an indication of a code's failure, there is at least some cause to conclude that various iterations of the sale of goods legislation have failed.[43] If a code is to be deemed to be a failure to the extent that it gives rise to interpretive difficulty, virtually every

[40] The Discussion Paper cites the need, in this connection, for recognition of the diversity of Australia's culture. As the Discussion Paper explains: 'Standards of acceptable conduct should be unambiguous, simple to understand and take particular account of the needs of people from different cultural backgrounds or experiencing disparate circumstances. Australia's cultural diversity demands that our contract law should be readily translatable into other languages to facilitate domestic and international trade and improve general public awareness of the law.' See: Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012), 4.

[41] The paper explains that 'elasticity … may help support relational contracts; that is, long-term contracts which support successful continuing relationships. Many contracts involve complex projects which rely on cooperation between the parties over a significant period of time. The use of flexible, gap-filling concepts like good faith, reasonableness or adaptation for hardship may be needed to help these contracts work as time passes and circumstances change.' See: Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012), 5.

[42] In the Discussion Paper this term connotes harmonisation with international norms.

[43] See, eg, the discussion in: Samuel Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods - I' (1952) 15 *Modern Law Review* 425; Samuel Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods - II' (1953) 16 *Modern Law Review* 174; Michael Lambiris, 'Reform of the Law of Sale in Australia' (1996) 20 *Melbourne University Law Review* 690.

code will eventually face censure.[44] Alternatively, if a code's need of 'corrective' amendments is to be seen as indicative of failure, the sale of goods legislation must again be marked down. Of the many changes which have been made to the legislation's original text, a number were directed solely to the correction of error – such as the difficulties which stemmed from the original statute's use of concepts and terminology which were alien to Scots law.[45] Equally, if a code's success is to be measured by the degree to which the judicial interpretation and application of the code conforms to the intentions and expectations of those who drafted it, there is some cause to doubt the success of the New Zealand experience of contract codification.[46] Determining whether these metrics ought to be used to judge a code's success is far from straightforward. Furthermore, even if it is established that a particular metric may legitimately be employed, the task of giving precise meaning to the relevant terminology and concepts poses further significant challenges.

Though this thesis does not purport to resolve all of these difficulties, it does make significant strides in exploring one of the most important 'drivers' of codification – the attainment of 'certainty'. Though the literature sometimes employs a cognate expression in place of 'certainty', it is nonetheless clear that a code's propensity to deliver 'certainty' is widely seen as a metric by which its success can be measured. The first paper in this thesis makes a significant contribution to the codification debate insofar as it identifies the gap in the existing literature in this connection, and proffers a workable answer. As noted above, it is suggested in the first paper that the general notion of 'certainty', when used in the context of contract codification, is capable of being divided into two interrelated concepts. The first can be deemed 'legal certainty', and concerns the confidence with which the content and scope of substantive legal principles can be stated. The second is best termed 'accessibility', as it concerns the ease with which the law's 'users' can ascertain with accuracy the way in which particular real-world questions would be resolved if they were to be submitted to formal adjudication. The first paper then goes on to explain how this framework might be applied in the context of Australia.

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[44] For some recent discussion of such difficulties in respect of the Indian Contract Act, see: Shivprasad Swaminathan and Ragini Surana 'Minors' Contracts: A Major Problem with the Indian Contract Act, 1872' (2019) *Statute Law Review* (forthcoming).

[45] See the discussion in: Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (Law Com. No. 160) (Scot. Law Com. No. 104), 1987.

[46] See: Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 149. One contemporaneous commentator described the *Contractual Mistakes Act 1977* (NZ) as 'well-intentioned but ill-executed'. See: J N Finn, 'The Contractual Mistakes Act 1977' (1979) 8 *New Zealand Universities Law Review* 312, 320.

The second principal contribution made by this thesis relates to and builds upon this first point. As is explained in the first paper, though a number of commentators have criticised the lack of judicial leadership shown by the High Court in the sphere of contracts, few have sought to link these observations to the codification debate.[47] This thesis is the first contribution to the Australian contract codification debate which supports its analysis of the merits of codification by reference to detailed doctrinal analysis. The second and third papers in this thesis, while superficially concerned with matters at some remove from the codification debate, are in truth integral to structure of the thesis. In addition to suggesting that a lack of judicial leadership on the part of the High Court might undermine 'certainty' even after the enactment of a code, this thesis goes on to demonstrate that want of leadership at considerable length. This methodological feature of the thesis is itself one aspect of its contribution to the literature.

Thirdly, and finally, this thesis makes a key contribution to the literature insofar as it seeks to highlight the significance of legal and professional culture in the codification process. Though some commentators have sought to draw attention to this and related aspects of the codification debate, relatively few have devoted significant attention to its study.[48] One of the key components of the fourth paper in this thesis is its examination of the role of judicial and professional culture in the development, interpretation and application of codes. Similarly, the fifth paper takes regard of the significance of these factors insofar as it seeks to identify reform projects which are likely to be relatively uncontroversial. In exploring this neglected aspect of the codification debate, this thesis fills an important gap in the existing literature.

V The Methodology and Boundaries of this Thesis

It might be thought sufficient, when defining the methodology utilised in this thesis, simply to say that it belongs to the genre of law-reform scholarship, which has long been recognised as

[47] For a notable exception, see the discussion in: Andrew Stewart, 'What's Wrong with the Australian Law of Contract' (2012) 29 *Journal of Contract Law* 74.

[48] For a discussion of the importance of 'genuine consultation' and the involvement of a broad range of stakeholders in the codification process, see: Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 147.

a distinct form of legal research.[49] Yet it is important also to offer a brief explanation of the nature of this genre of legal writing, and to explain how the methodology has been implemented here.

As is common in law-reform research, this thesis draws on a range of different analytic techniques, with a view to combining the strengths of each.[50] The analysis of the current Australian law of contract in papers 2 and 3 is best categorised as doctrinal legal analysis,[51] whereas the analysis in papers 1, 4 and 5 involve engagement with both practical and theoretical questions.[52] The thesis as a whole is also informed to a significant degree by the techniques of comparative law. Indeed, as will be seen throughout the papers, the literature in respect of comparative law is drawn upon in order to ensure the utilisation of comparative materials is robust and appropriate.[53]

Perhaps the most important question to address when discussing the methodology of this thesis is that of whether it involves the gathering of fresh empirical evidence to test the questions which it canvasses. The short answer to this question is that this thesis does not involve

[49] See, eg, the taxonomy of legal research set out in: Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983). See further: Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005). In addition to the myriad examples of law-reform research, there also exists a burgeoning body of scholarship which traces the history of law-reform as a discipline and phenomenon. See, eg: David Weisbrot (ed) *The Promise of Law Reform* (Federation Press, 2005); Matthew Dyson, James Lee, Shona Wilson-Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016).

[50] For the view that all legal research is in truth an amalgam of disparate analytic techniques, see: Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 *University of Toronto Law Journal* 333, 345.

[51] Much has been written about the nature of doctrinal legal analysis, see, eg: Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans W Micklitz and Edward L Rubin (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017); Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in Mark Van Hoecke (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline*? (Hart Publishing, 2013). In addition to general writings of this type, there also exist writings which focus on jurisprudential questions which are of importance in doctrinal legal research, such as the distinction between notions of 'principle' and 'policy': see, eg: Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057, 1060.

[52] This is not the place for a detailed exploration of the various types of contract theory. For such a discussion, see, eg: Peter Benson (ed), *The Theory of Contract Law* (Cambridge University Press, 2001); Stephen Smith, *Contract Theory* (Oxford University Press, 2004).

[53] For a general discussion of the potential pitfalls in the utilisation of comparative materials, see: Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

research of this kind – the empirical analysis it contains is confined to the assessment and analysis of existing data. This methodological choice is not at all a consequence of scepticism as to the merits of empirical research.[54] Indeed, this thesis does draw on empirical scholarship and derives several useful insights from it. Instead, the decision not to gather fresh empirical data is a consequence of the resource constraints inherent in a project of this type.

It is also important at the outset to note with care the boundaries of this thesis. There are a number of questions which, while undoubtedly of interest, are beyond this work's remit, and others which are touched upon only incidentally. Indeed, the complexity of the codification debate, along with the resource and space constraints which are inherent in a project of this type, means that some interesting matters must necessarily be left unexplored.

Perhaps the first question which arises when considering the boundaries of this thesis is that of whether it amounts to an exhaustive exploration of whether, and how, the Australian law of contract ought to be reformed. It should be stressed that this thesis expressly disavows any intention of taking up such a task. Even if such a project were possible, it would plainly be a task of mammoth proportions, and one which could not be completed within the bounds of a thesis such as this. This thesis is instead concerned with answering the question of whether a particular type of reform, namely codification, ought to be undertaken. Its engagement with broader questions is incidental to this core task.

Once this thesis is understood as being focused principally upon codification, there then arises the question of the degree to which it explores the subject of codification in general, as opposed to the particular question of the codification of the Australian law of contract. The short answer to this is that this is a thesis which is concerned with the codification of Australian contract law. Though it may shed light upon general questions which arise in connection with codification, it does so only incidentally. Though this may be thought to be an unduly narrow approach, or one which baulks at the difficult task of identifying general patterns or themes, it is in truth simply a consequence of a choice which must be taken as to where focus ought to be

[54] For a general discussion of the value and importance of empirical legal scholarship, see: Theodore Eisenberg, 'Why Do Empirical Legal Scholarship?' (2004) 41 *San Diego Law Review* 1741. As is widely-known, empirical legal research has enjoyed a steady rise in volume and influence in recent decades. See, eg: Michael R Heise 'An Empirical Analysis of Empirical Legal Scholarship Production, 1990 – 2009' (2011) *University of Illinois Law Review* 1729.

directed. There is little doubt that a sustained theoretical analysis of the general subject of codification could be carried out, and that such an analysis could be fruitful and worthwhile. Equally, one could embark upon a rigorous exercise in comparative legal scholarship, seeking to explore codification projects elsewhere in the common law world with a view to identifying lessons for Australia. Yet, as will become apparent, it is necessary, if the questions relating to Australian contract law are to be explored in sufficient depth, to deal with a great deal of material which is peculiar to the Australian law of contract.

Further, out of an abundance of caution, it ought to be added that this thesis should not be taken to make any claim as to the relative merits of common law and civilian legal systems. Though there does indeed exist an interminable debate as to which scheme of law is 'superior',[55] the question of whether the Australian law of contract ought to be codified has little to do with that question. It is inexcusably simplistic to understand the process of codification in a common law legal system to involve an adoption of a civilian scheme – any code enacted in a jurisdiction such as Australia will inevitably be shaped by the methods and techniques of the common law.[56] It is equally wrongheaded to conclude that a favourable view of the merits of contract codification in Australia must entail a general belief as to the superiority of codified schemes of law.

Finally, it is worth saying something as to the relationship between this thesis and the 2012 Discussion Paper mentioned above. Two points should be made in this respect. First, it should be noted that this thesis does not seek to give a comprehensive answer to all of the questions posed in that paper. As will be seen, the 2012 Discussion Paper, while preoccupied with codification, also sought views on a number of other questions in respect of the reform of the Australian law of contract. As has already been explained, this is a thesis which is focused on codification, and which grapples with related questions only insofar as is necessary to deal with that central topic. Second, it should be made clear at the outset that this thesis should not be

[55] This debate intersects with the ongoing discussion in respect of legal origin theory, as to which, see: Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117 *Quarterly Journal of Economics* 1193; Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285; Simon Deakin and Katharina Pistor (eds) *Legal Origin Theory* (Edward Elgar, 2012). For the debate as to whether the common law offers the more fertile soil for economic activity, see: F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, 1982); Paul G Mahoney 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30 *Journal of Legal Studies* 503.

[56] This is a point which is taken up further in the first paper.

thought of as a study *of* the 2012 Discussion Paper itself or of its aftermath. As the paper is the most recent major law reform exercise in respect of the Australian law of contract, the papers necessarily refer to it with great frequency. Yet it should be clearly understood that the 2012 Discussion Paper is merely one among many important sources which this thesis draws upon in seeking to answer the questions with which it is concerned.

VI Conclusions and Further Research

As noted above, the core contention of this thesis that there are strong reasons to think that the Australian law of contract ought not to be codified. Many of the arguments traditionally advanced in favour of the codification of the law of contract fail to withstand sustained scrutiny. At the same time, there are a number of serious challenges which would have to be overcome in order to codify Australian contract law successfully. Put simply, in addition to the serious difficulties which attend the positive case for codification, there is a strong negative case which has received too little serious attention.

Though this conclusion might at first seem to offer little to proponents of codification or reform, this thesis in fact offers many suggestions as to how the task of redressing the shortcomings of the Australian law of contract might be approached. Indeed, the final paper in this thesis is centred on the task of identifying what next steps ought to be taken in the reform of the Australian law of contract. Though that paper rejects codification as a desirable option, it is far from reticent in suggesting desirable reforms. In a similar vein, the fourth paper sets out a number of suggestions as to how future Australian contract codification projects might avoid the pitfalls which have derailed past efforts at reform. It would thus be quite wrong to view this thesis as being wholly opposed to reform or legal change. Indeed, in addition to the many specific reforms which are suggested throughout, the thesis offers up a good deal of general advice on the subject of codification which may be of some considerable use to future would-be codifiers.

Though this thesis is firm in its conclusion that the Australian law of contract ought not to be codified, it acknowledges at a number of points that key questions in the contract codification debate ought to be the subject of further investigation and analysis. These questions are for the most part those which can only be answered through the gathering of empirical evidence. In

the final paper, for instance, it is observed that much might be gained from building an understanding of the factors which drive parties to prefer (or eschew) Australian law as the governing law of their contract.[57] The answer to questions such as this might either cast yet further doubt on the case for codification, or instead offer some support to those who maintain that the case for codification is a convincing one. A number of other questions in a similar vein are identified throughout this thesis.

The resolution of empirical questions of this kind are among the more pressing tasks which remain in connection with the Australian contract codification debate. Though this thesis was constrained from exploring those questions, it does identify them with some care, and seeks to place them within their broader context. It is hoped that a future research project will take up the challenge which these questions pose.

[57] Some empirical scholarship in this vein already exists elsewhere. See, eg: Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34 *Northwestern Journal of International Law & Business* 455.

PAPER ONE: 'CONTRACT CODIFICATION AND 'CERTAINTY''

STATEMENT OF AUTHORSHIP

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CONTRACT CODIFICATION AND 'CERTAINTY'

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In March 2012, the Commonwealth Attorney-General's Department issued a brief but wide-ranging discussion paper which canvassed the possibility of codifying or otherwise reforming the Australian law of contract. This article is concerned with a particular dimension of the debate sparked by that paper: namely the question of whether codification would promote 'certainty' in the Australian law of contract. It first seeks to establish an understanding of the likely nature of any successful Australian contract codification project. It then proceeds to set out and apply a framework for understanding the concept of 'certainty' in the present context. It is concluded that although there may be cause to think that codification might promote 'certainty' to at least some extent, there are good reasons to think that its impact in this respect would likely be less significant than has often been suggested.

In March 2012, the Commonwealth Attorney-General's Department issued a brief but wide-ranging discussion paper which canvassed the possibility of codifying or otherwise reforming the Australian law of contract.[1] Though it attracted 58 submissions and a number of thoughtful papers, there is nonetheless a clear disjunct between the significance and scope of the questions raised by the paper and the response which it attracted.[2] Indeed, though the codification of Australian contract law has been mooted several times in the past fifty years, the merit of such a reform has rarely been the subject of sustained analysis.[3]

In the wake of the 2012 Discussion Paper, governmental enthusiasm for the reform of the law of contract appears to have waned.[4] There is good reason to think that codification – or any

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[1] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012.

[2] See, eg, A Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *JCL* 74; W Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney LR* 131; M Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law' (2014) 34 *Legal Studies* 24; M Keyes and T Wilson, eds, *Codifying Contract Law: International and Consumer Law Perspectives*, Ashgate, Farnham 2014; L Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, Or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry' (2015) 34 *University of Queensland LJ* 99.

[3] For writings which examine the prospect of codifying Australian contract law but which pre-date the 2012 Discussion Paper, see, eg, M P Ellinghaus, E W Wright and M Karras *Models of Contract Law: An Empirical Evaluation of their Utility*,Themis Press, Sydney, 2005; J Starke, 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1978) 49 *ALJ* 234; D Svantesson 'Codifying Australia's Contract Law - Time for A Stocktake in the Common Law Factory' (2008) 20 *Bond LR* 1.

[4] The Discussion Paper was not followed by any significant further activity on the part of the Attorney General's Department, and the reform of contract law appears no longer to be a priority.

similar such reform – is unlikely to eventuate in the near future.[5] Even so, it is well worth continuing to grapple with the questions raised by the paper and by the debate which it prompted, not the least because of the arguably unmerited optimism evident in much of what has been written by the proponents of reform.

It is no object of this article to canvass the full range of issues thrown up by the question of whether Australian contract law ought to be codified or otherwise significantly reformed.[6] Such a discussion would require engagement with a wide range of issues, including the important question of whether the Australian law of contract ought to be 'harmonized' with the law of other jurisdictions or with transnational instruments. It instead grapples at length with a particular dimension of the debate: namely the question of whether codification would promote 'certainty' in the Australian law of contract. As one of the focal points of the argument surrounding contract codification, it is somewhat surprising that this question is yet to be the subject of detailed consideration from an Australian perspective.[7] This article seeks to fill this gap. It shows, after canvassing a range of doctrinal and practical considerations, that although there is cause to think that codification might promote 'certainty' to at least some extent, there are good reasons to think that its likely impact in this respect would likely be less significant than has often been suggested.

This article proceeds in four parts. It first seeks to establish an understanding of the likely nature of any successful Australian contract codification project. Such an exercise is unavoidably conjectural and is necessarily capable of being carried out only at a relatively high level of generality. Even so, as will be seen, it is both possible and necessary to put certain species of reform to one side on the basis that they are distinctly unlikely to be taken up in Australia. Without doing so, it is very difficult to engage in a focused and realistic assessment of the impact which a reform of this type would have if taken up.

Having confined the analysis in this way, this article then proceeds to set out a framework for understanding the concept of 'certainty' in the present context. As will be seen, this task is

[5] See the discussion in: W Swain, ''The Steaming Lungs of a Pigeon'': Predicting the Direction of Australian Contract Law in the Next 25 Years' in K Barker, K Fairweather and R Grantham, eds, *Private Law in the 21st Century*, Hart Publishing, Oxford, 2017.
[6] That task has been ably undertaken elsewhere. See, in particular: Swain, above, n 2.
[7] Other key dimensions of the debate surrounding the 2012 Discussion Paper have been the subject of focused analysis. In respect of the 'harmonisation' of Australian contract law, for instance, see: D Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *JCL* 1.

complicated by the terminological confusion apparent in much of the codification literature, along with a widespread tendency towards exploring questions of 'certainty' without first explicitly defining what this concept entails. In light of the absence of an established conception of 'certainty' in the codification literature, this paper considers what insights might be derived from a range of more general writings on the subject of 'certainty'.

This article suggests that the general notion of 'certainty' in this setting is capable of being divided into two interrelated concepts. The first can be deemed 'legal certainty', and concerns the confidence with which the content and scope of substantive legal principles can be stated. The second is best termed 'accessibility', as it concerns the ease with which the law's 'users' can ascertain with accuracy the way in which particular real-world questions would be resolved if they were to be submitted to formal adjudication.

After setting out this distinction, this article proceeds, in parts 3 and 4, to analyse each of these concepts in turn. It should be noted at the outset that the analysis in each of these parts grapples with a number of important normative questions which arise in connection with these two dimensions of 'certainty'. It is suggested in part 4, for instance, that the normative importance of 'accessibility' must be qualified in light of the important lessons to be derived from empirical contracts scholarship.

Part 4 also engages with the important question of the degree to which further empirical research would be helpful in resolving the questions which arise in this area. The conclusion, in both parts 3 and 4, is that the impact which codification would have upon the 'certainty' of the Australian law of contract would be much less significant than has often been suggested.

UNDERSTANDING 'CODIFICATION'

There has long been a clash of ideas in respect of codification.[8] It is thus unsurprising that there exists an abundant literature, spanning years and jurisdictions, in which the merits and

[8] For a recent examination of the historical contest in respect of contract codification and its principal belligerents, see: W Swain, 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland LJ* 39. For a survey focused principally on European codification, see: S Stoljar, ed, *Problems of Codification*, Australian National University Research School of Social Sciences, Canberra, 1977.

consequences of particular codification proposals are subjected to critical scrutiny.[9] There also exist writings which assess the phenomenon of codification from a broader stance, and which seek to derive insights applicable to codes and codification generally.[10]

It might well be thought, in light of the long history of the debate surrounding codification, that the resolution of the question of whether the Australian law of contract ought to be codified is simply a matter of attending closely to this existing body of work. Yet as will be seen in the course of the discussion below, such a view would be misconceived.

Though the canon of work in respect of codification is indeed vast, its constituent writings are for the most part preoccupied with the challenges and imperatives of the particular codification proposals with which they are concerned. So much is unsurprising. But since the bulk of these writings concern proposals which are at a far jurisdictional remove from Australia, they largely fail to take account of the objectives and challenges peculiar to the reform of the Australian law of contract.[11] It follows that if the insights which these writings promise are to be brought to the fore, they must be supplemented by analysis informed by the legal, social, and economic context of twenty-first century Australia.

The necessity for attention to context is no less important when building an understanding of what 'codification' entails. Though this is a task which may seem, at first glance, relatively straightforward, it is in reality liable to lead to confusion if not undertaken with care.

The starting point in building such an understanding is straightforward. There exist many uncontentious statements of the core features of codes or of codification, each of which traverses similar matters. To take just one such definition which can be readily accepted,

[9] It is difficult to give an accurate sense of just how significant and disparate is the body of writing which falls within this category, only a very small part of which is referred to here.

[10] See, eg, F Stone, 'A Primer on Codification' (1955) 29 *Tulane LR* 303; L Scarman, 'Codification and Judge Made Law: A Problem of Coexistence' (1967) 42 *Indiana LR* 355; A von Mehren, 'Some Reflections on Codification and Case Law in the Twenty First Century' (1997) 31 *University of California Davis LR* 659; G Weiss, 'The Enchantment of Codification in the Common Law World' (2000) 25 *Yale Journal of International Law* 435.

[11] There is a considerable body of writing which debates the existence and nature of a distinctively 'Australian' contract law. See, eg, A Mason, 'Australian Contract Law' (1988) 1 *JCL* 1; M P Ellinghaus, 'An Australian Contract Law?' (1989) 2 *JCL* 13; J Gava, 'An Australian Contract Law? – A Reply' (1998) 12 *JCL* 242.

Catherine Skinner has suggested that a code, in the context of a common law system, should be understood as: [12]

> [A]n instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field. And codification is the process of drafting and enacting such an instrument. A code by this definition is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law. Thus it has an organising and indexing role than an ordinary statute does not share.

It is once it is sought to move beyond this relatively clear starting point that difficulties begin to emerge. A particularly significant risk is that of eliding potentially important distinctions between the operation of codes in common law systems and their operation in civilian legal systems.[13] One question which arises in this connection and which is especially relevant to much of what follows below is that of what role is to be played by judicial precedents after a code is enacted in a common law system.

The best way of exploring this question is through a brief case study centred on the Australian Contract Code, an instrument drawn up on behalf of the Law Reform Commission of Victoria by Fred Ellinghaus and Ted Wright and first published in 1992.[14] The Australian Contract Code is unusual in virtually every respect. It is comprised, for instance, of only 27 articles, marking it as a clear outlier when assessed against comparable instruments elsewhere in the common law world. Harvey McGregor's ill-fated code of the English law of contract, for instance, was comprised of 673 clauses.[15] Similarly, the recent restatements of the English law of contract by Andrew Burrows and Neil Andrews contain 50 statements and 198 articles respectively (though the former figure is misleadingly low, as many of Burrows' statements are comprised of multiple parts).[16]

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[12] C Skinner, 'Codification and the Common Law' (2009) 11 *European Journal of Law Reform* 225 at 228. For a discussion of the various different senses in which 'codification' might be understood, see: S Wilson Stark, *The Work of the British Law Commissions: Law Reform ... Now?*, Hart Publishing, Oxford, 2017 at 157-9.

[13] See, for instance, the observations of Hein Kötz in respect of the debate surrounding codification in England: H Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *MLR* 1 at 2 ('First, it was assumed implicitly that codification in England would be more or less tantamount to what it is on the Continent. Secondly, Continental codes were described as being based on a number of distinctive and uniform characteristics.')

[14] Law Reform Commission of Victoria, *An Australian Contract Code*, Discussion Paper No 27, 1992.

[15] H McGregor, *Contract Code: Drawn Up on Behalf of the English Law Commission*, Guiffré, Milan, 1993. For a brief overview of the nature and fate of McGregor's code, see: F M B Reynolds, 'Contract: Codification, Legislation and Judicial Development' (1995) 9 *JCL* 11 at 13-17; S Waddams, 'Codification, Law Reform and Judicial Development' (1996) 9 *JCL* 192.

[16] A Burrows, *A Restatement of the English Law of Contract*, Oxford University Press, Oxford, 2016; N Andrews, *Contract Law Rules: Decoding English Law*, Intersentia, Cambridge, 2016.

The Australian Contract Code is further marked out as unusual by its enthusiastic embrace of discretion, which is encapsulated in the Code's final article: [17]

> **Overriding article**
>
> **Article 27**
> A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

To term this provision radical would be an understatement.[18] Ellinghaus and Wright's enthusiasm for this discretion-based approach was bolstered by the findings of an empirical study which concluded that the Australian Contract Code operated no less predictably than the common law.[19] It is not necessary to dwell on this empirical study at present, nor is it possible to engage here with the normative question of the desirability of such a discretion-based approach.[20] It is instead for present purposes important to focus upon the interpretive provisions in the Code, the most important of which provides: [21]

> **Article 3**
> Neither past nor future decisions govern the application of the Code.

This provision gives a clear answer to the question of what role case law would play under the Australian Contract Code: *stare decisis* would, at least formally, be swept away, and in its place would be an approach under which the text of the Code alone would provide the answer to any legal question in the domain of contract. Such an approach must be contrasted with the real operation of civilian codes, in which judicial precedents do play a meaningful role, as well as the typical operation of codes in common law systems.[22]

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[17] Law Reform Commission of Victoria, above, n 14, p 17.

[18] Among other things, it seems precisely the type of approach which Lord Radcliffe had in mind when cautioning that ''unconscionable' must not be taken to be a panacea for adjusting any contract between competent parties when it shows a rough edge to one side or the other'. See: *Campbell Discount Co Limited v Bridge* [1962] AC 600 at 626.

[19] See: Ellinghaus, Wright and Karras, above, n 3. See also: 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 LR* 399.

[20] Any such discussion must necessarily engage with the extensive body of literature respecting the notion of 'discretionary remedialism'. See, eg, P Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia LR* 1; S Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney LR* 463.

[21] Law Reform Commission of Victoria, above, n 14.

[22] The status of case law in a civilian legal system differs from jurisdiction to jurisdiction. Its status has, notably, been likened to that of 'soft law': V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 *International Review of Law and Economics* 519. For a recent overview of the status of case law in German law, see the discussion in: J A Bargenda and S Wilson Stark, 'The Legal Holy Grail? German Lessons on Codification for a Fragmented Britain' (2018) 22 *Edinburgh LR* 183.

In respect of the latter point, it must be emphasised that the approach taken to judicial precedent under the Australian Contract Code is at odds with that taken under every significant legislative code which has been adopted in Australia and in England.[23] These codes, without exception, permit the accretion of a body of exegetical case law which is as important in understanding and applying the code as the language of the code itself. This is a point which, though often implicitly acknowledged, is not always made explicit.[24]

It is difficult to discuss the impact which codification might have in the absence of a clear and confined understanding of the general nature of such a reform. In particular, it is difficult to arrive at a realistic assessment of the likely impact of codification upon 'certainty' if it is necessary to consider in equal detail every conceivable type of code, even where some, like the Australian Contract Code, are at a far remove from the mainstream.

This article accordingly proceeds on the footing that any contract code adopted in Australia would, like every other significant code in the Australian context, permit judicial exegesis of the type which is customarily applied to codifying statutes. The classic statement of the relevant principles is found in the speech of Lord Herschell in *Bank of England v Vagliano Brothers*: [25]

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

The case law which emerges from this process will, over time, come to constitute a considerable body of jurisprudence which sits alongside the code itself.

The approach adopted may well be criticised for taking too narrow a view of the possibilities of reform. It is nonetheless defensible for both pragmatic and principled reasons: it is necessary to keep the present discussion within reasonable bounds, and it seems distinctly improbable that a code of the type posited by Ellinghaus and Wright stands a real chance of being adopted.[26]

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[23] In addition to the examples discussed below, see, eg, the sale of goods legislation as enacted in each Australian jurisdiction.

[24] Though see, for instance: A Diamond, 'Codification of the Law of Contract' (1968) 31 *MLR* 361 at 384.

[25] [1891] AC 107 at 144. The question of the extent to which courts in fact look to pre-code case law can be put to one side at present.

[26] Indeed, the Australian Contract Code has never commanded significant support, and it seems even its authors have moved towards a more orthodox approach in later work. See, for instance, the code drafted by Ellinghaus

On this footing, then, it is necessary to turn now to a consideration of what 'certainty' entails.

UNDERSTANDING 'CERTAINTY'

Claims that codification renders the law more 'certain', 'accessible', 'clear', or 'intelligible' recur with great frequency. Though it is now uncommon for such views to be expressed with the zeal exhibited by the early proponents of codification,[27] and modern proponents of codification sometimes seek to distance themselves from particular claims in this sphere,[28] it nonetheless remains common for writings in respect of codification to highlight the potential of codification to promote the ease with which law can be ascertained, understood and applied. Thus, Ellinghaus and Wright, in their 1992 Discussion Paper on behalf of the Law Reform Commission of Victoria, stressed the fact that the Australian Contract Code can 'be easily read and understood by people who are not lawyers. Indeed, it is possible to read the entire Code in the time it takes to travel the two kilometres between Collins Street, Melbourne, and Grattan Street, Carlton, by the No. 19 Tram'.[29] Similarly, the 2012 Discussion Paper issued by the Attorney-General's Department cited 'accessibility' and 'certainty' as two potential 'drivers for reform'.[30]

Before claims of this type can be properly interrogated, it is necessary to consider the terms employed in this arena, and to develop definitions against which the claims of codification's proponents can be tested. It is the task of this section to set out a framework, under the rubric of the term 'certainty', through which the issues which arise in this sphere can be explored.

The difficulty in this task stems from the fact that the terminology in this area is often used inconsistently and without recourse to clear definitions. The greatest difficulties are posed by the term 'certainty' itself, which is often employed as a general, overarching label which

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and Wright (along with David Kelly) in response to the 2012 Discussion Paper, which is comprised of 109 articles and eschews the more unusual features of the Australian Contract Code. See: M P Ellinghaus, D StL Kelly and E W Wright, 'A Draft Australian Law of Contract' Working Paper No 03-03-14, Newcastle Law School.

[27] Particularly Jeremy Bentham, as to which, see: Swain, above, n 8.

[28] See, eg, M R Topping and J P M Vanderlinden, 'Ibi Renascit Jus Commune' (1970) 33 *MLR* 170 at 170.

[29] Law Reform Commission of Victoria, above, n 14, p 1.

[30] Attorney-General's Department (Cth), above, n 1, p 3. For further examples of claims of this kind, see: Svantesson, above, n 3; L Nottage, 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response' in Keyes and Wilson, above, n 2; A Tettenborn 'Codifying Contracts – An Idea Whose Time Has Come?' (2014) 67 *CLP* 273.

encompasses a range of related subsidiary concepts. This point is well-illustrated by considering the approach taken in the 2012 Discussion Paper, where, in respect of 'certainty', the paper states: [31]

> Improving certainty in those areas of contract law which are unsettled or unclear would have a number of benefits. When the legal consequences of actions or omissions are clear and predictable, individuals and businesses have the information they need to make informed choices and to develop long-term plans. Legal certainty also has important economic benefits such as allowing contracting parties to allocate risk more efficiently. Greater certainty in the law lessens the likelihood of disputes arising or being escalated, reducing costs both for parties and for governments. That said, the degree to which certainty is valued may need to be balanced against its potential to produce unfairness.

Clearly, the matters canvassed here are capable of being described in general terms as being issues of 'certainty'. Yet insofar as they concern the ease of ascertaining the legal consequences of an act or omission, they intersect with concepts which are often dealt with in the literature under the rubric of 'accessibility'.[32] Difficulties of this kind recur regularly.[33] Indeed, even where an effort is made to focus solely upon a particular dimension of the debate, there is a tendency for terminological distinctions to quickly break down. Aubrey Diamond, for instance, when seeking to assess the potential of codification to promote the '[a]ccessibility of the law to the legal profession',[34] sets out the following hypothetical, in which 'certainty' and 'accessibility' eventually blur together: [35]

> A client consults his solicitor with a problem. He has ordered twenty-four cases of whisky. The seller now tells him that eight cases will be delivered tomorrow, eight cases at the end of the week, and the remaining eight cases early next week. Can the client insist on delivery of all twenty-four cases at one go? This is a problem of sale, the law on which was codified by the Sale of Goods Act 1893. If we can imagine the solicitor faced with these facts in 1890, he would turn to the books for guidance and there be referred to the cases. The most recent case was *Reuter v Sala* in 1879 [(1879) 4 CPD 239]. In that case Thesiger LJ said: "… the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity." But before advising his client that he would not be bound to accept delivery of any less than twenty-four cases, the solicitor would have been well advised to look at the case more closely … One does not have to be an experienced lawyer to be uncertain whether *Reuter v Sala* would govern the problem of the whisky. In our problem we have no contractual time mentioned, and unlike [*Reuter v Sala*] there is no question of an irremediable breach … Now consider the solicitor faced with this problem in 1967. He will first turn to the Sale of Goods Act 1893, and he hardly need read more than the sixteen words in section 31(1): "Unless otherwise agreed, the buyer of goods is not bound

[31] Attorney-General's Department (Cth), above, n 1, p 3. The paper cites, in support of its concluding observation, the oft-cited: M A Eisenberg, 'The bargain principle and its limits' (1982) 95 *Harvard LR* 741, at 769-70.
[32] See, eg: M Arden, 'Time for an English Commercial Code?' [1997] 56 *CLJ* 516 at 532.
[33] Indeed, the Discussion Paper goes on to discuss 'accessibility' in a manner which seems to be focused upon the ease with which legal rules can be understood, rather than the ease with which the legal consequences of particular acts and omissions can be discerned. See: Attorney-General's Department (Cth), above, n 1, p 3. ('There is an inherent benefit in as many people as possible being able to understand rules which affect them.')
[34] Diamond, above, n 24, p 363.
[35] Diamond, above, n 24, pp 368-70 (footnotes omitted).

> to accept delivery thereof by instalments." The law has not only been made more accessible (our 1890 solicitor would undoubtedly have investigated many more cases beyond *Reuter v Sala*) it has also been made more certain.

In other cases, a seemingly clear analytic scheme is seen, on close examination, to provide only limited guidance. Andrew Tettenborn, for instance, utilises a framework which makes distinctions between matters of 'uncertainty',[36] 'communication',[37] and 'indeterminacy'.[38] Despite the apparent rigour of this approach, it is compromised by the absence of an explicit and clear definition in respect of each of these labels.

Presented with these difficulties, and faced with the need to craft clear definitions, it is necessary to look beyond the literature in respect of codification, and to consider what lessons might be derived from more general writings on the subject of 'certainty'. Some care must be taken when surveying this literature, since the notion of 'certainty' has figured regularly in jurisprudential debates, not all of which have relevance in the present context.

One body of writing which can be largely set to one side is that concerned with the degree to which legal decision-making is 'bounded' by law. Though the central issues in this debate can be formulated in a number of different ways, the key question is the degree to which the answers to legal problems are a function of the application of legal doctrine, and to what extent answers are instead the products of what can for present purposes be termed 'extra-legal' considerations.[39] The scholarship on this subject can be sub-divided into various schools of thought, among which can be counted the realists and the critical legal studies movement.[40] Throughout the literature in this area, terms such as 'indeterminacy' are often used as a shorthand for the contention that legal doctrine is not determinative of legal problems.[41]

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[36] Tettenborn, above, n 30, pp 278-80.
[37] Tettenborn above, n 30, pp 280-3.
[38] Tettenborn above, n 30, pp 283-5.
[39] For some examples of contributions to this debate, see: J W Singer 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale LJ* 1; R Posner *How Judges Think*, Harvard University Press, Cambridge MA, 2008.
[40] For a general overview of the emergence, nature and influence of legal realism, see: M J Horwitz *The Transformation of American Law 1870 – 1960: The Crisis of Legal Orthodoxy*, Oxford University Press, New York, 1992; W W Fisher, M J Horwitz and T A Reed *American Legal Realism*, Oxford University Press, New York, 1993. For an account of the core project of critical legal studies, see: R Unger *The Critical Legal Studies Movement: Another Time, A Greater Task*, Harvard University Press, Cambridge MA, 1983.
[41] For examples of this usage, see: D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685; L B Solum 'On the Indeterminacy Crisis: Critiquing Legal Dogma' (1987) 52 *University of Chicago LR* 462.

Though it is beyond doubt that this debate is of great importance, it has little direct application in the present context. This is because the debate as to legal 'indeterminacy' is not concerned with practical questions such as whether some bodies of legal doctrine are more or less 'indeterminate' than others. It is instead focused on more fundamental questions as to the nature of law and of judicial decision-making. The critical legal scholars, for instance, have had nothing to say on the question of whether the codification of the law of contract (or of any other body of law) can assist in ushering in a more 'determinate' legal order.[42] Instead, such scholarship is focused on the question of whether legal decision-making is *ever* divorced from political and cultural drivers.

More assistance can be found in an examination of a second (albeit somewhat related) debate as to the competing merits of clear rules and flexible, discretionary standards. The two sides of the debate have been explained by Cass Sunstein in the following terms: [43]

> The first, associated with Jeremy Bentham and more recently with Justices Hugo Black and Antonin Scalia, places a high premium on the creation and application of general rules. On this view, public authorities should avoid "balancing tests" or close attention to individual circumstances. They should attempt instead to give guidance to lower courts, future legislators, and citizens through clear, abstract rules laid down in advance of actual applications. The second conception, associated with William Blackstone and more recently with Justices Felix Frankfurter and John Marshall Harlan, places a high premium on law-making at the point of application through case-by-case decisions, narrowly tailored to the particulars of individual circumstances. On this view, public authorities should stay close to the details of the controversy before them and avoid broader principles altogether.

Though the terminology used in this debate is not always consistent, the literature nonetheless shares common concepts and frameworks. Peter Schuck, for instance, uses the term 'indeterminacy' interchangeably with 'uncertainty', and explains that it: [44]

> [I]s a quality of both rules and of legal processes and institutions. Indeterminate rules, processes, and institutions are usually open-textured, flexible, multi-factored, and fluid. The familiar reasonableness standard in tort law is an example of an indeterminate rule. Turning

[42] This is not to say that critical legal scholars have neglected the law of contract altogether. For some examples of a critical approach to contract law, see: J M Feinman 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard LR* 678; C Dalton 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale LJ* 997. For an overview with a particular focus on Australia, see: P Drahos and S Parker, 'Critical Contract Law in Australia' (1990) 3 *JCL* 30. Richard Hyland has discussed the implications of critical legal theory for codification, but has done so with the object of discerning what modern jurisprudential debates may have to teach us about the process of codification: R Hyland 'Codification and the American Discussion About How Judges Decide Cases' in Keyes and Wilson, above, n 2.

[43] C Sunstein, 'Problems With Rules' (1995) 83 *California LR* 956 at 956-7 (footnotes omitted). For further examples of analyses which employ this framework, see, eg, L Kaplow 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke LJ* 557; E Friedman and A L Wickelgren 'A New Angle on Rules versus Standards' (2014) 16 *American Law and Economics Review* 499.

[44] P H Schuck, 'Legal Complexity' (1992) 42 *Duke LJ* 1 at 4.

> on diverse mixtures of fact and policy, indeterminate rules tend to be costly to apply and their outcomes are often hard to predict.

Though the terminology here is somewhat at odds with Sunstein's, it is clear that both are concerned with a tension between clear yet inflexible rules, and flexible yet unpredictable standards.[45]

The principal value of this literature for present purposes is its highlighting of the competing normative dimensions of 'certainty'. Indeed, as is reflected in the closing sentence of the passage from the 2012 Discussion Paper quoted above,[46] there are a number of explicit acknowledgements in the codification literature of the fact that 'certainty' can, at least on some understandings, be a double-edged sword.[47] Any framework for the assessment of 'certainty' as a dividend of codification must incorporate a consideration of this important normative question.

On the other hand, the weakness of this literature for present purposes is in its failure to take full account of the real-world operation of legal doctrine. The distinctions contemplated in the passages set out above are of great use in assessing the 'certainty' inherent in particular legal principles by characterizing them as either rules or standards (or, perhaps more accurately, placing them on a spectrum which has these two concepts at its poles). Yet these distinctions fail to engage with questions such as the 'accessibility' or 'intelligibility' of the law for its users. This is, of course, unsurprising: the analytic framework described by Sunstein and Schuck was never intended to be used a means of assessing the 'certainty' of law in the context of codification. What is needed is a framework for analyzing 'certainty' which is specifically adapted to the issues and concerns which arise in this setting.

In line with this, the framework which will be utilized here subdivides the general notion of 'certainty' in this setting into two interrelated concepts. The first can be deemed 'legal certainty': that is, the confidence with which it is possible to state the content and scope of substantive legal principles. A body of law can be said to be 'certain' in this sense if it is

[45] For an example of terminology which differs yet further, see: J Braithwaite 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.
[46] 'That said, the degree to which certainty is valued may need to be balanced against its potential to produce unfairness', citing Eisenberg, above, n 31.
[47] See, eg, M Keyes and T Wilson, 'Codifying Contract Law: Internationalization Imperatives and Regional Perspectives' in Keyes and Wilson, above, n 2, p 12.

possible to confidently state its constituent principles in the abstract of their application to a particular set of facts.

The second aspect is best termed 'accessibility', as it connotes the ease with which the law's 'users' can ascertain with accuracy the way in which particular real-world questions would be resolved if they were to be submitted to formal adjudication. Understood in this way, 'accessibility' is a function not only of the ease with which legal sources can be accessed and understood, but also of the degree to which the law's 'users' can confidently predict the outcome of adjudicative processes. As is no doubt apparent, any analysis of this second aspect of 'certainty' must grapple with the points discussed above as to the comparative normative merits of rules and standards.

Two points should be made in respect of this framework. First, there is nothing revolutionary or startling about these definitions. Indeed, there is good reason to think that the framework proposed here does little more than give clear expression to ideas which are implicit in much of what has been written in respect of codification.

Second, it is not suggested that this framework is the *only* means by which 'certainty' in this context might be adequately analyzed. One could well proceed, for instance, by separating 'accessibility' into the two constituent parts noted above, and proceeding with a tripartite framework for assessing 'certainty' as a whole.[48] Even so, it is not necessary to dwell on the various ways in which this framework could be subdivided or reframed. It is preferable to proceed instead to its application.

'LEGAL CERTAINTY' UNDER A CODE

There is a logical and intuitive appeal to the suggestion that a code can make easier the task of confidently stating legal principles. At least at first glance, codification does away with some features of the common law which can hamper 'legal certainty'. A code can, for instance, pre-empt legal questions, thus providing an answer without the necessity of waiting for an

[48] Indeed, it seems to be something of this kind which Andrew Tettenborn has in mind in respect of the framework discussed above, though, as also noted above, the point is not made explicit. For an example of an alternative framework for understanding 'certainty' which, though drawing upon much of the theoretical literature discussed above, differs in some key respects from the framework used here, see: I MacNeil, 'Uncertainty in Commercial Law' (2009) 13 *Edinburgh LR* 68.

appropriate test case.[49] Codes also typically employ uniform terminology and internally coherent conceptual frameworks, each of which facilitates the ease with which substantive legal principles can be identified and stated.[50]

Even so, it would be quite wrong to exaggerate these advantages enjoyed by a codified body of law. The fact that codes are subject to judicial exegesis has two important ramifications which are relevant here. The first is that, at least in the immediate wake of their enactment, codes operate to *promote* uncertainty, given the necessity of building up a body of guiding case law.[51] Thus, the effect of an amendment of the codifying legislation in respect of bills of sale was described by a contemporaneous commentator thus:[52]

> The words with which the Master of the Rolls began his judgment in one of the earliest cases that came before the Court of Appeal were ominous. The Act, he said, 'will give rise to many discussions on questions of law.' Not only has this turned out to be a prophecy painfully true to litigants, but, had he added that Judges of great and acknowledged ability and experience would differ among themselves, and even at times change their opinions as to the construction of the provisions of the statute, it would have been equally true. The tests of the validity of bills of sale under the Act have varied from time to time, and words and a form, which were at first supposed to be simple, have been found to be full of internal difficulties and complications. In fact a legislative riddle has been put forth, and though some of its knots have been cut by the Courts, the difficulties can hardly be deemed to have been solved by that process.

The second is that, once such a body of case law begins to build up, codes are capable of giving rise to precisely the sorts of difficulties which often cause uncertainty in areas of the law which are comprised largely or wholly of common law rules. To give just one example, there was, up until very recently, a long-running controversy as to the proper construction of the Uniform

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[49] A practically important example of this type of uncertainty in the common law of contract is that of the legal effect of clicking 'I agree' on an electronic form (in particular, that of whether it has the same effect as a signature). Though the question was addressed in *eBay International AG v Creative Festival Entertainment Pty Limited* (2006) 170 FCR 450; [2006] FCA 1768, the unsatisfactory way in which the issue was dealt with meant that the position remained unclear. A similar example may be the application of the postal acceptance rule to email, which for some time generated considerable controversy. See: S Hill, 'Flogging a Dead Horse: The Postal Acceptance Rule and Email' (2001) 17 *JCL* 151. Of course, a code's ability to pre-empt the answers to new legal questions which flow from changes in technology and social conditions depends on whether it is updated from time to time.

[50] R Goode, 'The Codification of Commercial Law' (1988) 14 *Monash University LR* 135 at 137-8. For a discussion of the potential of a non-binding restatement to address uncertainty, see: K Barker, 'Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales' (2014) 34 *OJLS* 155.

[51] This point has been explicitly recognised on a number of occasions. See, eg, H R Hahlo 'Here Lies the Common Law: Rest in Peace' (1967) 30 *MLR* 241 at 249-50.

[52] E Cooper Willis, 'Observations on the working of the Bills of Sale Act 1878, Amendment Act 1882' (1887) 3 *LQR* 300 at 300-1. This example is also cited in Swain, above, n 2, p 141. For a further discussion of difficulties encountered under the legislation in respect of bills of sale, see: V H Kulp 'The Fictitious Payee' (1920) 18 *Michigan LR* 296. For a general discussion of the codification of commercial law in this period, see: A Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *LQR* 570.

Evidence Legislation provisions relating to the conditions for the admissibility of tendency evidence in criminal trials.[53] The difficulty arose from different constructions being adopted by the courts of New South Wales and the courts of Victoria, and was resolved only upon the High Court pronouncing upon the matter.[54] It is, put simply, quite wrong to think of the difficulties caused by conflicting or inconsistent authorities as being a problem which can be wholly done away with through codification.

These points, though perhaps obvious, cast some doubt on the real impact which codification would be likely to have in this sphere. Yet there remains a more fundamental point to be made. In recent decades, many commentators have suggested that one of the principal sources of uncertainty in the Australian law of contract has been the lack of judicial leadership shown by the High Court of Australia. It is not possible here to canvass the full range of writings in respect of this point, or to test whether such criticisms are merited.[55] It should be emphasised, however, that if a lack of leadership on the part of the High Court is indeed a key driver of uncertainty in the law of contract, there can be little basis for thinking that this difficulty would be remedied by the adoption of a contract code.

'ACCESSIBILITY' UNDER A CODE

As was explained above, 'accessibility' is used here to connote the ease with which the law's 'users' can ascertain with accuracy the way in which particular real-world questions would be resolved if they were to be submitted to formal adjudication. Understood in this way, 'accessibility' is a function not only of the ease with which legal sources can be accessed and understood, but also of the degree to which the law's 'users' can confidently predict the outcome of adjudicative processes. This part thus proceeds by addressing each of these points in turn. Before undertaking that task, however, it is necessary to say something in respect of

[53] See, eg: *Evidence Act 1995* (Cth) s 97. Though it is not material for present purposes, there is a question as to whether the Uniform Evidence Legislation can properly be termed a code, given it seems to presuppose the continued operation of some common law rules. See: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 631-2; [2011] HCA 21 at [110] per Heydon J.

[54] The question was resolved in *Hughes v The Queen* (2017) 344 ALR 187; [2017] HCA 20. For examples of the competing constructions in New South Wales and Victoria, see: *Saoud v The Queen* (2014) 87 NSWLR 481; [2014] NSWCCA 136; *Velkoski v The Queen* (2014) 45 VR 680; [2014] VSCA 121.

[55] Though see, eg: J W Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia LR* 49; A Stewart and J W Carter, 'The High Court and Contract Law in the New Millennium' (2003) 6 *Flinders Journal of Law Reform* 185; Stewart, above, n 2, pp 79-81; J W Carter, W Courtney, E Peden, A Stewart and G J Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *JCL* 99 at 128-30.

the normative importance of 'accessibility' in the domain of contract.

There are many powerful general statements of the normative importance of the accessibility of law and legal sources. Lord Bingham, for instance, has given the following explanation which canvasses the principal points which are typically invoked: [56]

> The law must be accessible and so far as possible intelligible, clear and predictable. Why must it? I think there are really three reasons. First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can. One important function of the criminal law is to discourage criminal behaviour, and we cannot be discouraged if we do not know, and cannot reasonably easily discover, what it is we should not do. The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations. It is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it. Equally, you can only perform a duty to recycle different kinds of rubbish in different bags if you know what you are meant to do. The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.

Each of these points can, of course, be accepted without demur. More prosaic accounts of the normative importance of the accessibility of legal sources to the legal profession can also be found. An example is seen in the comments of Windeyer J in *Incorporated Council of Law Reporting (Queensland) v Federal Commissioner of Taxation*: [57]

> In any country governed by the common law, the publication of the reports of decisions of the superior courts is essential for the continuance of the rule of law. The continuity of the common law and its characteristic capacity for development and change depend upon those who are concerned with its administration having a means of knowing the current course of precedents. Without that the law would become stagnant and cease to be a living stream. Ever since the time of the Year Books law reports have been the essential nourishment of the life of the common law.

Again, these points can be accepted without objection. There can indeed be little doubt that the ability of the legal profession and the public to access and comprehend legal sources is of significant importance. The difficulty, however, is that this importance can easily be exaggerated in the debate surrounding contract codification. This risk is particularly likely to

[56] T Bingham, *The Rule of Law*, Allen Lane, London, 2010, pp 37-8. Bingham's conception of the rule of law clearly owes a great deal to Dicey, among others, but it is not necessary to explore the provenance of Bingham's views on this point.

[57] (1971) 125 CLR 659 at 672.

eventuate if inadequate attention is given to the lessons offered by the now mature literature in respect of the degree to which the positive rules of contract law 'matter' to the law's users.

It is neither possible nor necessary to survey here the whole of the empirical literature in this sphere. It is enough, given the now uncontroversial nature of the core claims upon which reliance is placed here, simply to offer a brief sketch of a number of key points. The first point relates to the importance placed upon formal contract law by business entities. As is well known, the scholarship in this field is overshadowed by the figure of Stewart Macaulay, who, with 'Non-Contractual Relations in Business',[58] profoundly influenced the development of empirical contracts scholarship.[59] As John Gava has explained: [60]

> Macaulay made six key claims in 'Non-contractual Relations'. The first was that firms, large and small, tried to plan their transactions. Second, planning and recourse to contract law were used when the gains were thought to outweigh the costs. Third, legal sanctions were often unnecessary and could have undesirable effects. Fourth, legal enforcement harmed trust and existing business relationships. Fifth, legal sanctions were rarely used to settle disputes, with trust and various reputations mechanisms the preferred means to adjust relationships and settle disputes. Finally, businesspeople preferred trust to contract even in transactions that involved risk and large amounts of money.

Though groundbreaking, the core of Macaulay's findings – that formal legal sanctions, and the formal rules of contract, matter to business actors far less than might be thought – are now taken largely for granted. Indeed, the debate in this sphere is now largely focused on the question of what ought to flow from these findings.[61]

A related body of literature has arrived at similar conclusions in respect of consumer contracting. Most notable in this regard is a string of empirical studies in the United States which has shown that consumers have little propensity to seek to familiarize themselves with the provisions of standard-form contracts, even where it seems important to do so.[62] The

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[58] S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55.

[59] For a consideration of the legacy of Macaulay's scholarship as a whole, see: J Braucher, J Kidwell and W C Whitford, eds, *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical*, Hart Publishing, Oxford, 2013.

[60] J Gava 'Taking Stewart Macaulay and Hugh Collins Seriously' (2016) 33 *JCL* 108 at 110. Gava's summary draws in turn upon that provided by Robert Scott. See: R Scott 'The Promise and the Peril of Relational Contract Theory' in Braucher, Kidwell and Whitford, above, n 59, pp 108-11.

[61] Gava, above, n 60, pp 108-9.

[62] See, eg: Y Bakos, F Marotta-Wurgler and D R Trossen 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43 *Journal of Legal Studies* 1. This empirical literature has been supplemented in recent years by theoretical analyses in a similar vein. See, eg, M J Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Princeton University Press, Princeton, 2013.

lesson, put simply, is that consumer contracting, much like business contracting, seems to take place at something of a remove from considerations as to strict legal rights and duties.[63]

Though the accessibility of legal sources, both to the public and the profession, is undoubtedly important, it must always be remembered that lawyers have a wholly natural tendency to exaggerate the importance of contract law in the conduct of the everyday affairs of businesspeople and consumers. It is thus necessary, when considering the analysis which follows, to ensure that the normative importance of 'accessibility' is tempered by an acknowledgement of the findings of this scholarship.[64]

Accessing and Understanding Legal Sources

Though the questions which arise in this setting may at first seem ripe for empirical analysis, there is in reality quite limited scope for such work as a means of directly answering the key questions in issue here.[65] This is so for two reasons. First, and most obviously, contract codes differ drastically in length, content, detail, style, and expression. It is thus not possible to conduct an empirical analysis measuring the relative accessibility of a code and the common law unless it is possible to identify a specific code in respect of which the analysis is to be carried out.

Second, even if a particular code were under analysis, there are real difficulties in conceiving of an experimental design that adequately emulates the conditions in which law is actually used. It is thus difficult, even in a case where it is sought to compare the common law with a particular code, to undertake empirical work which yields useful findings. The point is well-illustrated by considering the approach which was adopted in the empirical study carried out

[63] Warren Swain has made a related point, noting that 'Even [if] 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.' See: Swain, above, n 2, p 140.

[64] This is not to say that this scholarship has been wholly ignored. See, eg, Swain, above, n 2, pp 140-1; R Bigwood, 'The Partial Codification of Contract Law: Lessons From New Zealand' in Keyes and Wilson, above, n 2, p 167; R Brownsword, 'After Brexit: Regulatory-Instrumentalism, Coherentism and the English Law of Contract' (2017) 34 *JCL* 139 at 148.

[65] This is not to deny the potential utility of empirical research in exploring other dimensions of the contract codification debate. In particular, it seems likely that an empirical investigation of the demand among businesses and consumers for further 'internationalization' of Australian contract law could be of considerable use in shedding light upon a number of issues. In this connection, it is worth noting that the contract codification debate as a whole must be understood in light of the availability, at least in some circumstances, of transnational legal instruments such as the United Nations Convention on Contracts for the International Sale of Goods.

in respect of the Australian Contract Code.[66]

The goal of the study was to experimentally evaluate the comparative 'utility' of three different models of contract law: the Australian law of contract as it stood at the time of the study, the UNIDROIT Principles of International Commercial Contracts ('UPICC'), and the Australian Contract Code. One object of this approach was to test the relative merits of broad principles and detailed rules.[67] As the authors explained, the study: [68]

> [A]dopted a conception of utility which reflects the demands which are in fact most often made of legal systems by lawyers and non-lawyers alike. These are that the law should be:
>
> - certain (predictable outcomes)
> - just (fair outcomes)
> - accessible (clear language and logic)
> - efficient (easy to comprehend and apply)

The authors sought to test the relative utility of each of the models through a series of experiments involving 1800 Australian university students. The authors described their experiments as follows: [69]

> In the first experiment, law students enrolled in Contract Law were given the facts of a dispute and a statement of the relevant law, drawn from one of the three models, and asked to decide the dispute. They were asked to record their decision (for plaintiff or defendant), along with the time at which it was reached. They were also asked to supply a brief statement of their reasons indicating how they applied the law. A maximum of 80 minutes was allowed to complete these tasks. After this time the students were asked to rank their level of agreement with a number of propositions relating to the utility of the law model (the Likert technique). They were given 10 minutes for this task … Experiment 2 was a replication of Experiment 1 with one difference, namely the student judges worked in pairs … In Experiment 3, university students *not* enrolled in law were asked to read a statement of the facts of a dispute and a judgment deciding the dispute, using one of the law models. They were also asked to complete a questionnaire by responding to a number of propositions about the judgment, again using the Likert technique. Then they were asked to re-familiarise themselves with the facts, read a second judgment in favour of the other party, based on the same or a different law model, and complete an identical questionnaire. They had a maximum of one hour to complete these tasks.

Though reasonable minds may differ as to whether an experiment of this type is capable of yielding useful results,[70] it seems clear beyond argument that it can never hope to capture

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[66] See: Ellinghaus, Wright and Karras, above, n 3.
[67] Ellinghaus, Wright and Karras, above, n 3, p 7.
[68] Ellinghaus, Wright and Karras, above, n 3, pp 25-6. It should be noted that this terminological framework differs yet again from those considered above, lending further support to the conclusion that there exists widespread confusion as to what 'certainty' connotes.
[69] Ellinghaus, Wright and Karras, above, n 3, pp 27-8.
[70] The authors argued strongly that the conditions sufficiently emulated real-world results so as to yield useful findings. See: Ellinghaus, Wright and Karras, above, n 3, pp 32-3.

fully the conditions in which law is actually used and applied.[71] Much the same can be said of other quantitative approaches, such as Aubrey Diamond's technique of analyzing cases in both codified and uncodified areas of law in an effort to collate statistical information as to the cases cited therein.[72] As Diamond acknowledges, this approach too suffers from methodological limitations: [73]

> Although these figures give us some insight into the operation of our system of case-law, it is fair to say that they will not give a precise picture of the amount of case investigation involved in legal practice. No account is taken of the cases read and rejected for one reason or another. Nor are the reported cases I have chosen necessarily representative (though there is sufficient similarity between each of the three volumes of 1965 to suggest that none of them is wildly unusual). Moreover, the study is looking at - can only look at - reported cases: cases reported are likely to be those involving important, interesting or novel points of law. There must be many cases fought where no authorities were cited and the sole issue is one of fact. Without a different type of inquiry we can know little of the cases not reported, and even less of those not brought to hearing.

It is consequently preferable to put empirical analyses to one side, and to consider instead what can be said in respect of the general plausibility of the contention that a code is easier for both the profession and the public to access and understand.

This task is complicated by the fact that the arguments adduced on this point are often difficult to test, involving assertions, unsupported by clear evidence, as to the difficulties engendered by the status quo or the supposed superiority of alternative arrangements.[74] It seems unlikely, in short, that the competing claims can be clearly resolved,[75] and it may be that this question is one which, along with other recurring questions in the codification debate, is simply not susceptible of a firm answer.[76]

Even in the face of these difficulties, however, several points can be established quite clearly. The first is that, whatever may be the challenges involved in building an understanding of the common law from a consideration of the cases alone, unaided by a treatise or reference work,

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[71] Similar points have been made elsewhere. See: N Thompson, 'Book Reviews' (2006) 27 *Queensland Lawyer* 80 at 82-3.
[72] Diamond, above, n 24, pp 363-8.
[73] Diamond, above, n 24, p 368. Of course, the last difficulty identified by Diamond could today be addressed to some degree by the wider availability of unreported judgments.
[74] See, for instance: Nottage, above, n 30, p 134.
[75] See the comments on this point in: Hahlo, above, n 51, p 248. ('*Ex cathedra* statements of this sort, even if supported by an "of course" or "no doubt", are in the nature of things capable of neither proof nor disproof').
[76] J Farrar, 'The Codification of Commercial Law', in J Finn and S Todd, eds, *Law, Liberty, Legislation*, LexisNexis, Wellington, 2008, p 57.

such difficulties are of little relevance here.[77] To ask whether the law can more readily be identified from the law reports or from a code is to pose a question of little practical significance. A more meaningful comparison would be that between a standard reference text on the one hand and an annotated code on the other.[78] Of course, the resolution to this comparison is not at all obvious. Yet once it is put in these terms, the intuitive appeal of the arguments on behalf of a code is considerably diminished.

Second, it must be acknowledged that the impact of codification upon the accessibility of legal sources is not necessarily wholly positive. Indeed, though the point is largely overlooked, there is a plausible case to be made that codification may operate in some circumstances to hamper the ability of members of the public to arrive at accurate understandings of the law. The point, though important, can be illustrated simply.

Where members of the public seek to inform themselves as to a body of law which is comprised largely of common law rules, there is no single authoritative instrument, promulgated by the state, to which recourse can be had. In such a setting, it seems likely that the individual concerned will consult a resource – whether it be online advice provided by other members of the public, a guide published by a commercial entity, state agency or NGO, or instead a textbook or reference work – which will synthesise and state the common law.

If a member of the public sought similar information in respect of a codified system of law, he or she would – likely at a keystroke – be presented with what appears on its face to be an exhaustive and state-sanctioned statement of the law in respect of the relevant subject. The natural conclusion to be drawn by a non-lawyer when faced with such an instrument may well be that the instrument is itself the final word. If the code has been construed in a manner somewhat at odds with its natural or apparent meaning, the potential for confusion and error is clear. As Anthony D'Amato has noted, and as any lawyer can attest: [79]

> [A] statute that seemed to mean one thing may be construed by a court to mean something different. Although the court will usually say that it is clarifying the statute, it does not always do so. It may create an exception, an exemption, a privilege; it might construe the rule narrowly to avoid constitutional problems, or broadly to give effect to an unnoticed

[77] See: Diamond, above, n 24, p 364. ('The truth is that there are many practitioners who rarely open a law report more than two years old').
[78] Of course, both must be supplemented by a general research resource whenever there is a risk, in respect of a particular point, that the annotated code or reference work may have been superseded by later developments.
[79] A D'Amato, 'Legal Uncertainty' (1983) 71 *California LR* 1 at 2.

> legislative intent buried in the legislative history. The court's decision becomes a part of the meaning of the rule, so that the rule now becomes more complex-it is a statute plus a judicial decision.

There is, of course, no clear means of ascertaining the degree to which this phenomenon might manifest itself.[80] There is, moreover, good reason for thinking its significance may be greater in some spheres than in others: sophisticated commercial actors may be less likely to fall victim to such an error than consumers. It is also quite right to say that this risk might be ameliorated by the taking of active steps, such as ensuring any code is published alongside an explanation that its provisions are subject to judicial exegesis. Even so, it can hardly be denied that the risk is a real one.[81]

It is, in sum, difficult to arrive at a firm view as to the impact which codification might have upon the ease with which legal sources can be accessed and used. What can be said, however, is that the intuitive appeal of the arguments on behalf of codification is considerably diminished upon close examination.

Predicting Adjudicative Outcomes

It is now necessary to turn finally to a consideration of whether the introduction of a code would likely affect the degree to which the law's 'users' could predict the outcome of adjudicative processes. Several points should be made at the outset.

First, it would of course be a mistake to suggest that formal adjudication is itself of the first order of importance to either consumers or business. Such a contention would be flatly at odds with the empirical scholarship canvassed above. Even so, the ability to ascertain with relative ease how a dispute would be determined if it *were* submitted to formal adjudication is of some considerable importance to both consumers and business. This is, of course, unsurprising, and is reflected in the submissions made to the 2012 Discussion Paper by a range of groups, many of whom stressed the importance of being able to readily gauge the likely answer to legal

[80] There is limited information available as to the degree to which individuals, when encountering legal problems, seek to resolve their difficulties by consulting published sources. See: Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, pp 99-110.

[81] Such a risk has been acknowledged, though only in general terms. See, eg: Reynolds, above, n 15, p 16. ('A further function is to promote accessibility. There is no need to go so far as supposing a garage proprietor with a small copy of the contract code in his back pocket. Informed persons from outside the charmed circle can have access to basic principles for themselves, even if they may not understand them and may even on occasion be misled.')

problems.[82]

Second, the analysis of this dimension of 'certainty' must grapple with the point canvassed earlier as to the comparative normative merits of rules and standards.[83] The reason for this is plain: if codification were to increase the degree to which the outcome of adjudicative processes can be accurately predicted, but were to achieve this by curtailing the flexibility afforded by the common law, it might well be thought – depending on one's view as to the comparative normative merits of rules and standards – that the added certainty were won at too great a cost. It is precisely this type of calculus which underlies the many expressions of concern that codification may lead to a loss of flexibility and a concomitant loss of the ability to achieve just outcomes in individual cases.[84]

It is plainly impossible here to seek to resolve the debate as to the relative merits of rules and standards.[85] Two points can nonetheless be made. First, it is important to acknowledge that even if codification were to increase the ease with which the outcome of adjudicative processes could be predicted, it would be necessary to consider whether, or to what extent, such certainty was won at the expense of flexibility. If indeed such a trade-off were involved, the question as to whether the balance was appropriately struck would be normatively complex.

Second, it should be stressed that codification need not *necessarily* lead to the fettering of adjudicative discretion. This point is best illustrated by reflecting again on the Australian Contract Code, which confers far more discretion on the court than does the common law of contract.[86] Indeed, as was seen, the Australian Contract Code is a code which has discretion

[82] See for example the submission of the Civil Contractors Federation (Submission No 17), which highlights the difficulties which can flow from uncertainty as to how a contract will be construed.

[83] For arguments in favour of the normative importance of rules, see, eg: J Raz 'Legal Principles and the Limits of Law' (1972) 81 *Yale LJ* 823; A Scalia 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago LR* 1175. For a contrary view, see: Y Feldman and S Lifshitz 'Behind the Veil of Legal Uncertainty' (2011) 74 *Law and Contemporary Problems* 133.

[84] See, eg: Keyes and Wilson, above, n 47, p 12. This type of concern should not be confused with the rather different concern that codification will prevent the law from evolving so as to meet the needs presented by changing technological and social conditions. This point can be put to one side at present, though it is worth noting that there is some cause to question the degree to which the common law of contract evolves in this way. See, eg, the discussion in: M J Radin, 'The Deformation of Contract in the Information Society' (2017) 37 *OJLS* 505.

[85] It seems distinctly improbable, of course, that this question has a 'right' answer.

[86] Of course, the authors of the Australian Contract Code would likely resist this contention, since, as explained above, the Code rests on the empirical claim that detailed rules in truth yield no more predictable outcomes than broad principles.

at its core. It would thus be quite wrong to proceed on the footing that codification would inevitably involve a reduction in flexibility in the law of contract.[87]

Having dealt with these conceptual points, it is now necessary to consider two particularly important practical considerations which tend against the likelihood of codification having a meaningful impact in this sphere.

The first point is entirely straightforward, but it is nonetheless of great importance. This is that it is important, when considering the degree to which it is possible to predict the outcome of an adjudicative process, to distinguish between uncertainty which stems from questions of law and uncertainty which is referable to the facts of the dispute in question. The outcome of many forensic contests can, at the outset, aptly be termed 'uncertain' insofar as their outcomes are difficult to predict.[88] But this uncertainty relates, in many cases (and especially those in the lower courts, where the vast majority of disputes are heard), to the difficulty of predicting what will be the findings of fact in the dispute in question. It is, for instance, very difficult to foresee how evidentiary material will be received by the tribunal of fact, or whether evidence will be shaken in cross-examination. Furthermore, in contractual disputes, difficulties often flow from disagreements as to the proper construction of the parties' agreement.[89] Though this type of uncertainty is undoubtedly not welcomed by parties to litigation, it is for the most part unavoidable. Indeed, there would be cause for concern if the outcome of forensic disputes were generally predictable: such a state of affairs would suggest that matters which ought to have been the subject of settlement agreements were being brought to hearing unnecessarily.

There is no sense in which codification can be expected to ameliorate uncertainty which has its genesis in the facts of particular disputes.[90] There is accordingly a limit to how far the uncertainties inherent in many disputes could be influenced by the introduction of a code.

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[87] This is in fact implicitly acknowledged whenever it is argued that codification along 'civilian' lines – that is, the adoption of a code that states principles at a high level of abstraction – is alien to a common law system. See, for instance, the discussion in: M Kerr, 'Law Reform in Changing Times' (1980) 96 *LQR* 515 at 527-8.

[88] There is considerable empirical evidence which suggests that even lawyers have a limited ability to accurately predict the outcomes of forensic contests. See, eg, J Goodman-Delahunty, P Anders Granhag, M Hartwig, and E F Loftus, 'Insightul or Wishful: Lawyers' Ability to Predict Case Outcomes' (2010) 16 *Psychology, Public Policy, and Law* 133.

[89] Predicting the outcome of a construction dispute is a notoriously hazardous undertaking. See: J Steyn, 'The Intractable Problem of the Interpretation of Legal Texts (2003) 25 *Sydney LR* 5; D McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney LR* 5 at 5.

[90] This point was recognised by the submission made to the 2012 Discussion Paper by T F Bathurst, the Chief Justice of New South Wales (Submission No 11).

The second point concerns the issue of access to justice, which has been the subject of a recent and thoroughgoing assessment in Australia by the Productivity Commission.[91] It is, of course, trite to observe that the practical enforceability of legal rights is in part a function of the degree to which legal advice can be sought and readily obtained.[92] Yet the availability of legal advice is of equal importance in ascertaining whether a practically enforceable right exists in the first place. It is, in other words, of critical importance in ascertaining how a question would likely be resolved if it were submitted to a formal adjudicative process.

Recent years have seen a steady increase in concern as to the cost and difficulty of accessing professional legal advice and the courts.[93] These concerns were underscored by the findings of the Productivity Commission. The Commission explained, for instance: [94]

> While many disputes can be resolved with some basic information and direction, where people do need to engage a private legal professional, they find selecting a service provider challenging. The irregular need for legal advice, combined with different billing arrangements and services offered by providers, makes drawing comparisons difficult and often inconclusive. The difficulties consumers face in selecting lawyers — and switching lawyers, should they prove dissatisfied — have meant that they have not fully appropriated the benefits of the increased supply of lawyers in recent years.

Of course, the receipt of professional legal advice is only one way in which the existence and nature of legal rights can be ascertained. Yet even when taking a broad view of the means by which individuals and businesses can obtain relevant information, there are many practical barriers which remain.[95]

Again, the uncertainty which is consequent on an inability to obtain adequate legal advice and information is a species of uncertainty which would not be affected by the introduction of a code. It is of course no answer to say that under a code, the cost of legal representation would be lower as a result of the increased ease and speed with which practitioners could ascertain

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[91] Productivity Commission, *Access to Justice Arrangements: Inquiry Paper*, 2014.
[92] This point, though of undoubted importance, cannot be said to be an issue of 'certainty', and as such can be put to one side at present.
[93] See, eg: W Martin, 'Creating a just future by improving access to justice', Community Legal Centres Association WA Annual Conference, Perth, 2012; T F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35 *UNSWLJ* 870 at 870; K M Hayne, 'The Australian Judicial System: Causes for Dissatisfaction' (2018) 92 *ALJ* 32 at 33.
[94] Productivity Commission, *Access to Justice Arrangements: Inquiry Paper, Overview*, 2014, p 9.
[95] See, for instance, the matters canvassed in: Attorney-General's Department (Cth), A Strategic Framework for Access to Justice in the Federal Civil Justice System, 2009, pp 16-25.

the relevant law. Such an argument presupposes that a code would indeed be more accessible, whereas, as explained above, such a conclusion is in truth questionable.

There is, in sum, real reason to doubt that codification would meaningfully affect the 'accessibility' of the law, either by promoting the ease with which legal sources can be accessed and understood, or by facilitating the prediction of the outcome of adjudicative processes. These conclusions, taken together with those above, suggest that codification's likely dividend in respect of 'certainty' can easily be overstated.

CONCLUSION

This article has sought to explore the question of whether the codification of the Australian law of contract would promote 'certainty'. Having undertaken that analysis, it remains only to make a number of final points in order to situate its conclusions within the broader context of the contract codification debate.

As was noted at the outset, this article has conceded that codification might plausibly improve 'certainty' to some small extent. Its core contention has been that this effect would be considerably less significant than is commonly suggested.

The concession that codification may yield some slight dividend in respect of 'certainty' might be thought to amount, at least insofar as 'certainty' is concerned, to a prima-facie case for reform. Though it is not possible here to enter at length into the general debate respecting the desirability of contract codification, it should nonetheless be emphasised that the costliness and difficulty of codification as a law reform exercise means it is necessary to establish a very strong positive case in its favour in order to support the conclusion that it ought to be undertaken. Where there is reason to think codification would promote a particular normative goal, the degree to which it does so must be weighed against the various costs and difficulties which are unavoidable in such a reform. Such a view is hardly controversial.[96] Indeed, the

[96] Such an approach is at least implicit in almost all analyses of the merits and demerits of codification.

many practical challenges inherent in any codification project are well-canvassed in the literature.[97]

Although a concluded view could only be offered upon a detailed analysis of all of the relevant competing factors in respect of contract codification, it is nonetheless suggested that the relatively modest positive effect which codification may have upon 'certainty' means that its significance as a factor in favour of codification is quite minor. Though it may be that other drivers of codification nonetheless tilt the scales in favour of reform – and this article offers no view either way on this point – it is nonetheless plain that the discussion above has cast doubt upon the confidence with which the case for codification has often been put.

[97] See, eg, Diamond, above, n 24, pp 375-84; B Donald, 'Codification in Common Law Systems' (1973) 47 *ALJ* 160 at 172-3; H R Hahlo, 'Codifying the Common Law: Protracted Gestation' (1975) 38 *MLR* 23; A E Anton, 'Obstacles to Codification' (1982) 15 *Juridical Review* 15; Swain, above, n 2, p 149. It is worth noting that the literature has engaged only obliquely with a fundamental challenge to any contract codification project – namely that of the entrenched and fundamental disagreement as to the purpose which contract law ought to serve. The debate is often described as being between 'formalism' and 'contextualism', though to do so is to oversimplify the nature of the disagreement. The debate is far from being merely academic, and has a range of practical ramifications. For an overview of this controversy, see: J Gava, 'How Should Judges Decide Commercial Contract Cases?' (2013) 30 *JCL* 133.

PAPER TWO: ‘SURROUNDING CIRCUMSTANCES IN CONTRACTUAL INTERPRETATION: WHERE ARE WE NOW?’

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Signed Date: 18 February 2019

'SURROUNDING CIRCUMSTANCES' IN CONTRACTUAL INTERPRETATION: WHERE ARE WE NOW?

John Eldridge*

For several decades, the High Court's pronouncements on the subject of contractual interpretation have generated confusion in intermediate appellate courts and caused considerable academic debate. The key difficulty relates to the question of when recourse may be had to evidence of 'surrounding circumstances' as an aid to construction. In particular, a controversy has emerged in recent years as to whether it is necessary to point to textual 'ambiguity' as a precondition for the use of such evidence as an aid to construction. Though this question is fundamental and of some considerable importance, the task of answering it is far from straightforward. The object of this short article is to explain the nature of the difficulty in respect of this question, and to consider a number of recent developments both in the High Court and in intermediate appellate courts. In doing so, it is sought to offer an assessment of the present state of the law and a view as to its likely future development.

I INTRODUCTION

Given the regularity with which disputes as to the proper construction of contracts present themselves in legal practice, it might well be thought that the basic principles in this sphere should be well-settled.[1] Though it may be accepted that academic debate in respect of construction will inevitably be characterised by disagreement,[2] and that some technicality might necessarily attend the rules which apply to the construction of special categories of

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[1] On the regularity with which questions of construction arise in practice, see: David McLauchlan 'Contract Interpretation: What is it About?' (2009) 31 *Sydney Law Review* 5, 5.

[2] In recent years, for instance, the question of whether the implication of terms forms part of the exercise of construction has generated considerable controversy and disagreement. The debate owes its genesis to the advice of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, a decision which has recently been revisited by the UK Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] 3 WLR 1843. See, on this point: Wayne Courtney and J W Carter, 'Implied Terms: What is the Role of Construction?' (2014) 31 *Journal of Contract Law* 151; Joanna McCunn, '*Belize* it or Not: Implied Contract Terms in *Marks and Spencer v BNP Paribas*' (2016) 79 *Modern Law Review* 1090; J W Carter and Wayne Courtney, 'Unexpressed Intention and Contract Construction' (2017) 37 *Oxford Journal of Legal Studies* 326.

contractual term,[3] it should nonetheless be possible to state simply and with some confidence the core principles of contractual interpretation.[4]

This is far from true in Australian law today. For several decades, the High Court's pronouncements on this subject have generated confusion in intermediate appellate courts and attracted astringent academic commentary.[5] The key difficulty relates to the question of when recourse may be had to evidence of 'surrounding circumstances' as an aid to construction. In particular, a controversy has emerged in recent years as to whether it is necessary to point to textual 'ambiguity' as a precondition for the use of such evidence as an aid to construction. Though this question is fundamental and of some considerable importance, the task of answering it is far from straightforward.

The object of this short article is to explain the nature of the difficulty in respect of this question, and to consider a number of recent developments both in the High Court and in intermediate appellate courts. In doing so, it is sought to offer an assessment of the present state of the law and a view as to its likely future development.

Before taking up this task, it is important to note that there are a number of matters which, while undoubtedly of great importance and interest, are not dealt with here. First, this article does not seek to grapple in detail with the question of *what* can properly be said to form part of the 'surrounding circumstances' admissible as an aid to construction. It is often necessary, for instance, to ask whether particular evidence of which direct use cannot be made can nonetheless be used indirectly to prove objective background facts known to both the parties to a contract.[6] Though the questions which arise in connection with this point are of great practical significance, they can be put to one side for present purposes.

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[3] Special rules apply, for instance, to the construction of exclusion clauses. See: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500. For an unusually candid discussion of the history of judicial attitudes towards the construction exclusion clauses, see: *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning).

[4] The terms 'construction' and 'interpretation' are used interchangeably in this paper.

[5] For particularly strong criticism, see: J W Carter, 'Context and Literalism in Construction' (2014) 31 *Journal of Contract Law* 100 and Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, where it is said (at 84) that '[i]t is almost as if the High Court regards this as a private joke that need not be shared'.

[6] See: Ryan Catterwell 'The Indirect Use of Evidence of Prior Negotiations and Subjective Intention: Part of the Surrounding Circumstances' (2012) 29 *Journal of Contract Law* 183; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352; *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297, [57]; *Angas Securities Ltd v Small Business Consortium Lloyds Consortium No 9056* [2016] NSWCA 182, [112]; *Cherry v Steele-Park* [2017] NSWCA 295, [57] – [67].

Second, this article engages only obliquely with the many normative questions which arise in this setting. In particular, this article does not seek to enter the debate as to the limits which *ought* to be placed upon the evidence to which courts may have recourse when construing contracts. Though this debate is of considerable interest and of equally considerable practical importance, and must be engaged with in passing in order to offer an adequate account of the likely development of the law, it too can largely be put to one side at present.[7]

II 'Surrounding Circumstances' in Contractual Interpretation: An Overview of the Controversy

In explaining the controversy in this area, it is best to proceed by giving a roughly chronological account of the key developments. Before turning to the Australian position, however, it is necessary to give some brief consideration to the approach taken to contractual interpretation in English law. Though it would be quite misleading to suggest that the English position is wholly settled,[8] it remains the case that the interpretation of contracts in English courts is governed by reference to the following principles, first enunciated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (hereafter 'the *ICS* principles'):

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

[7] The practical importance of the debate is seen in the concern, expressed on a number of occasions, that the expansion of the field of material to which courts may have recourse when construing contracts will operate to increase the cost and complexity of litigation. See, eg: Sir Christopher Staughton, 'How do the Courts Interpret Commercial Contracts' (1999) 58 *Cambridge Law Journal* 303, 307; J J Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (2007) 81 *Australian Law Journal* 322, 334.

[8] For criticism of the approach which has obtained in England in recent years, and a suggestion that change is afoot, see: Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) 17 *Oxford University Commonwealth Law Journal* 301.

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] 2 WLR 945.
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.[9]

Most important for present purposes is the fact that, under these principles, a court may have recourse to evidence of relevant 'background' as a matter of course, without it being necessary first to demonstrate 'ambiguity'.[10] Of course, care must be taken not to overstate the significance these principles accord to extrinsic evidence: as principle (5) makes clear, a court will be slow to conclude that the 'background' against which a contract was concluded mandates a construction which is at odds with the language in which it is expressed.[11]

The position in Australia is far more vexed. It is necessary to begin with the authority which has been the source of much of the difficulty. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW* ('*Codelfa*'),[12] Mason J (as his Honour then was) set out the following 'rule' in respect of the admissibility of surrounding circumstances when construing a contract:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than

[9] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 – 913. It should be noted that it is somewhat misleading to treat the *ICS* principles as amounting to a radical break with all that had gone before. In addition to Lord Hoffmann's explicit reliance upon the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, it should also be noted that Joanna McCunn has shown that the shift towards contextual construction is in truth something of a return to an approach which prevailed in the early modern period. See: Joanna McCunn 'Revolutions in Contractual Interpretation: A Historical Perspective' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds) *Revolution and Evolution in Private Law* (Hart Publishing, 2018). For an example of an authoritative endorsement of a contextual approach to interpretation as late as 1877, see *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763 (Lord Blackburn). Though his Lordship's comments were made in the immediate context of the construction of a statute, the principles are said to be relevant to the construction of any 'instrument in writing'. See further: Lord Bingham of Cornhill, 'A New Thing Under the Sun? The Interpretation of Contract and the *ICS* Decision' (2008) 12 *Edinburgh Law Review* 374.

[10] The terminological differences in this sphere – as between, for instance, 'context', 'background', and 'surrounding circumstances' – are not wholly insignificant, but they can be put to one side for present purposes.

[11] For further discussion, see: J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) chs 6 and 7.

[12] (1982) 149 CLR 337.

> one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.[13]

At least on one view, this statement can be taken to mean that, when construing a contract, it is necessary to point to textual 'ambiguity' before recourse can be had to evidence of 'surrounding circumstances' as an aid to interpretation.[14] Whatever may be said against such an approach – and it is indeed open to criticism on a number of bases, some of which are discussed below – it might, but for later developments, have come to enjoy a secure place in the Australian law of contract.[15]

Difficulties began to emerge however, when, in a series of decisions over a considerable period, the High Court began to proffer statements of the law which seemed to be at odds with that set out in *Codelfa*. As there already exist a number of detailed surveys of these authorities, it is best simply to draw attention to the nature of the remarks which began to recur in the High Court's decisions.[16] In *Maggbury Pty Ltd v Hafele Australia Pty Ltd*, for instance, the majority stated that:

> Interpretation of a written contract involves, as Lord Hoffmann has put it: 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'[17]

The statement of Lord Hoffmann which the High Court has quoted in this passage is no doubt recognisable as the first of the *ICS* principles set out above. This explicit endorsement of Lord Hoffmann's principles sits uneasily alongside the approach apparently required by *Codelfa*.

In a similar vein, the High Court unanimously stated in *Pacific Carriers Ltd v BNP Paribas*:

> The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires

[13] Ibid 352.
[14] It is worth noting that Sir Anthony Mason, writing extra-curially, has expressed regret at the manner in which he expressed his view on this point. See: Sir Anthony Mason, 'Opening Address' (2009) 25 *Journal of Contract Law* 1, 3. As was observed by Allsop P (as his Honour then was) in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 (at [1]), the statement of the 'true rule' in *Codelfa* might also be contrasted with later statements of Mason J as to the proper approach to the interpretation of legal instruments. See, eg: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (though here the context was statutory interpretation).
[15] For an example of this approach being endorsed in an intermediate appellate court, see: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163 (Heydon JA).
[16] For a detailed survey of the relevant authorities, see, eg: David McLauchlan, 'Plain Meaning and Commercial Construction: Has Australia Adopted the *ICS* Principles?' (2009) 25 *Journal of Contract Law* 7.
[17] (2001) 210 CLR 181, 188 (footnotes omitted).

> consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.[18]

And yet again, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, the Court stated:

> The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[19]

Each of these statements appears to amount to an endorsement of the *ICS* principles by the High Court, at least insofar as the use of 'surrounding circumstances' in construction is concerned. They suggest, put simply, a departure from the approach apparently mandated by *Codelfa*, and the abandonment of any requirement of 'ambiguity' as a precondition to the use of evidence of 'surrounding circumstances' as an aid to construction.

Such conclusions might have been arrived at without difficulty by intermediate appellate courts, were it not for the difficulties posed by the High Court's own statement as to the status of *Codelfa*. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council* ('*Royal Botanic*'), the majority explained:

> [R]eference was made in argument to several decisions of the House of Lords, delivered since *Codelfa* but without reference to it ... It is unnecessary to determine whether their Lordships there took a broader view of the admissible "background" than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.[20]

As is no doubt plain, lower courts were placed in an invidious position. Though the decisions in *Pacific Carriers Ltd v BNP Paribas* and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* were delivered after *Royal Botanic*,[21] the High Court offered no explicit explanation for how they were each to be reconciled. In the wake of these decisions, a number of intermediate appellate courts surveyed the relevant authorities and concluded that it was no longer necessary to point to 'ambiguity' as a precondition to the use of evidence of 'surrounding circumstances'.[22]

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[18] (2004) 218 CLR 451, 461 – 462 (footnotes omitted).
[19] (2004) 219 CLR 165, 179 (footnotes omitted).
[20] (2002) 240 CLR 45, 53 (footnotes omitted).
[21] And see also, for example: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, 529 (Gleeson CJ, McHugh, Gummow and Kirby JJ); *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 (Gleeson CJ), 174 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
[22] See, eg: *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234, [1] – [3].

Matters were soon to be complicated further, chiefly by the reasons given in the disposition of a special leave application in *Western Export Services Inc v Jireh International Pty Ltd* ('*Jireh*').[23] In the course of those reasons, Gummow, Heydon and Bell JJ stated:

> The primary judge had referred to what he described as "the summary of principles" in *Franklins Pty Ltd v Metcash Trading Ltd*. The applicant in this Court refers to that decision and to *MBF Investments Pty Ltd v Nolan* as authority rejecting the requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction. The applicant also refers to statements in England said to be to the same effect, including that by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*. Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* by Mason J, with the concurrence of Stephen J and Wilson J, to be the "true rule" as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts. The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* and it should not have been necessary to reiterate the point here. We do not read anything said in this Court in *Pacific Carriers Ltd v BNP Paribas*; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*; *Wilkie v Gordian Runoff Ltd* and *International Air Transport Association v Ansett Australia Holdings Ltd* as operating inconsistently with what was said by Mason J in the passage in *Codelfa* to which we have referred.[24]

Though these remarks emphasise the necessity of demonstrating 'ambiguity' before having recourse to evidence of 'surrounding circumstances', their utility for lower courts is limited for two reasons. First, as was later observed by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* ('*Wright Prospecting*')[25] the reasons given upon the disposition of a special leave application do not amount to a binding precedent.[26] It is thus unclear how *Jireh* ought to be reconciled with the apparently inconsistent passages quoted above.

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[23] (2011) 282 ALR 604. Though they have had a more muted impact than the special reasons in *Jireh*, it is worth noting also the remarks in the joint judgment of Heydon and Crennan JJ in *Byrnes v Kendle* (2011) 243 CLR 253, 285 (fn 155):

> This Court said in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62-63 [39] that until this Court had decided on whether there were differences between *Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]* [1998] 1 WLR 896; [1998] 1 All ER 98 and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, and if so which should be preferred, the latter case should be followed in Australia. The question has not been argued or decided in this Court. The opinions stated in *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at 384-385 [1]-[4], 406-407 [112]-[113] and *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 616-618 [14]-[18], 621-622 [42], 626 [63], 663-678 [239]-[305] must be read in this light.

[24] *Jireh*, 605 (footnotes omitted).

[25] (2015) 256 CLR 104. Every member of the Court was in agreement on this point. See: *Wright Prospecting*, 117 (French CJ, Nettle and Gordon JJ), 133 (Kiefel and Keane JJ), 134 (Bell and Gageler JJ).

[26] The same point has been made by the High Court on a number of other occasions. See, eg: *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 643; *Attorney-General (Cth) v Finch (No 2)* (1984) 155 CLR 107, 114 – 115.

Second, the High Court, in the wake of *Jireh*, quickly resumed its practice of setting out general statements of the law respecting contractual interpretation which appear to be at odds with the notion that it is necessary to point to 'ambiguity' before recourse can be had to 'surrounding circumstances'. In *Electricity Generation Corporation v Woodside Energy Ltd*, for instance, the Court stated:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.[27]

Similarly, in the very recent decision in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, the majority explained:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.[28]

The High Court authorities are, in sum, in a state of disarray.[29] Faced with the unenviable task of negotiating a path through the conflicting passages set out above, intermediate appellate courts have diverged in their conclusions as to what the law now is. Though it is not necessary here to canvass these divergent views in detail, it is worth noting some of the key differences which have emerged.

In New South Wales, there is now a well-established line of authority which holds that it is not necessary to point to 'ambiguity' before having recourse to evidence of 'surrounding

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[27] (2014) 251 CLR 640, 656 (footnotes omitted).
[28] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [16] (footnotes omitted).
[29] For some of the many discussions of these difficulties, see, in addition to the works cited above: M Walton, 'Where now ambiguity?' (2011) 35 *Australian Bar Review* 176; Derek Wong and Brent Michael, '*Western Export Services v Jireh International*: Ambiguity as the gateway to surrounding circumstances?' (2012) 86 *Australian Law Journal* 57; David McLauchlan and Matthew Lees, 'Construction Controversy' (2011) 28 *Journal of Contract Law* 101; David McLauchlan and Matthew Lees, 'More Construction Controversy' (2012) 29 *Journal of Contract Law* 97; The Hon Justice Kenneth Martin, 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37 *Australian Bar Review* 118; The Hon Kevin Lindgren, 'The Ambiguity of Ambiguity in the Construction of Contracts' (2014) 37 *Australian Bar Review* 153; Thomas Prince, 'Defending Orthodoxy: Codelfa and Ambiguity' (2015) 89 *Australian Law Journal* 491; Daniel Reynolds, 'Construction of Contracts After *Mount Bruce Mining v Wright Prospecting*' (2016) 90 *Australian Law Journal* 190.

circumstances'.[30] Perhaps the most important authority in this connection is *Mainteck Services Pty Ltd v Stein Heurtey SA* ('*Mainteck*'), in which Leeming JA stated, in the course of a careful consideration of the difficulties discussed above:

> To the extent that what was said in *Jireh* supports a proposition that "ambiguity" can be evaluated without regard to surrounding circumstances and commercial purpose or objects, it is clear that it is inconsistent with what was said in *Woodside* at [35]. The judgment confirms that not only will the language used "require consideration" but so too will the surrounding circumstances and the commercial purpose or objects. Although the High Court in *Woodside* did not expressly identify a divergence of approach, *Jireh* was notoriously controversial in precisely this respect … It cannot be that the mandatory words "will require consideration" used by four Justices of the High Court were chosen lightly, or should be "understood as being some incautious or inaccurate use of language": cf *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [45].[31]

This conclusion has been endorsed by the Full Court of the Federal Court of Australia.[32] It has also been reiterated on a number of occasions in the courts of New South Wales, often bolstered by reference to further High Court judgments delivered since *Mainteck*, in particular *Victoria v Tatts Group Limited*[33] and *Simic v New South Wales Land and Housing Corporation*.[34] In *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd*, for instance, Barrett AJA stated:

> [T]he notion that it may first be necessary to consider context when construing a contract is not inconsistent with Mason J's 'true rule'. On this footing, it does not follow that the task of assessing whether a phrase or expression is ambiguous or susceptible of more than one meaning must be undertaken without regard to evidence of surrounding circumstances. This position corresponds with the approach of the High Court in *Victoria v Tatts Group Ltd* where the relevant contract was construed by reference to its text, context and purpose without any anterior finding of ambiguity as a precondition to a consideration of surrounding circumstances as an aid to discovering or elucidating context and purpose.[35]

Similarly, in the recent decision in *Cherry v Steele-Park*,[36] Leeming JA (with whom Gleeson and White JJA agreed on this point) reviewed the relevant authorities and concluded that '[t]here is now a deal of authority for the proposition that whether there is in truth a constructional choice available to a written contract cannot be determined without first at least considering evidence of surrounding circumstances'.[37]

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[30] In addition to the authorities considered below, see, eg: *Righi v Kissane Family Pty Ltd* [2015] NSWCA 238, [44]; *Calvo v Ellimark Pty Ltd* [2016] NSWCA 136, [55]; *Zhang v ROC Services (NSW) Pty Ltd; National Transport Insurance by its manager NTI Ltd v Zhang* [2016] NSWCA 370, [79].
[31] (2014) 89 NSWLR 633, 653 (footnotes omitted).
[32] *Stratton Finance Pty Ltd v Webb* [2014] FCAFC 110, [36] – [40] (Allsop CJ, Siopis and Flick JJ).
[33] [2016] HCA 5.
[34] [2016] HCA 47.
[35] [2016] NSWCA 297,[59] (footnotes omitted).
[36] [2017] NSWCA 295.
[37] Ibid 76.

Different approaches can be seen elsewhere. In Victoria, the matter was considered recently in *Apple and Pear Australia Ltd v Pink Lady America LLC*.[38] The most extensive treatment of the point is found in the judgment of Tate JA, who, after careful consideration of the reasons in *Wright Prospecting*, was sceptical of the conclusion arrived at in *Mainteck*:

> In my view, it follows from what was said in [*Wright Prospecting*] that it would be wrong to conclude that the High Court has endorsed an approach to the construction of commercial contracts, whereby the surrounding circumstances, including, relevantly, pre-contractual negotiations, can invariably be relied upon to assist construction. This is not to deny that the objective approach to contractual interpretation requires, as confirmed by French CJ, Nettle and Gordon JJ in [*Wright Prospecting*], reference to the 'text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose' … [T]here has been controversy, reflected in the judgments of many intermediate appellate courts, about when, and in what manner, surrounding circumstances can be relied upon in the construction of commercial contracts, the questions surrounding the extent to which surrounding circumstances can be relied upon in the construction of commercial contracts raise large issues and their fate remains to be resolved by the High Court on another day. It is not in dispute that this Court must follow the precepts of the High Court. While this Court may, as a matter of judicial comity, extend deference to the observations made by other intermediate appellate courts with respect to their understanding of principles enunciated by the High Court, it is 'bound directly' by what the High Court has said and 'is not bound indirectly by another court's interpretation of what the High Court said'.[39]

Ferguson and McLeish JJA dealt with the point more briefly, concluding:

> Consistently with the foregoing, at least where the contractual language is ambiguous or susceptible of more than one meaning, evidence of events, circumstances and things external to the contract is permissible. The requirement of ambiguity was stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*, and this Court is bound to apply that decision unless and until the High Court says otherwise. As Tate JA has explained, that is this Court's primary obligation, and it is not bound to adopt the interpretations of the High Court's reasons propounded by other intermediate appellate judges or courts in preference to its own interpretation of those reasons. In our opinion, it is not necessary in this appeal to address the controversy that exists as to whether or not evidence of matters external to the contract may be called in aid to establish the ambiguity to which Mason J referred.[40]

The courts of Western Australia have now repeatedly stated that they will continue to subscribe to the requirement of an 'ambiguity gateway' until the High Court expressly indicates that a different approach is to be preferred. In *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd*,[41] for instance, McLure P (with whom Newnes JA agreed) explained:

> After careful consideration of multiple High Court decisions on the subject, a number of intermediate appellate courts in this country came to the view that evidence of

[38] [2016] VSCA 280.
[39] Ibid [137] – [138] (footnotes omitted).
[40] Ibid [231] – [232] (footnotes omitted).
[41] [2014] WASCA 164.

> surrounding circumstances was always admissible to assist in the construction of a contract, whether or not the contractual language was ambiguous or susceptible of more than one meaning. However, in dismissing the special leave application in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; (2011) 282 ALR 604, three members of the High Court (Gummow, Heydon & Bell JJ) said that conclusion was inconsistent with binding authority. … This court has taken the view that the guidance in *Western Export Services* should be followed until further direction from the High Court … The controversy has raised its head again. The appellant contends that the 'true rule' in *Codelfa* is the law and, as the meaning of the language of the GPR Deed is unambiguously clear, evidence of surrounding circumstances is (subject to limited exceptions) inadmissible for construction purposes. The respondents contend that the recent High Court decision in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2014] HCA 7 (*EGC*), has vindicated the pre-*Western Export Services* position adopted by those intermediate appellate courts that had abandoned the gateway requirement that the language of a contract had to be ambiguous or susceptible of more than one meaning before regard could be had to evidence of surrounding circumstances to assist in the construction of a contract. The construction issue was not raised by the *EGC* parties in this court. Gummow and Heydon JJ had retired before the hearing of *EGC* and Bell J did not sit. *Western Export Services* and the response of intermediate appellate courts thereto were not directly addressed by the High Court in *EGC*. However, the respondent points to the approach taken in the majority judgment. There can be no doubt that the majority in *EGC* took into account surrounding circumstances known to both parties in the construction of the gas supply agreement: [35], [48]. However, there is no express consideration by the majority of whether, or finding that, the language of the gas supply agreement was ambiguous or susceptible of more than one meaning. The respondent also drew this court's attention to the reliance by the majority in *EGC* on [14] of the English decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, 2906 - 2907. That paragraph cites with approval Lord Hoffman's first principle in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1997] UKHL 28; [1998] 1 WLR 896 … Lord Hoffman's first principle is not consistent with the gateway requirement in Mason J's 'true rule' in *Codelfa*. However, the appellant contends that the High Court would not impliedly repudiate the express repudiation in *Western Export Services* of the abandonment of the gateway requirement by some intermediate appellate courts. The aridity of this debate at the intermediate appellate court level is manifest. Until the High Court expressly states its position on the subject, I propose to continue to apply the 'true rule' as explained in *Hancock Prospecting* at [9], [74] - [81]. In that case this court concluded that the true rule permits regard to be had to some surrounding circumstances for construction purposes without having to satisfy the gateway requirement [81].[42]

It is not necessary to belabour the point. It is plain that until the High Court explicitly addresses and resolves the difficulty in this area, intermediate appellate courts will continue to offer divergent views. It is thus worth considering what view the High Court is likely to endorse when the occasion arises for it to decide the matter explicitly.

[42] Ibid [35] – [45] (footnotes omitted). See also: *McCourt v Cranston* [2012] WASCA 60; *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29.

III WHAT WILL THE HIGH COURT DECIDE?

Offering a firm view as to the High Court's likely conclusion in respect of this question is not entirely straightforward. As was seen above in respect of *Royal Botanic* and *Byrnes v Kendle*, where the Court has adverted explicitly to the controversy in this area, it has expressly declined to offer a view as to its resolution. Even so, it is suggested that there are, on balance, good reasons to favour the view that the High Court will, when the question arises, endorse an approach to construction in which recourse may be had to 'surrounding circumstances' without it first being necessary to point to 'ambiguity'. There are, broadly speaking, two key bases for such a view.

The first is found in the statements of Kiefel and Keane JJ in *Wright Prospecting*. Though their Honours were cautious not to offer any view as to how the controversy ought ultimately to be resolved, their judgment is nonetheless noteworthy for its expression of the view that Mason J's 'true rule' is silent as to how an ambiguity might be identified. As their Honours explained:

> The "ambiguity" which Mason J said may need to be resolved arises when the words are "susceptible of more than one meaning". His Honour did not say how such an ambiguity might be identified. His Honour's reasons in *Codelfa* are directed to how an ambiguity might be resolved. In reasons for the refusal of special leave to appeal given in *Western Export Services Inc v Jireh International Pty Ltd*, reference was made to a requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and the object of the transaction. There may be differences of views about whether this requirement arises from what was said in *Codelfa*. This is not the occasion to resolve that question. It should, however, be observed that statements made in the course of reasons for refusing an application for special leave create no precedent and are binding on no one. An application for special leave is merely an application to commence proceedings in the Court. Until the grant of special leave there are no proceedings inter partes before the Court. The question whether an ambiguity in the meaning of terms in a commercial contract may be identified by reference to matters external to the contract does not arise in this case and the issue identified in *Jireh* has not been the subject of submissions before this Court. To the extent that there is any possible ambiguity as to the meaning of the words "deriving title through or under", it arises from the terms of cl 24(iii) itself.[43]

Insofar as this passage leaves the way open to an approach akin to that in *Mainteck* – that is, adopting a reading of *Codelfa* that dispenses with the 'ambiguity gateway' – it offers some clue as to the High Court's likely approach. Of course, whether Mason J's remarks are readily

[43] *Wright Prospecting*, 132 – 133 (footnotes omitted).

susceptible of such a reading is another question: indeed, Thomas Prince has strongly criticised *Mainteck* on precisely this point.[44]

The second basis for the view proffered here is the general lack of enthusiasm on the part of commentators and courts for the notion of an 'ambiguity gateway'. As has already been noted, it is no object of this paper to enter at length into the normative debate as to what evidence a court *ought* to consider when construing a contract (or the debate as to the relative importance which ought to be accorded to language and context).[45] Even so, it is important to note that though there are many commentators who contend that the modern law of contractual interpretation has accorded too much weight to extrinsic material at the expense of language,[46] such views are very rarely accompanied by a suggestion that an 'ambiguity gateway', or any similar such rule, is normatively desirable.[47] Indeed, the lack of support for the notion of an 'ambiguity gateway' is well-illustrated by considering the line of recent English cases which has been held up as evidence of a retreat from the importance formerly accorded to extrinsic material.[48] The statements as to the nature of construction in these cases is distinctly at odds with any notion of an 'ambiguity gateway'. As Lord Hodge (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed) explained in *Wood v Capita Insurance Services Limited*:

> Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest … Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated … To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival

[44] Prince, above n 29, 494 – 495. The manner in which Mason J's 'true rule' is expressed has been subjected to some considerable textual analysis. See, further: Reynolds, above n 29, 191 – 192.
[45] It is also no object of this paper to weigh in on the question as to the proper intersection of construction and rectification. For a discussion of this point, see: Paul S Davies, 'Interpretation and Rectification in Australia' (2017) 76 *Cambridge Law Journal* 483.
[46] For a recent example, see: Sumption, above n 8.
[47] Of course, exceptions do exist. See, eg: Prince, above n 29.
[48] See, eg: *Re Sigma Finance Corporation* [2010] 1 All ER 571; *Marley v Rawlings* [2014] 2 WLR 213; *Arnold v Britton* [2015] AC 1619; *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095, and generally the discussion in: Rohan Havelock, 'The 'Unitary Exercise' of Contractual Interpretation' (2017) 76 *Cambridge Law Journal* 486.

> constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.[49]

The lack of enthusiasm for the notion of an 'ambiguity' is unsurprising. Even if an approach is sought which seeks to emphasise the primacy of contractual language, the imposition of an 'ambiguity gateway' is an unnecessarily complex and fraught means of achieving such an end. It is far preferable to seek to promote the primacy of language without taking up a test which necessarily involves the answering such questions as what it is for a contractual term to be 'ambiguous'.[50]

For these reasons, then, it is submitted that the High Court is likely, when the occasion presents itself, to endorse an approach to construction in which recourse may be had to 'surrounding circumstances' as an aid to construction without it first being necessary to point to 'ambiguity'.

IV CONCLUSION

It is worth, in closing, reflecting upon why the confusion in this area has proven to be so persistent. Of course, in light of the discussion above, the immediate answer to this question may seem obvious: it is the apparent (if not actual) vacillation of the High Court which has led to confusion and divergence in lower courts. To put the point in this way, however, simply masks the important question of why the High Court has opted, in cases such as *Wright Prospecting*, to decline to dispel the uncertainty which has been productive of so much difficulty.

Such a course was, at least in principle, open to the High Court on a number of occasions. The High Court has stated clearly that lower courts are to follow the 'seriously considered dicta' of a majority of the High Court,[51] and it has been seen that lower courts do indeed abide by this injunction.[52] Even if the High Court had offered guidance in this sphere which was wholly obiter, it would almost certainly have been followed by lower courts.

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[49] [2017] 2 WLR 1095, [11] – [12] (footnotes omitted).
[50] *Mainteck*, 655; *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227, 234.
[51] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151.
[52] See the discussion in: Matthew Harding and Ian Malkin, 'The High Court of Australia's Obiter Dicta and Decision-Making in the Lower Courts' (2012) 34 *Sydney Law Review* 12.

The High Court's reticence is likely a function of it adhering to the principle that a court ought not to determine a question where it is not necessary to do so in resolving the matter before it. As Dyson Heydon has forcefully observed:

> A discursive analysis of the law can be appropriate if it is necessary to decide the matter. An intermediate appellate court may be confronted with a conflict of authorities in different trial courts throughout Australia, and may have to choose. The possibilities are wider still in the High Court. But even in these courts it is wrong to deal with issues which, even though they have been raised, are not issues which it is necessary for the specific outcome of the case to deal with. It is even worse to deal with unnecessary issues which have not been raised. A badge of suspicion must attach to a judgment which, after setting out various issues and arguments, says "Though it is not necessary to decide this point, in deference to the careful submissions of the parties, the court will deal with it." Courts are not supposed to decide questions which are merely moot, theoretical, abstract or hypothetical. They are not supposed to offer opinions which are merely advisory, having no foreseeable consequences for the particular parties. Their determinations are supposed to be conclusive or final decisions on concrete controversies, not inconclusive and tentative speculations on controversies which have not yet arisen. Excessive and self-indulgent surveys of the law and debates about the background to and future of particular rules contravene these prohibitions, which are based on good sense.[53]

Few would cavil with the contention that a court should be slow to offer a view on points which are wholly academic or hypothetical. Even so, reasonable views may differ as to the degree of circumspection owed by the High Court when presented with an opportunity to provide guidance on a point which has been productive of confusion and difficulty in lower courts. The proper approach in such cases might be thought to depend upon the importance of the question and the degree to which the Court has had the opportunity to explore the competing arguments.

If considered in this way, it is difficult to find the approach adopted by the Court in this sphere wholly satisfactory. It is profoundly concerning that the law is in a state of such confusion in respect of a matter so fundamental to the law of contract. Indeed, there is considerable evidence that the difficulties in this area are the cause of much vexation for courts at first instance: a recent study of the most frequently-cited judgments in Australian contract law, for instance, found that *Jireh*, notwithstanding its lack of precedential force, is the 75th most cited 'authority' in the Australian law of contract.[54] If the High Court forbears from offering guidance on this point until its hand is forced, there is every reason to believe this confusion and difficulty will continue for some considerable time: after all, in order for it to become *necessary* to decide this point, the Court will have to be presented with a matter which turns on the construction of

[53] J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 120 – 121.

[54] See: Daniel Reynolds and Lyndon Goddard *Leading Cases in Contract Law: A Guide to the 100 Most Frequently Cited Cases in Contract and Related Subjects* (Federation Press, 2017).

apparently unambiguous language. There are, in short, good reasons to conclude that the High Court ought to abandon its reticence on this point and take the opportunity to offer explicit guidance as to the proper approach.

PAPER THREE: 'THE NEW LAW OF PENALTIES: MAPPING THE TERRAIN'

STATEMENT OF AUTHORSHIP

This paper was published in 2018 in the *Journal of Business Law*:

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This paper, of which I am the sole author, contains original research I conducted during the period of my Higher Degree by Research candidature. It is not subject to any obligations or contractual agreements with a third party that would constrain its inclusion in this thesis.

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THE NEW LAW OF PENALTIES: MAPPING THE TERRAIN

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Abstract

This paper gives an account of recent developments in respect of the penalty rule in Australia and England, before going on to explore two unresolved questions. The first is whether Australian law recognises two jurisdictions to relieve against penalties – one in equity and another at common law – or instead a unitary penalty doctrine. The second is the important question of how the recent developments are playing out "on the ground".

INTRODUCTION

In both England and Australia, the rule against penalties is in a state of flux.[1] Recent years have seen a string of decisions which have seen the doctrine transformed. At the same time, the scrutiny to which the rule has been subject has reignited a number of important normative debates as to its justification and proper function.

These developments have elicited a considerable volume of thoughtful commentary.[2] Yet though the ground in this area is now well-tilled, a number of important questions remain to be

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[1] To employ such an expression as 'the rule against penalties' is to presuppose the existence of a unitary doctrine. Such expressions are employed throughout this paper, even though (as is made clear below) the current state of the authorities might be thought to make them inapt.

[2] For just some of the writings in respect of these recent developments, see: J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99; Anthony Gray, 'Contractual Penalties in Australian Law After *Andrews*: An Opportunity Missed' (2013) 18 *Deakin Law Review* 1; Paul Davies and P G Turner, 'Relief Against Penalties Without a Breach of Contract' [2013] *Cambridge Law Journal* 20; Sirko Harder, 'The Relevance of Breach to the Applicability of the Rule Against Penalties' (2013) 30 *Journal of Contract Law* 52; Edwin Peel, 'The Rule Against Penalties' (2013) 129 *Law Quarterly Review* 152; Edwin Peel, 'Unjustified Penalties or an Unjustified Rule Against Penalties?' (2014) 130 *Law Quarterly Review* 365; Katy Barnett, '*Paciocco v Australia and New Zealand Banking Group Ltd*: Are Late Payment Fees on Credit Cards Enforceable?' (2015) 37 *Sydney Law Review* 595; Jessica Palmer, 'Implications of the New Rule Against Penalties' (2016) 47 *Victoria University of Wellington Law Review* 305; Lord Hope 'The Law on Penalties – A Wasted Opportunity?' (2016) 33 *Journal of Contract Law* 93; Sarah Worthington, 'The Death of Penalties in Two Legal Cultures?' [2016] *UK Supreme Court Yearbook* 129; Jonathan Morgan, 'The Penalty Clause Doctrine: Unloveable but Untouchable' [2016] *Cambridge Law Journal* 11; Nicholas Tiverios, 'Doctrinal Approaches to the Law of Penalties: A post-*Andrews* Intention-Based Defence of Relief Against Fixed Contractual Penalties' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook 2016); Sirko Harder, 'The Scope of the Rule Against Contractual Penalties: A New Divergence' in Andrew Robertson and Michael Tilbury (eds) *Divergences in Private Law* (Hart Publishing, 2016); John Stumbles, '*Paciocco* in the High Court: Penalties and Late Payment Fees' (2017) 91 *Australian Law Journal* 969; J W Carter, Wayne Courtney and G J Tolhurst 'Assessment of Contractual Penalties: *Dunlop* Deflated' (2017) 34 *Journal of Contract Law* 4; Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (I): Underlying Principles in Equity and at Common Law' (2017) 11 *Journal of Equity* 1; Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian

resolved. This short paper has two objects. The first is to give a concise account of the recent developments in this sphere. The second is to essay a tentative resolution to two questions, and in doing so to illuminate a number of general patterns and trends in the law of contract in Australia and England.

The first question is whether Australian law recognises two jurisdictions to relieve against penalties – one in equity and another at common law – or instead a unitary penalty doctrine. Though the answer to this question might seem at first to be straightforward, there is, as will be seen, a surprising diversity of views as to the correct answer. It is suggested that though the preponderance of authority supports the recognition of two jurisdictions to relieve against penalties which operate side-by-side, the normative case for the embrace of a unitary penalty doctrine is compelling.

The second question relates to how the recent developments in this sphere in both England and Australia are playing out "on the ground". A preliminary review of authorities suggests that the blurring of the doctrine's scope in Australia has not had the deleterious impact which was feared in some quarters. At the same time, it seems possible that the recent restatement of the test for adjudging whether an impugned provision is penal has had a more muted impact than was initially anticipated. It is suggested, however, that a clear understanding of the doctrine's practical operation can only be arrived at through a wide-ranging analysis of decisions which apply the "new" law.

THE PENALTY RULE TRANSFORMED

The penalty rule is no stranger to difficulty or controversy. For much of its modern history it has been attended by doctrinal technicality and doubt as to its proper normative basis.[3] Even so, up until relatively recently, the core features of the rule could be said to be well-settled.

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and English Approaches' (2017) 11 *Journal of Equity* 185; Andrew Summers 'Unresolved Issues in the Law on Penalties' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 95; P G Turner, 'Lex Sequitur Equitatem: Fusion and the Penalty Doctrine' in John C P Goldberg, Henry E Smith and P G Turner (eds) *Equity and Law: Fusion and Fission* (Cambridge University Press, 2018) (forthcoming).

[3] A number of important doctrinal questions in respect of the penalty rule have remained unresolved for many years. One example is the question of whether the sum fixed in an irrecoverable penalty operates as a 'ceiling' on the damages recoverable in an action for breach. Compare the views expressed in: *Lord Elphinstone v Markland Iron & Coal Co Ltd* (1886) 11 App Cas 332, 346; *Public Works Commissioner v Hills* [1906] AC 368; *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66; *Watts, Watts & Co v Mitsui* [1917] AC 227. For the debate as to the rule's normative basis, see, eg: Charles J Goetz and Robert E Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle' (1977) 77 *Columbia Law Review* 554; Samuel A Rea, 'Efficiency Implications of Penalties and Liquidated Damages' (1984) 13 *Journal of Legal Studies* 147; Elisabeth Lanyon, 'Equity and the Doctrine of Penalties' (1996) 9 *Journal of Contract Law* 234; P D Baron, 'Confused in Words: Unconscionability and the Doctrine of Penalties' (2008) 34 *Monash University Law Review* 285; Carmine Conte, *Penalties Reworked: the Rule Against Penalties Restated, Justified and Refined* (DPhil Thesis, University of Oxford, 2014).

In consequence of a succession of recent decisions at the highest level, the rule has been almost wholly transformed. In giving an account of the relevant developments, it is best to consider first the expansion of the doctrine's scope, before turning to an examination of the reformulation of the test for adjudging whether an impugned provision is penal.

The rule's scope

Though any critique of the developments as to the scope of the penalty rule is necessarily complex, the upshot of those developments can nonetheless be stated simply. Recent years have seen the rejection, in Australian law, of the notion that the penalty rule is capable of being invoked only in respect of provisions triggered by breach of contract. At the same time, English law has firmly set its face against such a position, opting instead to reaffirm the "breach limitation" as a firm control on the doctrine's scope.

The rejection of any "breach limitation" in Australian law was effected by the High Court's decision in *Andrews v Australia and New Zealand Banking Group Ltd* ("*Andrews*").[4] That decision, as is well known, arose in the context of a representative action which challenged the enforceability of a range of bank fees and charges.[5] The matter initially came before Gordon J in the Federal Court of Australia, where the plaintiffs were met with the argument that a number of the impugned fees, being triggered by events other than breach of contract, were altogether outside the rule's scope.[6]

Gordon J determined the question as to the rule's scope in the bank's favour. Her Honour noted that the decision of the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* ("*Interstar*")[7] precluded a holding that the penalty rule was capable of being invoked in respect of a stipulation triggered by an event other than breach of contract.[8] An appeal to the Full Court of the Federal Court against her Honour's decision was removed to the High Court.[9]

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[4] (2012) 247 CLR 205.

[5] The plaintiffs founded their challenge not only on the penalty rule, but also on a number of statutory provisions, eg; *Australian Securities and Investments Commission Act 2001*(Cth) ss 12CB, 12CC; *Fair Trading Act 1999* (Vic) ss 8, 8A.

[6] *Andrews v Australian and New Zealand Banking Group Limited* [2011] FCA 1376.

[7] (2008) 257 ALR 292.

[8] In *Interstar*, the New South Wales Court of Appeal rejected the contrary view expressed by Brereton J at first instance. See: *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* [2007] NSWSC 592. Though *Interstar* did not proceed to the High Court, it nonetheless attracted considerable comment and speculation. See, eg: Elisabeth Peden, 'Penalty Clauses and What Would the High Court Have Made of *Interstar Wholesale Finance Pty Ltd v Integral Home Loans*?' (2009) 23 *Commercial Law Quarterly* 6.

[9] Pursuant to *Judiciary Act 1903* (Cth) s 40(2).

The High Court unanimously allowed the appeal. Though the reasons traverse the penalty rule's history at some length, they can be distilled in brief form as follows. First, the Court traced the rule's origin to the practice of the Chancery in granting relief against the enforcement of conditional bonds.[10] Such instruments typically created an obligation for the payment of a sum of money on a fixed date, subject to a condition that the bond should be discharged upon the satisfaction of some other stipulation (which was often endorsed on the back of the bond itself), such as the rendering of services or the provision of goods.[11] Such a device might seem an awkward mechanism for the imposition of promissory liability, but the technicalities of the forms of action meant that such an approach had considerable appeal. From at least 1321, the writ of covenant could be successfully brought only where plaintiff could produce a deed.[12] It was thus unwise for parties to conclude substantial bargains informally. This, combined with the procedural advantages presented by the writ of debt and the desire to avoid the uncertainty inherent in having damages assessed by a jury, drove parties to prefer the employment of conditional bonds. The practice which eventually emerged in the Chancery involved the routine grant of relief against the enforcement of such bonds where it was possible for compensation to be made for loss actually sustained.[13]

The second step in the reasoning was to conclude that, contrary to the view earlier expressed in the High Court, this equitable jurisdiction to relieve against penalties remained alive and well. In particular, the High Court rejected the suggestion that the jurisdiction had "withered on the vine" after the courts of common law began to follow Chancery in granting relief against the enforcement of penal stipulations.[14] This extant equitable jurisdiction, having developed in the context of the grant of relief against the enforcement of conditional bonds, was, in the High Court's view, plainly not limited in scope to stipulations triggered by breach of contract.

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[10] For the classic account of the history of relief against conditional bonds, see: A W B Simpson, 'The Penal Bond With Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392.

[11] See the discussion in: David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), 28-30.

[12] The circumstances surrounding the emergence of the deed requirement in covenant are not wholly clear. See the discussion in: David Ibbetson, 'Words and Deeds: the Action of Covenant in the Reign of Edward I' (1986) 4 *Law and History Review* 71; Patrick Philbin, 'Proving the Will of Another: The Specialty Requirement in Covenant' (1992) 105 *Harvard Law Review* 2001; John H Baker, 'Deeds Speak Louder Than Words: Covenants and the Law of Proof, 1290–1321' in Susanne Jenks, Jonathan Rose and Christopher Whittick (eds) *Law, Lawyers and Texts: Studies in Medieval Legal History in Honour of Paul Brand* (Brill, 2012).

[13] The Chancery typically secured the quantification of such loss by a jury by directing an issue of *quantum damnificatus*. See: *Andrews*, [58]; *Astley v Weldon* (1801) 2 Bos & Pul 346; 126 ER 1318; *Hardy v Martin* (1783) 1 Cox 26; 29 ER 1046.

[14] For such a suggestion, see: *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191 (Mason and Wilson JJ). There is some debate as to the circumstances in which the courts of common law began to offer relief analogous to that available in Chancery. This point is discussed further below.

Having rejected the notion of a breach requirement, it was necessary for the High Court to posit a statement of the penalty rule which offered some alternative means of demarcating the doctrine's scope. The Court thus proffered a statement of the rule as follows:

> "In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation."[15]

This restatement of the law caused considerable consternation in some quarters. Much of the concern stemmed from the Court's election to eschew any examination of policy factors in favour of a purely historical analysis.[16] Indeed, this aspect of *Andrews* was singled out for criticism by the Supreme Court of the United Kingdom in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* ("*Cavendish*"),[17] in which the Australian view as to the scope of the penalty rule was considered and rejected. As Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed) stated:

> "Any decision of the High Court of Australia has strong persuasive force in this court. But we cannot accept that English law should take the same path, quite apart from its inconsistency with established and unchallenged House of Lords authority. In the first place, although the reasoning in *Andrews* was entirely historical, it is not in fact consistent with the equitable rule as it developed historically. The equitable jurisdiction to relieve from penalties arose wholly in the context of bonds defeasible in the event of the performance of a contractual obligation. It necessarily posited a breach of that obligation. Secondly, if there is a distinct and still subsisting equitable jurisdiction to relieve against penalties which is wider than the common law jurisdiction, with three possible exceptions it appears to have left no trace in the authorities since the fusion of law and equity in 1873 … Thirdly, the High Court's redefinition of a penalty is, with respect, difficult to apply to the case to which it is supposedly directed, namely where there is no breach of contract. It treats as a potential penalty any clause which is 'in the nature of a security for and in terrorem of the satisfaction of the primary stipulation.' By a 'security' it means a provision to secure 'compensation … for the prejudice suffered by the failure of the primary stipulation'. This analysis assumes that the 'primary stipulation' is some kind of promise, in which case its failure is necessarily a breach of that promise … Finally, the High Court's decision does not address the major legal and commercial implications of transforming a rule for controlling remedies for breach of contract into a jurisdiction to review the content of the substantive obligations which the parties have agreed. Modern contracts contain a very great variety of contingent obligations … The potential assimilation of all of these to clauses imposing penal remedies for breach of contract

[15] Ibid 216 – 217.
[16] See, eg: J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99, 132.
[17] [2015] UKSC 67.

> would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement."[18]

The upshot of these developments is that English and Australian law have now clearly diverged in respect of the rule's scope.[19] At the same time, the potentially extensive reach of the rule in Australia has given rise to the question of whether it operates to curtail freedom of contract to a significantly greater degree than its English counterpart.[20]

When is a stipulation a penalty?

The second recent development in respect of the penalty rule relates to the test for adjudging whether an impugned provision is penal. In this sphere, English and Australian law are now largely aligned.

As is well-known, the traditional tests for ascertaining whether an impugned provision is indeed a penalty were found in the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* ("*Dunlop*").[21] In *Cavendish*, those tests were distilled in the following terms:

> "(a) [T]hat the provision would be penal if 'the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach'; (b) that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum; (c) that there was a presumption (but no more) that it would be penal if it was payable in a number of events of varying gravity; and (d) that it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss."[22]

It is the first of his Lordship's tests that is the most notable. Put simply, the application of this test involved a comparison of the sum fixed by the impugned stipulation with the sum which might be recoverable in an action for breach of contract.

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[18] *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [42]. The three examples instanced by the Supreme Court are, first, *In re Dagenham (Thames) Dock Co; Ex p Hulse* (1873) LR 8 Ch App 1022 *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 (though this was dismissed by their Lordships as involving 'no more than an unsupported throw-away line in the judgment of Diplock LJ'); and *Jobson v Johnson* [1989] 1 WLR 1026.

[19] This divergence has been explicitly remarked upon in the High Court. See: *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525, [7] – [10] (French CJ).

[20] To the extent that the Australian position sanctions a significant curtailment of party autonomy in the interests of fairness, this might be seen as a manifestation of a concern for fair dealing which permeates the Australian law of contract. For a discussion of the notion of a distinctively 'Australian' law of contract, and the role in Australian law of notions of conscience and fair dealing, see, eg: M P Ellinghaus, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13; Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 100; J W Carter and Andrew Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia Law Review* 49.

[21] [1915] AC 79.

[22] Cavendish, [21].

In *Cavendish*, the Supreme Court revisited Lord Dunedin's tests. Their Lordships observed the "unfortunate" fact that "[s]ome of the many decisions on the validity of damages clauses are little more than a detailed exegesis or application of his four tests with a view to discovering whether the clause in issue can be brought within one or more of them".[23] Their Lordships, upon a re-examination of the relevant authorities, restated the relevant test in the following terms:

> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."[24]

In contrast with the orthodox approach set out in the speech of Lord Dunedin in *Dunlop*, this test permits regard to be had to a wider range of matters when adjudging whether an impugned provision is penal.

The approach taken in *Cavendish* has been the subject of considerable criticism in some quarters.[25] All the same, a similar approach has been followed by the High Court of Australia. That step was taken in *Paciocco v Australia and New Zealand Banking Group Limited* ("*Paciocco*"),[26] a further instalment in the representative action of which *Andrews* formed part. The High Court, after engaging in a re-examination of the relevant authorities, reformulated the test for adjudging whether an impugned provision is penal. Kiefel J (as her Honour then was, and with whom French CJ relevantly agreed), framed the question as being that of "whether the sum is 'out of all proportion' to the interests said to be damaged in the event of default".[27]

Gageler J framed the inquiry as being that of whether "the stipulation in issue is properly characterised as having no purpose other than to punish".[28] Insofar as this formulation differs from that adopted in *Cavendish*, his Honour noted:

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[23] *Cavendish*, [22].
[24] *Cavendish*, [32].
[25] See, eg: J W Carter, Wayne Courtney and G J Tolhurst 'Assessment of Contractual Penalties: *Dunlop* Deflated' (2017) 34 *Journal of Contract Law* 4; W M C Gummow,'What is in a Word? 'Legitimate' Interests and Expectations as Common Law Criteria' (2018) 45 *Australian Bar Review* 23.
[26] (2016) 258 CLR 525.
[27] *Paciocco*, [57].
[28] Ibid [165].

> "Framing the inquiry in terms of whether the stipulation in issue is properly characterised as having no purpose other than to punish compels a more tailored inquiry into the commercial circumstances within which the parties entered into the contract containing the stipulation than might be involved in asking, as did the Supreme Court of the United Kingdom in *Cavendish*, whether the stipulation serves a 'legitimate interest'. That is not, of course, to say that the differently framed inquiries might not lead to the same result."[29]

Keane J quoted with approval the statement in *Cavendish* that whether an impugned provision is penal turns on "whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract".[30]

Nettle J was the sole dissentient. His Honour, while accepting *Cavendish* as a correct statement of the law, stressed the notion that the test posited in *Cavendish* is consistent with the earlier authorities. His Honour explained:

> "Asking whether the sum agreed is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation reprises the test formulated by Lord Robertson in *Clydebank Engineering and Shipbuilding Company v Yzquierdo y Castaneda* … for application to a case where the damage suffered by the innocent party as a result of a breach is incapable of precise or even approximate quantification. The *Andrews* description of *Dunlop*, as being concerned with whether the sum agreed was commensurate with the interest protected by the bargain, was part of the Court's consideration of cases in which damage is incapable of even approximate quantification. Nothing said in *Andrews* runs counter to the approach adopted in *Ringrow* that 'in typical penalty cases, the court compares what would be recoverable as unliquidated damages with the sum of money stipulated as payable on breach'."[31]

In sum, though expressed (consistently with the holding in *Andrews*) in terms capable of extending beyond stipulations triggered by breach of contract, *Paciocco* largely involved an alignment of Australian law with the approach taken in *Cavendish*.

We do this at common law but that in equity?

Perhaps the most perplexing outstanding issue in respect of the penalty rule is the question of whether Australian law recognises two jurisdictions to relieve against penalties – one in equity and another at common law – or instead a unitary penalty doctrine. Though this question was definitively settled for English law by the decision in *Cavendish* – which rejected the existence of any equitable jurisdiction to relieve against penalties – the position in Australia remains unclear.

[29] Ibid [166].
[30] Ibid [270].
[31] Ibid [320].

Though this question might be thought to be of fundamental importance, it has attracted relatively little sustained analysis.[32] The notable exception in this regard is an important paper of Nicholas Tiverios, who has addressed this question thoughtfully and at some length. Tiverios has argued that Australian law ought to, and does, recognise a unitary penalty rule. He has advanced four reasons in support of this contention, each of which merits separate attention.

First, Tiverios observes that "in *Andrews* the High Court staunchly rejected the proposition that the penalties doctrine in Australia is a conceptually distinct rule of common law and not equity".[33] Tiverios is doubtless right to say that *Andrews* involves a rejection of the notion that the rule is one of common law alone. Yet it is quite another thing to say, as Tiverios does, that "the High Court's approach signifies a single rule against penalties albeit with equitable origins".[34] In truth, this is a question on which *Andrews* offers no explicit guidance.

The second argument proffered by Tiverios is purely doctrinal, resting on the contention "the cases decided after *Paciocco* appeared to be adopting a clear trend toward applying a unified approach".[35] Though Tiverios acknowledges that the recent decision of the New South Wales Court of Appeal in *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd*[36] poses some difficulty for this argument, it is nonetheless important to stress the extent to which the authorities are at odds with the recognition of a unified penalty rule.

It is true that some of the cases decided since *Paciocco* lend some support to the recognition of a unified rule.[37] But it is not just *Australia Capital Financial Management* which can be said to support the contrary view. Indeed, in that case, Ward JA expressly rested her conclusion as to the existence of two separate jurisdictions to relieve against penalties on the reasons of Gageler J in *Paciocco*. As Ward JA explained:

"In *Paciocco* (HCA), the reasons of Gageler J (at [118]-[127]) lend support to an

[32] This is certainly not to say that the point has been wholly ignored. In addition to the exploration of this point by Nicholas Tiverios, see further the discussion in: J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99; John Stumbles, '*Paciocco* in the High Court: Penalties and Late Payment Fees' (2017) 91 *Australian Law Journal* 969.

[33] Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185, 214.

[34] Ibid.

[35] Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185, 215 (footnotes omitted).

[36] [2017] NSWCA 99.

[37] Tiverios instances: *Sydney Constructions & Developments Pty Ltd v Reynolds Private Wealth Pty Ltd* [2016] NSWSC 1104 [45]– [52]; *Wu v Ling* [2016] NSWCA 322 [1], [21]; [117] – [123]; *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328 [69]–[112] (though, as noted below, this authority has been relied upon as being consistent with the recognition of two jurisdictions to relieve against penalties); *Magnin v Creevey* [2017] NSWSC 375 [10] – [12].

> interpretation of *Andrews* as envisioning a common law penalties doctrine, applicable in most circumstances, modified by a flexible equitable doctrine in certain circumstances. Such an interpretation is consistent with that adopted by Gordon J in *Paciocco* (FCA) at first instance (at [13]-[32]) and with the approach adopted in this Court in the recent decision of *Arab Bank* [*Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328] a case in which the alleged penalty was triggered by a breach of contract."[38]

The key passage from the reasons of Gageler J in *Paciocco* is as follows:

> "The statement in *Andrews* that '[i]t is the availability of compensation which generates the "equity" upon which the court intervenes' without which 'the parties are left to their legal rights and obligations' is, in context, a reference to the historically important, although now comparatively rare, exercise of equitable jurisdiction to grant relief against penalties. The statements that, '[i]n general terms', a penalty is enforced 'only to the extent' that compensation can be made for prejudice suffered by failure of the primary stipulation and that a party who can provide compensation 'is relieved to that degree from liability to satisfy the collateral stipulation' are similarly directed to, and broadly descriptive of, the grant of equitable relief. The present case does not involve the grant of equitable relief. Nor does the present case involve non-observance of a non-promissory primary contractual stipulation. The customers' claim to recover the amounts charged as, and paid following the imposition of, the late payment fee in the representative proceeding, although variously and elaborately framed, was in substance a common law action in restitution which turned on the enforceability at common law of an obligation to pay a specified sum of money on breach of contract."[39]

The reasons of Gordon J in *Paciocco* at first instance also cast doubt on the recognition of a unified rule. Her Honour proceeded on the footing that it was necessary to consider the position at common law and the position in equity separately (though it is important to note that the parties were in agreement as to this course, and accordingly the point was not the subject of submissions). As her Honour explained:

> "The Applicants alleged that the Exception Fee Provisions were penalties at common law and, further or alternatively, penalties in equity. The need to consider them separately was said by both sides to arise from the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205 (*Andrews High Court*). The penalty doctrine in equity has not been subsumed into the common law: *Andrews High Court* at [51]. Although it is said now by both sides to be necessary to consider the penalties question at law and in equity separately, the principles, and the relief, are not unconnected. While the circumstances necessary to enliven the common law doctrine are different from those necessary to enliven equity, a stipulation (to pay a sum or other property) will not constitute a penalty at law or in equity unless it is 'extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved': *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1914] UKHL 1; [1915] AC 79 at 87."[40]

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[38] *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd* [2017] NSWCA 99, [360] (Ward JA).
[39] *Paciocco*, [125] – [126] (footnotes omitted).
[40] *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35, [13] – [14].

This approach was subsequently approved in the Full Federal Court, though again it must be noted that the point was not the subject of argument. Allsop CJ explained:

> "From [13]-[48] of the reasons, the primary judge set out the relevant principles in the light of the High Court's decision in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205 (*Andrews* (HC)). As her Honour pointed out, the principal operative conclusion from *Andrews* (HC) was that the doctrine of penalties in Equity had not been subsumed in the common law leading to the necessity to consider the question at common law and in Equity." [41]

There is, in sum, little reason to conclude that the authorities point clearly towards the recognition of a unified penalty rule. Tiverios does not, however, rest his contention solely on this doctrinal footing, instead going on to make two normative arguments. First, Tiverios notes that an insistence upon two distinct rules is productive of needless complexity, with contracts being "read and enforced in a complex and bifurcated manner".[42] Secondly, and in a similar vein, Tiverios notes that the very substantial overlap between the putative common law and equitable rules makes the retention of both unnecessary and unhelpful.[43]

It is these observations which illuminate the true position in respect of the question under examination here. Though the preponderance of authority supports the recognition in Australia of two jurisdictions to relieve against penalties which operate side-by-side, the normative case for the embrace of a unitary penalty doctrine is compelling.

Though this conclusion might well be controversial in some quarters, one need not be an ardent adherent of fusion to perceive the merit in the embrace of a unified rule.[44] The relationship between equity and common law in a post-judicature system was famously said by Professor Burrows to be capable of categorisation as follows:

> "The first category is where common law and equity co-exist coherently and where the historical labels of common law and equity remain the best or, at least, useful terminology. … The second category is where common law and equity co-exist coherently but, in contrast to the first category, there is nothing to be gained by adherence to those historical labels. If we are to take fusion seriously, the labels common law and

[41] *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [19] (Allsop CJ). It is worth noting that Allsop CJ's extracurial writings suggest his Honour views the authorities as they currently stand as supporting the existence of two jurisdictions to relieve against penalties. See: James Allsop, 'The Doctrine of Penalties in Modern Contract Law' (2018) 30 *Singapore Academy of Law Journal* 1.

[42] Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185, 215.

[43] Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185, 215 – 216 (footnotes omitted). Tiverios notes the view of Ben McFarlane to the same effect. See: Ben McFarlane, 'Penalties and Forfeiture' in John McGhee (gen ed), *Snell's Equity* (33rd ed, Sweet & Maxwell, 2015).

[44] As is well-known, the debate as to the 'fusion fallacy' has been especially heated in Australia. See, eg: J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2015), 47-61; Michael Tilbury, 'Fallacy or Furphy? Fusion in a Judicature World' (2003) 26 *University of New South Wales Law Journal* 357.

> equity in the areas of the law covered by this category should be abandoned at a stroke. Take, for example, the law on mistake in contract. In explaining the law we almost invariably distinguish between the position at common law and the position in equity. However, there is no reason why we could not say – and this would make the law more immediately comprehensible – that there are, for example, some shared or common mistakes that are so serious as to render a contract void: and some mistakes that are less serious and render a contract voidable or even voidable on terms … The third category is more complex. It comprises probably most of our civil law. In this category, in contrast to both of the first two categories, common law and equity do not exist coherently. If we are to take fusion seriously, what is needed is a change in the law, albeit often only a small change, so as to produce a principled product which may combine elements of law and equity."[45]

The current Australian law respecting penalties must be said to fall within the third, or, at best, second of these categories. In short, the normative question as to whether the law ought to recognise two jurisdictions to relieve against penalties is inextricably tied up with the anterior, descriptive question of what it is that sets the putative common law and equitable jurisdictions apart. The difficulty encountered when seeking to provide a clear answer to this descriptive question suggests that the recognition of two jurisdictions does more to obscure than to illuminate.

It might be said that the common law rule is limited in scope to stipulations triggered by breach of contract, while the equitable rule is not so limited. But if this is the full extent of the distinction between the two rules in their modern form, it is not at all clear what is to be gained by the application of the labels "equity" and "common law". As a matter of substance, there is, on this view, a single jurisdiction to relieve against penalties, which is not subject to any breach limitation. Indeed, the description of the doctrine as "equitable" when invoked in respect of a stipulation triggered by an event other than breach of contract seems, on this view, to have no substantive implications whatsoever. If this is the case, there seems little to be lost in dispensing with historical labels altogether in this setting.

If, on the other hand, the rules are also distinct in that the consequence of a stipulation being penal at common law is that the provision is void, whereas in equity such a provision is enforced *pro tanto*, then a number of real difficulties arise as to the interaction between the two rules. The difficulty, put simply, is that the scope of the equitable rule seems to encompass all that is covered by the common law rule, since a stipulation triggered by breach of contract must necessarily be accessory or collateral to a primary stipulation in the sense set out in *Andrews*.

[45] Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 *Oxford Journal of Legal Studies* 1, 6 – 7. Tiverios also draws upon Burrows in concluding that the embrace of a unified penalty rule is warranted. See: Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185, fn 173.

On this latter view, it is not immediately obvious how the two jurisdictions are to operate coherently. Indeed, the difficulties which can arise when rules of common law and rules of equity cover overlapping terrain, yet yield different results in their application, are well known.[46] It seems that, insofar as the authorities recognise the existence of two jurisdictions to relieve against penalties, they also suggest that the equitable jurisdiction has no role to play where the common law rule is engaged.[47] If Australian law is to recognise two jurisdictions to relieve against penalties, it does seem that this is the best explanation for how the two jurisdictions are to operate side-by-side. Yet at the same time, such an approach involves the recognition of two jurisdictions which, while occupying the same sphere, differ in ways which defy normative justification. The undesirability of such a state of affairs suggests there is a strong case for judicial consolidation of the two rules. If the rules were to be consolidated in Australia, it seems any unified rule must necessarily see a penal stipulation enforced *pro tanto*. Where a penal provision is rendered void in a case involving an underlying breach, the innocent party is relegated to his or her right to common law damages. If a penal stipulation were rendered void in a non-breach case, however, the innocent party would have no entitlement to compensation whatsoever.

To be clear, the embrace of a unified penalty rule need not involve an acceptance of the view that the rule is solely one of common law. Indeed, Peter Turner has recently suggested that the long-accepted notion that the courts of common law came to exercise a jurisdiction in respect of penalties analogous to that exercised in the Chancery is in truth a misapprehension, and that no such jurisdiction developed at common law prior to the intervention of statute.[48] This historical analysis might well be accepted as correct. For present purposes, however, it is beside the point to focus on the question of whether the jurisdiction to relieve against penalties is traceable to either or both of the courts of common law or the Chancery. The question is instead that of how the doctrine ought to be understood today so as to operate rationally and coherently.

[46] An analogy might be made with the difficulties occasioned by the approaches taken in equity and at common law to relief in respect of a common mistake. These difficulties were part of the reason for the rejection of the equitable jurisdiction in English law by the Court of Appeal. See: *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679. The position in Australia is less clear. See: Warren Swain, 'Common Mistake in Equity: Some Unanswered Questions' (2015) 40 *Australian Bar Review* 124.

[47] See, eg, the passage of Gageler J in *Paciocco* set out above.

[48] P G Turner, 'Lex Sequitur Equitatem: Fusion and the Penalty Doctrine' in John C P Goldberg, Henry E Smith and P G Turner (eds) *Equity and Law: Fusion and Fission* (Cambridge University Press, 2018) (forthcoming). Cf John Biancalana, 'Contractual Penalties in the King's Court 1260-1360' [2005] *Cambridge Law Journal* 212.

PENALTIES IN THE REAL WORLD

A less technical (though equally important) question which arises in the wake of recent developments is that of how the rule is now operating "on the ground" in both Australia and England. Though the effects of recent developments are yet to be fully appreciated, it is nonetheless possible to make a number of tentative observations in this respect.

Given recent developments in Australia have enlarged the penalty rule's scope while at the same time raising the bar for those seeking to demonstrate that an impugned provision is penal, it is not obvious whether, on balance, the rule has been left with greater or lesser practical force.[49] Even so, a consideration of a number of cases decided in the wake of *Paciocco* suggests that though courts are citing and relying upon the "interests test", it is doubtful whether the new law is being applied in such a way as to yield outcomes different from those which would have followed upon an application of the orthodox tests.[50] Equally, it is not clear whether *Andrews* has led to a significant enlargement of the scope of the penalty rule in practice – indeed, it is difficult to point to successful challenges to stipulations triggered by events other than breach of contract.[51]

The position seems similar in England. Though litigants still seek to invoke the penalty rule with some regularity,[52] it is difficult to point to a clear example of a case in which the application of the "interests test" led to an outcome different from that which would have followed upon an orthodox application of the *Dunlop* tests.[53] It may well be that the impact of *Cavendish* has been less marked than expected.

These observations are necessarily tentative. Indeed, engaging in a rigorous examination of how the penalty rule is operating in practice is not wholly straightforward. The best means of gauging how the rule is operating in practice is to engage in a thorough and rigorous examination of the first-instance authorities in both Australia and England. There are a number

[49] This point was acknowledged by Sackville AJA in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328 at [10].
[50] See, eg: *Melbourne Linh Son Buddhist Society v Gippsreal* [2017] VSCA 161.
[51] Though see, eg: *Cedar Meats (Aust) Pty Ltd Five Star Lamb Pty Ltd* [2014] VSCA 32.
[52] See, eg: *Wright & Anor (Liquidators of SHB Realisations Ltd) v The Prudential Assurance Company Ltd* [2018] Bus LR 1173; *Holyoake & Anor v Candy & Ors* [2017] EWHC 3397 (Ch); *Zccm Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm); *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch).
[53] For a possible example of where a different conclusion might have been arrived at upon an application of the 'old' law, see: *Signia Wealth Ltd v Vector Trustees Ltd & Ors* [2018] EWHC 1040. It is important to note that the Court's observations on this point were obiter, the stipulation in question having been held to have been triggered by an event other than breach of contract.

of models for how such an empirical analysis might proceed.[54] Though such an exercise is made difficult by the relatively short period of time which has passed since the relevant developments took place, and the consequent dearth of authority in superior courts, this difficulty is ameliorated to some degree by the fact that both Australian and English authority can be drawn upon in answering the relevant questions. There is, in sum, much which might be gained from such an exercise.[55]

CONCLUSION

Finally, something should be said as to what these developments suggest about the present state of contract law in both Australia and England. It is now more than six years since the Australian Commonwealth Attorney-General's Department issued a discussion paper which canvassed the possibility of codifying or otherwise substantially reforming the Australian law of contract.[56] Though it attracted a large number of responses and a significant body of commentary, that reform initiative now appears to have lost momentum entirely.[57] Indeed, there is little reason to think that any large-scale reform of the Australian law of contract is likely in the near term.[58]

So long as significant statutory intervention remains improbable, there is greater need than ever for the display of judicial leadership on the part of the High Court of Australia. Put simply, the Court must fill the field vacated by the legislature. Though there are, of course, inherent limits to the judiciary's capacity to "reform" the law, it should be noted that many of the

[54] See, eg: James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2017) 38 *Oxford Journal of Legal Studies* 90; James Goudkamp and Donal Nolan, 'Contributory Negligence in the Court of Appeal: an Empirical Study' (2017) 37 *Legal Studies* 437.

[55] This exercise is currently being undertaken by the author in the course of a project funded by the Society of Construction Law Australia.

[56] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012).

[57] For some such commentary, see, eg: Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74; Warren Swain 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland Law Journal* 39; Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131; Martin Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law' (2014) 34 *Legal Studies* 24; Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014); Luca Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, Or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry' (2015) 34 *University of Queensland Law Journal* 99; John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* (forthcoming).

[58] See the discussion in: Warren Swain, ''The Steaming Lungs of a Pigeon'': Predicting the Direction of Australian Contract Law in the Next 25 Years' in Kit Barker, Karen Fairweather and Ross Grantham, (eds) *Private Law in the 21st Century* (Hart Publishing, 2017).

questions canvassed above are matters which plainly fall within the judicial province.[59] Whatever may be the merits of the recognition of a unitary penalty doctrine, for instance, it is clear that the question of whether such a step should be taken is a matter not only for the legislature, but also for the courts.[60]

These observations are at once encouraging and discouraging. On the one hand, the ructions in respect of the penalty rule have been one of the principal causes of uncertainty and difficulty in the Australian law of contract in the past decade.[61] The fact that the position might well be clarified and simplified without the need for Parliamentary intervention is therefore cause for optimism.

On the other hand, recent years have seen no shortage of criticism of the High Court's leadership in developing and clarifying the law of contract.[62] A consideration of recent developments in respect of the penalty rule might well lead to a concern that the Court is disinclined to avail itself of opportunities to impose order on this important area of law.

This judicial reticence might be contrasted with the more adventurous spirit in evidence in the Supreme Court of the United Kingdom. Recent years have seen no shortage of cases in which the Supreme Court has evinced a clear willingness to grapple squarely with controversial questions and restate the law in a manner intended to provide clarity for lower courts. Though this tendency has not been limited to the domain of private law,[63] a number of important and recent contract appeals nonetheless suggest themselves as clear examples.[64] In sum, some

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[59] For a general discussion of law reform and the judicial function, see: Anthony Mason, 'Law Reform and the Courts' in David Weisbrot, (ed) *The Promise of Law Reform* (Federation Press, 2005). See further the discussion in: Gabrielle Golding, 'The Role of Judges in the Regulation of Australian Employment Contracts' (2016) 32 *International Journal of Comparative Labour Law & Industrial Relations* 69.

[60] A contrast might be made with other areas of the law of contract in which the High Court has been asked to effect change, and has demurred on the basis that the relevant question is one for the Parliament. See, eg: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

[61] The other contender must undoubtedly be the question of when regard might be had to evidence of 'surrounding circumstances' in construction. That controversy has been on foot for some time. See the discussion in: John Eldridge, 'Cherry v Steele-Park' (2018) 92 *Australian Law Journal* 249.

[62] See, eg: Stewart and J W Carter, 'The High Court and Contract Law in the New Millennium' (2003) 6 *Flinders Journal of Law Reform* 185; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 79 – 81; J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99, 128 – 130; John Eldridge, 'Lawful-Act Duress and Marital Agreements' [2018] *Cambridge Law Journal* 32.

[63] An example outside of contract (though arising within a contract appeal) is the important decision of the Supreme Court reforming the law as to dishonesty in the criminal law. See: *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67. For discussion, see: Graham Virgo, 'Cheating and Dishonesty' [2018] *Cambridge Law Journal* 18; John Eldridge, 'Ivey v Genting Casinos' (2018) 92 *Australian Law Journal* 27.

[64] See, eg, the recent decision in respect of '*Wrotham Park*' damages: *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20. For discussion, see: John Eldridge, 'Morris-Garner v One Step' (2018) 92 *Australian Law Journal* 345. Further examples might be the decisions in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, *Patel v Mirza* [2016] UKSC 42 and *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

lawyers in the antipodes might well envy the degree to which the United Kingdom's apex court has sought to clarify and simplify the law of contract, and might well think that a similarly bold approach is needed in Australia if the outstanding questions in respect of the penalty rule are to be satisfactorily answered.

PAPER FOUR: ‘CONTRACT CODIFICATION: CAUTIONARY LESSONS FROM AUSTRALIA’

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Signed Date: 18 February 2019

CONTRACT CODIFICATION: CAUTIONARY LESSONS FROM AUSTRALIA

JOHN ELDRIDGE[☼]

In March 2012, the Australian Commonwealth Attorney-General's Department published a Discussion Paper which explored the prospect of codifying or otherwise reforming the Australian law of contract. There is little reason to think that the codification of the Australian law of contract is likely to be embarked upon in the foreseeable future. At the same time, recent years have seen a resurgence of interest in codification in Britain. This paper examines the experience of contract codification efforts in Australia with a view to identifying a number of cautionary lessons. It focuses on two challenges inherent in contract codification which have been given too little attention by the proponents of reform in Australia.

A. INTRODUCTION

In March 2012, the Australian Commonwealth Attorney-General's Department published an ambitious Discussion Paper which explored the prospect of codifying or otherwise reforming the law of contract.[1] The Discussion Paper prompted a wide range of thoughtful responses,[2] which together serve as a reminder of the potential for codification proposals to produce sharp divisions of opinion.[3]

Despite the boldness of the 2012 Discussion Paper, there is little reason to think that the codification of the Australian law of contract is likely to be embarked upon in the foreseeable

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[1] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012.

[2] See, eg, A Stewart, "What's Wrong with the Australian Law of Contract?" (2012) 29 JCL 74; W Swain, "Codification of Contract Law: Some Lessons from History" (2012) 31 UQLJ 39; W Swain, "Contract Codification in Australia: Is it Necessary, Desirable and Possible?" (2014) 36 Syd LR 131; M Doris, "Promising Options, Dead Ends and the Reform of Australian Contract Law" (2014) 34 LS 24; M Keyes and T Wilson, (eds) *Codifying Contract Law: International and Consumer Law Perspectives*, (2014); L Siliquini-Cinelli, "Taking (Legal) Traditions Seriously, Or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry" (2015) 34 UQLJ 99.

[3] Codification has rightly been described as a 'polemical topic': J H Farrar, *Law Reform and the Law Commission* (1974) 57.

future.[4] Yet at the same time, recent years have seen a resurgence of interest in codification in Britain.[5] Despite doubt in some quarters, it may be that, with the approach of Brexit and the concomitant waning of British interest in pan-European law reform, contract codification within Britain will once more become a subject of widespread interest and debate.[6]

This article cannot, and does not, seek to examine the full range of matters which arise when asking whether the law of contract ought to be codified. To do so would require grappling with a vast range of questions, including whether codification is an effective mechanism for substantive reform of the law of contract, whether the domestic law of contract ought to be 'harmonized' with international instruments or with other legal systems,[7] and whether codification would promote 'certainty' or 'coherence' in the law.[8] This paper also eschews engagement with more general questions, such as why contract codification has been taken up with enthusiasm in some jurisdictions while having been met with a lukewarm reception elsewhere.[9]

A comprehensive examination of these issues must await another day.[10] This article has instead a more modest object. It seeks to examine contract codification efforts in Australia in order to highlight a number of cautionary lessons for would-be codifiers of the law of contract.

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[4] See the discussion in: W Swain, "'The Steaming Lungs of a Pigeon': Predicting the Direction of Australian Contract Law in the Next 25 Years" in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st Century* (2017).

[5] See, eg: A Tettenborn "Codifying Contracts – An Idea Whose Time Has Come?" (2014) 67 CLP 273; M A Hogg, "Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law" in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st Century* (2017); J A Bargenda and S W Stark, "The Legal Holy Grail? German Lessons on Codification for a Fragmented Britain" (2018) 22 EdinLR 183.

[6] For doubt as to the prospects of contract codification in England, see, eg: R Brownsword, "After Brexit: Regulatory-Instrumentalism, Coherentism and the English Law of Contract" (2017) 34 JCL 139, 148.

[7] For an exploration of this question in respect of Australia, see: D Robertson, "The International Harmonisation of Australian Contract Law" (2012) 29 JCL 1.

[8] For a detailed examination of codification's potential to promote 'certainty' in the law of contract, see: J Eldridge, "Contract Codification and 'Certainty'" (2018) 35 JCL (forthcoming). For a recent general discussion of the notion of 'coherence' in Australian private law, see: A Fell, "The Concept of Coherence in Australian Private Law" (2018) 41 MULR 1160.

[9] The success of the *Indian Contract Act 1872*, for instance, can only be understood once due regard is had to the broader historical context surrounding its enactment. For a discussion of the history of this code, see: S Tofaris, *A Historical Study in the Indian Contract Act 1872* (PhD Thesis, University of Cambridge, 2011). For a contemporaneous discussion of the Act, see: C Ilbert, "Indian Codification" (1889) 5 LQR 347. Equally, an examination of the history of pan-European contract codification throws up a number of themes and concerns which are specific to the project of legal harmonisation across Europe. For a discussion of European contract harmonisation, see: F de Elizalde, ed, *Uniform Rules for European Contract Law? A Critical Assessment*, (2018); L Miller, *The Emergence of EU Contract Law: Exploring Europeanization*, (2012); S Vogenauer and S Weatherill, (eds) *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, (2006).

[10] For a seminal overview of the arguments for and against contract codification, see: A Diamond, "Codification of the Law of Contract" (1968) 31 MLR 361. For a more sceptical, though similarly wide-ranging analysis, see: H R Hahlo "Here Lies the Common Law: Rest in Peace" (1967) 30 MLR 241. For a wide-ranging examination of the prospects of contract codification in Australia, see: W Swain, "Contract Codification in Australia: Is it Necessary, Desirable and Possible?" (2014) 36 Syd LR 131.

The paper proceeds in three parts. It first gives an overview of the history of contract codification in Australia. Against this backdrop, it then proceeds to identify and examine two challenges inherent in contract codification which have been given too little attention by the proponents of reform in Australia.[11]

The first species of difficulty arises from the conceptual and cultural dimensions of codification. As will be seen, building support for a contract code is made especially challenging by the continued lack of agreement as to contract law's proper purpose. Even in the wake of decades of academic debate as to the objects and nature of the law of contract, consensus remains elusive. After offering a very brief overview of the nature and extent of the continuing controversy, it will be shown that these unresolved theoretical questions have real ramifications for the way in which the codification process ought to be carried out, and the nature and content of any code. Indeed, as will be seen, the 2012 Discussion Paper issued by the Commonwealth Attorney-General's Department is a clear example of a reform proposal which fails to negotiate a clear path through competing conceptions of contract's purpose. If contract codification is to stand a real chance of being achieved in Australia, far more must be done on the part of its proponents to engage with the ongoing conceptual debates which continue to produce widespread division.

In addition to this conceptual challenge, the successful implementation of a contract code is often made difficult by the lack of enthusiasm typically evinced for codifying instruments on the part of practitioners and judges. As will be seen, much has been written in respect of common lawyers' tendency to view statute as an extraneous incursion upon the common law. Comparatively little, however, has been said about the degree to which codes are susceptible to being undermined by judicial and professional resistance. It is suggested that the proponents of codification ought to do far more to engage with stakeholders in the judiciary and the profession.[12]

Having charted these conceptual and cultural matters, the paper then moves on to an examination of the second type of difficulty, which is that encountered in seeking to identify a core body of rules and principles which together constitute 'contract law'. Any contract code must grapple not only with contract's intersection with other bodies of law, but with the

[11] In doing so, this paper joins a large body of writings which chart the challenges and hurdles inherent in codification. For other discussions in which this task is taken up, see: B Donald, "Codification in Common Law Systems" (1973) 47 ALJ 160, 172-173; H R Hahlo, "Codifying the Common Law: Protracted Gestation" (1975) 38 MLR 23; A E Anton, "Obstacles to Codification" (1982) 15 JurRev 15; M Clarke, "Doubts from the Dark Side — the Case against Codes" [2001] JBL 605; Diamond (n 10).

[12] Would-be reformers must also, of course, attract the support of the political class and the broader public if reforms are to be successfully enacted.

divisions and fault lines internal to the law of contract. As will be seen, proponents of codification in Australia have too often sought to treat the law of contract as a monolithic and internally homogenous legal structure. In consequence of this, codification proposals have tended to elide important distinctions within the law of contract, and to pay too little attention to the important question of how any contract code will interact with other spheres of law with which the law of contract overlaps. It will be suggested that until an appropriate degree of sophistication is brought to the challenges posed in this area, contract codification is unlikely to proceed successfully.

B. CONTRACT CODIFICATION IN AUSTRALIA: A SHORT HISTORY

Though perhaps somewhat surprising in light of Australia's colonial history, codification proposals have played a relatively minor part in the development of Australian private law.[13] Indeed, though Sir Samuel Griffith's criminal code has had a lasting legacy,[14] and British exercises in codification in such fields as the sale of goods and bills of exchange have been adopted in Australia without demur,[15] there has been relatively little impetus within Australia for codification of the common law.[16] Though the general lack of interest in codification in Australia is somewhat difficult to explain, it does make the task of surveying the relevant reform proposals relatively straightforward.[17]

Before turning to a consideration of those proposals, however, something must be said by way of definition of the terms employed here, as 'codification' is an expression which admits

[13] Much has been written about the relationship between codification and the emergence of nationhood. See, eg: H L MacQueen, "Private Law's Revolutionaries: Authors, Codifiers and Merchants?" in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law*, (2018), 41-43; R Zimmermann, "Codification: History and Present Significance of an Idea" (1995) 1 ERPL 95.

[14] For a discussion of Griffith's code and its legacy, see: G Mackenzie, "An Enduring Influence: Sir Samuel Griffith and his Contribution to Criminal Justice in Queensland" (2002) 2 *Queensland University of Technology Law and Justice Journal* 53. Griffith's work as a codifier was not limited to the criminal law. See, eg: *Defamation Act 1889* (Qld).

[15] For a discussion of the English legislation which was eventually adopted in much of the Commonwealth, see: A Rodger, "The Codification of Commercial Law in Victorian Britain" (1992) 108 LQR 570.

[16] There are, of course, important exceptions, the Uniform Evidence Law being perhaps the most significant. (Though as to whether the Uniform Evidence Law can properly be termed a code of the law of evidence, see: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 631-632).

[17] For general discussions which may shed light on the question of why codification has generally failed to command widespread interest in Australia, see: M Tilbury, "A History of Law Reform in Australia" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform*, (2005); J M Bennett, "Historical Trends in Australian Law Reform: (1970) 9 UWA L Rev 211.

of a range of understandings.[18] At least for present purposes, it is possible to adopt the definition proffered by Catherine Skinner, who has suggested that a code, at least in a common law system, should be understood to be:[19]

> [A]n instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field. And codification is the process of drafting and enacting such an instrument. A code by this definition is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law. Thus it has an organising and indexing role that an ordinary statute does not share.

To this it is necessary to add only two further points. The first is that, at least for the purposes of the present discussion, 'codification' should not be understood as being limited to an instrument that seeks simply to restate the common law in a statutory form. It encompasses also those reforms which seek to both restate and reform the law.[20] Indeed, it is doubtful whether a clear line can even be drawn between those codes which seek to reform the law and those which purport merely to restate it. An instrument which seeks merely to restate the law can prompt debate and discussion which in turn leads to substantive reform.[21] Moreover, at least where the content and scope of a legal rule is the subject of disagreement and debate, any restatement must necessarily make a choice as to the which of the competing views ought to be preferred. Insofar as the making of such a choice might precipitate a resolution of the relevant debate, the process of restating the law is inextricably tied up with its reform.[22]

The second point to be made is that codes, in a common law system, are typically construed in a manner consonant with their intended character as the principal statements of the law on their subject. The seminal statement of the proper approach to the construction of a code can be found in the speech of Lord Herschell in *Bank of England v Vagliano Brothers*:[23]

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[18] See the discussions in: E Caldwell, "A Vision of Tidiness: Codes, Consolidations, and Statute Law Revision" in Opeskin & Weisbrot (n 22); G L Gretton, "The Duty to Make the Law More Accessible? The Two C-Words" in D M J Lee, S Wilson-Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) 93. For a recent overview of different understandings of 'codification', see: S Wilson Stark, *The Work of the British Law Commissions: Law Reform … Now?*, (2017), 157-159.

[19] C Skinner, "Codification and the Common Law" (2009) 11 EJLR 225, 228.

[20] Indeed, several of the reform proposals discussed below fall squarely within this category.

[21] For an assessment of the impact of the recent restatement of the English law of unjust enrichment, see: K Barker, "Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales" (2014) 34 OJLS 155. For the restatement itself, see: A Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012).

[22] A clear example of an ongoing debate of this type in the Australian law of contract is that as to the circumstances in which recourse may be had to evidence of 'surrounding circumstances' as an aid to construction. The authorities on this point are now in a hopeless state of confusion. For a recent overview of the debate, see: J Eldridge, "Cherry v Steele-Park" (2018) 92 ALJ 249.

[23] [1891] AC 107, 144. Of course, disputes often arise as to whether, when construing a provision of a code, it is legitimate to have recourse to concepts and rules which precede its enactment. See, eg, the discussion in: *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236; *Brennan v The King* (1936) 55 CLR 253, 263.

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Armed with these definitions, it is possible to turn to a consideration of the principal Australian contract codification proposals. The first such proposal is the ill-fated code drawn up by William Edward Hearn, the inaugural Dean of Law in the University of Melbourne.[24] Michael Tilbury has explained:[25]

> [Hearn] sought no less than the codification of the main body of the general law of Victoria in a Bill, 'The General Code 1885', which he presented to the [Legislative] Council in 1885, the result of his academic work, particularly on the classifications of law. Notwithstanding a favourable report from a Joint Committee of both Houses, the Victorian Parliament succumbed to opposition from the legal profession and, after Hearn's death, failed to enact 'Australia's most interesting experiment in applied jurisprudence'.

The fate of Hearn's code perhaps acted to deter other would-be codifiers, at least in respect of the law of contract. Despite sporadic suggestions for reform,[26] and in spite of the brief period of enthusiasm for contract codification in Britain in the wake of the establishment of the Law Commission and Scottish Law Commission,[27] it was not until the 1990s that another serious Australian contract codification proposal was put forward.

That proposal was advanced by Fred Ellinghaus and Ted Wright, who together have been key figures in the debate respecting contract codification in Australia. Ellinghaus and Wright's first major contribution to the debate in respect of contract codification in Australia was the drafting of the Australian Contract Code, a compact code of the law of contract prepared on behalf of the Law Reform Commission of Victoria.[28] Given its originality and significance, it is worth considering the Australian Contract Code in some detail.

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[24] For further discussion of Hearn's code and its fate, see: A Castles, *An Australian Legal History*, (1982) 480-485.

[25] Tilbury (n 17) at 7 (footnotes omitted). The concluding quotation is drawn from Bennett (n 17) at 216.

[26] See, eg: J G Starke, "A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code" (1978) 49 ALJ 234; D Svantesson, "Codifying Australia's Contract Law — Time for a Stocktake in the Common Law Factory" (2008) 20 Bond LR 1.

[27] Though a British contract code never came to fruition, a complete draft was prepared by the late Harvey McGregor QC, and was later published. See: H McGregor, *Contract Code: Drawn Up on Behalf of the English Law Commission*, (1993). The proposal's fate was partly a consequence of disagreements between the Law Commission and the Scottish Law Commission. For further discussion, see: F M B Reynolds, "Contract: Codification, Legislation and Judicial Development" (1995) 9 JCL 11, 13-17; S Waddams, "Codification, Law Reform and Judicial Development" (1996) 9 JCL 192.

[28] See: Law Reform Commission of Victoria, *An Australian Contract Code*, Discussion Paper No 27, 1992.

The Australian Contract Code is distinctive in many respects. Comprised of only twenty-seven articles, it is by far the shortest code of the common law of contract yet to be proposed.[29] The Code is also unusual insofar as it favours discretion at the expense of fixed rules. The Code's final article provides:[30]

> **Overriding article**
>
> **Article 27**
> A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

This zeal for discretion is a feature of much of Ellinghaus and Wright's work in respect of contract codification. Indeed, as will be discussed further below, the authors later undertook empirical research which concluded that, notwithstanding this broad discretion, the Australian Contract Code, when applied, yielded results which were no less predictable than those of the common law.[31]

No less unusual is the fact that the Australian Contract Code sought to dispense with the doctrine of precedent. The Code provides:[32]

> **Article 3**
> Neither past nor future decisions govern the application of the Code.

Plainly, then, the Australian Contract Code was a novel and bold reform proposal. Even so, the Code struggled to find favour either with the legislature or the profession. Now, decades after its publication, it seems distinctly improbable that the Code will ever be adopted in Australia. In reflecting on why this is so, two points immediately suggest themselves.

First, the highly discretionary approach which the Code sanctions is at odds with much received wisdom as to how contractual disputes ought to be resolved. Indeed, it seems precisely the type of approach which Lord Radcliffe had in mind when cautioning that "'unconscionable' must not be taken to be a panacea for adjusting any contract between competent parties when it shows a rough edge to one side or the other".[33] It is perhaps unsurprising that such a radical departure from orthodoxy attracted few supporters.

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[29] By way of contrast, Harvey McGregor's code contained 673 clauses. See: McGregor, (n 27). Indeed, the brevity of the Australian Contract Code makes it an extreme outlier when compared with other like instruments See the discussion in: Swain (n 10) at 145.

[30] Law Reform Commission of Victoria (n 28) at 17.

[31] See: M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of their Utility*, (2005). See also: M P Ellinghaus and E W Wright, "The Common Law of Contracts: are Broad Principles better than Detailed Rules? An Empirical Investigation" (2005) 11 TexWesleyan LRev 399.

[32] Law Reform Commission of Victoria (n 28).

[33] *Campbell Discount Co Limited v Bridge* [1962] AC 600, 626. This point is also made in: Eldridge (n 8).

Second, some considerable doubt attends the persuasiveness of the empirical studies which the Code's authors later relied upon in its support. In order to test the relative utility of several 'models' of contract law, including both the common law as it then stood and the Australian Contract Code, a series of experiments was carried out involving 1800 Australian university students. As the authors explained, the study:[34]

> [A]dopted a conception of utility which reflects the demands which are in fact most often made of legal systems by lawyers and non-lawyers alike. These are that the law should be:
> - certain (predictable outcomes)
> - just (fair outcomes)
> - accessible (clear language and logic)
> - efficient (easy to comprehend and apply)

The authors described their experiments as follows:[35]

> In the first experiment, law students enrolled in Contract Law were given the facts of a dispute and a statement of the relevant law, drawn from one of the three models, and asked to decide the dispute. They were asked to record their decision (for plaintiff or defendant), along with the time at which it was reached. They were also asked to supply a brief statement of their reasons indicating how they applied the law. A maximum of 80 minutes was allowed to complete these tasks. After this time the students were asked to rank their level of agreement with a number of propositions relating to the utility of the law model (the Likert technique). They were given 10 minutes for this task … Experiment 2 was a replication of Experiment 1 with one difference, namely the student judges worked in pairs … In Experiment 3, university students *not* enrolled in law were asked to read a statement of the facts of a dispute and a judgment deciding the dispute, using one of the law models. They were also asked to complete a questionnaire by responding to a number of propositions about the judgment, again using the Likert technique. Then they were asked to re-familiarise themselves with the facts, read a second judgment in favour of the other party, based on the same or a different law model, and complete an identical questionnaire. They had a maximum of one hour to complete these tasks.

Though subjecting the Australian Contract Code to empirical analysis was sound in principle,[36] it is highly doubtful whether this experimental design adequately emulates real-world conditions.[37] Indeed, the experiment, in employing university students as its test subjects, raises more questions than it answers. What results, for instance, might the experiment have yielded had professional judges been employed as participants? How, if at all, might the results have varied had the participants been given more time to arrive at their determinations? Though

[34] Ellinghaus et al, *Models* (n 31) at 25-26.
[35] Ibid 27-28.
[36] It is worth noting that empirical studies of this type were, not long ago, almost unheard of in law reform. For a very strong criticism of mid-twentieth century English law reform, for instance, see: P S Atiyah, "Law Reform Committee: Twelfth Report" (1966) 29 MLR 541, 545 ('The moral of this Report is that we are unlikely ever to have really satisfactory law reform in this country until those responsible for it see that the basic research is undertaken on which sensible proposals can be formulated.')
[37] The authors' assumptions and experimental design have been the subject of criticism and scepticism elsewhere. For further discussion, see: N Thompson, "Book Reviews" (2006) 27 QL 80, 82-83; Swain (n 10) at 149.

of undoubted interest, there is good reason to question the extent to which the authors' experiments buttressed the case for the code's adoption.[38]

It may be that the failure of the Australian Contract Code to gain traction was instrumental in its authors' later embrace of a more conventional approach. In response to the 2012 Discussion Paper, Ellinghaus and Wright (along with David Kelly), drafted what is the second major reform proposal which merits mentioning here. The Australian Law of Contract, which is comprised of 109 articles, eschews the more radical features of the Australian Contract Code, opting instead simply to take as its core the current Australian law of contract and then modify and 'modernise' the law in a range of ways.[39] Like the Australian Contract Code, it seeks to dispense with strict rules of precedent in its construction and application.[40]

The Australian Law of Contract, like the Australian Contract Code, has failed to gain traction. Given its more modest ambitions, the explanation for its fortunes is not immediately apparent. The question of why this more conventional code has fared relatively poorly will be explored further below.

The third reform initiative which merits mention here is, of course, the 2012 Discussion Paper itself. Though it would be quite wrong to call the Paper a 'codification proposal', there can be no doubt that codification figured prominently in the responses which the Paper elicited.[41]

Despite the broad-ranging content of the Discussion Paper – the content of which will be discussed in more detail below – and the significant response it attracted, the initiative appears to have stalled, if not wholly collapsed. Indeed, the publication of the Discussion Paper was followed by only limited further activity on the part of the Attorney General's Department, and the initiative as a whole appears no longer to be a priority.

In sum, then, contract codification has fared poorly in Australia. Before turning to a detailed consideration of the key hurdles which have stood in the way of such a reform, it is worth dispensing briefly with a constitutional difficulty which, at first glance, might seem to supply the answer to the question of why an Australian contract code has yet to come to fruition.

There can be no doubt that the enactment of a national contract code is particularly challenging in Australia in consequence of the constitutional constraints within which any

[38] The authors contended that the experiments sufficiently emulated real-world results so as to yield useful findings. See: Ellinghaus et al, *Models* (n 31) at 32-33.
[39] See: M P Ellinghaus, D StL Kelly and E W Wright, "A Draft Australian Law of Contract" Working Paper No 03-03-14, Newcastle Law School. Perhaps the most radical provision in the Australian Law of Contract is its abolition, in Article 13, of the requirement of consideration.
[40] The relevant Articles are 1-4.
[41] See, for instance, the works cited in fn 2.

reform must be implemented. Though the Commonwealth enjoys some limited power to make laws in respect of certain species of contract,[42] and is competent to make laws for the facilitation of some modes of contracting,[43] the Commonwealth lacks any general power to make laws in respect of the negotiation, conclusion or performance of contracts.[44] If a national contract code were to be adopted, it would consequently be necessary to obtain the cooperation of the States in securing its implementation. Though views might reasonably differ as to the precise manner in which that result might be achieved, there are nonetheless a number of models to which reference might be had.[45] As these models have proven to be workable, there seems little reason to think that constitutional concerns peculiar to Australia have played a significant role in dampening enthusiasm for an antipodean contract code.[46]

C. THE CONCEPTUAL AND CULTURAL DIMENSION OF CONTRACT CODIFICATION

(1) Contract codification and contract theory

The conceptual dimension of the contract codification debate has received relatively little attention.[47] This is in many ways quite surprising. If a reform proposal of this kind is to be successfully executed, it is plainly important for those driving the process to have a clear notion of what a 'successful' reform would entail. Arriving at an agreed conception of 'success' in this setting in turn calls for agreement as to what function contract law is intended to serve.

Such agreement is hardly forthcoming. Notwithstanding decades of heated debate, a number of intersecting, ongoing, and long-lived arguments as to the nature and role of contract law

[42] An example can be seen in contracts of insurance. In the *Insurance Contracts Act 1984* (Cth), the Commonwealth has enacted a comprehensive statutory regime in respect of insurance contracts, further discussion of which can be seen below.
[43] See, eg, *Electronic Transactions Act 1999* (Cth).
[44] The same point has been made elsewhere. See, eg: Swain (n 10) at 136. Though it would be possible in principle for a power in respect of contracts and contracting to be adopted via referendum, there is little likelihood of such a reform being attempted. Even if attempted, its success is by no means assured. For a history of the referendum in Australia, and an analysis of why proposals to amend the Constitution have so often failed, see: G Williams and D Hume, *People Power: The History and Future of the Referendum in Australia* (2010).
[45] The key example is that of the Australian Consumer Law, which is applied as a law of the Commonwealth to the extent of the Commonwealth's legislative competency, and is also applied as a law of each state. In applying a contract code as a law of the Commonwealth, the corporations power would likely be of particular significance insofar as commercial contracting is concerned. For an overview of the expansive modern approach to the interpretation of the corporations power, see: J Stellios, *Zines's The High Court and the Constitution* (2015) ch 5.
[46] Of course, the substance of the Australian Consumer Law has been the subject of criticism. See, eg: J W Carter, "The Commercial Side of Australian Consumer Protection Law" (2010) 26 JCL 221.
[47] Though some commentators have approached the debate on a conceptual footing. See, eg: Siliquini-Cinelli (n 2).

remain unresolved.[48] These debates run along multiple axes. On one hand is the well-known tension between the notion of 'freedom of contract' and the countervailing pressure to intervene in parties' bargains in the interest of fairness.[49] On the other are more fundamental debates as to the proper normative justifications for the enforcement of contractual obligations.[50] Further still – and of somewhat greater significance for the debate in respect of codification – is the ongoing clash between what can be termed 'contextual' and 'formal' approaches to contract law and contract adjudication.[51] Though there are some who have suggested that the labels can sometimes obscure rather than illuminate,[52] there remains on any view a significant divergence of approach which divides academics, practitioners and judges.[53]

This disagreement has posed a formidable hurdle to any successful codification of the Australian law of contract. This is largely in consequence of the degree to which reform proposals have failed to grapple with the debates in this sphere. Indeed, Ellinghaus and Wright's Australian Contract Code seeks, in substance, to deftly side-step at least one of the conceptual debates insofar as its authors contended that flexible, discretionary standards – which are generally thought to be more capable of ensuring fair outcomes in particular cases – produce outcomes which are no less certain than clear, fixed rules.[54] If this premise is not accepted, one might well view the Australian Contract Code to be one which opts very strongly in favour of discretion at the expense of certainty. Though such a normative choice is plainly a contentious one, the authors of the Code do not seek to make a detailed case for why striking a balance between fairness and certainty in this way is warranted.

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[48] For surveys of the relevant debates, see: S A Smith, *Contract Theory* (2004); J Morgan, *Great Debates in Contract Law* (2015).

[49] For the classic treatment of the history of this debate, see: P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979). For a recent suggestion that this framework is in some respects unhelpful, see: C Willett, "Re-Theorising Consumer Law" [2018] CLJ 179.

[50] See, eg: J Gava, "Can Contract Law be Justified on Economic Grounds?" (2006) 25 UQLJ 253; C Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981); Lord Steyn, "Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 438.

[51] For an introduction to this debate, see: Morgan, (n 48) at 70-91. For examples of seminal contributions from contextualist and formalist perspectives, see, respectively: H Collins, *Regulating Contracts* (1999); J Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (2013).

[52] See, eg: Z X Tan "Beyond the Real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation" (2016) 79 MLR 623, 623 ("Contract lawyers are often divided between two schools of thought: formalism and contextualism. In the realm of contractual interpretation, this division illuminates various debates surrounding the modern contextual approach. Ultimately, however, the divide between the 'real and the paper deal' does not fully reflect the relevant fault lines. The real contest is between rival interpretations attempting to make the most coherent sense of the available text and context surrounding the document.")

[53] See the discussion in: J Gava, "How Should Judges Decide Commercial Contract Cases?" (2013) 30 JCL 133.

[54] See the discussion above.

Similar difficulties beset the 2012 Discussion Paper, which opens with the identification of eight questions upon which comment is sought. These are:[55]

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?

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?

The paper then proceeds to expand upon the considerations adverted to in these questions. Most importantly, the paper instances what are suggested to be the principal 'drivers of reform' in the domain of contract law. These are drawn in part from the principles articulated in the 2009 *Strategic Framework for Access to Justice*,[56] and are said to be:[57]

- Accessibility
- Certainty
- Simplification and removal of technicality
- Setting acceptable standards of conduct[58]
- Supporting innovation
- Maximising participation in the digital economy
- Suitability for small and medium sized-business
- Elasticity[59]

[55] Attorney-General's Department (Cth) (n 1) at iii.
[56] Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009.
[57] This is an abridged form of the factors which are set out in the Discussion Paper. See: Attorney-General's Department (Cth) (n 1) at 3-6.
[58] The Discussion Paper explicitly cites the need, in this connection, for acknowledgement of Australia's cultural diversity. As the Discussion Paper explains: 'Standards of acceptable conduct should be unambiguous, simple to understand and take particular account of the needs of people from different cultural backgrounds or experiencing disparate circumstances. Australia's cultural diversity demands that our contract law should be readily translatable into other languages to facilitate domestic and international trade and improve general public awareness of the law.' See: Attorney-General's Department (Cth) (n 1) at 4.
[59] The paper suggests that 'elasticity … may help support relational contracts; that is, long-term contracts which support successful continuing relationships. Many contracts involve complex projects which rely on cooperation

- Harmonisation
- Internationalisation[60]

The difficulty here is of a different kind to that evident in Ellinghaus and Wright's proposal. Rather than cleaving to a particular conception of the purpose and role of contract, or adopting a clear stance in respect of the various debates canvassed above, the 2012 Discussion Paper is characterised by its failure to adopt a coherent stance in respect of underlying normative questions. So much is made clear by the fact that the paper fails to indicate how the competing 'drivers of reform' might be reconciled where they are in tension with one another. This tension is, as is no doubt plain, quite real. There is, for instance, some considerable difficulty in reconciling the imperative to make the law of contract 'certain' with the imperative to ensure contract law "take[s] particular account of the needs of people from different cultural backgrounds or experiencing disparate circumstances".[61]

Of course, one answer to this criticism of the Discussion Paper is that it was only ever intended to be the first step in a long process of law reform, and that the task of arriving at a normative stance of the type under discussion here is one which properly ought to be undertaken at a later stage. Indeed, it might well be thought that any proper contract reform process ought at first to leave these fundamental questions open, with a view to permitting debate and discussion. A law reform project, however, is not an exercise in legal philosophy. In failing to take at least a preliminary stance at the outset on contentious questions of this type, there is a risk that the reform process as a whole will simply become an arena for the re-agitation of these long-running conceptual debates, with the result that the taking of practical steps is stalled.[62]

These observations ought to give the proponents of codification pause for thought. Even so, some care must be taken not to overstate the difficulties under discussion here. It is certainly not suggested that contract is beset by theoretical debate to a significantly greater extent than other areas of private law.[63] Nor is it suggested that the mere existence of theoretical disputation

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between the parties over a significant period of time. The use of flexible, gap-filling concepts like good faith, reasonableness or adaptation for hardship may be needed to help these contracts work as time passes and circumstances change.' See: Attorney-General's Department (Cth) (n 1) at 5.

[60] Which in the Discussion Paper connotes harmonisation with international norms.

[61] Attorney-General's Department (Cth) (n 1) at 4.

[62] Indeed, the 2012 Discussion Paper soon prompted a re-agitation of familiar conceptual debates. See, eg: J Gava, "Contract Law is Ignored by the Market, So Why Reform It?" *The Australian*, 8 March 2013, 26.

[63] The normative basis of the law of restitution, for instance, continues to be the subject of intense scholarly debate. See, eg: C Webb, *Reason and Restitution: A Theory of Unjust Enrichment*, (2016); F Wilmot-Smith, "Reasons? For *Restitution*?" (2016) 79 MLR 1116; F Wilmot-Smith, "Should the Payee Pay?" (2017) 37 OJLS 844; J E Penner, "We All Make Mistakes: A 'Duty of Virtue' Theory of Restitutionary Liability for Mistaken Payments" (2018) 81 MLR 222.

in respect of a body of law precludes the possibility of a successful project of codification – indeed, the successful Australian experience in respect of the Uniform Evidence Law suggests that this cannot be so.[64] It might be thought, however, that contract is riven by theoretical disputation to a greater extent than some areas of law which have been the subject of successful codification proposals.[65]

What lessons emerge from this experience for would-be codifiers of the law of contract? Put simply, it is suggested that if a contract codification project is to succeed, it ought at the outset to adopt and defend a clear stance in respect of the underlying debates as to the nature and purpose of the law of contract. In doing so, such a proposal can ensure that the debate which it foments is directed as far as possible to practical questions which must be answered if the reform is to be successful. At the same time, such an approach guards against the risk of the reform initiative being overwhelmed by theoretical disputation. Though it would be quite unrealistic to suppose that such theoretical debate could ever be wholly avoided, the Australian experience stands as a clear example of how such disputation can be invited unnecessarily.

(2) Codification and Legal Culture

The indifference which judges and practitioners often display in respect of codification projects and codifying instruments is merely one aspect of a broader want of enthusiasm for legislation as a source of law. This phenomenon is hardly new. As long ago as 1908, Roscoe Pound observed:[66]

> Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote corner the most obsolete decisions and cite all of them, seldom cite any statutes except those landmarks which have become a part of our American common law, or, if they do refer to legislation, do so through the judicial decisions which apply it. The courts, likewise, incline to ignore important legislation; not merely deciding it to be declaratory, but sometimes assuming silently that it is declaratory without adducing any reasons, citing prior judicial decisions and making no mention of the statute.

[64] The law of evidence is attended by rich and long-running theoretical debate. See, eg: M S Pardo, "The Nature and Purpose of Evidence Theory" (2013) 66 VandLRev 547, 548-553. One might also instance the success in the United States of the Uniform Commercial Code.
[65] The law respecting bills of exchange, for instance, has been the subject of relatively little theoretical debate.
[66] R Pound, "Common Law and Legislation" (1908) 21 HarvLRev 383, 383.

Indeed, this want of interest in statute law is not confined to the judiciary and profession, and seems to manifest itself equally in the academy. Elise Bant, in seeking to explain this state of affairs, has noted:[67]

> Explanations by the few commentators who have addressed the want of scholarship in this area include: the perception (often first gained at law school) that legislation is comparatively 'unexciting'; the sense that it is an intruder on foundational judge-made law; what might be termed constitutional concerns about the necessary separation of reasoning derived from the two sources of law; appreciation that the piecemeal and limited operation of many statutes make them ill-suited to inform debates concerning broader legal issues; and, finally, the view that legislation is often the poorly drafted outcome of political expediency, rather than reflective of legal principle. Underpinning all factors is a sense, often assumed and unarticulated, that the two sources of civil law liability are 'oil and water': separate sources of law that do not mix.

This may well be accurate, though further explanations also suggest themselves. Part of the explanation, for instance, at least insofar as private law is concerned, might be found in the somewhat mixed track record of recent statutory interventions.[68] Equally, it may partly arise from a want of a sense of ownership – that is to say, from an apprehension that legislation is imposed on the profession by law reformers and the political class, rather than being the product of the profession itself.[69] Insofar as codes are concerned, resistance may arise in part from a suspicion of or distaste for the Civil Law,[70] along with an apprehension that codification entails the adoption of Civilian techniques and concepts.[71] Yet whatever may be the

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[67] E Bant, "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38 UNSWLJ 367, 369 (footnotes omitted). Bant cites in turn: P S Atiyah, "Common Law and Statute Law" (1985) 48 MLR 1; J Beatson, "Has the Common Law a Future?" [1997] CLJ 291; J Beatson, "The Role of Statute in the Development of Common Law Doctrine", (2001) 117 LQR 247; A Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232; A Mason, "A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statutory Developments" (Paper presented at the Obligations VII Conference, University of Hong Kong, 17 July 2014).

[68] The significant statutory incursions into the law of negligence in Australia have generally been poorly received. See, eg: H Luntz, "Reform of the law of Negligence: Wrong Questions – Wrong Answers" (2002) 25 UNSWLJ 836; B McDonald, "Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia" (2005) 27 Syd LR 443, 443. Reforms have been met with criticism even in England, where statute has made more limited inroads. See: J Goudkamp, "Restating the Common Law? The Social Action, Responsibility and Heroism Act 2015" (2017) 37 LS 577. Statutory interventions in respect of the law of contract have also not been wholly happy. See, eg: A Stewart, "The South Australian Frustrated Contracts Act" (1992) 5 JCL 220; A Stewart and J W Carter, "Frustrated Contracts and Statutory Adjustment: The Case For a Reappraisal" [1992] CLJ 66.

[69] Such a view, of course, entails the acceptance of a number of premises that are not necessarily sound.

[70] There is some considerable evidence for the existence of a fear on the part of common lawyers that the common law's continued survival is in doubt. See, eg: S McLeish, "Challenges to the Survival of the Common Law" (2014) 38 MULR 818; J Beatson, "Has the Common Law a Future?" [1997] CLJ 291. Others have been avowedly optimistic in this regard. See, eg: R Goff, "The Future of the Common Law" (1997) 46 ICLQ 745.

[71] In truth, it is inexcusably simplistic to view the process of codification in a common law legal system to involve an adoption of a civilian scheme. This is, however, one of the most common misapprehensions in the codification debate. See: H Kötz, "Taking Civil Codes Less Seriously" (1987) 50 MLR 1, 2 ("First, it was assumed implicitly that codification in England would be more or less tantamount to what it is on the Continent. Secondly, Continental codes were described as being based on a number of distinctive and uniform characteristics.")

explanation for this phenomenon, it seems clear that, notwithstanding calls for lawyers to abandon the mindset described above,[72] there remains a general lack of enthusiasm for statute and for statutory reform on the part of the legal profession.

This state of affairs has significant ramifications for the prospects of contract codification. First, and most obviously, a lack of enthusiasm for statutory reform on the part of the judiciary and profession is likely to present a hurdle when seeking to build support for any proposed code.[73] Indeed, a survey of the submissions to the 2012 Discussion Paper reveals a scepticism as to the merits of codification on the part of the judiciary and profession.[74] This scepticism is, moreover, not peculiar to Australia. Lord Goff, for instance, was sceptical of any need for the codification of commercial law. His Lordship explained:[75]

> Another feature of our commercial law which our continental friends find almost impossible to understand is that we have no commercial code set alongside but distinct from a civil code. The continental lawyer goes around with his civil code in his pocket – or his commercial code, I suppose, if he is a commercial lawyer. We cannot do that. But there is, so far as I am aware, no call for a commercial code coming from our commercial judges or practitioners. There are academic lawyers who do call for one, most notably perhaps Professor Roy Goode, who speaks of a need for a commercial code as self evident … In a sense, we do not have one commercial code but several, to be found in all the standard forms so widely used throughout the world – the Lloyds form of standard marine policy, the various forms of charter party and commodity trade contract, and so on.

In sum, the proponents of codification have much work to do if broad-based support for codification from the judiciary and profession is to be secured. Until such support is forthcoming, the task of securing reform will remain especially difficult, particularly if senior judicial figures continue to caution against the institution of significant change.[76]

The foregoing points are by themselves sufficient to give would-be reformers pause for thought. Yet it would be wrong to view a lack of support in the judiciary and profession as posing a challenge only to the task of securing the enactment of a contract code.[77] Indeed, even

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[72] See, eg: El Bant and J M Paterson, "Consumer Redress Legislation: Simplifying or Subverting the Law of Contract" (2017) 80 MLR 895.

[73] This has been observed on a number of occasions. See, eg: Diamond (n 10) at 377.

[74] See the discussion in: L Nottage, "The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response" in Keyes & Wilson *Codifying* (n 2). Particularly notable in this respect is the submission of T F Bathurst, the Chief Justice of New South Wales (Submission No 11).

[75] R Goff, "Opening Address" (1992) 5 JCL 1, 3. For a distillation of Professor Goode's views in respect of the codification of commercial law, see: R Goode, "The Codification of Commercial Law" (1988) 14 Mon LR 135.

[76] Of course, not all senior judicial figures harbour hostility towards codification initiatives. For a notable example of judicial enthusiasm in this sphere, see: M Arden, "Time for an English Commercial Code?" [1997] CLJ 516.

[77] The difficulties posed by judicial and professional resistance are not, of course, confined to contract codification projects. For a discussion of judicial resistance to codification of the criminal law, see: R Cross, "The Reports of the Criminal Law Commissioners (1833– 1849) and the Abortive Bills of 1853" in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) 9-10.

if a code is successfully enacted in the face of lacklustre support, a want of judicial and professional enthusiasm can lead to its being undermined once in operation.

The judicial approach to the construction of the California Civil Code provides perhaps the most powerful illustration of the degree to which the judiciary is capable of manipulating the operation of a code in order to achieve a desired end.[78] Presented with the dilemma of a code which seemingly precluded a desired development of the law of contributory negligence, in circumstances where legislative intervention did not appear imminent, it was left to the judges to craft a solution. That solution was found in *Li v Yellow Cab Co*.[79] As the majority there explained:[80]

> It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin -- its genesis being traditionally attributed to the opinion of Lord Ellenborough in *Butterfield v. Forrester* (K.B. 1809) 103 Eng. Rep. 926 -- the enactment of section 1714 of the Civil Code in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds. Subsequent cases of this court, it is pointed out, have unanimously affirmed that -- barring the appearance of some constitutional infirmity -- the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise … We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided … it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Though this conclusion served to resolve the immediate difficulty before the Court, there can be little doubt that it is starkly at odds with the notion of a code as the principal statement of the law on its subject.[81] Indeed, insofar as it amounts to a judicial reclamation of responsibility for the law's development, the decision stands as a clear warning of the extent to which the fate of a code is in the hands of the judges.[82] This only reinforces the need for a code to have a broad base of support among those who will be responsible for its application.

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[78] For an overview of the circumstances leading to the Code's enactment, see: M E Harrison, "The First Half Century of the California Civil Code" (1922) 10 CLR 185.
[79] (1975) 13 Cal. 3d 804.
[80] *Li v Yellow Cab Co* (1975) 13 Cal. 3d 804 at 813-814. For further discussion, see: R Hyland, "Codification and the American Discussion About How Judges Decide Cases" in Keyes & Wilson *Codifying* (n 2) at 206.
[81] Of course, in a common law system, it is always wrong to conceive of a code as amounting to an *exhaustive* statement of the law on its subject. See the discussion in: Eldridge (n 8).
[82] Another rather different example might well be the *Defamation Act 1958* (NSW), a code of the law of defamation which, in consequence of a succession of judicial decisions, was gradually rendered unworkable. The Act was subsequently repealed. For a discussion of the Act and its fate, see: D Rolph, *Defamation Law*, (2016), 52-55.

What, then, can be said in respect of Australian contract codification proposals and reform initiatives in light of these points? The most obvious observation to be made is that the proposed Australian Contract Code put forward by Ellinghaus and Wright did not garner the level of support in the judiciary or the profession which would have been essential to its success.[83] Much the same can be said of the Australian Law of Contract.[84] Equally, the 2012 Discussion Paper did not elicit responses which point to a consensus – or even a significant majority – in favour of codification. Yet to make these points is simply to invite the more important question of what might be done to build the requisite support.

This indeed ought to be recognised as one of the most pressing questions facing the proponents of contract codification. Yet unfortunately for those sympathetic to such a reform, no obvious solutions are forthcoming. Indeed, a consideration of the processes surrounding successful reform proposals suggests that the best that can be done is to endeavour to work closely with the judiciary and profession throughout the reform process. In addition to examples from other areas of law,[85] there exist a number of potential models for such an approach to contract law reform. John Gava and Peter Kincaid, for instance, in examining attitudes in the Australian legal profession towards changes in the law of contract, engaged in an empirical survey which gathered hard evidence of the views and preferences of practising lawyers.[86] Such evidence may well be valuable in ascertaining how engagement with the profession ought to proceed.

Lessons might also be derived from the approach taken by the American Law Institute, which has traditionally involved a wide and diverse range of stakeholders in the preparation of restatements of the general law.[87] Indeed, this approach has already been emulated to some extent elsewhere. Andrew Burrows, in preparing his recent restatement of English contract law,[88] drew upon the expertise of an advisory group which included many senior figures from

[83] Indeed, as noted above, Ellinghaus and Wright's proposal seems never to have been in favour among practitioners. It should be noted, however, that the Hon. Michael Kirby did offer support for reform: M Kirby, "Foreword" in Ellinghaus et al *Models* (n 31).

[84] It should be noted that the Australian Law of Contract did attract mainstream interest. See, eg: C Merritt, "Meet the Great Reformers of Contract Law", *The Australian*, 17 August 2012, 29.

[85] Perhaps the best example within Australia is provided by the reform processes which led to the Uniform Evidence Law. A rigorous reform process, led by the Australian Law Reform Commission, engaged with a wide range of stakeholders in the course of the legislation's development. See: Australian Law Reform Commission, *Evidence*, Report No 38, 1987.

[86] J Gava and P Kincaid, "Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia" (1996) 10 JCL 141.

[87] E A Farnsworth, "Ingredients in the Redaction of The Restatement (Second) of Contracts" (1981) 81 ColumLRev 1. Others have also suggested that the processes of the American Law Institute may be instructive. See, eg: Swain (n 10) at 146.

[88] See: A Burrows, *A Restatement of the English Law of Contract* (2016). A restatement has also recently been drafted by Professor Andrews: N Andrews, *Contract Law Rules: Decoding English Law* (2016).

the judiciary and the profession.[89] If this example were followed in respect of future contract codification projects, it might well be easier to win the support of the judiciary and the profession. Indeed, would-be codifiers might even see projects such as Burrows' restatement as a useful precursor to a code, at least insofar as such a document might acclimatise the profession and the judiciary to the notion of an instrument which purports to set out the whole of the law of contract.

There are, of course, a range of other reasons for seeking to consult broadly in the course of a codification project, not least the desire to avoid errors and oversights.[90] Yet, in light of the considerations canvassed above as to the lack of enthusiasm on the part of the judiciary and the profession for reform of this type, perhaps the most significant benefit to be derived from following this example is the building of goodwill with those whose support is necessary if a code is to be successfully enacted and implemented.

D. THE UNCERTAIN METES AND BOUNDS OF 'CONTRACT LAW'

Any contract code must grapple not only with contract's intersection with other bodies of law, but with the divisions and fault lines internal to the law of contract. Yet proponents of contract codification in Australia have too often sought to treat the law of contract as a monolithic and internally homogenous legal structure. The result has been that codification proposals have often elided distinctions within the law of contract, and have failed to adequately explain how the proposed code will interact with other areas of law with which the law of contract overlaps.

It is not difficult to see how the difficulties under consideration here come to arise. There does seem to be an intuitive sense in which 'contract' is felt to be a unitary legal category,

[89] The advisory group comprised: Lord Toulson, Lord Justice Longmore, Lord Justice Gross, Lord Justice Lewison, Lord Justice Beatson, Mr Justice Hamblen, Mr Stephen Moriarty QC, Mr Laurence Rabinowitz QC, Mr Marcus Smith QC, Mr Richard Calnan, Professor Hugh Beale, Professor Mindy Chen-Wishart, Mr Richard Hooley, Professor Ewan McKendrick, Professor Gerard McMeel, Dr Janet O'Sullivan, Professor Robert Stevens, Professor Andrew Tettenborn, Professor Simon Whittaker, and Dr Frederick Wilmot-Smith. A similar approach was taken to the drafting of Professor Burrows' restatement of the English law of unjust enrichment, for which, see: A Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012).

[90] It should be noted, however, that even the involvement of eminent experts cannot wholly eliminate the risk of error. By way of example, Professor Burrows' restatement was compiled with the assistance of a panel of leading figures from the judiciary and the academy. Yet the finished product omitted any restatement of the important (albeit nascent) principle of 'contractual estoppel'. See: G Leggatt "Publication Review: A Restatement of the English Law of Contract" (2017) 133 LQR 521, 523. As to contractual estoppel, see: J Braithwaite, "The Origins and Implications of Contractual Estoppel" (2016) 132 LQR 132. Of course, this omission was likely welcomed in some quarters. See, eg: G McMeel, "Documentary Fundamentalism in the Senior Courts: the Myth of Contractual Estoppel" [2011] LMCLQ 185; G McMeel, "The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy" in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Contract* (2017).

subject to core organising principles and susceptible to reduction to a coherent and intelligible codifying instrument.[91] The same intuition does not arise in respect of all areas of law. Nobody has attempted, for instance, the codification of 'equity', and the notion of such a project seems distinctly improbable.[92] Yet the notion that 'contract' exists as a wholly discrete and unified body of legal doctrine begins to break down upon even cursory examination.

Consider, for instance, how one might go about drawing a bright line around the rules and principles which together constitute the 'law of contract'. While some rules and principles – such as the requirement of consideration – might be thought to be at the heart of contract law,[93] others defy such easy categorisation. Does the doctrine of undue influence form part of the law of contract? Or is it instead a general equitable doctrine that may, in some instances, apply to vitiate a contract? This absence of precisely demarcated categories, whilst a hallmark of the common law, has been the cause of much vexation. Some have looked enviously at the comparatively elegant scheme of the Roman law of obligations.[94] Others have gone further, advancing a private law theory that has categorisation and taxonomy at its core.[95]

For textbook authors, this absence of clear boundaries has generally been resolved by the taking of a broad view of the subjects which ought to be included. Accordingly, texts and reference works often include discussions of a range of doctrines which, while not limited to the domain of contract, are often invoked in factual settings in which the existence, performance or breach of a contract is in question. So it is that leading contract texts regularly include an introductory treatment of such subjects as the law of restitution.[96]

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[91] It is worth noting that though the existence of such an intuition may be widespread today, this was not always so. Indeed, the modern conception of contract as a coherent body of principle was for many centuries obscured by the forms of action. Obligations which today would be characterised as contractual were enforced variously in covenant, debt, and, most importantly, assumpsit. See: S F C Milsom, *Historical Foundations of the Common Law* (1981) chs 10 – 12.

[92] Indeed, a number of commentators of great authority have claimed that equity (as distinct from particular equitable doctrines) is insusceptible even of a clear definition. See, eg: J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (2014), [1-005] ("Equity can be described but not defined."); P Millett, "The Common Lawyer and the Equity Practitioner" [2015] *UK Supreme Court Yearbook* 193, 193 ("Equity is not a set of rules but a state of mind.") It should be noted that though no attempt has been made to codify equity as a body of doctrine, particular equitable doctrines have been 'picked up' and modified by statute. Most notable in this respect is the law respecting the duties owed by company directors. See, eg: *Corporations Act 2001* (Cth) ss 180, 181.

[93] Despite being the subject of perennial criticism. See, eg: Lord Wright, 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1936) 49 HarvLRev 1225; A Burrows, "Improving Contract and Tort" in A Burrows (ed) *Understanding the Law of Obligations* (1998), 197. For a defence of consideration, see: M Chen-Wishart, "In Defence of Consideration" (2013) 13 OUCLJ 209.

[94] For an example of a survey of the law of obligations in which some considerable sympathy for Roman legal thought is evident, see: D Ibbetson, *A Historical Introduction to the Law of Obligation*, (1999).

[95] The most famous such work is that of the late Professor Birks. See, eg: P Birks, *An Introduction to the Law of Restitution* (1989); P Birks (ed), *The Classification of Obligations* (1997).

[96] See, eg: J W Carter, *Contract Law in Australia* (2018), ch 38; N C Seddon and R A Bigwood, *Cheshire and Fifoot: Law of Contract* (2017), ch 26.

Such a solution is not readily available to one who seeks to codify the law of contract. Consider again a doctrine such as undue influence, which can be invoked in respect of a contract and also in respect of other transactions, such as a voluntary *inter vivos* disposition of property.[97] If contract law is to be codified, ought undue influence be included in the code? If so, should the code state the law of undue influence only insofar as it operates in respect of contracts? Such an approach might result in two substantively different doctrines of undue influence: a codified doctrine which would operate in respect of contracts, and a general law doctrine which would apply in respect of non-contractual transactions.[98] It is not at all easy to see how such a position could be justified.[99] Indeed, the unwelcome prospect of this seems reason enough to conclude that if undue influence is to be codified at all, the code ought to state the whole of the law of undue influence. But the objection to this course is also plain: a contract code which states the operation of the doctrine of undue influence in general seems to be a code which has spilled over its banks. Indeed, once it is accepted that a contract code might extend to embrace doctrines which merely intersect with contract, it is difficult to adjudge where the code's boundaries ought to be drawn.

Plainly, the lack of a clear demarcation as to where 'the law of contract' begins and ends is a problem with which would-be codifiers and reformers must grapple.[100] There can be no doubt that the task is a challenging one.[101] It is compounded by the fact that relatively few successful examples can be drawn from elsewhere. The same challenges do not arise in a civilian setting, for instance, where the boundary line between the code and the common law need not be drawn.[102] The difficulties in this sphere are also less pronounced where, as is the case in New Zealand, it is sought to codify only clearly-demarcated parts of the law of contract.[103] Indeed, even where comprehensive contract codes have been successfully enacted in the context of a

[97] Indeed, the doctrine's application to voluntary *inter vivos* dispositions is of some considerable practical importance. See the discussion in: F R Burns, "Undue Influence Inter Vivos and the Elderly" (2002) 26 MULR 499.

[98] This outcome might be the result of a deliberate choice, when drafting the code, to codify undue influence in a modified form. Yet even if the code sought simply to re-state the general law, there would remain the possibility of the courts construing the code in a manner giving rise to a divergence from the position at general law.

[99] It should of course be noted that there is nothing unusual in the notion of a doctrine operating in a way which is sensitive to context, such that its practical operation may differ slightly from one setting to another.

[100] The challenge has been remarked upon elsewhere. See, eg, Swain (n 10) at 143.

[101] Indeed, any exercise which calls for the crafting of a clear statement of the metes and bounds of 'the law of contract' is a perilous one. See the discussion in: J Eldridge, "Book Review: Leading Cases in Contract Law" (2017) 34 JCL 174, 175.

[102] This is not to discount the difficulties which can arise in determining the internal demarcations which ought to be observed when drafting such a code.

[103] As to the New Zealand reforms, see: F G Barton, "The Effect of the Contract Statutes in New Zealand" (2000) 16 JCL 233; R Bigwood, "The Partial Codification of Contract Law: Lessons From New Zealand" in Keyes & Wilson *Codifying* (n 2). The New Zealand statutes have recently been consolidated in the *Contract and Commercial Law Act 2017* (NZ).

common law system, reforms have often proceeded in a way which avoided the necessity of setting down boundaries in this way: the *Indian Contract Act 1872*, for instance, deliberately sought to codify not just the law of contract, but also a wide range of other subjects with which the law of contract overlaps.[104]

In light of these difficulties, it is somewhat surprising that the taxonomical challenges inherent in identifying the boundaries of the law of contract have often been dealt with cursorily by the proponents of reform in Australia. It is not entirely clear, for instance, how the Australian Contract Code or Australian Law of Contract are to operate alongside other bodies of law: each code is simply to be given effect according to its terms, and any deleterious consequences for the coherence of private law as a whole are seemingly left to be grappled with by the courts.[105]

Even putting to one side the difficulties encountered in identifying the boundaries of the law of contract, equally vexing challenges are posed by contract law's internal fault lines. These divisions exist in at least two senses. First, there is the well-understood recognition of a range of special rules and principles which govern particular species of contract (or particular species of contractual term). These special categories arise as a consequence of common law rules and through statutory intervention.[106] Second, there are the various conceptual ways in which the law of contract might be divided or categorised. One might, for instance, seek to classify some bargains as 'relational' contracts.[107] Though this second species of fault line is itself the subject of considerable debate,[108] it could scarcely be suggested that such distinctions within the law of contract can be altogether ignored. Indeed, at least one conceptual sub-category of contract – that of the consumer contract – is now almost universally recognised.[109]

The challenge for would-be codifiers and reformers is to bring an appropriate degree of sophistication to the task of engaging with these internal divisions. It is not wholly clear, for instance, how Ellinghaus and Wright's Australian Contract Code is intended to interact with

[104] See the discussion in: Tofaris (n 9).
[105] Though these difficulties may strengthen the appeal of a more far-reaching reform, such as a civil code, the prospects of such an instrument being successfully enacted seem relatively poor.
[106] The common law, for instance, recognises that special principles are relevant to the construction of contractual indemnities. See generally: W Courtney, *Contractual Indemnities* (2014). For an important Australian example of special rules provided by statute, see: *Insurance Contracts Act 1984* (Cth). It is worth observing that the entire second volume of *Chitty on Contracts* is devoted to 'specific contracts'. See: H Beale, (ed) *Chitty on Contracts* (2015), vol 2.
[107] Though the notion of the 'relational' contract has now attained widespread currency, it remains largely a conceptual label, rather than a category recognised at the level of legal doctrine. See, eg, the discussion in: M A Eisenberg, "Why There is No Law of Relational Contracts" (1999) 94 NWULR 805.
[108] See, eg: S Mouzas and M Furmston, "A Proposed Taxonomy of Contracts" (2013) 30 JCL 1.
[109] See, eg: R Brownsword, "The Law of Contract: Doctrinal Impulses, External Pressures, Future Directions" (2014) 31 JCL 73, 73 ("Nowadays, it seems almost trite to remark that the law of contract does, and indeed should, distinguish between consumer transactions and business-to-business deals.")

other statutory schemes which affect some species of contract.[110] Similarly, while it seems that the Australian Law of Contract is intended to apply to all species of contract, the decision to assimilate both consumer and commercial contracts to a uniform set of rules invites a range of objections which are not squarely answered by the Code's authors. In the same vein, the 2012 Discussion Paper, insofar as it seeks to canvass the prospect of a wholesale reform of the law of contract, arguably fails to observe the necessity of approaching the reform of commercial contract law and the reform of consumer contract law as two discrete exercises.

Would-be reformers might draw an important lesson from this experience. Put simply, what is needed is for reform proposals to engage explicitly with the difficulties and decisions under discussion here. There might, for instance, be sound reasons for declining to distinguish between consumer and commercial agreements when setting out the core principles of the law of contract (indeed, it may be that such an approach is ideal insofar as it promotes coherence in the law and avoids needless complexity).[111] If such an approach is to be adopted, however, its proponents must proffer a clear and rigorous defence of the contentious choices it entails. To do any less than this is simply to invite controversy and confusion.

E. CONCLUSION

The task of this paper has been to examine a number of challenges inherent in contract codification which have been given too little attention by the proponents of reform in Australia. Having done so, it remains only to make a number of points as to how the matters discussed in this paper bear upon the future prospects of contract codification both in Australia and elsewhere in the common law world. In particular, it is necessary to make mention of a number of matters which merit special attention when considering the prospects of contract codification in Britain.

[110] The Code simply provides, in Article 2, that 'The Code does not apply to the extent that it is inconsistent with Commonwealth, State or Territory legislation'. See: Law Reform Commission of Victoria (n 28) 13. The position is no clearer in respect of the Australian Law of Contract, which also makes relevant provision in this respect in Article 2. See: Ellinghaus et al (n 39) ("This Law states the rules that apply to a contract or proposed contract if the parties agree that Australian law applies, or the contract has its closest connection with an Australian jurisdiction, except to the extent that a statutory provision of an Australian jurisdiction applies to it.")

[111] It might be noted, however, that in the most recent initiative by the American Law Institute in respect of the law of contract, consumer contracts have been singled out as being suitable for a discrete restatement. For a discussion of that project, see: O Bar-Gill, O Ben-Shahar and F Marotta-Wurgler, "Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts" (2017) 84 UChiLRev 7.

First, it should be stressed that it is at no stage suggested that the difficulties canvassed in this paper pose insuperable barriers to the enactment of a successful contract code. Indeed, a number of points have been made as to how the proponents of reform might go about negotiating the difficulties examined here. What is suggested, however, is that Australian contract codification reform proposals have often failed to pay sufficient attention to a number of serious challenges which any successful reform proposal must find a means of negotiating.

Second, it must always be borne in mind that ascertaining whether the codification of the law of contract is a worthwhile endeavour is a question of balancing a range of competing factors. None could deny that such a reform would be costly and time-consuming. Few would deny that such a reform would come with a range of risks. The points made in this paper must thus be understood in their proper context. It is only when taken together with the other contributions to the codification debate – and in particular, when weighed against the writings of the proponents of codification – that the points made here offer guidance as to whether such a reform is warranted.

Finally, it must be remembered that any British contract codification project would be beset by challenges which are peculiar to the constitutional and political context in which that reform would be pursued. There is, therefore, some danger in extrapolating too readily from the Australian experience. Though a study of the difficulties encountered in Australia is instructive, it provides only imperfect guidance to reformers elsewhere. Indeed, the fact that contract codification proposals have fared significantly better in some jurisdictions than in others is a reminder of the importance of paying heed to the particular circumstances in which a reform proposal is put forward.

The prospects of contract codification in Britain remain uncertain. As is clear from the discussion above, a glance at the history of codification in Britain offers up examples of both successful reforms – such as the sale of goods legislation – as well as those that failed to attract adequate support.[112] Any would-be codifier of the British law of contract must also negotiate the complex reform environment ushered in by Brexit. While recent political developments might have opened the door to fresh efforts at contract law reform within Britain – at least insofar as those developments have led to the waning of British interest in pan-European law reform – they have also made law reform projects of this type far more challenging. Indeed, at least until the short-term legal and regulatory challenges posed by

[112] The sale of goods legislation merits special mention for its successful negotiation of the differences between English law and Scots law.

Brexit have been resolved, the competition for the resources and political capital which are necessary for the success of any ambitious law-reform initiative will continue to be fierce. It is, therefore, difficult to predict with any confidence whether contract codification is likely to enjoy a recrudescence in Britain in the near future. What can be said with confidence, however, is that those sympathetic to such a reform would be well-advised to give careful consideration to the cautionary lessons of the Australian experience.

PAPER FIVE: ‘REFORMING THE AUSTRALIAN LAW OF CONTRACT: SOME PRACTICAL NEXT STEPS’

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Signed Date: 18 February 2019

REFORMING THE AUSTRALIAN LAW OF CONTRACT – SOME PRACTICAL NEXT STEPS

John Eldridge*

In March 2012, the Commonwealth Attorney-General's Department issued a discussion paper which flagged the possibility of codifying or otherwise reforming the Australian law of contract. Half a decade later, it seems distinctly improbable that the initiative will yield anything of substance. The result is that would-be reformers of the Australian law of contract might well feel frustrated at the uncertainty as to how the cause of reform ought to be prosecuted. The object of this paper is to offer up some suggestions in this regard. It seeks to identify some practical steps which might be taken by way of reform of the Australian law of contract. It seeks in particular to identify those reforms which are sufficiently uncontroversial as to attract support on the part of government. The paper also grapples with the question of whether the more radical options set out in the 2012 discussion paper – including the prospect of codification – were ever suitable responses to the challenges facing the Australian law of contract.

In March 2012, the Commonwealth Attorney-General's Department issued an ambitious discussion paper which flagged the possibility of codifying or otherwise reforming the Australian law of contract.[1] The paper's reception was mixed. Though it attracted 58 thoughtful submissions and a number of scholarly papers, no consensus emerged as to the course of action which ought to be taken. While some commentators saw a clear case for far-reaching reform, others were sceptical of the wisdom of radical change.[2] Others, while forthright in setting out

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[1] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012.

[2] For an example of a commentator largely supportive of reform, see: Luke Nottage, 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response' in Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014). For papers evincing a scepticism of the wisdom of radical change, see: Warren Swain, 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland Law Journal* 39; Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131; Luca Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, Or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry' (2015) 34 *University of Queensland Law Journal* 99; John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* (forthcoming); John Eldridge, 'Codifying Contract Law: Cautionary Lessons from Australia' (2019) 23 *Edinburgh Law Review* (forthcoming).

the law's shortcomings, took a cautious approach when considering the various mechanisms by which reform might be effected.[3]

Though the 2012 reform project appeared to have strong support from within the cabinet, it nonetheless failed to maintain momentum.[4] In the wake of the flurry of activity which followed upon the publication of the discussion paper, interest in the reform of the law of contract quickly subsided. Now, over half a decade after the discussion paper was issued, it seems distinctly improbable that the 2012 reform initiative – though never formally discontinued – will yield anything of substance. Indeed, few would now suggest that radical reform of the Australian law of contract is likely to eventuate in the near future.[5]

The Australian law of contract therefore stands at something of a crossroads. Though there is little reason to think that there exists an urgent need for root-and-branch reform, few would suggest that the law as it presently stands is wholly satisfactory – indeed, even a cursory glance at the academic literature yields a panoply of suggested reforms and interventions.[6] Yet at the same time, the lack of interest in contract law reform on the part of government means that there exists no obvious mechanism by which desirable change might be effected. The result is that would-be reformers of the Australian law of contract might well feel frustrated at the uncertainty as to how their cause ought to be prosecuted.

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[3] See, eg: Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74.

[4] For some suggestion of the strength of the then-Attorney-General's commitment to the project at its outset, see: Nicola Roxon, 'Time for the Great Contract Reform', *The Australian*, 23 March 2012, 30.

[5] For a discussion of likely future developments in the Australian law of contract, see: Warren Swain, ''The Steaming Lungs of a Pigeon'': Predicting the Direction of Australian Contract Law in the Next 25 Years' in Kit Barker, Karen Fairweather and Ross Grantham, (eds), *Private Law in the 21st Century*, (Hart Publishing, 2017). By way of contrast, one might look to the position in Britain, where contract codification may be enjoying a recrudescence. See, eg: Andrew Tettenborn 'Codifying Contracts – An Idea Whose Time Has Come?' (2014) 67 *Current Legal Problems* 273; M A Hogg, 'Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017); Neil Andrews, 'Codification of Remedies for Breach of Commercial Contracts: A Blueprint' in Graham Virgo and Sarah Worthington (eds) *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017); Julia Anna Bargenda and Shona Wilson Stark, 'The Legal Holy Grail? German Lessons on Codification for a Fragmented Britain' (2018) 22 *Edinburgh Law Review* 183. The renewed interest in codification has followed in the wake of a series of 'restatements' of various aspects of English private law. See, eg: Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012); Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016); Neil Andrews, *Contract Law Rules: Decoding English Law* (Intersentia, 2016). As to the impact of these restatements, see the discussion in: Kit Barker, 'Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales' (2014) 34 *Oxford Journal of Legal Studies* 155.

[6] Aspects of this literature are canvassed below.

The modest object of this short paper is to offer up some suggestions in this regard. It seeks to identify some practical steps which might be taken by way of reform of the Australian law of contract. As will be seen below, it seeks in particular to identify those reforms which are sufficiently uncontroversial as to attract support on the part of government. In the course of its analysis, the paper also grapples with the question of whether the more radical options set out in the 2012 discussion paper – including the prospect of codification – were ever suitable responses to the challenges facing the Australian law of contract.

The paper proceeds in two broad parts. The first offers up a very short overview of past contract law reform initiatives in Australia – including those which were ultimately unsuccessful. Against this backdrop, the second part proceeds to identify and assess several key opportunities for reform. As will be seen, each of these potential reforms can in truth be seen as steps towards an overarching goal – namely that of creating a 'uniform' law of contract within Australia, free of the inconsistencies and irregularities which, while minor, are nonetheless productive of considerable inconvenience.

CONTRACT LAW REFORM IN AUSTRALIA

Ambitious law reform proposals often have their genesis in discontent. Where a body of law is widely thought to be operating satisfactorily, there will typically be little appetite for fundamental reform.[7] Thus viewed, the relative lack of interest in the reform of the Australian law of contract might well be seen as a sign that it has largely met the needs and expectations of those who rely upon it.[8] Indeed, a survey of the history of the Australian law of contract reveals a body of law which has evolved slowly and incrementally, and which has only gradually moved away from its English roots.[9]

[7] It has been observed, however, that at least some law reform initiatives – in particular codification exercises – stem in part from a desire to signal the emergence of nationhood, and not solely from an apprehension that the existing law is unsatisfactory in its practical operation. See, eg, the discussion in: Hector L MacQueen, 'Private Law's Revolutionaries: Authors, Codifiers and Merchants?' in Sarah Worthington, Andrew Robertson and Graham Virgo, (eds) *Revolution and Evolution in Private Law*, (Hart Publishing, 2018), 41-3.

[8] Of course, the identification of exactly what those needs and expectations are – or, more generally, the identification of the proper normative objects of the law of contract – is not wholly straightforward. There exists a rich literature in respect of the law of contract's normative underpinnings. See, eg: Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, (Oxford University Press, 1981); J Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433; Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999); John Gava, 'Can Contract Law be Justified on Economic Grounds?' (2006) 25 *University of Queensland Law Journal* 253; Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013); Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press, 2017).

[9] For writings which document and debate the emergence of an 'Australian' law of contract, see: Anthony Mason, 'Australian Contract Law' (1988) 1 *Journal of Contract Law* 1; M P Ellinghaus, 'An Australian

Many of the most notable changes in the Australian law of contract in the past half-century have originated in statute. In addition to those statutes which operate directly upon the law of contract – by, for instance, providing special rules which apply to particular types of agreement – there are also a number of enactments which have had a significant indirect impact on the law's operation and development.[10]

Though one must take care not to understate the extent of the influence which these statutory interventions have had on the Australian law of contract, they nonetheless pale in comparison with a number of more radical reform initiatives which – while ultimately unsuccessful – would have rendered the law of contract almost wholly unrecognisable. Most notable among these abortive reform initiatives are the various proposals to codify the Australian law of contract.[11] Though the debate respecting contract codification has a long history and spans many jurisdictions,[12] and even within Australia has captured the interest of a diverse range of commentators,[13] it is beyond question that the most extensive contributions to the contract codification debate in Australia have been made by Fred Ellinghaus and Ted Wright. In order to arrive at a clear understanding of the landmarks of contract law reform in Australia, and to ascertain whether codification has promise as a mechanism for effecting substantive reform of the law, Ellinghaus and Wright's work merits careful consideration.[14]

Contract Law?' (1989) 2 *Journal of Contract Law* 13; John Gava, 'An Australian Contract Law? – A Reply' (1998) 12 *Journal of Contract Law* 242; J W Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia Law Review* 49.

[10] A key instance of the former type of statute is the *Insurance Contracts Act 1984* (Cth). Perhaps the most important example of the latter type of enactment is the statutory proscription of misleading or deceptive conduct, which was first set out in *Trade Practices Act 1974* (Cth) s 52. For a discussion of that section's impact on the law of contract, see: David Harland, 'The Statutory Prohibition of Misleading or Deceptive Conduct in Australia and its Impact on the Law of Contract' (1995) 111 *Law Quarterly Review* 100. The statutory proscription of misleading or deceptive conduct is now found in Australian Consumer Law s 18.

[11] This is not the place for a lengthy discussion of the various shades of meaning which can attach to 'codification'. For a discussion of a range of different understandings of codification, see: Shona Wilson Stark, *The Work of the British Law Commissions: Law Reform … Now?*, (Hart Publishing, 2017), 157-9.

[12] For seminal contributions to the debate, see: Aubrey Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361; H R Hahlo 'Here Lies the Common Law: Rest in Peace' (1967) 30 *Modern Law Review* 241. Some English commentators have also suggested broader codification exercises which might have encompassed the law of contract. See, eg: Roy Goode, 'The Codification of Commercial Law' (1988) 14 *Monash University Law Review* 135; Mary Arden, 'Time for an English Commercial Code?' [1997] *Cambridge Law Journal* 516.

[13] For some examples of contributions to the contract codification debate within Australia, see, in addition to the works discussed below: J 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; Dan Svantesson 'Codifying Australia's Contract Law - Time for A Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review* 1.

[14] For a more detailed overview of the history of contract codification in Australia, see: John Eldridge, 'Codifying Contract Law: Cautionary Lessons from Australia' (2019) 23 *Edinburgh Law Review* (forthcoming). What follows here is an abridged form of that discussion.

At the core of Ellinghaus and Wright's work on contract codification is the Australian Contract Code, a code of the law of contract prepared at the behest of the Law Reform Commission of Victoria and published in 1992.[15] Though several models existed to which the authors might have looked when drafting their code – notably the *Indian Contract Act 1872*, as well as the British contract code drafted by the late Harvey McGregor QC – the Australian Contract Code eschewed the approach taken by these earlier instruments, opting instead to chart its own distinctive course.[16]

Almost every aspect of the Australian Contract Code sets it apart from the contract codes which have preceded it. At a mere 27 articles, it is the shortest code of the common law of contract ever to be proposed (indeed, by way of contrast, McGregor's code contained 673 clauses). It also differs from the instruments mentioned above insofar as it favours discretion over fixed rules. The Code's concluding article provides:[17]

> **Overriding article**
> **Article 27**
> A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

This approach – in which discretion takes the place of prescriptive and restrictive rules – was at the heart of the authors' approach. As is explained below, the authors later carried out empirical research which purported to demonstrate that, notwithstanding the discretion afforded to a decision maker under the Australian Contract Code, it was in practice no less predictable and certain than the common law.[18]

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[15] See: Law Reform Commission of Victoria, *An Australian Contract Code*, Discussion Paper No 27, 1992.
[16] For a detailed study of the *Indian Contract Act 1872*, see: Stellios Tofaris, *A Historical Study in the Indian Contract Act 1972* (PhD Thesis, University of Cambridge, 2011). For Harvey McGregor's draft code, see: Harvey McGregor, *Contract Code: Drawn Up on Behalf of the English Law Commission*, (Guiffré, 1993). For discussion of the abortive British reforms, see: F M B Reynolds, 'Contract: Codification, Legislation and Judicial Development' (1995) 9 *Journal of Contract Law* 11, 13-17; Stephen Waddams, 'Codification, Law Reform and Judicial Development' (1996) 9 *Journal of Contract Law* 192.
[17] Law Reform Commission of Victoria, *An Australian Contract Code*, Discussion Paper No 27, 1992, 17.
[18] See: M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of their Utility*, (Themis Press, 2005). See also: 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. Another radical aspect of the Code is its approach to the doctrine of precedent. Article 3 of the Code, which provides that 'Neither past nor future decisions govern the application of the Code', mandates a departure from conventional approaches to statutory interpretation and application.

Though there can be little doubt that the Australian Contract Code was bold in its originality, it nonetheless struggled to gain traction in the profession or to capture the imagination of the legislature. Indeed, few would suggest that the Code ever stood a realistic chance of being adopted. Though the lack of enthusiasm for the Australian Contract Code was doubtless partly attributable to its jarring contrast with the common law, it also seems possible that the difficulties it encountered stemmed in part from scepticism as to the findings of the empirical studies upon which its authors relied.[19]

In order to compare the relative merits of different 'models' of contract law, including both the common law of contract and the Australian Contract Code, a series of experiments were conducted with the co-operation of 1800 Australian university students. The authors explained that the study:[20]

> adopted a conception of utility which reflects the demands which are in fact most often made of legal systems by lawyers and non-lawyers alike. These are that the law should be:
>
> - certain (predictable outcomes)
> - just (fair outcomes)
> - accessible (clear language and logic)
> - efficient (easy to comprehend and apply)
> -

The authors described their experimental design in the following way:[21]

> In the first experiment, law students enrolled in Contract Law were given the facts of a dispute and a statement of the relevant law, drawn from one of the three models, and asked to decide the dispute. They were asked to record their decision (for plaintiff or defendant), along with the time at which it was reached. They were also asked to supply a brief statement of their reasons indicating how they applied the law. A maximum of 80 minutes was allowed to complete these tasks. After this time the students were asked to rank their level of agreement with a number of propositions relating to the utility of the law model (the Likert technique). They were given 10 minutes for this task … Experiment 2 was a replication of Experiment 1 with one difference, namely the student judges worked in pairs … In Experiment 3, university students *not* enrolled in law were asked to read a statement of the facts of a dispute and a judgment deciding the dispute, using one of the law models. They were also asked to complete a questionnaire by responding to a number of propositions about the judgment, again using the Likert technique. Then they were asked to re-familiarise themselves with the facts, read a second judgment in favour of the other party, based on the same or a different law model, and complete an identical questionnaire. They had a maximum of one hour to complete these tasks.

[19] It must be borne in mind, of course, that the authors' empirical work was published many years after the initial publication of the Australian Contract Code. Accordingly, it cannot have influenced the Code's initial reception.

[20] M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of their Utility*, (Themis Press, 2005) 25-6.

[21] M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of their Utility*, (Themis Press, 2005) 27-8.

Though of undoubted academic interest, it is doubtful whether the authors' experimental work assisted in building mainstream support for the Australian Contract Code. It is not at all clear, for instance, whether the authors' experimental design simulates real-world conditions to a sufficiently close degree.[22]

Despite the lack of mainstream enthusiasm for the Australian Contract Code, its authors have remained steadfast proponents of contract codification. Shortly after the 2012 discussion paper was issued, Ellinghaus and Wright, along with David Kelly, published a further, quite different contract code, entitled the Australian Law of Contract. Comprised of 109 articles, this revised code is drafted along somewhat more conservative lines than the Australian Contract Code, taking the existing common law of contract as its foundation and then seeking to restate the law in a simplified form and 'improve' upon it in a number of ways.[23] Despite this more cautious approach, and the authors' efforts to build mainstream support, the Australian Law of Contract has thus far gained no more traction than the Australian Contract Code.[24]

The fate of these two draft codes might well be thought to paint a discouraging picture for would-be reformers of the Australian law of contract. Indeed, the fact that even the Australian Law of Contract met with an indifferent reception, despite eschewing the more radical features of its predecessor, might fairly suggest that there is simply little appetite in Australia for the codification of the law of contract.[25]

Even if this is so, however, it would be wrong to conclude that this apparent lack of enthusiasm for codification necessarily poses a serious hurdle to the implementation of thoroughgoing

[22] The authors' experimental design has been the subject of scepticism elsewhere. See, eg: Neil Thompson, 'Book Reviews' (2006) 27 *Queensland Lawyer* 80, 82-3; Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 149. See further the criticism in: John Eldridge, 'Codifying Contract Law: Cautionary Lessons from Australia' (2019) 23 *Edinburgh Law Review* (forthcoming). It should be noted that Ellinghaus and Wright were firmly of the view that the experiments sufficiently simulated real-world decision-making. See: M P Ellinghaus, E W Wright and M Karras, *Models of Contract Law: An Empirical Evaluation of their Utility*, (Themis Press, 2005), 32-3.

[23] See: M P Ellinghaus, D StL Kelly and E W Wright, 'A Draft Australian Law of Contract' Working Paper No 03-03-14, Newcastle Law School. One relatively significant departure from the common law is the abolition, in Article 13, of the requirement of consideration. Like the Australian Contract Code, the Australian Law of Contract also seeks, in Articles 1-4, to dispense with strict rules of precedent in its application.

[24] As to the authors' efforts to build mainstream support, see: Chris Merritt, 'Meet the Great Reformers of Contract Law', *The Australian*, 17 August 2012, 29.

[25] There is, however, some basis for thinking that a future code of the Australian law of contract might fare better than its predecessors if the lessons of those unsuccessful reforms were heeded. See the discussion in: John Eldridge, 'Codifying Contract Law: Cautionary Lessons from Australia' (2019) 23 *Edinburgh Law Review* (forthcoming).

reform of the law of contract. Indeed, it must be emphasised that though it is possible to seize upon codification as a means of effecting substantive reform of contract law's underlying rules, there is no *necessary* relationship between codification and substantive reform of this type.

It is certainly possible to conceive of a code as an instrument which at once restates and reforms the law – indeed, both the Australian Contract Code and the Australian Law of Contract are instruments of this kind.[26] Equally, it is possible to conceive of a code which endeavours solely to restate the law, eschewing substantive reform.[27] Such an instrument might be favoured by those who believe that the principal benefit of a code is to be found not in its utility as a mechanism for substantive law reform, but in its supposed tendency to promote certainty and accessibility.[28] Though it is the case that the most ambitious would-be reformers of the Australian law of contract have advanced their proposals through the rubric of codification, and while the responses to the 2012 discussion paper were perhaps unduly preoccupied with codification (either as proponents or detractors), it must be remembered that there remain a number of other mechanisms for substantive reform which, while promising, have been paid relatively little attention of late. Indeed, it is not necessary to look far afield in seeking instructive examples of alternative options. The approach taken in New Zealand, for instance, has been to subject the law of contract to statutory intervention in specific, limited areas.[29]

It is consequently necessary to uncouple questions of substantive law reform from the question of whether the law ought to be codified. Though there may well exist scenarios in which a body of law is in need of such thoroughgoing and fundamental substantive reform that codification is the only sensible means by which reform can be effected, there has been no serious effort made to demonstrate that this is so in respect of the Australian law of contract.

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[26] It is also possible to point to codes from other areas of law which belong within this category. The Uniform Evidence Acts are a clear example of an instrument which seeks to codify aspects of the common law while also effecting substantive reforms. (It should be added that it is unclear whether the Uniform Evidence Acts can truly be termed a code, given they presuppose the continued operation of some common law rules. See the discussion in: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 631-2; [2011] HCA 21 at [110] per Heydon J; J D Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017) 148-158.

[27] Of course, where the law is uncertain, the task of 'restating' it will often involve a choice as to which view ought to be preferred. At least in cases such as this, the line between reform and 'mere' restatement is blurred.

[28] For a critique of this view, see: John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* (forthcoming).

[29] This approach – under which statutory intervention is limited to specific areas, such as illegality and mistake – has been termed a 'partial codification' by some. See: Rick Bigwood, 'The Partial Codification of Contract Law: Lessons From New Zealand' in Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014); F G Barton, 'The Effect of the Contract Statutes in New Zealand' (2000) 16 *Journal of Contract Law* 233. The New Zealand contract statutes have recently been consolidated in the *Contract and Commercial Law Act 2017* (NZ).

Indeed, as the discussion below shows, some aspects of the law of contract which are most frequently cited as being in need of reform can be addressed through targeted and limited statutory intervention. This conclusion casts serious doubt on whether the drastic step of codification – with its inevitable transition costs and the unavoidable risk of negative and unintended consequences – was ever a sensible mechanism for reform in this sphere.

SUBSTANTIVE REFORM: THE PATH FORWARD

Though the task of identifying desirable reforms in respect of a body of law as complex and important as the law of contract is by no means straightforward, any would-be reformer of the Australian law of contract is assisted by the rich body of writing devoted to identifying and studying the law's shortcomings. A survey of the literature reveals no shortage of commentary on the major areas of current difficulty. The law respecting contractual penalties,[30] the proper use which can be made of evidence of 'surrounding circumstances' in contractual interpretation,[31] and the proper approach to the identification of implied terms have all been the subject of extensive scholarly examination.[32]

The challenge in charting an appropriate course for reform is not, therefore, in identifying areas of difficulty, nor in gaining an understanding of the relevant debates. The challenge is instead that of isolating areas which are susceptible to uncontroversial resolution, such that the

[30] For discussion of the various difficulties in this area, see: John Stumbles, '*Paciocco* in the High Court: Penalties and Late Payment Fees' (2017) 91 *Australian Law Journal* 969; J W Carter, Wayne Courtney and G J Tolhurst 'Assessment of Contractual Penalties: *Dunlop* Deflated' (2017) 34 *Journal of Contract Law* 4; Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (I): Underlying Principles in Equity and at Common Law' (2017) 11 *Journal of Equity* 1; Nicholas Tiverios 'A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches' (2017) 11 *Journal of Equity* 185; Andrew Summers 'Unresolved Issues in the Law on Penalties' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 95; John Eldridge, 'The New Law of Penalties: Mapping the Terrain' [2018] *Journal of Business Law* (forthcoming).

[31] For discussion of the continued confusion in this area, see: David McLauchlan and Matthew Lees, 'Construction Controversy' (2011) 28 *Journal of Contract Law* 101; David McLauchlan and Matthew Lees, 'More Construction Controversy' (2012) 29 *Journal of Contract Law* 97; The Hon Justice Kenneth Martin, 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37 *Australian Bar Review* 118; The Hon Kevin Lindgren, 'The Ambiguity of Ambiguity in the Construction of Contracts' (2014) 37 *Australian Bar Review* 153; Thomas Prince, 'Defending Orthodoxy: Codelfa and Ambiguity' (2015) 89 *Australian Law Journal* 491; Daniel Reynolds, 'Construction of Contracts After *Mount Bruce Mining v Wright Prospecting*' (2016) 90 *Australian Law Journal* 190; John Eldridge, ''Surrounding Circumstances' in Contractual Interpretation: Where are we Now?' (2018) 32 *Commercial Law Quarterly* (forthcoming).

[32] See, eg: Wayne Courtney and J W Carter, 'Implied Terms: What Is the Role of Construction' (2014) 31 *Journal of Contract Law* 151; David McLauchlan, 'Construction and Implication: In Defence of Belize Telecom' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 203; J W Carter and Wayne Courtney, 'Belize Telecom: A Reply to Professor McLauchlan' [2015] *Lloyd's Maritime and Commercial Law Quarterly* 245; Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Are they Necessary?' (2015) 28 *Australian Journal of Labour Law* 113.

requisite political support for reform can be readily attained.[33] Indeed, the importance of building a broad base for any reform is one of the most important lessons to be derived from the lukewarm reception of most major contract law reform initiatives in Australia.[34] Much the same lesson emerges from a consideration of reform efforts elsewhere – McGregor's draft code, for instance, failed to be adopted largely in consequence of the inability of the Law Commission and the Scottish Law Commission to reach agreement on controversial points of difference.[35]

It would therefore be wrongheaded, when identifying sensible avenues for reform, to seize upon perennial yet controversial questions, such as the case for the abolition of the requirement of consideration.[36] Equally, there is little to be gained from re-entering the well-known and interminable debate as to the proper role of good faith in the Australian law of contract.[37]

Other reform proposals, while frequently mooted, break down upon closer examination. Perhaps the best examples are the regular calls for contract law to be 'updated' so as to be responsive to the needs of modern technology and e-commerce. While calls of this kind are common – indeed, they featured prominently in the 2012 discussion paper – it is not at all clear

[33] It should be noted that though the focus here is on legislative law reform, there is also, plainly, a very real sense in which courts act as instruments of law reform. See the discussion in: Anthony Mason, 'Law Reform and the Courts' in David Weisbrot (ed), *The Promise of Law Reform* (Federation Press, 2005).

[34] A recent example of the difficulties inherent in securing the necessary support of the political class can be seen in the sphere of private international law. In 2016, the Joint Standing Committee on Treaties recommended that Australia accede to the Hague Convention on Choice of Court Agreements. That step will require a statutory enactment. As of late-2018, such an enactment is yet to be introduced to Parliament. As to the proposed reform, see: Michael Douglas, 'Choice of Court Agreements Under an International Civil Law Act' (2018) 34 *Journal of Contract Law* 186; Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the Hague Convention on Choice of Court Agreements' (2017) 41 *Melbourne University Law Review* 246.

[35] For general discussion, see: F M B Reynolds, 'Contract: Codification, Legislation and Judicial Development' (1995) 9 *Journal of Contract Law* 11.

[36] See, eg: Lord Wright, 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1936) 49 *Harvard Law Review* 1225; Andrew Burrows, 'Improving Contract and Tort' in Andrew Burrows (ed) *Understanding the Law of Obligations* (Hart Publishing, 1998), 197. For a contrary view, see: Mindy Chen-Wishart, 'In Defence of Consideration' (2013) 13 *Oxford University Commonwealth Law Journal* 209. As noted above, both the Australian Contract Code and the Australian Law of Contract sought to abolish the requirement of consideration.

[37] Many proponents of contract codification have seen the enactment of a code as a convenient mechanism for the introduction of an obligation of good faith. See, eg: Mary Keyes, 'The Challenges of Good Faith in Contract Law Codification' in Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014). The need for such an obligation in the Australian law of contract is controversial. Some commentators have suggested that good faith ought to be understood as being implicit in the Australian law of contract. See, eg: Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 *Sydney Law Review* 222; J W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155; Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis, 2003). For an overview of the position in Australia today, see: J W Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018), ch 2.

what specific reforms are truly necessary in this connection.[38] While there are a number of difficulties posed by the application of orthodox contract doctrine to 'e-commerce', these questions are for the most part confined to relatively narrow questions of law, and there is little reason to think that the confusion which they have caused has been generative of a great deal of inconvenience.[39] Indeed, some of the purported difficulties which are flagged most frequently in this sphere often, on closer examination, prove to pose a far smaller challenge than is commonly thought.[40] It is therefore not at all clear whether emerging technologies truly amount to a key driver for reform of the law of contract. At the very least, it cannot be said that the proper content of any such reform is straightforward or uncontroversial.

Rather than pursuing these relatively unprofitable avenues of inquiry, would-be reformers of the Australian law of contract would do far better to concentrate their energies on the task of 'harmonising' the law so as to eliminate inconsistencies and irregularities which cause practical inconvenience. Some care must be taken, however, when grappling with the question of 'harmonisation' in this setting. Indeed, though 'harmonisation' seems at first to be a straightforward notion, it is crucial to make appropriate distinctions between 'international' and 'domestic' harmonisation imperatives.

The 'international harmonisation' of the Australian law of contract has been a much-mooted topic by those concerned to reform and modernise the law.[41] Indeed, an enthusiasm for this

[38] For this aspect of the discussion paper, see the 'drivers' of reform identified in the paper, which advert to the challenges posed by electronic commerce: Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012, 3-6.

[39] For a discussion of some such difficulties, see: Eliza Mik, 'The Effectiveness of Acceptances Communicated by Electronic Means, Or – Does the Postal Acceptance Rule Apply to Email?' (2009) 26 *Journal of Contract Law* 68; Elisabeth Macdonald, 'Incorporation of Standard Terms in Website Contracting – Clicking 'I Agree'' (2011) 27 *Journal of Contract Law* 198. Some difficulties in this sphere have been addressed through the adoption of the Electronic Transactions Acts. See, eg: *Electronic Transactions Act 1999* (Cth).

[40] Perhaps the best recent example is the debate as to the challenges posed by 'smart contracts'. Though this technology is in some respects novel, there is good reason to think that it is largely capable of being accommodated within existing contract doctrine. See the discussion in: Eliza Mik, 'Smart Contracts (Or: Much Ado About Nothing?)' Paper Presented at the *Journal of Contract Law* Annual Conference, 2018. The mismatch between the interest in the challenges posed by smart contracts, and the actual difficulty which they seem to have occasioned, is part of a broader trend in which the challenges posed by new technologies are to some degree overstated. See the discussion in: Eliza Mik, 'The Unimportance of Being Electronic – or Popular Misconceptions About "Internet Contracting"' (2011) 19 *International Journal of Law and Information Technology* 324.

[41] See, eg, many of the essays in Mary Keyes and Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate, 2014). The authors of the Australian Law of Contract were motivated to a significant degree by the desire to promote harmonisation of the Australian law of contract with international norms. See: M P Ellinghaus, D StL Kelly and E W Wright, 'A Draft Australian Law of Contract' Working Paper No 03-03-14, Newcastle Law School. The 2012 discussion paper was similarly concerned with

species of reform is not peculiar to Australia – the long-running efforts towards the creation of a harmonised private law within Europe have proven to be a high-profile example to reformers across many jurisdictions.[42] Yet despite the enthusiasm evinced in many quarters for reform of this type, it remains unclear how such reforms ought to be implemented in practice, and, indeed, whether there truly is a demand for such reform from contract law's 'users'.

'International harmonisation' is in truth a shorthand for several related species of reform. On the one hand is a reform initiative which seeks to 'harmonise' the Australian law of contract with the domestic contract law of other jurisdictions. This might be effected through the introduction of substantive reforms which seek to bring the law into closer conformity with the contract law of Australia's major trading partners. On the other hand is a reform initiative which seeks to align the Australian law of contract with norms embodied in international instruments such as the UNIDROIT Principles of International Commercial Contracts ('UPICC') or the United Nations Convention on Contracts for the International Sale of Goods ('the Vienna Convention').[43] Though these two types of initiative may plainly overlap in some cases – that is, where an alignment of Australian law with the domestic law of a particular jurisdiction would also involve an alignment with norms embodied in international instruments – there is also some capacity for these two objects to be in tension. The proper approach to the resolution of this tension, where it exists, is not at all clear.

Indeed, even if this tension is put to one side, there exists some doubt as to the extent to which the harmonisation of Australian law with the domestic law of other jurisdictions can truly be pursued. As has been observed, any effort to align Australian law with the law of a particular

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this 'driver' of reform. See: Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law*, 2012, 3-6. For further discussion of the 'international harmonisation' of Australian contract law, see: Donald Robertson, 'The International Harmonisation of Australian Contract Law' (2012) 29 *Journal of Contract Law* 1; Paul Finn, 'Internationalisation or Isolation: The Australian *cul de sac*? The Case of Contract Law' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010).

[42] For discussion of the European harmonisation efforts, see: Francisco de Elizalde (ed) *Uniform Rules for European Contract Law? A Critical Assessment*, (Hart Publishing, 2018); Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization*, (Oxford University Press, 2012); Stefan Vogenauer and Stephen Weatherill, (eds) *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, (Hart Publishing, 2006). For some cautionary lessons which emerge from a consideration of the European efforts, see: Martin Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law' (2014) 34 *Legal Studies* 24.

[43] As to the latter, see 1489 UNTS 3.

trading partner may well lead to a greater divergence between Australian law and the law of other, equally important jurisdictions.[44]

One answer to these concerns may be to approach the 'international harmonisation' of the Australian law of contract with a focus solely on the second type of reform initiative described above – namely, the alignment of the Australian law of contract with norms embodied in international instruments. The difficulty with this approach is that there is serious doubt as to the extent of the demand for reform of this type. As has been noted in many quarters, there is a widespread feeling that the Australian legal profession makes little use of international instruments such as UPICC and the Vienna Convention.[45]To the extent this perception is accurate, it suggests a lack of interest in such instruments, and, by extension, a lack of desire for this species of 'harmonisation'.

It is, of course, possible that these widespread impressions as to the lack of interest in international instruments of this kind are mistaken. Yet all the same, it would be both unwise and impractical to proceed with this type of reform without carrying out empirical work aimed at rigorously investigating the extent to which these impressions reflect reality.[46] Indeed, much might be gained in general from building an understanding of the factors which drive parties to choose Australian law as the governing law of their contract, or, similarly, from gathering empirical evidence as to the degree to which commercial actors suffer material inconvenience as a consequence of the dissimilarities between the Australian law of contract and the law of contract of Australia's major trading partners.[47] Until that work is carried out, however, it

[44] See the discussion in: Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 136. To give just one clear example, an alignment of Australian law with the Chinese law of contract would necessarily increase the divergence between Australian law and the contract law of the United States. Difficulties of this kind may be less pronounced where a state's trading partners belong largely to a common legal tradition.

[45] See, eg, the discussion in: 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.

[46] Other commentators have also called for empirical work of this kind. See, eg: Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 138. For a study of this type in the United States, see: 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.

[47] Some empirical scholarship in this general vein already exists elsewhere. See, eg: Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34 *Northwestern Journal of International Law & Business* 455.

would be ill-advised to seek to progress the 'international harmonisation' of the Australian law of contract.

This conclusion is doubtless somewhat discouraging for those seeking to progress the cause of law reform. Fortunately, however, the second dimension of 'harmonisation' – what might loosely be termed 'domestic harmonisation' – offers up a wide range of fruitful opportunities for reform.

Though there is a single common law of Australia, it would nonetheless be misleading to conclude that there exists a single, unified Australian law of contract.[48] Each State and Territory has enacted a complex web of legislation which operates to modify the operation of the common law. Though these statutory incursions do not differ in any radical respect, they are nonetheless subject to many small inconsistencies.[49] Though this is not the place for a detailed survey of these enactments, it is nonetheless possible to identify at least three areas in which divergent approaches can be identified, and in respect of which the adoption of a consistent, national approach ought to be welcomed.[50]

The first such divergence is the inconsistent approach taken in respect of statutory modification of the doctrine of privity. While the doctrine's potential to work injustice has long been recognised, only Queensland, the Northern Territory and Western Australia have enacted general provisions aimed at modifying the doctrine's operation.[51] Though not radically divergent, the approach taken in each of these three jurisdictions is not wholly identical.[52] While the existence of a divergence of this kind does not in and of itself amount to a case for reform, the case for the adoption of a unified approach in respect of privity is strengthened by

[48] The existence of a single common law of Australia was affirmed by the High Court in *Lipohar v The Queen* (1999) 200 CLR 485. The correctness of this view has been doubted by some. See, eg: L J Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221.
[49] For further discussion of these inconsistencies, see: Lisa Spagnolo, 'Law Wars: Australian Contract Law Reform vs CISG vs CESL' (2013) 58 *Villanova Law Review* 623.
[50] It is worth noting that inconsistencies also exist between enactments which are principally concerned with other areas of law, and which impact upon the law of contract only to a limited extent. Perhaps the best example is that of the civil liability legislation, which affects only some contracts. That statutory regime differs between jurisdictions. Compare, for instance: *Civil Liability Act 2002* (NSW) s 30; *Civil Liability Act 1936* (SA) s 53.
[51] See: *Property Law Act 1974* (Qld) s 55; *Law of Property Act 2000* (NT) s 56; *Property Law Act 1969* (WA) s 11. There also exist a number of provisions which are aimed at specific types of contract. See, eg: *Insurance Contracts Act 1984* (Cth) s 48; *Marine Insurance Act 1909* (Cth) s 20(2).
[52] The Queensland and Northern Territory provisions are largely alike, though they differ from the approach taken in Western Australia. For further discussion, see: Michael Furmston and G J Tolhurst, *Privity of Contract* (Oxford University Press, 2015) ch 9.

the extent to which commentators have supported modification of the common law rule.[53] Though it would be wrong to suggest that the introduction of a unified, national approach to statutory modification of the privity doctrine would be wholly without difficulty, there can be little cause to think that it would meet with serious opposition.[54]

The second area ripe for 'domestic harmonisation' is that of the rules respecting contractual capacity. Though few would suggest that questions of capacity arise with any real frequency, there can nonetheless be little justification for the status quo, under which only New South Wales has adopted a systematic approach to the reform of the common law.[55] Few would suggest that there exists a convincing case for the retention, in an unmodified form, of the common law rules respecting contractual capacity.[56] The present position, however, manages to combine both the shortcomings of the common law with the added confusion consequent upon inconsistency.

Finally, there exists a strong case for the adoption of a uniform national approach to the statutory modification of the consequences of frustration at common law. Though the particular approaches which have been adopted have each been the subject of criticism, it is the want of national uniformity which truly merits objection.[57] Given the infrequency with which questions of frustration present themselves, it is perhaps unsurprising that there has not yet been a push for the harmonisation of the law respecting frustration. Yet at the same time, the relative rarity of frustration disputes ought not to excuse the continued lack of national coherence in this aspect of the law.

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[53] See, eg: Arthur Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 *Law Quarterly Review* 12; Gordon Samuels, 'Contracts for the Benefit of Third Parties' (1968) 8 *University of Western Australia Law Review* 378; John N Adams and Roger Brownsword, 'Privity and the Concept of a Network Contract' (1990) 10 *Legal Studies* 12. Criticism has also been levelled by law-reform bodies. See, eg: Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Report No. 242, 1996. The third-party rule has not been without its defenders. See, eg: Peter Kincaid, 'Privity and the Essence of Contract' (1989) 12 *University of New South Wales Law Journal* 59; Stephen A Smith, 'Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule' (1997) 17 *Oxford Journal of Legal Studies* 643.

[54] Indeed, much of the difficulty would turn on the question of how best to effect the reform. A reform of this type might best be initiated by the Standing Committee of Attorneys-General.

[55] See: *Minors (Contracts and Property) Act 1970* (NSW). Other jurisdictions have eschewed the systematic approach taken in New South Wales. See, eg: *Minors' Contracts (Miscellaneous Provisions) Act 1979* (SA).

[56] For an overview of the common law rules, see: J W Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018) ch 15.

[57] Compare: *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic) Pt 3.2. For a discussion of the differences between each jurisdiction, see: J W Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018) ch 34. For criticism of the various approaches, see: Andrew Stewart and J W Carter, 'Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal' [1992] *Cambridge Law Journal* 66.

The suggestions mooted here could not be characterised as radical. They are, indeed, quite unlikely to excite passion in any quarter, though they have attracted sympathy from a number of commentators.[58] Yet it is precisely this quality that gives each of the reforms canvassed here a real prospect of being successfully implemented. Indeed, as was noted at the outset, it is those reforms which are uncontroversial which are most likely to attract support on the part of government.[59] The suggestions set out here, while far from revolutionary, can each be seen as steps towards a worthwhile and overarching goal – namely that of creating a 'uniform' law of contract within Australia, free of the inconsistencies and irregularities which, while minor, are nonetheless productive of considerable inconvenience. Though the implementation of the reforms mooted here would not of themselves create a wholly uniform Australian law of contract – and indeed, some might object that the suggestions set out here do not go far enough – they would nonetheless be very significant steps towards a worthwhile goal.[60]

CONCLUSION

This paper has sought to identify some practical steps which might be taken by way of reform of the Australian law of contract. As has been seen, it is possible to identify a number of such reforms. Indeed, this paper has shown that some aspects of the law of contract which are most frequently cited as being in need of reform can be addressed through targeted and limited statutory intervention. This conclusion in turn casts serious doubt on whether the proponents of codification were correct to suggest that such a drastic step was ever a sensible mechanism for reform in this sphere.

[58] See, eg: Lisa Spagnolo, 'Law Wars: Australian Contract Law Reform vs CISG vs CESL' (2013) 58 *Villanova Law Review* 623; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 78; Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131, 134-5.

[59] It would, of course, be wrong to exaggerate the ease with which these changes might be implemented. Though reforms such as these are unlikely to attract strong opposition, their relatively 'unexciting' nature makes the task of attracting the interest and attention of the political class somewhat challenging. Given these reforms would require co-operation across jurisdictional lines, such support is crucial.

[60] The difficulty, of course, in pursuing a broad-ranging harmonisation initiative, which seeks in one step to usher in a wholly uniform law of contract, is that such a scheme will inevitably capture subjects which are far more controversial than the reforms mooted here. Any attempted harmonisation of the civil liability acts, for instance, would risk reigniting familiar debates as to the proper balance to be struck between plaintiff and defendant in respect of claims for personal injury. The inclusion of such a reform as one part of a broader project would risk imperilling the initiative as a whole.

In the course of its analysis, this paper has also identified a number of matters which ought to be the subject of further investigation and analysis. These questions are for the most part those which can only be answered through the gathering of empirical evidence. Most significantly, it should be stressed that much might be gained from building an understanding of the factors which drive parties to prefer (or eschew) Australian law as the governing law of their contract, or, similarly, from gathering empirical evidence as to the degree to which commercial actors suffer material inconvenience as a consequence of the dissimilarities between the Australian law of contract and the law of contract of Australia's major trading partners. It is hoped that a future research project will take up the challenge which these questions pose.

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