Reviewing Australia's Contract Law: A Time for Change?


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Question 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?

1.1 The main difficulties faced by domestic users of Australian contract law are fourfold. The first is duplication. Not only does each State/Territory have its own contract law, but sources of law are a combination of various statutes and case law in each of those jurisdictions. This leads to a lack of accessibility for users, and reduced clarity. Those most affected are businesses that engage in interstate transactions. The second is divergence. Substantive rules develop through case law or legislative reform in each jurisdiction. Some examples of divergence are in the areas of privity (see 1.1.1-1.1.3 below) and capacity (see 1.1.4-1.1.5 below), as well as differences arising under Sale of Goods legislation. Thirdly, there are areas which are outdated or overly complex. Areas that might benefit from review for reasons of inefficient design, uncertainty, and/or lack of coherence are the concept of consideration (see 2.5-2.8 below), parol evidence rule, and good faith (see 2.9-2.32 below). Finally, the design of Australian domestic contract law is arguably inefficient for international sales (see 1.3 below).

Privity

1.1.1 Privity is a well established rule at common law. As Mason CJ and Wilson J noted in Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107, a case that epitomises the problems posed by the privity rule, the rule has “been under siege throughout the common law world”.

It has the capacity to cause injustice. Often it is resorted to opportunistically, by parties who had clearly undertaken an obligation towards a third party but who subsequently see an opportunity to avoid the obligation on a the technicality of the rule. It can be a pit-fall, lead to injustice, result in costly litigation (as Trident and several other cases demonstrate), increase transaction costs for businesses, and undermine commercial dealings.

1.1.2 Consequently the rule has been reformed by statutes in many jurisdictions. For example, it has been reformed in most American states. New Zealand enacted a Contracts (Privity) Act 1982 (NZ) to reform the rule. So too has the UK, in enacting the Contracts (Rights of Third Parties) Act 1999 (UK). Within Australia, at state and territory levels, some jurisdictions have provided in statutes to erode the Privity rule in some circumstances, while others have retained the pure common law. WA (in Property Law Act 1969 (WA), s11), Queensland (in Property Law Act 1974 (QLD), s55) and NT (in Property Law Act 1974 (NT), s56) have all made provisions that erode the application of the privity rule in certain circumstances. However, these provisions are not uniform, and the circumstances for their application can be different and confusing. At the Federal level, the Commonwealth included a specific provision in the Insurance Contracts Act 1984 (Cth), s48 to enable third party beneficiaries to enforce insurance contracts. This removes the problem such as encountered by the claimant in the Trident Case, but it only applies to insurance contracts.

1.1.3 The position on the privity rule within Australia is fragmented and unsatisfactory. In developing a seamless national economy that is productive and just, efficient and effective, the law on privity regarding all contracts should be harmonised. That should be considered in the light of what has been done in other jurisdictions.

Capacity

1.1.4 The law relating to the capacity of natural persons to enter into, or be bound by contracts they enter into, vary greatly among the jurisdictions in Australia. The categories of incapacity are minority, mental incapacity, and intoxication. Of these, minority is the main issue. The law on minority consists of a combination of common law (inconsistently applied) and state and territory legislation of varying content. For instance, NSW has a comprehensive statute, the *Minors (Property and Contracts) Act* 1970 (NSW). Victoria law needs to be gleaned from the *Age of Majority Act* 1977 (Vic) and some provisions in *Goods Act* 1958 (Vic) and the *Supreme Court Act* 1986 (Vic). Queensland’s law consist of *Law Reform Act* 1995 (QLD), and the common law. In SA, the law is to be found in *Age of Majority (Reduction) Act* 1971 (SA) and the *Minors’ Contracts (Miscellaneous Provisions) Act* 1979 (SA). WA’s law comprises *Age of Majority Act* 1972 (WA) and the *Statute of Frauds (Amendment) Act* 1828 (UK) (‘Lord Tenterden’s Act’) in its original form as imperial legislation. Tasmania, ACT and NT all have a combination of statutes and the common law. The age of majority in all jurisdictions is 18 years, which is a rare consistency, but the effect of a contract with a minor and the consequences for the parties vary greatly among the jurisdictions.

1.1.5 Capacity may not be an issue in business to business (B2B) contracts. However, it can be an issue in business to consumer (B2C) contracts. In online B2C contracts, where the parties may be located in different jurisdictions, difficult issues may arise. Uniform comprehensive statutory provisions, such as exist in NSW, is desirable for efficiency and effectiveness in a national economy.

1.2 Australian contract law is also used by international businesses who are parties to contracts governed by Australian law. They must also deal with the same problems faced by domestic users, exacerbated by their unfamiliarity with local sources of law and potential areas of divergence. It should be noted that Australia is a member State of the UN Convention on Contracts for the Sale of Goods (‘CISG’), so that where contracts for goods are entered between Australian businesses and international counterparties, the CISG will in most cases apply as the proper law of the contract unless excluded by agreement. This can reduce each of the above problems for international sales for both domestic and international users, since the CISG is a harmonized uniform law which improves accessibility of substantive rules, and provides internationalised rules specifically designed to improve the efficiency of international trade vis-à-vis domestic laws. Furthermore, the CISG reduces a problem that cannot be rectified by Australian domestic law reform: it reduces choice of law
risks, since it will be applied by all forums in member States when the law of a member State law is chosen unless excluded.

1.3 In summary, both domestic users and international business face certain key costs and risks in relation to international transactions which can be categorized as substantive and procedural inefficiencies:

Substantive inefficiencies

1.3.1 Substantive efficiencies relate to the efficiency of the design of default rules. There are differences between rules that potentially apply to international contract. Australian law is just one potential law amongst many. As noted in the Discussion Paper, the most popular choices are English law and New York law, but these selections may not be in fact motivated by inherent superior efficiency of the substantive design of the rules themselves. The standard of legal services, quality of judges may all influence the decision, and less rationally perhaps, path dependent behavioural influences affect choices of law. In an analysis comparing the economic efficiency of the substantive design of English law, New York domestic law and the CISG for international sales, it was concluded that the CISG is generally as efficient as English and New York domestic contract law, and once procedural efficiencies were considered, probably more efficient than them. However, transactional features or institutionalised choices (eg. by trade associations in standard forms) render other choices more appropriate, eg. commodities where the standardized choice is for English law (and sometimes New York law excluding CISG). Furthermore, the assessment does not apply to contracts predominantly related to the provision of services or consumer transactions. However, generally speaking, rules that favour the maintenance of the contract (favour contractus) rather than easy termination, that allow for cure and that encourage

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3 English, New York and Swiss law have been identified by respondents to surveys as their preferred choice of law (other than the law of their home jurisdiction): Stefan Vogenauber, Oxford Civil Justice Survey - Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law A Business Survey; Final Results <http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf> and subsequent publication: Stefan Vogenauber and Chris Hodges (eds), Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law (Studies of the Oxford Institute of European & Comparative Law) (Hart Publishing, 2011) (‘Oxford Survey’) Questions 17(g-2) (in a study of European businesses conducted in 2008, yielding 103 responses, when asked which law they would prefer for cross-border trade other than the law of their home jurisdiction, the most popular response was Swiss law (29%), followed by English law (23%), US law (14%)); School of International Arbitration at Queen Mary, University of London, International Arbitration Survey: Choices in International Arbitration (2010), 11, 15 <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> (reporting corporate counsel respondents, other than their own law, preferred English law (40%), New York Law (17%)), or Swiss law (8%));

4 Oxford Survey, above note 3 at Questions 33-35 (in a European survey responses albeit for reasons for choice of forum, the most important factors out of 23 possible reasons were: quality of judges and courts, fairness, corruption, predictability, speed, then contact law, costs, discovery then quality of lawyers). Although not always the case, choice of forum may influence choice of law.


6 Truth or Dare, above note 2, Ch. 4, at 89-107, Ch. 5, especially at 156-157.

7 Truth or Dare, above note 2, Ch. 6, at 182-188, Ch. 7, at 216-220 ; Green Eggs, above note 5, at 458-62.
communication at each contractual stage with simple uniform rules, and which resolve most conflict of laws risks (see 1.3.4-1.3.5 below), are more efficient for cross-border trade over long distances with high transport costs than the alternative choices of domestic law designed primarily for domestic trade.  

1.3.2 To the extent Australian domestic substantive contract rules are not currently tailored to cater for international trade, they are substantively inefficient. However, the CISG is part of Australian law, thus on the face of it, Australian law is already efficient in relation to international sales. It is even more efficient for international sales once procedural efficiencies are considered (see 1.3.4-1.3.5 below). However, in practice, the CISG’s ‘automatic’ exclusion by Australian practitioners (ie. without proper assessment) reduces the effective efficiency of Australian law – a problem which is not entirely based on rational economic decision making, but on behavioural influences that are only partly economic in nature. Instead, the behaviours prompting exclusions are likely to be driven by unfamiliarity, learning costs and moral hazard, and by entrenched general legal practice and institutionalized path dependence. These can be ameliorated in time by discouraging inappropriate ‘automatic’ exclusions (see Q8 for suggested approaches).

1.3.3 Notably, the conclusion in 1.3.2 regarding the efficiency of Australian law does not apply to international service contracts, nor international sales excluding the CISG. These remain subject to the substantively less efficient (at least for sales) Australian domestic contract law.

Procedural inefficiencies

1.3.4 Procedural inefficiencies are those not arising from the substantive nature of the rules. For international contracts, includes the inefficiencies arising from predictability of conflict of laws rules and off-setting efficiency gains arising from repeated choice of a single law. Conflict of laws risks arise from the difficulty of knowing which jurisdictions’ conflict rules will be applied. If proceedings are commenced in a forum located in another jurisdiction, non-Australian choice of law rules will be applied to determine the governing law of the contract. The manner in which choice of law (and choice of forum) clauses are interpreted may varies across jurisdictions, for reasons including application of different principles of good faith. This may result in a choice of law not being incorporated into the contract, or not being interpreted as intended. Even if the parties’ choice of law is upheld, the manner in which that law is applied in the foreign forum seized of the matter might not completely correspond with it would be applied in the home forum, and proof of law may be required so that there are highly costs and risks in having foreign law applied in a foreign forum (expert evidence etc). Consequently, businesses face a certain level of uncertainty about which law will ultimately be applied to their contracts, how their chosen law will be applied, even with

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8 *Truth or Dare*, above note 2, Ch. 4.
9 On reasons for exclusion, see analysis of all current data from other jurisdictions, and concluding that the strongest correlations were between exclusion rates, familiarity and learning costs; *Truth or Dare*, above note 2, Ch. 6, especially at 174-175 & 189. See also *Truth or Dare*, above note 2, Ch. 7, at 202-216; *Green Eggs*, above note 5, at 435-438, 445-53, 456 (discussing lawyer risk-reward decision-making structures regarding choices of law in jurisdictions where exclusions have historically been high).
10 In some jurisdiction there is little scope for choice of law by the parties at all: eg, Brazilian law deems the *lex loci contractus* as the governing law, and this rule is widely construed as a prohibition on choice of law: Art. 9 Lei de Introdução ao Código Civil Brasileiro 1942 [Introductory Law to the Brazilian Civil Code], Decreto-Lei Nº 4657/1942 (affecting contracts not containing arbitration clauses).
11 See, above note 2.
inclusion of a choice of law clause, and additional costs and uncertainties in relation to proof of law.\textsuperscript{12}

1.3.5 Reform of Australian contract rules cannot address conflict of laws risks and forum risks. However, in all CISG member States, conflict of laws risks are reduced for international sales by straightforward applicability rules within the Convention. Issues of evidence of the content of foreign law are also eliminated by the CISG. Unfortunately, in Australia, courts have not always appreciated the effect of the CISG’s applicability, and have misinterpreted the implementing legislation to mean that domestic Australian contract law may be applied to such contracts unless it is inconsistent with the CISG. This undermines the efficiency of the CISG in Australia and encourages exclusion. It misunderstands the nature of the uniform law as an autonomous body of law to be interpreted not through domestic case law, but in its own right.\textsuperscript{13} The mistaken approach of Australian courts has been the subject of comment on international databases referred to by courts and scholars globally. Such misunderstandings can be addressed by clarifying the implementing legislation and/or judicial education (see below).

1.3.6 A potential procedural efficiency gain relates to ability to maximize choice of the same law for each contract. Unless a particular business enjoys greater bargaining strength across all its contracts (both sales and supply) it cannot repeatedly insist on a single preferred choice of law, and will hold a portfolio of contracts with various choices of law. This heightens performance and dispute resolution costs (ie. ‘contract management costs’), since the process of identifying applicable law and establishing the nature of obligations arising thereunder will be higher. By contrast, repeated use of the same law enables economies of scale in performance and dispute resolution.\textsuperscript{14} Globally uniform law is one way in which this can be achieved, since the advantage in negotiations of choice of a neutral law may more easily enable consistently repeated choice of the same law across a particular businesses’ portfolio if it does not have greater bargaining power in every negotiation, especially where it transacts with businesses from various parts of the globe. It is fair to say that most Australian counterparties will be unable to always insist on the application of Australian law excluding the CISG, and will need to accept choices of the laws of other jurisdictions. Yet provided neither party insists on exclusion, where the law chosen is that of a member State, the CISG will apply in any event, thus effectively allowing repeated choice of the same rules, and reducing performance and dispute resolution costs for Australian business.

1.4 While the CISG will not suit every transaction, its frequent exclusion within Australia hints at a failure to appreciate potential efficiency gains and lack of assessment of its suitability for individual transaction types. This appears to have led to a practice of more or less ‘automatic’ opt outs, whereby it is excluded without proper consideration of the potential advantages and disadvantages. Exclusions of the CISG have persisted amongst practitioners despite the potential efficiency gains for business, in large part spurred by unfamiliarity, reluctance and learning costs, and a consequent interest in maintaining the status quo of selecting domestic law. This lack of awareness of the advantages of using the CISG is a problem for Australian business to the extent that the CISG is a more efficient choice of law (substantively and procedurally). Behaviours prompting exclusions in Australia are thus

\textsuperscript{12} Truth or Dare, above note 2, Ch. 3, at 42; Ch. 5, at 129-133.

\textsuperscript{13} That is, autonomous interpretation of the CISG is an obligation of courts in member States pursuant to Art. 7 CISG. This means interpretation by reference to decisions on its provisions from courts all member State jurisdictions and in light of its own legislative history and scholarly commentary.

\textsuperscript{14} Truth or Dare, above note 2, Ch. 5, at 128-129.
likely to be driven by institutionalised behaviours entrenched within legal practice.\textsuperscript{15} As awareness of the CISG grows in other jurisdictions, previous preferences for exclusion of the CISG are slowly dissipating in them.\textsuperscript{16} Continued insistence on exclusion by Australian counterparties may therefore increasingly place Australian business at a competitive disadvantage in negotiations.\textsuperscript{17}

1.5 However, irrespective of potential efficiency gains,\textsuperscript{18} many Australian lawyers are still unfamiliar with the CISG, and still adopt a somewhat entrenched practice of excluding the CISG, contrary to trends in competitor jurisdictions\textsuperscript{19} and the predominant practice of lawyers in jurisdictions of some of our most important trading partners, where lawyers are (or are now becoming) far more familiar with it than was previously the case.\textsuperscript{20} Sometimes the imperative for familiarization arises from pressure due to lack of relative bargaining strength in repeated transactions with counterparties that prefer the CISG. This may force practitioners to become more familiar, and lead to the related ability to spread initial learning costs of familiarisation.\textsuperscript{21} For example, the CISG is strongly preferred as a choice of law for international contracts amongst Chinese practitioners, where exclusions are low and familiarity high, since the CISG is examinable for the bar exam for qualification.\textsuperscript{22} Consequently, over long periods of time, high levels of trade with China might be expected to lead to familiarity with the CISG in jurisdictions of counterparties, despite entrenched behaviours to the contrary.\textsuperscript{23} Indeed, in the U.S.A., where practitioner attitudes were once similar to those (apparently)\textsuperscript{24} predominant in Australia, exclusions are now becoming less frequent.\textsuperscript{25} The New York State Bar Association has been very active in the past 18 months in promoting use of the CISG amongst practitioners. The CISG is seen as a competitive advantage in the market for legal services for international contracts, since England has yet to become a member state of the CISG.\textsuperscript{26}

\textsuperscript{15} See, \textit{Green Eggs}, above note 5, at 439-438; \textit{Truth or Dare}, above note 2, Ch. 7, at 196-202 (discussing this as a form of moral hazard).

\textsuperscript{16} \textit{Truth or Dare}, above note 2, Ch. 7, at 220-226 (citing recent studies).

\textsuperscript{17} \textit{Truth or Dare}, above note 2, at 134.

\textsuperscript{18} See above note 6.

\textsuperscript{19} Anecdotally: see \textit{Last Outpost}, above note 2, at 160. By contrast, exclusions seem to be slowly becoming less frequent in Germany, Italy, and in the US: \textit{Truth or Dare}, above note 2, Ch. 7, at 202-216.

\textsuperscript{20} \textit{Truth or Dare}, above note 2, Ch. 7, at 202-216 (citing inter alia the Global Sales Law Project findings relating to US practitioners).

\textsuperscript{21} \textit{Truth or Dare}, above note 2, Ch. 7, at 202-216; \textit{Green Eggs}, above note 5, at 463.

\textsuperscript{22} \textit{Truth or Dare}, above note 2, at 166.

\textsuperscript{23} \textit{Truth or Dare}, above note 2, Ch. 7, at 202-216; \textit{Green Eggs}, above note 5, at 435-438, 445-53, 456 (discussing lawyer risk-reward decision-making structures regarding choices of law in jurisdictions where exclusions have historically been high, as well as the influence of law firms as a group decision-making influence).

\textsuperscript{24} No data has yet been collected in Australia directly from practitioners, unlike many other jurisdictions where empirical surveys have been conducted (\textit{Truth or Dare}, above note 2, Ch. 6). However, there are indicators which suggest that the situation was similar (including litigation rates) and many anecdotal accounts exist which suggest a high degree of similarity in persistent opt out practices: \textit{Truth or Dare}, above note 2, Ch. 6, at 165-173 \& 174-175; L. Spagnolo, ‘A Glimpse Through the Kaleidoscope: Choices of Law and the CISG’ (2009) 13(1) \textit{Vindobona Journal of International Commercial Law and Arbitration} 135, 141-148 (comparing education differentials and litigation rates across multiple jurisdictions for correlation with exclusion rates)(‘Kaleidoscope I’); \textit{Last Outpost}, above note 2, at 160 (Australian anecdotal evidence).

\textsuperscript{25} \textit{Truth or Dare}, above note 2, Ch. 7, at 220-216.

\textsuperscript{26} Lisa Spagnolo has been involved as Guest Advisor to a Committee of the NYSBA International Section in advising the NYSBA in setting up resources and planning.
1.6 The difference in how quickly lawyers elsewhere are becoming familiar with and utilizing the CISG can probably be attributed to a number of factors, including legal education and frequency of litigation involving CISG.27 The latter has unfortunately been exacerbated by misinterpretation of both the CISG’s provisions, and of the implementing legislation in Australian courts.28 Failure of courts to interpret the CISG properly in Australia (or in some cases, even apply it at all) cannot encourage practitioners to have confidence in enforcement of the CISG in litigation before Australian courts.29 While Australia was active in the drafting of the CISG, it has not been active in implementing programs to improve familiarity with it in practice (as has been done/is occurring in other jurisdictions like New York), nor has Australia participated in recent UN Commission sessions of June-July 2012, where the possibility of re-examining the CISG has been proposed pursuant to the Swiss proposal to UNCITRAL.30 Australia’s absence from participation in the recent process of review of international commercial law is unfortunate, not only for the message it sends local practitioners about the importance of uniform law, but also in terms of how Australia is viewed by the wider international community involved in developing uniform law. Furthermore, it deprives UNCITRAL of input from Australia about the development of

27 For discussion, see ‘Kaleidoscope I’, above note 24, at 140–150; Truth or Dare, above note 2, Ch. 6, at 165-174.

‘the Court concluded it meant that ‘either the Goods Act or the Convention applied’ and although the CISG enjoyed ‘paramountcy’ over the Goods Act, that this was only ‘in the event of any inconsistency between the two’… however, if there were no ‘material differences or inconsistencies’ between the two, it would be acceptable to apply the local Goods Act provisions, since ‘[n]othing turn[ed] on the fact that I have reversed that order’. Effectively, the Court was stating that the CISG would only be applied if the paramountcy provision was enlivened by an inconsistency.

With respect, this is not the way the CISG works. The enabling Act gives the CISG the force of law. The CISG’s own terms require that it be applied in its entirety when it is the governing law of the contract, not just to the extent of inconsistency. In other words, when the CISG applies, the Goods Act is displaced by it. The CISG applies exclusively, to the extent of its scope. Were it not so, it would be incapable of achieving its purpose of unifying sales laws around the world for international sales. One cannot rely upon seemingly familiar provisions to conclude it is ‘consistent’ with local sales provisions, and therefore no harm flows from their application. The interpretive method demanded by art 7 for the autonomous interpretation of the CISG’s provisions will always render the CISG inconsistent with domestic law regardless of any surface similarities. … The reference to the CISG prevailing in the event of ‘inconsistency’ in s 6 of the enabling Act is a mere clarification. It should not usurp the force of law granted by s 5, but instead be interpreted as underlining the pre-emptive effect of the CISG on local laws which overlap with its scope. The latter construction enables ss 5 and 6 to be read not only consistently with one another, but also in harmony with the CISG’s legislative history, purpose and jurisprudence.’

29 See Last Outpost, above note 2, at 215 (suggesting it was wise to include an arbitration clause due to poor interpretation by Australian courts).
30 A paper concerning the Swiss proposal to review the CISG is available at <http://www.uncitral.org/uncitral/commission/sessions/45th.html>. The official outcome of the recent Commission Sessions of UNCITRAL was that the ‘Commission agreed that a meeting or symposium should be held on the topic of general contract law with a view to determining the desirability of future work in that field’: <http://www.unis.unvienna.org/unis/pressrels/2012/unisl170.html>. See further, Q8 below.
international commercial law, a significant regression from Australia’s activism in relation to the initial promulgation of the CISG and the recent ECC discussed below.

1.7 The Discussion Paper mentions the paucity of CISG cases decided in Australia (in fact there are actually around 23 Australian cases now). It should be noted Australian counterparties have been involved in arbitrations and litigations determined in non-Australian forums, so the number of cases in Australia does not give a reliable picture of how often the CISG governs contracts with Australian businesses in practice. In particular, there are many Chinese arbitrations involving Australian counterparties where the CISG is applied, and Chinese arbitral tribunals and courts frequently use the CISG to guide their interpretations of domestic law or as evidence of usages even where it is inapplicable per se. Consequently, Australian businesses are more often subject to the CISG than it might appear. Nonetheless, it is not doubted that compared to other jurisdictions, litigation of the CISG within Australia itself is infrequent, and it is this lack of Australian case law (and moreover, Australian decisions properly applying the CISG) that makes the CISG less visible to Australian practitioners.

1.8 For contract law, although considerations of fairness are vital, the most important drivers of reform are economic. Yet, it must be recognized that there are competing and sometimes conflicting economic interests, the nuances of which should not be ignored. Competing interests are involved in terms of both choice of law amongst existing choices (as discussed above), and in relation to the potential for reform of existing laws. Not all such drivers are completely rational in a classic sense, and some entail moral hazard issues and path dependent behaviours. There are certainly efficiency gains available from improved accessibility, clarity and reduced duplication in and divergences between Australian contract laws, especially for contracts which do not benefit from substantively efficient rules (i.e. domestic contracts, international service contracts, international sales excluding CISG), any change will involve learning costs and thus meet resistance from the bulk of the legal profession, irrespective of benefits to business.

1.9 Moreover, in the same vein, despite being part of current Australian law, Australia still underutilizes the substantively and procedurally efficient rules of the CISG, and Australian courts have exacerbated the problem in a way that has led to Australia lagging behind other jurisdictions. Learning costs associated with familiarity largely underpin reluctance amongst practitioners to embrace these efficiency gains. Positive steps to improve the situation, some of which can be seen taking place in other jurisdictions, have not yet been implemented in Australia (see 1.5 above). This results in efficiency losses for Australian business engaged in international trade, including competitive disadvantage. Thus while drivers of economic efficiency exist, they are currently suppressed by competing interests in maintaining the status quo.

1.10 Fortunately, Australia has been internationally focussed and at the forefront in related areas of law, as is evident in the (almost complete) adherence to the ECC (bar one state),

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32 See above notes 15 & 23.
33 Last Outpost, above note 2, at 164-165; Truth or Dare, above note 2, Ch. 5, at 140-141 (comparative advantage for the jurisdiction and its legal profession); Ch. 7, at 214-216 (rationale for internalization of learning costs).
34 See paragraph 3.1 below.
Research has shown that uncertainty relating to international online transactions has dampened potential online trade. Some reforms have been implemented to deal with implications of online trade in Australia, notably implementation of the Electronic Transactions Acts and subsequently, the new UN Convention on the Use of Electronic Communications in International Contracts 2005 (‘ECC’) in all but one State in Australia. The ECC is designed to integrate with the CISG to ensure certainty in international sales concluded online. Other than the delay in introducing legislation agreed upon some four years ago, Australia is at the forefront of the international movement in relation to electronic transactions. These can be contrasted to Australia’s current lack of participation in the latest UNCITRAL Commission hearings in July 2012 relating to international commercial law (review of CISG).

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35 Australia adopted the UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the UNCITRAL on 21 June 1985) enacted as the *International Arbitration Act 1974* (Cth) sch 2. and New South Wales, Northern Territory, Victoria, South Australia and Tasmania have adopted UNCITRAL’s subsequent 2006 amendments to the Model Law. on Arbitration amendments of 2006
**Question 2: What costs, inefficiencies, difficulties or lost opportunities do businesses experience as a result of the domestic operation of Australian contract law?**

2.1 There are three inefficiencies relating to the problems identified in Q1. The first inefficiency arises from the costs of accessibility, reduced clarity, duplication, and divergences, all caused by the nature of contract law as a matter of State law. Naturally these result in some level of information costs for the majority of businesses who transact across State borders. It must be acknowledged that when disputes arise, ascertaining which law applies and determining the applicable rules will always involve higher costs under the current domestic contract law system than under a single national law. These problems of accessibility and lack of clarity result in higher transaction costs for domestic and international traders.

2.2 The second inefficiency arises from the substantive design Australian domestic contract law. In particular, the Australian domestic sale of goods regimes were essentially developed in the wake of the industrial revolution. As noted above, Australian contract rules suffer from outdated design in some instances, but there is likely to be strong resistance to change. Some jurisdictions have reacted to the problems of archaic design by overhauling their domestic regime to more closely reflect international rules and trends. In doing so, it should be noted that reform of domestic law in other jurisdictions has taken inspiration from CISG and Unidroit Principles. National domestic contract rules have been to varying degrees ‘synchronized’ with these instruments in order to modernize and improve domestic law. They have not been designed to ‘overlap’ with the CISG’s application to international sales in member States. Instead, the reformed domestic laws apply to domestic trade, international service contracts and international sales which opt out of the CISG. Australia could take such an approach, so that its domestic contract law would in some respects more closely mirror rules that are becoming prevalent in other jurisdictions. Concepts frequently derived from and influenced by uniform laws like CISG and Unidroit Principles include the right to cure, the ability to set additional time for performance, fundamental breach. Other key areas relevant to such a review are good faith (see major discussion at 2.9- below), the parol evidence rule and consideration (see 2.5-2.8 below). These highlight points of difference between Australian contract law and international trends, and failures of coherency between various aspects of Australian law (see in particular, discussion on good faith from 2.9 below). By contrast, adoption of the ETA and (soon) ECC have ensured Australia is relatively up to date concerning electronic transactions.

2.3 However, in regard to international sales, Australian contract law is designed to be efficient and adopts a relatively modern approach. The CISG is part Australian law, and applies to international sales unless excluded. Thus the applicable substantive rules of Australian sales law are in fact specifically designed for international trade. The CISG has a design that ensures substantive efficiency equal to or greater than most other commonly chosen domestic regimes (such as English or New York domestic law). In addition, it minimizes the other costs of international trade: information costs – accessibility and clarity - associated with identifying and ascertaining the content of the applicable law (since its

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36 See eg., divergences discussed at paras 1.1.1-1.1.5 above.
37 Reform of domestic laws
38 This conclusion was drawn after extensive analysis of the substantive design of the CISG, comparative efficiency of the substantive rules prevailing in New York domestic law and English law, and after consideration of the views of scholars who have made similar comparisons: *Truth or Dare*, above note 2, Chs 4 & 5.
applicability is relatively simple, and its rules are available freely online in multiple languages, as is case law related to it; conflict of laws risks and forum risks (its applicability is largely determined according to internal straightforward rules, particularly given the proliferation of member States, and its applicability is largely uniform in whatever forum is seized of the matter). Furthermore, there is evidence supporting its nature as a uniform and neutral law that is reasonably balanced between buyer and seller, and which reduces costs of negotiation where neither party is in a position to insist on the law of their own jurisdiction as the choice of law.

2.4 Thus the real cause of inefficiency in relation to international trade is not the substantive design of Australian law, but the practice by lawyers of excluding the application of the CISG in cases where it is the most efficient law, in favour of a less efficient, but perhaps more familiar, domestic law. In jurisdictions where this is becoming less common, remaining levels of exclusions perhaps more closely reflect assessments of its true suitability vis-à-vis competing choices of law, rather than choices based on ‘reflexive’ or ‘automatic’ exclusions made without an informed assessment of advantages and disadvantages by a practitioner familiar with the CISG. This is made worse by the less than satisfactory handling of CISG cases in Australian courts, and absence of familiarisation tools and programs in Australia, a matter further discussed below.

Consideration

2.5 Consideration is an element of contract that is well entrenched at common law. In commercial transactions, consideration is rarely an issue in the formation of contracts. However, consideration has posed serious problems in contract variations. That is, where after a contract has been formed, the parties consider it important to amend its terms. If the amendment is to vary the obligations of only one party (such as an increase in the price to be paid by a purchaser), the variation may be deemed not to have been supported by consideration by the other party. This is due to the existing legal duty (or pre-existing obligation) rule. The existing legal duty rule is to the effect that a promise to perform, or the performance of, an existing duty is not sufficient consideration for another promise. That is, a promise to do what one was already legally bound to do is not sufficient consideration for another promise.

2.6 One of the ways by which some courts have sought to address the problem is by the invention of a very narrow exception called the practical benefit rule, proposed in the UK case of Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, adopted and applied in the NSW case of Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723. Simply put, the practical benefit rule finds consideration to exist where certain elements are present,

39 It has been argued that CISG interpretation across numerous jurisdictions makes it more prone to uncertainty, particularly given the lack of a centralized appeal structure: for further discussion see, Truth or Dare, above note 2, Ch. 4, at 76-87 & 105-106.
40 Truth or Dare, above note 2, Ch. 5, at 123-125.
41 See above note 15.
including a practical benefit accruing to, or obviation of a detriment for, the party who claims that no consideration have been given by the other party. The NSW courts seem to have embraced the practical benefit rule, while other jurisdictions seem less willing to apply the rule.

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

2.8 In considering internationalisation of Australian contract law, the doctrine of consideration, particularly the existing legal duty rule, may be worth re-examination. It must be conceded, however, that not many common law jurisdictions have legislated to amend the common law on consideration (Ghana is one of, possibly, a few exceptions).\(^{42}\) However, that should not discourage an examination of the Australian position with the view to internationalising our law (for instance, to harmonise it with international legal instruments such as the CISG).

**Good Faith, Unconscionable Conduct, and Related Issues**

*Need for a Holistic Approach to Good Faith Across the Inquiry’s Questions*

2.9 The Discussion Paper contains more than a few references to good faith, fair dealing, and statutory unconscionable conduct. Amongst the areas in current contract law that it highlights as generating a lack of clarity and certainty for businesses and other parties is ‘the nature and scope of the obligation to act in good faith’.\(^{43}\) Similarly, the Discussion Paper includes amongst the key features of Australian contract law various matters relating to ‘fair dealing’, including statutory prohibition of unconscionable conduct. To that extent, good faith in contract and good faith in statutory unconscionability are clearly part of the equation in addressing the stated options of restating, simplifying, or substantially reforming contract law.

2.10 While there is understandable value in the breakdown of this whole inquiry into discrete components (as illustrated by the infolets), there remains a need to put the pieces back together in a holistic way and to draw relevant connections between them, at the risk of what would otherwise be a siloed and fragmented assessment. For example, the meaning and treatment of good faith is relevant to all of the following matters:

1. harmonisation of laws across Australian jurisdictions (including Commonwealth, State, and Territory laws that mention good faith in contexts that relate to contract);
2. synchronicity between Australian contract law and the contract law of Australia’s trading partners and internationally on good faith;

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\(^{42}\) See, e.g., *Contracts Act* 1960, Ghana (Act 25), s 9, which provides as follow:

‘The performance of an act or the promise to perform an act may be sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not’.

(3) consistency and coherence from policy and regulatory perspectives in how good faith is treated under statutory and judge-made law affecting contracts and surrounding conduct (e.g. breach or lack of good faith as an indicator of unconscionable business conduct under the ASIC Act and the Australian Consumer Law);

(4) updating of Australian law to meet the standards of international law and the laws of our major trading partners in the treatment of good faith;

(5) different norms and expectations in different industries and sectors concerning good faith (e.g. from government contracts to joint venture agreements to franchising arrangements); and

(6) evidence-based cost-benefit assessment of the practicalities of good faith’s treatment under current law and practice and any change to that position, including:

(a) the occasions and costs of legal advice on good faith issues across all industries and sectors;

(b) the projected costs and benefits of changing Australian law on good faith (including initial costs in changing standard transaction documentation and procedures across industries and sectors versus the socio-economic costs of entrenched injustice and abuses of commercial power);

(c) the availability and limits of contractual devices used to address good faith in commercial practice; and

(d) the impact upon ‘choice of law’ considerations involving major trading partners whose laws take a different approach to good faith and related contractual issues.

2.11 So, there is a risk to good policy and regulation in framing the issue of good faith with too much emphasis upon the judge-made law of contract alone, its controversy over implied terms or other norms of good faith (and related obligations), and the linkage of good faith to long-term and relational contracts. Moreover, the treatment of good faith in different industries and sectors, as reflected in the precedents of law firms in meeting different client needs and preferences in this area of practice, suggests that a much more nuanced approach to good faith is needed, as the options for addressing it in practice cover the full gamut from express inclusion to express exclusion.

2.12 In addition, there is a danger on this and other issues for the inquiry in tunnel vision on comparisons with the contract law of significant trading partners. The relevant indicators do not necessarily point in the same direction. On the data in Table 2 in the Discussion Paper, 40% of Australian trade is with countries that have a civil law system and a codified contract law. Does that give us more reason to lean towards codifying Australian contract law? Not necessarily. As the Discussion Paper also notes, English law remains a significant choice as the law of contracts worldwide, as is the USA (which has a strong good faith jurisprudence), notwithstanding that the UK now represents only 4.1% of Australian trade according to Table 2. So, it is also necessary to factor in not only the volume of Australian trade with different countries, but also favoured jurisdictions by Australian businesses and their legal advisers for choice of law purposes. More empirical evidence here is necessary to inform policy and regulatory solutions (see 8.3.6 below).
Crystallising Relevant Dimensions of Good Faith for This Inquiry

Australian Government Positions

2.13 To this point, the Australian Government has resisted policy and regulatory outcomes that mandate obligations of good faith and fair dealing, both generally and in discrete industry contexts. At the same time, the Australian Government has recently opened the way for the eventual acceptance of a suitably defined notion of good faith under the common law that could apply to franchising arrangements. This is reflected in section 23A of the Franchising Code of Conduct, as follows: ‘Nothing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith’. As indicated by the expert panel reporting to the Australian Government in early 2010 on statutory unconscionable conduct reform and particular franchising industry behaviours, ‘good faith … is intrinsically relevant to unconscionable conduct (due to its presence as a statutory indicator) and, less overtly, to [particular] franchising behaviours’.

Judicial and Academic Debates

2.14 The Australian law on good faith in contract has waxed and waned over the last decade or so, with a readiness by some courts to imply terms of good faith ad hoc or by law being replaced generally by a more cautious judicial approach. The acceptance of an implied term of good faith and reasonableness in contractual performance in the landmark decision of Renard Constructions (ME) Pty Ltd v Minister for Public Works has been followed in many cases, but also criticised by other courts and academic commentators on doctrinal and evidence-based grounds. Indeed, two prominent academic experts in this debate argue that subsequent cases relying upon Renard Constructions ‘have led Australian contract law into a potentially disastrous situation’.

2.15 In a nutshell, there is a divergence between some leading academics and the Australian judiciary over whether good faith is implicit throughout contract law or alternatively needs to be added or negated as an implied term. In addition, there is division over modes of implication, the content of good faith, its relationship to related terms (e.g., cooperation), and the capacity to exclude it by private agreement. Such important questions for contract law as a distinct body of law cannot be addressed in isolation from their transactional significance, supervening statutory inroads, or wider policy questions about consistency with international and foreign standard-setting on good faith.

2.16 Having characterised Australian contract law earlier this decade as possibly being ‘in a state of utter confusion’ about good faith, two of Australia’s leading academic contract lawyers - Professor John Carter and Professor Elisabeth Peden - crystallised its development to that point, as follows:

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47 Carter and Peden, above note 46, at 165.
48 Carter and Peden, above note 46, at 155.
(I)t would appear that Australian contract law is rapidly moving towards three propositions. First, in most contracts (perhaps all contracts) a requirement of good faith must be implied, at least in connection with termination pursuant to an express term of the contract, but perhaps more generally.

Second, where it is present, the source of the implied requirement of good faith is an implied term of the contract.

Third, the implied requirement of good faith is satisfied by a party who has acted:
- honestly; and
- reasonably.

2.17 A fourth proposition might be added to that list, given that ‘it has even been suggested that the law should go further than the three propositions require; for example, by treating the implied term as “entrenched”, that is, non-excludable’. In other work, Professor Peden argues that, if Australian courts accepted the notion of ‘implicit good faith’ and rejected the ‘implied obligation of good faith and reasonableness’ as invented by some Australian courts, commercial construction could proceed according to a more discrete notion of good faith, applied to the parties’ agreement and context as an expression of their contractual intention. ‘The standard of behaviour required by good faith would only be honesty, loyalty to the contract and, perhaps, a requirement to consider the interests of the other party’, she adds.

2.18 The academic debate about the source, meaning, and methodological implication of good faith has migrated to the arguments of litigation lawyers and judgments of courts in this crucial area of commercial law and practice. In other words, all arms of the legal profession are actively engaged with one another in determining and developing the law of good faith in this country. The debate presently has two divided camps.

2.19 One camp reflects the orthodox judicial position in Australia, which accepts the legitimacy of implied terms of good faith and reasonableness in at least some circumstances. The problem that many commercial parties and their lawyers have with this position is that it too readily implies obligations of good faith that are too broad in scope, compounded by too much uncertainty about how much of good faith (if any) can be excluded by private agreement.

2.20 Advocates of the Carter-Peden view of good faith in contract occupy the other camp. Under this view, good faith of a particular and important kind is intrinsic to contract law as a

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49 Carter and Peden, above note 46, at 156.
50 E. Peden, “‘Implicit Good Faith’ – or Do We Still Need an Implied Term of Good Faith?” (2009) 25 JCL 50 at 61.
51 Peden, above note 50, at 61.
52 See, for example, the judicial debate surrounding the views of leading academic experts on good faith in contract law (such as Professors Peden and Carter) and the extra-judicial comments of senior Australian judges (such as Sir Anthony Mason) on this topic, especially in recent trial and intermediate appellate court judgments, such as: Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWSC 17; Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15; Council of the City of Sydney v Goldspar Australia Pty Ltd [2006] FCA 472; CGU Workers Compensation (NSW) Limited v Garcia [2007] NSWCA 193; Insight Oceania Pty Ltd v Phillips Electronics Australia Ltd [2008] NSWSC 710; United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177; Macquarie International Health Clinic Pty Ltd v Sydney West Area Health Service [2010] NSWCA 268; Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd [2010] WASCA 222; and Alstom Ltd v Yokogawa Australia Pty Ltd (No 7) [2012] SASC 49.
whole. As a result, there is no need to imply terms of good faith or to extend their reach to reasonableness of some kind. This view of good faith is crystallised in one of Australia’s leading contract law texts as follows: ‘Good faith is inherent in all common law contract principles, and any attempt to imply an independent term requiring good faith is unnecessary and a retrograde step’. 53

Legal and Business Practice

2.21 What is the practical upshot of all of this, in terms of whether Australian contract law needs simplifying, restating, or reforming? Commercial parties mainly seek to avoid uncertainty or risk that cannot be priced or otherwise factored into contractual negotiations and drafting measures. Their current predicament is a widespread perception that there is too much uncertainty about when and how good faith will be judicially implied into commercial agreements, and with what range of elements. Conversely, many small businesses, consumers, and those who advise or represent them argue that an express and mandatory obligation of good faith is a necessary plank in adequate protection of small business and consumers from abuse of commercial power.

2.22 To some extent, the concern about good faith in some quarters of the business and legal sectors is justified because of the willingness of many Australian courts to import notions of reasonableness into contractual dealings through implied terms of good faith, although this commercial concern is sometimes exaggerated and there are also signs of a refined judicial approach that frames reasonableness by reference to the parties’ bargain rather than leaving it at large. Business would have less to fear from the uncertainty surrounding the law of contractual good faith if courts or legislatures would limit it to honest fidelity to the bargain, reasonableness in the context of the agreement, due consideration of the interests and benefits of other parties under the contract, and non-abuse of power such as arbitrary, capricious, and ill-motivated exercises of contractual rights, powers, and discretions. Such elements— as identified in judgments and the literature (see the views of Carter and Peden cited above)— can be conditioned by what the parties have agreed, thus keeping a balance between party autonomy and commercial morality.

2.23 The residual problems here are compounded by a lack of clarity about how far contractual parties can go in dealing with implications of good faith as a matter of private agreement. At the same time, negotiation over contractual terms is a product of bargaining power. So, in many cases, there is a degree of artificiality in saying that agreement to impose good faith on one party or exclude it completely is an even-handed result. Moreover, no real negotiation about such things is possible in the multitude of daily agreements across Australia that use standard terms of conditions for businesses and consumers alike.

Good Faith’s Relationship to Statutory Unconscionability

2.24 The unresolved issues here go beyond contract law and practice. In practice, good faith must often be addressed for drafting, advice, or litigious purposes by legal practitioners for their clients on all sides of a transaction as both a matter of contract law and a matter of potential statutory unconscionability, given that an absence or breach of good faith is an indicator of unconscionable conduct under various important pieces of economic regulation. In other words, good faith can be relevant to the terms and performance of a contract, but also

to conduct surrounding the contract, and both must be considered when advising clients on all sides of a transaction.

2.25 This relevance of good faith to statutory unconscionability now extends to a wide variety of contractual dealings and surrounding conduct. For example, it relates to regulation of unconscionable conduct in the areas of financial services (under the ASIC Act), trade and commerce generally (under the protections for businesses and consumers in the Australian Consumer Law), and retail and commercial leasing under some State laws. Importantly, excluding obligations of good faith to the extent lawfully permissible as a matter of private agreement is very different from purporting to exclude legislatively prescribed standards of business conduct that transcend private agreements.

2.26 In terms of the relationship between good faith and statutory regulation of unconscionable conduct, expert commentators already characterise the set of statutory indicators of unconscionable conduct towards small business as one comprising a sub-set of indicators that can be grouped together and characterised in terms of good faith and fair dealing.54 For example, Justice Paul Finn characterises the listed indicators of statutory unconscionability as heading ‘in the direction of proscribing unfair dealing and unfair trading’, especially ‘unfair dealing in relational contracts’.55 In his view, this is confirmed by ‘considerations that focus on possible discrimination, industry codes and standards, good faith etc’.56

2.27 In addition, there have been recent amendments to the provisions governing unconscionable business conduct in the ASIC Act and the Competition and Consumer Act. Some of these amendments affect good faith. The sets of statutory indicators of unconscionable conduct have been harmonized. This means that the same indicators apply now to business-to-business (B2B) dealings and business-to-consumer (B2C) dealings. So, the presence or absence of good faith is now a relevant factor in business conduct towards consumers, just as it has been a factor for some time in business conduct towards other businesses. In addition, there are new principles of interpretation that apply to the listed statutory indicators of unconscionable conduct in both B2B and B2C contexts, including the indicator relating to good faith. The courts are yet to rule on these amendments.

**International Dimensions of Good Faith**

2.28 This field of law and practice involving good faith in its contractual and statutory forms still awaits authoritative settlement by the High Court.57 However, even the High Court will not be able to undertake the reformulation of contract law generally or contractual good faith in particular that will bring such areas of law into sync with the legal standards of Australia’s

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54 On good faith and fair dealing in this context, see: Justice Finn, ‘Unconscionable Conduct’?, Presentation to the 4th Annual University of South Australia Trade Practices Workshop, 2006.

55 Justice Finn, above note 54, at 14-15. Beyond this statutory context, the relational nature of the commercial agreement considered in *Macquarie International Health Clinic Pty Ltd v Sydney West Area Health Service* [2010] NSWCA 268 significantly informed the findings of the court concerning the content of an express term of utmost good faith: see, particularly, at [144] per Hodgson JA (Macfarlan JA concurring).

56 Justice Finn, above note 54, at p 15.

57 While accepting that ‘the issues respecting the existence and scope of a “good faith” doctrine are important’, the High Court expressly declined to address the status, content, and limits of good faith under Australian contract law in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [40]; (2002) 240 CLR 45 at 63 per Gleeson CJ and Gaudron, McHugh, Gummow, and Hayne JJ. No suitable test case for revisiting such issues had reached the High Court by mid-2012.
major trading partners and international commercial law.\textsuperscript{58} In the domain of international and transnational contracting, norms of good faith and fair dealing are becoming central elements of landmark instruments of ‘hard’ and ‘soft’ law, to the point where good faith arguably deserves recognition ‘as an attribute of modern international commercial law, as it was of the law merchant’, according to President James Allsop of the NSW Court of Appeal.\textsuperscript{59}

\textbf{2.29} Relevant trends here include good faith’s acceptance in contract law in Europe, North America, China, and other countries, its enshrinement in the Uniform Commercial Code and \textit{Restatement (Second) of Contract} in the USA, and its use in international commercial instruments such as the UNIDROIT Principles of International Commercial Contracts and the CISG. Indeed, the collective reluctance of the Australian judiciary to embrace good faith as such an organising principle faces ongoing pressure in an increasingly globalised legal world, with its growing transnational movement towards good faith in judicial, legislative, and other forms of regulatory standard-setting.\textsuperscript{60}

\textit{Implications for the Current Inquiry’s Policy and Regulatory Outcomes}

\textbf{2.30} Such considerations are relevant to a number of aspects of the current inquiry. In terms of reforming contract law, the topic of good faith cannot be viewed just in terms of the doctrines of contract law, but must at least take account of its manifestation in statutory unconscionability too, given that both sources of law relating to good faith regulate business and consumer transactions. In turn, this affects policy and regulatory options concerning codification of contract law, especially in light of the systematic way in which Australian law has approached regulation of specific problems (eg unfair contract terms) and specific industries (eg franchising and financial services) through discrete pieces of legislation customised to those needs (e.g. in the Competition and Consumer Act, ASIC Act, and Franchising Code of Conduct), as distinct from a general codified law of contract.

\textbf{2.31} However, we are presently far from a consensus amongst the judiciary, legal academy, business and consumer sectors, and the broader legal profession about such matters. Simplifying the law to make it more accessible but without changing its content will not satisfy those stakeholders who are concerned about abuse of commercial power. At the other extreme, radically reforming the law of good faith to mandate it by legislation is likely to be resisted by those who do not want any change to the existing position or who fear the directions in which the courts have taken good faith, and still requires attention to the content, scope, limits, and excludability of good faith in any event.

\textbf{2.32} The option of leaving it to the courts to work through the issues of good faith has clear limits. Case-by-case development of the law takes time and is ill-suited where systematic review is needed. The courts in different Australian jurisdictions take different approaches to the content and limits of good faith, and its mode of implication in contracts. Whatever the correctness of such differences n doctrinal terms, they are unhelpful in fostering uniform approaches for a borderless national economy. The resistance of business and its legal advisers to embedding obligations of good faith in law is driven, in part, by the expanded


elements that the courts have built in to the notion of good faith in contract. The gap between Australian contract law’s treatment of good faith and how it is treated beyond Australian shores cannot be bridged completely or quickly through incremental development of the common law. Finally, Australian courts are yet to resolve many important questions surrounding the meaning and scope of the provisions governing statutory regulation of unconscionable conduct, including issues surrounding good faith and its relationship to statutory unconscionability. So, working through these various dimensions of good faith systematically requires a suitable process, with suitable stakeholder buy-in.
Question 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?

3.1 As mentioned above, there are issues of procedural efficiency which involve conflict of laws risks. Some of these concerns are already met within the CISG, and the adoption in Australia of ETAs and particularly the ECC (pending Queensland) will enhance efficiency of the CISG for international B2B online transactions, since it was designed to integrate with it.  

3.2 Once legislation is passed in Queensland implementing the ECC, it will enter force internationally, and Australia will be at the forefront of regulation of international commercial transactions conducted online. It is important that Australia becomes a signatory to the ECC in addition to adopting it so that our actions in adopting the ECC are more visible globally. Similarly, it would be advantageous if we were to ensure Australian representatives attended future UNCITRAL Working Groups to ensure we remain influential in current international legal developments.

3.3 It is ultimately a policy choice as to when online terms and conditions be given effect. As mentioned in the Discussion Paper, it is likely that consumers in Australia are not engaging in online transactions at optimal levels, and this observation accords with European evidence. The impact of online transactions for consumers might more closely be examined and potentially regulated. However, if additional protection is to be afforded for consumers, it is advisable that this should be implemented in reforms separate from those regulating the commercial sphere, given the experience with the European DCFR & the new Draft European Sales law. The latter has been criticized for its attempt to combine commercial and consumer contract laws in a complex and ultimately confusing manner.

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\[\text{Note:} \text{Truth or Dare, above note 2, Ch. 5, at 126-128 (citing studies indicating barriers to entry from lack of neutral contract laws).}\]
**Question 4: To what extent do businesses experience significant costs, inefficiencies, difficulties or lost opportunities as a result of the differences between Australian and foreign contract law?**

4.1 The Discussion Paper discusses the notion that Australia should ‘internationalise’ its domestic contract law. One rationale for this appears to be in order to reduce differences between Australian law and other laws that might apply to international transactions, given the lack of interest amongst Australian practitioners in utilizing the CISG. Options mentioned were for potential application of an ‘internationalised’ Australian contract law initially to international sales on opt in, opt out and mandatory bases.

4.2 National domestic contract regimes in other jurisdictions have been to varying degrees ‘synchronized’ with international harmonization instruments in order to modernize and improve domestic law. Since inspiration is often taken from the CISG and Unidroit Principles, this has naturally led to the gradual reduction of differences between domestic contract laws applicable in such jurisdictions, although significant differences remain. Essentially, there has been a gradual convergence under the influence of harmonized laws.\(^{62}\) To the extent that such modernization programs improve the design of local contract laws, this has improved the efficiency of trade, both domestic and international.

4.3 Notably, where domestic regimes in countries such as Germany, China, Netherlands and elsewhere have been ‘modernized’ or ‘internationalised’, they have not been designed to ‘overlap’ with the CISG’s application to international sales. Instead, the reformed domestic laws apply to domestic trade, international service contracts and international sales which opt out of the CISG. Australia could take such an approach, so that its domestic contract law would in some respects more closely mirror rules that are becoming prevalent in other jurisdictions, such as the right to cure, the ability to set additional time for performance, fundamental breach.

4.4 What cannot be improved by ‘internationalising’ or ‘modernising’ domestic contract rules are the peculiar costs involved in international transactions, which can be broken down into: the costs of negotiating a choice of law (negotiation costs); the costs of identifying the proper law of the contract and ascertaining its content, particularly for the party unfamiliar with that law, or both parties if a neutral third law is chosen (information costs). This involves knowledge of frequently unpredictable conflict of laws rules in multiple jurisdictions (conflict of laws risks), as well as identification of and assessment of each of the potentially applicable laws and assessment of their substantive advantages and disadvantages (information costs). Furthermore, there are related issues concerning choice of forum, and enforcement of the chosen law in that forum (forum risks). These costs are incurred during the negotiation and drafting stages and increase the transaction costs of doing business.

\(^{62}\) Notably, the Unidroit Principles expand upon the CISG. The CISG has had direct impact on domestic law in China, Germany, Scandinavia, Japan, Québec, Czech Republic, Russia and Estonia. It has affected reforms in the Netherlands, Germany, Japan, Greece and OHADA Member States. It has had an indirect impact on the domestic law of Denmark, France and Italy via the EU Directive on certain aspects of the sale of consumer goods and associated guarantees, Directive 99/44/EC [1999] OJ L171/12 itself based on the CISG (Ferrari, supra n 23, 472–73). The CISG has also directly influenced the Draft Common Frame of Reference for the European Union, especially IV.A on sales, but also II on contract formation and III on obligations and remedies. See C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition* (Munich, Sellier, 2009), see eg IV.A–2:306 Note 1, 1305 (which subsequently formed the basis for the present Draft European Sales Law 2011).
extreme cases, they may cause businesses to decline to trade internationally. Even if businesses choose not to make these assessments, the costs may eventuate during the time for performance (when obligations will need to be ascertained) or if disputes arise. Thus additional costs are involved and consequently inefficiencies arise which discourage international transactions. These costs would only be removed if rules of each jurisdiction were identical.

4.5 So far as it is possible to make rules of each jurisdiction identical, the CISG does so for international contracts of sale in member States. Thus the substantive design of Australian law applicable to international sales is already ‘internationalised’ in the form of the CISG. Further, the CISG is unique, because unlike any internationalised national law, it minimizes conflict of laws risks and information costs by virtue of greater accessibility, largely uniform application and internal applicability rules.

4.6 This is not to say that ‘internationalising’ Australian contract law is not worthwhile. On the contrary, it could be highly beneficial. The contracts that would benefit from modernizing Australian domestic contract law would be domestic contracts for sales and services, international contracts for services, and international contracts for goods where the CISG is not excluded in relation to issues not covered by the CISG (such as certain matters of validity). Internationalising or modernizing would also benefit international sales contracts where Australian law is chosen and application of the CISG excluded by agreement. The main benefits of ‘internationalising’ or ‘modernizing’ for all of these transactions are the improvements to design and reduction in outmoded rules. However, it must be recognized that in the latter case, conflict of laws risks and other procedural inefficiencies will remain.

4.7 In the case of international contracts predominantly for services, although the Unidroit Principles could presently be utilized, this ‘opt in’ set of soft rules is rarely used. This means that in most cases, the inefficiencies discussed above apply, and it is from amelioration of these that the greatest benefits would arise for international service contracts.

4.8 An incidental effect in modernizing Australia’s domestic contract laws to be more ‘international’ in nature may be an increased appreciation and reduced exclusion of the efficient uniform international sales law which Australia has already adopted. As mentioned above, the design of domestic contract law affects business to the extent advantages and disadvantages are not properly assessed. Globally, lawyers seem less inclined to exclude CISG when it is similar to the domestic contract law. A case in point is Germany, where the domestic regime was altered, resulting in it being more closely aligned to the CISG. Practitioners soon appreciated that the CISG was consequently not so different and in fact offered many advantages (some of which have been mentioned here). Consequently, it has become standard practice in Germany not to exclude it, contrary to the previous position. The same is true in other jurisdictions which have undergone modernization reforms of their contract laws. Notably, such jurisdictions, while international sales are governed by the CISG, residual domestic contract rules have undergone modernization reforms which to various degrees have ‘synchronized’ them with the CISG rules, and with Unidroit Principles (which themselves are based on the CISG).

63 Truth or Dare, above note 2, Ch. 6, at 173-174; Green Eggs, above note 5, at 425-426.
**Question 5: What are the costs and benefits of internationalising Australian contract law?**

5.1 By ‘internationalising’, it is understood that the proposal is to alter the substantive rules of Australian domestic contract law to modernize them, aligning them more closely with international trends. Given the trends in other parts of the world where this has occurred, this is likely to mean Australian domestic contract law would become more similar to the CISG and Unidroit Principles.

5.2 It is not recommended that Australia ‘internationalise’ its domestic contract law in the sense that it will make the reformed domestic contract law primarily applicable to international sales, since that is the role of the existing harmonized law of the CISG (in regard to the subject matters governed by it), unless the latter is excluded by agreement between parties. This important issue is further discussed below. The approach to international sales must be considered separately, given the applicability of the CISG. As mentioned above, differences between Australian and foreign contract law really mostly affect commercial B2B sales when the CISG is excluded. Where it is not excluded, in 80% of cases, the CISG provides identical default contract rules across most jurisdictions for the most important issues affecting sales. In the other 20% of cases where the law of a non-member State governs the contract, and, additionally, in those transactions where the CISG is excluded, the information costs, forum risks and conflict of laws risks continue to increase transaction costs proportionately greater for small to medium sized businesses, since such parties are unable to spread the cost of legal advice and are unlikely to engage in sophisticated analysis or allocation of legal risks.

5.3 Thus ‘internationalisation’ to more closely align Australian law with the more modernized contract law prevailing in other jurisdictions will benefit domestic transactions, international contracts for services, international transactions for goods in which the CISG has been excluded, and to international contracts to which CISG applies, but only in relation to issues not covered under the CISG (e.g. validity).

**Benefits:**

5.4 Depending on the form such a proposal takes, one of the main benefits that might be anticipated is a change to more efficient substantive rules of contract. As mentioned earlier, this might be beneficial in terms of making the rules more modern. They might also be more suited in design to international trade. The later is important for services contracts, although not quite as important for sales, since the CISG is primarily applicable to the latter. However, where CISG is excluded, this aspect is also important for international sales choosing Australian law. The degree to which reform provides for greater substantive efficiency obviously depends heavily on the type of rules chosen.

5.5 An important benefit would be potentially improved accessibility and clarity. If Australian domestic contract law were to be unified in some way, the rules would be easier for parties to identify, and would not be as prone to State/Territory points of divergence. This would improve the efficiency of interstate and international trade by reducing information costs. Even after case law develops under a unified national framework, the process of identifying and assessing the effect of court interpretations of the national law would be rendered less onerous by the fact that cases would refer to the same rules. This will be enhanced by the manner in which cases are organized in online databases, by search functions linking to provisions of the single law.
5.6 Importantly, duplication and divergence currently observable between State rules could be rectified under a single uniform national contract law. This would reduce information costs and improve accessibility and efficiency for both domestic and international users of Australian domestic contract law. As mentioned earlier, privity and capacity (above 1.1.1-1.1.5) are two such examples of inefficient divergence, as well as differences arising under Sale of Goods legislation. Unification of rules would help prevent the scope for future divergences to re-emerge. Further, other areas of law could be reviewed during the process of unification, e.g. the concept of consideration (above 2.5-2.8), parol evidence rule, and good faith and fair dealing in performance and enforcement (above 2.9-2.32).

5.7 Modernization of Australian domestic contract law would allow Australia to join a number of other jurisdictions that have taken steps to replace archaic and confusing rules with simpler more streamlined rules in keeping with international trends. Provided consumer and commercial rules are not combined, this is a desirable step. Notably, the jurisdictions which have undergone the process of modernization and ‘internationalisation’ (e.g. China, Germany, Netherlands etc) have not withdrawn from the CISG, but have improved their domestic contract law so that domestic transactions (and international sales where CISG is excluded) are better regulated. In modernizing domestic contract laws, Australia will also send a signal that it is alert to the need to cater for commercial needs.

5.8 As mentioned above, a beneficial side effect observed in jurisdictions has been renewed interest in, and improved familiarity with CISG by practitioners following modernization of domestic law. This is because one factor in exclusion frequencies appears to be the similarity of domestic contract law with CISG, and most modernizations have brought domestic law closer in nature to the latter. Again, this means that modernization may assist in addressing the problems in practice of inappropriate exclusions of uniform law.

Costs:

5.9 Naturally, the shift from one regime to another involves substantial ‘switching’ costs as practitioners and courts will need to familiarize themselves with a new set of rules and new sources. The transition will also cause a period of time when business may need to content with some of their contracts being governed by the old regime, while others fall within the new regime, entailing a temporary loss of some economies of scale in contract management costs. The question must be whether the longer term benefits are worth this learning cost.

5.10 It should be borne in mind that many of the costs of switching to a new regime would be borne by lawyers, while most of the benefits accrue to business. It must be accepted that the profession therefore has a special interest in maintaining the status quo and strongly resisting any change irrespective of the benefits, even where the benefits far outweigh the costs.

5.11 Naturally there will be costs involved in the process of formulating the new regime, including investigation of divergences and review of reform areas.

5.12 It is submitted that benefits of accessibility, modernization and simplification will outweigh temporary costs, particularly if CLE programs are encouraged in regard to the effect of the new laws, their advantages and disadvantages.
**Question 6: Which reform options (restatement, simplification or substantial reform of contract law) would be preferable? What benefits and costs would result from each?**

6.1 The current problems of current divergences and duplication strongly indicate that Australian domestic contract law should be unified as well as substantively modernized if it is to become more efficient, despite the resistance this is likely to meet.

6.2 The greatest efficiency gains would result from a single national hard law. This would optimize accessibility to the law for all users (under a single set of national provisions, with case law from all States/Territories thereby accessible through databases indexing such provisions etc), and reduce the tendency for future divergences to arise. It would also optimally facilitate uniform modernization and streamlining of substantive rules. As mentioned in the Discussion Paper, this raises constitutional issues.

6.3 However, national codification would be a drastic step. Recalling that many of the problems relating to current underutilization of efficient laws in Australia relate to learning costs and entrenched behaviours, only some of which are rationally economic in nature, an interim approach might be the best way ahead.

6.4 To minimize the costs involved, particularly those borne by the legal profession, and to allow for a period of adjustment, careful consideration might be given to adopting a national Restatement of Contract Law. A Restatement might be the optimal course for modernization, as it will allow a realization of some of the benefits specified above, but minimize the costs. Importantly, it will also reduce resistance to change that might otherwise be expected, since a Restatement will not be binding law. Nonetheless, as seen in the US, Restatements can be highly persuasive and influential.

6.5 Over time, a uniform restatement might therefore allow for convergence of principles by providing a uniform point of reference for courts. It could resolve some of the less controversial points of divergence, and enable the future development of resolutions by debate and discussion to iron out difficult problems that might arise from the new rules over time, facilitating a gradual learning process amongst all stakeholders, and pave the way for any future hard law options such as national codification, which might then provide maximum benefits of modernization for all transactions using Australian contract law.

6.6 Requiring little by way of cost, but providing potential benefits of improved clarification and certainty is the proposal that existing implementing legislation regarding the CISG should be improved to make it clearer to courts that application of the CISG is not an optional exercise where it is the applicable law, irrespective of any perceived similarity to domestic contract law.

**No Single Magic Bullet – Instead, a Multi-Pronged Approach**

6.7 There is no single global answer to the inquiry’s basic question of whether Australian contract law should be simplified, restated, or reformed. In reality, a mix of all three responses is needed, matched to different parts of the overall problem. The Discussion Paper rightly recognises the potential need for a nuanced approach, in stating (at p 21) for example that ‘(m)andatory reform would be most attractive if the reform was relatively small-scale or involved discrete areas of law’. Ultimately, the choice of one or more of these responses is contingent upon answers to other questions about: (i) the nature and scope of identified
problems and gaps in the Australian law of contract; (ii) evidence-based assessment of the real costs and benefits of the current position and any change to it; and (iii) a holistic assessment of the connections between the various matters covered in the separate infolets and their overall significance in both social, economic, and legal terms.

6.8 For example, there are anomalies in how different Australian States and Territories treat basic elements of contract such as privity of contract (see above 1.1.1-1.1.3 above) and capacity to contract (see 1.4-1.5 above), and ancillary matters, which might usefully and easily be addressed through consensus towards national harmonisation in these discrete areas, without overhauling the rest of contract law. At the same time, modernising Australian contract law in key areas to meet the legal standards internationally and from Australia’s major trading partners needs something more systematic than incremental development by courts and Act-by-Act development by parliaments.

6.9 All of this requires a multi-pronged policy and regulatory approach, lying between the two extremes of mandating radical and comprehensive changes by law and leaving the current state of contract law and practice untouched. In a suitable form, the restatement option provides a process for an ongoing national contract law project and its various dimensions of awareness-raising, evidence-gathering, consensus-building, standard-setting, and stakeholder buy-in. It does not preclude more discrete and immediate reform initiatives. Its chief advantage is that it provides an inclusive process, in a form that can address and work towards solutions for the discrete issues that the Discussion Paper raises for resolution.

6.10 Where do we go from here? Evidence-based policy and regulatory assessment requires more investigation and research in some areas, to inform the cost-benefit evaluation of necessary changes to existing law and practice. This applies to discrete aspects such as the anomalies in how basic elements of contract are treated under different Commonwealth, State, and Territory laws. It also applies to areas that the Discussion Paper and infolets themselves identify. For example, we need more investigation and research to identify the various barriers to further uptake of foreign and international standards by the private sector and their legal advisers. Both the domestic and transnational aspects of this cross-jurisdictional problem are signalled in Infolet 2’s recognition that ‘differences in contract law between Australian states and territories, or between Australia and other countries may discourage business from trading interstate or overseas [and] these differences may increase the risk and cost of doing business across borders’.

6.11 Finally, given that much of contract law is implemented in business and consumer practice through standard agreements and organisational procedures and training based upon them, the ‘up front’ practical costs of any significant legal changes must be factored into overall assessments of the long-term socio-economic and legal benefits of doing so (see also 5.9 & 6.4 above). Curing demonstrated socio-economic injustice and equipping Australian contract law for the global economy - even at some initial business inconvenience and cost - is one thing. Doing it without regard to the hidden and real costs in practice as part of a balanced cost-benefit evaluation is another thing altogether.

6.12 The Attorney-General’s Department could develop its current inquiry into a National Contract Law Project in cooperation with academics, regulators, judges, and representatives

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64 The results and design of a number of similar empirical studies on lawyer practices in choice of law for international contracts conducted in other jurisdictions have been analysed by one of the authors, Lisa Spagnolo *Truth or Dare*, above note 2, Ch. 5. However, to date, no such study has been conducted in Australia.
of business, consumer groups, and the broader legal profession. This would also be an important way of implementing the recommendation by the Advisory Group on Reform of Australian Government Administration in its landmark report, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, to ‘(b)uild partnerships with academia, research institutions and the community and private sectors’ to enhance policy and regulatory capability. This area is ripe for such a government-initiated multi-stakeholder initiative of the highest national significance across political, sectoral, and industry boundaries.

6.13 Such a project could take many forms and have many uses, many of which could interact with one another. For example, a principle-based national contract law framework could set the parameters within which discrete areas of contract law, regulation, and practice are reviewed and updated, with input from expert and industry participants. This could become a process through which general or specific needs for codification could be explored, again in a stakeholder-inclusive way. It could provide a basis for industry-led development of model agreements and standard conditions, much as already happens in areas as varied as residential tenancies, sale of land, and public infrastructure development. It could leverage and build upon existing regulatory infrastructure such as industry codes of conduct and consumer guarantees (e.g. in the banking, franchising, and telecommunications industries).

6.14 It could also include work towards a particular kind of restatement that could become an authoritative reference point for courts, regulators, and other stakeholders, eventually laying the groundwork for an informed consensus about necessary changes in contract law, with enhanced buy-in across stakeholder groups. Models such as the UNIDROIT Principles and other restatement initiatives, European initiatives such as the Principles of European Contract Law, and US Restatement of Contracts and the Uniform Commercial Code show what is possible. All of these uses and others show that the ‘restatement’ option can take more than one form and be put to more than one use, to greater overall effect. Its desirability is not contingent upon the priority given to accessibility alone.

6.15 The Discussion Paper highlights (at p 19) an issue in this context of ‘the extent to which a restatement or codification should seek to go into detail (lessening its accessibility) or should confine itself to high-level principles (which might undermine predictability). However, it is possible here to have one’s cake and eat it too. This is because there are many examples now of principle-based frameworks of various kinds and in various areas of regulation and practice that operate on primary, secondary, and tertiary levels of guidance. Basic principles can be broken down into subsidiary principles and elements, which can themselves be further elaborated in terms of other guidelines, commentary, and examples.

**A Restatement Project – Options and Elements**

6.16 Justice Paul Finn has been an advocate in the past of the need for an Australian restatement of contract law. The views outlined above suggest that such a restatement is a worthy option, takes multiple forms, and serves multiple purposes that connect to the policy and regulatory options of simplification and reform too. Here, nothing more is needed than to endorse and endorse the elements of a restatement as suggested by Justice Finn.\(^{65}\) It can be modelled on restatement initiatives internationally and in other countries and regions. It

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\(^{65}\) The following draws upon Finn’s views about optimal features of a restatement in Finn, above note 58, at 151-152, 155-162, and 168.
requires participation beyond government. It needs to involve the judiciary, legal profession, and academic experts, as well as other stakeholders. It requires involvement and leadership from peak representative bodies. It can be turned to various additional policy and regulatory ends. In Finn’s own words, the crystallised case for a restatement embraces the objectives of simplification, accessibility, and reform.\textsuperscript{66}

One lesson is, I consider, obvious from the international developments I have mentioned. It is that the sensitive and successful reformation of contract is likely best to be achieved if the task is undertaken in the first instance by experts, subject to rigorous review by judges and practitioners knowledgeable in the discipline – and this irrespective of whether the final product is or is not to be legislative in form. I emphasise this matter for this reason. A significant reappraisal of Australian contract law is needed but it needs first and foremost to be systematic; the law needs to be simplified and clarified; and it needs to be better aligned with international commercial law. If the ultimate vehicle must necessarily be national legislation because of the quirks of our federation, the process itself should not be left simply in the hands of governments. Australian contract law as a system is too important for that.

\textsuperscript{66} Finn, above note 58, at 162.
Question 7: How should any reform of contract law be implemented?

7.1 Any steering group should include representatives that have a keen awareness and understanding of international trends in contract law reform, and an appreciation of the current problems with Australian contract law, including divergences, current developments, business and consumer concerns, practitioner behavioural drivers, and of the key models for modernization, the CISG and Unidroit Principles. The Attorney General might give some thought to appointments to a steering committee, to include lawyers, academics, business and consumers from various sectors.

7.2 The Steering Committee which could then be set the task of creating a report reviewing the issues raised here and by other stakeholders in more depth. As part of this, empirical work could be commissioned to better gauge the needs of users of Australian contract law. The steering committee would need to consult State Attorneys General, and produce a number of options for restructure and reform.

7.3 Following the production of the report, a period of time should be allowed for submissions from interested groups and individuals, and possibly a number of forums could be held in major cities to encourage debate and discussion.

7.4 Ultimately, the Committee should aim to produce a Restatement of Contract Law which, at a national level, can resolve some less controversial divergences (such as privity and capacity), seek to adopt some modernizations, and outline of any remaining problems requiring future resolution.

7.5 As mentioned earlier, international sales need to be separately considered. The Discussion paper mentions the possibility of limiting reforms to apply only to international contracts initially, and to making such reformed law applicable to international contracts on either an opt in, opt out or mandatory basis. It is not recommended that this course be followed.

7.6 A special separate set of ‘internationalised’ Australian contract rules that allow parties to opt in (as raised in the Discussion Paper) and which operates alongside ordinary Australian contract law is not recommended. Such rules will most probably be underutilized in Australia for the same reasons as the CISG is currently underutilized (and far more so, the opt in system of the Unidroit Principles).

7.7 The alternative (raised in the Discussion Paper) of an ‘opt out’ or mandatory set of rules applicable to international sales must be avoided, as this may constitute a breach of Australia’s international obligation to apply the CISG. This would send a very negative signal about Australia as a trading partner for international commerce. Withdraw from the Convention goes against current international momentum in support of joining the CISG. Almost all of Australia’s major trading partners are member States. China, one of our strongest trading partners, is the most frequently user of the CISG. Indeed, as more and more jurisdictions continue to adopt the CISG (e.g., most recently, Brazil), it would be unfortunate if Australia were to withdraw or openly jeopardize our status as a member State. Membership and proper application of the CISG is one way to strongly signal a jurisdiction’s engagement with international trade.

7.8 Assuming Australia does not wish to withdraw from the Convention, then the CISG will continue to apply as the law of international sales to most transactions between Australia and
other jurisdictions. Any Restatement or other outcome would need to specify that it does not apply to issues governed by the CISG when the latter is the proper law of the contract.

7.9 It follows that if Australia intends to establish itself as a hub for international commercial arbitration, then, it should not withdraw from the globally accepted harmonized law of sales. Instead, as New York is presently doing, it should focus on how to best promote familiarity with the CISG in relation to international sales, particularly by practitioner education and other means. Likewise, for the same reasons, Australia should fully participate in current global legal developments in relation to harmonization of commercial law. Unfortunately this has not occurred in some instances in recent times. There are, however, forthcoming opportunities for Australia to re-establish its involvement with UNCITRAL (discussed below Q8).

67 See above note 26.
68 Note by the Secretariat, Possible future work in the area of international contract law. Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law, A/69/758 General (8 May 2012) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement> (‘Swiss Proposal’). For information regarding the recent UNCITRAL Commission Session which, inter alia, discussed this, see <http://www.uncitral.org/uncitral/commission/sessions/45th.html>.

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Question 8: What next steps should be conducted? Who should be involved?

8.1 Reform of Contract Law

8.1.1 Steering Committee

As mentioned above, the Attorney General should appoint a Steering Committee comprised of representations from the legal profession, small, medium and large business, consumer groups, and academics. Where possible, representatives should have an appreciation of international legal developments, and materials should be consulted indicating the changes implemented in other jurisdictions.

8.1.2 Restatement of the Law of Contract

The Steering Committee should aim to produce a Restatement which would be a national document of a non-binding nature, which as succinctly as possible, sets out the principles and rules of law relating to contract. Where possible, areas of current divergence should be resolved. Further, the Committee should look to improve outdated or technical rules and consider improvements by reference to international harmonized instruments. Consumer and commercial rules should be kept separate wherever combining them would lead to undue complexity or confusion.

8.2 Reforms of Related Laws to Improve Efficiency

8.2.1 Implementing Legislation should be Clarified

The wording of current legislation implementing the CISG has been misinterpreted, and the error has now been followed in later decisions. An amendment making clear that where applicable ipso iure, the CISG is to be applied to issues within its scope would help ensure courts no longer misinterpret their international obligation to apply the Convention.

8.2.2 Implementing ECC in Queensland

Once this step is taken, the ECC will come into force internationally. This is an important step for Australia internally, and will help improve Australia’s standing as an innovative adopter of reforms that benefit international trade.

It is understood that Queensland still intends to pass the legislation, but at the time of writing, it had not yet been introduced into parliament despite a period of 4 years since the agreement of Attorneys General to do so.

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69 See above note 28.
70 See above note 28.
8.3 Steps to Realize Potential Efficiency Gains under Existing Australian Contract Law

Irrespective of whether reform of existing contract law proceeds or not, it is recommended that a number of steps be taken to ensure existing laws are utilized in a way that maximizes efficiency gains available:

8.3.1 Empirical Data – It is recommended that a study be commissioned to gauge business needs and attitudes to contract law, and to survey practitioner CISG exclusion practices.71 As mentioned earlier, we currently have no direct data on Australian exclusion rates, although there have been many surveys conducted in other jurisdictions globally.72

8.3.2 Continuing Legal Education – To improve familiarity amongst practitioners, CLE programs should include CISG courses. This should be funded to ensure their accessibility with the support of State professional bodies, and consideration given to how to ensure wide dissemination amongst practitioners.

8.3.3 Practitioner Resources – Again, to support practitioners in becoming familiar with and confident in using the CISG, online databases such as the one developed by the NYSBA can be developed and promoted. The latter compared domestic laws with the CISG so that practitioners could identify the differences, and provided links to resources for further information.73 Consideration should be given to funding newsletters and a national forum for practitioners interested in further developing specialist skills.

8.3.4 Legal Education for Undergraduates /JD – To ensure future practitioners have an acceptable level of familiarity with the CISG, thereby minimizing the competing economic interests that have so far ensured persistent inefficient choices of law (automatic exclusion of the CISG), it is recommended that domestic Contract Law courses include comparisons with the CISG, or that this becomes a component of other compulsory subjects for undergraduate LLB/JD courses. This could be the subject of a recommendation to the Council of Australian Law Deans. Specialist courses should also be encouraged, although they will not have the wider effect of inclusion in compulsory courses. One way in which the development of high level international commercial law (and arbitration) skills at the undergraduate level can be positively supported is by way of grants to Law Schools seeking to send students to the annual Vis International Arbitration Moot where the students work on simulated real life arbitration cases involving the CISG.

8.3.5 Judicial Education – To ensure the applicability of the CISG is not overlooked in future litigation by the bench, that the impact of implementing legislation is properly understood, and that courts appreciate the manner in which the CISG is to be applied, a series of seminars open to State and Federal judges might be useful. Presently, the unfortunate state of Australian decisions is well known internationally and does not paint our jurisdiction in a favourable light as an appropriate forum for dispute resolution. Seminars could be run in conjunction with amendments to the implementing legislation.

8.3.6 Funded Research Projects - Many of the issues raised in the Discussion Paper and in this submission could usefully be made the subject of further research, across the disciplines

71 See paragraph 8.3.6 & below note 74.
72 These have been extensively critiqued and analysed: above note 64.
73 Lisa Spagnolo was heavily involved in the development of the NYSBA Checklist database.
of law, economics, business, and the social sciences. Such research is needed to inform the full cost-benefit assessments needed to make policy and regulatory decisions about the real effects of the current state of contract law and practice and any changes to it.\textsuperscript{74} It can be commissioned as part of a systematic National Contract Law project, and aligned with other initiatives too (e.g. restatement and reform options). The resourcing of such research is a shared responsibility across the public, private, and university sectors. If a project of this kind is a national priority in legal, economic, and social terms, official statements to that effect can provide incentives to relevant experts and collaborative partners to undertake such research and also assist funding bodies (e.g. the Australian Research Council) to recognise such priorities and national benefits.

8.4 Increased Involvement by Australia in Global Contract Law Developments

8.4.1 Domestic Engagement with UNCITRAL

UNCITRAL are very keen for Australia to once again become actively involved in the current dialogue relating to the Swiss proposal to the UN,\textsuperscript{75} and in engaging with our trading partners in the Asia-Pacific region on issues of trade law. In particular, on the basis of collaboration with one of the authors, UNCITRAL is sending a representative to Australia later this year to speak with practitioners in July and November,\textsuperscript{76} and at the Canberra International Trade Law Symposium organized by the Law Council of Australia in September. The involvement of the Attorney General’s Department with these visits including meetings with representatives will enhance the impact of these visits in terms of raising Australia’s profile at the international level.

8.4.2 Australian Engagement with Regional Talks organized by UNCITRAL

Further, a series of meetings are planned by UNCITRAL for early next year, to discuss future directions in international commercial law at the next stage of developments after the recent UNCITRAL Commission Sessions in June-July this year.\textsuperscript{77} Following from these hearings, there are to be further discussions on regional commercial law in the Asia-Pacific.

One key meeting is to be in Seoul (February 2013), and it is suggested that an Australian delegation should meet with delegates from Japan, South Korea and other Asia Pacific countries to participate in regional discussions with our major trading partners.\textsuperscript{78}

\textsuperscript{74} No such study has been conducted in Australia. The results and design of a number of similar empirical studies on lawyer practices in choice of law for international contracts conducted in other jurisdictions have been analysed by one of the authors, see above note 64.

\textsuperscript{75} See above note 30.


\textsuperscript{77} See above note 30.

\textsuperscript{78} For information for last year’s RCAP meeting: <http://www.uncitral.org/uncitral/en/tac/rcap.html>. For further details contact Lisa Spagnolo.