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Abstract

It has been noted that: 'the law of England has swollen to an unmanageable bulk. There is but one cure and that is codification...' 2 . That statement was made approximately 200 years ago, and the situation is by no means better today. Nor can it be said that the situation in Australia is much better than that in England. The volume of case law, particularly when combined with what seems like an endless flow of lengthy and complex statutes, place the Australian law in an unhealthy state. Just like a store or a warehouse periodically needs to take stock of its assets, the common law is now in desperate need of stocktake.

CODIFYING AUSTRALIA'S CONTRACT LAW

– TIME FOR A STOCKTAKE IN THE COMMON LAW FACTORY

DAN JERKER B SVANTESSON*

*'It has been the history of law in every other civilised country that after customary or common law has developed to a certain degree, or for a long period of years, and become unwieldy, a Code has followed.'*¹

Introduction

It has been noted that: 'the law of England has swollen to an unmanageable bulk. There is but one cure and that is codification...'². That statement was made approximately 200 years ago, and the situation is by no means better today. Nor can it be said that the situation in Australia is much better than that in England. The volume of case law, particularly when combined with what seems like an endless flow of lengthy and complex statutes, place the Australian law in an unhealthy state. Just like a store or a warehouse periodically needs to take stock of its assets, the common law is now in desperate need of stocktake.

The masses of materials currently making up the Australian law may cause those applying it to feel uncertain as to whether they have consulted all relevant materials. Further, the law is difficult to teach and it is certainly outside the reach of laypersons. Looking at these issues through the lens of contract law,³ this article argues that

* Associate Professor, Faculty of Law, Bond University, Gold Coast, Queensland 4229. I wish to thank Emeritus Professor Mary Hiscock for her valuable comments and guidance. Further, I wish to acknowledge the helpful research assistance provided by Andrew Antonopoulos. Any mistakes remain my own.

¹ Williston, 'Written and Unwritten Law' (1931) 17 *American Bar Association Journal* 39, at 41. (As reproduced in Bruce Donald, 'Codification in Common Law Systems' (1973) 47 *The Australian Law Journal* 160, at 160).

² H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *The Modern Law Review* 241, at 244, quoting from Robert S. Pollard, *Speed-up Law Reform* (1957), at 6-7, who in turn referred to an article published in the *Law Times*.

³ Contract law is a particularly suitable area of law to focus on as it has been discussed as an area ripe for codification for a long time and several attempts have been made at codifying contract law.

Australian law, and ultimately the Australian people, would benefit considerably from the codification of a range of areas of law.

While the topic of codification has been the subject of academic analysis for a long time, little attention has been given to this topic in Australia for at least 15 years. In light of that, this article seeks to re-open the topic by summarising and discussing: (1) a range of benefits of codification; (2) arguments that have been raised against the codification of the common law; and (3) certain practical issues that must be tackled if Australia's contract law should be codified. However, the article commences with a discussion of the meaning of the term 'codification', and it is necessary to distinguish between three forms of codification: stocktake, gap-filling and reform. Focusing on the common law relating to unconscionability, the article concludes by giving examples of these three codification methods.

What is 'codification'?

Codification has a long history and, from time to time, it has been a 'hot topic' in common law countries.⁴ Consequently, there is no lack of literature discussing the virtues and vices of codification.⁵ One significant codifications debate reached its peak in the mid 1960s when the Law Commission in England was charged with the task of reviewing the law 'with a view to its systematic development and reform, including in particular the codification of such law'.⁶ It is a well known fact that the Law Reform Commission's work did not result in a contract code, and there are

⁴ For an insightful overview of this history refer to: John Farrar, *The Codification Of Commercial Law* in Steven Todd and Jeremy Finn ed., *Law, Liberty and Legislation* (LexisNexis, forthcoming).

⁵ See eg: Samuel Jacob Stoljar ed., *Problems of Codification* (Canberra, Australian National University 1977); Bruce Donald, 'Codification in Common Law Systems' (1973) 47 *The Australian Law Journal* 160; H. R. Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *The Modern Law Review* 241; Peter M. North, 'Problems of Codification in a Common Law System' (1982) 46 *RabelsZ* 490; Aubrey L. Diamond, 'Codification of the Law of Contract' (1968) 31 *The Modern Law Review* 361; Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *The Modern Law Review* 1; Sir Leslie Scarman, 'A Code of English Law?', Hull University, 1966; Michael Kerr, 'Law Reform in Changing Times' (1980) 96 *The Law Quarterly Review* 515; A. E. Anton, 'Obstacles to Codification' (1982) 15 *Juridical Review* 15; John Farrar, *The Codification Of Commercial Law* in Steven Todd and Jeremy Finn ed., *Law, Liberty and Legislation* (LexisNexis, forthcoming); and Sir Leslie Scarman, 'Codification and Judge-made Law', Birmingham University, 1966.

⁶ *Law Commission Act 1965* (England), s. 3(1).

many reasons for that outcome.⁷ Other attempts have been more fruitful. For example, New Zealand has introduced several pieces of legislation codifying aspects of contract law.⁸ Another example is found in the US Uniform Commercial Code.⁹ The most recent Australian attempt at a codification of contract law is Ellinghaus and Wright's interesting 1992 Discussion Paper on *An Australian Contract Code*.¹⁰ However, as is familiar, Australia's contract law is still largely to be found in case law.

The word *codification* may make most people think of the various continental codes. Of these, the best known probably is the French *Code Civil*, introduced in 1804 by Napoleon Bonaparte. Another well known example of such codes is the German Civil Code (*Bürgerliches Gesetzbuch*) introduced in 1900. Put simply, the characteristic features of the continental codes are their comprehensive and gap-free scope, their systematic approach and the generality of their rules.

However, a code need not be of this nature. Donald provides the following valuable definition: 'In its most general sense, codification is the systematic collection or formulation of the law, reducing it from a disparate mass into an accessible statement which is given legislative rather than merely judicial or academic authority.'¹¹ References made to the term 'codification', throughout this article, should be read in light of this definition. Consequently, a statute of the type common in Australian law can be classed as a code, be as it may, a not always very comprehensive code.

With this broad definition in mind, it is submitted that codification can come in three different forms. At its most modest level, codification is the mere restatement of the law at the time of codification. This can be achieved by a process we can refer to as *stocktake* – one has to evaluate each and every relevant authority to see what the law really is at the moment. As far as contract law is concerned, this painstaking process would be greatly assisted by the many quality textbooks available on the Australian

⁷ See further: Peter M. North, 'Problems of Codification in a Common Law System' (1982) 46 *RabelsZ* 490.

⁸ See further, Thomas Gibbons, *A Contracts (Consolidation) Act For New Zealand* [2003] *WkoLRev* 2.

⁹ <http://www.law.cornell.edu/ucc/ucc.table.html>.

¹⁰ M P Ellinghaus and E W Wright, *An Australian Contract Code* (1992) Law Reform Commission of Victoria, Discussion Paper No. 27. See further: Ellinghaus et al., *Models of Contract Law: An Empirical Evaluation of Their Utility* (Federation Press, 2005).

¹¹ Bruce Donald, 'Codification in Common Law Systems' (1973) 47 *The Australian Law Journal* 160, at 161.

market;¹² After all, as noted by Stoljar, ‘academic *summa* performs a role very similar to a code; indeed there have been many works, standard text-books, which for long periods have operated like sorts of codes at common law.’¹³

The stocktake process will inevitably identify gaps in the law – the common law has not developed so fully as to provide a complete law. When the stocktake process is faced with such a scenario, two alternatives are available; (1) we can write the code in very general language so as to leave the legal issue unanswered, or (2) we can take one step up on the ‘codification ladder’ and move on to what we can call *gap filling*. Where the codification process involves gap filling, it not only restates the law, but expands on it.

The highest, or most advanced, form of codification is what we can refer to as *reform*.¹⁴ Codification at this level involves a conscious decision to start fresh, leaving the shackles of the existing law behind, and constructing a code from scratch. While this may sound rather dramatic, it should be pointed out that, in constructing a new code, account may be taken of the existing law. Indeed, the ‘historical fact is that only after long, or at least fruitful, periods of case-law can summarising or codifying attempts effectively begin.’¹⁵ The significant difference between reform and the lower levels of codification is that in the reform model, the drafter is not bound to follow existing law, but can do so at will.

As far as reform is concerned, a distinction can be drawn between reform of one specific area of law, and codification of e.g. the whole civil law of a country. As seen, the continental codes are typically codifications of virtually the whole civil law, while common law countries largely have preferred codifying specific areas one-by-one.

As Diamond has stated: ‘The real case for codification, I believe, is that it facilitates law reform. We can improve the content of the law when we create the new code; and we can improve it later by revising the code.’¹⁶ I agree that the preferable option

¹² See eg: Willmott *et al.* *Contract Law*, Paterson, Robertson and Heffey, *Principles of Contract Law*, Graw S, *An Introduction to the Law of Contract*, Seddon and Ellinghaus, *Cheshire & Fifoot’s Law of Contract*, Carter and Harland, *Contract Law in Australia*, and Khouri D and Yamouni Y, *Understanding Contract Law*.

¹³ Samuel Jacob Stoljar ed., *Problems of Codification* (Canberra, Australian National University 1977), at 11.

¹⁴ It is acknowledged that the term ‘reform’ also has a much broader meaning, but for the purpose of this article ‘reform’ carries the meaning outlined above.

¹⁵ Samuel Jacob Stoljar ed., *Problems of Codification* (Canberra, Australian National University 1977), at 12.

¹⁶ Aubrey L. Diamond, ‘Codification of the Law of Contract’ (1968) 31 *Modern Law Review* 361, at 372.

is reform. However, codification, in the form of stocktake or even gap filling, is more likely to be met with acceptance than is codification in the form of reform. Thus, this article proposes that, at least as far as contract law is concerned, Australia's common law is to be codified mainly using the stocktake model, accompanied by gap filling where necessary. At the same time, it may be worth considering reforming those areas of Australia's contract law that are incompatible with international legal practice. One such area is the law relating to *consideration*, another is the awkward *postal acceptance rule*.

In other words, it is submitted that, in the construction of a codified Australian contract law, most aspects of the code can be built on the stocktake model, some aspects need to be constructed through gap filling and a small number of aspects need to be constructed using the reform method.

Benefits of codification

In discussing the benefits that flow from codification, we must keep in mind the different forms codification may take. To use the concepts introduced above, we must distinguish between stocktake, gap filling and reform. This article is focused on stocktake aided by gap filling, but a few words will also be said about the benefits of reform.

It can perhaps be said that each step up the ladder of codification results in further benefits. In other words, gap filling has the same benefits as stocktake, plus a few additional ones, and reform has the same benefits as gap filling, plus a few additional ones. However, the most useful starting point is to, on a general level, examine the benefits that may flow from codification.

Having examined a large number of journal articles discussing the benefits of codification, a rather clear pattern emerges. While the terminology used varies, the following benefits are typically associated with codification:

- Simplification;
- Systematisation;
- Unification;
- Clarification;
- Evolution; and
- Internationalisation.

These benefits are discussed one-by-one.

Simplification

Many learned commentators point to how codification can simplify the law and make it more accessible and manageable. The difficulties associated with extracting law from a mass of cases are widely acknowledged, and the process can be compared to assembling a puzzle – one needs to examine closely a vast number of pieces to find those that fit together to form the full picture. Indeed, all too often one finds that important pieces are missing making it impossible to view the whole picture. As noted by Diamond: ‘Small wonder that over the centuries voices have been raised in protest against the tons of verbal pulp that must be squeezed to obtain an ounce of pure judicial law.’¹⁷

Whether or not the law can be made so accessible as to be understood by laypersons is discussed below. Here it suffices to discuss why simplification is important.

The law must always be as ‘user friendly’ as possible, and simplification is the most fundamentally important step in making the law user friendly. The importance of the law being user friendly is perhaps particularly great in the case of legal rules that are only applicable where the users elect to apply them. After all, people entering into a contract can, with some limitations,¹⁸ use choice of law clauses to nominate the legal system that will govern the contract. Put simply, legal rules, such as many rules within contract law, are subject to market powers, not dissimilar to the market economy – if the rules are not popular they will not be used.

This is not to say that the lawmakers should focus exclusively on what makes legal rules popular. Such an approach would ultimately result in a situation where the rules of contract law are one-sidedly aimed at protecting the stronger contractual party as typically the stronger party decides the applicable law. The law must remain focused on providing justice. What I am here aiming at is not so much the legal rules themselves, but rather what we can refer to as their *packaging*. Not even just and fair rules will be popular if they are inaccessible. The packaging is crucial for making rules popular and the current masses of relevant cases, making up the Australian law of contract, are not accessible.

It is my strong conviction that the law makers must take account of the market situation in which contract law operates, and look to the packaging needs of the users of the law – easily accessible, clearly expressed rules will serve Australian businesses and individuals better than does the current state of Australia’s contract law.

¹⁷ Aubrey L Diamond, ‘Codification of the Law of Contract’ (1968) 31 *Modern Law Review* 361, at 362.

¹⁸ Such as those limitations that are associated with consumer contracts.

Another aspect of simplification relates to the 'teachability' of the law. Students of law are constantly faced with the difficult task of developing an understanding of complex legal concepts and principles. The way such concepts and principles are presented to the students vary from teacher to teacher. However, typically, students are introduced to key cases and the teacher assists them to identify the relevant legal concepts and principles flowing from those cases. After the examination of the key cases students are assumed, or assisted, to understand:

- How the concepts and principles identified from the cases interrelate; and
- How the concepts and principles identified from the cases create a comprehensive system of regulation.

The development of this approach is natural in, and its prevalence typical of, a country following the common law tradition where case law, at least historically, is the dominant source of law.

Where the law is contained in a code, this process can be turned around. Starting by looking at the provisions of a code, students are not only provided with the legal concepts and principles as such, they also get a *map* of how the relevant concepts and principles, within a particular area of law, interrelate and create a comprehensive system of regulation; as Stoljar puts it, codes can provide 'a sort of instant overall picture of what the principles are meant to achieve'.¹⁹ Armed with that knowledge students are ready to investigate the details of the law, which, where appropriate, can be done by reference to case law. In other words, while the typical common law approach is to go from micro issues to macro issues, the teaching of law by reference to a code can go from macro issues to micro issues. This has significant benefits: most importantly, this approach gives students an immediate appreciation of the bigger picture of how the relevant area of law operates. This rapidly creates a feeling of having gained knowledge, and prepares students to proceed comfortably and confidently with a detailed study of the area in question.

In finishing the discussion of the benefit of simplification, it is interesting to reflect on Lord Wilberforce's observation that:

By presenting to the courts legislation drafted in a simple way by definition of principles, we may restore to the judges what they may have lost for many years to their great regret; the task of interpreting law according to statements of principle, rather than by painfully hacking their way through the jungles of detailed and intricate legislation. So I believe that a process of codification,

¹⁹ Samuel Jacob Stoljar ed., *Problems of Codification* (Canberra, Australian National University 1977), at 9.

intelligently carried out, will revive the spirit of the Common Law rather than militate against it.²⁰

Systematisation

The nature in which the common law evolves is of course not random. Judges carefully analyse previous decisions and apply the law to the facts of the case at hand. In that sense, the common law evolves in a relatively systematic manner. However, a fundamental weakness that makes the evolution of the common law random is that a court does not get the chance to develop the law until a suitable case is brought before it. For example, the law of *non est factum* cannot evolve until a court is able to consider the law of *non est factum* in a case brought before it. Bearing in mind the principle of *ratio decidendi*, that case must exactly relate to those aspects of the law of *non est factum* requiring change, before any amendments can be made.

Sir Leslie Scarman²¹ has pointed to a related matter:

The basic weakness of a system of law which relies upon judicial precedent for its development is that it is not the primary function of courts or judges to legislate. This criticism may be put somewhat differently: development by judicial precedent is development of the law by lawyers – a practice against which man has protested with more or less success since the dawn of civilisation. [...] Codification is, however, a true law-making process – not merely an incidental benefit thrown up by another process, that of adjudication. It provides for study, research, consultation, planning – all essential to orderly development: it looks forward to the shape of things to come as well as back to the achievements of the past. Further, in an English [and Australian] context, it is a process which enables the layman's voice to be heard in the process of law-making.²²

To conclude, codification can produce a systematic, orderly and internally logical and consistent contract law that is simply unattainable through case law.

Unification

While certain aims seem universal, codification is always driven by the specific circumstances of the jurisdiction in which it takes place, and may stem from a great variety of aims. For example: '[o]ne of the main factors in both France and Germany

²⁰ H L Deb, Vol 264, col 1175-1176 (April 1, 1965). (As reproduced in Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *The Modern Law Review* 1, at 1.)

²¹ As he then was.

²² Sir Leslie Scarman, 'A Code of English Law?', Hull University, 1966. (As reproduced in Michael Zander, *The Law-Making Process* (6th ed, 2004), at 485).

that gave rise to codification was the fact that pre-existing law lacked any unity throughout the country.’²³

The law of contract in Australia is by no means suffering from the degree of disunity that could be observed in France or Germany at the time of their codifications. Consequently, unification is only a marginal benefit as far as Australia’s contract law is concerned. Nevertheless, owing to the common law’s approach to precedent, it is not surprising that we find variations in the approaches to contract law between the Australian states and territories.

For example, there are two main competing approaches to the issue of whether a contract is for *goods* or for *work and materials* – the *main substance test* of *Robinson v Graves*²⁴, and the *end product test* of *Lee v Griffin*²⁵. Since the High Court has not decided the matter conclusively, there is no Australia wide preferred approach. However, the Supreme Court of Victoria has expressed its preference for the ‘end product test’.²⁶ As a consequence, lower courts in Victoria are bound by an approach similar courts in other states are not bound by. Codification in the form of gap filling or reform could cure this disunity.

Clarification

Little needs to be said about clarification. It is undisputable that codification in the form of gap filling or reform can clarify the current grey areas of Australia’s contract law. Several benefits would flow from such clarification. Perhaps most importantly, as litigation often relates to the grey areas of the law, a clearer, more certain and more predictable law will result in less litigation, which should be the aim of any legal system.

Stocktake alone cannot achieve the required clarification in the contract law of Australia.

Evolution

As has been noted by several learned commentators, it is of the greatest importance that the law constantly evolves: ‘In every society, law reform in changing times is a

²³ Bruce Donald, ‘Codification in Common Law Systems’ (1973) 47 *The Australian Law Journal* 160, at 167.

²⁴ [1935] 1 KB 579.

²⁵ (1861) 1 B & S 272.

²⁶ *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167.

process which is as endlessly necessary as cleaning the streets, maintaining buildings, pruning trees and disposing of refuse.²⁷

Where codification comes in the form of reform, or at least gap filling, one of the benefits is that the law evolves. Where codification merely comes in the form of strict stocktake, no evolution takes place.

Internationalisation

The codification of the contract law of Australia, were it to involve reform, is a great opportunity for what can be termed *internationalisation*. If there is a will to reform Australia's contract law, we can aim at making it more consistent with the rules of relevant international contract law. In particular, attention could suitably be given to the rules found in the *United Nations Convention on Contracts for the International Sale of Goods* (CISG)²⁸ and to the attempts at a uniform European contract law.

Internationalisation in this form has several benefits. For example, where the Australian law is in line with international contract law, Australian businesses obtain a competitive advantage when engaging in international transactions in that they already operate under those rules. Further, Australia could lead the way towards a universal contract code by ensuring the contract law of Australia is in harmony with international contract law practices.

To a much more limited degree, internationalisation can also be achieved through gap filling. Then, however, internationalisation is only achieved in the areas of law not yet settled. A further limitation flows from the fact that a code must be systematic. This means that the benefits of internationalisation may be very limited where practices based on international rules cannot operate with existing national legal rules.

Arguments against codification

When discussing the arguments that can reasonably be raised against codification, we must again distinguish between stocktake, gap filling and reform. To an extent it seems that, the more radical the approach to codification is, the more arguments can be presented against it.

²⁷ Michael Kerr, 'Law Reform in Changing Times' (1980) 96 *The Law Quarterly Review* 515, at 515-516.

²⁸ *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April, 1980).

Layperson understanding cannot be achieved

While accessibility is a benefit outlined above under the banner of simplification, the degree of accessibility that can be achieved through codification has been questioned: 'Just as construction is the province of the trained engineer, and medicine of the schooled physician, so law is the specialised field of the learned lawyer. In a highly stratified and complicated society, law cannot be anything but intricate and difficult.'²⁹ In other words, codified or not, the law, like other sciences, does not lie within the comprehension of the layperson.

This may very well be true in a general sense. However, grouping all non-lawyers together under the title of laypersons obscures the real goal – that of making the law comprehensible to the end-users wherever possible. It is true that, for example, a bank customer cannot be expected to understand fully the complex regulation of the banking industry. On the other hand, it is ludicrous to suggest that a sophisticated businessperson is completely incapable of forming an understanding of the general principles of, for example, contract law. In other words, where the aim is to make all members of society understand all aspects of the law, we are clearly setting the bar too high. However, as is proven by the pedagogical success of textbooks summarising the law,³⁰ when expressed clearly and systematically the law is more easily accessible to a greater number of people, including non-lawyers.

Furthermore, as observed by Diamond: 'If a code makes the law more accessible to the legal profession, it thereby makes the law accessible to the public. [...] The law is accessible to the public in the sense that a lawyer can readily advise his client and, if he wishes, explain the working of the law too.'³¹ Thus, the aim should be to create a code that is accessible to the profession, rather than a code that is accessible to the layperson. Such a code will also be more accessible for the layperson, both directly (in that it is more accessible than the current state of the law) and indirectly (in the manner expressed by Diamond above), without rendering the law oversimplified and defective.

²⁹ H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *The Modern Law Review* 241, at 245.

³⁰ One case in point being the Law Handbooks, such as: *The Law Handbook: Your Practical Guide to the Law in NSW* (10th ed, 2007).

³¹ Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 370. In demonstrating his point, Diamond uses a very good example drawn from the *Sale of Goods Act* (see further pages 368-370). That example, although very illustrative, will not be repeated here.

Codes are out of date at the time they are introduced

One common criticism of codes is that they are too rigid, and rapidly become outdated which means that they are useless at best, and at worst directly dangerous. However, for the common law to call the civil law rigid is a bit like the pot calling the kettle black. Had it not been for the rigidity of the common law, there would never have been any need for the law of equity to develop: '[T]he invention of equity was itself no more than a pragmatic and piecemeal device to prevent the stagnation of the common law system, and [...] this device then in its turn became a further cause of our continuing failure to adopt any radical approach to reform.'³²

Further, the risk that a code will be too rigid, and rapidly become outdated is only a concern where codes are viewed as the first and last step in the codification process. As noted by Sir Leslie Scarman:³³ 'It is true that a code begins to grow old, to become obsolete as soon as it is enacted. But if there be machinery for its continuous review, a code becomes not the last but the first stage in codification.'³⁴

Where a system is in place for constant and frequent review of a code, it is no more likely to become outdated than is the common law. Indeed, a code that is subject to constant and frequent review is less likely to become outdated, and is easier to amend, than is the common law.

The legal profession will need to re-learn the law and legal method

Opponents to codification point to the difficulties that the legal profession will have learning the new laws and how to work with them: 'Judges, practitioners and academic lawyers have to learn an entirely new system, a task likely to tax the capacity of some of the older members of the profession to the limit.'³⁵ Indeed, in expressing his fear of the consequences of codification, Hahlo goes as far as to point to the fact that: '[l]egal textbooks [will] have to be rewritten.'³⁶ One can only hope that those engaged in other sciences do not share this fear of progress. It would, for example, be highly unfortunate if a new treatment for cancer was to be ignored

³² Michael Kerr, 'Law Reform in Changing Times' (1980) 96 *The Law Quarterly Review* 515, at 517.

³³ As he then was.

³⁴ Sir Leslie Scarman, 'A Code of English Law?', Hull University, 1966. (As reproduced in Michael Zander, *The Law-Making Process* (6th ed, 2004), at 485).

³⁵ H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *Modern Law Review* 241, at 253.

³⁶ H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *Modern Law Review* 241, at 253.

purely because it necessitated re-learning by the medical profession, and re-writing of medical text books.

Further, a fear of the need for re-learning is only justified if the codification takes the form of reform. Under a codification mainly based on the stocktake method, the law will not change to any significant degree, and as is discussed below, pre-code cases will still have a role to play. Consequently, as far as the substance of the law is concerned, little re-learning will be required.

Furthermore, also the need for re-learning legal method is overstated. The Australian legal profession is not only competent to interpret and apply codes, but they are used to doing so. After all, large parts of Australian law, such as criminal law, company law, tax law and consumer protection law, are already found in legislation of a code-like nature. Thus, there will be little if any need for re-learning legal method.

Codes cannot possibly deal with all relevant issues

One of the strongest arguments against codification is that a code cannot be drafted in a manner that anticipates all possible situations that it sets out to regulate. After all, it is more difficult to anticipate the future (like a code seeks to do) than decide a case by reference to history (as does the common law). In this context, Kötz notes that: 'Indeed, all codes, partly from age, partly from the intention of their draftsmen, partly from mere oversight, leave wide gaps which cannot be filled by the available statutory rules.'³⁷

However, this problem is not insurmountable. First, post-code cases will flesh out those parts of the code that need being fleshed out. Second, as is discussed in detail below, a code must be subject to constant and frequent reviews and amendments – it needs to be a 'living thing'.

Finally, the problem of anticipating the future is not solely a codification problem. Judges are faced with a similar dilemma – they wish to phrase their *ratio decidendi* in a manner that allows the case to be used as a precedent where appropriate, without the case becoming a far-reaching precedent affecting areas it should not affect.

A code needs to be general and vague to a degree making it useless

One objection to codes is that, to deal with all issues they seek to address, they need to be drafted in such vague and general terms as to render them virtually useless. But the use of vague and indeterminate concepts is by no means limited to codes. As noted by Kötz, case law also contains vague concepts:

³⁷ Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 11.

No one in England seems to object to the judges using vague and indeterminate concepts and particularising them as cases come up so long as these concepts are common law concepts created by the judges themselves, as when a judge in an action for damages for negligence decides whether the defendant's conduct has been that of a reasonable man who took reasonable care to avoid an unreasonable risk of causing injury to others.³⁸

Looking at Australian legal drafting, it is interesting to note that, arguably, the most significant provision in any Australian statute is drafted in very vague terms. Section 52 of the *Trade Practices Act 1974* (Cth) simply states that:

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

If there ever was any doubt, the proven usefulness of this provision ought to demonstrate that vague and general language does not make a provision useless.

Codes make the law less certain

Above, I discussed how codification can increase certainty in the law. However, the opposite view has also been expressed:

The immediate effect of the introduction of a code, so far from making the law more certain, is to create a lengthy period of increased legal uncertainty. True, many hitherto doubtful issues will have been settled, but the re-formulation of the old rules and the adoption of new rules, added to the systematisation of the law, are bound to open up new disputes. For each head of controversy that has been cut off, there will arise, hydra-like, one or more new ones. And it will only be decades later, after the code has become overlain with a thick encrustation of case law, that the old measure of legal certainty (or uncertainty) will be restored.³⁹

Even disregarding the clever reference to Heracles' battle with the hydra, this statement is overstating the matter. Of course, codification will open up for new disputes, and where the code is adopting a new language and is poorly drafted, the degree of uncertainty that is created may indeed be great. But there is no reason to presume that a code will be poorly drafted – a well drafted code, solidly rooted in existing law, will increase, not decrease, the degree of certainty in the law. Further, as

³⁸ Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 4-5.

³⁹ H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *Modern Law Review* 241, at 249.

discussed in detail below, one should not presume that pre-code case law will be ignored as a source of guidance in the interpretation of the code.

Practical issues associated with codification

There are several practical issues associated with codification. In this part of the article I address some such issues, namely the following:

- The level of abstraction;
- The code's relationship with other law; and
- The need for reviews and amendments.

In contrast, I do not discuss what can perhaps be described as the largest practical obstacles to codifying Australia's contract law – the problems of getting consensus about the specific areas for codification, about the language of the code, and of attracting political attention to, and support for, a codification project.⁴⁰ Those questions cannot be adequately addressed within the scope of this article and deserve to be dealt with at length in a separate article that can do justice to the complications involved. Here, it suffices to repeat Kötz's observation that seems equally true in relation to present day Australia as it was in the context it was made:

Noted German authors have called the idea of codification a romantic anachronism since the demands and pressures on legislatures today to counteract specific social and economic ills have reached such a degree as to foreclose their undertaking any recasting or rewriting of code provisions on a more general and systematic basis in an attempt to keep them in touch with current needs.⁴¹

It may be that the solution to this problem lies in international or bilateral cooperation. In discussing the possibility of New Zealand seeking to codify its contract law, Farrar points to the advantages of approaching codification on a Trans Tasman or Commonwealth basis.⁴² The resource implications of a codification project suggest that it would also be in Australia's interest to consider such a cooperative approach.

⁴⁰ For a discussion of these issues, see eg: A. E. Anton, 'Obstacles to Codification' (1982) 15 *Juridical Review* 15, and Bruce Donald, 'Codification in Common Law Systems' (1973) 47 *The Australian Law Journal* 160.

⁴¹ Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 13.

⁴² John Farrar, *The Codification Of Commercial Law* in Steven Todd and Jeremy Finn ed., *Law, Liberty and Legislation* (LexisNexis, forthcoming).

The level of abstraction

One central problem in legal drafting is to find a suitable level of abstraction. As Field so aptly phrased it: 'There should be neither a generalisation too vague nor a particularity too minute.'⁴³ Essentially, the drafter is faced with two alternatives: short general provisions in the style of the civil law (and of Ellinghouse and Wright's *Australian Contract Code*⁴⁴), or detailed provisions seeking to address every possible issue, typical of the common law style of drafting. In commenting upon the difference between these two approaches North noted:

Herein lies the crucial difference between the common law and civil law approach to codification. Both systems can attempt to simplify, systemise and reform and may succeed in their different ways in doing all three; but the end product will look very different. The reason is, of course, to be found in the difference between the principled approach of the civil lawyer and the far more pragmatic approach of the common lawyer – an approach engendered in him by his need always to find the law from cases. English statutes, including so-called codifying statutes, are complex because those who prepare them, whether law reformers or Parliamentary draftsmen, attempt to envisage all the situations that could arise and to provide an answer to them (and almost invariably fail in the process), rather than to provide a general principle broad enough to be interpreted by the judge to cover all appropriate cases, but vague or flexible enough to enable him to do this.⁴⁵

This question goes beyond the issue of drafting style. Indeed, it affects a much bigger issue: how much discretion ought to be left to the judges?⁴⁶ Where a code is drafted in short general provisions outlining legal principles, the judges will be left with a great degree of discretion. However, where the typical common law model of drafting is used, judges are left with little or no discretion at all.

⁴³ *First Report of the Commissioners of the Code to the New York Legislature*, 1858, cited Honnold, *The Life of the Law*, at 109. (As reproduced in Aubrey L. Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 379).

⁴⁴ See further: Ellinghaus et al, *Models of Contract Law: An Empirical Evaluation of Their Utility* (Federation Press, 2005).

⁴⁵ Peter M. North, 'Problems of Codification in a Common Law System' (1982) 46 *RebelsZ* 490, at 503.

⁴⁶ Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 380.

The general, almost abstract, approach advocated by Ellinghaus and Wright⁴⁷ is supported by statements made by some leading commentators. For example, Kötz has noted that: 'In the law of contract and tort [...] the statute, call it a code or not, can often do no more than lay down guiding principles lest the vitality and flexibility needed in these fields be lost.'⁴⁸ Others disagree. For example, Diamond takes the view that: 'Some of our most tortuous enactments are with us because the draftsman mistakenly thought brevity was a virtue; it takes more words, not less, to state complicated ideas clearly.'⁴⁹ Further, Sir Leslie Scarman⁵⁰ has noted:

It is disingenuous to ask of law that it should be simple, when its subject-matter is not. The problem becomes one of degree. In certain branches of the law, e.g. contract, property, the criminal law, the ordinary citizen requires guidance. He enters into business agreements; he buys and sells; he owns property; he has to determine his personal conduct in society. In these fields it is not merely the judge who wants to know how to decide his case; it is the ordinary citizen who, without recourse to litigation, has to regulate his dealings and his conduct. In such branches of the law the code must condescend to detail, thus ensuring that its provisions are not overlaid by judicial decision which, by and large, will be accessible only to the legal profession.⁵¹

To conclude, where codification comes in the form of reform, it would be interesting to draft in the style of the short general provisions outlining legal principles, typical of civil law countries and as preferred by Ellinghaus and Wright. However, the drafting method is dictated by the choice of codifications method – using the stocktake method, the existing contract law cannot suitably be restated in short general provisions outlining legal principles. Thus, while I do not hesitate to give greater discretion to the judges, I nevertheless favour more detailed rules wherever the stocktake, and or gap-filling, method is proposed. On the other hand, this is not

⁴⁷ See further: M P Ellinghaus and E W Wright, *An Australian Contract Code* (1992) Law Reform Commission of Victoria, Discussion Paper No. 27 and M P Ellinghaus and E W Wright, 'The common law of contracts: Are broad principles better than detailed rules? An empirical investigation' (2005) 11 *Texas Wesleyan Law Review* 399. See further: Ellinghaus et al., *Models of Contract Law: An Empirical Evaluation of Their Utility* (Federation Press, 2005)

⁴⁸ Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 10.

⁴⁹ Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 382.

⁵⁰ As he then was.

⁵¹ Sir Leslie Scarman, 'Codification and Judge-made Law', Birmingham University, 1966. (As reproduced in Michael Zander, *The Law-Making Process* (6th ed, 2004), at 487).

to say that I propose to go as far as the level of detail typically found in common law drafting.

The code's relationship to other law – the status of pre-codification case law

One interesting issue that must be addressed is that of the status of pre-codification case law. Two alternatives exist. Case law decided prior to the introduction of the code can be an invalid source of law. Alternatively, pre-codification case law can be used as guidance where the code is not clear or specific enough.

As to the first alternative, Kötz has observed: 'It has been said that a special characteristic of a code is that within its field it is the exclusive, authoritative, and comprehensive source of the law, and that the judges must accordingly wipe out their knowledge of prior law and concentrate on the statutory words.'⁵² However, he does not share this view, and he concludes: 'It is unrealistic to expect that lawyers trained under pre-code law can be prevented from going back to it if the code is silent, if the language is not clear or if the words used in it had previously acquired a technical meaning.'⁵³

Furthermore, it cannot be said that the experience of the common law supports pre-code case law being disregarded. In discussing this issue, Diamond points to the *Sale of Goods Act* and notes that a great number of cases cited in the interpretation of that Act were decided prior to the Act being drafted.⁵⁴ This irrefutable evidence of the continued value of pre-code cases should be calming for those opponents of codification who fear that uncertainty follows codification.

To conclude, pre-code case law must play a part in the interpretation of a code, and it is submitted that in evaluating the use of pre-code cases, we ought to adopt Lord Herschell's classic approach:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was

⁵² Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 10.

⁵³ Hein Kötz, 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, at 11.

⁵⁴ Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 379.

probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.⁵⁵

The code's relationship to other law – the status of post-codification case law

It is a common misconception that a code must be the sole statement of the law. Most, if not all, civil law countries attach value to court judgments interpreting the codes. There is no reason why the situation would not be the same in relation to an Australian contract code. This means that judges play an, at least, as important role in relation to a codified law, as they do under the common law, and as pointed out by Sir Leslie Scarman:⁵⁶ 'Code and persuasive precedent can co-exist to the advantage of law.'⁵⁷ Expanding on this point, Stoljar observed that:

[C]ase-law forms an inevitable component of any system of law, at any rate to the extent that it emphasises the need as well as the inevitability of an ongoing legal experience as this is nurtured and sustained by judicial creativity; [...] [C]odes represent a desire not so much for legal certainty as for structure or order, the need of rearranging or reordering an otherwise shapeless and unmanageable mass of legal results. It follows that cases and codes, the former betokening experience, the latter form or structure, far from necessarily conflicting can in fact perform complementary roles.⁵⁸

In discussing the relevance of post-code cases, it is interesting to note Hahlo's observation that: 'Experience, however, has shown that English and American cases, being based on the discussion of legal principles, are of far more assistance than Continental decisions, which in most cases turn on the interpretation of specific code provisions.'⁵⁹ While it is true that common law judgments are typically far more detailed than civil law judgments, this is not due to a difference in focus. As legal principles are indisputably integrated into the civil law codes, a judgment discussing the interpretation of the code is in fact discussing the legal principle much the same as a common law judgment discussing a legal principle. The reasons why common

⁵⁵ *Bank of England v. Vagliano Brothers* [1891] A.C. 107, H.L. (As reproduced in Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, at 377).

⁵⁶ As he then was.

⁵⁷ Sir Leslie Scarman, 'A Code of English Law?', Hull University, 1966. (As reproduced in Michael Zander, *The Law-Making Process* (6th ed, 2004), at 486).

⁵⁸ Samuel Jacob Stoljar ed., *Problems of Codification* (Canberra, Australian National University 1977), at 3.

⁵⁹ H R Hahlo, 'Here Lies the Common Law: Rest in peace' (1967) 30 *Modern Law Review* 241, at 258.

law judgments are more detailed are found, for example, in the different approach to dissenting judgments and the common law approach to precedent.⁶⁰

To conclude, post-code case law will constitute an important mechanism for the evolution of the code; first as a tool for the interpretation of the code, and second, as an inspiration for amendments to the code.

The code's relationship to other law – the issue of 'parallelism'

Another aspect of codification relates to how a new code will interact with related statutes. We are doubtlessly witnessing an increase in the Australian law's reliance on legislation. At the same time, an overwhelming jungle of statutes is nothing new to the common law system. As pointed out by Michael Kerr, already in 1593 – more than 300 years before the Commonwealth of Australia even was formed – Francis Bacon sought to reduce the number of statutes as he perceived them to be 'so many in number that neither the common people can practise [sic] them nor the lawyers sufficiently understand them.'⁶¹ Indeed, taking account of the fact that one of the most distinguishing features of the common law system is its reliance on case law, it is somewhat ironic that the legislation of common law countries typically fills many more library shelves than does the legislation of civil law countries. While I am not sure that the civil law approach is right as such, this fact alone convinces me that the common law approach is wrong.

Although contract law is a typical case law area, certain aspects of it are already regulated through legislation in Australia. Primarily, the relevant law is found in the *Trade Practices Act 1974* (Cth) and in the various state based *Sale of Goods Acts*. If the law, as stated in those Acts, remains in force after the introduction of an Australian code on contract law, we will be faced with an undesirable *parallelism* – parallel legislation will regulate the same issues. It seems clear that, where codification takes the form of reform (as defined above), every steps must be taken to avoid parallelism. However, as this article proposed codification by reference to the stocktake method, the question is whether when using this method, we must avoid parallelism, or whether such overlap can be allowed to exist as it is a current reality of the common law absent of codification?

The first issue to note is that, the easiest option would be to limit the code to the aspects of the law currently found in case law. It would be a considerably larger and more complex task to codify in a manner that absorbs and incorporates the law

⁶⁰ See further: Neil MacCormick et al. (ed), *Interpreting Precedent: A Comparative Study: Applied Legal Philosophy* (Dartmouth Publishing Co Ltd, 1997).

⁶¹ Michael Kerr, 'Law Reform in Changing Times' (1980) 96 *Law Quarterly Review* 515, at 518.

currently contained in statutes. On the other hand, the disadvantages of merely codifying the case law, leaving relevant statute law untouched, are indisputable. First, it would create the undesirable parallelism discussed above, and second, the code that would be created would not meet the expectation of being a comprehensive statement of the relevant law, and thereby, one advantage of codification would be lost.

To conclude, ideally the codification of the Australian law of contract ought to absorb and incorporate both the law currently contained in case law and the law currently contained in statutes. At the same time, it is acknowledged that such a codification may be impractical, yet it is submitted that codification of case laws alone is better than no codification at all. Further, once the case law has been codified, it may be easier, at a later stage, to merge it with the existing relevant Acts, such as the *Trade Practices Act 1974* (Cth) and the various state based *Sale of Goods Acts*.⁶²

The need for reviews and amendments

Above, I have acknowledged that a code cannot be absolutely complete, and the need for a code to be subjected to frequent reviews and amendments has been stressed. While opponents to codification often point to this as an obstacle to codification, proponents of codification see it differently. In discussing the views expressed by Austin, Donald notes the following:

He conceded that no code could be absolutely complete, but rather than admit this as an argument against codification, he suggested that it should support the structuring of a monitoring system: ‘...there should therefore be a perpetual provision for its amendment, on suggestions from the judges who are engaged in applying it and who are in the best of all situations for observing its defects. By this means, the growth of judiciary law explanatory of, and supplementary to, the code, cannot indeed be prevented altogether, but in [sic] may be kept within a moderate bulk, by being wrought into the code itself from time to time.’ He also pointed out that a great fault of the Prussian Code had been a failure to incorporate subsequent legislation.⁶³

⁶² I acknowledge that this two-step approach to a complete contract code is associated with problems such as the risk of gaps during the initial stage of parallelism, the risk of losing overview of the final codification, and the annoyance to the profession of the law changing twice.

⁶³ Bruce Donald, ‘Codification in Common Law Systems’ (1973) 47 *Australian Law Journal* 160, at 165. Footnote omitted. Internal quote refers to Campbell ed., Austin’s *Jurisprudence* 5th ed. (1885), at 675.

To conclude, it is submitted that, codification, whether in the form of stocktake, gap filling or reform, must be followed by as frequent and constant reviews and amendments as possibly can be fitted within the realities of the legislative timetable.

Codifying the common law of unconscionability

Above, distinctions were drawn between three different methods of codification: stocktake, gap filling and reform. Focusing on the law relating to unconscionability, I will now discuss on a more practical level how each of these methods could work.

Unconscionable conduct is regulated by both statute and common law in Australia. In other words, we already are faced by the problem of parallelism. Sections 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth) provide an extraordinarily lengthy and complex regulation of unconscionability,⁶⁴ in addition to the legal rules provided by the common law. Taken together those three sections are made up of more than 2100 words – that is about a quarter of this article. Needless to say, they are thus far too lengthy to be reproduced here. However, they are useful examples of Australian legal drafting at its worst.

The modern application of the equitable doctrine of unconscionable dealings is exemplified in the leading case of *Commercial Bank of Australia Ltd v Amadio*.⁶⁵ If engaging in a stocktake exercise, most of the relevant legal principles can be found in this case. However, several older cases, such as *Lisciandro v Official Trustee in Bankruptcy*,⁶⁶ *Blomley v Ryan*,⁶⁷ *Bridgewater v Leahy*,⁶⁸ *Barburin v Barburin*⁶⁹ and *Louth v Diprose*⁷⁰ must also be considered when examining the common law of unconscionability. If one was to extract and combine the legal principles stated in the mentioned cases (ie employ the stocktake method to this area of law), the following rule could be formulated:

1. Where a contract is entered into as a result of unconscionable conduct, it is voidable at the innocent party's application, unless it is proven that the

⁶⁴ Partly mirrored in the various *Fair Trading Acts*.

⁶⁵ (1983) 151 CLR 447.

⁶⁶ (1996) 69 FCR 180.

⁶⁷ (1956) 99 CLR 405.

⁶⁸ (1998) 194 CLR 457.

⁶⁹ [1990] 2 Qd R 101.

⁷⁰ (1992) 175 CLR 621.

contract was fair, just and reasonable,⁷¹ or it is proven that an unreasonable amount of time has elapsed⁷² since the time the unconscionability ceased.

2. For the purpose of Article 1, conduct is unconscionable where:
 - (a) the innocent party acts under some *special disadvantage*;
 - (b) the other party has actual or constructive awareness of the innocent party's *special disadvantage*; and
 - (c) the other party exploits the innocent party's *special disadvantage*.⁷³
3. In determining whether a party acts under special disadvantage, attention shall be given to that party's circumstances, as far as they are of relevance for the contract in question, including, but not limited to:
 - (a) age;
 - (b) sex;
 - (c) health;
 - (d) intoxication;
 - (e) infirmity of body or mind;
 - (f) poverty;
 - (g) needs of any kind;
 - (h) emotional dependence;
 - (i) illiteracy;
 - (j) level of education
 - (k) level of experience;
 - (l) ignorance; and
 - (m) access to assistance, advice and explanations.⁷⁴

This is obviously only one of many possible ways of expressing the legal principles.

If one was inclined to engage in gap filling, one could, for example, develop more detailed rules regarding the circumstances in which inequality of bargaining power

⁷¹ See eg *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474.

⁷² See eg *Barburin v Barburin* [1990] 2 Qd R 101, at 113, per Kelly S P J.

⁷³ See eg *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474.

⁷⁴ The majority of these factors were identified in *Blomley v Ryan* (1956) 99 CLR 405, at 475.

indicates unconscionability. This would obviously add to, and expand upon, existing law which would be useful, but would not go as far as reform.

Finally, if one was prepared to go all the way and engage in reform, one could suitably consider how the overlap between the common law and legislation could be addressed. Indeed, if one was to reform this area of law, it would be suitable to start by simplifying the three provisions in the TPA that deal with unconscionable conduct, and examine how those provisions could be merged with the law as currently expressed by the common law.

When discussing a reform of the law of unconscionability, it is interesting to point to how other countries regulate this area. To choose two examples, we can contrast the lengthy and complex provisions in the TPA, to the approaches taken in the US and in Sweden. In the US, the Uniform Commercial Code § 2-302 deals with unconscionable conduct:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This provision has been applied in numerous cases, and courts have generally preferred it to traditional common law actions such as undue influence, duress and misrepresentation.⁷⁵

Swedish law contains an equally brief statement of the law, that in fact, is even broader in scope than the Uniform Commercial Code § 2-302.:

Contractual terms may be modified or disregarded if the term is unreasonable with regard to the content of the contract, the circumstances of the contract formation, subsequent changes to the conditions and other circumstances. Where the term is of such importance for the contract that it [i.e. the contract] cannot reasonably be upheld if unchanged [after being modified in relation to the unreasonable contractual term], the contract may be modified also in other regards or be disregarded in full.

⁷⁵ K Zweigert and H Kötz, *An Introduction to Comparative Law* 3rd Ed (Oxford University Press, Oxford, 1998), at 343.

In the application of [the above] particular regard shall be had to the need for protection for those who in the capacity of consumer, or otherwise, assume an inferior position in the contractual relation.⁷⁶

It may be that a reform of the Australian law of contracts could draw upon examples of drafting from countries such as these.

Concluding remarks

In 1966, Sir Leslie Scarman⁷⁷ aptly observed:

No one could suggest, without taking leave of his senses, that the present shape of English law is either simple or modern [...] English law lacks coherent shape, is inaccessible save to those with training, the stamina, and the time to explore the jungle of case and statute law, and is unmanageable save by the initiated.⁷⁸

This article submits that the same is true today in relation to Australian contract law. The benefits of codification have been highlighted, and the arguments against codification have been shown to be either misguided or exaggerated. Finally, some practical issues associated with the codification of Australia's contract law have been explored.

History shows the problems associated with codifying common law, and I have no illusion that this article will achieve what so many learned commentators have failed to do. At the same time, I think it is important to keep the codification debate alive, and I hope that this article may spark a renewed interest in the codification of Australian law in general, and in the codification of Australian contract law in particular.

Codifying Australia's contract law is doubtlessly a daunting undertaking. However, if done successfully, it can also be a remarkable, significant and long lasting achievement. The best known codifier in history, Napoleon Bonaparte, noted: 'My

⁷⁶ The author's translation of: "*Avtalsvillkor får jämkas eller lämnas utan avseende, om villkoret är oskäligt med hänsyn till avtalets innehåll, omständigheterna vid avtalets tillkomst, senare inträffade förhållanden och omständigheterna i övrigt. Har villkoret sådan betydelse för avtalet att det icke skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet lämnas utan avseende. Vid prövning enligt första stycket skall särskild hänsyn tagas Till behovet av skydd för den som i egenskap av konsument eller eljest intager en underlägsen ställning i avtalsförhållandet.*"

⁷⁷ As he then was.

⁷⁸ Sir Leslie Scarman, 'A Code of English Law?', Hull University, 1966. (As reproduced in Michael Zander, *The Law-Making Process* (6th ed, 2004), at 484).

real glory is not the 40 battles I won—for my defeat at Waterloo will destroy the memory of those victories [...] What nothing will destroy, what will live forever, is my Civil Code.⁷⁹

⁷⁹ Two nations, One Vision of Liberty: A Continuing Exchange on Law, Cornell University Law School (2007), at 18.
<<http://library.lawschool.cornell.edu/WhoWeAre/upload/LawSchoolcommgift7127.pdf>> (27 August, 2007).