

Summary: Australian Contract Law Reform

Why is contract law important?

Efficient and just systems of contract law play a central role in successful economies. Contract law increases people's autonomy by allowing them to make enforceable agreements, and supports economic growth by giving businesses and individuals the stability and predictability they need to trade and invest. Contract law also upholds basic standards of fairness in people's dealings with each other.

Why is the Government thinking about reforming contract law?

Australia's system of contract law is derived from a mixture of different sources. It is primarily made up of common law rules and equitable principles which are developed by judicial decisions in individual cases. The basic common law rules are derived from English law. Many date back centuries.

Commonwealth, State and Territory legislation has supplemented and, in some cases, altered these judge-made rules. Although the common law rules are the same throughout Australia, non-uniform State and Territory legislation means that some areas of contract law vary in different jurisdictions. In some situations, international instruments may also be relevant.

Australia's system of contract law performs well by international standards. However, this is no reason for complacency. There may be significant room for improvement. Reform may offer the opportunity to:

- increase the accessibility of contract law
- improve the certainty of the law in those areas which are unclear or unsettled
- simplify the law and remove unnecessarily technical rules
- set basic standards of acceptable conduct
- support innovation and new ways of doing business
- maximise participation in the digital economy
- ensure that contract law meets the needs of small and medium-sized businesses
- facilitate elasticity and flexibility to help support long-term contractual relationships
- harmonise statute law applying in the different States and Territories, and
- internationalise the law to facilitate cross-border trade and investment.

What are some potential problems with our current system of contract law?

The complex relationship between common law, equity and legislation and the large number of cases and statutes involved may make it difficult to discover the applicable law or to predict the outcome of a particular case. Some important issues—such as what material can be used when interpreting written contracts—remain unsettled. Contract law also may need to adapt to new technologies and ways of doing business, such as electronic contracting.

How does our system of contract law compare with the systems of our trading partners?

Internationally, Australia's economy relies more and more on trade in our own region. Our first, second and fourth biggest trading partners (China, Japan, and the Republic of Korea) have systems of contract law which differ significantly from Australia's common law system. The contract law of our third biggest trading partner, the United States, has diverged significantly from its English origins. Differences between national systems of contract law may increase the risks and costs involved in international transactions. It may be worth considering whether some traditional rules should be retained in Australia.

How has contract law been approached on an international level?

International instruments have been developed to bridge the gap between different national systems of contract law, making it easier for parties from different jurisdictions to contract with each other. Examples include the United Nations Convention on Contracts for the International Sale of Goods, a multilateral treaty providing rules for international sale of goods contracts which has been implemented in Australian law by statute, and the UNIDROIT Principles of International Commercial Contracts, an extensive set of 'soft law' principles which have influenced several countries when reforming their domestic systems of contract law. There are ongoing attempts to harmonise contract law within the European Union. There is relatively little knowledge within Australia about these developments, which may constitute a lost opportunity.

What are the options for contract law reform?

Contract law reform is not an 'all or nothing' affair. There is a wide spectrum of possible options lying in between 'no action' and 'radical overhaul'. Three possible types of reform include:

- restatement: expressing the existing law in a single text to increase its accessibility, while making only minimal changes to the substance of the law
- simplification: changing the law to eliminate unnecessary complexity without attempting a general overhaul, and
- full-scale reform: making significant changes to the substance of contract law.

What are some of the issues involved in implementing contract law reform?

Any change to Australian contract law could be implemented either as an opt-in reform (so that the new rules only applied if the parties agreed that they should), an opt-out reform (so that the rules would apply unless the parties excluded them from doing so), or as a mandatory reform. Reform could apply to all contracts, or be limited at least initially to international contracts. There are various heads of power under the Australian Constitution which could be relevant to Commonwealth legislation on contract law.

What are the next steps the Australian Government is going to take?

The Australian Government considers that broad consultation on this project is essential. Stakeholders' submissions in response to the issues raised in this paper, combined with input from other methods of consultation, will help determine the project's future direction.