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BY: LACA

Professor Ted Wright
Belle Wiese Professor of Legal Ethics
School of Law
University Drive, Callaghan
NSW 2308 Australia
Telephone: (02) 49 21 5119
Facsimile: (02) 49 21 6931
EMAIL: ted.wright@newcastle.edu.au
WEB: www.newcastle.edu.au/school/law

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 Ms Joanne Towner
Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Towner

Harmonisation of Legal Systems

We are responding to your invitation to make a submission to the House of Representatives Standing Committee of Legal and Constitutional Affairs on its position on *HARMONISATION OF LEGAL SYSTEMS*. We are writing to bring to the attention of the Committee a model Australian Contract Code (ACC) which could serve as a vehicle for harmonising contract law.

As contracts are fundamental to commerce, the harmonisation of contract law is an indispensable element of any endeavour to harmonise the law affecting trade and commerce. At present, in the 8 states and territories of Australia and in New Zealand contract law is largely to found in many thousands of volumes of reported cases. Codification of contract law is the best means of overcoming jurisdictional differences in trade law which are inevitable in such a system.

A statement of contract law that can apply across all these jurisdictions (and beyond) can only be in the form of broad principles which transcend legislative differences between jurisdictions. The ACC is such a statement.

Contrary to widely held belief, a uniform contract law based on broad principles would not reduce certainty and in fact is likely to increase it. It would also be more accessible, lead to more fair outcomes, and save costs. We are able to provide the Committee with empirical evidence to back up these claims.

The ACC was drafted by us for the Law Reform Commission of Victoria. We are enclosing the Discussion Paper *An Australian Contract Code*, published by the Commission in 1992. The paper sets out the advantages of codifying and the characteristics of a successful code. It contains the text of the Code, a Commentary, and examples of its application to real-life disputes drawn from High Court cases.

Exhibit

The ACC contains only 27 short articles. These are stated at a high level of generality. This makes it possible to embody the whole law of contract within them. At the same time, they are sufficiently specific to serve as a practical vehicle for



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regulating contracts and resolving contract disputes. Although this may seem a large claim, our empirical research provides strong support for it.

We recently conducted three experiments, involving 1800 participants, comparing the utility of the ACC with Australian case law and with another, more detailed, code (UNIDROIT Principles of International Commercial Contracts). In two of these experiments law students were asked to decide contract disputes drawn from real cases. In the third experiment university students were asked to evaluate judgments deciding the same disputes.

The results of our empirical work will be published shortly, in the form of a book (*Models of Contract Law: an empirical evaluation of their utility*, Law & Justice Foundation of NSW and Federation Press, forthcoming July, 2005) and an article in an American law journal ("The Common Law of Contracts: are broad principles better than detailed rules? An empirical investigation" (2005) 11 *Texas Wesleyan Law Review* (No 2 – Spring issue). We are attaching the book's summary chapter which provides a succinct account of the research questions and methodology, and the statistically significant findings and the conclusions which lead us to submit that adoption of the ACC would be a positive step towards harmonisation of trade law.

How could the ACC be implemented? It could be a template enacted by Commonwealth legislation, applying to all contracts made by corporations and in interstate trade (on the same constitutional basis as the Trade Practices Act 1974). This template could serve as a model for complementary legislation by the States and New Zealand.

Alternatively, the template need not take legislative form but could be given authoritative status by other means. For example, it could be published as a 'Restatement' following an American model. It could also be officially recommended for adoption by contracting parties as the basis of their contracts.

The Committee is no doubt aware that there is a world-wide movement towards harmonisation of contract law. The ACC could provide the basis for Australian participation in this movement, particularly with our Asian trading partners. The ACC is compatible with codes of contract law adopted or being adopted by other countries in our region, for example China.

We hope that the Committee will find this submission useful. We are willing to attend a hearing to answer questions if this is desired.

Yours sincerely



Ted Wright
Dean and Professor of Law
University of Newcastle



M P Ellinghaus
Associate Professor of Law
University of Melbourne