

# Australia

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## Australia's legal environment

### *Constitutional structure<sup>2</sup>*

Australia is a constitutional monarchy with a federal system of government. There are six states, two territories (Northern Territory and Australian Capital Territory) and the Federal Government (Commonwealth of Australia). Each of has an elected parliament based on the United Kingdom's Westminster system. With the exception of Queensland, which has only one chamber, each parliament is bicameral, comprising two houses of almost equal power which enact legislation on any matter within their constitutional power.

The formal Head of State is the Queen of Australia, who is also the Queen of the UK and of 14 other Commonwealth realms. In practice, the Queen's representatives, the Governor-General (Commonwealth) and Governors (States), exercise her formal powers on a day-to-day basis. Their most important formal power is to sign Acts of Parliament to make them part of the statute law of Australia.

Today, despite the formal constitutional structure, Australia effectively functions more like a republic than a monarchy. Since the Australia Act 1986, the name given to two separate acts that eliminated the remaining associations between the laws and judiciary of Australia and their counterparts in the UK, the UK Parliament does not even have a theoretical legislative role in Australian affairs. The High Court of Australia is the supreme judicial authority for Australian law. Appeals to the Privy Council from all Australian jurisdictions were abolished progressively, with the process ending in 1986. But perhaps more significantly, the effective Head of State, the Governor-General of Australia, is nominated by the Australian Government for the formal approval of the Queen. Since 1965, all Australian Governors-General have been Australian born, and it seems inconceivable that this situation would change in the future.

### *Federal division of legislative powers<sup>3</sup>*

Australia has a written constitution that was enacted in 1900 and became effective on 1 January 1901. It comprises 128 articles in eight chapters. These cover the parliament, the executive government, the judicature, finance and trade, the states, new states, miscellaneous and alteration of the Constitution.

The Constitution was accepted by the people of Australia in a referendum, in which a majority of voters, and the majority of colonies (as the states then were) approved it as the fundamental law of the Commonwealth of Australia. The Australian Constitution was originally an Act of the UK Parliament. Changes to the Constitution require that the Commonwealth Government put any

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<sup>1</sup> Expert, Determination Chambers, [www.expertdetermination.net](http://www.expertdetermination.net).

<sup>2</sup> Donald Charrett and Matthew Bell, 'Statutory intervention into the common construction law of Australia – progress or regress?' (2011) 137 *Australian Construction Law Newsletter* 6; (2012) *Journal of the Canadian College of Construction Lawyers* 11.

<sup>3</sup> Ibid.

proposed change to the people in a referendum. A majority of the electorate comprising voters across the nation, plus a majority of the electors in a majority of the states, must agree to a change before the Constitution can be amended.

In terms of the split between the legislative power of the Commonwealth and the states, section 51 of the Australian Constitution defines 39 ‘heads of power’ that give the Commonwealth its legislative authority. Some of these powers are exclusive, and some are shared with the states. In respect of the latter however, if the Commonwealth legislation ‘covers the field’, then any state legislation is void to the extent of any inconsistency.<sup>4</sup> Those heads of legislative power not referred to in section 51 are the exclusive province of the states, and the Commonwealth has no powers to make laws in respect of them. However, over the past century, the legislative bailiwick of the Commonwealth has grown through a combination of favourable interpretations of the section 51 powers by the High Court, referenda, or the consent of the states and territories to refer their powers to the Commonwealth. The responsibility for private law generally rests with the states and territories, except where the Commonwealth relies on its heads of power in the Constitution.

Therefore, matters including taxation, company regulation, insolvency and industrial relations are now predominately within the control of the Commonwealth. Nonetheless, there remain a number of important issues over which the states and territories have exclusive and independent jurisdiction, and the Commonwealth is effectively powerless in respect of them in the absence of state cooperation.

In the event of a challenge to the constitutionality of any act of parliament, the High Court of Australia is the sole authority. In the 117 years since Federation, the High Court has ruled a number of acts of parliament unconstitutional, sometimes with very far reaching effects. For example, section 51(xx) provides that the Commonwealth has the power to make laws for the peace, order, and good government of the Commonwealth with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. The High Court traditionally construed section 51(xx) as giving the states the exclusive power to regulate the formation of companies,<sup>5</sup> making the Australia wide regulation of companies constitutionally difficult. This ultimately led to the states and territories ceding their constitutional power to regulate the formation of companies in favour of the Commonwealth, with the result that there is now a single Corporations Act which applies Australia wide.

In addition to the Australian Constitution of the Commonwealth of Australia, each state also has its own constitution, which is subject to the overarching provisions of the Australian Constitution.

### *The common law of Australia*<sup>6</sup>

Australia is a common law country, and in contrast to the United States, with a single common law applicable to all states and territories.<sup>7</sup> As with other common law jurisdictions, the common law in Australia grew from its single root in England. Applicable English common law was taken at a given point in time to the Australian colonies established by Great Britain and incorporated by the

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4 S 109.

5 See, eg, *Huddart Parker v Moorhead* (1909) 8 CLR 330.

6 See n2 above.

7 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2.

enactment of reception statutes. The received common law was, subsequently, gradually changed by judgments in local courts, and increasingly, by local statutes.<sup>8</sup>

### *The Australian court system<sup>9</sup>*

Each state and territory has a supreme court, which has appellate jurisdiction to hear all matters within its jurisdiction. State supreme courts are also vested with federal jurisdiction to hear actions arising under the laws of the Commonwealth of Australia.<sup>10</sup> Therefore, a single controversy involving matters arising under the common law, state law and federal law can be heard by a state supreme court. There is also a federal court which has jurisdiction to hear actions arising under federal law. Subject to the provisions of the Judiciary Act 1903 (Cth), the federal court also has delegated jurisdiction to hear matters arising under state law. The High Court of Australia is the ultimate court of appeal from both state and territory supreme courts, and the federal court.

In principle, judgments in other common law jurisdictions (particularly England, New Zealand and Canada, but also other former British colonies such as the US, South Africa and Singapore) may be consistent with the common law in Australia, and relied on by Australian judges if the factual circumstances are sufficiently similar. As Justice Paul Finn has put it, the High Court has viewed such foreign materials as being ‘persuasive to the extent they could persuade’.<sup>11</sup> However, any judgment from an extraneous jurisdiction, including another state of Australia, must be carefully reviewed for any relevant differences in the applicable statutory framework, or whether it has been overruled by a relevant court in the applicable jurisdiction.<sup>12</sup>

### *Contract law*

While there have been some attempts to reform and possibly codify contract law in Australia,<sup>13</sup> to date this has not received legislative support. Accordingly, except for the legislative interventions into specific aspects of contract law, contract law is part of the common law of Australia.

The most important Australian legislation affecting contract law comprises the following:

- the Australian Consumer Law (Cth)<sup>14</sup> and state and territory fair trading legislation;
- proportionate liability legislation;<sup>15</sup>
- frustrated contracts legislation;<sup>16</sup>

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8 See, eg, Paul Finn, ‘Internationalization or isolation: the Australian *cul de sac*? The case of contract law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010), p 46.

9 See n2 above.

10 See, primarily, Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth).

11 See n8 above, p 45.

12 Eg, see n7 above at 135.

13 Eg, Manfred P Ellinghaus & Edmund Wright, ‘An Australian Contract Code’ (1992) Law Reform Commission of Victoria Discussion Paper No 27, reproduced in Philip Loots & Donald Charrett, *Practical Guide to Engineering and Construction Contracts* (CCH, 2009) 359.

14 Comprising a schedule to the Competition and Consumer Act 2010 (Cth), which is the harmonised re-enactment of the Trade Practices Act 1974 (Cth) and equivalent state-based fair-trading legislation.

15 Civil Law (Wrongs) Act 2002 (ACT) Chapter 7A; Civil Liability Act 2002 (NSW) pt 4; Proportionate Liability Act 2005 (NT); Civil Liability Act 2003 (Qld) Chapter 2 pt 2; Development Act 1993 (SA) s 72; Civil Liability Act 2002 (Tas) pt 9A; Wrongs Act 1958 (Vic) Part IVAA; Civil Liability Act 2002 (WA) pt 1F; Australian Consumer Law pt VI A; Corporations Act 2001 (Cth) pt 7.10 Div 2A; Australian Securities and Investments Act 2001 (Cth) pt 2 Div 2 Subdiv GA.

16 Frustrated Contracts Act 1978 (NSW); Frustrated Contracts Act 1988 (SA); Fair Trading Act 2012 (Vic) pt 3.2.

- legislation for limitation periods for commencement of actions;<sup>17</sup>
- contributory negligence and contribution from concurrent wrongdoers;<sup>18</sup>
- security interests in personal property;<sup>19</sup> and
- modifications to the Corporations Act to make ipso facto clauses unenforceable.

The Australian Consumer Law and state and territory fair trading legislation are perhaps the greatest constraint on freedom of contract in Australia. This legislation has had a pervasive impact on the conduct of economic activity in Australia. ‘It has set new norms of corporate behaviour in both competition and consumer protection, modifying our view of acceptable corporate behaviour and consequently improving the welfare of all Australians.’<sup>20</sup> The most powerful effect has been the banning of misleading or deceptive conduct in section 18, which states simply and broadly: ‘A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ The remedies available for breach of this ban include not only compensation for damages, but wide-ranging orders:

- declaring the whole or part of a contract void from the beginning;
- varying contracts or arrangements;
- refusing to enforce a contract;
- directing a person who engaged in contravening conduct to refund money or return property;
- for the payment of compensation;
- to undertake repairs or supply parts;
- to provide specified services; or
- to terminate leases and mortgages or require land to be transferred.

The principle of joint and several liability of joint wrongdoers has been repealed in favour of proportionate liability in respect of certain breaches of contract. Proportionate liability applies in a claim for economic loss or damage to property in an action for damages, whether in tort, contract under statute or otherwise, arising from a failure to take reasonable care. Where proportionate liability applies, the liability of a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just, having regard to the extent of the defendant’s responsibility for the loss or damage.<sup>21</sup>

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17 Primarily Limitation Act 1969 (ACT) ss 11 and 13; Limitation Act 1969 (NSW) ss 14 and 16; Limitation Act (NT) ss 12 and 14; Limitation of Actions Act 1974 (Qld) s 10; Limitation of Actions Act 1936 (SA) ss 34 and 35; Limitation Act 1974 (Tas) s 4; Limitation of Actions Act 1958 (Vic) s 5; Limitation Act 2005 (WA) ss 12 and 13; Australian Consumer Law s 236(2); Building Act 1993 (Vic) s 134.

18 Primarily, *Civil Law (Wrongs) Act 2002* (ACT), pt 7.3; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), pt 3; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), pt V; *Law Reform Act 1995* (Qld), pt 3; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 7; *Wrongs Act 1954* (Tas), s 4; *Wrongs Act 1958* (Vic), pt V; *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA), s 4.

19 Personal Properties Securities Act 2009 (Cth).

20 Russell V Miller, *Miller’s Annotated Trade Practices Act* (26th edn, 2005), p viii.

21 Eg, *Wrongs Act 1958* (Vic) pt IVAA.

Recent amendments to the Corporations Act<sup>22</sup> provide for a temporary stay on enforcing contractual rights in certain circumstances. The stay on ipso facto clauses prevent express provisions in a contract being immediately enforced against a body merely because it has taken certain specified steps to restructure its affairs to avoid being wound up in insolvency.

There is legislation in a number of specific areas that puts further constraints on freedom of contract. The following are a few examples:

- Insurance Contracts Act 1984 (Cth);
- security of payment legislation<sup>23</sup> and, similarly, legislation providing for payment of contractor's debts<sup>24</sup> and for contractors' or subcontractors' liens<sup>25</sup>;
- statutory warranties in contracts for domestic building work;<sup>26</sup> and
- legislation mandating licensing of builders and building professionals.<sup>27</sup>

A doctrine of good faith in the execution of contracts is emerging in Australia, particularly in New South Wales. It could be considered as the most recent head of public policy to be used by some Australian courts to constrain freedom of contract.<sup>28</sup> This is still very much a developing area of contract law in Australia and has been the subject of much academic discussion. At the time of writing, the High Court has not addressed whether there is an implied obligation of good faith in the execution of all commercial contracts. Accordingly, the common law in this area is not settled, particularly given Dixon J's view that there is no general obligation of good faith implied in construction contracts as a matter of the law of the State of Victoria.<sup>29</sup>

However, the Australian Consumer Law has a provision in connection with the acquisition or supply of goods or services from a person that provides that a person must not, in trade or commerce, engage in conduct that is in all the circumstances, unconscionable.<sup>30</sup> It has been said that the prohibition on unconscionable conduct in the Australian Consumer Law goes some way towards legislatively enshrining many of the features of a duty of good faith such as is comprehended by the UNIDROIT Principles.<sup>31</sup>

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22 Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth).

23 Primarily, Building and Construction Industry (Security of Payment) Act 2009 (ACT); Building and Construction Industry Security of Payment Act 1999 (NSW); Construction Contracts (Security of Payments) Act 2004 (NT); Building Industry Fairness (Security of Payment) Act 2017 (Qld); Building and Construction Industry Security of Payment Act 2009 (SA); Building and Construction Industry Security of Payment Act 2009 (Tas); Building and Construction Industry Security of Payment Act 2002 (Vic); Construction Contracts Act 2004 (WA)

24 Contractor's Debts Act 1997 (NSW).

25 Workers Liens Act 1893 (SA); Building Industry Fairness (Security of Payment) Act 2017 (Qld).

26 See, eg, Building Act 2004 (ACT) ss 42 and 88; Home Building Act 1989 (NSW) s 18B; Domestic Building Contracts Act 2000 (Qld) Div 2; Building Work Contractors Act 1995 (SA) s 32; Housing Indemnity Act 1992 (Tas) s 7; Domestic Building Contracts Act 1995 (Vic) s 8.

27 See, eg, Construction Occupations Licensing Act 2004 (ACT); Building Professionals Act 2005 (NSW); Building Act (NT); Queensland Building and Construction Commission Act 1991 (Qld); Building Work Contractors Act 1995 (SA); Building Act 2000 (Tas); Building Act 1993 (Vic); Builders Registration Act 1939 (WA).

28 Eg, *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Alcatel Australia Ltd v Scarcella* (1998) NSWSC 483; (1998) 44 NSWLR 349 at 369; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) NSWCA 187 at 159, 164.

29 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2012) VSC 99, (420).

30 S 21.

31 Paul Finn, 'The UNIDROIT Principles: Australia's Response' in *The Age of Uniform Law Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, (UNIDROIT, 2016) 1,387.

# Application of the UNIDROIT Principles in Australia

## *Governing law of the contract*

While the common law of Australia recognises the parties' freedom of contract to choose the law governing their contract, it is doubtful whether it recognises their right to choose non-state rules of law.<sup>32</sup> Australia has not implemented The Hague Convention on Choice of Law in International Commercial Contracts, and accordingly has not enshrined in legislation the ability of parties to choose 'rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules', which would of course include the UNIDROIT Principles.

It should be noted that while UNIDROIT 'reflect a distillation of vast wisdom about contract law from across the world'<sup>33</sup> and 'represent a system of principles and rules of contract law which are common to existing national legal systems or best adapted to the special requirements of international commercial transactions',<sup>34</sup> not all of its provisions are consistent with Australian common law. Articles 4.1 (Intention of the parties), Article 4.2 (Interpretation of statements and other conduct), Article 4.3 (Relevant circumstances) and Article 4.8 (Supplying an omitted term) allow for a greater amount of factual material to assist in interpreting the meaning of a contract, particularly in allowing for evidence of pre-contractual negotiations, earlier drafts of the contract, and each party's subjective intent than is generally applicable to many common law rules.

In *Chartbrook Ltd v Persimmon Homes Ltd*,<sup>35</sup> Lord Hoffmann confirmed the traditional common law exclusionary rule of the inadmissibility of evidence of pre-contractual negotiations. However, this issue is not without controversy, as several judges have argued in favour of a flexible application of the exclusionary rule whenever a cautious use of the pre-contract material would enable the court to arrive at a meaning of the contract that accorded with the ascertainable intention of the parties. In *Proforce Recruit Ltd v The Rugby Group Ltd*,<sup>36</sup> L J Arden suggested that consideration should be given to the possibility of admitting evidence of pre-contractual negotiations in interpretation questions on a wider basis than the law presently permits. In her view 'it may be appropriate to consider a number of international instruments applying to contracts', such as the UNIDROIT Principles which 'give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties' (Article 4.3).

At this point in time it appears that, even if parties selected the UNIDROIT Principles as the governing law of the contract in Australia, a court would nevertheless apply Australian common law as the governing law. This situation may well change in the future, as the Australian Attorney General has noted that it is intended that The Hague Principles on Choice of Law in International Commercial Contracts will be implemented together with The Hague Convention on Choice of Court Agreements domestically through new legislation.<sup>37</sup> When this occurs, it should be possible to select the UNIDROIT Principles as the governing law of a contract in Australia and have a contract construed by a court in accordance with the Principles.

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32 Ian Govey AM, 'Australia and UNIDROIT' in *The Age of Uniform Law Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, (UNIDROIT, 2016) 331.

33 Justice Paul, 'The UNIDROIT Principles: An Australian Perspective', (2010) 17 *Australian International Law Journal* 193, 196.

34 Preamble, UNIDROIT Principles, 2016.

35 (2009) UKHL 38.

36 (2006) EWCA Civ 69.

37 Attorney General, Commonwealth of Australia, *Annual Report 2015-2016*, 29.

## *Knowledge of the UNIDROIT Principles in Australia*

In my discussions with legal colleagues in Australia I have not found much awareness of the UNIDROIT Principles, and I am not aware of any Australian contracts which have specifically adopted them as the governing law of the contract. None of the Australian court cases that have referred to the UNIDROIT Principles have involved a contract that specifically referred to them.

However, Paul Finn notes that, from 1996, a small number of judges and scholars in both case law and legal scholarship drew attention to provisions in the UNIDROIT Principles as providing possible guidance for desirable, ordered development of the common law in Australia. The focus was on existing irritants or gaps within contemporary contract doctrine.<sup>38</sup> A search on the most extensive repository of references on legal materials in Australia<sup>39</sup> reveals that since 2000, there have been 75 academic papers that have referred to the UNIDROIT Principles. The majority of these are brief references to Article 1.7 (good faith), in the context of the international acceptance of the principle of good faith in the entry into and performance of contracts, and the appropriateness of this in the development of Australian common law. Some of these papers are on the topic of codification of contract law in Australia, an issue that does not appear to have significant support in the legal profession.

However, the extent of knowledge of the UNIDROIT Principles in Australia should increase over the next few years, since a number of teachers of contract law in Australian law schools have begun to use the UNIDROIT Principles and the US Uniform Commercial Code and the Restatement Second as ‘vehicles to illustrate how deficiencies, unfairness and antiquated doctrines could be rectified or replaced; how greater clarity or coherence could be achieved; and how international harmonisation could now be realised’.<sup>40</sup> Some contemporary Australian textbooks on the law of contract and university course materials refer to the UNIDROIT Principles.<sup>41</sup>

## *Application by Australian courts*

There are a number of judgments in Australia that have referred to the UNIDROIT Principles, generally as international support for development of common law in Australia.<sup>42</sup> Of the 16 Australian court cases identified in which judges have referred to the UNIDROIT Principles, only one of these cases was in the High Court of Australia. The other cases were from the superior courts of New South Wales, Queensland, Western Australia and the Federal Court. It is perhaps reflective of the limited knowledge and application of the UNIDROIT Principles in Australia that only 11 judges from four of Australia’s nine jurisdictions have referred to them, and that Finn J was a judge in five of these cases.

As part of the gradual move in Australia towards recognising a general duty of good faith in particular circumstances, ten cases have drawn support from Article 1.7 of the UNIDROIT Principles.<sup>43</sup> In upholding an extensive dispute resolution clause in a contract requiring the parties to meet and

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38 See n3 above, (UNIDROIT, 2016) 1388.

39 See [www.austlii.edu.au](http://www.austlii.edu.au) accessed 11 November 2019.

40 See n33, 1,388.

41 See, eg, the indices in E A Farnsworth, *Contracts* (4th edn, 2004).

42 Unilex cases 634, 648, 667, 845, 1134, 1135, 1232, 1366, 1517, 1518, 1519, 1520, 1614 and 1921. In addition to these 14 cases listed on the Unilex website, there are a further two court cases in which the judge has referred to the UNIDROIT Principles in the context of good faith (*Papale & Ors v Wilmar Sugar Australia Ltd* [2017] QSC 72 and *Lien v Clontarf Residential Pty Ltd* [2018] QSC 94). Also, a reference by the Commissioner of Patents referred to the provisions in the UNIDROIT Principles in respect of dispatch and receipt of an offer, which was different to the relevant Australian law (*Aristocrat Technologies* [2008] APO 33).

43 Unilex cases 634, 648, 667, 845, 1134, 1517, 1614 and 1921.

undertake genuine and good faith negotiations, Justice Allsop noted that good faith is not a concept foreign to common law, and is recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions, for example, the UNIDROIT Principles.<sup>44</sup>

In addition to the cases in which judges have referred to Article 1.7 in support of a good-faith principle,<sup>45</sup> judges have also used other articles of the UNIDROIT Principles as additional support for findings as to what the common law is. For example, in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*,<sup>46</sup> Finn J referred to Article 2.1.18<sup>47</sup> (Modification in a particular form) in relation to the parties' right to make an oral variation, and article 6.1.4 (Order of performance) in relation to the time at which instalment payments become due and payable under an 'entire contract' clause.<sup>48</sup>

In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,<sup>49</sup> the Australian High Court noted that a distinction between breach of essential terms and 'intermediate' terms is not part of Australian law and referred to UNIDROIT Principles Articles 7.3.1 (Right to terminate the contract) and 7.3.3 (Anticipatory non-performance), implicitly recognising that the UNIDROIT Principles and Australian law coincide on this issue.<sup>50</sup>

In *Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd*,<sup>51</sup> Finn J recognised that a prior course of dealing between parties and practices and usages can provide for both the drawing of inferences as to the actual terms on which the parties have contracted, and also for the imputation of implied terms in their contract, and referred to UNIDROIT Principles Articles 1.9 (Usages and practices) and 5.1.2 (Implied obligations) in support.<sup>52</sup>

### *The UNIDROIT Principles and international arbitration in Australia*

If the seat of an international arbitration is in Australia, the International Arbitration Act 1974 (Cth) (IAA) will apply to the procedural rules applicable to the proceedings. The IAA incorporates the UNCITRAL Model Law on International Commercial Arbitration as the law governing the procedure of an arbitration held in Australia. Article 28(1) provides: 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.'

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's international dispute resolution institution. It was established in 1985 as an independent, not-for-profit organisation. ACICA published its most recent Rules for the conduct of international

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44 *United Group Rail Services v Rail Corporation of New South Wales* (2009) NSWCA 177, (58).

45 Unilex cases 634, 648, 667, 845, 1134, 1517, 1614, 1921 and two further Queensland Supreme Court cases not in Unilex.

46 (2003) FCA 50.

47 The article numbers in brackets are quoted as those in the 2016 edition, although the article number originally quoted from the 1994 edition was different.

48 Donald Charrett, *The Application of Contracts in Engineering and Construction Projects* (Informa Law from Routledge, 2018), 363.

49 (2007) HCA 61.

50 See n 48, above.

51 (2008) FCA 1591.

52 See n 48, above.

arbitration in Australia in 2016,<sup>53</sup> and these are frequently incorporated in international arbitration clauses where the seat of the arbitration is Australia. Section 39.1 provides as follows: ‘The Arbitral Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the rules of law which it considers applicable.’

This ACICA rule is consistent with the rules of other arbitral institutions, for example, Article 21.1 of the ICC Arbitration Rules (2017). It should be noted that the provisions of both the IAA and the ACICA Rules give the parties the autonomy to determine the rules of law applicable to the substance of the dispute, including the governing law of the contract. There is no restriction that these rules of law are required to be rules of law of a state.

In *Musawi v RE International (UK) Ltd*,<sup>54</sup> the High Court of England and Wales affirmed that section 46(1)(b) of the Arbitration Act 1996 (UK) ‘allows parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system’ and that ‘such a choice may include a non-national set of legal principles (such as the 1994 UNIDROIT Principles) or, more broadly, general principles of commercial law or the *lex mercatoria*.’

Section 46(1)(b) of the Arbitration Act 1996 (UK) is in similar terms to Article 28 (1) of the UNCITRAL Model Law, and there is no reason to expect that an Australian court would come to a different conclusion in respect of the parties’ autonomy to choose a non-national set of legal principles such as the UNIDROIT Principles under the IAA.

It is generally accepted that an arbitration has no *lex fori* (the law of the country in which an action is brought), and accordingly in the absence of any provisions in the IAA or the arbitration rules agreed by the parties that would require an arbitral tribunal to apply a national system of law, an arbitral tribunal sitting in Australia would be free to apply the UNIDROIT Principles as the governing law of the contract if appropriate.

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53 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions [https://acica.org.au/wp-content/uploads/2016/02/ACICA\\_Rules\\_2016\\_Booklet.pdf](https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf) accessed 13 July 2018.

54 (2007) EWHC 2981 (Ch).