

# ‘TEXT, CONTEXT, AND PURPOSE’: AUSTRALIAN LAWMAKERS’ ADOPTION OF THE CISG, AND THE USE OF LEGISLATIVE HISTORIES AS AIDS IN STATUTORY INTERPRETATION

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*The United Nations Convention on Contracts for the International Sale of Goods (‘CISG’ or ‘Convention’), a convention aimed at harmonising international sales law and thereby promoting international trade, has been part of Australian law for over 30 years. An interpretative problem persists, however, with respect to Australia’s implementing Acts: one reading, endorsed in the case law, suggests that the Convention applies only on a provision-by-provision basis where inconsistent with non-harmonised Australian law. Whilst the CISG’s text is subject to its own internationally minded interpretative rules, Australia’s implementing Acts are instead subject to ordinary Australian statutory interpretation principles. This article applies Australia’s extrinsic materials rules, in conjunction with Australia’s CISG legislative histories (explanatory memoranda, second reading speeches and parliamentary debates relating to the Convention’s adoption), to confirm our legislatures’ intent to apply the CISG in its entirety in Australia. After identifying that no Australian CISG cases have yet referenced those materials, this article identifies how future case law (and local and international legislative activity) can benefit from their consideration.*

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## I INTRODUCTION

The *United Nations Convention on Contracts for the International Sale of Goods*<sup>1</sup> ('CISG' or 'Convention') — a 'widespread uniform law'<sup>2</sup> harmonising

<sup>1</sup> *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('CISG').

<sup>2</sup> Camilla Baasch Andersen, 'A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their "Jurisconsultorium"' (2015) 38(3) *University of New South Wales Law Journal* 911, 912.

cross-border sales laws<sup>3</sup> and intending to facilitate trade<sup>4</sup> — has 95 contracting States,<sup>5</sup> including Australia.<sup>6</sup> Its adoption makes it a resounding success,<sup>7</sup> ‘bested’<sup>8</sup> only (in the international commercial law arena) by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.<sup>9</sup> This comparison is apt given that the development of international dispute resolution systems and substantive international commercial law are said to be ‘matched’.<sup>10</sup>

<sup>3</sup> See Martin Doris, ‘Promising Options, Dead Ends and the Reform of Australian Contract Law’ (2014) 34(1) *Legal Studies* 24, 38, 41.

<sup>4</sup> CISG (n 1) Preamble para 3.

<sup>5</sup> This article capitalises ‘State’ when referring to nations and uses the lower case ‘state’ and ‘territory’ when referring to Australia’s internal jurisdictions.

<sup>6</sup> ‘Chapter X: International Trade and Development: United Nations Convention on Contracts for the International Sale of Goods’, *United Nations Treaty Collection* (Web Page, 2023) <[https://web.archive.org/web/20230425115633/https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=X-10&chapter=10&clang=\\_en](https://web.archive.org/web/20230425115633/https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=X-10&chapter=10&clang=_en)> (‘Chapter X: CISG’). Saudi Arabia is poised to become the 96<sup>th</sup> contracting State of the CISG (n 1) after its Cabinet approved accession on 20 June 2023: ‘ECZA Relocates HQ to Riyadh’, *Argaam* (online, 20 June 2023) <<https://arg.am/3BBA0E61>>, archived at <<https://perma.cc/9LCV-YTPE>>; ‘Saudi Arabia Accession to “International Sale of Goods” Convention Boosts Trade Growth: Al-Qasabi’, *Argaam* (online, 23 June 2023) <<https://arg.am/3BBA1613>>, archived at <<https://perma.cc/U6NR-HZJ4>>.

<sup>7</sup> Ingeborg Schwenzer, ‘Introduction’ in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5<sup>th</sup> ed, 2022) 1, 1; Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, ‘Introduction to the CISG’ in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (CH Beck, 2<sup>nd</sup> ed, 2018) 1, 1.

<sup>8</sup> Michael Bridge, ‘An Overview of the CISG and an Introduction to the Debate about the Future Convention’ (2013) 58(4) *Villanova Law Review* 487, 487.

<sup>9</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (‘*New York Convention*’). At the time of writing, there are 172 contracting States to the *New York Convention* (n 9): ‘Chapter XXII: Commercial Arbitration and Mediation: Convention on the Recognition and Enforcement of Foreign Arbitral Awards’, *United Nations Treaty Collection* (Web Page, 2023) <[https://web.archive.org/web/20231002070640/https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXII-1&chapter=22&clang=\\_en](https://web.archive.org/web/20231002070640/https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XXII-1&chapter=22&clang=_en)>.

<sup>10</sup> Chief Justice James Allsop, ‘International Commercial Courts: Next Frontier or Latest Trend?’ (Speech, Singapore International Commercial Court Symposium, 10 March 2021). For example, both the CISG (n 1) and the *New York Convention* (n 9) seek to bridge the common law and civil law divide: ‘International Arbitration and the CISG’, *Arbitral Insights* (Reed Smith, 21 June 2023) 0:18:06–0:18:58 <<https://reedsmithinternationalarbitration.podbean.com/e/international-arbitration-and-the-cisg/>>.

Still, the *CISG* faces challenges in its application, including in 'maintaining uniformity', given the *Convention* constitutes 'a living thing in a stream of continuing legal development'.<sup>11</sup> The *CISG* itself establishes 'textual uniformity', though 'applied uniformity' depends upon its interpretation:<sup>12</sup> and this is what 'really matters' for the *Convention's* trade facilitation ambitions.<sup>13</sup> Another challenge arises from merchants' automatic exclusions of the *CISG* as their governing law.<sup>14</sup> On this metric, the *CISG's* success 'is less clear'.<sup>15</sup> These challenges are related. One important empirical study (amongst several now addressing the *CISG's* application) found that the risk of differing interpretations being given to the *CISG* in different jurisdictions was one reason for parties opting out of the *Convention's* application.<sup>16</sup>

This article examines how the *CISG's* Australian adoption via legislation enacted at the state, territory and Commonwealth levels affects its local application, and thus its acceptability to merchants. To that end, I investigate four questions nearly entirely overlooked in the literature to date:<sup>17</sup>

<sup>11</sup> Bridge (n 8) 487.

<sup>12</sup> Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12(1) *Uniform Law Review* 5, 43–4.

<sup>13</sup> Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, 'An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia' (2020) 44(1) *Melbourne University Law Review* 1, 5 (emphasis in original).

<sup>14</sup> Benjamin Hayward, 'CISG Opt-Outs in Australia: Fact or Fiction, and What To Do?' (Speech, UNCCA UN Day Seminar: 40 Years of CISG, 26 October 2020) 2–4 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3719620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719620)>, archived at <<https://perma.cc/6VSM-83GM>>.

<sup>15</sup> John F Coyle, 'The Role of the CISG in US Contract Practice: An Empirical Study' (2016) 38(1) *University of Pennsylvania Journal of International Law* 195, 199.

<sup>16</sup> Gustavo Moser, *Rethinking Choice of Law in Cross-Border Sales* (Eleven International Publishing, 2018) 72–3. For a summary of the other relevant empirical studies, see at 8–32.

<sup>17</sup> For some existing references addressing Australia's parliamentary procedures effecting the local operation of the *CISG* (n 1) in a more general sense, see Benjamin Hayward, 'CISG as the Applicable Law: The Curious Case of Australia' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 167, 171–4 [10.11]–[10.17], 184–5 [10.43] ('CISG as the Applicable Law'); Bruno Zeller, 'The CISG in Australasia: An Overview' in Franco Ferrari (ed), *Quo Vadis CISG? Celebrating the 25<sup>th</sup> Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (Bruylant, 2005) 293, 298–9 ('The CISG in Australasia'); Benjamin Hayward and Patricia Perlen, 'The CISG in Australia: The Jigsaw Puzzle That Doesn't Quite Fit' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 119, 125; Benjamin Hayward, 'The CISG in Australia: The Jigsaw Puz-

- 1 Did Australia's lawmakers understand the *CISG*'s intended international operation?
- 2 Are Australia's *CISG* legislative histories useful in evidencing that understanding?
- 3 To what extent have Australian courts drawn upon those legislative histories as interpretative aids?
- 4 To what extent might they do so in the future, in order to support the *CISG*'s application and (in turn) its trade facilitation objectives?

Answering these questions is practically important for several reasons. First, Australian courts do not always approach the *CISG* with an internationalist spirit,<sup>18</sup> despite Australia's 'history of constructive *CISG* scholarship'.<sup>19</sup> Secondly, Australia's *CISG* applications not only affect outcomes in particular cases,<sup>20</sup> but also merchants' contractual performance outside of formal dispute resolution.<sup>21</sup> Thirdly, private international law (which includes the *CISG*)<sup>22</sup> 'is increasingly essential to legal practice in Australia'<sup>23</sup> given the

zle Missing a Piece' (2010) 14(2) *Vindobona Journal of International Commercial Law and Arbitration* 193, 193, 195, 199, 221–2 ('The Jigsaw Puzzle Missing a Piece').

- <sup>18</sup> Hayward, 'CISG as the Applicable Law' (n 17) 182–5 [10.37]–[10.44]; Bruno Zeller, 'The CISG and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 57, 57 ('The CISG and the Common Law'); Anastasi, Hayward and Brown (n 13) 35–44; Lisa Spagnolo, 'The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10(1) *Melbourne Journal of International Law* 141, 167–9 ('The Last Outpost'); Christopher Kee and Edgardo Muñoz, 'In Defence of the *CISG*' (2009) 14(1) *Deakin Law Review* 99, 100, 110.
- <sup>19</sup> Hayward, 'CISG as the Applicable Law' (n 17) 175–7 [10.21]–[10.25].
- <sup>20</sup> See Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 2 [1.02].
- <sup>21</sup> See *ibid* 34–5 [1.68]–[1.71].
- <sup>22</sup> See generally Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16<sup>th</sup> ed, 2022) vol 1, 3 [1–001]. Given the internationality requirement in art 1(1) of the *CISG* (n 1), the *Convention*'s application inherently involves international contexts.
- <sup>23</sup> Michael Douglas, 'Integrating Private International Law into the Australian Law Curriculum' (2020) 44(1) *Melbourne University Law Review* 98, 102.

increasing internationalisation of business.<sup>24</sup> Fourthly, Australia owes other CISG contracting States public international law obligations to apply the *Convention* correctly and to its correct extent.<sup>25</sup> Finally, and more generally, my analysis is a useful case study on the use of extrinsic aids in statutory interpretation, amidst our 'age of statutes'<sup>26</sup> where statutory interpretation is 'the single most important aspect of legal and judicial work',<sup>27</sup> and where there is a 'growing' use of national uniform legislation.<sup>28</sup> My analysis of extrinsic materials, intended to support the operation of national uniform legislation, is an approach that might be usefully applied in other legal fields.

Part II of this article sets the scene by examining the CISG's Australian adoption via state, territory and Commonwealth legislation. Part III identifies an interpretative problem emerging from that adoption. Case law shows that some Australian courts consider the CISG's individual provisions applicable only on a piecemeal basis and only where inconsistent with non-harmonised Australian law.<sup>29</sup> The extent to which statutory interpretation rules allow Australia's CISG legislative histories<sup>30</sup> to be consulted in resolving this

<sup>24</sup> Even ostensibly local trade can have international dimensions: Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018) 86–7.

<sup>25</sup> Ben Köhler, 'For an Independent Development of the CISG beyond Article 7 (2): A Stocktake and a Proposal' in Zlatan Meškić et al (eds), *Balkan Yearbook of European and International Law 2020* (Springer, 2021) 3, 4, 20, 24–5; Hayward, 'CISG as the Applicable Law' (n 17) 171 [10.10], 173 [10.15]; Renaud Sorieul, Emma Hatcher and Cyril Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58(4) *Villanova Law Review* 491, 500, 503, 506; Bryan Horrigan, Emmanuel Laryea and Lisa Spagnolo, Submission No 35 to the Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (20 July 2012) 6 [1.3.5] n 13, 30 [7.7] <[https://researchmgt.monash.edu/ws/portalfiles/portal/259436322/Submission\\_035\\_Contract\\_Law\\_Review\\_Horrigan\\_Laryea\\_Spagnolo.pdf](https://researchmgt.monash.edu/ws/portalfiles/portal/259436322/Submission_035_Contract_Law_Review_Horrigan_Laryea_Spagnolo.pdf)>, archived at <<https://perma.cc/FV3W-C83V>>.

<sup>26</sup> Lisa B Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159, 159.

<sup>27</sup> Justice Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24(2) *Statute Law Review* 95, 96.

<sup>28</sup> Guzyal Hill, *National Uniform Legislation* (Springer, 2022) 41.

<sup>29</sup> See, eg, *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108, [245] (Hansen J) ('*Playcorp*'); *A-G (Botswana) v Aussie Diamond Products Pty Ltd [No 3]* [2010] WASC 141, [210] (Murphy J) ('*Aussie Diamond*').

<sup>30</sup> This article uses the term 'legislative histories' as a domestic equivalent to *travaux préparatoires*, as opposed to its alternative usage referring to 'prior statutory provisions dealing with the same subject matter': Kath Hall and Claire Macken, *Statutory Interpretation: Princi-*

problem is established. Part IV determines the extent to which those histories evidence parliamentary intent to instead give the *CISG* full local operation. Such full operation is necessary for the *CISG* to achieve its trade facilitation purposes in Australia,<sup>31</sup> making Part IV's analysis an essential consideration for courts and lawyers applying the *Convention* as well as Australian merchants entering into international sales contracts. Part V's case law analysis considers whether those histories have been used as interpretative aids to date. It finds that they have not. Part VI, concluding, identifies several practical future applications for my analysis in Australia and abroad.

As well as answering the four novel questions identified above, this article makes two additional contributions to the field. First, Appendix 1 and Part IV collate and analyse Australia's *CISG* legislative histories in full: a task never before attempted.<sup>32</sup> Secondly, Appendix 2 takes a census of Australia's current *CISG* case load. The last time this was attempted was in 2009,<sup>33</sup> and as demonstrated in Part V, much has happened since that time.

## II AUSTRALIA'S STATUTORY *CISG* ARCHITECTURE AND THE RULES GOVERNING ITS INTERPRETATION IN AUSTRALIA

Australia's status as a dualist State means the *CISG* did not automatically apply upon accession.<sup>34</sup> Local legislation (referred to in this article as 'Australia's *CISG* legislation', '*CISG* Acts' and '*CISG* legislation') was required for the *Convention* to create private rights and obligations in Australia.<sup>35</sup> Australia

*ples and Context* (LexisNexis, 2021) 102 [5.43]. For this article's purposes, these legislative histories include explanatory memoranda, second reading speeches and parliamentary debates relating to the Australian implementation of the *CISG* (n 1).

<sup>31</sup> See *CISG* (n 1) Preamble para 3.

<sup>32</sup> See Hayward, 'CISG as the Applicable Law' (n 17) 172 [10.12].

<sup>33</sup> See Spagnolo, 'The Last Outpost' (n 18) 167–207.

<sup>34</sup> Justice Michael Kirby, 'The Growing Impact of International Law on Australian Constitutional Values' (2008) 27(1) *University of Tasmania Law Review* 1, 3.

<sup>35</sup> See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 301 (Toohey J), 316 (McHugh J) ('*Teoh*'); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 32–3 [99] (McHugh and Gummow JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 531 [21] (French CJ), 643–4 [462], 650 [490] (Keane J). See also Lisa Spagnolo, *CISG Implementation in Asia and the Pacific* (Report, 13 December 2013) 19 ('*CISG Implementation*').



participated in the *CISG*'s drafting at an international level,<sup>36</sup> alongside other nation States and interest groups,<sup>37</sup> via the United Nations Commission on International Trade Law's ('UNCITRAL') treaty-making process that culminated in the 1980 Vienna Diplomatic Conference.<sup>38</sup> Yet it was Australia's parliaments — collectives of individuals having their own distinct understandings<sup>39</sup> — that were entirely responsible for giving it local effect.

Following Australia's decision to adopt the *CISG* (announced on 22 November 1984),<sup>40</sup> its 'principal'<sup>41</sup> local effect flows from state or territory legislation making it 'part of' Australian law.<sup>42</sup> Alongside supplementary federal legislation,<sup>43</sup> those Acts came into force on 1 April 1989, coinciding with the *CISG*'s entry into force for Australia.<sup>44</sup> Relying on national uniform

<sup>36</sup> Hayward, 'CISG as the Applicable Law' (n 17) 174–5 [10.19]–[10.20]; Horrigan, Laryea and Spagnolo (n 25) 8 [1.6]. With respect to other comparable instruments, cf *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281–2 (Lord Diplock); Bruno Zeller and Camilla Andersen, 'The Transnational Dimension of Statutory Interpretation: Tragically Overlooked in a Global Commercial Environment' [2019] (1) *Nordic Journal of Commercial Law* 5, 7–8.

<sup>37</sup> *United Nations Conference on Contracts for the International Sale of Goods: Vienna, 10 March – 11 April 1980*, UN Doc A/CONF.97/19 (1991) 176 [3], [5].

<sup>38</sup> See generally *ibid.*

<sup>39</sup> The legislative process may involve 'multifaceted debate among parliamentarians and other stakeholders with divergent perspectives, responding to diverse and sometimes irreconcilable differences between these stakeholders': Annette O'Callaghan and Meredith Leigh, 'Foreword from the Parliamentary Counsel' in Guzyal Hill, *National Uniform Legislation* (Springer, 2022) vii, vii. See, eg, Jamieson Murphy, 'Majority of Nationals Voters Want Much More Climate Action', *The Canberra Times* (online, 30 August 2021) <<https://www.canberratimes.com.au/story/7406237/voters-in-every-electorate-want-action-on-climate-pol-l-reveals/>>, quoting Barnaby Joyce, then Deputy Prime Minister and National Party Leader, who noted (in the climate change context): 'I'm not a scientist mate, I'm a legislator'.

<sup>40</sup> Jonathan Brown (ed), 'Australian Practice in International Law 1984–1987' in DW Greig (ed), *The Australian Year Book of International Law* (Australian National University, 1991) vol 11, 159, 307.

<sup>41</sup> Hayward, 'CISG as the Applicable Law' (n 17) 171 [10.11].

<sup>42</sup> *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216, 222 (von Doussa J) ('*Roder*'); Lisa Spagnolo, 'The International Dimensions of Australian Contract Law' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21<sup>st</sup> Century* (Federation Press, 2021) 221, 221.

<sup>43</sup> See, eg, *Statute Law (Miscellaneous Provisions) Act 1987* (Cth) sch 1.

<sup>44</sup> Ian Govey and Christopher Staker, 'Vienna Sales Convention Takes Effect in Australia Next Year' (1988) 23(5) *Australian Law News* 19, 19. Australia's *CISG* legislation was passed pre-accession, consistent with Australian treaty practice: 'Australia's Treaty-Making Process', *Department of Foreign Affairs and Trade* (Guidance Note) <<https://www.dfat.gov.au/international-relations/treaties/treaty-making-process>>, archived

legislation<sup>45</sup> reflects ‘Australian federalism at its best’,<sup>46</sup> but also reflects constitutional sensitivities of the time. Despite the existence of the Commonwealth’s external affairs power,<sup>47</sup> the Standing Committee of Attorneys-General<sup>48</sup> agreed to use state and territory legislation to give effect to the *Convention*.<sup>49</sup> This makes practical sense as sales law is otherwise state and territory business,<sup>50</sup> though it was also thought politically expedient (after *Commonwealth v Tasmania*)<sup>51</sup> to avoid overusing the external affairs power.<sup>52</sup>

at <<https://perma.cc/YD7R-SSB9>>. This best secures Australia’s compliance with the public international law obligations that arise following accession: Hayward, ‘CISG as the Applicable Law’ (n 17) 171 [10.11].

<sup>45</sup> Australia’s CISG legislation does not appear on the Australasian Parliamentary Counsel’s Committee’s list of national uniform legislation: Australasian Parliamentary Counsel’s Committee, *Australian National Uniform Law Schemes and Associated Legislation of Participating Jurisdictions* (Web Document, November 2020) <<https://pcc.gov.au/uniform/National%20Uniform%20Legislation%20table%20-%202020%20final.pdf>>, archived at <<https://perma.cc/M4U9-4YMQ>>. Nevertheless, Australia’s CISG Acts qualify as they take a common form: Govey and Staker (n 44) 19.

<sup>46</sup> Tim D Castle, ‘50 Years of UNCITRAL: What’s Next?’ [2018] (Spring) *Bar News* 88, 90.

<sup>47</sup> *Australian Constitution* s 51(xxix).

<sup>48</sup> See generally Hill, *National Uniform Legislation* (n 28) 44.

<sup>49</sup> Govey and Staker (n 44) 19.

<sup>50</sup> Lisa Spagnolo, ‘Law Wars: Australian Contract Law Reform vs CISG vs CESL’ (2013) 58(4) *Villanova Law Review* 623, 623 (‘Law Wars’); David Fairlie, ‘A Commentary on Issues Arising under Articles 1 to 6 of the CISG: With Special Reference to the Position in Australia’ in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Singapore International Arbitration Centre, 2006) 39, 40. See, eg, *Sale of Goods Act 1923* (NSW); *Goods Act 1958* (Vic) (‘*Goods Act*’).

<sup>51</sup> (1983) 158 CLR 1.

<sup>52</sup> See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 1986, 6678 (John P Hannaford) (‘NSW *Parliamentary Debates* (19 November 1986)’); Queensland, *Parliamentary Debates*, Legislative Assembly, 2 September 1986, 770–1 (Sir William Knox), 773 (Neville J Harper) (‘Qld *Parliamentary Debates* (2 September 1986)’); Victoria, *Parliamentary Debates*, Legislative Assembly, 30 April 1987, 1759 (Peter Ross-Edwards) (‘Vic *Parliamentary Debates* (30 April 1987)’); Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 1986, 4001 (Andrew Mensaros) (‘WA *Legislative Assembly Parliamentary Debates* (11 November 1986)’); Western Australia, *Parliamentary Debates*, Legislative Council, 19 November 1986, 4408 (Norman F Moore) (‘WA *Parliamentary Debates* (19 November 1986)’); Western Australia, *Parliamentary Debates*, Legislative Council, 20 November 1986, 4561 (Phillip G Pental) (‘WA *Parliamentary Debates* (20 November 1986)’).

In addition to s 66A of the *Trade Practices Act 1974* (Cth) ('TPA'), Australia's CISG legislation initially comprised the:

- *Sale of Goods (Vienna Convention) Act 1987* (ACT);<sup>53</sup>
- *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island);<sup>54</sup>
- *Sale of Goods (Vienna Convention) Act 1986* (NSW);
- *Sale of Goods (Vienna Convention) Act 1987* (NT);
- *Sale of Goods (Vienna Convention) Act 1986* (Qld);
- *Sale of Goods (Vienna Convention) Act 1986* (SA);
- *Sale of Goods (Vienna Convention) Act 1987* (Tas);
- *Sale of Goods (Vienna Convention) Act 1987* (Vic); and
- *Sale of Goods (Vienna Convention) Act 1986* (WA).

Though it was initially intended that later ordinances would extend the CISG's Australian application to the Cocos (Keeling) Islands, Christmas Island, and the Ashmore and Cartier Islands,<sup>55</sup> this never occurred. Australia's CISG art 93 declaration regarding those external territories remains in force to this day.<sup>56</sup>

This statutory architecture has been altered three times. First, the *Sale of Goods (Vienna Convention) (Amendment) Ordinance 1989* (ACT) amended the Australian Capital Territory's ('ACT') original ordinance to address territory self-government,<sup>57</sup> and to correct 'a number of typographical errors'

<sup>53</sup> Originally the *Sale of Goods (Vienna Convention) Ordinance 1987* (ACT), which was restyled as an Act after the Australian Capital Territory attained self-government.

<sup>54</sup> Norfolk Island's CISG legislation is sometimes overlooked, though trade statistics from around the time of enactment disclose an import and export relationship with New Zealand: *Norfolk Island Report 1986–87* (Parliamentary Paper No 78 of 1988, 1987) 47–51. New Zealand itself adopted the CISG (n 1) in 1994: 'Chapter X: CISG' (n 6). Trade between Norfolk Island and the Australian mainland is practically necessary: see *Chasing the Light: Norfolk Island* (Ray Martin and Max Uechtritz, 2022) 0:39:10–0:39:25 ('*Chasing the Light*'). However, it remains intra-Australian trade and is not governed by the CISG (n 1): at art 1(1); E Jayme, 'Article 1: International Sales Contracts' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 27, 30 [2.2].

<sup>55</sup> Attorney-General's Department (Cth), 'Review of Developments in International Trade Law' [1988] (November) *Australian International Law News* 157, 163.

<sup>56</sup> 'Chapter X: CISG' (n 6).

<sup>57</sup> *Sale of Goods (Vienna Convention) (Amendment) Ordinance 1989* (ACT) s 3; Explanatory Statement, *Sale of Goods (Vienna Convention) (Amendment) Ordinance 1989* (ACT).

in its reproduction of the CISG.<sup>58</sup> These technical amendments are not relevant for this article's purposes. However, both Victoria and the Commonwealth also reconsidered their CISG legislation in 2010. This legislative activity is of present interest. The *Consumer Affairs Legislation Amendment (Reform) Act 2010* (Vic) repealed the *Sale of Goods (Vienna Convention) Act 1987* (Vic), relocating its provisions into pt IV of the *Goods Act 1958* (Vic) ('*Goods Act*').<sup>59</sup> Section 68 of the *Australian Consumer Law* ('*ACL*'), which is set out in sch 2 of the *Competition and Consumer Act 2010* (Cth),<sup>60</sup> also now supersedes s 66A of the *TPA*.<sup>61</sup>

Australia's state and territory CISG Acts, attaching the CISG as a schedule,<sup>62</sup> contain almost identical operative provisions.<sup>63</sup> They each:

<sup>58</sup> Explanatory Statement, *Sale of Goods (Vienna Convention) (Amendment) Ordinance 1989* (ACT).

<sup>59</sup> *Sale of Goods (Vienna Convention) Act 1987* (Vic) ('*Sale of Goods (Vienna Convention) Act (Vic)*'), as repealed by *Consumer Affairs Legislation Amendment (Reform) Act 2010* (Vic) s 20 ('*Consumer Affairs Legislation Amendment Act*'); *Goods Act* (n 50) pt IV, as inserted by *Consumer Affairs Legislation Amendment Act* (n 59) s 17. See also at s 1(d). Occasional reference to the repealed *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) persists: see, eg, Bronwyn Lincoln, 'The UN CISG and Its Implications for Australian Businesses during the COVID-19 Pandemic', *Lexology* (Blog Post, 21 May 2020) <<https://www.lexology.com/library/detail.aspx?g=a1d4b087-0372-4f9f-b591-107406962015>>, archived at <<https://perma.cc/R9K4-FSF2>>.

<sup>60</sup> The *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*') has state and territory, as well as Commonwealth, application: *Fair Trading (Australian Consumer Law) Act 1992* (ACT) pt 2; *Fair Trading Act 1987* (NSW) pt 3; *Consumer Affairs and Fair Trading Act 1990* (NT) pt 4; *Fair Trading Act 1989* (Qld) pt 3; *Fair Trading Act 1987* (SA) pt 3; *Australian Consumer Law (Tasmania) Act 2010* (Tas) pt 2; *Australian Consumer Law and Fair Trading Act 2012* (Vic) ch 2; *Fair Trading Act 2010* (WA) pt 3.

<sup>61</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) sch 1 ('*Trade Practices Amendment Act (No 2)*').

<sup>62</sup> *Sale of Goods (Vienna Convention) Act 1987* (ACT) sch 1 ('*Sale of Goods (Vienna Convention) Act (ACT)*'); *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island) sch ('*Sale of Goods (Vienna Convention) Act (Norfolk Island)*'); *Sale of Goods (Vienna Convention) Act 1986* (NSW) sch 1 ('*Sale of Goods (Vienna Convention) Act (NSW)*'); *Sale of Goods (Vienna Convention) Act 1987* (NT) sch ('*Sale of Goods (Vienna Convention) Act (NT)*'); *Sale of Goods (Vienna Convention) Act 1986* (Qld) sch ('*Sale of Goods (Vienna Convention) Act (Qld)*'); *Sale of Goods (Vienna Convention) Act 1986* (SA) sch ('*Sale of Goods (Vienna Convention) Act (SA)*'); *Sale of Goods (Vienna Convention) Act 1987* (Tas) sch 1 ('*Sale of Goods (Vienna Convention) Act (Tas)*'); *Goods Act* (n 50) sch, replacing *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) sch 1; *Sale of Goods (Vienna Convention) Act 1986* (WA) sch 1 ('*Sale of Goods (Vienna Convention) Act (WA)*').

<sup>63</sup> Robert French, 'Australia and International Law' (2020) 5 *Perth International Law Journal* 3, 11. See Hill, *National Uniform Legislation* (n 28) 29, 90–1.

- define 'Convention' (or the lower-case 'convention') as the *CISG*;<sup>64</sup>
- stipulate the *CISG*'s 'force of law' in each state and territory;<sup>65</sup> and
- stipulate that its provisions 'prevail over any other law in force' in each jurisdiction, 'to the extent of any inconsistency'.<sup>66</sup>

Any local adoption of the *CISG* requires the achievement of 'a balance ... between the international origin of the *Convention* and the fact that the *CISG* is inserted in the general structure of each domestic law'.<sup>67</sup> This balancing exercise raises interesting and very practical questions as to which interpretative rules support the *CISG*'s Australian application, which in turn directly affect the experiences of Australian lawyers and merchants engaging with the *CISG*. The *CISG*'s Australian adoption includes (as *CISG* art 98 requires) *CISG* art 7(1): its internal interpretation rule, pursuant to which 'regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. This rule requires the *CISG*'s autonomous interpretation,<sup>68</sup> excluding the opera-

<sup>64</sup> *Sale of Goods (Vienna Convention) Act (ACT)* (n 62) s 3; *Sale of Goods (Vienna Convention) Act (Norfolk Island)* (n 62) s 3; *Sale of Goods (Vienna Convention) Act (NSW)* (n 62) s 3; *Sale of Goods (Vienna Convention) Act (NT)* (n 62) s 3; *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) s 3 (definition of 'Convention'); *Sale of Goods (Vienna Convention) Act (SA)* (n 62) s 3; *Sale of Goods (Vienna Convention) Act (Tas)* (n 62) s 3; *Goods Act* (n 50) s 85, replacing *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) s 3; *Sale of Goods (Vienna Convention) Act (WA)* (n 62) s 3.

<sup>65</sup> *Sale of Goods (Vienna Convention) Act (ACT)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (Norfolk Island)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (NSW)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (NT)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (SA)* (n 62) s 4; *Sale of Goods (Vienna Convention) Act (Tas)* (n 62) s 5; *Goods Act* (n 50) s 86, replacing *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) s 5; *Sale of Goods (Vienna Convention) Act (WA)* (n 62) s 5.

<sup>66</sup> *Sale of Goods (Vienna Convention) Act (ACT)* (n 62) s 6; *Sale of Goods (Vienna Convention) Act (Norfolk Island)* (n 62) s 6; *Sale of Goods (Vienna Convention) Act (NSW)* (n 62) s 6; *Sale of Goods (Vienna Convention) Act (NT)* (n 62) s 6; *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) s 6; *Sale of Goods (Vienna Convention) Act (SA)* (n 62) s 5; *Sale of Goods (Vienna Convention) Act (Tas)* (n 62) s 6; *Goods Act* (n 50) s 87, replacing *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) s 6; *Sale of Goods (Vienna Convention) Act (WA)* (n 62) s 6.

<sup>67</sup> Pilar Perales Viscasillas, 'Article 7' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (CH Beck, 2<sup>nd</sup> ed, 2018) 112, 115 [7].

<sup>68</sup> Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5<sup>th</sup> ed,

tion of ordinary contracting State statutory interpretation rules.<sup>69</sup> The *CISG*'s own provisions must thus be interpreted 'independently from any domestic preconception'.<sup>70</sup>

Though existing scholarship has analysed the operative ('machinery') provisions contained in Australia's *CISG* Acts,<sup>71</sup> that scholarship has not yet addressed *their* subjection to different interpretative rules. *CISG* art 7(1) applies to 'the interpretation of this *Convention*': that is, to the *CISG* itself.<sup>72</sup> Australia's machinery provisions, giving the *CISG* effect, are local legislation.<sup>73</sup> *Their* interpretation therefore involves applying Australia's ordinary statutory interpretation rules: a proposition entirely consistent with *CISG* art 7(1)'s scope. *These* provisions, as explained below, have been problematic with respect to the *CISG*'s Australian application. Understanding the correct basis for their interpretation is essential in seeking to resolve those problems.

Australian courts conceptualise applying statutory interpretation rules as involving 'the duty of a court ... to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.<sup>74</sup> The 'familiar incantation'<sup>75</sup> of text, context, and purpose guides this function,<sup>76</sup>

2022) 135, 138–9 [8] ('Article 7 *CISG*'); *ibid* 113 [1]; Bruno Zeller, 'Article 48 *CISG*: Confusion or Sound Drafting?' (2022) 22(1) *Internationales Handelsrecht* 7, 7–8 [6], 8 [9]; Bruno Zeller, 'Good Faith: Is It a Contractual Obligation?' (2003) 15(2) *Bond Law Review* 215, 217; Bruno Zeller, 'Determining the Contractual Intent of Parties under the *CISG* and Common Law: A Comparative Analysis' (2002) 4(4) *European Journal of Law Reform* 629, 629 ('A Comparative Analysis'); Bruno Zeller, 'The Black Hole: Where Are the Four Corners of the *CISG*?' [2002] (7) *International Trade and Business Law Annual* 251, 251.

<sup>69</sup> See Hachem, 'Article 7 *CISG*' (n 68) 145 [20].

<sup>70</sup> *Ibid* 138 [8].

<sup>71</sup> See, eg, Hayward, 'CISG as the Applicable Law' (n 17) 171–4 [10.09]–[10.17], 182–5 [10.37]–[10.44]; Anastasi, Hayward and Brown (n 13) 35–7; Spagnolo, 'The Last Outpost' (n 18) 190–1; Fariba Aghili, 'A Critical Analysis of the *CISG* as Australian Law' (2007) 21(4) *Commercial Law Quarterly* 15, 20.

<sup>72</sup> Hachem, 'Article 7 *CISG*' (n 68) 137 [6]; Zeller and Andersen (n 36) 11.

<sup>73</sup> Anastasi, Hayward and Brown (n 13) 51.

<sup>74</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'). See also at 366 [13], 374–5 [41] (Brennan CJ). However, the difficulties in ascribing intention to Parliament as a collective are duly noted: Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 10–13.

<sup>75</sup> Michael Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1, 11 ('Choice of Law').

with interpretation Acts and common law rules providing further detail.<sup>77</sup> In this article, I address how Australia's extrinsic materials rules — local statutory interpretation rules — can confirm the *CISG*'s intended entire operation in Australia, via their application to Australia's machinery provisions.<sup>78</sup> Extrinsic materials are a 'useful guide to purpose';<sup>79</sup> their consultation therefore speaks to the essence of Australia's statutory interpretation function.

Referencing extrinsic materials is now described<sup>80</sup> as 'an issue of considerable significance' as they 'may resolve an ambiguity or doubt as to meaning' in a statute.<sup>81</sup> Not all authorities agree,<sup>82</sup> perhaps reflecting the legislative

<sup>76</sup> See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374–5 [37]–[38] (Gageler J), 388–9 [82]–[83], 392 [92] (Edelman J); *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 539–40 [47] (French CJ, Crennan, Kiefel, Gageler and Keane JJ), quoting *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (French CJ and Hayne J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 31–2 [4]–[5] (French CJ), 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Alcan*'); *Project Blue Sky* (n 74) 368 [19], [21], 374–5 [41] (Brennan CJ), 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ, Gaudron J agreeing at 412) ('*CIC Insurance*'). See also Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2019) 33–4 [2.1] ('*Statutory Interpretation*'); Alice Lloyd, 'A Purposive Approach to Interpreting Australia's Complementary Protection Regime' (2019) 43(2) *Melbourne University Law Review* 654, 657–8, 669–71; Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 632, 655–6; Michael Kirby, 'The Never-Ending Challenge of Drafting and Interpreting Statutes: A Meditation on the Career of John Finemore QC' (2012) 36(1) *Melbourne University Law Review* 140, 158–60, 168 ('The Never-Ending Challenge'); Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) *Melbourne University Law Review* 113, 116, 131–3; Justice Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Law Review* 576, 583–4.

<sup>77</sup> Gageler (n 74) 3–4, 6–7.

<sup>78</sup> Australia's *CISG* legislative histories disclose varying levels of accuracy in understanding the provisions of the *Convention*: Hayward, 'CISG as the Applicable Law' (n 17) 171–4 [10.09]–[10.17]. Whilst this is an interesting topic, this is a separate issue to those under examination in this article.

<sup>79</sup> Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2<sup>nd</sup> ed, 2021) 267.

<sup>80</sup> After some historical reluctance: Gageler (n 74) 4–5.

<sup>81</sup> Pearce, *Statutory Interpretation* (n 76) 85 [3.1].

<sup>82</sup> See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 605 [86] (Heydon J); *Brennan v Comcare* (1994) 50 FCR 555, 573–5 (Gummow J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514,

drafters' joke that 'we do not read legislation, we write legislation'.<sup>83</sup> This potential nevertheless warrants their careful analysis. In the commercial arbitration context — where Australia's legislation is also based on international instruments<sup>84</sup> — extrinsic materials have informed the interpretation of the *International Arbitration Act 1974 (Cth)*<sup>85</sup> and its state-based domestic equivalents.<sup>86</sup>

517–18 (Mason CJ, Wilson and Dawson JJ); Crawford et al (n 79) 240, 268–9. See also *Alcan* (n 76) 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

<sup>83</sup> SydneyLawSchool, 'Ross Parsons Centre Law & Business Seminar: Common Mistakes in Using National Uniform Legislation' (YouTube, 26 November 2021) 0:03:21–0:03:31 <<https://www.youtube.com/watch?v=NoKmCBfrhHU>>.

<sup>84</sup> *International Arbitration Act 1974 (Cth)* ss 2D(d)–(e) ('*International Arbitration Act (Cth)*'); *Commercial Arbitration Act 2017 (ACT)* pt 1A note; *Commercial Arbitration Act 2010 (NSW)* pt 1A note; *Commercial Arbitration (National Uniform Legislation) Act 2011 (NT)* s 1E; *Commercial Arbitration Act 2013 (Qld)* pt 1A note; *Commercial Arbitration Act 2011 (SA)* pt 1A note; *Commercial Arbitration Act 2011 (Tas)* pt 1A note; *Commercial Arbitration Act 2011 (Vic)* pt 1A note ('*Commercial Arbitration Act (Vic)*'); *Commercial Arbitration Act 2012 (WA)* s 1D.

<sup>85</sup> *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533, 546–7 [35]–[36] (Ward J); *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209, 210 [3], 222 [65], 224 [75]–[77] (Murphy J). Cf *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91, 123 [141] (Martin CJ, Buss JA agreeing at 125 [153]), 135 [203]–[205] (Murphy JA) ('*Rizhao Steel*'). The United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (21 June 1985) annex I, as amended by *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session*, UN Doc A/61/17 (7 July 2006) annex I ('*Model Law*') contains an equivalent to CISG (n 1) art 7(1): *Model Law* (n 85) art 2A(1); Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Wolters Kluwer, 4<sup>th</sup> ed, 2019) 59. Australia adopted the *Model Law* (n 85) via s 16(1) of the *International Arbitration Act (Cth)* (n 84) and the *Model Law* (n 85) appears in sch 2 of the *International Arbitration Act (Cth)* (n 84). This, however, does not explain referencing extrinsic materials of Australian origin pertaining to the non-*Model Law* (n 85) parts of the *International Arbitration Act (Cth)* (n 84) itself.

<sup>86</sup> *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [35] n 63 (Croft J). Like art 2A(1) of the *Model Law* (n 85), s 2A(1) of the *Commercial Arbitration Act (Vic)* (n 84) is broadly equivalent to art 7(1) of the CISG (n 1), though this does not explain references to extrinsic materials of Australian origin for the same reasons already identified: see above n 85. It is particularly important, in relation to this legislation, to note that the *Commercial Arbitration Act (Vic)* (n 84) s 2A(4) confirms the continued operation of the *Interpretation of Legislation Act 1984 (Vic)* s 35 in relation to the *Commercial Arbitration Act (Vic)* (n 84).



Australia's interpretation Acts themselves are not uniform,<sup>87</sup> but nearly all contain extrinsic materials rules. The common law does too, and does not require 'ambiguity to be established before the materials may be considered'.<sup>88</sup> I focus on Australia's statutory rules in this article. Since some apply subject to thresholds, I thereby confront the highest hurdle for their use in resolving Part III's interpretative problem.

Whilst the *CISG* mainly applies via state and territory law,<sup>89</sup> s 15AB(1) of the *Acts Interpretation Act 1901* (Cth) ('*AIA (Cth)*') is an appropriate starting point. This section, which state and territory equivalents are 'based on',<sup>90</sup> provides:

Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
  - (i) the provision is ambiguous or obscure; or
  - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.<sup>91</sup>

Extrinsic materials can therefore be used to confirm legislation's ordinary meaning at any time,<sup>92</sup> though when used to 'change an interpretation of

<sup>87</sup> SydneyLawSchool (n 83) 0:22:40–0:22:50.

<sup>88</sup> Hall and Macken (n 30) 93 [5.10]. See also *CIC Insurance* (n 76) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ, Gaudron J agreeing at 412), quoted in Crawford et al (n 79) 268; Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 334–5; Kirby, 'The Never-Ending Challenge' (n 76) 163.

<sup>89</sup> See above nn 40–66 and accompanying text.

<sup>90</sup> Pearce, *Statutory Interpretation* (n 76) 98 [3.16]. See also Gageler (n 74) 6.

<sup>91</sup> *Acts Interpretation Act 1901* (Cth) s 15AB(1) ('*AIA (Cth)*').

<sup>92</sup> Pearce, *Statutory Interpretation* (n 76) 99 [3.17].

legislation which would otherwise have been arrived at', there must first be ambiguity, obscurity, or the risk of a manifestly absurd or unreasonable result.<sup>93</sup> Section 15AB(2) of the *AIA (Cth)* non-exhaustively lists extrinsic materials that may be consulted. Australia's *CISG* legislative histories comprise explanatory memoranda, second reading speeches and parliamentary debates (falling within the *AIA (Cth)* ss 15AB(2)(e)–(f), (h)). Recourse to extrinsic materials is also discretionary.<sup>94</sup> That discretion is partly defined by s 15AB(3)(b) of the *AIA (Cth)*, which instructs that 'regard shall be had' to 'the need to avoid prolonging legal ... proceedings without compensating advantage'. The implications of my analysis for the exercise of this discretion are addressed below.

Interpretation Acts in New South Wales ('NSW'),<sup>95</sup> the Northern Territory ('NT'),<sup>96</sup> Queensland,<sup>97</sup> South Australia ('SA'),<sup>98</sup> Tasmania<sup>99</sup> and Western Australia ('WA')<sup>100</sup> follow this approach, applying it in substance to those jurisdictions' *CISG* machinery provisions. The *Interpretation Act 1979* (Norfolk Island) adopts s 15AB of the *AIA (Cth)* in that territory, rendering the Commonwealth rule directly applicable in Norfolk Island.<sup>101</sup> The ACT and Victorian provisions differ. In these jurisdictions, extrinsic materials can be referred to in all cases, without threshold.<sup>102</sup>

<sup>93</sup> Ibid 100 [3.18].

<sup>94</sup> This discretion was a 'generally agreed' feature of Australia's extrinsic materials rules from the time of their very drafting: Dharmananda (n 88) 337.

<sup>95</sup> *Interpretation Act 1987* (NSW) s 34.

<sup>96</sup> *Interpretation Act 1978* (NT) s 62B.

<sup>97</sup> *Acts Interpretation Act 1954* (Qld) s 14B ('*AIA (Qld)*'). This provision is structured differently to s 15AB of the *AIA (Cth)* (n 91) but is substantially to the same effect.

<sup>98</sup> *Legislation Interpretation Act 2021* (SA) s 16. See also Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis Butterworths, 2018) 2 [1.4].

<sup>99</sup> *Acts Interpretation Act 1931* (Tas) s 8B. This provision's structure is similar to s 14B of the *AIA (Qld)* (n 97) and is likewise to the same effect as s 15AB of the *AIA (Cth)* (n 91).

<sup>100</sup> *Interpretation Act 1984* (WA) s 19.

<sup>101</sup> *Interpretation Act 1979* (Norfolk Island) s 8A.

<sup>102</sup> *Legislation Act 2001* (ACT) ss 141–2; *Interpretation of Legislation Act 1984* (Vic) s 35(b).

### III DETERMINING THE CISG'S EXTENT OF OPERATION IN AUSTRALIA: WHERE HARMONISED AND NON-HARMONISED LAWS COLLIDE

This analysis sets the scene to revisit a previously identified statutory interpretation problem emerging from Australia's machinery provisions: what is the CISG's correct extent of operation according to Australian law? Does the CISG apply in Australia in its entirety or only in a piecemeal fashion?

A distinction needs to be drawn here between the CISG's intended international application and its application as defined by Australian law. Internationally, the CISG is supposed to apply over non-harmonised contracting State law,<sup>103</sup> to the extent of the subject matter scope of CISG art 4,<sup>104</sup> where its internal application rules are satisfied.<sup>105</sup> External gaps (legal issues outside the scope of CISG art 4)<sup>106</sup> are necessarily resolved via an otherwise applicable law.<sup>107</sup> Internal gaps (within the scope of CISG art 4 but not expressly settled)<sup>108</sup> are, pursuant to CISG art 7(2), filled by reference to general principles (if possible) before resort is had to non-harmonised law.<sup>109</sup>

<sup>103</sup> See above nn 68–70 and accompanying text.

<sup>104</sup> Whilst the CISG (n 1) arts 4(a)–(b) specifically identify that validity and property's passage are beyond the scope of the *Convention*, the provision's second sentence's opening words ('[i]n particular') 'make it clear that the matters set out [in arts 4(a)–(b)] are not the only matters which fall outside the realm of concern of the *Convention*': W Khoo, 'Article 4: Questions To Be Covered by Convention' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 44, 45 [2.4]. Thus, as a result of art 4, the subject matter scope of the CISG (n 1) extends only to contract formation and party rights and obligations issues.

<sup>105</sup> CISG (n 1) arts 1–6, 100. See also Shaotang Wang, 'Baodeli Co, Ltd v Ceic (Guangdong)' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 293, 298; Peng Wang, Yueshan Liu and Chaolin Zhang, 'Vishaybc Components Beyschlag Gmbh versus Shanghai Y Hsu Trading Co, Ltd: Dispute Arising from a Sale of Goods Contract' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 361, 366.

<sup>106</sup> Larry A DiMatteo, 'CISG as Basis of a Comprehensive International Sales Law' (2013) 58(4) *Villanova Law Review* 691, 691.

<sup>107</sup> Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36(4) *Victoria University of Wellington Law Review* 781, 788. See also Brooke Marshall, 'The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law' (2018) 66(1) *American Journal of Comparative Law* 175, 198.

<sup>108</sup> Hachem, 'Article 7 CISG' (n 68) 148–9 [27].

<sup>109</sup> *Ibid* 149 [27].

These gaps, and the need to fill them, reflect the fact that the *CISG* ‘is not a code’.<sup>110</sup>

Nothing described so far in this Part is controversial. Thus, at least in principle, ‘[t]he *Goods Act* and any other relevant laws will only apply to those contracts or parts of contracts that are not covered by the *CISG*’.<sup>111</sup> Still, Australia’s machinery provisions (and their interpretation) cast doubt upon this. This is a matter of great practical importance as it is here ‘where the relationship between the convention and national law is regulated’.<sup>112</sup> Should these machinery provisions limit the *CISG*’s operation, that might violate public international law, whilst still being correct (if normatively undesirable) under Australian law.<sup>113</sup> As Warren CJ explained, in the related international commercial arbitration context and referring to the *International Arbitration Act 1974* (Cth):

Ultimately, this court is required to construe an Australian statute. That process must be performed in accordance with established principles of Australian statutory interpretation. International case law may be useful and instructive, but it cannot supersede the words used in the Act. The weight to be accorded to such authority will depend upon the similarity of the language used in foreign statutes being construed to the terms of the Act.<sup>114</sup>

The issue comes down to a simple proposition, as Lord Devlin once put it extra-curially:

<sup>110</sup> Bruno Zeller, *CISG and the Unification of International Trade Law* (Routledge-Cavendish, 2007) 1 (*CISG and the Unification*); Bruno Zeller, ‘Recent Developments of the CISG: Are Regional Developments the Answer to Harmonisation?’ (2014) 18(1) *Vindobona Journal of International Commercial Law and Arbitration* 111, 112; Zeller and Andersen (n 36) 15; Bruno Zeller, ‘In or out of the CISG? That Is the Question’ [2013] *Australian Mining and Petroleum Law Association Yearbook* 410, 413 (*In or out of the CISG*). See generally Filip De Ly, ‘Sources of International Sales Law: An Eclectic Model’ (2005) 25(1) *Journal of Law and Commerce* 1.

<sup>111</sup> Bruno Zeller, ‘Is the Sale of Goods (Vienna Convention) Act the Perfect Tool To Manage Cross Border Legal Risks Faced by Australian Firms?’ (1999) 6(3) *eLaw Journal: Murdoch University Electronic Journal of Law*, [15] <<https://www.murdoch.edu.au/elaw/issues/v6n3/zeller63.html>>, archived at <<https://perma.cc/MEW9-P9SW>> (*‘The Perfect Tool’*), discussing *Goods Act* (n 50).

<sup>112</sup> Zeller, ‘The CISG in Australasia’ (n 17) 299.

<sup>113</sup> See above n 25 and accompanying text.

<sup>114</sup> *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, 314 [37], discussing *International Arbitration Act (Cth)* (n 84).

The law is what the judges say it is. If the House of Lords [or, for this article's purposes, an Australian court] were to give to an Act of Parliament a meaning which no one else thought it could reasonably bear, it is their construction of the words used in preference to the words themselves that would become the law.<sup>115</sup>

Australia's force of law and inconsistency provisions (the *Goods Act* ss 86–7 being representative) are at issue here. The former establishes that '[t]he provisions of the *Convention* have the force of law in Victoria',<sup>116</sup> which is consistent with the *CISG's* intended international operation.<sup>117</sup> The latter, however, muddies the waters: 'The provisions of the *Convention* prevail over any other law in force in Victoria to the extent of any inconsistency.'<sup>118</sup> Despite initial parliamentary impressions,<sup>119</sup> a genuine ambiguity arises here.<sup>120</sup> Does the *CISG* apply to its full extent, or only on a provision-by-provision basis, to the extent that its rules are inconsistent with other state or territory law?<sup>121</sup> The text of these provisions is an insufficient guide to parliamentary intent. On the one hand, Australia's force of law provisions may give the *CISG* entire local operation, with the inconsistency provisions clarifying this operation.<sup>122</sup> On the other hand, those inconsistency provisions may qualify Australia's force of law provisions, leading to the *CISG's* piecemeal application.<sup>123</sup>

In these circumstances, Australia's extrinsic materials threshold requirements (to the extent they apply in some Australian jurisdictions) are met.<sup>124</sup>

<sup>115</sup> Patrick Devlin, *Samples of Lawmaking* (Oxford University Press, 1962) 2. See also *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 267 (Brennan J).

<sup>116</sup> *Goods Act* (n 50) s 86.

<sup>117</sup> See above nn 68–70 and accompanying text.

<sup>118</sup> *Goods Act* (n 50) s 87.

<sup>119</sup> *Qld Parliamentary Debates* (2 September 1986) (n 52) 773 (Neville J Harper).

<sup>120</sup> Anastasi, Hayward and Brown (n 13) 35–7. See also Zeller, 'The Perfect Tool' (n 111) [16]. See generally Frank Maher, 'Words, Words, Words' (1984) 14(3) *Melbourne University Law Review* 468, 469.

<sup>121</sup> See generally *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, 71–2 [61] (Callinan, Heydon and Crennan JJ).

<sup>122</sup> Spagnolo, 'The Last Outpost' (n 18) 190–1. See also Zeller, 'The CISG in Australasia' (n 17) 303–4; Zeller, 'A Comparative Analysis' (n 68) 642; Zeller, 'In or out of the CISG' (n 110) 414; Horrigan, Laryea and Spagnolo (n 25) 6 [1.3.5], 8 [1.6], 32 [8.2.1].

<sup>123</sup> Aghili (n 71) 20–5.

<sup>124</sup> See above nn 90–102 and accompanying text.

Explanatory memoranda, second reading speeches and parliamentary debates may thus be referred to for the purpose of identifying the ‘legal meaning of the text’,<sup>125</sup> and thereby Australian parliaments’ intent.<sup>126</sup>

Part V’s review of Australia’s CISG case law discloses three judgments addressing this interpretative problem. In *Playcorp Pty Ltd v Taiyo Kogyo Ltd* (*‘Playcorp’*),<sup>127</sup> the Supreme Court of Victoria ‘simply followed the order in the pleadings’,<sup>128</sup> and in doing so considered the non-harmonised *Goods Act* ss 19(a)–(b) implied terms ‘before’ resorting to the conformity rules in CISG art 35.<sup>129</sup> Adopting the second interpretation described above, the Court explained:

The application of this principle of private international law means that either the *Goods Act* or the *Convention* applied to the sales contract. It is thus unnecessary to consider the earlier submissions as to the proper law of the contract. As I have stated, the *Convention* has the benefit of paramountcy over the *Goods Act* in the event of any inconsistency between the two. As I have said, no such inconsistency was suggested, and having regard also to the way in which the case was conducted, it is appropriate to proceed on the basis that there is none.<sup>130</sup>

The Supreme Court of WA cited and endorsed *Playcorp* in *Attorney-General (Botswana) v Aussie Diamond Products Pty Ltd [No 3]* (*‘Aussie Diamond’*), describing the CISG’s provisions as applying in Australia ‘insofar as they are relevant’.<sup>131</sup> The Court found it ‘unnecessary’ to apply the CISG at all in that case, as ‘[n]either party ... ha[d] suggested that there [we]re provisions of the *Convention* which require[d] consideration’, and it was also not suggested that any provisions ‘operate[d] inconsistently’ with the *Sale of Goods Act 1895* (WA) (*‘Sale of Goods Act (WA)’*).<sup>132</sup> The second interpretation again prevailed. Neither case identified the alternative possibility and neither invoked any particular statutory interpretation rules.

<sup>125</sup> Crawford et al (n 79) 255 (emphasis in original).

<sup>126</sup> See above n 74 and accompanying text.

<sup>127</sup> *Playcorp* (n 29).

<sup>128</sup> *Ibid* [235] (Hansen J).

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid* [245].

<sup>131</sup> *Aussie Diamond* (n 29) [210] (Murphy J), citing *ibid* [235]–[245].

<sup>132</sup> *Aussie Diamond* (n 29) [210] (Murphy J).

Before *Playcorp*, the Supreme Court of WA also considered that jurisdiction's machinery provisions in *Ginza Pte Ltd v Vista Corporation Pty Ltd* ('*Ginza*').<sup>133</sup> The Court in *Ginza* contemplated both views: explaining that the Western Australian inconsistency provision 'would appear to mean that, for example, to the extent that the [CISG] makes provision inconsistent with that made by the [*Sale of Goods Act (WA)*], the provisions of the *Convention* prevail',<sup>134</sup> but ultimately concluding that 'the terms of the *Convention* would appear to govern all relevant issues to the exclusion of the [*Sale of Goods Act (WA)*]'.<sup>135</sup> Unlike *Playcorp* and *Aussie Diamond*, *Ginza* therefore correctly understands the CISG's entire operation in Australia in substance, though it predates those two other problematic decisions. Given that *Aussie Diamond* was also a Western Australian case, and given that *Aussie Diamond's* later appeal did not revisit the CISG's application,<sup>136</sup> it might fairly be said that *Ginza* no longer reflects the current state of Western Australian law.

Even if Australia's CISG application legislation and its interpretation are out of step with international standards, one might still query whether this problem is more apparent than real. If Australian courts apply non-harmonised Australian law because it is not inconsistent with the CISG, should it not be the case that outcomes remain unaffected? And if that is the case, one might ask, how can a genuine problem arise? Whilst posing these rhetorical questions seems to have intuitive appeal, three reasons confirm the practical importance of my analysis.

First, even if case outcomes remain unaffected, this problem adversely impacts the CISG's trade facilitation purposes.<sup>137</sup> This is particularly true noting the empirical finding described in Part I. Failure to apply the CISG in its entirety undermines its capacity to reduce transaction costs,<sup>138</sup> as merchants no longer engage with the same legal rules across jurisdictions.<sup>139</sup>

<sup>133</sup> [2003] WASC 11, [188] (Barker J) ('*Ginza*').

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* [196].

<sup>136</sup> *A-G (Botswana) v Aussie Diamond Products Pty Ltd [No 2]* [2012] WASCA 73 ('*Aussie Diamond Appeal*').

<sup>137</sup> See Zeller, 'The CISG in Australasia' (n 17) 302.

<sup>138</sup> See generally Jadranka Petrovic, 'The Interplay of CISG Cultural, Legal, Historical and Religious Variances and Their Impact on the Treatment of the CISG' (2016) 20(1) *Vindobona Journal of International Commercial Law and Arbitration* 71, 72; Luke Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG): A New Zealander's View from

Secondly, concluding that outcomes remain unaffected presumes accurate judicial assessments of consistency. This is not always the case, as where courts incorrectly equate CISG art 74 with the rule in *Hadley v Baxendale*,<sup>140</sup> or CISG art 35 with merchantable quality.<sup>141</sup>

And thirdly, even if non-harmonised Australian law and the CISG are genuinely consistent, it remains necessary (as a matter of civil procedure) to plead the correct law. *Perry Engineering Pty Ltd (rec and mgr apptd) (admin apptd) v Bernold AG* illustrates the dangers of not doing so.<sup>142</sup> The Court there refused to assess contract damages, following default judgment, where the *Sale of Goods Act 1895* (SA) was relied upon instead of the CISG.<sup>143</sup> That

Australia and Japan' (2005) 36(4) *Victoria University of Wellington Law Review* 815, 830; Horrigan, Laryea and Spagnolo (n 25) 3–4 [1.2], 6 [1.3.5], 23 [4.5].

<sup>139</sup> Zeller, *CISG and the Unification* (n 110) 3. See also John Goldring, 'Uniformity, Harmonisation or Restatement of Laws: Desirability and Implementation' [1995–96] (68) *Reform* 7, 9.

<sup>140</sup> (1854) 9 Ex 341; 156 ER 145, 151 (Alderson B for the Court). See, eg, *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462, 484 [48] (Williams JA, Davies JA agreeing at 472 [1], Byrne J agreeing at 485 [52]) ('*Downs Appeal*'); *Delchi Carrier SpA v Rotorex Corporation*, 71 F 3d 1024, 1029 [10, 11] (Winter J for the Court) (2<sup>nd</sup> Cir, 1995); Zeller, *CISG and the Unification* (n 110) 104; Geng Wang, Shu Zhang and Peng Guo, 'Novelact (Resources) Limited v Xiamen Special Economic Zone International Trade Trust Company' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 1, 8; Chaolin Zhang, Shu Zhang and Peng Guo, 'Sanmei (Japan) Trading Co, Ltd v Fujian Zhangzhou Metals & Minerals Import and Export Co, Ltd' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 13, 23–4; Zeller, 'The CISG in Australasia' (n 17) 318–19; V Susanne Cook, 'The UN Convention on Contracts for the International Sale of Goods: A Mandate To Abandon Legal Ethnocentricity' (1997) 16(2) *Journal of Law and Commerce* 257, 259–60.

<sup>141</sup> *Fryer Holdings Pty Ltd (in liq) v Liaoning MEC Group Co Ltd* [2012] NSWSC 18, [16], [19] (McDougall J) ('*Fryer Holdings*'); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445, 460 [89] (Keane CJ, Lander and Besanko JJ) ('*Castel Appeal*'); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028, [123] (Ryan J) ('*Castel Trial*'); *Playcorp* (n 29) [235], [245] (Hansen J); Zeller, 'The CISG in Australasia' (n 17) 320–1; Bruno Zeller, 'The Duty To Mitigate: A Comparative Analysis between the English Common Law and the CISG' (2018) 92(3) *Australian Law Journal* 205, 207 ('The Duty To Mitigate').

<sup>142</sup> [2001] SASC 15 ('*Perry Engineering*').

<sup>143</sup> *Ibid* [16]–[19] (Judge Burley). Judge Burley held at [18]:

To the extent that the plaintiff relies in the statement of claim upon the [*Sale of Goods Act 1895* (SA)] and not the provisions of the Act which apply by virtue of the ... *Convention*, the plaintiff is precluded from pursuing such a course because it is only the provisions of the latter Act which apply.



this Court approached the pleadings differently to the courts in *Playcorp* and *Aussie Diamond* further illustrates the risks associated with the *CISG*'s currently uncertain extent of operation in Australia.

Prior scholarship identifies and addresses this interpretative problem, though primarily with reference to the *CISG*'s international understandings.<sup>144</sup> The role to be played by Australia's *CISG* legislative histories (applied to Australia's machinery provisions) in resolving this problem has never been considered. It is to these extrinsic materials that attention now turns.

#### IV AUSTRALIA'S *CISG* LEGISLATIVE HISTORIES EXAMINED: A SYSTEMATIC CONTENT ANALYSIS

Ten Australian jurisdictions have *CISG* legislation. This legislation's passage generated the explanatory memoranda, second reading speeches and parliamentary debates comprising the Australian *CISG* legislative histories under examination.<sup>145</sup> Part III established that these sources *can* be consulted to help solve the interpretative problem there identified. In this Part, I assess whether courts *should* do so, via a systematic content analysis. Identifying whether these histories evidence parliamentary intent to apply the *CISG* in its entirety is relevant to their interpretative utility, and thus to the exercise of judicial discretion to consult them.

Not all Australian jurisdictions have generated all three categories of *CISG* legislative histories. Appendix 1 identifies the availability of these histories, based upon each jurisdiction's parliamentary practices, and thereby establishes the parameters of this Part's analysis.

##### *A Reading Australia's CISG Legislative Histories via a Systematic Content Analysis*

Australia's *CISG* legislative histories are voluminous, differ markedly in detail, contain countless observations that are intellectually interesting but irrelevant for present purposes, and evidence the *CISG*'s intended Australian operation in different ways. For these reasons, their careful review is essential.

<sup>144</sup> Spagnolo, 'The Last Outpost' (n 18) 190–1; Aghili (n 71) 16, 20–5. See also Castle (n 46) 91; Ken Shiu, 'The Exclusion of the *CISG* in Technology Contracts: Fear of the Unknown?' (2005) 61 (September) *Computers and Law* 19, 19–20.

<sup>145</sup> See below Appendix 1.

Consistent with other national uniform legislation research,<sup>146</sup> a systematic content analysis is undertaken in this Part as ‘a beneficial supplement’<sup>147</sup> to my otherwise doctrinal approach.

This analysis involved reviewing Australia’s *CISG* legislative histories in light of the following question: do those histories evidence the *CISG*’s intended entire operation in each Australian jurisdiction? As Australian parliaments are presumed to legislate consistently with international law,<sup>148</sup> I considered it unlikely that these histories would actually evidence the opposite view. This was an estimation that my review ultimately confirmed, though for the avoidance of doubt, this alternative perspective was actively searched for during my review.

I initially proposed two coding categories to capture relevant evidence of parliamentary intent:

- indirect evidence: statements implying the *CISG*’s entire operation in Australia (including statements about its intended benefits which presuppose such application in order to be true); and
- direct evidence: statements expressly confirming the *CISG*’s intended entire operation in Australia.

My review quickly disclosed the need to add a third coding category:<sup>149</sup> general evidence of the *CISG*’s intended entire operation in Australia, comprising reference to Australia’s *CISG* accession, adoption, implementation etc. Such statements also imply the *CISG*’s entire operation, since this is what the *CISG* itself requires (subject only to permitted reservations).<sup>150</sup> However, unlike indirect evidence, this evidence is less specific and thus qualitatively different.

<sup>146</sup> See, eg, Hill, *National Uniform Legislation* (n 28) 12–13; Guzyal Hill, ‘Categories of the “Art of the Impossible”: Achieving Sustainable Uniformity in Harmonised Legislation in the Australian Federation’ (2020) 48(3) *Federal Law Review* 350, 353–4 (‘Art of the Impossible’).

<sup>147</sup> Maryam Salehijam, ‘The Value of Systematic Content Analysis in Legal Research’ (2018) 23(1–2) *Tilburg Law Review* 34, 35.

<sup>148</sup> Crawford et al (n 79) 280–1. See, eg, *Teoh* (n 35) 287 (Mason CJ and Deane J), 315 (McHugh J); *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J), 348–9 (Dawson J), 360–1 (Toohey J).

<sup>149</sup> Salehijam (n 147) 37, discussing Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) *California Law Review* 63, 107.

<sup>150</sup> *CISG* (n 1) art 98.

This Part now uses this coding scheme to analyse Australia's *CISG* legislative histories and their capacity to assist in resolving the interpretative problem identified in Part III. The states and territories are analysed alphabetically; Commonwealth materials are considered last; and, given the nature of general evidence, only footnotes (rather than explanations) are provided in relation to those relevant sources.

### B *The ACT*

The *Sale of Goods (Vienna Convention) Act 1987 (ACT)*, originally the *Sale of Goods (Vienna Convention) Ordinance 1987 (ACT)*, generated only an explanatory statement.

#### 1 *The ACT's Explanatory Memorandum (Explanatory Statement)*

Content categories: General,<sup>151</sup> indirect. No views supporting the *CISG*'s piecemeal application were expressed.

The ACT's three-page explanatory statement is lengthy by Australian standards, though its treatment of the ACT's machinery provisions is descriptive and brief.<sup>152</sup> Its contents mostly summarise the *CISG*.<sup>153</sup> So far as the ACT's machinery provisions are concerned, the *CISG* is described as prevailing 'in the event of inconsistency',<sup>154</sup> rather than (as legislated) 'to the extent of any inconsistency'.<sup>155</sup> This indirectly evidences its intended entire operation in the ACT, since 'extent' is a relative term that is more suggestive of the *CISG*'s piecemeal application.

### C *Norfolk Island*

Norfolk Island's 'tiny' and sometimes 'forgotten' status<sup>156</sup> extends, in a legal sense, to its *CISG* implementation. As Appendix 1 notes, the existence or accessibility of Norfolk Island's *CISG* legislative histories remains unknown,

<sup>151</sup> Explanatory Statement, *Sale of Goods (Vienna Convention) Ordinance 1987 (ACT)* 1–2.

<sup>152</sup> *Ibid* 2–3.

<sup>153</sup> *Ibid* 1–2.

<sup>154</sup> *Ibid* 3.

<sup>155</sup> *Sale of Goods (Vienna Convention) Act (ACT)* (n 62) s 6.

<sup>156</sup> *Chasing the Light* (n 54) 0:03:17–0:03:24.

despite efforts to clarify that situation.<sup>157</sup> Analysis of these legislative histories (if they do exist) is thus impossible at this time.

## D NSW

The *Sale of Goods (Vienna Convention) Act 1986* (NSW) generated all three types of CISG legislative histories.<sup>158</sup> Since NSW's bicameral Parliament generated two second reading speeches, and since those speeches differ, both are addressed.

### 1 NSW's Explanatory Memorandum (Explanatory Note)

Content categories: General.<sup>159</sup> No views supporting the CISG's piecemeal application were expressed.

No direct or indirect evidence of the CISG's intended entire operation in NSW is provided.

### 2 NSW's Second Reading Speeches

Content categories: General,<sup>160</sup> indirect. No views supporting the CISG's piecemeal application were expressed.

The Legislative Assembly's second reading speech was delivered by Terence Sheahan (Australian Labor Party ('ALP'), Attorney-General) on 23 October 1986.<sup>161</sup> Lengthy by Australian standards, it indirectly evidences the CISG's intended entire operation in NSW via:

- the CISG's description as 'a uniform law governing the formation and operation of contracts for the international sale of goods';<sup>162</sup>
- this uniformity's description as overcoming 'the present diversity of laws applying to the international sale of goods', thereby facilitating and encouraging international trade;<sup>163</sup>

<sup>157</sup> See below n 403.

<sup>158</sup> See generally Hayward, 'CISG as the Applicable Law' (n 17) 172–3 [10.12]–[10.15].

<sup>159</sup> Explanatory Note, *Sale of Goods (Vienna Convention) Bill 1986* (NSW).

<sup>160</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1986, 5374–6 (Terence Sheahan) ('*NSW Parliamentary Debates (23 October 1986)*').

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* 5374.

<sup>163</sup> *Ibid* 5375.

- the *CISG* being said to 'enable the parties to assess their legal position with greater clarity and certainty than the application of a foreign law might allow', reducing 'the incidence of disputes on legal points';<sup>164</sup> and
- the *CISG*'s description as 'favourable to Australia's interests' and 'designed to cater for the special needs of international ... trade'.<sup>165</sup>

These statements presuppose the *CISG*'s entire operation in NSW. In particular, the benefits identified in the second and third bullet points above can only be realised if the *CISG* applies in its entirety in NSW. Additional indirect evidence appears where the *CISG* is described as having the force of law in NSW *and* prevailing to the extent of inconsistency.<sup>166</sup> The conjunctive 'and' suggests inconsistency is not a limitation.

The Legislative Council's speech was delivered by Jack Hallam (ALP) on 19 November 1986.<sup>167</sup> It identifies the *CISG*'s capacity to bind Australian traders even without Australia's accession and notes that the *CISG* may promote certainty 'even allowing for possible differences in interpretation ... at local level'.<sup>168</sup> These statements indirectly evidence the *CISG*'s intended entire operation in NSW by implying that the *Convention* applies (or at least is meant to apply) the same way in foreign and Australian contexts.

### 3 NSW's Parliamentary Debates

Content categories: General,<sup>169</sup> indirect. No views supporting the *CISG*'s piecemeal application were expressed.

In the Legislative Assembly, only John Dowd (Liberal Party ('Liberals')) addressed the *CISG*.<sup>170</sup> Dowd's caution that Australia 'will not find it as easy as some to accede to what is in effect a code of legislation'<sup>171</sup> indirectly evidences the *CISG*'s intended entire operation in NSW as this difficulty would not arise should the *CISG* have only piecemeal application. Dowd's

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> *NSW Parliamentary Debates (19 November 1986)* (n 52) 6672–4 (Jack R Hallam).

<sup>168</sup> Ibid 6673. See also *CISG* (n 1) arts 1(1)(b), 7(1).

<sup>169</sup> *NSW Parliamentary Debates (19 November 1986)* (n 52) 6674 (Robert B Rowland Smith).

<sup>170</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 1986, 6116 (John Dowd) ('*NSW Parliamentary Debates (11 November 1986)*').

<sup>171</sup> Ibid.

assertions that Australia would be a *CISG* ‘beneficiary’ and that it ‘will save much time and effort in interpreting which laws apply to which contracts’,<sup>172</sup> similarly assume (and indirectly evidence) the *CISG*’s entire operation.

Five Legislative Council members addressed the *CISG*: Robert Rowland Smith (National Party (‘Nationals’)),<sup>173</sup> Jack Hallam,<sup>174</sup> John Hannaford (Liberals),<sup>175</sup> Ronald Dyer (ALP)<sup>176</sup> and Fred Nile (Call to Australia Party).<sup>177</sup> Indirect evidence is provided by Rowland Smith identifying the *CISG* as

an important piece of legislation [that] sets out rules and regulations pertaining to the sale of goods on an international basis. After all, the economy of this country depends very much on the sale of goods we export ... It is vital for the well-being of international trade that such agreements are set out clearly and concisely.<sup>178</sup>

The *CISG*’s piecemeal application undermines these statements. Hallam’s description of the *CISG* as enhancing ‘the opportunity for trade between nations’<sup>179</sup> provides indirect evidence: the *CISG* must apply entirely for this proposition to be true. Similarly, Nile’s description of the NSW machinery provisions as a ‘powerful weapon’<sup>180</sup> makes the most sense if they apply the *CISG* in full.

### E *The NT*

The *Sale of Goods (Vienna Convention) Act 1987* (NT) is accompanied by a single second reading speech and single set of debates, given the NT’s unicameral Parliament.<sup>181</sup>

<sup>172</sup> Ibid.

<sup>173</sup> *NSW Parliamentary Debates (19 November 1986)* (n 52) 6674–7 (Robert B Rowland Smith).

<sup>174</sup> Ibid 6672–4, 6677–9 (Jack R Hallam).

<sup>175</sup> Ibid 6678 (John P Hannaford).

<sup>176</sup> Ibid 6678 (Ronald D Dyer).

<sup>177</sup> Ibid 6679 (Fred J Nile). An additional interjection by Michael Egan (ALP) is irrelevant for present purposes: at 6674 (Michael R Egan).

<sup>178</sup> Ibid 6675 (Robert B Rowland Smith).

<sup>179</sup> Ibid 6678 (Jack R Hallam).

<sup>180</sup> Ibid 6679 (Fred J Nile).

<sup>181</sup> *Northern Territory (Self-Government) Act 1978* (Cth) ss 6–7.

### 1 *The NT's Second Reading Speech*

Content categories: General,<sup>182</sup> indirect. No views supporting the *CISG's* piecemeal application were expressed.

The NT's second reading speech was delivered by Daryl Manzie (Country Liberal Party ('CLP'), Attorney-General) on 29 April 1987.<sup>183</sup> It indirectly evidences the *CISG's* intended entire operation in the NT via:

- the use of the conjunctive 'and' when describing the NT's machinery provisions,<sup>184</sup> as in NSW;<sup>185</sup> and
- reference to private international law's uncertainty, noting that the *CISG* 'provides uniform rules' for matters within its scope (only true if the *CISG* applies in its entirety in the NT).<sup>186</sup>

### 2 *The NT's Parliamentary Debates*

Content categories: Direct, indirect. No views supporting the *CISG's* piecemeal application were expressed.

The NT's parliamentary debates comprise four members' contributions: Neil Bell (ALP),<sup>187</sup> Richard Setter (CLP),<sup>188</sup> Noel Padgham-Purich (CLP)<sup>189</sup> and Daryl Manzie.<sup>190</sup> Setter directly evidences the *CISG's* intended entire operation in the NT when explaining:

The other important point is that this bill will override any other Northern Territory law that has previously pertained to matters relating to the sale and or the purchase. There is no point in passing this bill if other legislation still pertains to the transaction.<sup>191</sup>

<sup>182</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 91–2 (Daryl Manzie) ('*NT Parliamentary Debates (29 April 1987)*').

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid* 92.

<sup>185</sup> See above n 166 and accompanying text.

<sup>186</sup> *NT Parliamentary Debates (29 April 1987)* (n 182) 92 (Daryl Manzie).

<sup>187</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 June 1987, 585–6 (Neil Bell) ('*NT Parliamentary Debates (3 June 1987)*').

<sup>188</sup> *Ibid* 586–7 (Richard Setter).

<sup>189</sup> *Ibid* 587–8 (Noel Padgham-Purich).

<sup>190</sup> *Ibid* 588 (Daryl Manzie).

<sup>191</sup> *Ibid* 587 (Richard Setter).

Setter's explanation that Australia's *CISG* legislation will lead to 'one approach'<sup>192</sup> implies the same would be true across Australia. Indirect evidence is provided by Bell's reference to the 'need for new contract arrangements',<sup>193</sup> Setter and Manzie's addressing of cross-border contract law differences,<sup>194</sup> and Setter's explanation of the *CISG*'s trade facilitation aims:<sup>195</sup> all imply or require the entire operation of the *CISG* in the NT.

## F Queensland

The *Sale of Goods (Vienna Convention) Act 1986* (Qld) is also accompanied by a single second reading speech and a single set of debates, given Queensland's unicameral Parliament.<sup>196</sup>

### 1 Queensland's Second Reading Speech

Content categories: General,<sup>197</sup> indirect. No views supporting the *CISG*'s piecemeal application were expressed.

Queensland's second reading speech, delivered by Neville Harper (Nationals, Minister for Justice and Attorney-General) on 19 August 1986,<sup>198</sup> indirectly evidences the *CISG*'s intended entire operation via the same conjunctive 'and', as addressed with respect to NSW and the NT.<sup>199</sup>

### 2 Queensland's Parliamentary Debates

Content categories: General,<sup>200</sup> indirect. No views supporting the *CISG*'s piecemeal application were expressed.

<sup>192</sup> Ibid 586.

<sup>193</sup> Ibid 585 (Neil Bell).

<sup>194</sup> Ibid 586–7 (Richard Setter), 588 (Daryl Manzie).

<sup>195</sup> Ibid 587 (Richard Setter).

<sup>196</sup> Queensland's Legislative Council was abolished in 1922: *Constitution Act Amendment Act 1922* (Qld) s 2(1).

<sup>197</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 August 1986, 351 (Neville J Harper) ('*Qld Parliamentary Debates (19 August 1986)*').

<sup>198</sup> Ibid.

<sup>199</sup> Ibid. See above nn 166, 184–5 and accompanying text.

<sup>200</sup> *Qld Parliamentary Debates (19 August 1986)* (n 197) 350–1 (Neville J Harper); *Qld Parliamentary Debates (2 September 1986)* (n 52) 769 (Wayne Goss).



Queensland's six-page parliamentary debates comprise contributions from Wayne Goss (ALP),<sup>201</sup> William Knox (Liberals),<sup>202</sup> John Innes (Liberals)<sup>203</sup> and Neville Harper.<sup>204</sup> Whilst lengthy, they mostly comprise political posturing, including one particularly pointed personal barb referencing the inconveniences of Parliament sitting late into the evening.<sup>205</sup> Some scepticism of international law was expressed,<sup>206</sup> though Innes recognised that '[t]he legislation is important and substantial and it merits some serious consideration'.<sup>207</sup> This was somewhat ironic, since such consideration (even in the context of relatively lengthy debates) did not occur. Reference to the *CISG*'s uniformity goals,<sup>208</sup> and its capacity to address private international law's 'minefield',<sup>209</sup> nevertheless indirectly evidence the *CISG*'s intended entire operation in Queensland via presupposition of that fact.

#### G SA

Whilst SA's Parliament does not produce explanatory memoranda,<sup>210</sup> its second reading speeches include an explanation of clauses at their conclusion.<sup>211</sup> Given their functional equivalence, they are treated as explanatory memoranda for the purposes of this Part. The *Sale of Goods (Vienna Convention) Act 1986* (SA) is otherwise accompanied by two second reading speeches and two sets of debates. Only SA's Legislative Council speech and

<sup>201</sup> *Qld Parliamentary Debates (2 September 1986)* (n 52) 769–70 (Wayne Goss).

<sup>202</sup> *Ibid* 770–4 (Sir William Knox).

<sup>203</sup> *Ibid* 772–3 (John Innes).

<sup>204</sup> *Ibid* 773–4 (Neville J Harper). Interjections from Terence Mackenroth (ALP): at 770; Patrick Comben (ALP): at 771–2; and Terence Gygar (Liberals): at 773; are irrelevant for present purposes.

<sup>205</sup> *Ibid* 772 (John Innes).

<sup>206</sup> *Ibid* 771 (Sir William Knox).

<sup>207</sup> *Ibid* 772 (John Innes).

<sup>208</sup> *Ibid*.

<sup>209</sup> *Ibid*.

<sup>210</sup> Patrick O'Neill, "'Was There an EM?': Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament' (Research Brief No 15, Parliamentary Library, Parliament of Australia, 23 May 2005) 23.

<sup>211</sup> *Ibid*.

explanation of clauses are addressed here, as its House of Assembly equivalents are substantially identical.<sup>212</sup>

### 1 SA's *Explanatory Memorandum Equivalent (Explanation of Clauses)*

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

SA's explanation of clauses comprises seven short and descriptive sentences addressing its Bill's six clauses and schedule,<sup>213</sup> and provides no evidence of the CISG's intended entire operation in SA.

### 2 SA's *Second Reading Speech*

Content categories: General,<sup>214</sup> indirect. No views supporting the CISG's piecemeal application were expressed.

SA's second reading speech, delivered by Christopher Sumner (ALP, Attorney-General) on 17 September 1986,<sup>215</sup> indirectly evidences the CISG's intended entire operation in that jurisdiction by:

- describing the CISG as 'uniform law' (assuming its consistent entire operation in all adopting jurisdictions);<sup>216</sup> and
- describing the CISG as 'tailored to the special needs of international trade' (confirming its autonomy vis-a-vis non-harmonised South Australian law).<sup>217</sup>

### 3 SA's *Parliamentary Debates*

Content categories: General,<sup>218</sup> indirect. No views supporting the CISG's piecemeal application were expressed.

<sup>212</sup> See South Australia, *Parliamentary Debates*, House of Assembly, 25 September 1986, 1237–8 (Donald J Hopgood) ('SA *Parliamentary Debates (25 September 1986)*'). Cf South Australia, *Parliamentary Debates*, Legislative Council, 17 September 1986, 912–13 (Christopher J Sumner) ('SA *Parliamentary Debates (17 September 1986)*').

<sup>213</sup> SA *Parliamentary Debates (17 September 1986)* (n 212) 913 (Christopher J Sumner).

<sup>214</sup> Ibid 912.

<sup>215</sup> Ibid 912–13.

<sup>216</sup> Ibid 912.

<sup>217</sup> Ibid.

<sup>218</sup> South Australia, *Parliamentary Debates*, Legislative Council, 24 September 1986, 1133 (Kenneth T Griffin) ('SA *Parliamentary Debates (24 September 1986)*'); South Australia,

SA's Legislative Council debates contain one contribution. Kenneth Griffin (Liberals) relevantly notes 'we have no say in what is in the convention', the *CISG* 'will facilitate our international trading activity' and it will bring 'benefits for our businesses'.<sup>219</sup> These statements indirectly evidence the *CISG*'s intended entire operation by emphasising its unchangeable international origins and benefits that derive from such entire application in SA.

The House of Assembly's debates feature contributions from Stephen Baker (Liberals)<sup>220</sup> and Gregory Crafter (ALP).<sup>221</sup> Baker indirectly evidences the *CISG*'s entire operation in SA by referencing:

- the 'inevitabl[e] difficulties when dealing with contracts between countries',<sup>222</sup>
- the *CISG*'s potential to generate 'freer trade',<sup>223</sup>
- the *CISG*'s tailoring to international trade,<sup>224</sup> and
- the ability of Australian traders to 'understand their contractual obligations when merchandising overseas in those countries that are signatories', leading to 'a clear understanding enforceable in law as to [Australian and foreign traders'] rights and responsibilities'.<sup>225</sup>

The *CISG* must apply in its entirety if these benefits are to be realised. If the *CISG* is applied only in a piecemeal fashion in SA, trade would not be promoted in the way envisaged by the *Convention*, and the difficulties arising out of differing non-harmonised nation State sales laws would persist.

*Parliamentary Debates*, House of Assembly, 19 November 1986, 2133 (Gregory J Crafter) ('SA *Parliamentary Debates* (19 November 1986)').

<sup>219</sup> SA *Parliamentary Debates* (24 September 1986) (n 218) 1133 (Kenneth T Griffin).

<sup>220</sup> SA *Parliamentary Debates* (19 November 1986) (n 218) 2133 (Stephen J Baker).

<sup>221</sup> Ibid 2133 (Gregory J Crafter).

<sup>222</sup> Ibid 2133 (Stephen J Baker).

<sup>223</sup> Ibid. Noting, for the purposes of utmost clarity, that the *CISG* (n 1) creates private law rights and obligations and is therefore distinct from public law (nation State to nation State) free trade agreements: at art 1(1).

<sup>224</sup> SA *Parliamentary Debates* (19 November 1986) (n 218) 2133 (Stephen J Baker), discussing SA *Parliamentary Debates* (17 September 1986) (n 212) 912 (Christopher J Sumner).

<sup>225</sup> SA *Parliamentary Debates* (19 November 1986) (n 218) 2133 (Stephen J Baker).

## H *Tasmania*

The *Sale of Goods (Vienna Convention) Act 1987* (Tas) generated an explanatory memorandum, two different second reading speeches and two sets of debates. Only the House of Assembly's debates are addressed, however, as Tasmania's Legislative Council Hansard merely notes that the Bill was 'taken through the Committee stage' in that House of Parliament.<sup>226</sup>

### 1 *Tasmania's Explanatory Memorandum (Clause Notes)*

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

Tasmania's explanatory memorandum has single-sentence descriptions of each Bill clause and does not evidence the CISG's intended entire operation in that jurisdiction.<sup>227</sup>

### 2 *Tasmania's Second Reading Speeches*

Content categories: General, indirect. No views supporting the CISG's piecemeal application were expressed.

Tasmania's House of Assembly second reading speech was given by John Bennett (Liberals, Attorney-General) on 24 March 1987.<sup>228</sup> Being similar to SA's speeches, it provides the same general and indirect evidence cited and described with respect to that jurisdiction.<sup>229</sup> Additional indirect evidence appears in its unique final paragraphs:

The convention is an attempt to establish common provisions between countries of diverse economic, political and legal backgrounds and to bridge differences between national approaches to choice of law. Its provisions constitute a delicate balancing of interests between developed and developing countries and the common law, civil law and socialist legal systems. It is in the interests of Australian commerce that the convention should come into force and provide certainty as to the law applicable to international sales.

<sup>226</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 26 March 1987, 413 (Peter McKay) ('*Tas Parliamentary Debates (26 March 1987)*').

<sup>227</sup> Clause Notes, *Sale of Goods (Vienna Convention) Bill 1987* (Tas).

<sup>228</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 24 March 1987, 674–5 (John Bennett) ('*Tas Parliamentary Debates (24 March 1987)*').

<sup>229</sup> *Ibid* 674. See above nn 214–17 and accompanying text.

The provisions of the convention after it enters into force in respect of Australia have the force of law in this [s]tate by virtue of this legislation.<sup>230</sup>

The first paragraph's assertions are only true if the *CISG* applies entirely, and in the same manner, in all contracting States. The second describes the *CISG*'s force of law in Tasmania without reference to any inconsistency-based qualification.

The Legislative Council's speech, delivered by Peter McKay (Independent) on 26 March 1987, contains a passage virtually identical to the first paragraph quoted above<sup>231</sup> and thus also indirectly evidences the *CISG*'s intended entire Tasmanian operation for the same reasons given above. It provides additional indirect evidence by clearly distinguishing the *Sale of Goods Act 1896* (Tas) from the *CISG* as 'an international law to govern the sale of goods', addressing 'problems when a Tasmanian company has bought from or sold to an ... overseas company because two systems of law may become involved'.<sup>232</sup> Since (in McKay's words) '[o]bviously the convention must differ from our domestic law because it is a result of bringing together and rationalising a whole range of world practices',<sup>233</sup> this distinction and its emphasis on the *CISG*'s unique rules imply the *CISG*'s entire local operation.

### 3 *Tasmania's Parliamentary Debates*

Content categories: Indirect. No views supporting the *CISG*'s piecemeal application were expressed.

Tasmania's House of Assembly debates comprise contributions from three members: John White (ALP),<sup>234</sup> Robert Brown (Independent)<sup>235</sup> and Michael Weldon (ALP).<sup>236</sup> They indirectly evidence the *CISG*'s intended entire Tasmanian operation via:

- Brown's observation that the Bill 'has increased provisions for the protection of vendors and consumers over existing law'<sup>237</sup> (though imprecise

<sup>230</sup> *Tas Parliamentary Debates* (24 March 1987) (n 228) 675 (John Bennett).

<sup>231</sup> *Tas Parliamentary Debates* (26 March 1987) (n 226) 413 (Peter McKay).

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> *Tas Parliamentary Debates* (24 March 1987) (n 228) 675 (John White).

<sup>235</sup> *Ibid* 675–6 (Robert Brown).

<sup>236</sup> *Ibid* 676 (Michael Weldon).

<sup>237</sup> *Ibid* 675 (Robert Brown).

regarding consumers,<sup>238</sup> this statement still recognises the *CISG*'s autonomy); and

- White's observation that the model Bill process means 'it does not really behove us today to attempt to amend it because the moment we do it ceases to be uniform legislation which would defeat the whole purpose of the bill'<sup>239</sup> (arguably assuming that the whole legislative package — including the *CISG* — is to apply in its entirety in Tasmania).

### I *Victoria*

Victoria's Parliament is unique amongst those in Australia's states and territories for considering the *CISG* twice:<sup>240</sup> first in 1987, and secondly in 2010 when the provisions of the *Sale of Goods (Vienna Convention) Act 1987* (Vic) were rolled into Victoria's otherwise non-harmonised *Goods Act*.<sup>241</sup>

#### 1 *Victoria's Original 1987 Legislation*

Victoria's original *Sale of Goods (Vienna Convention) Act 1987* (Vic) was accompanied by all three types of legislative history under consideration. Only the Legislative Council's second reading speech is addressed here, as the Legislative Assembly's speech is substantially identical.<sup>242</sup>

##### (a) *Victoria's 1987 Explanatory Memorandum*

Content categories: None. No views supporting the *CISG*'s piecemeal application were expressed.

<sup>238</sup> See *CISG* (n 1) art 2(a).

<sup>239</sup> *Tas Parliamentary Debates (24 March 1987)* (n 228) 675 (John White).

<sup>240</sup> Zeller, 'The *CISG* and the Common Law' (n 18) 58.

<sup>241</sup> See generally Hayward, 'CISG as the Applicable Law' (n 17) 172–4 [10.12]–[10.17]; Zeller, 'The *CISG* in Australasia' (n 17) 298–9.

<sup>242</sup> Victoria, *Parliamentary Debates*, Legislative Council, 3 March 1987, 171–2 (James H Kennan) ('*Vic Parliamentary Debates (3 March 1987)*'). Cf Victoria, *Parliamentary Debates*, Legislative Assembly, 14 April 1987, 1220–1 (Race Mathews) ('*Vic Parliamentary Debates (14 April 1987)*').

Victoria's 'amazingly brief'<sup>243</sup> 1987 explanatory memorandum comprises one-sentence descriptions of each Bill clause,<sup>244</sup> providing no evidence of the CISG's intended entire operation in that jurisdiction.

(b) *Victoria's 1987 Second Reading Speech*

Content categories: General,<sup>245</sup> indirect. No views supporting the CISG's piecemeal application were expressed.

Victoria's 1987 second reading speech was delivered in the Legislative Council on 3 March 1987 by James Kennan (ALP, Attorney-General).<sup>246</sup> Its indirect evidence includes assertions that the *Convention* 'provides a standard set of legal principles which govern certain international contracts for the sale of goods', and that it provides 'greater certainty' given 'most of Australia's major trading partners were expected to become parties to the convention'.<sup>247</sup> Both comments presuppose the CISG's entire Victorian operation, in the same way that the CISG applies (or is meant to apply) in its entirety in other international jurisdictions.

(c) *Victoria's 1987 Parliamentary Debates*

Content categories: General,<sup>248</sup> indirect. No views supporting the CISG's piecemeal application were expressed.

Victoria's 1987 Legislative Council debates comprise contributions by Bruce Chamberlain (Liberals),<sup>249</sup> James Kennan<sup>250</sup> and William Baxter (Nationals).<sup>251</sup> Kennan's observation that 'this is an area in which we want national and international uniformity for the simpler resolution of commer-

<sup>243</sup> Hayward, 'CISG as the Applicable Law' (n 17) 172 [10.13], discussing Explanatory Memorandum, Sale of Goods (Vienna Convention) Bill 1987 (Vic).

<sup>244</sup> Explanatory Memorandum, Sale of Goods (Vienna Convention) Bill 1987 (Vic).

<sup>245</sup> *Vic Parliamentary Debates (3 March 1987)* (n 242) 171–2 (James H Kennan).

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid* 171.

<sup>248</sup> Victoria, *Parliamentary Debates*, Legislative Council, 17 March 1987, 306 (Bruce A Chamberlain), 307 (William R Baxter) ('*Vic Parliamentary Debates (17 March 1987)*'); *Vic Parliamentary Debates (30 April 1987)* (n 52) 1758 (Michael John).

<sup>249</sup> *Vic Parliamentary Debates (17 March 1987)* (n 248) 306–9 (Bruce A Chamberlain).

<sup>250</sup> *Ibid* 307–8 (James H Kennan).

<sup>251</sup> *Ibid* 307–8 (William R Baxter). An interjection from Geoffrey Connard (Liberals): at 307; is irrelevant for present purposes.

cial disputes<sup>252</sup> indirectly evidences the *CISG*'s intended entire operation in Victoria by presuming the *Convention*'s identical operation locally and abroad. There cannot be uniformity within Australia if the *CISG* applies in a piecemeal fashion, as different state and territory laws might mean different levels of inconsistency with the *CISG*.

Otherwise, in the Legislative Council, Baxter's general criticism of United Nations conventions (and emphasis on safeguarding Australia's 'sovereignty')<sup>253</sup> implicates two interesting competing possible meanings. Those comments might at first glance appear suggestive of the *CISG*'s limited application. However, they might also indirectly evidence the *CISG*'s intended entire operation in Victoria as this would necessarily have a greater impact on the sovereignty Baxter refers to. In any event, since Baxter clarified that no issue was taken with the *CISG*,<sup>254</sup> it is not possible to take my analysis of these comments any further.

Victoria's 1987 Legislative Assembly debates comprise three members' contributions: Michael John (Liberals),<sup>255</sup> Peter Ross-Edwards (Nationals)<sup>256</sup> and Race Mathews (ALP).<sup>257</sup> Indirect evidence appears in John's reference to the importance of uniformity in overcoming 'the complexity and uncertainty of private international law'.<sup>258</sup> It is the *CISG*'s entire operation in Victoria that secures such uniformity and overcomes this uncertainty. Otherwise, in the Legislative Assembly, Ross-Edwards' suggestion that '[e]ach [s]tate is free to amend [its *CISG*] legislation from time to time'<sup>259</sup> might (superficially) seem to accommodate limited application of the *CISG*. However, as the target of this observation (the *CISG*, Victoria's machinery provisions, or both) is unclear, this implication cannot fairly be drawn.

<sup>252</sup> Ibid 308 (James H Kennan).

<sup>253</sup> Ibid 307–8 (William R Baxter). See generally Hill, *National Uniform Legislation* (n 28) 50, 122–3; Guzyal Hill, 'Avoiding a "Catch 22": Major Lessons from a Meta-Analysis of Reports of the Parliament of Western Australia on Threats to Sovereignty by National Uniform Legislation' (2021) 33(1) *Bond Law Review* 37, 40–2; Goldring (n 139) 8; SydneyLawSchool (n 83) 0:30:29–0:39:24.

<sup>254</sup> *Vic Parliamentary Debates (17 March 1987)* (n 248) 307–8 (William R Baxter).

<sup>255</sup> *Vic Parliamentary Debates (30 April 1987)* (n 52) 1758–9 (Michael John).

<sup>256</sup> Ibid 1759 (Peter Ross-Edwards).

<sup>257</sup> Ibid 1759 (Race Mathews).

<sup>258</sup> Ibid 1758 (Michael John).

<sup>259</sup> Ibid 1759 (Peter Ross-Edwards).



## 2 Victoria's Relocated 2010 Legislation

The omnibus *Consumer Affairs Legislation Amendment (Reform) Act 2010* (Vic) repealed the *Sale of Goods (Vienna Convention) Act 1987* (Vic),<sup>260</sup> relocating its provisions into pt IV of the *Goods Act*.<sup>261</sup> This second parliamentary consideration of Victoria's CISG legislation is accompanied by all three categories of legislative history under examination. Only the Legislative Assembly's speech is considered, however, as the Legislative Council's is substantially identical.<sup>262</sup>

### (a) Victoria's 2010 Explanatory Memorandum

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

Victoria's 2010 explanatory memorandum merely references the re-enactment of Victoria's CISG provisions,<sup>263</sup> providing no evidence of the CISG's intended entire operation in that jurisdiction.

### (b) Victoria's 2010 Second Reading Speech

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

Victoria's 2010 second reading speech, delivered in the Legislative Assembly on 28 July 2010 by Anthony Robinson (ALP, Minister for Consumer Affairs),<sup>264</sup> addresses the CISG in one paragraph only.<sup>265</sup> Despite Robinson noting that the repealed Act is 'consolidate[d] ... into the *Goods Act*' in order '[t]o improve usability for users of Victoria's mercantile law'<sup>266</sup> — an objec-

<sup>260</sup> *Sale of Goods (Vienna Convention) Act (Vic)* (n 59), as repealed by *Consumer Affairs Legislation Amendment Act* (n 59) s 20.

<sup>261</sup> *Consumer Affairs Legislation Amendment Act* (n 59) ss 17–19. See *Goods Act* (n 50) pt IV.

<sup>262</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2815–19 (Anthony Robinson) ('*Vic Parliamentary Debates (28 July 2010)*'). Cf Victoria, *Parliamentary Debates*, Legislative Council, 12 August 2010, 4023–6 (Gavin Jenings) ('*Vic Legislative Council Parliamentary Debates (12 August 2010)*').

<sup>263</sup> Explanatory Memorandum, *Consumer Affairs Legislation Amendment (Reform) Bill 2010* (Vic) 1, 15–16 ('Explanatory Memorandum, Consumer Affairs Legislation').

<sup>264</sup> *Vic Parliamentary Debates (28 July 2010)* (n 262) 2815–19 (Anthony Robinson).

<sup>265</sup> *Ibid* 2817.

<sup>266</sup> *Ibid*, discussing *Goods Act* (n 50).

tive that does have merit<sup>267</sup> — no evidence of the CISG's intended entire operation in Victoria appears.

(c) *Victoria's 2010 Parliamentary Debates*

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

Victoria's 2010 Legislative Assembly debates comprise seven members' contributions, alongside ten in the Legislative Council.<sup>268</sup> CISG comments are few, and 'evidence zero advancement' of the Victorian Parliament's 1987 CISG analysis.<sup>269</sup>

In the Legislative Assembly, Michael O'Brien (Liberals) noted that 'by necessity [he would] have to be extremely brief in dealing with particular issues'.<sup>270</sup> On the CISG, O'Brien simply referred to the law's 'consolidation'.<sup>271</sup> O'Brien otherwise noted that '[t]hose provisions are quite involved and detailed, but since there is no substantive change involved in the measures, it is probably better to move on in the limited time available to discuss other matters'.<sup>272</sup> Martin Foley (ALP) referred to the Bill as 'amend[ing] the *Goods Act*', without referencing the CISG.<sup>273</sup> David Hodgett (Liberals) described the Bill as amending the *Goods Act* and repealing the *Sale of Goods (Vienna Convention) Act 1987 (Vic)*.<sup>274</sup> Otherwise, in the Legislative Council, Susan Pennicuik (Victorian Greens) inaccurately referenced 'amendments' to Victoria's actually repealed CISG Act.<sup>275</sup> None of these contributions evidence

<sup>267</sup> Kee and Muñoz (n 18) 100.

<sup>268</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 11 August 2010, 3114–24 ('*Vic Parliamentary Debates (11 August 2010)*'). These figures include non-substantive interjections.

<sup>269</sup> Hayward, 'CISG as the Applicable Law' (n 17) 174 [10.17].

<sup>270</sup> *Vic Parliamentary Debates (11 August 2010)* (n 268) 3114 (Michael O'Brien).

<sup>271</sup> *Ibid* 3116.

<sup>272</sup> *Ibid*.

<sup>273</sup> *Ibid* 3122 (Martin Foley).

<sup>274</sup> *Ibid* 3123 (David Hodgett).

<sup>275</sup> Victoria, *Parliamentary Debates*, Legislative Council, 2 September 2010, 4451 (Susan Pennicuik) ('*Vic Parliamentary Debates (2 September 2010)*').

the *CISG*'s intended entire operation in Victoria, despite Victoria's *Playcorp* decision<sup>276</sup> (and its scholarly critique)<sup>277</sup> pre-dating 2010.<sup>278</sup>

Upper House amendments to the Bill necessitating its reconsideration by the Legislative Assembly did not concern the *CISG*,<sup>279</sup> and thus did not generate any further parliamentary consideration of the *Convention*.

## J WA

The *Sale of Goods (Vienna Convention) Act 1986* (WA) is accompanied by second reading speeches and parliamentary debates. Only the Legislative Assembly's speech is considered here, as WA's Legislative Council equivalent is substantially identical.<sup>280</sup>

### 1 WA's Second Reading Speech

Content categories: General,<sup>281</sup> indirect. No views supporting the *CISG*'s piecemeal application were expressed.

The Legislative Assembly's second reading speech was delivered by Keith Wilson (ALP, Minister for Consumer Affairs) on 7 October 1986.<sup>282</sup> Indirect evidence appears via observations that the *CISG* would remove barriers to trade and provide 'uniform rules' for international trade, with the measure being 'timely ... given the difficulties that Australia is facing in its role as a trading nation'.<sup>283</sup> These statements, and the *CISG*'s description as containing 'ground rules for the international sale of goods',<sup>284</sup> presuppose the *CISG*'s entire operation in WA.

<sup>276</sup> See above nn 127–30 and accompanying text.

<sup>277</sup> Spagnolo, 'The Last Outpost' (n 18) 190–1.

<sup>278</sup> Spagnolo, 'Law Wars' (n 50) 629. Cf Zeller, 'The Perfect Tool' (n 111) [2].

<sup>279</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2010, 3650 ('*Vic Parliamentary Debates (14 September 2010)*'); Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2010, 3878–80 ('*Vic Parliamentary Debates (16 September 2010)*').

<sup>280</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 October 1986, 2744–5 (Keith Wilson) ('*WA Parliamentary Debates (7 October 1986)*'). Cf Western Australia, *Parliamentary Debates*, Legislative Council, 11 November 1986, 3942 (Kay Hallahan) ('*WA Legislative Council Parliamentary Debates (11 November 1986)*').

<sup>281</sup> *WA Parliamentary Debates (7 October 1986)* (n 280) 2745 (Keith Wilson).

<sup>282</sup> *Ibid* 2744–5.

<sup>283</sup> *Ibid* 2745.

<sup>284</sup> *Ibid*.

## 2 WA's Parliamentary Debates

Content categories: Indirect. No views supporting the *CISG*'s piecemeal application were expressed.

WA's Legislative Assembly debates comprise two members' contributions: Andrew Mensaros (Liberals)<sup>285</sup> and Keith Wilson.<sup>286</sup> Five members contributed in the Legislative Council: Norman Moore (Liberals),<sup>287</sup> Max Evans (Liberals),<sup>288</sup> Kay Hallahan (ALP),<sup>289</sup> Phillip Pental (Liberals)<sup>290</sup> and John Williams (Liberals).<sup>291</sup> A Legislative Council amendment, correcting the inadvertent omission of an 'Act binds the Crown' clause,<sup>292</sup> necessitated reconsideration of the Bill by the Legislative Assembly, though Hansard merely notes that the amendment was 'agreed to' at that later stage.<sup>293</sup>

Mensaros observed that 'the contents of the Bill ... are really the convention'.<sup>294</sup> Similar observations were made by Moore<sup>295</sup> and Pental.<sup>296</sup> All gently and indirectly evidence the *CISG*'s intended entire operation in WA by emphasising the relative importance of the *CISG*'s text over WA's machinery provisions. Further indirect evidence comprises Hallahan's description of the Bill's 'main purpose [as] to overcome longstanding uncertainty experienced in the international business community over laws which are applicable to international contracts', suggesting the 'lack of understanding and clarity

<sup>285</sup> *WA Legislative Assembly Parliamentary Debates (11 November 1986)* (n 52) 4000–2 (Andrew Mensaros).

<sup>286</sup> *Ibid* 4002 (Keith Wilson).

<sup>287</sup> *WA Parliamentary Debates (19 November 1986)* (n 52) 4407–8 (Norman F Moore); *WA Parliamentary Debates (20 November 1986)* (n 52) 4560–1 (Norman F Moore).

<sup>288</sup> *WA Parliamentary Debates (19 November 1986)* (n 52) 4408–9 (Max Evans).

<sup>289</sup> *Ibid* 4409 (Kay Hallahan); *WA Parliamentary Debates (20 November 1986)* (n 52) 4560–2 (Kay Hallahan).

<sup>290</sup> *WA Parliamentary Debates (20 November 1986)* (n 52) 4561–2 (Phillip G Pental).

<sup>291</sup> *Ibid* 4562 (John Williams). An interjection from Fred McKenzie (ALP): at 4560; is not relevant for present purposes.

<sup>292</sup> *Ibid* 4561 (Kay Hallahan).

<sup>293</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 November 1986, 5088 ('*WA Parliamentary Debates (27 November 1986)*').

<sup>294</sup> *WA Legislative Assembly Parliamentary Debates (11 November 1986)* (n 52) 4001 (Andrew Mensaros).

<sup>295</sup> *WA Parliamentary Debates (19 November 1986)* (n 52) 4408 (Norman F Moore).

<sup>296</sup> *WA Parliamentary Debates (20 November 1986)* (n 52) 4562 (Phillip G Pental).

about [international] contracts of sale is to be sorted out'.<sup>297</sup> Without the *CISG*'s entire operation in WA, this uncertainty cannot be resolved in this way.

### K *The Commonwealth*

Whilst state and territory Acts give the *CISG* primary local effect, supplementary Commonwealth legislation was required to address the *Convention*'s relationship with the *TPA* (now the *ACL*).<sup>298</sup> This limited legislation was necessary as the *CISG* and Australia's consumer laws do not define consumer transactions the same way,<sup>299</sup> making it possible for a sale to be a consumer contract under non-harmonised Australian law but also a non-consumer contract under the *CISG*.<sup>300</sup> The Commonwealth's *CISG* provisions prioritise the *Convention* over the *ACL*'s consumer guarantees<sup>301</sup> and the *TPA*'s prior implied terms.<sup>302</sup> Both cover similar legal ground to the *CISG*'s seller obligations.<sup>303</sup>

Initially, according to s 66A of the *TPA*:

The provisions of the *United Nations Convention on Contracts for the International Sale of Goods*, adopted at Vienna, Austria, on 10 April 1980, prevail over

<sup>297</sup> Ibid 4560 (Kay Hallahan).

<sup>298</sup> French (n 63) 11. See *ACL* (n 60) s 68; *Trade Practices Act 1974* (Cth) s 66A ('*TPA*'), as repealed by *Trade Practices Amendment Act (No 2)* (n 61) sch 1.

<sup>299</sup> Hayward, 'CISG as the Applicable Law' (n 17) 170 [10.06], discussing *CISG* (n 1) art 2(a); Michael Pryles, 'An Assessment of the Vienna Sales Convention' [1989] *Australian Mining and Petroleum Law Association Yearbook* 337, 339. See also Pascal Hachem, 'Article 2 CISG: Sales Excluded from Convention's Scope' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5<sup>th</sup> ed, 2022) 60, 66–7 [17].

<sup>300</sup> This means the exclusion contained in *CISG* (n 1) art 2(a) does not apply: Hayward, 'CISG as the Applicable Law' (n 17) 179–80 [10.31]–[10.32]; Hayward and Perlen (n 17) 153–4; Pryles (n 299) 339; Fairlie (n 50) 40. See also *ACL* (n 60) s 3(1); *TPA* (n 298) ss 4B(1)–(2).

<sup>301</sup> *ACL* (n 60) s 68. For the consumer guarantees, see at pt 3-2 div 1.

<sup>302</sup> *TPA* (n 298) s 66A. For the implied terms, see at pt V div 2.

<sup>303</sup> Other aspects of Australia's consumer law, including its unfair contract terms regime, do not overlap with the *Convention* given the subject matter scope of *CISG* (n 1) art 4: Hayward, 'CISG as the Applicable Law' (n 17) 178 [10.29]. See, eg, *CISG* (n 1) art 35; *ibid* s 71; *ACL* (n 60) s 54.

the provisions of this Division [ie its otherwise mandatory implied terms] to the extent of any inconsistency.

Now, according to s 68 of the *ACL*:

The provisions of the *United Nations Convention on Contracts for the International Sale of Goods*, done at Vienna on 11 April 1980, as amended and in force for Australia from time to time, prevail over the provisions of this Division [ie its otherwise mandatory consumer guarantees] to the extent of any inconsistency.

These inconsistency references repeat ‘in essence’ the state and territory approach.<sup>304</sup> Understanding the *CISG*’s intended Commonwealth operation is of practical importance (despite these provisions’ supplementary character vis-a-vis Australia’s other *CISG* Acts) as the conformity obligations contained in art 35 of the *CISG* are subject to party agreement.<sup>305</sup> On the other hand, the consumer guarantees (and the implied terms before them) are and were not.<sup>306</sup>

### 1 *The TPA s 66A: Enacted 1987*

Section 66A of the *TPA* was inserted into the Act by s 3 and sch 1 of the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth). It was intended to be enacted earlier in 1987 via the almost identically titled (but distinct) *Statute Law (Miscellaneous Provisions) Bill (No 1) 1987* (Cth). That Bill, however, lapsed when an early election was called.<sup>307</sup> Limited legislative histories exist regarding the lapsed Bill and they remain informative. All three types of legislative history under examination here exist for the eventual Act. Only the Senate’s second reading speech for that Act is addressed, as the House of

<sup>304</sup> Zeller, ‘The Perfect Tool’ (n 111) [15].

<sup>305</sup> Pryles (n 299) 339.

<sup>306</sup> *ACL* (n 60) s 64; *TPA* (n 298) s 68; *ibid*. This may be why s 66A of the *TPA* (n 298) was described as ‘a remarkable provision’: Marcus S Jacobs, Katrin Cutbush-Sabine and Philip Bambagiotti, ‘The UN Convention for the International Sale of Goods (CISG) in Australia-To-Date: An Illusive Quest for Global Harmonisation?’ (2002) 17(12) *Mealey’s International Arbitration Report* 24, 27 [4.7].

<sup>307</sup> Commonwealth, *Parliamentary Debates*, Senate, 7 October 1987, 782 (Michael Tate) (*‘Cth Parliamentary Debates (7 October 1987)’*).

Representatives' speech is substantially identical.<sup>308</sup> Only the House of Representatives' second reading speech for the lapsed Bill is considered for the same reason.<sup>309</sup>

(a) *The Commonwealth's 1987 Explanatory Memorandum*

Content categories: Direct (Act), direct (Bill). No views supporting the CISG's piecemeal application were expressed.

The explanatory memorandum of the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth) directly evidences the CISG's intended entire operation at the Commonwealth level vis-a-vis the TPA:

The proposed amendment is required to eliminate overlap and potential conflict between provisions of the Act, which import certain terms into contracts for the sale of goods, and the Vienna Convention, which is being implemented by uniform legislation in the various [s]tates and [t]erritories.<sup>310</sup>

An identically worded passage appears in the lapsed Bill's explanatory memorandum.<sup>311</sup> Both expressly confirm the CISG's intended full priority over the TPA's implied terms.<sup>312</sup>

(b) *The Commonwealth's 1987 Second Reading Speech*

Content categories: None (Act), direct (Bill). No views supporting the CISG's piecemeal application were expressed.

The *Statute Law (Miscellaneous Provisions) Act 1987* (Cth)'s second reading speech, delivered in the Senate by Michael Tate (ALP, Minister for Justice) on 24 September 1987,<sup>313</sup> does not reference the CISG.

<sup>308</sup> Commonwealth, *Parliamentary Debates*, Senate, 24 September 1987, 617–20 (Michael Tate) ('*Cth Parliamentary Debates (24 September 1987)*'). Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1987, 2661–4 (Peter Staples) ('*Cth Parliamentary Debates (25 November 1987)*').

<sup>309</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2302–6 (Lionel Bowen) ('*Cth Parliamentary Debates (30 April 1987)*'). Cf Commonwealth, *Parliamentary Debates*, Senate, 26 May 1987, 2908–11 (Gareth Evans) ('*Cth Parliamentary Debates (26 May 1987)*').

<sup>310</sup> Explanatory Memorandum, *Statute Law (Miscellaneous Provisions) Bill 1987* (Cth) 109.

<sup>311</sup> Explanatory Memorandum, *Statute Law (Miscellaneous Provisions) Bill (No 1) 1987* (Cth) 77.

<sup>312</sup> See TPA (n 298) s 66A.

<sup>313</sup> *Cth Parliamentary Debates (24 September 1987)* (n 308) 617–20 (Michael Tate).

The lapsed Bill's speech, however, delivered in the House of Representatives by Lionel Bowen (ALP, Attorney-General) on 30 April 1987,<sup>314</sup> records the same intention to 'eliminate overlap and possible conflict'<sup>315</sup> referred to above. It therefore also directly evidences the CISG's intended entire operation at the Commonwealth level.

(c) *The Commonwealth's 1987 Parliamentary Debates*

Content categories: None (Act), direct (Bill). No views supporting the CISG's piecemeal application were expressed.

The *Statute Law (Miscellaneous Provisions) Act 1987* (Cth)'s Senate debates comprise seven members' contributions,<sup>316</sup> with ten contributing in the House of Representatives.<sup>317</sup> None address the CISG. House of Representatives amendments required reconsideration in the Senate,<sup>318</sup> though as they did not address the CISG, those subsequent Senate proceedings are irrelevant for present purposes.

House of Representatives debates on the lapsed Bill featured 12 members' contributions.<sup>319</sup> Michael Maher (ALP) identified the intent, referred to above, to 'eliminate the overlap and possible conflict'.<sup>320</sup> Once again, this directly evidences the CISG's intended entire operation at the Commonwealth level.

2 *The ACL s 68: Enacted 2010*

The TPA was transformed in 2010–11. The *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) and *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) transitioned

<sup>314</sup> *Cth Parliamentary Debates (30 April 1987)* (n 309) 2302–6 (Lionel Bowen).

<sup>315</sup> *Ibid* 2305.

<sup>316</sup> *Cth Parliamentary Debates (7 October 1987)* (n 307) 777–86. Two of these contributions were non-substantive interjections.

<sup>317</sup> *Cth Parliamentary Debates (25 November 1987)* (n 308) 2664–7, 2693–706. Three of these contributions were non-substantive interjections.

<sup>318</sup> Commonwealth, *Parliamentary Debates*, Senate, 26 November 1987, 2445 ('*Cth Parliamentary Debates (26 November 1987)*'); Commonwealth, *Parliamentary Debates*, Senate, 10 December 1987, 2877–81 ('*Cth Parliamentary Debates (10 December 1987)*').

<sup>319</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1987, 2913–35 ('*Cth Parliamentary Debates (11 May 1987)*'). One of these contributions was a non-substantive interjection.

<sup>320</sup> *Ibid* 2917 (Michael Maher).



the old regime into the present *Competition and Consumer Act 2010* (Cth), containing in its sch 2 the *ACL*, which applies today.<sup>321</sup> The second of these amendment Acts effected the current *ACL* s 68.<sup>322</sup> All three extrinsic materials categories under examination exist for that Act. Only the House of Representatives' speech is addressed here, as the Senate's is substantially identical.<sup>323</sup> Senate amendments requiring reconsideration by the House of Representatives did not address the *CISG*,<sup>324</sup> rendering those subsequent Senate proceedings presently irrelevant.

(a) *The Commonwealth's 2010 Explanatory Memorandum*

Content categories: None. No views supporting the *CISG*'s piecemeal application were expressed.

The 2010 Commonwealth explanatory memorandum addresses the consumer guarantees across 34 pages, including via 21 illustrative examples.<sup>325</sup> The *CISG* is addressed in just two paragraphs,<sup>326</sup> neither of which evidences the intended scope of operation of s 68 of the *ACL*.

(b) *The Commonwealth's 2010 Second Reading Speech*

Content categories: Indirect. No views supporting the *CISG*'s piecemeal application were expressed.

The House of Representatives' second reading speech was delivered by Craig Emerson (ALP, Minister for Competition Policy and Consumer Affairs) on 17 March 2010.<sup>327</sup> It does not specifically address the *CISG*, but indirectly evidences its intended entire operation at the Commonwealth level by acknowledging that many *ACL* provisions (s 68 being amongst them, though it is not specifically identified) 'are substantially the same as those in

<sup>321</sup> *Casaceli v Natuzzi SpA* (2012) 292 ALR 143, 145 [8] (Jagot J) ('*Casaceli*').

<sup>322</sup> *ACL* (n 60) s 68, as inserted by *Trade Practices Amendment Act (No 2)* (n 61) sch 1.

<sup>323</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2718–24 (Craig Emerson) ('*Cth Parliamentary Debates (17 March 2010)*'). Cf Commonwealth, *Parliamentary Debates*, Senate, 24 June 2010, 4283–8 (Joseph Ludwig) ('*Cth Senate Parliamentary Debates (24 June 2010)*').

<sup>324</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2010, 6621–9 ('*Cth House of Representatives Parliamentary Debates (24 June 2010)*').

<sup>325</sup> Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) ch 7.

<sup>326</sup> *Ibid* 198 [7.87]–[7.88].

<sup>327</sup> *Cth Parliamentary Debates (17 March 2010)* (n 323) 2718–24 (Craig Emerson).

the [TPA].<sup>328</sup> Evidence of the CISG's intended entire operation relating to the TPA s 66A is effectively (indirectly) incorporated by reference here.

(c) *The Commonwealth's 2010 Parliamentary Debates*

Content categories: None. No views supporting the CISG's piecemeal application were expressed.

Nine House of Representatives members addressed the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth),<sup>329</sup> and two did so in the Senate.<sup>330</sup> None of their contributions addressed the CISG.

#### L *Interim Conclusion*

Australia's CISG legislative histories do not contain evidence that the CISG was intended to have piecemeal application in any of Australia's jurisdictions. They therefore do not support the interpretative approach adopted in *Playcorp* and *Aussie Diamond*.<sup>331</sup> Instead, numerous jurisdictions' histories provide general and indirect evidence implying the *Convention's* intended entire operation in Australia. In addition, in the NT and at the Commonwealth level, that intent is directly expressed.<sup>332</sup>

Parts II–III identified that these materials *may* be referred to for the purpose of interpreting Australia's CISG machinery provisions, and this Part confirms their interpretative utility. The question naturally arising, and now addressed in Part V, is: have Australian judges actually ever referenced these materials?

<sup>328</sup> Ibid 2720.

<sup>329</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 2010, 6470–93 ('*Cth Parliamentary Debates (23 June 2010)*').

<sup>330</sup> *Cth Senate Parliamentary Debates (24 June 2010)* (n 323) 4288–96.

<sup>331</sup> See above nn 127–32 and accompanying text.

<sup>332</sup> See, eg, *NT Parliamentary Debates (3 June 1987)* (n 187) 587 (Richard Setter); *Cth Parliamentary Debates (30 April 1987)* (n 309) 2305 (Lionel Bowen).

## V AUSTRALIA'S CISG CASE LAW: CATALOGUED AND EXAMINED

Local and international commentators routinely observe that only a small number of Australian CISG cases exist.<sup>333</sup> As Appendix 2 confirms, the force of this observation is diminishing over time. However, identifying *exactly* how many cases there are is both necessary and challenging for present purposes. There is no official repository; Australian cases refer to the CISG using numerous different labels, and different databases catalogue different judgments. At the time of writing, I understand that 51 Australian CISG cases (as the phrase 'Australian CISG case' is defined below) exist. This tally comprises all cases currently captured by the Pace Law Albert H Kritzer CISG Database ('Pace Database'),<sup>334</sup> plus one additional case<sup>335</sup> out of the 36

<sup>333</sup> Jessica Viven-Wilksch, 'How Long Is Too Long To Determine the Success of a Legal Transplant? International Doctrines and Contract Law in Oceania' in Vito Breda (ed), *Legal Transplants in East Asia and Oceania* (Cambridge University Press, 2019) 132, 146–7; Hayward, 'CISG as the Applicable Law' (n 17) 181 [10.35]; Fairlie (n 50) 40; Zeller, 'The CISG in Australasia' (n 17) 294; Anastasi, Hayward and Brown (n 13) 47; Petrovic (n 138) 84–6; Spagnolo, 'The Last Outpost' (n 18) 159–60; Gary F Bell, 'Harmonisation of Contract Law in Asia: Harmonising Regionally or Adopting Global Harmonisations' [2005] (December) *Singapore Journal of Legal Studies* 362, 371; Nottage (n 138) 817, 835–6; Henning Lutz, 'The CISG and Common Law Courts: Is There Really a Problem?' (2004) 35(3) *Victoria University of Wellington Law Review* 711, 714; Zeller, 'The Perfect Tool' (n 111) [3]; Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper To Explore the Scope for Reforming Australian Contract Law* (Discussion Paper, 2012) 15 [5.4]; Justice James Douglas, 'Australia's Role in UNCITRAL: Specifically Its Implementation of UNCITRAL Conventions and Model Laws' (Speech, UQ Trade Law Forum, 2 December 2016) 4 <<http://www.austlii.edu.au/au/journals/QldJSchol/2016/26.pdf>>, archived at <<https://perma.cc/U8N7-RC79>>; Horrigan, Laryea and Spagnolo (n 25) 9 [1.7]; UNCITRAL: United Nations Commission on International Trade Law, 'Topic 3: The CISG as a Backbone of Transnational Commercial Law' (YouTube, 30 October 2020) 0:35:54–0:36:29 <<https://www.youtube.com/watch?v=GidMVLIO6lg>> ('Topic 3'). See also Peng Guo and Shu Zhang, 'Is the CISG an Appropriate Option for Australian and Chinese Businesses? A Good Faith Perspective' (2019) 23(1) *Vindobona Journal of International Commercial Law and Arbitration* 81, 87; Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG' (Pt I) (2009) 13(1) *Vindobona Journal of International Commercial Law and Arbitration* 135, 143–7, which calculates Australia's (then low) relative case load per million capita and per trillion trade dollar. Informal discussions with Australian lawyers have confirmed to me that there are Australian disputes relating to the CISG (n 1) which have not proceeded to trial: see also Fairlie (n 50) 41.

<sup>334</sup> 'Search Cases in the CISG Database', *Pace Law Albert H Kritzer CISG Database* (Web Page) <<https://iicl.law.pace.edu/cisg/search/cases>>. Free registration is required to access the Pace Database's case law search facilities, which includes searching by country. At the time of writing, 49 individual Australian case entries were identified on the Pace Database, with a 50<sup>th</sup> case being nested under another as a related proceeding: see 'Australia May 27, 2004

recorded on CISG-online.<sup>336</sup> Neither database is inherently authoritative,<sup>337</sup> hence the need to cross reference both and independently check their contents against Australian<sup>338</sup> and other international case law databases (including UNCITRAL's own Case Law on UNCITRAL Texts ('CLOUT') database). These exercises failed to disclose any additional Australian CISG cases, noting in particular that CLOUT records only 15 Australian CISG cases which all otherwise appear on the Pace Database.<sup>339</sup>

Supreme Court (Summit Chemicals Pty Ltd v Vetrotex Espana SA)', *Pace Law Albert H Kritzer CISG Database* (Web Page) <<https://iicl.law.pace.edu/cisg/case/australia-may-27-2004-supreme-court-summit-chemicals-pty-ltd-v-vetrotex-espana-sa>>; *Aqua Technics* (WA) Pty Ltd v Summit Chemicals Pty Ltd [2003] WASC 182 ('*Aqua Technics*').

<sup>335</sup> *Aussie Diamond Appeal* (n 136).

<sup>336</sup> 'Search for Cases', *CISG-Online* (Web Page) <<https://cisg-online.org/search-for-cases/>>, archived at <<https://perma.cc/JAS4-DPDT>>. A further case, in addition to the one referred to in this footnote's accompanying text, appears on CISG-online and does not appear on the Pace Database: '*Pucci Srl v Italian Imported Foods Pty Ltd*', *CISG-Online* (Web Page) <<https://cisg-online.org/search-for-cases?caseId=9744>>, archived at <<https://perma.cc/DM A6-YR8X>>. This case is not considered any further, however, as it is a first instance local court decision referred to in an appeal judgment that is not otherwise itself on the public record. That no published judgment exists is confirmed by searching the NSW case law database: 'Advanced Search', *New South Wales Caselaw* (Web Page) <<https://www.caselaw.nsw.gov.au/search/advanced>>. A request was made to the NSW Local Court Registry to obtain a copy of this judgment in 2021 — that request was acknowledged but was never responded to.

<sup>337</sup> The Pace Database's reputation is long established, including in the Australian context: see Justice James Douglas, 'Arbitration of International Sale of Goods Disputes under the Vienna Convention' (Speech, Institute of Arbitrators and Mediators Australia National Conference, 2006) 2 <<https://archive.sclqld.org.au/judgepub/2007/douglas270506.pdf>>; Lutz (n 333) 714. It must be noted, however, that this database has not necessarily been actively updated with respect to Australia since approximately 2015; thus, this database cannot be assumed to be a comprehensive source.

<sup>338</sup> Lutz (n 333) 728. Prior scholarship identified some Pace Database omissions as of 2020, which are now remedied: Anastasi, Hayward and Brown (n 13) 47 n 293. Pace Database updates effected in late 2022 added previously omitted pre-2020 decisions. On the assumption that the Pace Database is now (save as to the one additional case recorded on CISG-online) complete up to 2020, my own searches of the Lexis Advance, Westlaw AU and AustLII databases have failed to identify any post-2020 Australian CISG cases not currently recorded. The following search terms (exact phrases) were used: 'CISG', 'Vienna Convention', 'Vienna Act', 'Vienna Contract', 'Vienna Sales', 'Sales Convention', 'Sale of Goods Convention', 'UN Sales', 'United Nations Sales', 'Uniform Sales', 'Uniform Contract', 'International Contract', 'International Sales' and 'Done at Vienna'.

<sup>339</sup> 'Case Law on UNCITRAL Texts (CLOUT)', *United Nations Commission on International Trade Law* (Web Page) <<https://www.uncitral.org/clout/index.jsp>>. The UNILEX database records 12 cases, which also all appear on the Pace Database: 'Selected Cases by Country',

Australia's supposedly small *CISG* case load does not make the *Convention* unworthy of local analysis.<sup>340</sup> On the contrary, that case load has grown significantly since its last proper audit in 2009<sup>341</sup> and provides essential context for this Part's purposes: it defines the opportunities that Australian courts have had to consult extrinsic materials in clarifying the *Convention's* extent of operation in Australia. However, this exercise is nuanced, necessitating the classification of Australia's *CISG* cases so that this context is properly understood. As will appear, many of Australia's *CISG* cases are actually of little significance for present purposes.

Australia's 51 *CISG* cases are collated in Appendix 2. Appendix 2 presents these cases in chronological order, identifies each case's internal jurisdiction and provides citations for each in accordance with the *Australian Guide to Legal Citation*:<sup>342</sup> the latter, important for the purposes of Australian audiences, are often missing on the internationally focused Pace Database. Also unique are Appendix 2's case categorisations that (consistent with Part IV's analysis) are coded using a systematic content analysis methodology.<sup>343</sup> Those categorisations are key to this Part's analysis, as they more specifically confine the limits within which Australia's courts *could* have actually considered Australia's *CISG* legislative histories to date. In that regard, it can be noted that Australia's overall tally of 51 *CISG* cases is misleading in the sense that not all of those cases actually apply the *Convention*.<sup>344</sup> Appendix 2 categorises Australia's *CISG* cases as follows:<sup>345</sup>

- cases where the *CISG* was applied;
- cases where the *CISG* was not applied but where it should have been;
- cases where the *CISG* was applied as incidental to other legal questions;

*UNILEX on UNIDROIT Principles & CISG: International Case Law & Bibliography* (Web Page) <[http://unilex.info/cisg/cases/country/25#country\\_Australia](http://unilex.info/cisg/cases/country/25#country_Australia)>, archived at <<https://perma.cc/PD2H-6UGC>>.

<sup>340</sup> Hayward, 'CISG as the Applicable Law' (n 17) 169 [10.03].

<sup>341</sup> Spagnolo, 'The Last Outpost' (n 18) 167–207.

<sup>342</sup> Melbourne University Law Review and Melbourne Journal of International Law, *Australian Guide to Legal Citation* (4<sup>th</sup> rev ed, 2021).

<sup>343</sup> See Salehijam (n 147) 35–7.

<sup>344</sup> Viven-Wilksch (n 333) 147, discussing *Playcorp* (n 29) [235] (Hansen J), and *Aussie Diamond* (n 29) [210] (Murphy J).

<sup>345</sup> This coding scheme builds and expands upon categories of Australian *CISG* cases previously identified in the literature: Hayward, 'CISG as the Applicable Law' (n 17) 177 [10.25].

- cases where the *CISG* was not applied, that are related to other Australian *CISG* cases;<sup>346</sup>
- cases involving choice of law clauses excluding the *CISG*, pursuant to *CISG* art 6;<sup>347</sup>
- cases where the *CISG* was referred to in passing, for other reasons; and
- appeal judgments from cases falling within any other category.

Initially, I proposed to use just one coding category for all *CISG* application cases. However, upon closer analysis, it became apparent that some cases apply the *CISG* to resolve substantive contract law disputes,<sup>348</sup> whilst others do so where the *CISG* intersects with other legal issues: including jurisdictional questions<sup>349</sup> and questions concerning *Corporations Act 2001* (Cth) statutory demands.<sup>350</sup> Whilst all of these cases do apply the *CISG*, the second type of case does so indirectly. Though there is no evidence specifically confirming this point, it stands to reason that courts handling cases that only indirectly apply the *CISG* may be less likely to engage with Australia's machinery provisions, justifying the use of different coding for these two categories of case. This difference is therefore meaningful in understanding the context referred to above.

<sup>346</sup> For example, this category includes cases that consider the enforcement of an arbitral award and where the *CISG* (n 1) had previously been relevant (in related proceedings): see, eg, *Re TCL Airconditioner (Zhongshan) Co Ltd [No 2]* (2019) 369 ALR 192, 194 [10]–[11] (McKerracher J) (*Re TCL Airconditioner*).

<sup>347</sup> Though *CISG* (n 1) art 6 confers upon parties the power to 'exclude the application of this Convention', it is noted (for the purposes of utmost clarity) that a purported exclusion is not pursuant to that provision where (as is the case in some Australian *CISG* cases) the law of a non-contracting State is chosen, meaning that the *CISG* (n 1) would not have applied in any event. See, eg, Lisa Spagnolo, *Exclusion of the CISG under Article 6* (CISG Advisory Council Opinion No 16, 30 May 2014) 2 [1] (emphasis added) (*Exclusion of the CISG*), which states that '[w]here the *CISG* is applicable according to Arts 1–3 *CISG*, the principle of party autonomy expressed in Art 6 *CISG* permits parties to agree to exclude its application'. Duly noting this disclaimer, exclusions are described as being 'pursuant to' *CISG* (n 1) art 6 in this footnote's accompanying text in order to identify the source of the parties' power to exclude in the usual case.

<sup>348</sup> See, eg, *Roder* (n 42) 221–31 (von Doussa J).

<sup>349</sup> See, eg, *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* [2012] VSC 548, [57]–[58] (Daly AsJ) (*Castel VSC*).

<sup>350</sup> See, eg, *Fletcher v Capstone Aluminium SDN BHD; Re McLay Industries Pty Ltd (in liq)* [2016] FCA 1459, [36] (Greenwood J) (*Fletcher*), discussing *Corporations Act 2001* (Cth).

Before addressing Appendix 2, several further clarifications are required regarding my usage of the term 'Australian CISG cases'. First, Australian parties appear in CISG cases before foreign courts and arbitral tribunals.<sup>351</sup> These disputes are not captured in Appendix 2. Since such cases are unlikely to apply Australia's machinery provisions, they need not be considered further. Secondly, as my coding scheme implies, a low threshold determines whether or not cases are considered 'Australian CISG cases' for present purposes. Any case referring to or even just relating to the CISG in any way is included. Thirdly, cases coded as excluding the CISG may not have otherwise actually applied the *Convention*. For example, arbitral award enforcement cases might cite choice of law clauses excluding the CISG that were contained in the arbitration's underlying contract, for contextual purposes only.<sup>352</sup> Fourthly, cases are coded as applying the CISG where they recognise it as applicable and attempt to apply its provisions, even if wrongly, according to the *Convention's* international understandings.<sup>353</sup> Finally, cases that do not apply the CISG but that should have done so include cases that mention or recognise the *Convention's* relevance in the abstract, but fail to apply its provisions in substance.<sup>354</sup>

<sup>351</sup> Spagnolo, 'The Last Outpost' (n 18) 148; Horrigan, Laryea and Spagnolo (n 25) 9 [1.7]; 'Topic 3' (n 333) 0:36:29–0:36:46. CISG-online records 81 cases worldwide involving Australian parties: 'CISG by Jurisdiction', *CISG-Online* (Web Page) <<https://cisg-online.org/CISG-by-jurisdiction>>. See, eg, Yan Shang, 'Promopen Australia Pty Ltd v Fuyang Import and Export Co Ltd' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2023) vol 2, 77, 77; Charles Caishun Guo, Wenjing Lin and Charlie Xiao-chuan Weng, 'XXX (Beijing) International Trade Co, Ltd v XX Co, Ltd' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2023) vol 2, 129, 129; Wenjing An, 'Shanghai Donglin International Trade Co Ltd v Johnson Trading Australia Pty Ltd' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 269, 269.

<sup>352</sup> See, eg, *Rizhao Steel* (n 85) 128 [164] (Murphy JA).

<sup>353</sup> See generally Zeller, 'The Duty To Mitigate' (n 141) 205; Warren Swain, 'Contract Codification in Australia: Is It Necessary, Desirable and Possible?' (2014) 36(1) *Sydney Law Review* 131, 137; Zeller, 'In or out of the CISG' (n 110) 412. This includes case law evidencing the homeward trend: see generally Zeller, 'The CISG and the Common Law' (n 18) 59, 61–2, 71–5; Bruno Zeller, 'Analysis of the Cultural Homeward Trend in International Sales Law' (2021) 10(1) *Victoria University Law and Justice Journal* 131, 131–5; Bruno Zeller, 'The Challenge of a Uniform Application of the CISG: Common Problems and Their Solutions' (2006) 3 *Macquarie Journal of Business Law* 309, 311–14.

<sup>354</sup> See, eg, *Luo v Windy Hills Australian Game Meats Pty [No 3]* [2019] NSWSC 862, [77] (Stevenson J) ('Luo').

A careful review of all Australian *CISG* cases confirms that none have ever referred to Australia's *CISG* legislative histories, for any purpose. From the outset, this can be seen as a missed opportunity to resolve Part III's interpretative problem. Additional conclusions can be drawn, however, by contextualising this missed opportunity against Appendix 2's coding.

First, Australia's machinery provisions affect the *CISG*'s local *application*. Thus, only cases involving the *CISG*'s direct or indirect *application* could possibly have referred to Australia's *CISG* legislative histories for the purpose of understanding those machinery provisions.<sup>355</sup> Cases that should have applied the *CISG*, but did not, might have benefited from consulting those histories. However, by definition, they could not have done so. Thus, only 21 of Australia's 51 *CISG* cases (equating to only 18 unique disputes, accounting for appeals) could possibly have referred to Australia's *CISG* legislative histories (for the purposes envisaged by this article). Twenty-one missed opportunities are still missed opportunities, but are far fewer than the 51 one might initially presume.

Secondly, *Playcorp* and *Aussie Diamond* are Victorian and Western Australian cases respectively.<sup>356</sup> Of Australia's nine direct application cases, five are Commonwealth, two are from Queensland, and one each are from WA and NSW. Of Australia's 12 indirect application cases, three are Commonwealth, three each are from Victoria and WA, two are from NSW and one is from SA. Victoria and WA, having three and four application cases respectively, interestingly emerge as relatively experienced Australian *CISG* jurisdictions. At the same time, no Australian *CISG* cases have come from the NT and none address the Commonwealth's consumer law-related provisions.<sup>357</sup> Since Australia's *CISG* Acts, being mirror legislation,<sup>358</sup> can be read

<sup>355</sup> This is a slight analytic simplification as, strictly speaking, the *CISG* (n 1) governs its own exclusion: at art 6; Pascal Hachem, 'Article 6 CISG: Exclusion or Derogation by the Parties (Party Autonomy)' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5<sup>th</sup> ed, 2022) 116, 129 [25]; Spagnolo, *Exclusion of the CISG* (n 347) 2 [2]. Even so, it remains inappropriate to add the 11 cases Appendix 2 identifies as involving *CISG* (n 1) exclusions to this total. As noted above, not all of those cases resolved substantive sales law disputes arising under the contracts containing those exclusions. In addition, where the *Convention* is excluded, the practical necessity to interpret Australia's machinery provisions disappears in any event.

<sup>356</sup> *Playcorp* (n 29); *Aussie Diamond* (n 29).

<sup>357</sup> See below Appendix 2. See also Hayward, 'CISG as the Applicable Law' (n 17) 179 [10.30]. This remains the case at the time of writing.



on standalone bases,<sup>359</sup> it is unlikely that Victorian or Western Australian courts would refer to NT or Commonwealth legislative histories directly evidencing the *CISG*'s intended entire operation in those jurisdictions (even though national uniform legislation should be interpreted consistently).<sup>360</sup>

Finally, and interestingly, it appears that Australia's *CISG* cases are perceived as having limited precedential value by the profession at large, despite regular cross-citation amongst them.<sup>361</sup> *Playcorp* and *Aussie Diamond* sit amongst 32 unreported Australian *CISG* cases (that number being over 62% of Australia's total);<sup>362</sup> this may speak to their low perceived value in developing the law.<sup>363</sup> In addition, no Australian *CISG* case applying the *Convention* has yet reached the High Court of Australia.<sup>364</sup> The absence of 'an authorita-

<sup>358</sup> See generally Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) 31(1) *Bond Law Review* 81, 108–9.

<sup>359</sup> SydneyLawSchool (n 83) 0:19:55–0:20:08, 0:43:45–0:44:05.

<sup>360</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Pyramid Building Society (in liq) v Terry* (1997) 189 CLR 176, 207 (Kirby J, Toohey J agreeing at 181); *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ), quoted in *Enterra Pty Ltd v ADI Ltd* (2002) 55 NSWLR 521, 522 [5] (Einstein J). See also Hill, *National Uniform Legislation* (n 28) 145.

<sup>361</sup> See, eg, *Aussie Diamond* (n 29) [210] (Murphy J), citing *Playcorp* (n 29) [235]–[245] (Hansen J).

<sup>362</sup> See below Appendix 2.

<sup>363</sup> Regarding the criteria for reporting judgments in Queensland: see, eg, 'Reporting Process', *Incorporated Council of Law Reporting for the State of Queensland* (Web Page) <<https://www.queenslandreports.com.au/reports/reporting-process/>>, archived at <<https://perma.cc/C3FV-MMDD>>. See also Carolyn Ford, 'Salute to Law Reporters' (2020) 96(11) *Law Institute Journal* 79, 80.

<sup>364</sup> Zeller, 'The CISG and the Common Law' (n 18) 59; Petrovic (n 138) 89. This is still true today: see below Appendix 2. The only High Court of Australia case referring to the *CISG* (n 1) at all did so only in a dissenting judgment, and only for the purposes of its comparison with non-harmonised Australian law: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 156–7 [108] (Kirby J) ('*Koompahtoo*'). Otherwise, the *CISG* (n 1) was referred to in passing in argument in the High Court of Australia in 1995 in litigation unconnected with the *CISG* (n 1): Transcript of Proceedings, *South Australia v Commonwealth* [1995] HCATrans 301; Transcript of Proceedings, *Victoria v Commonwealth* [1995] HCATrans 302; Transcript of Proceedings, *Western Australia v Commonwealth* [1995] HCATrans 303. Whilst Castel Electronics Pty Ltd sought to appeal the Full Court of the Federal Court of Australia's decision in its dispute with Toshiba Singapore Pte Ltd, the High Court of Australia refused special leave, given the appeal's insufficient prospects of success: *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] HCASL 208, [5] (Gummow and Kiefel JJ). Even if that intended High Court

tive, appellate level judgment clearly explaining the *CISG*'s interaction with Australian domestic law', identified in 2010 as a 'missing piece' of the metaphorical Australian *CISG* jigsaw puzzle,<sup>365</sup> thus remains to this day.

## VI CONCLUSIONS: LESSONS LEARNED, AND THEIR IMPLICATIONS FOR FUTURE CASE LAW AND LAW REFORM INITIATIVES IN AUSTRALIA AND ABROAD

Following Australia's accession to the *CISG*, the *Convention* became part of Australian law.<sup>366</sup> In line with *CISG* art 7(1), the *Convention*'s *travaux préparatoires* (amongst other sources) inform the interpretation of its own provisions.<sup>367</sup> However, the *CISG*'s local enactment also generated Australian *CISG* legislative histories: explanatory memoranda, second reading speeches and parliamentary debates.<sup>368</sup> These local extrinsic materials may inform the interpretation of Australia's machinery provisions, as those provisions exist outside of the *Convention* itself and are thus matters of 'local legislative judgment'.<sup>369</sup>

Australian law determines the *CISG*'s extent of application in Australia, even if that application is incorrect according to the *Convention*'s international understandings.<sup>370</sup> In that regard, as Part III noted, a statutory interpretation problem arises in Australian jurisdictions. Do Australia's machinery provisions establish the *CISG*'s entire application in each Australian jurisdiction? Or does the *Convention* apply on a provision-by-provision basis, only where its provisions are inconsistent with non-harmonised Australian

appeal had been allowed to proceed, it apparently would have focused on factual (rather than legal) issues framed as affecting the provision of natural justice: at [3]–[4]. As one former Chief Justice of the High Court of Australia has explained, 'it is the need to clarify the law — to formulate the correct principle — that is the decisive consideration in the grant of special leave': Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 786.

<sup>365</sup> Hayward, 'The Jigsaw Puzzle Missing a Piece' (n 17) 222. See also Petrovic (n 138) 89; Bruno Zeller, 'The Vienna Convention 11 Years On' (1999) 73(3) *Law Institute Journal* 72, 73.

<sup>366</sup> See above nn 40–2 and accompanying text.

<sup>367</sup> See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–2.

<sup>368</sup> See below Appendix 1.

<sup>369</sup> Anastasi, Hayward and Brown (n 13) 51.

<sup>370</sup> See *CISG* (n 1) art 7(1).

law? As noted in Part II, Australia's extrinsic materials rules help ascertain legislative intent. Australia's *CISG* legislative histories provide ample evidence of the *Convention's* intended entire operation, which may inform the interpretation of Australia's machinery provisions. Australian courts' failure to consult these materials to date represents a missed opportunity to resolve Part III's interpretative problem in a principled way, and to correct the problematic piecemeal interpretation in *Playcorp* and *Aussie Diamond* in the process.<sup>371</sup>

Despite this missed opportunity, my research lays the groundwork for future Australian *CISG* cases to apply the *Convention* to its full extent. My analysis shows this approach to be correct from both Australian and international perspectives. Future Australian courts addressing the *CISG* have the discretion to consult Australia's *CISG* legislative histories when interpreting Australia's machinery provisions. In exercising that discretion, they must weigh the 'advantage' of doing so against 'the need to avoid prolonging legal ... proceedings'.<sup>372</sup> My research removes any practical inconvenience that may have previously existed in collating and analysing Australia's *CISG* legislative histories. A strong case can therefore be made for referring to those histories in future litigation. This is especially so given the broader commercial and public international law issues also at play, addressed in Parts I and III. Naturally, my research is limited by its focus on one statutory interpretation rule. This was a necessary concession in the context of an article. It may be that other statutory interpretation rules support the same conclusion:<sup>373</sup> an interesting question left open for future study.

My research has implications for future Australian law reform, as well as litigation. Scholarship has recommended various reforms to Australia's *CISG* Acts, including repealing their inconsistency provisions and adopting New

<sup>371</sup> See above nn 127–32 and accompanying text.

<sup>372</sup> See, eg, *AIA (Cth)* (n 91) s 15AB(3)(b).

<sup>373</sup> For example, the preamble to the *Sale of Goods (Vienna Convention) Act (Vic)* (n 59) referred to it being 'agreed' (amongst the Australian jurisdictions) to give the *CISG* (n 1) 'the force of law', without any reference to an inconsistency qualification. This preamble could also be used as an aid in understanding the Victorian Parliament's legislative intent at that time: *Wacando v Commonwealth* (1981) 148 CLR 1, 15–16 (Gibbs CJ), 23 (Mason J); *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 451 (Griffith CJ), 458–9 (O'Connor J). See generally Pearce, *Statutory Interpretation* (n 76) 191–2 [4.62].

Zealand's legislative model in their place.<sup>374</sup> That model, avoiding reference to inconsistency, clearly displaces New Zealand's non-harmonised law to the *CISG's* subject matter extent.<sup>375</sup> It also correlates with comparatively more internationalist case law in that jurisdiction.<sup>376</sup> My research confirms that this proposal is consistent with Australia's original parliamentary intentions. On the other hand, should other internal jurisdictions follow Victoria's lead and fold their existing *CISG* Acts into their sale of goods Acts, it would be useful for those future amendments' own legislative histories to emphasise the *CISG's* intended entire operation in each relevant jurisdiction. This would have utility even if (as in Victoria) the machinery provisions themselves escape 'any critical analysis'.<sup>377</sup> Though preparing extrinsic materials is challenging,<sup>378</sup> existing NT and Commonwealth legislative histories prove this can be done.

My analysis has implications for future international legislative initiatives too. Though the *CISG* currently has 95 contracting States, new States continue to join,<sup>379</sup> and existing contracting States (outside of Australia) might also feel the need to amend or re-enact their implementing legislation

<sup>374</sup> Hayward, 'CISG as the Applicable Law' (n 17) 186–7 [10.48], discussing *Contract and Commercial Law Act 2017* (NZ) s 205 ('*Contract and Commercial Law Act*'); Anastasi, Hayward and Brown (n 13) 51–2. See also Nottage (n 138) 817, 841, 844; Horrigan, Laryea and Spagnolo (n 25) 26 [6.6], 32 [8.2.1].

<sup>375</sup> Kellie Ewing, 'The United Nations Convention on the International Sale of Goods: What Are New Zealand Traders Missing out on?' (2008) 1(3) *New Zealand Law Students' Journal* 431, 433.

<sup>376</sup> See, eg, *Smallmon v Transport Sales Ltd* (High Court of New Zealand, French J, 30 July 2010) [88], affd [2012] 2 NZLR 109, 121 [39], [41] (Stevens J for the Court). See also Zeller, 'The CISG and the Common Law' (n 18) 75–6; Anastasi, Hayward and Brown (n 13) 45–6; Zeller and Andersen (n 36) 17–18; Zeller, 'In or out of the CISG' (n 110) 413–14.

<sup>377</sup> Hayward, 'CISG as the Applicable Law' (n 17) 173 [10.17], discussing Explanatory Memorandum, Consumer Affairs Legislation (n 263) 15–17.

<sup>378</sup> Hilary Penfold, 'Legislative Drafting and Statutory Interpretation' (2006) 7(4) *Judicial Review* 471, 478–81.

<sup>379</sup> 'Topic 3' (n 333) 0:14:42–0:15:50. See also Spagnolo, *CISG Implementation* (n 35) 49–50; Angelo Chianale, 'The CISG as a Model Law: A Comparative Law Approach' [2016] (1) *Singapore Journal of Legal Studies* 29, 33, 42. It has been argued that Pakistan should join the community of *CISG* (n 1) contracting States: Bruno Zeller and Sarmad Ali, 'Should Pakistan Adopt the United Nations Convention on Contracts for the International Sale of Goods?' (2017) 7(1) *Victoria University Law and Justice Journal* 67, 67–8. Saudi Arabia is expected to soon become the 96<sup>th</sup> contracting State of the *CISG* (n 1): see above n 6.

from time to time.<sup>380</sup> With Australia's legislation continuing to constitute an international model,<sup>381</sup> for better or worse, other jurisdictions can learn from Australia's *CISG* experience.

The recent extension of the *CISG* to the Hong Kong Special Administrative Region ('SAR') of the People's Republic of China is a topical example.<sup>382</sup> Though some uncertainty previously existed as to the *CISG*'s operation in Hong Kong,<sup>383</sup> legislation now confirms that fact,<sup>384</sup> and Queensland's *CISG* Act inspired its form.<sup>385</sup> Australian-style force of law and inconsistency

<sup>380</sup> See, eg, *Sale of Goods (United Nations Convention) Act 1994* (NZ), as repealed by *Contract and Commercial Law Act* (n 374) s 345(1)(j). This was later superseded by the *Contract and Commercial Law Act* (n 374) ss 202–6. Notably, force of law and inconsistency provisions exist in Singapore and Canada's relatively longstanding *CISG* Acts: *Sale of Goods (United Nations Convention) Act 1995* (Singapore, 2020 rev ed) ss 3–4 ('Singapore Act'); *International Sale of Goods Contracts Convention Act*, SC 1991, c 13, ss 4, 6 ('Canada Act').

<sup>381</sup> Department of Justice of Hong Kong, *Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region* (Consultation Paper, March 2021) 4 [11] n 15 ('Proposed Application Report') <<https://www.legco.gov.hk/yr20-21/english/panels/ajls/papers/ajls20210322cb4-648-3-e.pdf>>, archived at <<https://perma.cc/48ZN-TV33>>; *Sale of Goods (United Nations Convention) Ordinance* (Hong Kong) cap 641, ss 1–5, sch ('Hong Kong Ordinance'); Muna Ndulo, *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Explanatory Documentation Prepared for Commonwealth Jurisdictions* (Commonwealth Secretariat, 1991) 36–8.

<sup>382</sup> 'Chapter X: CISG' (n 6); *Hong Kong Ordinance* (n 381).

<sup>383</sup> See generally Spagnolo, *CISG Implementation* (n 35) 55; Xiaojun Chen, 'Dahua Umbrella (HK) Co, Ltd v Lee In Hwan' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2023) vol 2, 277, 280–1; Xiaojun Chen, 'Possehl (HK) Ltd v China Metals and Minerals Import and Export (Shenzhen) Corporation' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG)* (Springer, 2022) vol 1, 397, 400–1; Bruno Zeller, 'Facilitating Regional Economic Integration: ASEAN, ATIGA and the CISG' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2<sup>nd</sup> Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011) 255, 258–9; Ulrich G Schroeter, 'The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods' (2004) 16(2) *Pace International Law Review* 307, 309; 'Topic 3' (n 333) 0:13:46–0:14:42, 1:28:58–1:31:44.

<sup>384</sup> *Hong Kong Ordinance* (n 381).

<sup>385</sup> *Proposed Application Report* (n 381) 4 [11] n 15. The *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) was cited alongside the *Singapore Act* (n 380) and *Canada Act* (n 380), both of which also employ force of law and inconsistency provisions: *Singapore Act* (n 380) ss 3–4; *Canada Act* (n 380) ss 4, 6. See also *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) ss 5–6.

provisions appear in Hong Kong's *CISG* Act.<sup>386</sup> Other than confirming a link with Queensland's *CISG* Act, Hong Kong's explanatory memorandum and consultation materials do not clarify those provisions' intended interaction.<sup>387</sup> My research provides a model for moving beyond those sources and considering other relevant extrinsic materials, should the interaction of Hong Kong's force of law and inconsistency provisions ever be tested in court.

Sticking with this Hong Kong example,<sup>388</sup> to the extent that its law permits reference to extrinsic materials for statutory interpretation purposes,<sup>389</sup> its courts might refer to the Hong Kong Bar Association's *CISG* consultation submission.<sup>390</sup> That submission cautioned against applying a *CISG* art 95 reservation to the Hong Kong SAR as it 'would lead to a less expansive application of the *Convention* ... and that would not be in line with the stated aims of applying the *Convention* in Hong Kong in the first place'.<sup>391</sup> Hong Kong's courts might also refer to The Law Society of Hong Kong's consulta-

<sup>386</sup> *Hong Kong Ordinance* (n 381) ss 4–5. Cf *Sale of Goods (Vienna Convention) Act (Qld)* (n 62) ss 5–6.

<sup>387</sup> See, eg, Explanatory Memorandum, Sale of Goods (United Nations Convention) Bill (Hong Kong) [6]–[7]; Department of Justice of Hong Kong, *Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region* (Consultation Paper, 2020) 179 [5]–[6] <<https://www.gov.hk/en/residents/government/publication/consultation/docs/2020/CISG.pdf>>, archived at <<https://perma.cc/VE3V-8SLL>>.

<sup>388</sup> For clarity, Hong Kong is not itself a *CISG* (n 1) contracting State. Hong Kong is an SAR of the People's Republic of China, which is a contracting State: see 'Chapter X: *CISG*' (n 6).

<sup>389</sup> Extrinsic materials might be consulted via Hong Kong's '[g]eneral principles of interpretation', pursuant to which '[a]n Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit': *Interpretation and General Clauses Ordinance* (Hong Kong) cap 1, s 19. See also Department of Justice of Hong Kong, 'Interpretation and General Clauses Ordinance (Chapter 1): Interpretation and General Clauses (Amendment) Bill 1999' (Legislative Council Brief No LP 5019/6, February 1999) 2 [6], 3 [11], [13] <[https://www.legco.gov.hk/yr98-99/english/bc/bc69/general/52\\_brf.pdf](https://www.legco.gov.hk/yr98-99/english/bc/bc69/general/52_brf.pdf)>, archived at <<https://perma.cc/D3XD-PXRZ>>; Law Reform Commission of Hong Kong, *Extrinsic Materials as an Aid to Statutory Interpretation* (Report, March 1997) 169–71 [9.57]–[9.63] <<https://www.hkreform.gov.hk/en/docs/rstatutory-e.pdf>>, archived at <<https://perma.cc/Q7FN-PB6N>>.

<sup>390</sup> Hong Kong Bar Association, *Consultation Paper on the Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region* (Submissions, 3 August 2020) <[https://www.hkba.org/uploads/DOJ%20-%20Proposed%20application%20of%20the%20United%20Nations%20Convention%20for%20Intl%20Sales%20of%20Goods%20to%20HKSAR%20\(3%20Aug%202020\).pdf](https://www.hkba.org/uploads/DOJ%20-%20Proposed%20application%20of%20the%20United%20Nations%20Convention%20for%20Intl%20Sales%20of%20Goods%20to%20HKSAR%20(3%20Aug%202020).pdf)>.

<sup>391</sup> *Ibid* 6 [27].

tion submission, noting that 'where the *CISG* is applicable, it will prevail over domestic law unless such issues are not determinable by the *CISG* provisions'.<sup>392</sup> These materials evidence an understanding, at least amongst Hong Kong's legal community at large, that the *CISG* applies in the Hong Kong SAR to its full extent. So far as the Hong Kong Legislative Council's understanding is concerned, analysis of its Hansard<sup>393</sup> is beyond the scope of this article, though this too would be a productive point of future study.

In conclusion, and returning to the 'familiar incantation'<sup>394</sup> of text, context, and purpose underpinning statutory interpretation in Australia, Australia's *CISG* legislative histories can (and should) assist Australian courts in understanding Australian parliaments' intentions to apply the *CISG* to its full extent. Whilst the *CISG*'s text is subject to its interpretative rules in art 7(1), Australia's machinery provisions — being genuinely local legislation — are subject to regular Australian statutory interpretation rules instead. Those rules support reference to extrinsic materials where, as is the case here, they can assist in resolving legislative ambiguities. Taking this approach is highly practical. My research exposes new flaws in *Playcorp* and *Aussie Diamond*'s reasoning, stands to affect the conduct of trade, and clarifies that Australia did intend to (and did actually) legislate consistently with international law when adopting the *CISG* (as it is presumed to do).

The *CISG* is 'truly a law for merchants'.<sup>395</sup> Empirical evidence suggests that its trade facilitation purposes are undercut where its application is affected by local peculiarities.<sup>396</sup> Merchants should not have to second guess the *CISG*'s application in contracting States.<sup>397</sup> My research confirms they

<sup>392</sup> The Law Society of Hong Kong, *Consultation Paper on the Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region* (Submissions, 27 October 2020) 3 [7] <[https://www.hklawsoc.org.hk/-/media/hkls/pub\\_e/news/submissions/20201027.pdf](https://www.hklawsoc.org.hk/-/media/hkls/pub_e/news/submissions/20201027.pdf)>, archived at <<https://perma.cc/E988-TNHZ>>. The submission refers to the concept of inconsistency in a way that does not diminish this prior observation: at 4 [11].

<sup>393</sup> See generally Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, 'Database on Official Record of Proceedings', *Library* (Web Page, 2024) <<https://app.legco.gov.hk/HansardDB/english/Search.aspx>>.

<sup>394</sup> Michael Douglas, 'Choice of Law' (n 75) 11.

<sup>395</sup> Viven-Wilksch (n 333) 138. See also Troy Keily and Benjamin Hayward, 'Good News for Japanese Trade' (2010) 84(6) *Law Institute Journal* 48, 48; Nottage (n 138) 827–30.

<sup>396</sup> Moser (n 16) 72–3.

<sup>397</sup> Just as they should not need to second guess the application of the *New York Convention* (n 9) in the (related) international commercial arbitration space: see Albert Jan van den Berg

need not in Australia. This confirmation will help better secure the CISG's applied uniformity in this jurisdiction. Though such uniformity is not itself 'a panacea',<sup>398</sup> it supports the CISG's trade facilitation purposes.<sup>399</sup> Particularly in an era characterised by the potential for COVID-19 related international sales law disputes,<sup>400</sup> my research will promote the CISG's capacity to benefit the merchants, lawyers and other trade stakeholders it seeks to serve.

(ed), *Yearbook Commercial Arbitration: Volume XLII* (Wolters Kluwer, 2017) 526, 528, discussing *Fluor Transworld Services Inc v Petrixo Oil* (Court of Cassation of Dubai, Appeal No 384 of 2016, 19 June 2016), *Fluor Transworld Services Inc v Petrixo Oil* (Court of Appeal of Dubai, Appeal No 52 of 2016, 28 September 2016). For the profession's response to these proceedings' initial holding that the United Kingdom was not a contracting State of the *New York Convention* (n 9), and the Court of Cassation's correction of that error, respectively, see Gordon Blanke, 'Dubai Court of Appeal Questions UK NYC Membership: Investors Keep Calm ... and Carry On!', *Kluwer Arbitration Blog* (Blog Post, 6 May 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/05/06/dubai-court-of-appeal-questions-uk-nyc-membership-investors-keep-calm-and-carry-on/>>, archived at <<https://perma.cc/7RZR-DLXS>>; Gordon Blanke, 'Back on Track: Dubai Court of Cassation Affirms Enforceability of UK Award under NYC', *Kluwer Arbitration Blog* (Blog Post, 1 August 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/08/01/back-track-dubai-court-cassation-affirms-enforceability-uk-award-nyc/>>, archived at <<https://perma.cc/A7EX-VU25>>.

<sup>398</sup> Hill, 'Art of the Impossible' (n 146) 351. See also Goldring (n 139) 12.

<sup>399</sup> CISG (n 1) Preamble para 3.

<sup>400</sup> See generally Lok Kan So, Poomintr Sooksripaisarnkit and Sai Ramani Garimella, 'COVID-19 in the Context of the CISG: Reconsidering the Concept of Hardship and Force Majeure' in Zlatan Meškić et al (eds), *Balkan Yearbook of European and International Law 2020* (Springer, 2021) 105, 105–6; Laura Maria Franciosi, 'The Effects of COVID-19 on International Contracts: A Comparative Overview' (2020) 51(3) *Victoria University of Wellington Law Review* 413, 414; Lincoln (n 59).



VII APPENDIX 1: AUSTRALIA'S CISG LEGISLATIVE HISTORIES BY JURISDICTION AND TYPE

Explanatory memorandum	Second reading speech	Parliamentary debates
ACT		
Explanatory Statement, <i>Sale of Goods (Vienna Convention) Ordinance 1987</i> (ACT)	None <sup>401</sup>	None <sup>402</sup>
Norfolk Island		
Unknown <sup>403</sup>	Unknown	Unknown
NSW		
Explanatory Note, <i>Sale of Goods (Vienna Convention)</i>	Legislative Assembly: • 23 October 1986 <sup>404</sup>	Legislative Assembly: • First reading: 23

<sup>401</sup> No second reading speech exists with respect to the ACT's CISG legislation as it was initially passed as an ordinance (delegated legislation passed by the Governor-General) before self-government in the territory: *Seat of Government (Administration) Act 1910* (Cth) s 12; 'How Laws Are Made', *Legislative Assembly for the Australian Capital Territory* (Web Page) <<https://www.parliament.act.gov.au/visit-and-learn/resources/factsheets/how-laws-are-made>>, archived at <<https://perma.cc/Q26Q-JKG3>>. Correspondence with the Office of the Official Secretary to the Governor-General in 2021 confirmed that no materials of this nature were held by that office.

<sup>402</sup> No parliamentary debates exist with respect to the ACT's CISG legislation, for the same reasons previously identified: see above n 401.

<sup>403</sup> I have been unable to identify whether or not any Norfolk Island CISG legislative histories exist, and if they do, whether they remain accessible today. Norfolk Island's website contains incomplete scans of its historic Legislative Assembly minutes and Hansard: 'Norfolk Island Legislative Assembly: Minutes', *Norfolk Island Regional Council* (Web Page) <<https://norfolkisland.gov.nf/historical-information/norfolk-island-legislative-assembly-minutes>>, archived at <<https://perma.cc/U8YG-JC58>>; 'Legislative Assembly Hansards', *Norfolk Island Regional Council* (Web Page) <<https://norfolkisland.gov.nf/historical-information/legislative-assembly-hansards>>, archived at <<https://perma.cc/BTD2-PDRF>>. Records relating to the fourth Legislative Assembly, which may pertain to the *Sale of Goods (Vienna Convention) Act (Norfolk Island)* (n 62), are missing. Communications with the Norfolk Island Library in 2021, seeking to confirm the existence and accessibility of these materials, failed to yield definitive answers.

<sup>404</sup> *NSW Parliamentary Debates (23 October 1986)* (n 160) 5374–6 (Terence Sheahan).

Explanatory memorandum	Second reading speech	Parliamentary debates
Bill 1986 (NSW)	Legislative Council: <ul style="list-style-type: none"> <li>• 19 November 1986<sup>405</sup></li> </ul>	October 1986 <sup>406</sup> <ul style="list-style-type: none"> <li>• Debates: 11 November 1986<sup>407</sup></li> <li>• Third reading: 11 November 1986<sup>408</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• First reading: 12 November 1986<sup>409</sup></li> <li>• Debates: 19 November 1986<sup>410</sup></li> <li>• Third reading: 20 November 1986<sup>411</sup></li> </ul>
NT		
None <sup>412</sup>	29 April 1987 <sup>413</sup>	First reading: 29 April 1987 <sup>414</sup> <ul style="list-style-type: none"> <li>Debates: 3 June 1987<sup>415</sup></li> <li>Third reading: 3 June 1987<sup>416</sup></li> </ul>

<sup>405</sup> NSW *Parliamentary Debates* (19 November 1986) (n 52) 6672–4 (Jack R Hallam).

<sup>406</sup> NSW *Parliamentary Debates* (23 October 1986) (n 160) 5374.

<sup>407</sup> NSW *Parliamentary Debates* (11 November 1986) (n 170) 6116.

<sup>408</sup> *Ibid.*

<sup>409</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 1986, 6125.

<sup>410</sup> NSW *Parliamentary Debates* (19 November 1986) (n 52) 6674–9.

<sup>411</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1986, 6859.

<sup>412</sup> Explanatory statements for NT Bills have been generated since 2005: O’Neill (n 210) 23.

<sup>413</sup> NT *Parliamentary Debates* (29 April 1987) (n 182) 91–2 (Daryl Manzie).

<sup>414</sup> *Ibid.* 91.

<sup>415</sup> NT *Parliamentary Debates* (3 June 1987) (n 187) 585–8.

<sup>416</sup> *Ibid.* 588.

Explanatory memorandum	Second reading speech	Parliamentary debates
Queensland		
None <sup>417</sup>	19 August 1986 <sup>418</sup>	First reading: 19 August 1986 <sup>419</sup> Debates: 2 September 1986 <sup>420</sup> Third reading: 2 September 1986 <sup>421</sup>
SA		
None <sup>422</sup>	Legislative Council: • 17 September 1986 <sup>423</sup> House of Assembly: • 25 September 1986 <sup>424</sup>	Legislative Council: • First reading: 17 September 1986 <sup>425</sup> • Debates: 24 September 1986 <sup>426</sup> • Third reading: 24 September 1986 <sup>427</sup> House of Assembly: • First reading: 25

<sup>417</sup> Queensland did not start issuing explanatory notes for Bills until around 1990: O'Neill (n 210) 23.

<sup>418</sup> *Qld Parliamentary Debates (19 August 1986)* (n 197) 351 (Neville J Harper).

<sup>419</sup> *Ibid* 351.

<sup>420</sup> *Qld Parliamentary Debates (2 September 1986)* (n 52) 769–74.

<sup>421</sup> *Ibid* 774.

<sup>422</sup> South Australian legislative practice includes explanations of clauses at the end of second reading speeches and does not generate separate explanatory memoranda: O'Neill (n 210) 23. SA's explanation of clauses is treated as functionally equivalent to an explanatory memorandum for the purposes of Part IV.

<sup>423</sup> *SA Parliamentary Debates (17 September 1986)* (n 212) 912–13 (Christopher J Sumner).

<sup>424</sup> *SA Parliamentary Debates (25 September 1986)* (n 212) 1237–8 (Donald J Hopgood).

<sup>425</sup> *SA Parliamentary Debates (17 September 1986)* (n 212) 912.

<sup>426</sup> *SA Parliamentary Debates (24 September 1986)* (n 218) 1133.

<sup>427</sup> *Ibid*.

Explanatory memorandum	Second reading speech	Parliamentary debates
		September 1986 <sup>428</sup> <ul style="list-style-type: none"> <li>• Debates: 19 November 1986<sup>429</sup></li> <li>• Third reading: 19 November 1986<sup>430</sup></li> </ul>
<b>Tasmania</b>		
Clause Notes, Sale of Goods (Vienna Convention) Bill 1987 (Tas)	House of Assembly: <ul style="list-style-type: none"> <li>• 24 March 1987<sup>431</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• 26 March 1987<sup>432</sup></li> </ul>	House of Assembly: <ul style="list-style-type: none"> <li>• First reading: 4 March 1987<sup>433</sup></li> <li>• Debates: 24 March 1987<sup>434</sup></li> <li>• Third reading: 24 March 1987<sup>435</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• First reading: 25 March 1987<sup>436</sup></li> <li>• Debates: 26 March 1987<sup>437</sup></li> <li>• Third reading: 1 April 1987<sup>438</sup></li> </ul>

<sup>428</sup> SA *Parliamentary Debates* (25 September 1986) (n 212) 1237.

<sup>429</sup> SA *Parliamentary Debates* (19 November 1986) (n 218) 2133.

<sup>430</sup> *Ibid.*

<sup>431</sup> *Tas Parliamentary Debates* (24 March 1987) (n 228) 674–5 (John Bennett).

<sup>432</sup> *Tas Parliamentary Debates* (26 March 1987) (n 226) 413 (Peter McKay).

<sup>433</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 4 March 1987, 2.

<sup>434</sup> *Tas Parliamentary Debates* (24 March 1987) (n 228) 675–6.

<sup>435</sup> *Ibid.* 676.

<sup>436</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 25 March 1987, 333.

<sup>437</sup> *Tas Parliamentary Debates* (26 March 1987) (n 226) 413.

<sup>438</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 1 April 1987, 475.

Explanatory memorandum	Second reading speech	Parliamentary debates
Victoria		
Explanatory Memorandum, Sale of Goods (Vienna Convention) Bill 1987 (Vic)	Legislative Council: <ul style="list-style-type: none"> <li>• 3 March 1987<sup>439</sup></li> </ul> Legislative Assembly: <ul style="list-style-type: none"> <li>• 14 April 1987<sup>440</sup></li> </ul>	Legislative Council: <ul style="list-style-type: none"> <li>• First reading: 25 February 1987<sup>441</sup></li> <li>• Debates: 17 March 1987,<sup>442</sup> 9 April 1987<sup>443</sup></li> <li>• Third reading: 9 April 1987<sup>444</sup></li> </ul> Legislative Assembly: <ul style="list-style-type: none"> <li>• First reading: 9 April 1987<sup>445</sup></li> <li>• Debates: 30 April 1987<sup>446</sup></li> <li>• Third reading: 30 April 1987<sup>447</sup></li> </ul>
Explanatory Memorandum, Consumer Affairs	Legislative Assembly: <ul style="list-style-type: none"> <li>• 28 July 2010<sup>448</sup></li> </ul>	Legislative Assembly: <ul style="list-style-type: none"> <li>• First reading: 27 July</li> </ul>

<sup>439</sup> *Vic Parliamentary Debates* (3 March 1987) (n 242) 171–2 (James H Kennan).

<sup>440</sup> *Vic Parliamentary Debates* (14 April 1987) (n 242) 1220–1 (Race Mathews).

<sup>441</sup> Victoria, *Parliamentary Debates*, Legislative Council, 25 February 1987, 80.

<sup>442</sup> *Vic Parliamentary Debates* (17 March 1987) (n 248) 306–9.

<sup>443</sup> Victoria, *Parliamentary Debates*, Legislative Council, 9 April 1987, 850–1.

<sup>444</sup> *Ibid* 851.

<sup>445</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1987, 1181.

<sup>446</sup> *Vic Parliamentary Debates* (30 April 1987) (n 52) 1758–9.

<sup>447</sup> *Ibid* 1759.

<sup>448</sup> *Vic Parliamentary Debates* (28 July 2010) (n 262) 2815–19 (Anthony Robinson). This second reading speech is preceded by a statement of compatibility addressing the Consumer Affairs Legislation Amendment (Reform) Bill 2010 (Vic), now required in Victoria by virtue of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Explanatory memorandum	Second reading speech	Parliamentary debates
Legislation Amendment (Reform) Bill 2010 (Vic)	Legislative Council: <ul style="list-style-type: none"> <li>• 12 August 2010<sup>449</sup></li> </ul>	2010 <sup>450</sup> <ul style="list-style-type: none"> <li>• Debates: 11 August 2010,<sup>451</sup> 12 August 2010<sup>452</sup></li> <li>• Third reading: 12 August 2010<sup>453</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• First reading: 12 August 2010<sup>454</sup></li> <li>• Debates: 2 September 2010<sup>455</sup></li> <li>• Third reading: 2 September 2010<sup>456</sup></li> </ul> Legislative Assembly's consideration of amendments made by the Legislative Council: <ul style="list-style-type: none"> <li>• 14 September 2010<sup>457</sup></li> </ul>

ss 28(1)–(2): *Vic Parliamentary Debates* (28 July 2010) (n 262) 2813–15 (Anthony Robinson). That statement of compatibility is not relevant for the purposes of this article's analysis.

<sup>449</sup> *Vic Legislative Council Parliamentary Debates* (12 August 2010) (n 262) 4023–6 (Gavin Jennings). As in the Legislative Assembly, this second reading speech is preceded by a statement of compatibility, which is not relevant for the purposes of this article's analysis: at 4021–3.

<sup>450</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 27 July 2010, 2641.

<sup>451</sup> *Vic Parliamentary Debates* (11 August 2010) (n 268) 3114–24.

<sup>452</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August 2010, 3232.

<sup>453</sup> *Ibid.*

<sup>454</sup> *Vic Legislative Council Parliamentary Debates* (12 August 2010) (n 262) 4021.

<sup>455</sup> *Vic Parliamentary Debates* (2 September 2010) (n 275) 4448–54, 4459–69.

<sup>456</sup> *Ibid.* 4469.

<sup>457</sup> *Vic Parliamentary Debates* (14 September 2010) (n 279) 3650.

Explanatory memorandum	Second reading speech	Parliamentary debates
		<ul style="list-style-type: none"> <li>• 16 September 2010<sup>458</sup></li> </ul>
WA		
None <sup>459</sup>	Legislative Assembly: <ul style="list-style-type: none"> <li>• 7 October 1986<sup>460</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• 11 November 1986<sup>461</sup></li> </ul>	Legislative Assembly: <ul style="list-style-type: none"> <li>• First reading: 7 October 1986<sup>462</sup></li> <li>• Debates: 11 November 1986<sup>463</sup></li> <li>• Third reading: 11 November 1986<sup>464</sup></li> </ul> Legislative Council: <ul style="list-style-type: none"> <li>• First reading: 11 November 1986<sup>465</sup></li> <li>• Debates: 19 November 1986,<sup>466</sup> 20 November 1986<sup>467</sup></li> <li>• Third reading: 20 November 1986<sup>468</sup></li> </ul>

<sup>458</sup> *Vic Parliamentary Debates (16 September 2010)* (n 279) 3878–80.

<sup>459</sup> While the Parliament of WA did produce explanatory memoranda at the time it enacted its CISG legislation, it did not produce an explanatory memorandum for the Sale of Goods (Vienna Convention) Bill 1986 (WA).

<sup>460</sup> *WA Parliamentary Debates (7 October 1986)* (n 280) 2744–5 (Keith Wilson).

<sup>461</sup> *WA Legislative Council Parliamentary Debates (11 November 1986)* (n 280) 3942 (Kay Hallahan).

<sup>462</sup> *WA Parliamentary Debates (7 October 1986)* (n 280) 2741, 2744.

<sup>463</sup> *WA Legislative Assembly Parliamentary Debates (11 November 1986)* (n 52) 4000–2.

<sup>464</sup> *Ibid* 4002.

<sup>465</sup> *WA Legislative Council Parliamentary Debates (11 November 1986)* (n 280) 3941.

<sup>466</sup> *WA Parliamentary Debates (19 November 1986)* (n 52) 4407–9.

<sup>467</sup> *WA Parliamentary Debates (20 November 1986)* (n 52) 4560–2, 4566.

<sup>468</sup> *Ibid* 4562.

Explanatory memorandum	Second reading speech	Parliamentary debates
Legislative Assembly's consideration of amendments made by the Legislative Council: <ul style="list-style-type: none"> <li>• 27 November 1986<sup>469</sup></li> </ul>		
Commonwealth		
Explanatory Memorandum, Statute Law (Miscellaneous Provisions) Bill 1987 (Cth)	Senate: <ul style="list-style-type: none"> <li>• 24 September 1987<sup>470</sup></li> </ul> House of Representatives: <ul style="list-style-type: none"> <li>• 25 November 1987<sup>471</sup></li> </ul>	Senate: <ul style="list-style-type: none"> <li>• First reading: 24 September 1987<sup>472</sup></li> <li>• Debates: 7 October 1987<sup>473</sup></li> <li>• Third reading: 7 October 1987<sup>474</sup></li> </ul> House of Representatives: <ul style="list-style-type: none"> <li>• First reading: 8 October 1987<sup>475</sup></li> <li>• Debates: 25 November 1987<sup>476</sup></li> <li>• Third reading: 25 November 1987<sup>477</sup></li> </ul> Senate's consideration of amendments made by the

<sup>469</sup> WA *Parliamentary Debates* (27 November 1986) (n 293) 5088.

<sup>470</sup> Cth *Parliamentary Debates* (24 September 1987) (n 308) 617–20 (Michael Tate).

<sup>471</sup> Cth *Parliamentary Debates* (25 November 1987) (n 308) 2661–4 (Peter Staples).

<sup>472</sup> Cth *Parliamentary Debates* (24 September 1987) (n 308) 617. See also Commonwealth, *Parliamentary Debates*, Senate, 23 September 1987, 524 (Gareth Evans).

<sup>473</sup> Cth *Parliamentary Debates* (7 October 1987) (n 307) 777–86.

<sup>474</sup> *Ibid* 786.

<sup>475</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 8 October 1987, 1030.

<sup>476</sup> Cth *Parliamentary Debates* (25 November 1987) (n 308) 2664–7, 2693–706.

<sup>477</sup> *Ibid* 2706.



Explanatory memorandum	Second reading speech	Parliamentary debates
		House of Representatives: <ul style="list-style-type: none"> <li>• 26 November 1987<sup>478</sup></li> <li>• 10 December 1987<sup>479</sup></li> </ul>
Lapsed Bill: Explanatory Memorandum, Statute Law (Miscellaneous Provisions) Bill (No 1) 1987 (Cth)	House of Representatives: <ul style="list-style-type: none"> <li>• 30 April 1987<sup>480</sup></li> </ul> Senate: <ul style="list-style-type: none"> <li>• 26 May 1987<sup>481</sup></li> </ul>	House of Representatives: <ul style="list-style-type: none"> <li>• First reading: 30 April 1987<sup>482</sup></li> <li>• Debates: 11 May 1987<sup>483</sup></li> <li>• Third reading: 11 May 1987<sup>484</sup></li> </ul> Senate: <ul style="list-style-type: none"> <li>• First reading: 26 May 1987<sup>485</sup> (no further progress on the lapsed Bill)</li> </ul>
Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth)	House of Representatives: <ul style="list-style-type: none"> <li>• 17 March 2010<sup>486</sup></li> </ul> Senate: <ul style="list-style-type: none"> <li>• 24 June 2010<sup>487</sup></li> </ul>	House of Representatives: <ul style="list-style-type: none"> <li>• First reading: 17 March 2010<sup>488</sup></li> <li>• Debates: 22 June</li> </ul>

<sup>478</sup> *Cth Parliamentary Debates* (26 November 1987) (n 318) 2445.

<sup>479</sup> *Cth Parliamentary Debates* (10 December 1987) (n 318) 2877–81.

<sup>480</sup> *Cth Parliamentary Debates* (30 April 1987) (n 309) 2302–6 (Lionel Bowen).

<sup>481</sup> *Cth Parliamentary Debates* (26 May 1987) (n 309) 2908–11 (Gareth Evans).

<sup>482</sup> *Cth Parliamentary Debates* (30 April 1987) (n 309) 2301.

<sup>483</sup> *Cth Parliamentary Debates* (11 May 1987) (n 319) 2913–35.

<sup>484</sup> *Ibid* 2935.

<sup>485</sup> *Cth Parliamentary Debates* (26 May 1987) (n 309) 2908.

<sup>486</sup> *Cth Parliamentary Debates* (17 March 2010) (n 323) 2718–24 (Craig Emerson).

<sup>487</sup> *Cth Senate Parliamentary Debates* (24 June 2010) (n 323) 4283–8 (Joseph Ludwig).

<sup>488</sup> *Cth Parliamentary Debates* (17 March 2010) (n 323) 2718. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2010, 2688.

Explanatory memorandum	Second reading speech	Parliamentary debates
		2010, <sup>489</sup> 23 June 2010 <sup>490</sup> <ul style="list-style-type: none"> <li>• Third reading: 24 June 2010<sup>491</sup></li> </ul> Senate: <ul style="list-style-type: none"> <li>• First reading: 24 June 2010<sup>492</sup></li> <li>• Debates: 24 June 2010<sup>493</sup></li> <li>• Third reading: 24 June 2010<sup>494</sup></li> </ul> House of Representatives' consideration of amendments made by the Senate: <ul style="list-style-type: none"> <li>• 24 June 2010<sup>495</sup></li> </ul>

<sup>489</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2010, 6132.

<sup>490</sup> *Cth Parliamentary Debates (23 June 2010)* (n 329) 6470–93.

<sup>491</sup> *Cth House of Representatives Parliamentary Debates (24 June 2010)* (n 324) 6521.

<sup>492</sup> *Cth Senate Parliamentary Debates (24 June 2010)* (n 323) 4283.

<sup>493</sup> *Ibid* 4288–96.

<sup>494</sup> *Ibid* 4296.

<sup>495</sup> *Cth House of Representatives Parliamentary Debates (24 June 2010)* (n 324) 6621–9. See also *ibid* 4435.

## VIII APPENDIX 2: AUSTRALIA'S CISG CASE LAW TO DATE

Case	Date	Jurisdiction and court	Category
<i>Renard Constructions (ME) Pty Ltd v Minister for Public Works</i>	12 March 1992	NSW: Court of Appeal	<i>CISG</i> mentioned in passing; appeal <sup>496</sup>
<i>Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd</i>	28 April 1995	Commonwealth: Federal Court	<i>CISG</i> applied <sup>497</sup>
<i>Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd (in liq)</i>	30 November 1995	Commonwealth: Federal Court	<i>CISG</i> mentioned in passing <sup>498</sup>
<i>South Sydney District Rugby League Football Club Ltd v News Ltd</i>	3 November 2000	Commonwealth: Federal Court	<i>CISG</i> mentioned in passing <sup>499</sup>
<i>Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD</i>	17 November 2000	Queensland: Supreme Court	<i>CISG</i> applied <sup>500</sup>
<i>Perry Engineering Pty Ltd (rec and mgr apptd) (admin apptd) v Bernold AG</i>	1 February 2001	SA: Supreme Court	<i>CISG</i> not applied (counsel omission), but should have been <sup>501</sup>

<sup>496</sup> (1992) 26 NSWLR 234, 264 (Priestley JA).

<sup>497</sup> *Roder* (n 42) 222–3 (von Doussa J).

<sup>498</sup> (Federal Court of Australia, von Doussa J, 30 November 1995) [3].

<sup>499</sup> (2000) 177 ALR 611, 696 [393] (Finn J).

<sup>500</sup> [2000] QSC 421, [58]–[64] (Ambrose J).

<sup>501</sup> *Perry Engineering* (n 142) [16]–[19] (Judge Burley).

Case	Date	Jurisdiction and court	Category
<i>Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD</i>	12 October 2001	Queensland: Court of Appeal	<i>CISG</i> applied; appeal <sup>502</sup>
<i>Ginza Pte Ltd v Vista Corporation Pty Ltd</i>	17 January 2003	WA: Supreme Court	<i>CISG</i> applied <sup>503</sup>
<i>Playcorp Pty Ltd v Taiyo Kogyo Ltd</i>	24 April 2003	Victoria: Supreme Court	<i>CISG</i> not applied, but should have been <sup>504</sup>
<i>Aqua Technics (WA) Pty Ltd v Summit Chemicals Pty Ltd</i>	19 September 2003	WA: Supreme Court	<i>CISG</i> incidental <sup>505</sup>
<i>Summit Chemicals Pty Ltd v Vetrotex Espana SA</i>	27 May 2004	WA: Full Court of the Supreme Court	<i>CISG</i> incidental; appeal <sup>506</sup>
<i>Ualesi v Expeditors International Pty Ltd</i>	20 December 2004	Commonwealth: Federal Court	<i>CISG</i> referred to in passing <sup>507</sup>
<i>South State Food &amp; Beverage Pty Ltd v Kaur</i>	12 May 2005	Commonwealth: Federal Court	<i>CISG</i> incidental <sup>508</sup>

<sup>502</sup> *Downs Appeal* (n 140) 482–3 [41]–[42], 484 [46], 484–5 [48]–[50] (Williams JA, Davies JA agreeing at 472 [1], Byrne J agreeing at 485 [52]).

<sup>503</sup> *Ginza* (n 133) [187]–[202], [259] (Barker J).

<sup>504</sup> *Playcorp* (n 29) [235], [245] (Hansen J).

<sup>505</sup> *Aqua Technics* (n 334) [23]–[25] (McKechnie J).

<sup>506</sup> [2004] WASCA 109, [35] (Heenan J, Miller J agreeing at [1]).

<sup>507</sup> [2004] FCA 1705, [8], [19] (Conti J).

<sup>508</sup> [2005] FCA 587, [35], [36], [50] (Finn J).

Case	Date	Jurisdiction and court	Category
<i>Italian Imported Foods Pty Ltd v Pucci Srl</i>	13 October 2006	NSW: Supreme Court	<i>CISG</i> not applied (procedural reasons), but should have been; appeal <sup>509</sup>
<i>Kingston Estate Wines Pty Ltd v Vetreria Etrusca Srl</i>	12 October 2007	SA: District Court	<i>CISG</i> incidental <sup>510</sup>
<i>Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd</i>	13 December 2007	Commonwealth: High Court	<i>CISG</i> referred to in passing; appeal <sup>511</sup>
<i>Vetreria Etrusca Srl v Kingston Estate Wines Pty Ltd</i>	14 March 2008	SA: Supreme Court	<i>CISG</i> not applied, but should have been; appeal <sup>512</sup>
<i>HannaFord v Australian Farmlink Pty Ltd</i>	24 October 2008	Commonwealth: Federal Court	<i>CISG</i> applied <sup>513</sup>
<i>Olivaylle Pty Ltd v Flottweg AG [No 4]</i>	20 May 2009	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>514</sup>
<i>Guang Dong Zhi Gao Australia Pty Ltd v Fortuna Network Pty Ltd</i>	4 November 2009	NSW: Supreme Court	<i>CISG</i> incidental <sup>515</sup>

<sup>509</sup> [2006] NSWSC 1060, [14]–[19] (Malpass AsJ). This is the appeal from the unpublished and unavailable first instance decision referred to in Part V: see above n 336.

<sup>510</sup> [2007] SADC 102, [27] (Muecke J).

<sup>511</sup> *Koompahtoo* (n 364) 156–7 [108] (Kirby J).

<sup>512</sup> [2008] SASC 75, [1]–[2] (Duggan J).

<sup>513</sup> [2008] FCA 1591, [5], [190] (Finn J).

<sup>514</sup> (2009) 255 ALR 632, 642–3 [28] (Logan J).

<sup>515</sup> [2009] NSWSC 1170, [6]–[8] (Einstein J).

Case	Date	Jurisdiction and court	Category
<i>Franklins Pty Ltd v Metcash Trading Ltd</i>	16 December 2009	NSW: Court of Appeal	<i>CISG</i> referred to in passing; appeal <sup>516</sup>
<i>Attorney-General (Botswana) v Aussie Diamond Products Pty Ltd [No 3]</i>	23 June 2010	WA: Supreme Court	<i>CISG</i> not applied, but should have been <sup>517</sup>
<i>Delphic Wholesalers (Aust) Pty Ltd v Agrilex Co Ltd</i>	6 August 2010	Victoria: Supreme Court	<i>CISG</i> incidental <sup>518</sup>
<i>Cortem SpA v Controlmatic Pty Ltd</i>	13 August 2010	Commonwealth: Federal Court	<i>CISG</i> applied <sup>519</sup>
<i>Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd</i>	28 September 2010	Commonwealth: Federal Court	<i>CISG</i> applied <sup>520</sup>
<i>Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd</i>	20 April 2011	Commonwealth: Full Court of the Federal Court	<i>CISG</i> applied; appeal <sup>521</sup>
<i>Olivaylle Pty Ltd (admin apptd) v Flottweg AG [No 6]</i>	17 June 2011	Commonwealth: Federal Court	<i>CISG</i> referred to in passing <sup>522</sup>
<i>Fryer Holdings Pty Ltd (in liq) v Liaoning MEC Group Co Ltd</i>	30 January 2012	NSW: Supreme Court	<i>CISG</i> applied <sup>523</sup>

<sup>516</sup> (2009) 76 NSWLR 603, 614–15 [8]–[9] (Allsop P).

<sup>517</sup> *Aussie Diamond* (n 29) [210] (Murphy J).

<sup>518</sup> [2010] VSC 328, [15], [30] (Ferguson J).

<sup>519</sup> [2010] FCA 852, [87]–[98] (Jessup J).

<sup>520</sup> *Castel Trial* (n 141) [53]–[54], [121]–[123], [166]–[167], [174]–[176] (Ryan J).

<sup>521</sup> *Castel Appeal* (n 141) 456 [60]–[61], 457 [63]–[64], 460 [88]–[91], 490–5 [301]–[332] (Keane CJ, Lander and Besanko JJ).

<sup>522</sup> [2011] FCA 688, [14] (Logan J).

<sup>523</sup> *Fryer Holdings* (n 141) [15]–[17] (McDougall J).

Case	Date	Jurisdiction and court	Category
<i>Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd</i>	9 March 2012	WA: Court of Appeal	<i>CISG</i> excluded; appeal <sup>524</sup>
<i>Traxys Europe SA v Balaji Coke Industry Pvt Ltd [No 2]</i>	23 March 2012	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>525</sup>
<i>Attorney-General (Botswana) v Aussie Diamond Products Pty Ltd [No 2]</i>	28 March 2012	WA: Court of Appeal	<i>CISG</i> not applied, but should have been; appeal <sup>526</sup>
<i>Casaceli v Natuzzi SpA</i>	29 June 2012	Commonwealth: Federal Court	<i>CISG</i> referred to in passing <sup>527</sup>
<i>Venter v Ilona MY Ltd</i>	24 August 2012	NSW: Supreme Court	<i>CISG</i> excluded <sup>528</sup>
<i>Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd</i>	17 December 2012	Victoria: Supreme Court	<i>CISG</i> incidental <sup>529</sup>
<i>Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd</i>	7 March 2013	Victoria: Supreme Court	<i>CISG</i> incidental; appeal <sup>530</sup>
<i>Severstal Export GmbH v Bhushan Steel Ltd</i>	8 May 2013	NSW: Court of Appeal	<i>CISG</i> incidental; appeal <sup>531</sup>

<sup>524</sup> *Rizhao Steel* (n 85) 128 [164] (Murphy JA).

<sup>525</sup> (2012) 201 FCR 535, 539 [14]–[17] (Foster J).

<sup>526</sup> *Aussie Diamond Appeal* (n 136) [13] (Martin CJ, Buss JA agreeing at [164], Newnes JA agreeing at [165]).

<sup>527</sup> *Casaceli* (n 321) 155 [39] (Jagot J).

<sup>528</sup> [2012] NSWSC 1029, [25]–[26] (Rein J).

<sup>529</sup> *Castel* VSC (n 349) [41]–[43], [57]–[58] (Daly AsJ).

<sup>530</sup> [2013] VSC 92, [15]–[24] (Davies J).

Case	Date	Jurisdiction and court	Category
<i>TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd</i>	16 July 2014	Commonwealth: Full Court of the Federal Court	<i>CISG</i> not applied, but related to other <i>CISG</i> cases; appeal <sup>532</sup>
<i>Toll Holdings Ltd v Stewart</i>	15 March 2016	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>533</sup>
<i>Sino Dragon Trading Ltd v Noble Resources International Pte Ltd</i>	13 September 2016	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>534</sup>
<i>Fletcher v Capstone Aluminium SDN BHD; Re McLay Industries Pty Ltd (in liq)</i>	5 December 2016	Commonwealth: Federal Court	<i>CISG</i> incidental <sup>535</sup>
<i>NT Beverages Group Pty Ltd v PT Bromo Tirta Lestari; Re NT Beverages Group Pty Ltd</i>	11 July 2017	Commonwealth: Federal Court	<i>CISG</i> incidental <sup>536</sup>
<i>Valve Corporation v Australian Competition and Consumer Commission</i>	22 December 2017	Commonwealth: Full Court of the Federal Court	<i>CISG</i> excluded; appeal <sup>537</sup>

<sup>531</sup> (2013) 84 NSWLR 141, 146–7 [13], 147 [16] (Bathurst CJ, Beazley P agreeing at 160 [73], Barrett JA agreeing at 160 [74]).

<sup>532</sup> (2014) 232 FCR 361, 366 [1]–[2] (Allsop CJ, Middleton and Foster JJ).

<sup>533</sup> (2016) 338 ALR 602, 610 [23] (Rares J).

<sup>534</sup> [2016] FCA 1131, [76] (Beach J).

<sup>535</sup> *Fletcher* (n 350) [36] (Greenwood J).

<sup>536</sup> [2017] FCA 775, [44]–[46] (Gleeson J).

<sup>537</sup> (2017) 258 FCR 190, 206 [55] (Dowsett, McKerracher and Moshinsky JJ).



Case	Date	Jurisdiction and court	Category
<i>Re TCL Airconditioner (Zhongshan) Co Ltd [No 2]</i>	1 March 2019	Commonwealth: Federal Court	<i>CISG</i> not applied, but related to other <i>CISG</i> cases <sup>538</sup>
<i>Luo v Windy Hills Australian Game Meats Pty Ltd [No 3]</i>	10 July 2019	NSW: Supreme Court	<i>CISG</i> not applied, but should have been <sup>539</sup>
<i>Dialogue Consulting Pty Ltd v Instagram Inc</i>	22 December 2020	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>540</sup>
<i>Freedom Foods Pty Ltd v Blue Diamond Growers</i>	5 March 2021	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>541</sup>
<i>LLC BryanskAgrostroy v Mackies Asia Pacific Pty Ltd</i>	29 September 2021	Commonwealth: Federal Court	<i>CISG</i> referred to in passing <sup>542</sup>
<i>Epic Games, Inc v Google LLC</i>	4 February 2022	Commonwealth: Federal Court	<i>CISG</i> excluded <sup>543</sup>
<i>Micon Mining &amp; Construction Products GmbH &amp; Co KG v Macmahon Mining Services Pty Ltd</i>	2 June 2022	WA: Court of Appeal	<i>CISG</i> incidental; appeal <sup>544</sup>
<i>Nawaz v Rasier Pacific Pty Ltd</i>	17 June 2022	Commonwealth: Fair Work Commission	<i>CISG</i> excluded <sup>545</sup>

<sup>538</sup> *Re TCL Airconditioner* (n 346) 194 [10]–[11] (McKerracher J).

<sup>539</sup> *Luo* (n 354) [77] (Stevenson J).

<sup>540</sup> (2020) 291 FCR 155, 192 [261] (Beach J).

<sup>541</sup> [2021] FCA 172, [35] (Moshinsky J).

<sup>542</sup> [2021] FCA 1180, [6] (Colvin J).

<sup>543</sup> (2022) 399 ALR 119, 158 [183]–[184] (Perram J).

<sup>544</sup> (2022) 58 WAR 334, 337 [1]–[2], 370–1 [169]–[173] (Buss P, Beech and Vaughan JJA).

Case	Date	Jurisdiction and court	Category
<i>Cha v Insurance Australia Ltd</i>	28 October 2022	NSW: Personal Injury Commission	<i>CISG</i> referred to in passing <sup>546</sup>

<sup>545</sup> (2022) 317 IR 134, 203 (Commissioner Hampton).

<sup>546</sup> [2022] NSWPICMR 64, [47] (Merit Reviewer Cassidy).

## IX ADDENDUM

Since this article was originally written, several additional Australian *CISG* cases have been handed down. None apply the *CISG*, and none alter the analysis contained in my article. However, following the handing down of *Re Sparkling Beverages Pty Ltd [No 2]*,<sup>547</sup> *C P Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd*,<sup>548</sup> *UIL (Singapore) Pte Ltd v Wollongong Coal Ltd*,<sup>549</sup> *Bolin Technology Co, Ltd v BirdDog Technology Ltd*,<sup>550</sup> a further instance of *Bolin Technology Co Ltd v BirdDog Technology Ltd*,<sup>551</sup> and *Ezy-Fit Engineering Group Pty Ltd v Microm Nominees Pty Ltd*,<sup>552</sup> it is now the case that there are 57 (rather than 51) Australian *CISG* cases in existence. Following the *CISG* being adopted by Saudi Arabia (as foreshadowed in footnote 6) and Rwanda, it is also now the case that there are 97 (rather than 95) contracting States to the *Convention*.<sup>553</sup>

<sup>547</sup> [2023] VSC 419. Here, non-harmonised contract law was at issue, though the *Convention* was referred to in passages quoted by the Court from secondary sources: see, eg, at [130] n 53 (Connock J), quoting JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2018) 48–9 [3-07].

<sup>548</sup> [2023] VCC 2134. In this case, the *Convention* was not applied to a dispute between Australian and Indian parties, though there would have been a strong argument for its application pursuant to art 1(1)(b): at [182]–[183] (Judge Macnamara).

<sup>549</sup> [2023] FCA 1578. This dispute concerned legal professional privilege, with the Court noting that the *Convention* was relevant to the parties' underlying dispute: at [4] (Beach J).

<sup>550</sup> [2024] FCA 129. This case involved an application for an anti-anti-suit injunction, with the Court noting that argument in the underlying dispute implicated the *Convention*: at [10] (Stewart J).

<sup>551</sup> [2024] FCA 286. This case is a continuation of the dispute in above n 550, revisiting the anti-anti-suit injunction issue as well as addressing a *forum non conveniens* claim. It again referred to the *Convention* as being implicated in the parties' underlying dispute: at [28] (Anderson J).

<sup>552</sup> [2024] FCA 441. The Court here applied non-harmonised Australian sales law and rejected one party's argument that the *Convention* (particularly art 35) applied: at [338]–[339] (Banks-Smith J).

<sup>553</sup> 'Chapter X: International Trade and Development: United Nations Convention on Contracts for the International Sale of Goods', *United Nations Treaty Collection* (Web Page, 2024) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=X-10&chapter=10&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en)>, archived at <<https://perma.cc/V54C-JAC4>>.