MODELS OF CONTRACT LAW
An empirical evaluation of their utility

MP Ellinghaus & EW Wright
with
M Karras

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Themis was the goddess of law, order, and justice in Greek religion and mythology. Her ability to foresee the future enabled her to become one of the oracles at Delphi, which in turn led to her establishment as the goddess of divine justice.
FOREWORD

The Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia

This is an important book. If I had not served for a decade in the Australian Law Reform Commission and, in the result, taken part in many activities involving the building of international law, I would doubtless have cast it aside as propounding ideas undesirable, futile or both. But I would have been seriously wrong to do so.

The law of contract concerns the very lifeblood of a modern economy. In Australia, as the authors point out, that law is to be found in a myriad of court decisions. Already, there are over six thousand Australian cases applying the law of contract, nearly 900 of them in the High Court of Australia. Deriving from the factual circumstances of old cases the precise rules of law applicable to the circumstances of a new case is no easy task. Yet this is what the system of the common law requires. Trained legal practitioners rejoice in its flexibility. It is a problem-solving system. It resists grand theories out of preference for rules that solve concrete disputes. Its flexibility is its strength. It offers a unique capacity to adapt old rules to new circumstances in ways that lawyers in succeeding decades perceive as fair and just.

Yet the price of such decisional proliferation is a malleable system of law often bordering on the chaotic. The growing intrusion of equitable relief in arm's length business dealings affords a still further dimension of uncertainty. Patchwork legislation repairs particular problems. It offers remedies against specific instances of unfairness that have caught the eye of officials and politicians. Rules of contract law there are. But so long as they are locked
away in judicial casebooks or stated in special statutes, the interpretation of their nuances belongs substantially to the priestly caste of the legal profession. This is what the authors want to change. Nothing less.

The greatest impetus for change is not the legal profession itself. Lawyers are reasonably comfortable with the old ways and aware that they have merits as well as defects. Embracing radical, but simple, reforms to substitute a new dimension for common law doctrine has never been an easy idea to sell. Although the reformed Torrens system of title to land by registration soon spread throughout Australia and then to other parts of the British Empire, it never took hold in England. To this day a true Torrens title only operates in nine jurisdictions of the United States. Mongolia and Uganda will be quicker to adopt computerised Torrens title than England, the origin of our land law.

What we in Australia now take as a self-evident, efficient, rational, cost-effective reform of land law has been fought off in America and England by the combined battalions of ignorance, complacency and self-interest. Ironically it is the same battalions that now resist moves in Australia towards the codification of contract law.

I say ironically, because, as the authors point out, in the United States, the dominant global economy, contract law is effectively codified in the form of a Restatement published by the American Law Institute and accepted as authoritative by federal and state courts. In addition, a Uniform Commercial Code operates in each of the American states with large significance for some contracts.

Why has Australia proved so resistant to the development of a code of contract law? The opposition has not come from commercial interests. They would benefit from the availability of basic principles such as could be expressed in a contract code. Nor does opposition come from citizens or civic educators who can readily observe the advantages in explaining such a fundamental area of the law from the foothold of a contract code. What we lack is the spirit of innovation that embraced the Torrens reforms
in colonial times and a conviction that the merits of such a change outweigh the transitional uncertainties that would come with the new expression of such a law.

I lived through a debate similar to this in the years in which I served as the first Chairman of the Australian Law Reform Commission. One of the tasks of the Commission was to draw up a national law on insurance contracts. There was little constitutional problem in doing so. Yet the opponents (mostly in the legal profession and amongst insurance brokers) said it could never be done. Too many ancient decisions. Too many nuanced rules. The old system ‘worked well’. If it ain’t broke, don’t fix it.

Ultimately, the Law Reform Commission carried most of the insurance industry and much of the legal profession to a conviction that discovering the law of insurance contracts through a patchwork of decisional law going back centuries was so inefficient, uncertain and unjust that change had to be achieved. Hence the Insurance Contracts report and the Insurance Contracts Act 1984 (Cwlth). It is not exactly a code. But it is a comprehensive statement of broad principles, in an Australian statute available to lawyer, insurer and insured alike. It is expressed in simple concepts. Of course, it had some teething problems as any large reform does. But now it operates with efficiency across the Australian continent. It is a great achievement in legal simplification and accessibility.

The success of the insurance contracts enterprise presents the question whether the still larger issue of collecting and stating the basic principles of Australian contract law could be achieved in manageable time. The same opponents stand in the way. Only their faces have changed with the passing of another generation. The same arguments will be invoked in resistance to a change. The task of explaining and selling the idea belongs to a new generation of lawyers. That is what I take this book to be about.

The authors have an important new consideration working for a revival of the earlier failed attempts to express basic contractual rights and obligations in statutory language. This is the rapid growth of the global and regional
economies and the consequent endorsement of the UNIDROIT principles of international commercial contracts and other efforts of international law to state in conceptual form the binding law of contracts for many jurisdictions. To the extent that trade brings increased contractual dealings between parties in different jurisdictions, an insistence on finding the law in the entrails of national judicial decisions, rather than in clearly stated, shared principles adopted by Parliament, will be increasingly difficult to accept in the international economy. It will burden our economy. It will impede economic growth.

These, then are the forces that are in contest in the issues explored by the authors. They are scholars highly experienced in the law of contract. They have a longstanding interest in the simplification of Australian contract law and its availability in more accessible form. They are committed to examining the models on offer, using empirical techniques. The advantage of their methodology is that they postulate competing approaches, test them by a well-researched methodology and illustrate how each system works, or would work, if adopted in Australia.

The conclusions that the authors suggest constitute a major challenge to the Australian legal system. They have convinced me that the availability of a statement of Australian contract law in a national code, using one of the available models they describe, is a course to be followed. Now they have the task before them to convince the sceptical, the apathetic and the resistant. Just as Robert Torrens had to do a hundred and fifty years ago. It can be done. There are new allies. There is a partial model in the particular field on insurance contracts. In the end, contract law is an integral part of the economy. The economy eventually shakes off serious inefficiency. The current law is inefficient. Concepts not cases should prevail. The path of reform lies before us. But do we have the imagination to start a journey on that path?

Michael Kirby
High Court of Australia, Canberra
27 July 2004
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PREFAE

The Law and Justice Foundation of NSW is an independent statutory body that contributes to the development of a fair, equitable and accessible justice system. Empirical research is an important strategy of the Foundation, and we have a proud history of collaborating with leading scholars to examine key access to justice issues.

This research project on models of contract law is, at its core, concerned with the simplification and thus the increased accessibility of Australian contract law. In keeping with the Foundation’s principles, it has, as Justice Kirby observes, potential benefits for all and not just, ‘the priestly caste of the legal profession’.

The authors employed an innovative experimental design for the project. This represents an important addition to the qualitative or legal-doctrinal research methods more common to research in the areas of law and justice system reform. The strength of the empirical design means the findings of this project are reliable, and may bear considerable weight in debates about law reform. As such, it is an excellent example of rigorous evidence-based research to which the Foundation is committed. The Foundation hopes that reports such as this will encourage the greater application of such methodologies to reform of the justice system.

While of itself unique, this report is part of an ongoing research series through which the Foundation seeks to identify effective reforms and access to justice initiatives through evidence-based research.

Geoff Mulherin, Director
Law and Justice Foundation of NSW
May 2005
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We are most grateful to the Honorable Justice Michael Kirby, AC, CMG for kindly writing the foreword to this report.

Finally, we are especially grateful to the 1800 Australian university students who participated in the study.

SUMMARY OF THE REPORT

Aims and significance of the research

In common law jurisdictions like Australia, the law of civil obligations—including its most important component contract law—is to be found mainly in the reported judgments of courts (Case Law). Their number is massive and constantly increasing. This makes the law costly to locate, comprehend and apply. A major policy issue facing these jurisdictions is whether the law reports should be replaced by an authoritative statement of the law in a more accessible form, such as a code.

The aims of this research were to find out whether it would be beneficial to codify Australian contract law, and if so, whether this would best be done by using a small number of broad principles or many detailed rules. The results are likely to be relevant to the whole of private law.

Contract law is fundamental to commerce. Codification might have many potential benefits. It may also be necessary if Australia wishes to participate in the movement towards a transnational contract law.

Whether it is better to state the law in the form of broad principles or detailed rules has been debated for a very long time. However, the debate has been largely theoretical. This report presents hard data based on empirical research. We conducted three experiments in order to compare the utility of Case Law with that of two different codes of contract law:

- UNIDROIT Principles of International Commercial Contracts (UPICC), a detailed model code published by the International Institute for the Unification of Private Law, which has been used in arbitrations of international commercial disputes

The most important conclusions supported by our results are:

- it would be beneficial to codify Australian contract law
- it would be better to state the law in a small number of broad principles rather than numerous detailed rules.

The three law models

To give the reader a picture of the three models being compared it is necessary to give some description of each. All three models address the same basic issues of contract of law in a similar way. Their main differences relate to the form in which their rules are expressed, their total number and their level of detail.

- Case Law is found in the published judgments of courts, but its precise formulation varies from case to case. Case Law includes broad principles but these are not applied directly; they are applied in accordance with more detailed rules.

- UPICC at the time of the experiments had 119 articles with an elaborate commentary. It has some broad principles, including a universal obligation of good faith and fair dealing, but it also has many highly detailed rules on all topics of contract law.

- The ACC, unlike Case Law and UPICC, is confined to a small number of broad principles, stated in only 27 Articles, with a short commentary. It contains an overriding provision preventing a person from asserting a right or denying an obligation to the extent it would be unconscionable to do so.

An example illustrating these differences may be found in Chapter 2.
Methodology

As stated earlier, our experiments were designed to evaluate the utility of the three law models described above. We adopted a conception of utility which reflects the demands most often made of legal systems by lawyers and non-lawyers alike. People expect law to be predictable, fair, clear and logical, as well as easy to comprehend and apply. Three experiments involving 1800 participants were conducted to measure the extent to which each of the three law models meets these elements of utility.

In the first two experiments law students were asked to decide a contract dispute using the three models. Three hundred law students were given the facts of a dispute and a statement of the relevant law, drawn from one of the law models. They were asked to decide the dispute, to record the time taken, to give reasons, and to complete a questionnaire. In a second experiment 600 law students working in pairs were asked to perform the same tasks. In the third experiment 900 non-law students were given the facts of the same disputes and asked to evaluate two judgments, each applying one of the law models. The experiments isolated the effect of law model from the effect of other variables.

Ten different disputes were used, drawn from real cases. A statement of the facts was prepared using the material facts identified by the original court. Statements of the relevant Case Law used the actual words of the judgments. The relevant UPICC and ACC provisions were extracted from their Articles and Commentary.

The Case Law judgments used in Experiment 3 were abridgments of the originals. The UPICC and ACC judgments were written using their relevant Articles and Commentary, preserving the conventions of judicial style and referring to the same factual grounds for the decision.
Relevance of the experiments to the real world

Readers may legitimately ask whether the experiments resembled real world tasks closely enough to make the results noteworthy.

In Experiments 1 and 2 we asked people with some formal legal training to resolve a wide range of contract disputes, drawn from life, by applying the law. This is a task performed everyday in the real world not only by judges but also by a range of legal advisers who must try to predict what a judge would decide.

In Experiment 3 we asked non-lawyers to read judgments deciding the same disputes. It is not uncommon in commerce for non-lawyers to have to consider how the law applies to a dispute, and to read court judgments. In any case the assumption that lay people can read and evaluate the judgments of courts is fundamental to our legal system.

Nevertheless, some aspects of our design were dictated by practical considerations rather than the aim to emulate real life. In Experiments 1 and 2, decision-makers were given the facts and the law in distilled form. They were given little more than one hour to decide. And they were students, not fully qualified legal professionals. It might be said that these are important respects in which the experiments failed to replicate real life conditions.

However, in reality the process of deciding disputes requires boiling them down to their material facts and identifying the relevant propositions of the law. Indeed, the facts of a dispute are presented in distilled form to some decision-makers such as appellate judges. Others must do the boiling down for themselves; we saved our participants this task. The Case Law statements used in our experiments were extracts from the original judgments using the exact words of the judges. Specialist lawyers such as barristers who have occasion to read case reports ultimately seek to distil similar statements from them. Many other users of the law, including
practising lawyers, often confine their research to legal textbooks and encyclopaedias which state the law in similar form.

As for allowing only one hour to decide, time in real life is often limited, and in some contexts decisions applying the law must in fact be made in one hour. More importantly, it is unlikely that observable differences in the utility of a law model affecting decisions made in one hour would not also be observed were a longer time allowed. Law schools throughout the common law world set similar time limits for the same kinds of tasks when assessing their students’ competence to advise clients in real life.

As for whether law students sufficiently resemble the qualified lawyers and judges of the real world, contract law students in Australia have usually completed several foundational subjects instilling the legal problem-solving skills that they will use in their professional careers.

Results

The data produced by Experiments 1 and 2 consisted of decisions and decision-makers’ evaluations of the law model used. Experiment 3 produced readers’ evaluations of judgments based on the three law models. These data yielded the following findings (all differences are statistically significant)

Decision data

- Overall no law model is more predictable than any other. However, the ACC made decisions more predictable in easier cases and less predictable in harder cases. The capacity of a law model to identify easy cases clearly enhances its utility.

- No law model was more likely to lead to a fair result, defined as the majority decision in the original case. However, ACC and UPICC users were more likely to reach the fair result when the dissent was substituted for the majority opinion in three cases because the researchers agreed with it (researcher opinion).
• The ACC was applied with greater accuracy (assessed by the researchers) than Case Law and UPICC. Other findings on relative utility must be assessed in this light.
• The ACC led to faster decisions, indicating that it was easier to comprehend and apply.

Evaluations of decision-makers

• Overall no law model made it easier to decide. However, Case Law made it more difficult for pairs to agree in easier cases.
• No law model was rated easier to understand or more vague than any other.
• The ACC and UPICC were applied more confidently than Case Law by single judges. But it must be remembered that UPICC was applied less accurately (researcher assessment) than the ACC.
• UPICC and the ACC were rated by single judges as more helpful in reaching a fair outcome than Case Law. The ACC was rated more helpful than UPICC and Case Law by pairs, especially in easier cases. This suggests that the ACC and UPICC are more likely to lead to fair outcomes than Case Law, and that the ACC is more likely to do so than UPICC. Again it must be remembered that UPICC was applied less accurately (researcher assessment) than the ACC.
• The ACC was rated less technical than UPICC and Case Law.

Evaluations of judgment readers

• ACC and UPICC judgments were rated easier to read, easier to follow, more logical, and less confusing than Case Law judgments.
• Case Law judgments in easier cases were rated hardest to read, most jargon-laden, most technical, most confusing and least easy to follow.
• ACC judgments were rated more jargon-free than UPICC judgments, which were rated better than Case Law judgments.
ACC jargon ratings differentiated most strongly between fair and unfair decisions (court majority). Readers of UPICC judgments rated them less jargon-laden when unfair.

ACC judgments were rated less technical than Case Law and UPICC judgments.

ACC judgment technicality ratings discriminated most strongly between fair and unfair decisions (court majority).

ACC and UPICC judgments were agreed with more strongly and thought to be fairer than Case Law judgments.

ACC and UPICC ratings of agreement and fairness differentiated more strongly between fair and unfair decisions (researcher opinion) in easier cases.

Case Law ratings of agreement and fairness differentiated more strongly between fair and unfair decisions (researcher opinion) in harder cases. However, these findings are largely the product of the ratings in only one case.

Ratings of the consideration of relevant facts were affected by the law model on which a judgment was based.

— UPICC judgments were rated more highly than Case Law judgments, with ACC ratings in between. However, UPICC readers did not discriminate between fair and unfair judgments.

— ACC ratings discriminated most strongly between fair and unfair decisions (researcher opinion) in easier cases.

— Although Case Law ratings of fact consideration discriminated more strongly between fair and unfair decisions (researcher opinion) in difficult cases, this finding is largely the product of the rating in only one case.

It is obviously important that a law model draws attention to all the important facts of a dispute. These results suggest that the ACC does this most effectively.
Conclusions

We have already stated our two most important conclusions:

- It would be beneficial to codify Australian contract law.
- It would be better to state the law in a small number of broad principles rather than numerous detailed rules.

On the basis of our research we also conclude:

- Codifying contract law would not diminish predictability. An ACC-type code would increase predictability in easier cases where it is most important.
- Codifying contract law is likely to lead to more fair outcomes. An ACC-type code would be more likely to do so than an UPICC-type code.
- Codes are more accessible (clearer language and logic) than Case Law. An ACC-type code would be more accessible than an UPICC-type code.
- An ACC-type code would more efficient (easier to comprehend and apply) than an UPICC-type code or Case Law.
1. SIGNIFICANCE OF THE RESEARCH

This chapter gives an account of the aims of the project. They were to find out whether it would be beneficial to codify Australian contract law, and if so, whether this would best be done by using a small number of broad principles or many detailed rules. Contract law is fundamental to commerce. Its codification might have many potential benefits. Australian contract law is at present to be found in a mass of case reports. Codification might make it more accessible. It may also be required for Australian participation in the growing movement towards transnational contract law.

The benefits of codification, and the relative utility of broad principles and detailed rules, have been the subject of theoretical discussion for a long time. Little or no empirical research seems to have been done. Our research was designed to collect hard data exploring these issues.

Aims of the project

The immediate aim of this project was to test empirically whether it would be beneficial to codify Australian contract law. The question whether to codify also necessarily raises the question how to codify. In particular, a choice must be made between stating the law in a relatively small number of broad principles and stating it in the form of numerous detailed rules. In this respect the spectrum of available code models runs from the exiguous

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1 Codifying the law means here restating, in legislative or other authoritative form, rules of law which have been developed by judges and are at present only to be found in reports of judges in court cases.
to the voluminous. At one end, the German law of contract is derived from a small number of general principles of the German Civil Code (BGB). At the other end, the Restatement of Contracts (USA) and the European Principles of Contract Law are cornucopias of detail.

The authors therefore set out to answer the questions whether it would be beneficial to codify Australian contract law and, if so, whether a detailed code should be preferred to a code containing statements of broad principle. We conducted three experiments involving the participation of 1800 subjects (law students and non-law students) in the resolution of disputes and the evaluation of judgments, using three different law models: (1) the Australian Case Law of contracts; (2) the UNIDROIT Principles of International Commercial Contracts (UPICC), a model code published by the International Institute for the Unification of Private Law in 1994; (3) the Australian Contract Code, a model code published by the Law Reform Commission of Victoria in 1992 (ACC). UPICC contains 119 Articles comprising detailed rules reflecting both common law and civil law antecedents. On the other hand, the ACC contains only 27 Articles containing a small number of general principles distilled from Case Law. The data provided by these experiments was analysed to establish the relative utility of the three models of law.

The relative utility of broad principles and detailed rules has long been the subject of a jurisprudential debate in Case Law jurisdictions (such as Australia) quite independently of any debate about codification. The nature of this debate is described more fully in Chapter 2. As two of the law models investigated in this research (Case Law and UPICC) rely on the use of detailed rules, and the third (ACC) relies on the use of broad principles, the project also aimed to contribute to the resolution of this jurisprudential debate.

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3 The experiments utilised fact situations and statements of law drawn from Australian courts.

4 The senior authors of this Report are also the authors of the ACC.
Significance of contract law

Contracts are fundamental to commerce. Most business and consumer transactions include making a contract. Contract law determines how a contract is made, whether it is enforceable, whether it has been breached, and what remedies are available for its breach. It is the foundation of the law of commercial transactions in all modern legal systems, including Australia's.

The rules of Australian contract law are at present found in the published judgments of courts (Case Law). As explained more fully in Chapter 2, Case Law consists of a large and ever increasing number of rules whose precise formulation varies from case to case. No rule of Case Law has any one authoritative form. Although a particular passage from a particular judgment may be quoted many times over it never attains the status of an authorised text.

The inconvenience caused by the absence of any authorised text in which the concepts and principles of Case Law are expressed is compounded by the bulk and complexity of the judgments delivered by Australian courts, even at trial level. The number of published judgments in which the rules are found is enormous and constantly increasing. We estimate that there are now over 6000 Australian decisions applying the law of contract, nearly 900 of them in the High Court. There are at least 200 new Australian decisions reported each year. Reports in electronic form have greatly increased the number of decisions available for consultation. It is, moreover, common practice for Australian judges to refer to decisions of the courts of England, New Zealand, Canada, the United States and other countries.

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A sample of 21 High Court decisions⁴ yields these indicative figures:

<table>
<thead>
<tr>
<th>Category</th>
<th>Figures</th>
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<tbody>
<tr>
<td>Average number of pages</td>
<td>39.3</td>
</tr>
<tr>
<td>Average number of separate judgments</td>
<td>3.3</td>
</tr>
<tr>
<td>Average number of citations of other decisions</td>
<td>37.7</td>
</tr>
</tbody>
</table>

The difficulty and expense of applying rules stated in myriad judgments has led to perennial demands for codifying the law.⁷ In Victoria a proposal for a General Code, including lengthy provisions on contract obligations, was almost adopted in 1885.⁸ A call specifically for the codification of Australian contract law was first made in 1975.⁹ In 1992 the Victorian Law Reform Commission published the draft ACC referred to above.¹⁰

Potential benefits of codifying contract law

Codification has some clear potential benefits. It would provide an authoritative statement of the law which would be easier to consult than the mass of law reports and learned commentary in which the law is at present to be found. Of course, in Australia for constitutional reasons, enactment of a code in legislative form would face formidable obstacles. However, an unenacted but authoritative 'Restatement of Australian Contract Law' could provide the same benefits. An example of a *de facto* code is the *Restatement of Contract 2nd* published by the American Law Institute, which is generally accepted by American courts.¹¹

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⁴ See Law Reform Commission of Victoria, 1992, Discussion Paper No. 27 'An Australian Contract Code', Law Reform Commission of Victoria, Melbourne. These cases were chosen to illustrate the operation of the Code and are for present purposes effectively a random sample.


⁸ A bill for the enactment of a General Code was brought into the Victorian Legislative Council by WE Hearn, first Professor of Law at the University of Melbourne, in 1885.


The question whether Australian contract law should be codified is becoming increasingly relevant in the global context. In the USA, the dominant global economy, contract law is, as already noted, in effect codified in the form of the Restatement. In addition a Uniform Commercial Code has been adopted by legislation in all American states.\textsuperscript{12}

In Europe, and in countries around the world which have laws modelled on European law, including Japan and other Asian countries, the law of contract is embodied in written codes. China enacted a codified Contract Law in 1999.\textsuperscript{13} Russia is currently codifying contract law.\textsuperscript{14} A proposal for a Commercial Code has been flagged by the Chairman of the UK Law Commission.\textsuperscript{15} In 1993 UNIDROIT\textsuperscript{16} published the Principles of International Commercial Contracts (UPICC), referred to above, and invited national and international legislators to use the Principles as a model for domestic codification. A group of scholars, funded in part by the European Commission, published The Principles of European Contract Law in 1998.\textsuperscript{17} In February 2003 the European Commission announced an Action Plan which contemplates, at least in the long run, the creation of a European code of

\textsuperscript{16} International Institute for the Unification of Private Law (Rome).
contract law.\textsuperscript{18} Momentum has also been gathering towards the production of a general European Civil Code.\textsuperscript{19} In a world in which the jurisdictions of many of our trading partners operate under codes of contract law, and in which codification is fast winning new adherents, it is more than ever appropriate to ask whether Australia too should consider adopting such a code.

The potential benefits of codification must be assessed in light of the growing movement towards international harmonisation of private law, especially contract law.\textsuperscript{20} Harmonisation is unlikely to be achieved except by agreement on codified statements of law.

The harmonisation movement also makes a resolution of the debate concerning the relative utility of broad principles and detailed rules a point of practical importance. International consensus may only be achievable at the level of broad principles because their use, as even opponents of convergence concede, allows for the preservation of jurisdictional differences of detail in the process of application.\textsuperscript{21} Codifying Australian contract law in the form of broad principles may be necessary if it is to play a role in the construction of a regional or global law of contracts. This may be the only way of preserving its unique and valuable aspects (for example, its application of equitable standards based on conscience to commercial transactions). It may also create an opportunity to simplify the law, making it more accessible to lawyers and non-lawyers alike. Even those who object to broad principles admit that they may be 'the key to less complex laws'.\textsuperscript{22}

\textsuperscript{18} The Commission's Press Release, [P/03/232, Brussels, 14 February 2003, identifies as the third of three main strands of the action plan 'reflection on ... an optional body of European contract law of wide application' existing 'in parallel to ... national contract laws'. See also Luke Nottage, 'Convergence, divergence, and the middle way in unifying or harmonizing private law', in Russel Miller and Peer Zumbansen (eds), Annual of German and European Law, vol. 1, 2003, 1 at 10.

\textsuperscript{19} Ibid.

\textsuperscript{20} Ibid at 15ff.

\textsuperscript{21} For example, Hugh Collins, 'Formalism and efficiency: designing European commercial contract law', European Review of Private Law, vol. 8, 2000, p. 211.

\textsuperscript{22} PS Atiyah, 'From principles to pragmatism: changes in the function of the judicial process and the law' Iowa Law Review, vol. 65, 1980, p. 1271.
Empirical nature of research

In countries such as Australia which have long-established legal systems based on English law, resistance to codification is based not merely on cultural inertia, but on belief that codes use broad principles to replace the finely tuned logic and fact-specificity of case law with generalised discretions, ultimately undermining the rule of law. This fear is also at the bottom of the longstanding jurisprudential debate about the relative utility of broad principles and detailed rules. The view that detailed rules lead to more predictable and more just outcomes has dominated the development of the common law for at least two centuries. Most lawyers will be familiar at least in outline with the theoretical debate on this issue and will know their own position in it.

However, it is a characteristic of this debate that the assumptions on which it is based are almost never subjected to empirical verification. Despite the long history of comparative scholarship, there appears to be little or no empirical research on the relative utility of case law and codified law in the field of contract law. In the same way, the question whether detailed rules

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24 The terms 'principles' and 'rules' have been used in a variety of senses. A classic usage is derived from Roscoe Pound, who distinguished between 'principles', 'rules', 'standards' and 'concepts'; see R Pound, An Introduction to the Philosophy of Law (rev. ed.), Yale University Press, New Haven, USA, 1954, chapter 3. More elaborate models have been proposed since: for example, Sunstein proposes a system of norms consisting of rules, standards, guidelines, principles, analogies and untrammeled discretion. C Sunstein, Legal Reasoning and Political Conflict, Oxford University Press, 1996.


26 Compare H Collins, 'Transaction costs and subsidiarity in European contract law', in S Grundmann and J Stoyck (eds), An Academic Green Paper on European Contract Law, Aspen Publishers, 2002, 269 at 280. The debate takes a variety of forms. It underlies current controversies of particular relevance to the enforcement of contracts, for example, about the relative merits of rule and discretion in granting remedies, about the imposition of a general duty to act in good faith; and about the application of an equitable standard of conscience to commercial transactions. The issue is often conceptualised as one of 'principle versus pragmatism' or general versus individualised justice: for example, PS Atiyah, 'From principles to pragmatism: changes in the function of the judicial process and the law', Iowa Law Review, vol. 65, 1980, p. 1249; compare AM Gleeson, 'Individualised Justice – The Holy Grail', Australian Law Journal, vol. 69, 1995, p. 421.
produce fairer or more predictable outcomes has been addressed in almost exclusively theoretical terms. But many of the important issues involved in these controversies can be investigated empirically. This research has done so by using appropriate experimental paradigms to collect 'hard' data on the utility of the three models of contract law already mentioned:

- Australian Case Law
- The UNIDROIT Principles of International Commercial Contracts (UPICC)
- The Australian Contract Code (ACC)

The relevant characteristics of each of the three models are described and illustrated in Chapter 2. The methodology and experimental materials, including the criteria of utility, employed in this project are described in Chapter 3. The results of the experiments are described in Chapter 4. Our conclusions are stated in Chapter 5.

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27 An notable exception is J Brathwaite, 'Rules and principles: a theory of legal certainty' Australian Journal of Legal Philosophy, vol. 27, 2002, p. 47, which considers empirical data on the relative certainty of principles and rules at the level of decision making by state regulatory officials (nursing home inspectors). The findings of this important study are in many respects similar to the findings on the relative utility of principles and rules in the resolution of disputes reported in this book.
2. THE THREE LAW MODELS

This chapter enables the reader to form a picture of the three law models being compared. The main differences are the form in which their rules are expressed, their total number and level of detail.

- Case Law is stated in non-authoritative form in the published judgments of courts. It contains broad principles but these are not applied directly; they are applied in accordance with an always growing number of detailed rules.

- The UNIDROIT Principles of International Commercial Contracts (UPICC) is a model code of law applying to international commercial contracts, published by the International Institute for the Unification of Private Law. At the time of the experiments UPICC had 119 articles and elaborate commentary. There are some broad principles, including a universal obligation of good faith and fair dealing, but on most topics of contract law there are also many highly detailed rules.

- The Australian Contract Code (ACC) is a draft code published by the Victorian Law Reform Commission in 1992. Unlike Case Law and UPICC it confines itself to a small number of broad principles, stated in only 27 Articles, with a short commentary. It contains an overriding provision which prevents a person from asserting a right or denying an obligation to the extent it would be unconscionable to do.

These differences are illustrated by an example drawn from the experimental materials.
The research compares the utility of three models of contract law. The three models are:

- Australian case law (Case Law)
- the UNIDROIT *Principles of International Commercial Contracts* (UPICC) ¹
- the *Australian Contract Code* (ACC).²

To enable the reader to form a picture of the three models being compared, it is necessary to give some description of each. However, a detailed comparison of their doctrinal content is not necessary. All three models address the same basic issues of contract law: how a contract is made; how its content is determined; when its performance is excused; and what remedies are available for its breach. There are some interesting doctrinal differences,³ but we took the view that such differences are unlikely to affect utility, and therefore our research design does not isolate these differences from the general effect of each law model.⁴

However, the three models differ markedly in the form in which the rules are expressed, their total number, and their level of detail. In our view, these are the major points of difference affecting their utility.

**Case Law**

As noted in Chapter 1, the rules of Australian contract law are to be found in the Case Law, that is in the published judgments of the courts. They are

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¹ International Institute for the Unification of Private Law (Rome, 1994).
³ For example; unlike Australian law, UPICC does not require ‘consideration’ as an element of formation of a contract; it has no ‘parol evidence’ rule excluding extrinsic evidence in the relation to contract documents; it imposes a substantive limit on terms limiting or excluding liability for non-performance; it confers a right to cure a breach; it imposes a duty to re-negotiate in cases of hardship.
⁴ Our conception of utility is explained in Chapter 3.
stated in non-authoritative (non-canonical\(^5\)) form. Their total number is unknown: in fact, it is implicitly growing. They include, at one end of a spectrum, relatively determinate rules formulated for specific contexts (detailed rules), and at the other end, highly indeterminate rules applying in all or most contexts (broad principles). As also noted in Chapter 1, there is a longstanding jurisprudential debate about the level of determinacy of Case Law rules and the degree of discretion entailed in their application, which includes continuing controversy about the meaning of ‘rule’, ‘principle’ and ‘discretion’. In this report we use the phrases ‘detailed rules’ and ‘broad principles’ not in reference to this debate, but simply to differentiate between levels of determinacy. For our purposes both detailed rules and broad principles are rules.\(^6\) Although Case Law acknowledges the existence of a number of broad principles, these are not applied directly to the facts in determining rights and obligations. Their application is mediated by more detailed rules which are intended to deprive them of open-ended operation and to reduce the scope of forensic inquiry.\(^7\) A striking illustration is provided by a number of recent decisions in the Australian High Court dealing with unconscionable conduct. The High Court has made it clear that, in determining whether such conduct has occurred in a particular case, judges are not entitled to determine the question ‘at large’ by reference to the ordinary meaning of conscience, but must apply established legal doctrines which define its legal meaning. Thus, in a recent case dealing with the exercise of a contractual right of termination Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ said:\(^8\)

The terms ‘unconscientious’ and ‘unconscionable’ ... describe in their various applications the formation and instruction of conscience by reference to well developed principles. ... It is to those principles that the court has first regard rather than entering into the case at that higher level

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\(^{8}\) *Tawwar Enterprises Pty Ltd v. Cauchi* [2003] HCA 57 at [20]–[22].
of abstraction involved in notions of unconscientious conduct in some
loose sense where all principles are at large. ... The conscience ... which
equity seeks to relieve is a 'properly formed and instructed conscience'.

Because Case Law rules are never stated in canonical form, they are
necessarily in a constant state of evolution. A good example in contract
law is the modern doctrine of 'promissory estoppel'. If A's conduct induces
B to make an assumption concerning a contract which is false, and B
incurs loss by relying on its truth, A may be liable to B for that loss. In the
archaic terminology of the law, A is 'estopped' (precluded) from denying
the truth of the assumption. For many years it was asserted in judgments
that this principle applied only to assumptions about an existing state of
affairs, and not to assumptions about the future (for example an assumption
that a promise will be performed). However, the principle was ultimately
applied to an assumption induced by a promise in an English decision in
1947.\(^9\) Thirty-five years elapsed during which Australian law on this point
remained uncertain. In 1983 the High Court endorsed the operation of
estoppel as a defence\(^11\) against the exercise of a contractual right if A
induced B to assume that it would not be enforced. For several more years
it remained unclear whether promissory estoppel could create rights as
well as supply a defence against their exercise. The High Court took this
step in 1988.\(^12\) Since then estoppel has been applied in a wide variety of
cases, but key issues about its operation remain uncertain. Is there a general
category of estoppel by conduct, or are there only distinct estoppels relating
to particular forms of conduct? Is the full range of legal remedies available?
Must unconscionable conduct be proved as a separate element? Is estoppel
an independent cause of action, or can it be relied on only in connection
with some other cause of action? These and other unresolved issues still
blur the outline of the principle. Despite (or perhaps because of) the
frequency with which it has been applied, no settled version of the law of

\(^9\) As Gleeson CJ put it in \textit{Australian Broadcasting Corporation v Lenah Game Meats Pty
Ltd} (2001) 208 CLR 199 at 227 [45].


\(^12\) \textit{Waltons Stores (Interstate) Ltd v. Maher} (1988) 164 CLR 387.
estoppel yet exists. In the foundational cases Walton and Verwayen several accounts of estoppel compete with each other. In Verwayen four different views are expressed on the relationship of ‘estoppel’ with ‘waiver’ (a related concept which can also lead to the enforcement of assumptions in some contexts).

UPICC

UPICC is a code of law applicable to international commercial contracts drafted by a Working Group convened by the International Institute for the Unification of Private Law, an independent organization funded by its fifty nine member states, of which Australia is one. It has been drafted as a model uniform law but has not been formally adopted in any jurisdiction. It has, however, been used in arbitration proceedings.

When we conducted our research UPPIC had 119 Articles. In addition there was a Commentary elaborating the rules and giving examples of their application. The Articles occupied 25 pages without the lengthy Commentary. Since then there have been additions which have brought the total to 194 Articles with a corresponding increase in the length of the Commentary.

UPICC begins with a chapter of General Provisions containing broad principles. These include a principle imposing a duty to act in accordance with good faith and fair dealing, which may not be excluded by the parties. However, there are now a further nine chapters (four added since our research was conducted) with rules dealing in detail with formation, validity, interpretation, content, performance and non-performance, third-party rights, set-off, assignment, and limitation periods. On all these topics UPICC provides numerous black-letter rules of varying detail, and elaborates these further by the use of lengthy Comments and Illustrations.

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13 Ibid.
15 See <www.unilex.info>.
ACC

The ACC was published in 1992 by the Victorian Law Reform Commission. It is a distillation of Australian Case Law, stated in only 27 Articles occupying five pages. In addition there is a short Commentary of 47 paragraphs. This explains the operation of the Articles and their relationship with the case law doctrines which they distil. There are no illustrations.

Unlike Case Law and UPICC, the ACC consists entirely of broad principles. For example, the formation of contracts is covered in three Articles, the determination of its content in four, excuses from performance in three. The need for detailed rules is eliminated by an article which explicitly overrides all others, Article 27:

A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

The Commentary explains that ‘unconscionable’ means ‘offending against conscience’ when ‘judged by reference to both the values of the wider community and … the particular environment’, but adds that ‘it is impossible to specify or define exhaustively the circumstances in which it is unconscionable to assert or deny a right by the elaboration of particular rules’. It will be seen that the ACC’s reliance on broad principle could hardly be more overt or complete.

Illustration: ‘Base Metals v. Precious Metals’

The characteristics of the three models can be demonstrated more concretely by using an example drawn from our experimental materials. The example is based on a reported case in an Australian appellate court, which we have renamed Base Metals v. Precious Metals. The materials

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16 The experimental materials are fully described in Chapter 3. The materials for this example are set out in Appendices 1 and 2.
include separate judgments for the plaintiff and the defendant based on each of the three law models. The judgments illustrate how the rules supplied by each model are applied to an actual dispute. A full set of the six judgments for this example is to be found in Appendix 2.

Two mining companies executed a document described as a 'heads of agreement'. This permitted Base Metals to explore a mining tenement owned by Precious Metals. The document contained only six clauses, which specified payments to be made, money to be spent on exploration activity, and dealt with some other matters.

The final clause of the document stated: 'The above forms a heads of agreement which constitutes an agreement in itself intended to be replaced by a fuller agreement not different in substance or form.'

Base Metals made payments and expended money as required, and discovered a valuable deposit of base metals. The parties also negotiated towards a fuller agreement, but disagreed on a number of points.

Precious Metals was then taken over by new owners. The new owners terminated negotiations. They claimed that the 'heads of agreement' did not constitute a binding contract because the parties had not intended to make one, and because they had not defined their obligations with sufficient certainty. Base Metals sued Precious Metals for breach of contract.

The three law models agree broadly in their response to such a claim. Each of them holds that a contract is only formed if the parties intend to be legally bound, and if their agreement is sufficiently certain. Each also provides rules for supplementing the express obligations of a contract as a means of curing uncertainty. However, the three law models differ considerably in the nature and number of the rules which embody these basic responses. These differences are described below.
Case Law relevant to Base Metals v. Precious Metals

The most relevant rules of Case Law, as applied in the original case, are as follows:

General principle
1. There is no binding contract unless the parties intend to create legally binding relations.

Mediating rules
2. The intention of the parties is determined objectively by reference to what a reasonable person would infer.
3. Evidence of their subjective intention is inadmissible.\(^\text{17}\)
4. Where important terms are uncertain, lack of intention to be legally bound can be inferred.
5. Where the parties contemplate the execution of a formal contract the case may belong to one of four classes:
   (a) They intend to be bound immediately. While they expect to sign a formal contract they do not promise to do so.
   (b) They intend to be bound immediately and promise to sign a formal document not different in effect.
   (c) They intend to be bound immediately but performance is conditional on signature of a formal document.
   (d) They intend not to be bound unless they sign a formal contract.

General principle
6. There is no binding contract if essential terms of the contract are missing or uncertain.

\(^{17}\) The leading judgment in the original case asserted that evidence of subjective intention on this point was inadmissible, although according to a more conventional view the rule against admitting such evidence applies only when the content, rather than the formation, of a contract is in issue.
Mediating rules

7. A term is not uncertain simply because it has more than one possible meaning.

8. A term is uncertain only if its language is so obscure that the court cannot attribute any particular intention.

9. There is no binding contract where an essential term is left to be settled by future agreement.

10. But there is no obstacle to the parties leaving important terms to be agreed later.

11. What is essential depends on the intention of the parties.

12. There is an implied obligation to do all such things as are necessary to enable the other party to have the benefit of the contract.

13. Where the parties have agreed to do something which cannot be done unless both concur in doing it, it is implied that they will do what is necessary.\(^{18}\)

It will be seen that Case Law provides two relevant broad principles—that the parties must intend legal relations, and that all essential terms must be certain—the application of which is, however, mediated by detailed elaborations. Thus the requirement that the parties must intend legal relations is elaborated by the rule that intention must be determined objectively, another rule that lack of significant detail indicates a lack of that intention, and even a rule specifically directed to cases where the parties have referred to a further formal document, enumerating four different categories of intention.

\(^{18}\) The court in the original case did not refer to further detailed rules governing implication of terms —

14. Where the contract belongs to an identifiable class of contracts, a term may be implied if it: (a) is necessary to prevent rights from being rendered nugatory', or (b) accords with 'perceived necessities of the times', or (c) is customary;

15. A term may be implied ad hoc, if it: (a) is necessary for business efficacy, (b) is reasonable and equitable, (c) is obvious, (d) is capable of clear expression, and (e) does not contradict any express term.
Similarly, the principle that essential terms must be certain is elaborated by a number of detailed rules: on interpreting ambiguous language; determining what terms are essential (including a rule distinguishing ‘essential’ from ‘important’); providing for the implication of missing terms by reference to an implied duty to co-operate; and dealing with deferred agreement.

It will be appreciated that the potential for endless elaboration of these rules is an inherent feature of the Case Law method. So, for example, it is currently a matter of controversy in Australian law whether, where the parties contemplate the execution of a formal contract, the case may belong to one of three classes rather than four, as stated above.\textsuperscript{19}

The majority of the court in the original case held that the parties intended to make an immediately binding contract. This was indicated by the language of clause six and the conduct of the parties, both before and after signing the heads of agreement. The case therefore belonged to the first of the four classes mentioned above. All essential terms were certain, because they could either be ascertained by interpretation or supplied by implication.

The minority decided that the parties did not intend a binding contract to come into existence until the formal document was finalised, because essential terms had not been agreed and others were too vague. Even if they did intend legal relations, their agreement was uncertain because essential terms had been left to further agreement.

**UPICC provisions relevant to Base Metals v. Precious Metals**

Rather than set out verbatim all the relevant rules in UPICC (see Appendix 1) they are summarised below.

1. Intention to be bound and sufficient definiteness of content are necessary elements of a contract formed by offer and acceptance: Articles 2.1, 2.2.

\textsuperscript{19} E Peden, JW Carter and GJ Tolhurst, ‘When three just isn’t enough: the fourth category of the “subject to contract” cases’, *Journal of Contract Law*, vol. 20, 2004, p. 156.
2. A contract may also be concluded by ‘conduct sufficient to show agreement’: Article 2.1. (It is not clear whether intention to be bound and sufficient definiteness are also pre-requisites of formation by conduct, although it would be strange if they were not.)

3. Whether there has been conduct sufficient to show agreement must be decided in accordance with criteria of intention, meaning, and regard for circumstances, set out in three separate Articles, 4.1, 4.2, and 4.3, containing 10 paragraphs or sub-paragraphs.

4. If a party insists that the contract is not concluded until there is agreement on specific matters or in a specific form, then no contract is concluded until that stipulation is satisfied: Article 2.13.

5. Where a party makes it clear that it does not intend to be bound unless a formal document is drawn up, there is no contract until this is done: Article 2.13, Comment 2.

6. As a general rule a contract is concluded if parties reach agreement on essential terms, while minor terms may be implied: Article 2.13, Comment 1.

7. UPICC provides a plurality of sources for the supplementation of express terms:

   (a) Each party has a duty to act in accordance with good faith and fair dealing: Article 1.7.

   (b) Each party has a duty not to act inconsistently with an understanding it has caused the other party to have: Article 1.8.20

   (c) Each party must co-operate when this may reasonably be expected: Article 5.3.

   (d) article 5.2 states that implied obligations may stem from

      (i) the nature and purpose of the contract

      (ii) practices and usages.

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12 This Article was added to UPICC after the conclusion of our experimental work, and was not included in the law statements used in the experiments.
(iii) good faith and fair dealing, and
(iv) reasonableness.

(e) Where the parties have omitted a term ‘important for the
determination of their rights and duties’ an appropriate term must
be supplied: Article 4.8.

(f) What is appropriate must be determined by regard for the
intention of the parties, nature and purpose of the contract, good
faith and fair dealing, and reasonableness.

UPICC supplies as many, and substantially the same, detailed rules as
Case Law for the solution of this dispute. Like Case Law, UPICC regards
intention to be bound and definiteness as prerequisites of the formation of
a contract, and elaborates on them in almost identical ways.

Detail is pursued to an extent that gives rise to some obvious difficulties. For
example, UPICC requires the application of distinctions between ‘implied
terms’ and ‘supplied terms’, and between ‘essential’ terms, ‘important’ terms
and ‘minor’ terms. The requirement of definiteness refers the decision-maker
to the possibility of supplying omissions, and the supply provision appears to
mandate this whenever missing detail is required to determine the parties’
rights. This leads one to wonder how an agreement can ever be too indefinite.

The UPICC majority21 concluded, like the Case Law majority, that the
parties intended to make an immediately binding contract. This was
indicated by the language of clause six and the conduct of the parties, both
before and after signing the heads of agreement. The stipulation for a
more formal agreement did not alter this conclusion. The heads of agreement
were sufficiently definite, as the missing terms could be determined by
interpreting the agreement, or could be supplied, or implied, or were covered
by the duty to cooperate. The majority said that Precious Metals might
have contravened the duty to act in good faith by denying that there was a
contract, but it was unnecessary to decide this.

21 The UPICC judgments were written by the Researchers. See Chapter 3.
The minority decided that Precious Metals made it clear that it did not intend a binding contract to come into existence until the formal document was finalised. The minority also concluded that there was no intention to be bound because of the importance of the terms which had been left unresolved. Even if the parties intended to conclude a binding contract, the absence or ambiguity of these terms meant that the agreement was not sufficiently definite. The arrangement could not be implemented without further agreement on critical points. The provisions of UPICC dealing with interpreting, supplying and implying terms, and the duty of cooperation, did not overcome these deficiencies. It was impossible to identify any ‘common intention’ of the parties from the heads of agreement. Nor was it possible to determine how reasonable persons would have understood it, or what terms should be supplied or implied in the circumstances. Pursuit of commercial self-interest by a party not contractually bound was not a breach of the duty of good faith.

**ACC provisions relevant to Base Metals v. Precious Metals**

The ACC provides five concise Articles relevant to the dispute. They may be quoted verbatim:

Article 5. A contract is made only when the parties intend legal obligations to arise.

Article 7. There is no contract if a necessary term is missing, is too vague, or has been left to future agreement. (The Commentary to Article 7 states a term is necessary if without it is not possible to discern what each party was intended to get from their promises, and that missing detail can be supplied under Article 10.)

Article 10. The parties must do everything that conscience requires to ensure that each gets the benefit intended by their promises.

Article 26. A person who makes an assumption may require another person to act in accordance with that assumption to the extent that it would be unconscionable not to do so.
Article 27. A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

The ACC provides no mediating rules governing the application of these broad principles. It does not provide rules for ascertaining the parties’ intention or interpreting their statements or conduct. It provides only a single source for the supplementation of express content. It does not provide specific rules for agreements contemplating the preparation of a formal document.

The ACC majority\textsuperscript{22} decided that the parties intended legal obligations to arise when they signed the heads of agreement. Clause six spoke for itself. The conduct of the parties supported this conclusion. The majority further found that the terms of the ‘heads of agreement’ were sufficient to show the intended benefit. The benefit which Base Metals was intended to get was the right to explore on Precious Metals’ land and to acquire any base metals discovered there. The detail not yet agreed could be worked out by reference to the requirements of conscience.

The majority further held that Base Metals had made an assumption that the heads of agreement constituted a contract. As it had expended money and discovered valuable deposits of metal, it was unconscionable for Precious Metals not to abide by that assumption.

The minority held that there had been no intention that legal obligations should arise on signing the heads of agreement. Clause six stated an intention to make a fuller agreement. This was to be expected in a long-term, large-scale venture of this kind. The omission of important matters of detail strengthened the inference that the heads of agreement was not intended to be a binding contract. Even if the parties meant to create legal obligations, the missing terms made it impossible to discern the intended benefit, and for that reason alone there was no contract.

\textsuperscript{22} The ACC judgments were written by the Researchers. See Chapter 3.
It was true that Base Metals made an assumption that there was a contract, but it was not unconscionable for Precious Metals not to act in accordance with that assumption. The assumption was wholly unreasonable in the particular environment. Base Metals had accepted the risk that negotiations towards a fuller agreement might never come to fruition.

This case illustrates how, by using unconscionability as an overriding criterion of obligation, the ACC avoids the use of detailed rules of the kind applied by Case Law and UPICC. Thus, the ACC does not distinguish between essential and inessential terms, terms left to future agreement, or agreements contemplating the preparation of a formal document. Nor does it contain specific rules governing the interpretation of statements and conduct.
3. METHODOLOGY

This chapter describes the experiments that were conducted to evaluate the utility of the three law models. People expect law to be predictable, fair, clear and logical, and easy to comprehend and apply. Three experiments were designed to measure the extent to which the three law models meet these elements of utility.

In the first two experiments law students were asked to decide a contract dispute using one of the three models. In the third experiment non-law students were given the facts of the same disputes and asked to evaluate two judgments, each applying one of the law models. The way in which the experiments isolate the effect of a law model from the effect of other variables is explained. The experiments and the materials used are described in detail. The chapter concludes by examining the relevance of the results to the real world.

Utility

As our research investigates the utility of the three models of contract law described in Chapter 2, it is necessary to explain our conception of utility. In keeping with the empirical nature of this investigation we adopted a conception of utility which reflects the demands which are in fact most often made of legal systems by lawyers and non-lawyers alike. These are that the law should be:

- certain (predictable outcomes)
- just (fair outcomes)
- accessible (clear language and logic)
- efficient (easy to comprehend and apply).

**Research design**

Our research used an experimental paradigm. Three experiments were conducted. Two involved the resolution of disputes by law students. The third involved the evaluation of judgments by non-law students. In this way we hoped to evaluate the utility of the three law models by reference to the concerns both of lawyers and the general community.

Although most readers will understand in a general way what they are, experiments are only rarely used to explore issues of legal policy. It is therefore desirable, before describing our research design in detail, that we draw attention to the unique virtues of experimental research.

As we have pointed out, the debate about detailed rules and broad principles involves a number of assertions about their relative utility. For example, it is claimed that detailed rules lead to more predictable decisions. However, this claim cannot be evaluated simply by observing legal decision-makers in their day-to-day activities, as a naturalist interested in the adaptive qualities of certain bill shapes would observe the behaviour of birds. In addition to the law model which is being applied, a myriad of factors may affect the outcomes of particular decisions, for example, the factual details of the dispute, the normative content of particular rules, and the characteristics of the decision-maker, including what she ate for breakfast. However, it would be impossible to isolate the effect of law model from the other factors by natural observation.

It is precisely the problem of isolating the effect of one of many possible variables that an experimental paradigm addresses. The effect of the

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1 Ease of location is another obviously relevant aspect of efficiency. However, our design did not investigate this aspect. See footnote 6 below, and Chapter 4.
research variable of interest can be isolated by independently manipulating it and measuring the effects on dependent variables, while keeping all other potential variables as equal as possible by controlling or randomising them. Thus the effect of law model on a decision can be isolated by controlling some variables, such as the facts of the dispute, by using the same dispute repeatedly, while the effect of other variables, such as the characteristics of decision-makers, can be randomised by assigning participants to law model groups in a fixed sequence.²

Admittedly experiments must generally be conducted in conditions which are only abstractions of real world conditions. But this does not make the results unreal. The method yields one very real result: whenever a significant difference between experimental groups is observed, one can say, definitely, that in these conditions the experimental variable caused this difference. It is true that the significance of this conclusion then depends on the extent to which the experimental conditions approximate the conditions of the real world. We address this issue after the detailed presentation of our design.

Experiment 1

In the first experiment, law students enrolled in Contract Law were given the facts of a dispute and a statement of the relevant law, drawn from one of the three law models, and asked to decide the dispute. They were asked to record their decision (for plaintiff or defendant), along with the time at which it was reached. They were also asked to supply a brief statement of their reasons indicating how they applied the law. A maximum of 80 minutes was allowed to complete these tasks. After this time the students were asked to rank their level of agreement with a number of propositions relating to the utility of the law model (the Likert technique). They were given 10 minutes for this task. They were paid $40 to reimburse them for their time and effort.

² First participant to Case Law, second to UPICC, third to ACC, repeat.
In all, we used 10 different disputes. These were chosen to span the full range of topics of contract law, that is, formation, content, excuses (invalidating or vitiating factors), termination and remedies. As there were three law models, there were 30 experimental groups. We randomly assigned 10 students to each. Thus, 300 students participated in Experiment 1.

Experiment 2

Experiment 2 was a replication of Experiment 1 with one difference, namely the student judges worked in pairs. Thus, 600 students participated in Experiment 2.\(^3\) We were concerned about how diligently participants in Experiment 1 would apply themselves to the task. After all, while the task was similar to sitting an examination, the students did not have the incentive of being graded in any course. We thought that if participants were required to work in pairs, this would make them accountable to each other and lead to a greater degree of application, as well as reduce the impact of idiosyncrasy.

Experiment 3

In Experiment 3, university students not enrolled in law\(^4\) were asked to read a statement of the facts of a dispute and a judgment deciding the dispute, using one of the law models. They were also asked to complete a questionnaire by responding to a number of propositions about the judgment, again using the Likert technique. Then they were asked to re-familiarise themselves with the facts, read a second judgment in favour of the other party, based on the same or a different law model, and complete an identical questionnaire. They had a maximum of one hour to complete these tasks; it was suggested that they take 30 minutes on the first part, and 25 minutes on the second. They were paid $30 to reimburse them for their time and effort.

\(^3\) Students who participated in Experiments 1 and 2 were recruited by distributing flyers during contract law lectures and tutorials. A full list of the participating Law Schools can be found in the Acknowledgements section of this report.

\(^4\) Participants at Macquarie University, the University of New South Wales and the University of Technology, Sydney, were recruited by distributing flyers on campus.
The same 10 disputes were used. In order to be able to distinguish the effect of law model from the effect of outcome, every possible pair combination of judgments was administered with equal frequency. As there are nine possible pairs of six different judgments (three law models X two judgments,) there were 90 experimental groups. We randomly assigned 10 students to each of these. In all, therefore, 900 students participated in Experiment 3.

**Experimental materials**

Complete sets of the experimental materials for one of the 10 disputes are reproduced in Appendix 1 (Experiments 1 and 2) and Appendix 2 (Experiment 3). They comprise:

**Experiment 1**
- written instructions
- a statement of facts
- a statement of law
- a judgment form
- a questionnaire

**Experiment 2**
- the same as Experiment 1 (with two extra questions about working in pairs)

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5 The order in which each pair was presented was counterbalanced within groups.
Experiment 3

- written instructions
- a statement of facts
- two judgments
- two questionnaires

The ten disputes were chosen according to a number of criteria. As we have already noted, they cover the full spectrum of contract law. Each was based on a reported Australian appellate court decision which resulted in a split decision.\(^6\) Split decisions were chosen because we believed that a law model effect would most likely be observed if the decisions were difficult. Disagreement between senior judges is an obvious indication of difficulty. Further, in Experiment 3, a law model effect could only be observed if the effect of outcome was controlled. Therefore each participant had to evaluate judgments for both parties, and either outcome had to be plausible. Disagreement between senior judges is also an indication that a decision for either party is plausible. Finally, to minimise the effect of familiarity, we chose only cases that were not referred to in any detail in the standard student texts and casebooks.

Statements of fact were prepared by the researchers, drawn from the report of each case. Statements of the relevant Case Law were also extracted from the reports, using the actual language of both the majority and minority judgments.\(^7\) The UPICC and ACC statements were extracted from the relevant articles and commentary. The fact statements and law statements ranged in length from one to four pages. The written instructions stated that the student judges should assume that the law statement

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\(^6\) One of the decisions was reversed by the High Court before we completed our analysis. Five of the decisions were for the plaintiff, and five, counting the High Court decision just mentioned, were for the defendant.

\(^7\) It will be evident that we did not require our Case Law student 'judges' to perform the tasks of finding the relevant precedents and reading them in full. In this way we removed much of the lead in Case Law's saddlebags. At the same time, this focused our research more precisely on effects related to the differences between the law models in their use of broad principles and detailed rules.
contained the only relevant rules applying to the dispute. This instruction was intended to minimise the extent to which students might use their own knowledge of other rules.

The judgments used in Experiment 3 were again prepared by the researchers. The Case Law judgments were abridgements of the original judgments, retaining the actual words of the judges, using a technique of elision familiar from the casebooks used by teachers and students of law throughout the common law world. The UPICCC and ACC judgments were written using their relevant articles and commentary. An attempt was made to preserve the conventions of judicial style. So far as this could be done, the reasons in all judgments referred to the same factual grounds for decision. The judgments ranged in length from three to six pages.

The judgment forms used in Experiments 1 and 2 required participants to record a decision in favour of either the plaintiff or the defendant, write down the time at which it was reached, and to give brief reasons.

The questionnaires used in Experiments 1 and 2 asked the participants to indicate what they thought about the rules in the law statements. They were asked to respond to eight statements by circling a number on a scale of agreement/disagreement (the Likert technique), and to provide comments. The statements related to the aspects of utility we have described above. The questionnaire concluded with an open-ended invitation for other comments.

The two questionnaires used in Experiment 3 were identical. Each asked the participant to evaluate the judgment they had just read, by responding to nine statements relating to utility, using the method just described.

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8 Pairs could indicate that they had not agreed.
9 Pairs were asked in addition to respond to the proposition ‘It was easy for the person I was working with and me to agree upon a decision’.
Generalisability of the results

To what extent have we managed to approximate the conditions of the real world in our experiments?

In Experiments 1 and 2 we asked people with some formal legal training to resolve a wide range of contract disputes, drawn from life, by applying the law. This is a task that is performed everyday in the real world not only by judges but also by a range of legal advisers who must try to predict what a judge would decide.

In Experiment 3 we asked non-lawyers to consider the same disputes and read a judge’s reasons for deciding in a particular way.\textsuperscript{10} It is not uncommon in commerce for non-lawyers to have to consider how the law applies to a dispute, and to read court judgments. In any case the assumption that lay people can read and evaluate the judgments of courts is fundamental to our legal system.

Nevertheless, some aspects of our design were dictated by practical considerations rather than the aim to emulate real life. To what extent do these impair the generalisability of our results?

We gave decision-makers the facts and the law in distilled form. Some would say that this is not the way in which disputes present themselves in the real world. But in fact the process of applying the law requires boiling the dispute down to its material facts and identifying the relevant propositions of the law. To some decision-makers such as appellate judges a dispute is in fact presented in this distilled form. Others must do the boiling down for themselves; we saved our participants this task.

Some would say that assessing the utility of Case Law should be done by using the full judgments in which it is to be found in the law reports. However,

\textsuperscript{10} It should be noted that the two different experimental paradigms (decision and evaluation) produced a number of similar results (see Chapter 4). Similarity of results between paradigms supports their generalisability as well as their validity.
the Case Law statements used in our experiments were extracts from these judgments using the exact words of the judges. Specialist lawyers such as barristers who have occasion to read case reports ultimately seek to distil similar statements from them. Many other users of the law including practising lawyers may not go beyond consulting similar statements to be found in legal textbooks and encyclopaedias.

Some would argue that an hour is not enough time to establish the relative utility of the law models. But they will have to admit that time in real life is often limited, and that in some contexts a decision requiring consideration of the law must be made in one hour. In any case, we doubt that observable differences in the utility of a law model affecting decisions made in one hour would not also be observed were a longer time allowed. It is unlikely that this time limit affects the fundamentals of the process of making a legal decision. Similar time limits for the same task are applied by law schools throughout the common law world in evaluating their students’ competence to advise clients in real life.

It might be thought that law students do not sufficiently resemble the qualified lawyers and judges of the real world. However, contract law students in Australia have usually completed several foundational subjects instilling the legal problem-solving skills that they will use in their professional careers.
4. RESULTS OF THE EXPERIMENTS

This chapter is the core of the Report. It presents the empirical findings in detail.

The data produced by Experiments 1 and 2 consisted of decisions and decision-makers' evaluations of the law model used. Experiment 3 produced readers' evaluations of judgments based on the three law models. These data yielded the following findings (all differences are statistically significant):

**Decision data**

- Overall no law model is more predictable than any other. However, the ACC made decisions more predictable in easier cases and less predictable in harder cases. The capacity of a law model to identify easy cases clearly enhances its utility.

- No law model was more likely to lead to a fair result, defined as the majority decision in the original case. However, ACC and UPICC users were more likely to reach the fair result when the dissent was substituted for the majority opinion in three cases because the researchers agreed with it (researcher opinion).

- The ACC was applied with greater accuracy (assessed by the researchers) than Case Law and UPICC. Other findings on relative utility must be assessed in this light.

- The ACC led to faster decisions, indicating that it was easier to comprehend and apply.


Evaluations of decision-makers

- Overall no law model made it easier to decide. However, Case Law made it more difficult for pairs to agree in easier cases.
- No law model was rated easier to understand or more vague than any other.
- The ACC and UPICC were applied more confidently than Case Law by single judges. But it must be remembered that UPICC was applied less accurately (researcher assessment) than the ACC.
- UPICC and the ACC were rated as more helpful in reaching a fair outcome than Case Law by single judges. The ACC was rated more helpful than UPICC and Case Law by pairs, especially in easier cases. This suggests that the ACC and UPICC are more likely to lead to fair outcomes than Case Law, and that the ACC is more likely to do so than UPICC. Again it must be remembered that UPICC was applied less accurately (researcher assessment) than the ACC.
- The ACC was rated less technical than UPICC and Case Law.

Evaluations of judgment readers

- ACC and UPICC judgments were rated easier to read, easier to follow, more logical, and less confusing than Case Law judgments.
- Case Law judgments in easier cases were rated hardest to read, most jargon-laden, most technical, most confusing and least easy to follow.
- ACC judgments were rated more jargon-free than UPICC judgments, which were rated better than Case Law judgments.
- ACC jargon ratings differentiated most strongly between fair and unfair decisions (court majority). Readers of UPICC judgments rated them less jargon-laden when unfair.
It is obvious that a law model draws attention to all the important facts of a dispute. These results suggest that the ACC and UPICC judgments were rated less technically than Case Law judgments. ACC and UPICC judgments were more strongly agreed with and thought to be fair than Case Law judgments.

Results of the experiments
Experiments 1 and 2

As explained in Chapter 3, the data obtained in Experiments 1 and 2 are qualitatively of two kinds: some relating to the decisions made by the student judges ('Decision data') and some consisting of their evaluations of the utility of the law model they used to decide ('Evaluations of utility'). The findings are presented in this Chapter under these headings.

Decision data

Certainty (predictable outcomes)

Level of agreement is a measure of predictability or certainty. All the student judges working singly in Experiment 1 reached a decision. Only five pairs, three using Case Law and two using the ACC, were unable to agree on a decision.1 We measured agreement by taking the number of decisions in favour of plaintiff and defendant, and expressing the majority to minority ratio as a percentage of agreement.2 Thus, if the 10 decisions were equally divided in favour of plaintiff and defendant this equals zero per cent agreement. If the 10 decisions were 10 for one of the parties to zero for the other, this equals 100 per cent agreement. A six to four split, to take one further example,3 equals 20 per cent agreement.

We also calculated agreement by combining singles and pairs decisions in each dispute.4 Because the combined measure of agreement is based on 20 decisions instead of 10, the combined results may be regarded as inherently more reliable indications of any law model effects.5

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1 Another pair using UPCC agreed on the result but gave radically different reasons.
2 The formula used was: % agreement = 100 X abs(2d – n) / n, where n is the number of decisions (10 singles or 10 pairs judgments) and d is the number of decisions in favour of plaintiff or defendant (as the absolute value of (2d – n) is used, it does not matter which).
3 This is close to the two-to-one split appellate decision of most of our examples.
4 The calculation of agreement for the combined data uses the formula described in note 2, although the number of decisions is, of course, 20 rather than 10. Thus, 20 decisions for one party equals 100 per cent agreement, while 10 decisions for each equals zero per cent agreement.
5 The measure of agreement makes the 'sampling unit' the dispute, rather than the individual participant (or pair of participants) and reduces our 'sample size' (number of observations in each experimental group), by a factor of 10 compared to the analysis of participant
Table 1 shows the mean level of agreement for each law model.

Table 1: Mean per cent agreement

<table>
<thead>
<tr>
<th></th>
<th>Case Law</th>
<th>UPICC</th>
<th>ACC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Singles</td>
<td>48</td>
<td>66</td>
<td>44</td>
</tr>
<tr>
<td>Pairs</td>
<td>47</td>
<td>40</td>
<td>56</td>
</tr>
<tr>
<td>Combined</td>
<td>40.5</td>
<td>51</td>
<td>48</td>
</tr>
</tbody>
</table>

Although the singles results may suggest that consensus among UPICC users was higher, this result was not statistically significant and its reliability is doubtful.\(^6\) The observed differences between the pairs and combined means were clearly not significant.\(^7\) On these results, none of the three models has any claim to greater certainty.

However, some of the disputes were, in our view, easier to decide than others. We wanted to capture this aspect in our analysis, as it is a feature of the real world, and we thought it possible that the three law models might perform differently if a factor for difficulty were taken into account. We therefore ranked the ten disputes in order of our opinion of their difficulty, and divided them into two groups, `easier` and `harder`. The statistical analysis on the singles and pairs data separately again revealed no significant differences. However, when the data are combined an interesting difference

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\(^6\) As is conventional, null hypothesis probabilities (p) less than .05 (corresponding to a chance of less than one in 20 of wrongly rejecting the null hypothesis) are described in this report as `significant`; and p equal to or greater than .05 and less than .10 as `marginally significant`. A few marginally significant findings are reported below, where the data exhibits a trend or pattern of difference which is consistent with other findings. As the term indicates, however, these are less reliable than significant findings and conclusions based on them should be regarded as provisional. In this case, although a test of the differences among the singles agreement scores using a non-parametric or rank-based (Friedman) test gave $S(2) = 5.52$, $p = 0.063$, which is marginally significant, the test using a one-way repeated measures ANOVA gave $F(2, 18) = 2.28$, $p = 0.131$, which is clearly not significant.

\(^7\) Pairs $F(2, 18) = 0.89$, $p = 0.427$; combined $F(2, 18) = 0.75$, $p = 0.488$
appears. Figure 1 shows the mean percent agreement, for the combined data, for each law model and level of difficulty.

Figure 1: Mean percent agreement (Combined) by law model and difficulty

The interaction of law model and difficulty is statistically significant.\textsuperscript{5,9} Figure 1 shows that users of the ACC agreed more often on the outcome in easier cases, and disagreed more often in harder cases. Although difficulty made some difference to agreement among UPICC users, the effect was smaller. In contrast, difficulty made no difference to the users of Case Law. The percentage of agreement among ACC users in easier cases means that, on average, nearly 18 of the 20 decision makers agreed in each case. We report other results below that also suggest that the ACC

\begin{footnote}
\textsuperscript{5} F(2, 16) = 4.62, p = 0.026. The main effect of difficulty is marginally significant: F(1, 16) = 4.86, p = 0.059.

\textsuperscript{9} It should be noted that the analysis of the data from the three experiments involved a large number of post hoc statistical tests. As the conventional threshold of significance of \( p < .05 \) has been adopted (see footnote 6), the chances are that one in 20 tests will have wrongly identified a difference as significant. However, against this it should also be noted that many of the significant results reported here are consistent with others, including results across the three different experiments. This consistency supports the reliability of these results. Nevertheless, we support the need for replication of these results using a \textit{a priori} hypotheses based on our conclusions.
\end{footnote}
tends to make the decision in easier cases clearer,\textsuperscript{10} while Case Law has a tendency to make even easier cases difficult.\textsuperscript{11}

\textit{Justice (fair outcomes)}

While strong consensus on an outcome is arguably an indication of its fairness, our data enabled us to explore the relationship between law model and justice in two other ways.

\textbf{Court majority}: The formal premise on which the legal system operates is that the decision of the court is fair. Hence, we categorised the decisions of the student judges as ‘fair’ if they corresponded with the majority decision in the appellate case on which the dispute was drawn.\textsuperscript{12}

We included in our statistical analysis the difficulty factor (described above), as we hypothesised that the percentage of fair outcomes would be related to it. The results are shown in Table 2.

\begin{table}[h]
\centering
\caption{Percentage of fair outcomes (court majority)}
\begin{tabular}{|l|c|c|c|c|c|}
\hline
 & \multicolumn{3}{|c|}{Easier cases} & \multicolumn{3}{|c|}{Harder cases} \\
 & Case Law & UPIC & ACC & Case Law & UPIC & ACC \\
\hline
Singles & 76 & 64 & 62 & 38 & 54 & 50 \\
Pairs & 66 & 62 & 58 & 48 & 62 & 60 \\
Combined & 71 & 63 & 58 & 42 & 58 & 55 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{10} The ACC was rated by users as more helpful in reaching a fair result and this effect was strongest in easier cases: see ‘The rules prevented me from / helped me to reach a fair result’ (Figure 3). Ratings of judgments for agreement (Figure 7), fairness (Figure 9) and consideration of the facts (Figure 13) indicated that the ACC made the fair outcome more apparent, at least in easier cases. It can be assumed that if a law model makes the just decision more apparent to a reader of a judgment, it will also make it more apparent to a decision-maker and thus increase the predictability of the outcome.

\textsuperscript{11} See user ratings of case of agreement (pairs) (Figure 2) and users ratings in response to ‘The rules prevented me from / helped me to reach a fair result’ (Figure 3). See also judgment reader ratings in response to ‘It was easy to read the judgment’ (Figure 4), ‘The judgment used too much legal jargon’ (Figure 5), ‘The decision was technical’ (Figure 11), ‘The judgment was confusing’ (Figure 15), ‘It was easy to follow the judge’s reasoning’ (Figure 16).

\textsuperscript{12} As noted in Chapter 3, at the time our cases were selected one of them was based on a split decision of the New South Wales Court of Appeal. Before the analysis of our data was completed, this decision was overruled by a unanimous High Court. We applied the High Court result in categorising student judge decisions as fair or unfair.
Although it may seem that Case Law yielded a higher proportion of fair outcomes in easier cases and a lower proportion in harder cases, in fact neither the law model effect nor the combined effect of law model and difficulty approaches significance. The proportion of fair outcomes was also not affected by difficulty.

**Researcher opinion:** Our own opinion was that the court majority decision was not in fact the fair outcome in three of the 10 disputes. We decided to re-analyse the data, using our opinion of the fair outcome. The results are shown in Table 3.

**Table 3:** Percentage of fair outcomes (researcher opinion)

<table>
<thead>
<tr>
<th></th>
<th>Easier cases</th>
<th>Harder cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Case Law</td>
<td>UPICC</td>
</tr>
<tr>
<td>Singles</td>
<td>72</td>
<td>84</td>
</tr>
<tr>
<td>Pairs</td>
<td>62</td>
<td>78</td>
</tr>
<tr>
<td>Combined</td>
<td>67</td>
<td>81</td>
</tr>
</tbody>
</table>

The effect of law model on the singles data is not significant, although the pattern is very similar to that of the pair data. The effect of law model on both pair and combined data is significant. As noted above, the combined result should be regarded as the more reliable indicator of significant effects.

The significant effect of law model indicates that users of the ACC and UPICC are more likely to reach a fair outcome than users of Case Law, in both easier and harder cases. Overall, about 72 per cent of decisions made

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1. Law model: Singles $F(2, 16) = .06, p = .941$; pairs $F(2, 16) = .35, p = .707$; combined $F(2, 16) = .26, p = .777$. Law model X difficulty: Singles $F(2,16) = 1.59, p = .234$, pairs $F(2, 16) = 1.59, p = .235$, combined $F(2, 16) = 2.51, p = .112$

2. Combined $F(1, 16) = 0.69, p = .432$

3. At the time we selected the cases, we disagreed with the majority, and agreed with the minority decision, in two of them. However, this became three when the High Court overturned one of the decisions before we completed our analysis: see footnote 12.

4. Singles $F(2,16) = 1.99, p = .169$

5. Pairs $F(2,16) = 3.99, p = 0.039$; combined $F(2,16) = 4.78, p = 0.024$

6. As noted in Chapter 3, there are also some grounds for regarding pair data as inherently more valuable than the singles.
using both ACC and UPICC corresponded with the fair result, whereas just 56 per cent of Case Law decisions did so.

Difficulty also had a significant effect on the likelihood of a fair decision, thus supporting our classification.\textsuperscript{19} In the combined data, 78 per cent of decisions corresponded with the fair result in easier cases, whereas less than 56 per cent of decisions in harder cases did so. There was no interaction between difficulty and law model.\textsuperscript{20}

The conclusion that UPICC users are as likely to reach a fair outcome as ACC users must be qualified in light of our analysis of the reasons given by the student judges, to which we now turn.

\textit{Quality of reasons (accurate application of law)}

In addition to analysing the decisions themselves we examined the quality of the written reasons the students gave for them. The senior researchers jointly assigned a mark (out of 10) to each set of reasons, based on our assessment of how accurately the student applied the relevant statement of law.

We were and remain conscious of the potential for researcher bias in this process, and took what measures we could against it. We endeavoured to make the assessment as objective as possible. In giving a mark we paid no attention to the outcome. We gave marks whenever a relevant rule was referred to, unless it had been plainly misunderstood. Both researchers have long experience in marking law student answers to legal problems. Our procedure was for one researcher to read a statement of reasons out loud to the other, and then each declared when he had arrived at a mark. We took turns to be the first to announce a mark. In the overwhelming majority of cases the other agreed almost exactly. In only a small minority was there need for discussion.\textsuperscript{21}

\textsuperscript{19} Singles $F(1, 16) = 6.88, p = 0.031$; pairs $F(1, 16) = 3.80, p = 0.087$ (marginal significance); combined $F(1, 16) = 7.39, p = 0.026$.

\textsuperscript{20} $F(2,16) = 0.56, p = 0.585$.

\textsuperscript{21} Copies of the reasons and marks assigned have been retained and are available for inspection and independent assessment. Requests should be directed to the Law and Justice Foundation of NSW.
Table 4 shows the mean mark awarded, by law model.

Table 4: Mean mark (out of 10) awarded to judgment reasons, by law model

<table>
<thead>
<tr>
<th></th>
<th>Easier cases</th>
<th>Harder cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Case Law</td>
<td>UPICC</td>
</tr>
<tr>
<td>Singles</td>
<td>5.6</td>
<td>5.0</td>
</tr>
<tr>
<td>Pairs</td>
<td>4.4</td>
<td>4.1</td>
</tr>
<tr>
<td>Combined</td>
<td>5.0</td>
<td>4.5</td>
</tr>
</tbody>
</table>

The results show that law students were able to apply the ACC with significantly greater accuracy than Case Law and UPICC.\(^2\) The quality of reasons given for harder decisions was lower than the quality of reasons given for easier decisions.\(^3\) Single judge reasons received higher marks than pair judge reasons.\(^4\) There are no significant interactions between these factors.

The poor quality of reasons given by UPICC users must be taken into account in assessing the relative likelihood that ACC and UPICC will lead their users to make just decisions. It suggests that the tendency of UPICC users to arrive at such decisions cannot be attributed to accurate application of its provisions.

We hypothesised that UPICC users might have tended to resort directly to Article 1.7, the general duty of good faith, without reference to the detailed rules.\(^5\) However, this was not reflected in their written reasons, which frequently omitted any reference to Article 1.7. Rather, we observed a marked tendency of UPICC users to select from the detailed rules those that supported their decision, and to ignore other potentially relevant rules.

\(^2\) \(F(2, 581) = 35.321, p = 0.000\)
\(^3\) \(F(1, 581) = 9.264, p = 0.002\)
\(^4\) \(F(1, 581) = 17.675, p = 0.000\). Although this result apparently runs counter to our hypothesis that pair decisions would be of better quality, it can be explained by the fact that pairs took longer to decide, and therefore had less time to write their reasons.
\(^5\) Article 1.7 was included in the statement of law in all cases.
Efficient (easy to comprehend and apply)\textsuperscript{26}

Time taken to arrive at a decision is a measure of the ease with which a law statement can be comprehended and applied. This time could be calculated by subtracting the time each experimental session began from the time our student judges recorded when they reached their decision.

As Table 5 below indicates, pair decisions took about five minutes longer than singles decisions,\textsuperscript{27} while ACC decisions took about five minutes less than both Case Law and UPICC decisions,\textsuperscript{28} a difference of about 15 per cent.\textsuperscript{29} There was no interaction between law model and the singles/pairs factors.\textsuperscript{30}

| Table 5: Mean time (minutes) to judgment by law model |
|-----------------|-----------|----------------|
|                | Case Law | UPICC | ACC  |
| Singles        | 30       | 28    | 25   |
| Pairs          | 35       | 35    | 29   |

These results suggest that the ACC is the most efficient of the three law models. We suggest that it can be assumed that UPICC is in fact more efficient than Case Law. This is because our experimental materials relieved student judges of the need to read the many relevant Case Law precedents, as judges (and lawyers) ordinarily have to do.

\textsuperscript{26} Our design, of course, did not test ease of locating the law. See Chapter 3, note 7.

\textsuperscript{27} F(1, 584) = 24.57, p = 0.000

\textsuperscript{28} Singles $F(2, 294) = 2.86, p = 0.059$; pairs $F(2, 290) = 5.48, p = 0.005$; combined $F(2, 584) = 9.43, p = 0.000$

\textsuperscript{29} We included the difficulty factor in this analysis. There was an apparent trend for decisions in harder cases to take about 1 minute longer than decisions in easier cases but this difference was not statistically significant: Singles $F(1, 294) = 0.10, p = 0.753$; pairs $F(1, 290) = 0.45, p = 0.503$; combined $F(2, 584) = 2.52, p = 0.113$. Therefore we have not depicted difficulty in Table 5.

\textsuperscript{30} As is common with time data, both the homogeneity of variance and normality assumptions of ANOVA were violated. However, ANOVA is robust to these violations, which in any case were not large. In fact, the same pattern of significant results was found when these violations were reduced by logarithmic and square root transformations, and the exclusion of extreme values.
Evaluations of utility

Once the student judges had reached a decision and written their reasons for it, they were instructed to complete a questionnaire that sought their opinion about the rules they had been asked to apply. The questionnaires contained propositions to which they were asked to respond by circling a number on a seven-point scale of agreement–disagreement. The propositions were designed to explore the aspects of utility described in Chapter 1.

The questionnaire also contained open-ended invitations for comments.\textsuperscript{31} Fewer than half the student judges volunteered comments and, therefore, interpretation of the narrative data has to be approached with great caution. Further, as will be seen, few themes attracted a substantial body of comment, and the comments often represent strongly opposing view points from participants using the same law model. The analysis of the ratings data provides a clearer picture. However, we have nevertheless attempted to summarise the comment data, including in our summary any theme evident in the comments of more than 10 per cent of the respondents within a law model group.\textsuperscript{32}

Tables 6 and 7 summarise the main effects of law model on the ratings of the single and paired student judges.

\textsuperscript{31} A copy of the questionnaire is included with the example experimental materials in Appendix 1.

\textsuperscript{32} Note that this means, in effect, an opinion expressed by 4 per cent or fewer of participants within a law model group. Rather than report the numbers expressing an opinion in misleadingly precise percentages of respondents, we have related them in terms such as ‘half’, ‘quarter’, and so on.
Table 6: Main effects of law model on student judge ratings of utility (singles)

<table>
<thead>
<tr>
<th>Questionnaire Items</th>
<th>Case Law</th>
<th>UPICC</th>
<th>ACC</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Scale: 1=strongly disagree, 7=strongly agree)</td>
<td>Mean(^{33}) (standard error)(^{34})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Q1: The rules made it easy for me to make a decision</td>
<td>4.4 (.14)</td>
<td>4.8 (.13)</td>
<td>4.5 (.14)</td>
</tr>
<tr>
<td>Q2: The rules were easy to understand</td>
<td>4.8 (.14)</td>
<td>5.0 (.12)</td>
<td>5.1 (.13)</td>
</tr>
<tr>
<td>Q3: I feel confident that I have applied the rules correctly</td>
<td>3.9 (.15)</td>
<td>4.4 (.13)</td>
<td>4.3 (.13)</td>
</tr>
<tr>
<td>Q4: The rules prevented me from reaching a fair result</td>
<td>3.3 (.16)</td>
<td>2.8 (.15)</td>
<td>2.9 (.15)</td>
</tr>
<tr>
<td>Q5: The rules helped me to reach a fair result</td>
<td>4.3 (.15)</td>
<td>5.0 (.15)</td>
<td>4.7 (.15)</td>
</tr>
<tr>
<td>Q6: The rules were vague</td>
<td>4.0 (.16)</td>
<td>3.8 (.17)</td>
<td>4.0 (.17)</td>
</tr>
<tr>
<td>Q7: The rules were technical</td>
<td>4.0 (.17)</td>
<td>3.7 (.14)</td>
<td>3.4 (.15)</td>
</tr>
</tbody>
</table>

\(^{33}\) The mean provides a measure of the average rating given by the student judges.

\(^{34}\) The standard error provides a measure of how much the value of the mean might vary in repeated experiments, due to chance differences between experimental sample groups.
Table 7: Main effects of law model on student judge ratings of utility (pairs)

<table>
<thead>
<tr>
<th>Questionnaire Items (Scale: 1=strongly disagree, 7=strongly agree)</th>
<th>Law Model</th>
<th>Mean(^{25}) (standard error)(^{26})</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Law Model</td>
<td>UPICC</td>
</tr>
<tr>
<td>Q1: The rules made it easy for me to make a decision</td>
<td>4.7</td>
<td>4.7</td>
</tr>
<tr>
<td></td>
<td>(.10)</td>
<td>(.10)</td>
</tr>
<tr>
<td>Q2: It was easy for the person I was working with and I to agree upon a decision</td>
<td>5.5</td>
<td>5.8</td>
</tr>
<tr>
<td></td>
<td>(.11)</td>
<td>(.08)</td>
</tr>
<tr>
<td>Q3: The rules were easy to understand</td>
<td>4.8</td>
<td>4.7</td>
</tr>
<tr>
<td></td>
<td>(.10)</td>
<td>(.10)</td>
</tr>
<tr>
<td>Q4: I feel confident that I have applied the rules correctly</td>
<td>4.7</td>
<td>4.8</td>
</tr>
<tr>
<td></td>
<td>(.09)</td>
<td>(.09)</td>
</tr>
<tr>
<td>Q5: The rules prevented me from reaching a fair result</td>
<td>3.1</td>
<td>2.9</td>
</tr>
<tr>
<td></td>
<td>(.12)</td>
<td>(.11)</td>
</tr>
<tr>
<td>Q6: The rules helped me to reach a fair result</td>
<td>4.8</td>
<td>4.9</td>
</tr>
<tr>
<td></td>
<td>(.10)</td>
<td>(.09)</td>
</tr>
<tr>
<td>Q7: The rules were vague</td>
<td>3.7</td>
<td>3.9</td>
</tr>
<tr>
<td></td>
<td>(.11)</td>
<td>(.12)</td>
</tr>
<tr>
<td>Q8: The rules were technical</td>
<td>4.0</td>
<td>3.8</td>
</tr>
<tr>
<td></td>
<td>(.11)</td>
<td>(.11)</td>
</tr>
</tbody>
</table>

As can be seen, the results of the two experiments are broadly similar. They are discussed together, below. However, because different approaches were taken to the statistical analysis of the two sets of data, we have not combined them. In the case of the singles data, we used a simple analysis of variance (ANOVA). Where this analysis has revealed significant law model effects\(^{37}\) we have compared model differences using the 95 per cent confidence intervals of their means. This is a conservative approach.\(^{38}\)

\(^{25}\) The mean provides a measure of the average rating given by the student judges.

\(^{26}\) The standard error provides a measure of how much the value of the mean might vary in repeated experiments, due to chance differences between experimental sample groups.

\(^{37}\) That is, p < .05.

\(^{38}\) Thus one model is only described as ‘significantly different’ from another when the 95 per cent confidence intervals of their means do not intersect. Because this is conservative, we have commented on trends suggesting difference where the degree of intersection between 95 per cent confidence intervals is small, or suggesting similarity where the degree of intersection between 95 per cent confidence intervals of the means of two models is substantial.
Results of the experiments

Notwithstanding that the students working in pairs completed separate questionnaires, it seemed probable that their responses would be related (i.e. not independent). Tests for relatedness of responses indicated that this was indeed the case. Therefore we have analysed the pair data using mixed ANOVAs treating the pair responses as a repeated measures factor. However, although the correlations between pair responses were highly significant, they were also generally small. (These results indicate, then, that the law students who participated in our experiment were fairly independent-minded.) As the correlations between pair ratings were low, and there were no significant 'pair' interactions, we were able, for the purpose of comparing law model effects to collapse this factor in a simple one-way ANOVA in order to estimate the 95 per cent confidence intervals of means.

We included the difficulty factor, described above, in both the singles and pair analyses. The observed main effects of difficulty on student judge evaluations of utility again supported our classification of the cases as 'easier' and 'harder'. They do not otherwise call for any comment. However, we found two interactions between difficulty and law model which are discussed in greater detail below.

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79 Reported significant law model effects are based on this analysis.
80 The correlations were all significant at the p < .001 level. The squared correlations of the pair responses for each question were as follows: Q1 = 0.27, Q2 = 0.41, Q3 = 0.22, Q4 = 0.14, Q5 = 0.14, Q6 = 0.16, Q7 = 0.12, Q8 = 0.07. The comparatively high correlation of responses to Q2 was to be expected, given the nature of the proposition ('it was easy for the person I was working with and I to agree upon a decision').
81 See footnote 37. The one-way ANOVA generated two significant law model effects not observed using the repeated measures ANOVA. In both cases the size of the effect was small and the degree of significance was marginal. We have reported significance of law model effects using the repeated measures ANOVA. Because the degree of relatedness was low (although significant) this is a conservative approach.
82 The significant main effects of difficulty were as follows: agreement with 'the rules made it easy to decide' lower in difficult cases (singles F(1,293) = 10.46, p = 0.001, pairs F(1, 293) = 3.13, p = 0.078 (marginal)); agreement with 'the rules were easy to understand' lower in difficult cases (singles F(1, 294) = 7.90, p = 0.005, pairs F(1, 294) = 8.27, p = 0.004); disagreement with 'the rules prevented me from reaching a fair result' stronger in easier cases (singles data only F(1, 293) = 11.90, p = 0.001); agreement with 'the rules helped me to reach a fair result' lower in difficult cases (singles data only F(1, 293) = 7.92, p = 0.005); disagreement with 'the rules were vague' stronger in easier cases (pair data only F(1, 294) = 4.32, p = 0.038); disagreement with 'the rules were technical' weaker in difficult cases (pair data only F(1, 293) = 5.99, p = 0.015).
83 See 'It was easy for the person I was working with and me to agree upon a decision' and 'The rules prevented me from reaching a fair result / the rules helped me to reach a fair result'.
'The rules made it easy for me to make a decision'

Both single and pair judges indicated similar levels of agreement in response to this proposition, regardless of law model used. The pairs were also asked to respond to 'It was easy for the person I was working with and me to agree upon a decision'. The users of all three law models agreed with this proposition, at the same high level.

This suggests that no one of the models makes it easier to decide than the others.

There was a clear trend indicating that pairs ratings of ease of agreement were affected by law model in combination with difficulty (see Figure 2).

Figure 2: Effect of Law model, difficulty on ease of agreement (pairs)

44 Singles $F(2,293) = 2.13, p = 0.121$, pairs $F(2,293) = 1.4, p = 0.244$.  
45 $F(2, 294) = 2.08, p = 0.127$.  
46 That is, the law model X difficulty interaction was marginally significant: $F(2, 294) = 2.55, p = 0.08$. 
Case Law users appear to have found it more difficult to agree in easier cases than in harder cases. This pattern is consistent with other findings suggesting a tendency of Case Law to make easier cases more difficult.

On the other hand, UPICC users apparently found it easier to agree in easier cases. If this were due to some quality of UPICC, then we would have expected a similar effect to be apparent in obviously related measures, that is, mean percent agreement, and ratings of ease of decision, understanding, and helpfulness in reaching a fair result. However, as reported above, overall consensus among UPICC pairs was, if anything, lower than among ACC and Case Law pairs. Further, paired UPICC users said their decision was no easier to make. As reported below, they rated UPICC no easier to understand than Case Law or the ACC. They also rated UPICC less helpful than the ACC, and no more helpful than Case Law in reaching a fair decision.

It may be that UPICC pairs found it easier to agree (in easier cases) because of their tendency to select rules that supported their decision, and to ignore other potentially relevant rules. This conclusion is consistent with the finding, reported above, that the quality of application of UPICC was poor.

The single judge comments suggest that, while ease of decision-making using the three models was similar overall, the reasons for this varied:

- Many students commented negatively on the abstractness of Case Law. While some described the rules as clear and easy to apply, the same number said they were confusing and contradictory.
- Nearly half of the UPICC comments said it provided clear direction but a quarter expressed confusion over its vague and contradictory nature.

It may be thought that a Likert scale difference of a half-point is too small to be of any importance. However, Likert scales are ordinal and not interval scales, that is, it is known that respondents do not treat the intervals on Likert scales as equal. In other words, the difference between say, three and four, is not the same as the difference between four and five. The Likert technique in fact yields relative rankings of the experimental groups. If the difference is statistically significant, then the rankings are reliable and therefore important, notwithstanding their nominal magnitude.

See footnote 11.
Nearly half of the ACC comments said there was 'too much discretion' involved in its application. However, a quarter felt that its overriding 'unconscionability' principle (Article 27) made it easy to decide, and a similar number found the rules to be accessible and straightforward.

A third of the pair judge comments from each law model group said the clarity of the rules had made it easy to make a decision. A small number of UICC users stated that difficulty in applying the rules had made it difficult to reach agreement with their partner.

'The rules were easy to understand'

Again, both single and pair judges indicated similar levels of agreement in response to this proposition, regardless of law model used.\(^\text{49}\)

This suggests that no one of the models is easier to understand than the others.

The single judge comments may be summarised as follows:

- A quarter of Case Law comments described it as unclear, vague, and confusing ('a maze of exceptions'), while a similar sized group described it as clear and easy to follow. A few users understood the rules after re-reading them ('confusing at first but could understand them after reading them three times'). A similar number described the rules as easy to understand but hard to apply.

- A quarter of UICC comments said the rules were unclear, difficult and contradictory ('highly technical and formalised language made these rules difficult to understand') but a similar number said they were clear ('use of plain English is fantastic'). Another quarter said some parts were easy to understand while others were confusing.

- Half of the ACC comments remarked on its conciseness. A quarter referred to the vagueness of the rules.

\(^{49}\) Singles $F(2,294) = 2.21$, $p = 0.111$, pairs $F(2,297) = 0.98$, $p = 0.375$
About a third of paired judge comments, from users of all three models, said the rules were clear and easy to understand. Nearly half of the ACC comments described it as vague or unclear. Fewer UPICC, and still fewer Case Law users made the same comment.

*I feel confident that I applied the rules correctly*

The law model used did not affect the level of confidence of paired judges. However, there was a strong trend indicating that single judge ratings were affected by law model, the effect falling only just short of significance. Although pair-wise comparisons of the means for each model were not significantly different, the trend of the means indicates that Case Law users were less confident than users of the ACC and UPICC.

We reported earlier that none of the law models made it easier to decide. The confidence result indicates that users of the two codes were, however, more confident when they decided that their decision was correct.

These results suggest that ease of decision and confidence that the law has been correctly applied are two different things. They further suggest that UPICC and ACC engender greater confidence in their application than Case Law.

The singles comments may be summarised as follows:

- A third of the Case Law comments conveyed uncertainty about the application of the rules because of their vague or contradictory nature.
- Fewer comments complained about lack of clarity in relation to the ACC and UPICC. A similar number indicated that they thought their application was subjective or a matter of opinion.

Less than one-quarter of the paired judges commented on this proposition and no strong themes were evident in these.

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[^30]: $F(2, 294) = 0.25, p = 0.778$
[^31]: $F(2, 294) = 3.01, p = 0.051$
‘The rules prevented me from reaching a fair result’

‘The rules helped me to reach a fair result’

These propositions are the converse of each other and they elicited similar patterns of responses. In order to increase the power of our statistical analysis, we combined the data.\textsuperscript{52}

While users of all models rated them positively in relation to both propositions, law model significantly affected these ratings.\textsuperscript{53} In the case of the single judges, UPICC user ratings were significantly better than Case Law ratings\textsuperscript{54} while the ACC mean was closer to the UPICC than to the Case Law mean.

In the case of the pairs, ACC user ratings were significantly better than Case Law ratings. UPICC ratings did not differ from Case Law ratings, while the difference between the ACC and UPICC means fell just short of significance.\textsuperscript{55} The law model effect was strongest in easier cases, although this interaction was only marginally significant (see Figure 3).\textsuperscript{56} The mean ratings indicate that ACC users found it more helpful in reaching a fair outcome in easier cases, while Case Law users found it, if anything, less helpful in easier cases than in difficult cases. UPICC ratings were not affected by difficulty. These findings are consistent with the finding, reported above, that consensus among ACC users in easier cases was significantly higher, while Case Law appears to make easier cases as difficult to decide as harder cases.\textsuperscript{57}

\textsuperscript{52} Disagreement with ‘the rules prevented me from reaching a fair result’ indicated a favourable view of the rules while, of course, agreement with ‘the rules helped me to reach a fair result’ was similarly positive. We combined the data using this formula: (‘helped fair result’ rating + (8 – ‘prevented fair result’ rating)) / 2.

\textsuperscript{53} Singles F(2, 292) = 4.98, p = 0.007, pairs F(2, 294) = 4.60, p = 0.011.

\textsuperscript{54} That is, the 95 per cent confidence intervals for the means of UPICC and Case Law did not overlap.

\textsuperscript{55} That is, the 95 per cent confidence intervals for the means of ACC and Case Law did not overlap, those of UPICC and Case Law substantially overlapped, and those of the ACC and UPICC only just intersected.

\textsuperscript{56} F(2, 294) = 2.95, p = 0.054.

\textsuperscript{57} See footnotes 10 and 11.
These results suggest that UPICC and ACC are more likely to lead to fair outcomes than Case Law, and on one of the two measures (pair results) the ACC is more likely to do so than UPICC. However, the perceptions of UPICC users must again be interpreted in light of the poor quality of its application, reported above.

The comments may be summarised as follows:

* **Single judge – 'the rules prevented me'**
  - Some of the Case Law comments referred explicitly to users feeling bound by the rules to reach a decision they did not feel was fair (‘law allowed little room for policies of “justice” to apply’). None of the users of the ACC or UPICC made a similar comment.
  - One-third of the UPICC comments thought the rules helped them reach a fair result but a small number said that they felt hindered by them (‘so vague they prevented me from seeing which result is a fair one’).
Half of the ACC comments indicated that its users felt the rules allowed them to reach a fair result (‘rules are very accommodating and very conducive to reaching a fair result’). A small number of ACC users said the overriding criterion of ‘unconscionability’ (Article 27) made it difficult to decide on the fair result (‘unconscionability made it a grey area so it wasn’t easy to apply’).

**Single judge – ‘the rules helped me’**

- Half of the Case Law comments said its vagueness and subjectivity meant that it helped them neither way (‘it depends on the conception of fairness in this case and it could have gone either way’). A small number said the rules helped in reaching a fair decision.

- A quarter of the UPICC comments said the rules helped in reaching a fair result (‘because they leave a lot to the reasonable person, there is room to incorporate notions of fairness into the decision’). On the other hand, another quarter referred to the subjective or discretionary nature of the rules and said the rules did not help at all or were of uncertain help.

- A small number of ACC comments said the rules facilitated a fair result (‘Article 27 was useful in reaching a fair result as it was clear that it was overriding’). A similar number said that the broad nature of the rules could support either a ‘fair’ or ‘unfair’ decision.

**Paired judges – ‘the rules prevented me’**

- A quarter of Case Law comments said the rules prevented reaching a fair result, because of their vague or restrictive nature. A similar number said the rules had facilitated a fair result.

- A quarter of UPICC comments said the rules had facilitated a fair result but nearly a fifth said they had felt hindered by them.

- A third of ACC comments said the rules did not prevent a fair result because of their flexibility and emphasis on ‘unconscionability’.
Paired judges – ‘The rules helped me’

- Half of the Case Law comments said the structure and direction provided by the rules had helped them to reach a fair result.
- A fifth of UPICC comments said the rules had helped them but nearly the same number said explicitly that the rules had not helped them.
- A third of ACC comments referred to the clarity and generality of the rules as helpful features.

‘The rules were vague’

The users of all three law models did not differ in their response to this proposition. The mean response indicated neither agreement nor disagreement.

This suggests that no one model is less vague than any other.

The single judge comments may be summarised as follows:

- A quarter of the Case Law comments said the rules were vague and an equal number described them as clear and straightforward.
- More than half of the UPICC comments said that some or all of the rules were vague. A quarter of these comments indicated this was a necessary feature but a larger number were critical of this aspect. A small number of comments said the rules were clear.
- A third of ACC comments mentioned the vagueness of ‘unconscionability’ but a quarter of these comments also said this was a desirable quality.

Because less than a third of paired judges commented, we concluded they were not worth summarising.

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\[ \text{Singles } F(2, 296) = 0.73, \ p = 0.481, \ \text{pairs } F(2, 294) = 0.97, \ p = 0.38 \]
'The rules were technical'

Ratings in response to this proposition were significantly affected by law model. In the case of the singles, ACC judges rated it significantly less technical than Case Law, while UPICC ratings were in between. In the case of the pairs, ACC was rated significantly less technical than Case Law, and there was a strong trend towards rating the ACC better than UPICC, while UPICC and Case Law ratings did not differ.

These findings indicate that the ACC is less technical than Case Law and UPICC.

The single judge comments may be summarised as follows:

- A quarter of the Case Law comments said the rules were not technical. A similar number said the rules were technical due to the use of legal jargon and narrowly constructed categories.
- The pattern of UPICC comments was nearly identical.
- A small number of the ACC comments said the rules were not technical, another small number said they were technical to a desirable degree, and yet another said they were not technical or specific enough.

The paired judge comments may be summarised as follows:

- Over one-third of the Case Law users said the rules were technical due to such things as jargon and strictly constructed categories.
- A little more than one-quarter of UPICC users said the rules were not technical, but an equal number said they were.
- Over half of the ACC users commented on the clarity, simplicity and logic of the rules.

59 Singles F(2, 292) = 3.90, p = 0.021, pairs F(2, 293) = 5.13, p = 0.006
60 No overlap between 95 per cent confidence intervals of the means
61 The 95 per cent confidence intervals of the means for UPICC and the ACC only just intersected, while the 95 per cent confidence intervals of the means for UPICC and Case Law overlapped substantially.
Experiment 3

University students enrolled in programs other than law were given two judgments to read, one for the plaintiff and one for the defendant, each based on one of the three law models. Ten students were assigned to each of the nine possible pair-combination groups. The same 10 disputes were used as in Experiments 1 and 2. Nine hundred non-law students participated in this experiment.

Before reading a judgment, participants were given a statement of facts. Once they had read their first judgment, they were instructed to complete a questionnaire. They then read the second judgment and completed a second questionnaire.

The questionnaires asked them to indicate their response to nine propositions on a seven-point scale. Participants were invited to add comments. The propositions were designed to explore the aspects of utility described in Chapter 3.

Main effects of law model on ratings of utility

Table 8 shows how the three law models were rated in response to each of the nine propositions.

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62 A copy of the questionnaire is included with the experimental materials in Appendix 2.
63 The comments added no significant qualitative insights. For this reason, we have chosen not to present this data.
Table 8: Main effects of law model on ratings of utility

<table>
<thead>
<tr>
<th>Questionnaire Items</th>
<th>Case Law</th>
<th>UPICC</th>
<th>ACC</th>
<th>Mean*</th>
<th>(standard error)3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1: It was easy to read the judgment</td>
<td>4.1</td>
<td>4.9</td>
<td>5.1</td>
<td>(.07)</td>
<td>(.06)</td>
</tr>
<tr>
<td>Q2: The judgment used too much legal jargon</td>
<td>4.2</td>
<td>3.6</td>
<td>3.4</td>
<td>(.07)</td>
<td>(.06)</td>
</tr>
<tr>
<td>Q3: I agree with the decision made by the judge</td>
<td>4.6</td>
<td>4.8</td>
<td>4.9</td>
<td>(.07)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Q4: The decision was fair</td>
<td>4.6</td>
<td>4.7</td>
<td>4.8</td>
<td>(.06)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Q5: The decision was technical</td>
<td>4.7</td>
<td>4.7</td>
<td>4.4</td>
<td>(.07)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Q6: The judgment was logical</td>
<td>4.9</td>
<td>5.2</td>
<td>5.2</td>
<td>(.06)</td>
<td>(.06)</td>
</tr>
<tr>
<td>Q7: The judgment took into account all of the important facts in this case</td>
<td>4.7</td>
<td>5.0</td>
<td>4.8</td>
<td>(.07)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Q8: The judgment was confusing</td>
<td>3.9</td>
<td>3.0</td>
<td>3.0</td>
<td>(.07)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Q9: It was easy to follow the Judge’s reasoning</td>
<td>4.6</td>
<td>5.2</td>
<td>5.3</td>
<td>(.06)</td>
<td>(.06)</td>
</tr>
</tbody>
</table>

'It was easy to read the judgment'

ACC and UPICC judgments were rated significantly easier to read than Case Law judgments.66

'The judgment used too much legal jargon'

ACC judgments were seen as significantly more jargon-free than UPICC judgments, and UPICC judgments were rated better than Case Law.67

66 The mean provides a measure of the average rating given by the student judgment readers.
65 The standard error provides a measure of how much the value of the mean might vary in repeated experiments, due to chance differences between experimental sample groups.
66 $F(2, 1979) = 83.65, p = 0.000$. There was no overlap between the 95 per cent confidence intervals of the means of Case Law and UPICC and Case Law and ACC, while the ACC and UPICC means were not significantly different.
67 $F(2, 1974) = 43.00, p = 0.000$, no overlap between 95 per cent confidence intervals of the ACC and UPICC means or the UPICC and Case Law means.
'I agree with the decision made by the judge'

Agreement with judgments was significantly affected by law model.\(^6\) Although pair-wise comparisons of the means for each model were not significantly different, the clear trend of the means indicated that readers of ACC and UPICC judgments agreed more strongly with decisions than readers of Case Law judgments.

'The decision was fair'

Fairness ratings were significantly affected by law model.\(^6\) Although pair-wise comparisons of the means for each model were not significantly different, the trend of the means indicated that ACC and UPICC judgments were rated fairer than Case Law judgments.

'The decision was technical'

Technicality ratings were significantly affected by law model.\(^7\) The clear trend of the means indicates that ACC judgments were rated less technical than UPICC and Case Law judgments. There was no difference between UPICC and Case Law ratings.

'The judgment was logical'

Logic ratings were significantly affected by law model.\(^7\) ACC judgments were rated significantly more logical than Case Law judgments. Although pair-wise comparisons of the UPICC mean with the other means were not significantly different, there was a clear trend indicating that their ratings were better than Case Law ratings and not different from ACC ratings.

\(^6\) \(F(2, 1796) = 3.79, p = 0.023\)
\(^6\) \(F(2, 1797) = 3.22, p = 0.04\)
\(^7\) \(F(2, 1793) = 4.06, p = 0.017\)
\(^7\) \(F(2, 1794) = 4.52, p = 0.011\)
'The judgment took into account all of the important facts in this case'

Responses to this proposition were significantly affected by law model. Although pair-wise comparisons of the means for each model were not significantly different, the trend of the means indicated that UPICC readers rated their judgments more highly on their consideration of the facts than did readers of Case Law judgments, while the rating of ACC judgments was in between.

It is important that a law model draws a judge's attention to all important facts of a dispute. This result suggests that UPICC does this more effectively than Case Law. This finding, however, has to be qualified in light of the finding, discussed below, that UPICC ratings of the consideration of the facts did not differentiate between fair and unfair decisions.

'The judgment was confusing'

ACC and UPICC judgments were rated significantly less confusing than Case Law judgments. There was no difference between the confusion ratings given to UPICC and ACC judgments.

'It was easy to follow the judge's reasoning'

ACC and UPICC judgments were rated significantly easier to follow than Case Law judgments. There was no difference between ACC and UPICC ratings.

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72 F(2, 1794) = 3.04, p = 0.048
73 F(2, 1795) = 53.31, p = 0.000, no overlap of 95 per cent confidence intervals of the ACC and Case Law means or the UPICC and Case Law means.
74 F(2, 1797) = 37.61, p = 0.000, no overlap of 95 per cent confidence intervals of the ACC and Case Law means or the UPICC and Case Law means.
Effects of law model on ratings of utility (adding fairness and difficulty)

It is an important element of the utility of a law model that it enables readers of judgments, including lay readers, to assess whether they are just. We can investigate whether the three law models differ in this respect, using our data.

It can be hypothesised that reader responses to at least some of the propositions (for example ‘I agree with the decision’) would be affected by whether the judgment they read was just. For example, we expected agreement with fair outcomes to be stronger than with unfair outcomes. We categorised the judgments as fair and unfair, using court majority and researcher opinion, as described in the report of Experiments 1 and 2.

We decided to include in this analysis the difficulty variable, also described in the report of Experiments 1 and 2. Our hypothesis was that responses would be affected by whether a decision was relatively easier or harder. For example, we thought it possible that agreement ratings would differentiate more sharply between fair and unfair decisions in easy cases. It is an obvious shortcoming of a law model if it does not assist readers to identify the just outcome in easy cases. On the other hand, it is to be expected that readers will find it difficult to discriminate between just and unjust outcomes in difficult cases. By controlling this variable in our analysis we have been able to reveal differences between law models which would otherwise have been masked.

When fairness of the decision and difficulty are taken into account, the analysis shows that the utility of judgments is affected by the law model used. A number of significant main effects and interactions of law model, fairness and difficulty were found. These are fully summarised in Appendix 3. We discuss the findings in which law model was a factor below.
'It was easy to read the judgment'

Readability was significantly affected by law model in combination with difficulty (see Figure 4).\textsuperscript{76} UPICC and ACC judgment ratings of readability were not affected by difficulty. However, easy Case Law judgments were rated hardest to read.

This result may be explained by a tendency of Case Law to make easy decisions relatively more difficult, also suggested by the results of Experiments 1 and 2.

\textbf{Figure 4: Effect of law model, difficulty on judgment readability}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4}
\end{figure}

'The judgment used too much legal jargon'

Jargon ratings were significantly affected by law model in combination with difficulty (see Figure 5).\textsuperscript{77} Difficulty did not affect UPICC and ACC ratings. However, easy Case Law judgments were rated most jargon-laden.

\textsuperscript{76} F(2, 1788) = 17.13, p = 0.000
\textsuperscript{77} F(2, 1785) = 7.30, p = 0.001
This result may again be explained by a tendency of Case Law to make easy decisions relatively more difficult.

**Figure 5: Effect of law model, difficulty on jargon ratings**

Jargon ratings were also affected by law model in combination with fairness of the decision (see Figure 6). Fairness made no difference to the jargon ratings of Case Law decisions. However, readers of ACC judgments rated them less jargon-laden when fair than when unfair. On the other hand readers of UPICCC judgments rated them less jargon-laden when unfair than when fair.

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* Court majority. $F(2, 1785) = 3.04, p = 0.048
Agreement ratings were significantly affected by law model in combination with difficulty and fairness of the decision\(^9\) (see Figures 7 and 8).\(^8\) In easier cases, readers of UPICC and ACC judgments differentiated more strongly between fair and unfair decisions, whereas readers of Case Law judgments scarcely differentiated. However, in more difficult cases, readers of Case Law judgments differentiated more strongly between fair and unfair decisions.
Even readers with a statistical background will appreciate that discussions of three-way interactions can sometimes be wearisome. However, this is the first of three significant interactions we found in our analysis, and they are important enough to make it necessary to say something more about all of them.
The first point that should be made is that we believe the stronger differentiation by Case Law readers in harder cases to be less important than the stronger differentiation by UPICC and ACC readers in easier cases. We have at least two reasons.

First, on investigating ratings in the 10 cases individually, we found that the trend of stronger differentiation in easier cases between fair and unfair decisions by readers of UPICC and ACC judgments was exhibited in four of the five cases.\textsuperscript{81} On the other hand, the overall significant differentiation by Case Law readers in difficult cases is the product of just two out of five cases. In only one of these is there in fact strong differentiation by Case Law readers between the fair and unfair decision. In the other case, it was the readers of the UPICC and ACC judgments who differentiated strongly between decisions, but their view of the ‘fair’ result was the opposite of the researchers’ opinion.\textsuperscript{82} The net effect is to drive the average agreement rating of ‘unfair’ judgments up relative to the Case Law average. When the influence of these two cases is discounted there is a slight differentiation between fair and unfair, but no law model effect in the average agreement ratings in the harder cases.

Second, it is an obvious shortcoming of a law model if it does not assist readers to identify the fair outcome in easy cases. On the other hand, it is to be expected that readers will find it difficult to discriminate between fair and unfair in difficult cases.

Overall, then, these results suggest that UPICC and the ACC make it easier for readers of judgments to assess whether they are just.

\textsuperscript{81} In the fifth case readers of the ACC and Case Law judgments disagreed with the researchers’ opinion (and agreed with the original court majority), and their ratings differentiated sharply between their view of the fair and unfair judgment. The degree of differentiation by ACC readers was greatest. In contrast, readers of the UPICC version of this judgment did not differentiate.

\textsuperscript{82} This was the case in which the High Court upheld an appeal before we completed our analysis; see footnote 12. The readers of UPICC and ACC judgments therefore agreed on the same result as the High Court, while Case Law readers indicated slightly stronger agreement with the fair result according to the opinions of the researchers and the majority of the NSW Court of Appeal.
The decision was fair'

Fairness ratings were significantly affected by law model in combination with difficulty and fairness of the decision\(^3\) (see Figures 9 and 10).\(^4\) In easier cases, readers of ACC and UPICC judgments differentiated more strongly between fair and unfair judgments than readers of Case Law judgments. However, in more difficult cases, readers of Case Law judgments again differentiated more strongly between fair and unfair judgments than readers of UPICC and ACC judgments.

\[\text{Figure 9: Effect of law model, fairness on fairness ratings (easier cases)}\]
Figure 10: Effect of law model, fairness on fairness ratings (harder cases)

Again, in our view the stronger differentiation by Case Law readers in harder cases is less important than the stronger differentiation by ACC readers in easier cases.

As with agreement ratings, in easier cases stronger differentiation between fair and unfair UPICC and ACC judgments was exhibited in four of the five cases.\textsuperscript{85} On the other hand, in difficult cases, the differentiation by Case Law readers between decisions is stronger than the differentiation exhibited by UPICC and ACC readers in only one case. In one other case, readers of UPICC and ACC judgments differentiated as strongly as Case Law readers but disagreed on the ‘fair result’. In another, it is in fact the readers of the UPICC and ACC judgments who differentiated between decisions most strongly, but their view of the ‘fair’ result was again the opposite of the researchers’ opinion.\textsuperscript{86} The net effect is, once more, to

\textsuperscript{85} In the fifth case readers of the ACC and Case Law judgments disagreed with the researchers’ opinion (and agreed with the original court majority), and their ratings differentiated sharply between their view of the fair and unfair judgment. The degree of differentiation by ACC readers was greatest. In contrast, readers of the UPICC version of this judgment did not differentiate.
drive the average agreement rating of ‘unfair’ judgments up relative to the Case Law average.

The results suggest that UPICC and the ACC better enable readers of judgments to assess whether they are just.

‘The decision was technical’

Two significant findings appear from the analysis of the responses to this proposition. Technicality ratings were affected by law model in combination with difficulty (see Figure 11). Case Law judgments in easier case were rated the most technical. Again, the explanation may lie in the tendency of Case Law to complicate easy decisions.

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86 This was again the case in which the High Court reversed the NSW Court of Appeal: see footnote 12. Thus the readers of UPICC and ACC judgments agreed on the same result as the High Court.

87 $F(2, 1784) = 3.37, p = 0.035$
Technicability ratings were also affected by law model in combination with fairness⁸⁸ (see Figure 12).⁹⁸ Unfair judgments received similar technicability ratings regardless of law model. However, fair ACC judgments were rated least technical.

This result suggests that the ACC makes it easier to assess whether judgments are just.

**Figure 12: Effect of law model, fairness on technicability ratings**

"The judgment took into account all of the important facts in this case"

Fact content ratings were significantly affected by law model in combination with difficulty and fairness⁹⁹ (see Figures 13 and 14).¹⁰¹ UPICC readers did not discriminate in their ratings between fair and unfair judgments. In easier cases readers of ACC judgments differentiated most strongly between fair and unfair judgments. However, once again, in difficult cases readers of Case Law judgments differentiated most strongly between fair

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⁸⁸ Court majority.
⁹⁸ F(2, 1784) = 3.98, p = 0.019
¹⁰¹ Researcher opinion.
¹⁰¹ F(2, 1785) = 3.28, p = .038
and unfair judgments. Although the difference was not statistically significant, the trend of UPICC readers was to rate unfair judgments more highly than fair judgments, in both easier and harder cases.

Figure 13: Effect of law model, fairness on fact content ratings (easier cases)

Figure 14: Effect of law model, fairness on fact content ratings (harder cases)
In our view, the more important result is the finding that the ACC makes it clearer in easier cases when a judgment has considered all important facts. It should be recalled that the fact content of Case Law judgments was rated lowest overall (see Table 8).

Further, when we examined the ratings in easier cases individually, we found clearly greater differentiation between fair and unfair decisions by readers of ACC judgments in three of the five cases and some differentiation in a fourth. In contrast, in difficult cases the significantly greater differentiation by readers of Case Law judgments was clearly driven by a strong effect in only one case, although there was a very slight effect in two other cases. Yet again, in a fourth case it was in fact the UPICC and ACC readers who differentiated between decisions (while Case Law readers did not) but their view of the 'fair' result was the opposite of the researchers' opinion, thus driving the average fact content ratings of 'unfair' judgments up relative to the Case Law average.

'The judgment was confusing'

Confusion ratings were significantly affected by law model in combination with difficulty (see Figure 15). Case Law judgments in easier cases were rated relatively more confusing than Case Law judgments in harder cases. UPICC and ACC ratings were not affected by difficulty.

Yet again, the explanation would appear to be the tendency of Case Law to make easy decisions more difficult.

\[ F(2, 1786) = 3.10, \ p = 0.045 \]

\[ ^{62} \text{In the fifth, readers of judgments using all three law models disagreed with the researchers' opinion of the fair result, and in relative terms differentiated to similar degrees.} \]
Figure 15: Effect of law model, difficulty on confusion ratings

'It was easy to follow the judge’s reasoning'

This proposition is essentially the converse of the preceding one. Not surprisingly the results are similar. Ratings were significantly affected by law model in combination with difficulty (see Figure 16). Case Law judgments in easier cases were rated relatively less easy to follow than Case Law judgments in harder cases. UPICC and ACC ratings were not affected by difficulty. Our explanation of this finding is the same.

Note: $F(2, 1788) = 3.06, p = 0.047$
5. CONCLUSIONS

The results of the experiments support the following conclusions:

- It would be beneficial to codify Australian contract law.
- It would be better to state the law in a small number of broad principles (an ACC-type code) rather than numerous detailed rules (an UPICC-type code).
- Codifying contract law would not diminish predictability. An ACC-type code would increase predictability in easier cases where it is most important.
- Codifying contract law is likely to lead to more just decisions (fair outcomes). An ACC-type code would be more likely than an UPICC-type to do this.
- Codes are more accessible (clearer language and logic) than Case Law. An ACC-type code would be more accessible than an UPICC-type code.
- An ACC-type code would be more efficient (easier to comprehend and apply) than an UPICC-type code or Case Law.

The first two questions we set out to answer were:

1. Would it be beneficial to codify Australian contract law?
2. If so, should an UPICC-type code be preferred to an ACC-type code?
As explained in Chapter 2, UPICC states the law in numerous detailed rules whereas the ACC consists of a small number of broad principles. As noted in Chapter 1, the choice between these code-types therefore also involves a question of general jurisprudential significance which is relevant not only to the law of contract, but to all other law, whether in the form of case law or legislation. The question may be formulated as follows:

- Is it more beneficial to state the law in numerous detailed rules or in a small number of broad principles?

**Analysis model**

As Chapter 4 demonstrates, the research yielded a large number of relevant findings. Here we endeavour to relate these findings to the questions we set out to answer. We have used the following analytical model.

**Where the law models do not differ**

- Whenever the law models do not differ, this is strictly evidence neither for nor against the superior utility of any law model, or the superior utility of detailed rules or broad principles. However, where a model has in some aspects greater utility, the fact that it has no less utility in other aspects is significant.

**Where the law models differ**

*Would codification be beneficial?*

- Whenever UPICC *and* the ACC are superior to Case Law, this is evidence of the greater utility of codes.

- Whenever in our data Case Law is superior to UPICC *and* the ACC, this is evidence of the greater utility of case law over codes.
Which type of code?

- Whenever UPICC is superior to the ACC, this is evidence of the greater utility of an UPICC-type code over an ACC-type code.
- Whenever the ACC is superior to UPICC, this is evidence of the greater utility of an ACC-type Code over an UPICC-type Code.

Detailed rules or broad principles?

- Whenever Case Law and UPICC are superior to the ACC this is evidence of the greater utility of detailed rules.
- Whenever ACC is superior to UPICC and Case Law this is evidence of the greater utility of broad principles.

There are, of course, other possible combinations, but none of these in fact occurred.

Conclusions on codification

Justice (fair outcomes)

The weight of our findings clearly favours the conclusion that UPICC and the ACC are more likely than Case Law to lead to just resolutions of disputes, and that both make it easier for readers of judgments to assess whether they are just. The relevant findings are as follows:

- Users of the ACC and UPICC reached a fair outcome (researcher opinion) more often than users of Case Law, in both easier and harder cases.
- Single judges rated UPICC and ACC as more helpful in reaching a fair outcome than users of Case Law.
- Readers agreed more strongly with ACC and UPICC judgments and rated them as fairer. Their agreement and fairness ratings differentiated more strongly between fair and unfair decisions (researcher opinion), at least in easier cases.
Certainty (predictable outcomes)

Our research supports the conclusion that codifying contract law would not diminish certainty. The relevant findings are:

- No model produced a higher mean level of agreement than any other.
- No model was rated overall as making it easier to decide than the others. However, paired judges using case law found it more difficult to agree on a decision in easier cases.

Accessibility (clear language and logic)

The findings support the conclusion that both UPICC and the ACC are more accessible than Case Law. The relevant findings are:

- UPICC and ACC users (single judges) felt more confident that they had applied the law correctly than Case Law users.
- ACC and UPICC judgments were rated easier to read, easier to follow, more logical, less confusing and more jargon-free than Case Law judgments.
- UPICC and ACC judgment ratings of readability were not affected by difficulty.
- Case Law judgments in easier cases were rated hardest to read, hardest to follow, most confusing, most technical and most jargon-laden.
- Users did not rate any model more or less vague than any other.
- Users did not rate any model more or less easy to understand than any other.

Efficiency (time needed for comprehension and application)

Our research supports the conclusion that the ACC is more efficient than Case Law. ACC users reached their decisions in significantly less time
than Case Law and UPICC users. We suggest that it can be assumed that UPICC is also more efficient than Case Law.\footnote{This is because our experimental materials relieved student judges of the need to read the many relevant Case Law precedents, as judges (and lawyers) ordinarily have to do.}

Conclusions on choice of code-type

Justice (fair outcomes)

The weight of our findings favours the conclusion that an ACC-type code would be more likely than an UPICC-type code to lead to just resolutions of disputes, and that an ACC-type code would make it easier for readers of judgments to assess whether they are just. The relevant findings are as follows:

\begin{itemize}
  \item Application of the ACC was significantly more accurate than application of UPICC. There was a clear tendency for UPICC users to make decisions without fully considering its provisions.\footnote{UPICC pair ratings of ease of agreement also suggested that UPICC decisions were based on selective application of its provisions. The potential for researcher bias to affect these assessments is discussed in Chapter 4, note 20 and accompanying text.}
  \item Paired judges rated the ACC more helpful in reaching a fair result than UPICC.
  \item Readers of ACC judgments in easier cases differentiated most strongly between fair and unfair judgments (researcher opinion) when rating them for their consideration of the important facts, whereas UPICC readers did not differentiate between fair and unfair judgments. Although there was a clear trend indicating that overall the fact content ratings of UPICC judgments were higher than Case Law ratings, they were not significantly higher than the ACC ratings.
  \item ACC users rated it less technical than UPICC.
  \item ACC judgments were rated less technical than UPICC judgments.
\end{itemize}
• Readers of ACC judgments were the only group to differentiate between fair and unfair judgments (court majority) when rating them for technicality.

Certainty (predictable outcomes)

As noted above, no law model produced a higher mean level of agreement than any other. However, our data supports the conclusion that an ACC-type code would yield greater certainty in easier cases, where predictability is most important. It is an obvious shortcoming of a law model if it does not assist in identifying the just outcome in easy cases. On the other hand, it is inevitably more difficult to discriminate between just and unjust outcomes in difficult cases.

The relevant findings are:

• Users of the ACC agreed significantly more often on the outcome in easier cases.
• ACC users (pairs) rated it more helpful in reaching a fair decision, especially in easier cases.
• The ACC also made the fair decision (researcher opinion) in easier cases more apparent to judgment readers than UPICC and Case Law.
• Readers of ACC judgments in easier cases differentiated most strongly between fair and unfair judgments (researcher opinion) when rating them for their consideration of the important facts.

It can be assumed that if a law model makes the just outcome more apparent, this increases predictability.

Accessibility (clear language and logic)

Our findings indicate that an ACC-type code would be more accessible than an UPICC-type code. The relevant findings are:
• ACC users rated it less technical than UPICC.
• Readers rated ACC decisions less jargon-laden than UPICC decisions.
• Readers of ACC judgments rated them less jargon-laden when fair than when unfair (court majority); on the other hand, readers of UPICC judgments rated them less jargon-laden when unfair than when fair.
• Readers rated ACC decisions less technical than UPICC decisions.
• Readers of ACC judgments were the only group to differentiate between fair and unfair judgments (court majority) when rating them for technicality.

Efficiency (time needed for comprehension and application)

Our findings support the conclusion that an ACC-type code would be more efficient than an UPICC-type code. Judges using the ACC reached their decisions in significantly less time.

Conclusions on broad principles and detailed rules

As explained in the description of our analytical model, because the ACC uses broad principles, and UPICC and Case Law use detailed rules, a finding that the ACC is superior to UPICC and Case Law is evidence of the greater utility of broad principles. When the models do not differ, this is by itself a ground neither for nor against preferring detailed rules to broad principles. However, where a model has in some aspects greater utility, the fact that it has no less utility in other aspects indicates that it has some advantages and no disadvantages.
A number of findings that the models do not differ in a number of important respects are reported above (*Conclusions on codification*). All the findings summarised above (*Conclusions on choice of code-type*) that the ACC was better than UPICC are also findings that the ACC was better than Case Law.

We therefore conclude that there are no clear disadvantages, and some advantages, in using broad principles to state the law, without the need for elaboration by detailed rules.

**Justice (fair outcomes)**

The weight of our findings favours the conclusion that broad principles are more likely than detailed rules to lead to just resolutions of disputes, and that broad principles make it easier for readers of judgments to assess whether they are just. The relevant findings are as follows:

- Application of the ACC was significantly more accurate than application of UPICC and Case Law.\(^3\)
- Paired judges rated the ACC more helpful in reaching a fair result than UPICC and Case Law.
- Readers of ACC judgments in easier cases differentiated more strongly than readers of UPICC and Case Law between fair and unfair judgments (researcher opinion) when rating them for their consideration of the important facts.
- ACC users rated it less technical than UPICC and Case Law.
- ACC judgments were rated less technical than UPICC and Case Law judgments.
- Readers of ACC judgments were the only group to differentiate between fair and unfair judgments (court majority) when rating them for technicality.

\(^3\) The potential for researcher bias to affect this assessment is discussed in Chapter 4, note 21 and accompanying text.
Certainty (predictable outcomes)

The data reported above on choice of code type also shows that detailed rules do not overall lead to greater certainty than broad principles. However, our findings support the conclusion that broad principles yield greater certainty than detailed rules in easier cases, where predictability is most important.

It is an obvious shortcoming of a law model if it does not assist in identifying the just outcome in easy cases. On the other hand, it is inevitably more difficult to discriminate between just and unjust outcomes in difficult cases.

The relevant findings are:

- Users of the ACC agreed significantly more often on the outcome in easier cases.
- ACC users (pairs) rated it more helpful in reaching a fair decision, especially in easier cases.
- The ACC also made the fair decision (researcher opinion) in easier cases more apparent to judgment readers than UPICC and Case Law.
- Readers of ACC judgments in easier cases differentiated most strongly between fair and unfair judgments (researcher opinion) when rating them for their consideration of the important facts.

It can be assumed that if a law model makes the just outcome more apparent, this increases predictability.

Accessibility (clear language and logic)

Our findings indicate that broad principles would be more accessible than detailed rules. The relevant findings are:

- ACC users rated it less technical than UPICC and Case Law.
- Readers rated ACC decisions less jargon-laden than UPICC and Case Law decisions.
• Readers of ACC judgments rated them less jargon-laden when fair than when unfair (court majority).
• Readers rated ACC decisions less technical than UPICC and Case Law decisions.
• Readers of ACC judgments were the only group to differentiate between fair and unfair judgments (court majority) when rating them for technicality.

Efficiency (time needed for comprehension and application)
We suggest that our finding that an ACC-type code is easier to comprehend and apply than an UPICC-type code is evidence that broad principles generally are easier to comprehend and apply than detailed rules.

Summary of conclusions
There are no differences between the three models on a number of measures of utility, but on many measures there are. There was no finding that Case Law was better than the ACC or UPICC on any measure of utility. Nor was there any unqualified finding that UPICC was better than the ACC. On the other hand, there were a number of findings that the ACC and UPICC were better than Case Law, and a number of findings that the ACC was better than UPICC and Case Law. Taking all of these findings into account, our conclusions are as follows:

1. It would be beneficial to codify Australian contract law, using either UPICC or the ACC as a model.
2. An ACC-type Code should probably be preferred.
3. There are no clear disadvantages, and some advantages, to using broad principles to determine legal rights, without the need for elaboration by specific rules.
APPENDIX 1 — MATERIALS FOR EXPERIMENTS 1 AND 2

[Experiment 1 – Singles]

Contract Law Research Project

INSTRUCTIONS

Attached you will find four documents. You may read this cover sheet but do not begin to read the four documents until instructed to do so.

Document 1 ‘Facts’

Document 1, headed ‘Facts’, is an account of all relevant facts concerning a legal dispute between A and B.

Document 2 ‘Law’

Document 2, headed ‘Law’, is a statement of the relevant legal rules. Please assume that this is an accurate statement of the only relevant rules that apply to this dispute.

YOUR TASK. Your task is to read these two documents and be the judge, using these rules.

Please be careful to not disturb or to be distracted by others working near you. Those working around you are working on different exercises.

Document 3 ‘Your Judgment’

When you come to a decision please use Document 3, headed ‘Your Judgment’, to tell us the time that you reached your decision. Then use the document to tell us what your decision is and to give your reasons for it. If you change your mind regarding your decision while writing your judgment, please be sure to amend, on this document, the time that you reached the judgment.

You have a maximum of ONE HOUR and 20 MINUTES to read Documents 1 and 2 and to complete Document 3. The researcher will indicate when you have 10 minutes left.

Please consider the facts and the law carefully and take as much time as you need to come to a judgment. Should you finish early please sit quietly and do not disturb others working near you.

Document 4 ‘Questionnaire’

After ONE HOUR and 20 MINUTES have elapsed we ask that you stop working on the judgment and give Document 3 ‘Your Judgment’ to the researcher. You will then be instructed to complete Document 4, headed ‘Questionnaire’. You have 10 minutes to complete this questionnaire. Again, please take your time.

On completion of the exercise, please bring your questionnaire to the front desk. We would like to offer you $40 as a reimbursement for your time and effort in participating.
[Experiment 2 – Pairs]

Contract Law Research Project

INSTRUCTIONS

Attached you will find four documents. You may read this cover sheet but do not begin to read the four documents until instructed to do so.

Document 1 ‘Facts’

Document 1, headed ‘Facts’, is an account of all relevant facts concerning a legal dispute between A and B.

Document 2 ‘Law’

Document 2, headed ‘Law’, is a statement of the relevant legal rules. Please assume that this is an accurate statement of the only relevant rules that apply to this dispute.

YOUR TASK. Your task is to read these two documents and work with the person next to you, in order to arrive at a mutually agreed upon judgment, using these rules.

Please be careful to not disturb or to be distracted by others working near you. Those working around you are working on different exercises.

Document 3 ‘Your Judgment’

Either you or your partner have Document 3, headed ‘Your Judgment’. When you come to a mutual decision please record the time that you reached the decision on this document. Then use the document to tell us what your decision is and to give your reasons for it.

You have a maximum of ONE HOUR and 20 MINUTES to read Documents 1 and 2 and to complete Document 3. The researcher will indicate when you have 10 minutes left.

Please consider the facts and the law carefully and take as much time as you need to come to a judgement. Should you finish early please sit quietly and do not disturb others working near you.

Document 4 ‘Questionnaire’

After ONE HOUR and 20 MINUTES have elapsed we ask that you stop working on the judgement and give document 3 ‘Your Judgment’ to the researcher. You will then be instructed to complete document 4, headed ‘Questionnaire’. You have 10 minutes to complete this questionnaire. Again, please take your time.

On completion of the exercise, please bring your questionnaire to the front desk. We would like to offer you $40 each as a reimbursement for your time and effort in participating.
Base Metals Pty Ltd v Precious Metals Pty Ltd

FACTS

Precious Metals Pty Ltd, an exploration company, is the registered owner of six mining tenements (the Tenements) in the north-eastern goldfields of Western Australia. It is mainly interested in gold and other precious metals.

Base Metals Pty Ltd, another exploration company, wished to explore the Tenements for base metals. It began negotiations with Precious Metals Pty Ltd in September 1998.

On 19 April 2000 Base Metals Pty Ltd sent a fax to Precious Metals Pty Ltd:

Subsequent to our conversation today, we propose the attached heads of agreement. This heads of agreement constitutes an agreement in itself, but is intended to be replaced by a fuller agreement not different in substance or intent.

Precious Metals Pty Ltd replied by fax proposing terms of its own as "the basis for a formal agreement". These included a proposal that Base Metals Pty Ltd's chief executive, Mr Wood, should undertake "to negotiate a formal agreement including the terms and conditions set out in this document".

Base Metals Pty Ltd replied with a fax which again attached heads of agreement. These were subsequently embodied in a letter (the Letter) which Mr Wood wrote to Mr Master, the chief executive of Precious Metals Pty Ltd. The Letter was received, read and signed by Mr Master on 26 April 2000. It reads:

TENEMENTS EXPLORATION

I refer to our conversations today, regarding the above-mentioned project, and propose the following as a heads of agreement.

1. Base Metals Pty Ltd will make three payments totaling $250,000 to Precious Metals Pty Ltd. The first payment of $25,000 will be payable within 14 days of the execution of this heads of agreement, the second payment of $100,000 will be payable on a date which is nine months from the date of execution of this heads of agreement, and the final payment of $125,000 will be payable on a date which is eighteen months from the date of execution of this heads of agreement.

2. Base Metals Pty Ltd will spend $500,000 over three years on exploration within the Tenements, subject to item 3, below. Base Metals Pty Ltd will further agree to provide Precious Metals Pty Ltd with copies of all exploration results, including any aerial photography and aeromagnetics acquired by Base Metals Pty Ltd.
3. Precious Metals Pty Ltd will retain a 1% Gross Royalty on revenue derived from any base metals produced from the Tenements, and this royalty will be capped at $10 million.

4. Precious Metals Pty Ltd will retain a 100% interest in any precious metals discovered within the Tenements.

5. In the event that either of the parties identify an area within the Tenements capable of sustaining a commercial mining operation for both precious and base metals then the priority of such a development will be determined by the mineral with the greatest recoverable value. The party with rights to first mine and treat such ore will undertake to treat the ore as a discrete batch and to store residues in a separate tailings compound.

6. The above forms a heads of agreement which constitutes an agreement in itself intended to be replaced by a fuller agreement not different in substance or form. On return of this signed agreement Base Metals Pty Ltd will proceed to a fuller agreement.

Kind regards

(Signed) Andrew Wood
Chief Executive

I, David Master, for and on behalf of Precious Metals Pty Ltd, do hereby agree to accept the terms and conditions set out above.

(Signed) David Master
Dated at Catta this 26 day of April 2000

Base Metals Pty Ltd paid $25,000 to Precious Metals Pty Ltd as required by clause 1. It commenced exploration for base minerals on the Tenements.

In July 2000 Base Metals Pty Ltd and Precious Metals Pty Ltd agreed to amend clause 1 so as to make the sums of $100,000 and $125,000 payable nine and eighteen months respectively from the date of execution of a full agreement, rather than from date of the execution of the heads of agreement (i.e. 26 April 2000).

Base Metals Pty Ltd and Precious Metals Pty Ltd conducted negotiations towards the "fuller agreement" contemplated by the Letter. Drafts were prepared. These dealt with various topics, including the possibility of transferring title in the Tenements to Base Metals Pty Ltd, responsibility for compliance with the Mining Act, procedures where one party’s rights infringed on the other’s, steps to be taken before mining, rights to pass and re-pass over the Tenements, payment of royalties, and the resolution of disputes.
Appendix 1

DOCUMENT 1

Differences emerged between the parties on a number of points: title to the Tenements, control over exploration, responsibility for statutory expenditures, responsibility for responding to native title claims.

In April 2001 Precious Metals Pty Ltd was acquired by a foreign company. Negotiations with Base Metals Pty Ltd were taken over by a new executive, Mr Bishop.

Base Metals Pty Ltd expended $120,000 on exploration work on the Tenements. By October 2001 this had revealed the existence of potentially large deposits of the base metals nickel and cobalt.

In early November 2001 Precious Metals Pty Ltd advised Base Metals Pty Ltd that, as the disagreements between the parties on native title claims and statutory compliance had not been resolved, Precious Metals Pty Ltd could no longer allow Base Metals Pty Ltd to engage in exploration activities on the Tenements. [As a matter of fact the parties had not resolved their other differences either.]

Base Metals Pty Ltd replied: "There is a Heads of Agreement which is legally binding and in operational effect." On 30 November 2001 Precious Metals Pty Ltd replied, "There is no concluded agreement."

Base Metals Pty Ltd brought this action claiming a declaration that the Letter constituted a binding contract. Precious Metals Pty Ltd claims a declaration that no binding contract was made.

You may assume that the Mining Act does not stand in the way of any such contract.

In cross-examination Mr Wood (the chief executive of Base Metals Pty Ltd) was asked about the proposed fuller agreement referred to in clause 6:

Was that provision inserted in the heads of agreement at your instance? Was that your idea?--It is a paragraph which I'm aware is used for many, indeed most that I am aware of, heads of agreement.

Is it a clause which is used, from your experience, even in cases where the parties know that there is a lot yet more to be decided?--It is certainly a clause which is employed when the parties know there is a lot of detail yet to be attended to.

Yes, and a lot of things yet to be agreed?--The heads of agreement, I was to understand as a layman, binds the parties to the broad commercial parameters of an agreement.

And when you achieve what you see as being an agreement as to the broad commercial parameters, at that stage, in your experience, you put a clause such as this in and then there is negotiation on the terms of a fuller agreement?--
Always at this stage where a heads of agreement is settled one assumes that both parties will negotiate in good faith a fuller agreement.

The document does not make any reference, or provision for, title arrangements in the event that nickel was discovered in commercial quantities. Do you see that as something which you would have expected to be spelled out in the fuller agreement?—That would be part of the detail to be spelt out in the fuller agreement.
The Law

For the purpose of the exercise, please accept the following as an authoritative statement of the only law applying to the case.

Intention to create legal relations

There is no binding contract unless the parties intend to create legally binding relations.

Whether parties intend to enter such relations is to be determined objectively (i.e. by reference to what a reasonable person would infer from their conduct).

Where parties have executed an instrument in writing but it is uncertain whether in so doing they intended to create legal relations, the court may have regard to all the relevant circumstances to determine, objectively, what the parties' intention was. The relevant circumstances may include prior negotiations and subsequent conduct. However, the evidence of the parties as to their subjective intent is not admissible.

Uncertainty and incompleteness

Once the court has determined that the requisite intention is present, it is then necessary to go on to consider whether the contract is so incomplete or uncertain as to be void.

There can be no binding contract unless its essential or critical terms have been agreed upon. Thus there is no binding contract where an essential or critical term is expressly left to be settled by future agreement of the parties.

A term is not regarded as essential because the court regards it as important. It is for the parties to decide what terms are important or unimportant. Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle to the parties agreeing to be bound now while deferring important matters to be agreed later.

A contract of which there can be more than one possible meaning is not therefore void for uncertainty. As long as it is capable of a meaning, it will bear that meaning which the court decides is proper. For a contract to be void for uncertainty, its language must be so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.

In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.
Relationship of intention to create legal relations and uncertainty/incompleteness

Where some terms are uncertain, or where terms which one would expect to be in a contract of the kind entered into are missing, inferences may be drawn that the parties lacked the requisite intention to contract. The more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.

However, the question whether the parties intended to make a concluded contract and the question whether they have succeeded in doing so are distinct questions.

Where the parties intend to make an immediately binding agreement, and believe they have done so, the courts will strive to uphold it despite the omission of terms or lack of clarity. However, this principle is not applicable where the issue is whether the parties intended to form a concluded bargain. That inquiry need not be approached with any predisposition in favour of upholding anything. The question is whether there is anything to uphold.

Where a formal contract is contemplated

Where the parties contemplate the execution of a formal contract the case may belong to any one of four classes:

1. The parties may intend to be bound immediately and exclusively by the terms which they have agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.

2. The parties may intend to be immediately bound but propose to have the terms restated in a form which will be fuller or more precise but not different in effect. In this case there is a contract binding the parties to perform whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in executing the formal document.

3. The parties may intend to make performance of one or more terms conditional on the execution of a formal document. In this case there is a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

4. The parties may intend not to make a concluded bargain at all unless and until they execute a formal contract.

Generally implied terms

It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.
As a general rule, where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.
The Law

UNIDROIT Principles of International Commercial Contracts

For the purpose of the exercise, please accept the following as an authoritative statement of the only law applying to the case.

ARTICLE 2.1 (Manner of formation)

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

COMMENT

2. Conduct sufficient to show agreement In commercial practice contracts, particularly when related to complex transactions, are often concluded after prolonged negotiations without an identifiable sequence of offer and acceptance. In such cases it may be difficult to determine if and when a contractual agreement has been reached. According to this article a contract may be held to be concluded even though the moment of its formation cannot be determined, provided that the conduct of the parties is sufficient to show agreement. In order to determine whether there is sufficient evidence of the parties’ intention to be bound by a contract, their conduct has to be interpreted in accordance with the criteria set forth in Art. 4.1 et seq.

ARTICLE 2.2 (Definition of offer)

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

COMMENT

1. Definiteness of an offer. Since a contract is concluded by the mere acceptance of an offer, the terms of the future agreement must already be indicated with sufficient definiteness in the offer itself. Whether a given offer meets this requirement cannot be established in general terms. Even essential terms, such as the precise description of the goods or the services to be delivered or rendered, the price to be paid for them, the time or place of performance, etc., may be left undetermined in the offer without necessarily rendering it insufficiently definite: all depends on whether or not the offeror by making the offer, and the offeree by accepting it, intends to enter into a binding agreement, and whether or not the missing terms can be determined by interpreting the language of the agreement in accordance with Arts. 4.1 et seq., or supplied in accordance with Arts. 4.8 or 5.2.
DOCUMENT 2

2. Intention to be bound. ... Since such an intention will rarely be declared expressly, it often has to be inferred from the circumstances of each individual case. ... Generally speaking, the more detailed and definite the proposal, the more likely it is to be construed as an offer. ...

ARTICLE 2.13 (Conclusion of contract dependent on agreement on specific matters or in a specific form)

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.

COMMENT

1. Conclusion of contract dependent on agreement on specific matters As a rule, a contract is concluded if the parties reach agreement on the terms which are essential to the type of transaction involved, while minor terms which the parties have not settled may subsequently be implied either in fact or by law. See comment 1 on Art. 2.2 and also Arts. 4.8 and 5.2. ...

2. Conclusion of contract dependent on agreement in a specific form In commercial practice, particularly when transactions of considerable complexity are involved, it is quite frequent that after prolonged negotiations the parties sign an informal document called "Preliminary Agreement", "Memorandum of Understanding", "Letter of Intent" or the like, containing the terms of the agreement so far reached, but at the same time state their intention to provide for the execution of a formal document at a later stage ("Subject to Contract", "Formal Agreement to follow"). In some cases the parties consider their contract as already being concluded and the execution of the formal document only as confirmation of the already complete agreement. If, however, both parties, or only one of them, make it clear that they do not intend to be bound unless the formal document has been drawn up, there will be no contract until that time even if the parties have agreed on all the relevant aspects of their transaction.

ARTICLE 4.1 (Intention of the parties)

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.
ARTICLE 4.2 (Interpretation of statements and other conduct)

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

ARTICLE 4.3 (Relevant circumstances) In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.

ARTICLE 4.8 (Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

ARTICLE 5.1 (Express and implied obligations) The contractual obligations of the parties may be express or implied.

COMMENT This provision restates the widely accepted principle according to which the obligations of the parties are not necessarily limited to that which has been expressly stipulated in the contract. Other obligations may be implicit...

ARTICLE 5.3 (Co-operation between the parties)

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

COMMENT A contract is not merely a meeting point for conflicting interests but must also, to a certain extent, be viewed as a common project in which
each party must cooperate. This view is clearly related to the principle of good faith and fair dealing (Art. 1.7) which permeates the law of contract ...

ARTICLE 1.7 (Good faith and fair dealing)
(1) Each party must act in accordance with good faith and fair dealing in trade.
(2) The parties may not exclude or limit this duty.

COMMENT 1. "Good faith and fair dealing" as a fundamental idea underlying the Principles ... By stating in general terms that each party must act in accordance with good faith and fair dealing para. (1) of this article makes it clear that even in the absence of special provisions in the Principles the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing.
The Law

Australian Contract Code

*For the purpose of the exercise, please accept the following as an authoritative statement of the only law applying to the case.*

Making a contract

**Article 5**
A contract is made only when the parties intend legal obligations to arise.

**COMMENTARY.** ... Articles in the Code which refer explicitly or implicitly to intention or other mental states must be read in conjunction with Article 26, which deals with rights arising from assumptions.

**Article 7**
There is no contract if a necessary term is missing, is too vague, or has been left to future agreement.

**COMMENTARY.** ... A term is necessary if, without it, it is not possible to discern what benefit each party was intended to get from their promises. Article 7 must be read in conjunction with Article 10. If the intended benefit is clear, then missing detail can be supplied. The conjunction of Articles 7 and 10 makes it clear that the court should be ready to adopt a construction which preserves the intended benefit. No narrow or pedantic approach is warranted. The conjunction of Articles 7 and 10 makes further elaboration unnecessary. For example, it is not necessary to distinguish between essential and inessential terms; to formulate criteria of ambiguity; ... or to distinguish between situations in which a term has been left to be fixed by one party, both parties, or a third party.

Obligations of the parties

**Article 10**
The obligations of the parties are –

- to perform their promises exactly [10.1]
- to do everything that conscience requires to ensure that each gets the benefit intended by their promises. [10.2]
Documents

Article 25
A court may exclude evidence which is inconsistent with an apparently genuine, complete and unequivocal document recording a contract.

Rights arising from assumptions

Article 26
A person who makes an assumption of any kind may require another person to act in accordance with that assumption to the extent that it would be unconscionable not to do so.

COMMENTARY. This Article applies the overriding principle contained in Article 27 specifically to the adoption of assumptions. It gives relief against unconscionable departure from any assumption, whether of law or fact, present or future. This includes –

• assumptions as to intention or other mental states
• assumptions that a contractual right exists or does not exist

The court may compel actual adherence to the assumption, or grant any other relief ...

Overriding article

Article 27
A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.

COMMENTARY. Article 27 overrides every other article in the Code. It operates whenever the application of any other article would result in the unconscionable assertion of a right or denial of an obligation.

Unconscionable' is used in the Code as meaning 'offending against conscience'...

Whether something is unconscionable must necessarily be judged by reference to both the values of the wider community and to the accepted morality of the particular environment in which it occurs. This encompasses the moralities of commercial expectations and risk allocation. ... Moreover, the particular facts of each transaction, including pre- and post-contractual events, are necessarily open to detailed scrutiny.
Your Judgment

1. Tick which of the following corresponds most closely to your judgment
   a) The plaintiff (Base Metals) is entitled to the relief described in Document 1. □
   b) The defendant (Precious Metals) is entitled to the relief described in Document 1. □

2. Please indicate the time that you reached your judgment: ________ AM/PM

3. Please give brief reasons for your judgment, indicating how you applied the rules
[Experiment 2 – Pairs]

Your Judgment

4. Did you reach a mutually agreed upon judgment
   Yes □
   No □ If no, please skip questions 2-4 and use the space below to explain the points on which you disagreed.

5. Tick which of the following corresponds most closely to your judgment
   c) The plaintiff (Base Metals) is entitled to the relief claimed in document 1. □
   d) The defendant (Precious Metals) is entitled to the relief claimed in document 1. □

6. Please indicate the time that you reached your judgment: ________ AM/PM

7. Please give brief reasons for your judgment, indicating how you applied the rules
QUESTIONNAIRE

We would like to know what you thought about the rules as stated in Document 2.

Please indicate your response to the statements below by circling a number.

1. The rules made it easy for me to make a decision

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment

2. The rules were easy to understand

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment

3. I feel confident that I have applied the rules correctly

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment

4. The rules prevented me from reaching a fair result

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment
[Experiment 1 – Singles]

5. The rules helped me to reach a fair result

   Strongly disagree ← 1 2 3 4 5 6 7 → Strongly agree

   Comment

6. The rules were vague

   Strongly disagree ← 1 2 3 4 5 6 7 → Strongly agree

   Comment

7. The rules were technical

   Strongly disagree ← 1 2 3 4 5 6 7 → Strongly agree

   Comment

Do you have any other comments that you wish to make about the rules or the task you were given?
[Experiment 2 – Pairs]

DOCUMENT 4

QUESTIONNAIRE

We would like to know what you thought about the rules as stated in Document 2

*Please indicate your response to the statements below by circling a number.*

8. The rules made it easy for me to make a decision

   ![Strongly disagree/Strongly agree scale](1 2 3 4 5 6 7)

   Comment

9. It was easy for the person I was working with and I to agree upon a decision

   ![Strongly disagree/Strongly agree scale](1 2 3 4 5 6 7)

   Comment

10. The rules were easy to understand

    ![Strongly disagree/Strongly agree scale](1 2 3 4 5 6 7)

    Comment

11. I feel confident that I have applied the rules correctly

    ![Strongly disagree/Strongly agree scale](1 2 3 4 5 6 7)

    Comment
[Experiment 2 – Pairs]

12. The rules prevented me from reaching a fair result

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

13. The rules helped me to reach a fair result

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

14. The rules were vague

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

15. The rules were technical

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

Do you have any other comments that you wish to make about the rules or the task you were given?
APPENDIX 2 — MATERIALS FOR EXPERIMENT 3

Instructions

You will be given a statement of facts and two judgments. We want you to evaluate the judgments. You must complete PART 1 before turning to PART 2.

PART 1 (Documents 1 – 3)

Attached you will find three documents. One, headed ‘Facts’ is an account of all of the relevant facts concerning the dispute between A and B. The second, headed ‘Judgment’, is a statement of the reasons for the Judge’s decision in this case. The third is a Questionnaire that we would like you to complete AFTER you have read the first two documents carefully.

Take your time, and consider the facts and the judgment carefully. We want to know what you think of the judgment, given the facts of the case. It is important that you provide considered responses to the questionnaire. We will check the questionnaires at the end of the session and can only pay you $30 if you have carefully read the documents and completed the questionnaire WITH COMMENTS. We suggest that you take about 25 minutes to read the Facts and the Judgment and 5 minutes to complete the Questionnaire.

PART 2 (Documents 1, 4 & 5)

The researcher will notify you when 40 minutes have passed. At this point you should have completed your questionnaire and be ready to move on to Part 2. You will use document 1, Facts, again but document 4 is a different Judgment. This Judgment may refer to legal principles which are different from those referred to in the Judgment used in Part 1. You should accept that each Judgment refers to the correct law and complete the Questionnaires on that basis.

Please take the time to re-familiarise yourself with the facts and read the new judgment carefully. Once again, we want to know what you think of the judgment, given the facts of the case. We suggest that you take about 20 minutes to re-familiarise yourself with the Facts and to read the Judgment and 5 minutes to complete the Questionnaire.

At the end of the session the researcher will ask you to bring your Questionnaires to the front desk. Once your Questionnaires have been checked to ensure that you have answered all questions and provided comments, you will be paid $30 cash for your time and effort.
PART 1

(Document 1 – 3)
PART 2
(Document 1, 4 & 5)

We would now like you to consider the same Facts and a different Judgment.
Base Metals Pty Ltd v Precious Metals Pty Ltd

FACTS

Precious Metals Pty Ltd, an exploration company, is the registered owner of six mining tenements (the Tenements) in the north-eastern goldfields of Western Australia. It is mainly interested in gold and other precious metals.

Base Metals Pty Ltd, another exploration company, wished to explore the Tenements for base metals. It began negotiations with Precious Metals in September 1998.

On 19 April 2000 Base Metals sent a fax to Precious Metals:

Subsequent to our conversation today, we propose the attached heads of agreement. This heads of agreement constitutes an agreement in itself, but is intended to be replaced by a fuller agreement not different in substance or intent.

Precious Metals replied by fax proposing terms of its own as "the basis for a formal agreement". These included a proposal that Base Metals' chief executive, Mr Wood, should undertake "to negotiate a formal agreement including the terms and conditions set out in this document".

Base Metals replied with a fax which again attached a document entitled heads of agreement. This was subsequently embodied in a letter (the Letter) which Mr Wood wrote to Mr Master, the chief executive of Precious Metals. The Letter was received, read and signed by Mr Master on 26 April 2000. It reads:

TENEMENTS EXPLORATION

I refer to our conversations today, regarding the above-mentioned project, and propose the following as a heads of agreement.

1. Base Metals will make three payments totalling $250,000 to Precious Metals. The first payment of $25,000 will be payable within 14 days of the execution of this heads of agreement, the second payment of $100,000 will be payable on a date which is nine months from the date of execution of this heads of agreement, and the final payment of $125,000 will be payable on a date which is eighteen months from the date of execution of this heads of agreement.

2. Base Metals will spend $500,000 over three years on exploration within the Tenements, to earn a 100% interest in any base metals discovered on the Tenements, subject to item 3, below. Base Metals will further agree to provide Precious Metals with copies of all exploration results, including any aerial photography and aeromagnetics acquired by Base Metals.

3. Precious Metals will retain a 1% Gross Royalty on revenue derived from any base metals produced from the Tenements, and this royalty will be capped at $10 million.
4. Precious Metals will retain a 100% interest in any precious metals discovered within the Tenements.

5. In the event that either of the parties identify an area within the Tenements capable of sustaining a commercial mining operation for both precious and base metals then the priority of such a development will be determined by the mineral with the greatest recoverable value. The party with rights to first mine and treat such ore will undertake to treat the ore as a discrete batch and to store residues in a separate tailings compound.

6. The above forms a heads of agreement which constitutes an agreement in itself intended to be replaced by a fuller agreement not different in substance or form. On return of this signed agreement Base Metals will proceed to a fuller agreement.

Kind regards

(Signed) Andrew Wood
Chief Executive

I, David Master, for and on behalf of Precious Metals, do hereby agree to accept the terms and conditions set out above.

(Signed) David Master
Dated at Catta this 26 day of April 2000

Base Metals paid $25,000 to Precious Metals as required by clause 1. It commenced exploration for base minerals on the Tenements.

In July 2000 Base Metals and Precious Metals agreed to amend clause 1 so as to make the sums of $100,000 and $125,000 payable nine and eighteen months respectively from the date of execution of a full agreement, rather than from date of the execution of the heads of agreement (i.e. 26 April 2000).

Base Metals and Precious Metals conducted negotiations towards the "fuller agreement" contemplated by the Letter. Drafts were prepared. These dealt with various topics, including the possibility of transferring title in the Tenements to Base Metals, responsibility for compliance with the Mining Act, procedures where one party's rights infringed on the other's, steps to be taken before mining, rights to pass and re-pass over the Tenements, payment of royalties, and the resolution of disputes.

Differences emerged between the parties on a number of points: title to the Tenements, control over exploration, responsibility for statutory expenditures, responsibility for responding to native title claims.

In April 2001 Precious Metals was acquired by a foreign company. Negotiations with Base Metals were taken over by a new executive, Mr Bishop.

Base Metals expended $120,000 on exploration work on the Tenements. By October 2001 this had revealed the existence of potentially large deposits of the base metals nickel and cobalt.
In early November 2001 Precious Metals advised Base Metals that, as the disagreements between the parties on native title claims and statutory compliance had not been resolved, Precious Metals could no longer allow Base Metals to engage in exploration activities on the Tenements. As a matter of fact the parties had not resolved their other differences either.

Base Metals replied: "There is a Heads of Agreement which is legally binding and in operational effect." On 30 November 2001 Precious Metals replied: "There is no concluded agreement."

Base Metals has brought this action asking the Court to determine that the Letter constituted a binding contract and that Precious Metals is liable to pay damages. Precious Metals claims that no binding contract was made.

In cross-examination Mr Wood (the chief executive of Base Metals) was asked about the proposed fuller agreement referred to in clause 6:

Was that provision inserted in the heads of agreement at your instance? Was that your idea?—It is a paragraph which I’m aware is used for many, indeed most that I am aware of, heads of agreement.

Is it a clause which is used, from your experience, even in cases where the parties know that there is a lot yet more to be decided?—It is certainly a clause which is employed when the parties know there is a lot of detail yet to be attended to.

Yes, and a lot of things yet to be agreed?—The heads of agreement, I was to understand as a layman, binds the parties to the broad commercial parameters of an agreement.

And when you achieve what you see as being an agreement as to the broad commercial parameters, at that stage, in your experience, you put a clause such as this in and then there is negotiation on the terms of a fuller agreement?—Always at this stage where a heads of agreement is settled one assumes that both parties will negotiate in good faith a fuller agreement.

The document does not make any reference, or provision for, title arrangements in the event that nickel was discovered in commercial quantities. Do you see that as something which you would have expected to be spelled out in the fuller agreement?—That would be part of the detail to be spelt out in the fuller agreement.
Base Metals v Precious Metals

JUDGMENT

B

The question raised by these proceedings is whether the Letter signed by the parties recording ‘heads of agreement’ (the Letter) constitutes a binding contract. What is at issue is firstly whether, by signing the heads of agreement, the parties intended to be bound to its terms and secondly, if so, whether the terms of the agreement are sufficiently certain to constitute a contract.

The question whether the parties intended to make a concluded contract and the question whether they have succeeded in doing so are distinct questions. However, where some terms are uncertain, or where terms which one would expect to be in a contract of the kind entered into are missing, inferences may be drawn that the parties lacked the requisite intention to contract. The more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention. In this case Precious Metals contended that, although the parties expressed their intention to be bound by the document they signed, and agreed on some important matters, nevertheless, they had omitted so many important matters and described so many others in such uncertain terms that, objectively speaking, the inference is to be drawn that they did not intend to bind themselves to a legally enforceable contract. Precious Metals further argued that what was said in prior negotiations and what took place by way of subsequent conduct supported this argument.

In support of its contention that no binding contract was intended, Precious Metals relies also on clause 6 of the Letter which records the parties’ intention to “proceed to a fuller agreement”. Precious Metals asserts that this clause shows that the intention of the parties was not to make a concluded bargain at all unless and until they executed a formal contract.

Finally, Precious Metals argues that even if the parties intended to make a binding contract, they have objectively failed to do so because the omissions and uncertainties already referred to relate to essential terms on which agreement is necessary before a contract can come into existence.

I will deal with each of these arguments in turn.

Intention to create legal relations. There is no binding contract unless the parties intend to create legally binding relations. Whether parties intend to enter into a contract binding at law is a question to be determined objectively.

As a matter of fact and common sense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.
However, it is well recognised that a binding contract may be arrived at even though it leaves unresolved many matters which might arise in future. An agreement does not have to be worked out in meticulous detail. The course of business often means that this must be so and it would be a reproach upon the law if parties who intended to agree, and believed they had agreed in this way, should be told that their agreement for legal reasons had never come into existence.

There are powerful indications in the Letter that the parties intended that the document should be a legally binding contract. The statement therein that the document "forms a heads of agreement which constitutes an agreement in itself" speaks for itself. The plain meaning of these words is reinforced by the words immediately above Mr Master's signature, namely, "I, David Master, for and on behalf of Precious Metals, do hereby agree to accept the terms and conditions set out above." On the face of the document, the parties intended to be bound.

In my opinion, nothing in the subsequent conduct of the parties detracts from the clear statements of intent to contract contained in the Letter.

Two weeks after the Letter was executed Base Metals paid $25,000 to Precious Metals, as required by cl 1. Base Metals commenced ground-disturbing exploration for base metals on the Tenements. By October 2001, when it became apparent that there were potentially large deposits of the base metals nickel and cobalt on the Tenements, the agreement in the Letter had been in the course of implementation for some 16 months, and Base Metals had expended $120,000 on the site. Certainly, this implementation of the agreement supports Base Metals' contention that the document was intended to be a binding contract.

The existence of significant differences in relation to important commercial points does not necessarily mean that there was no intention to agree, contractually, on the terms set out in the Letter. The fact that the parties entered into further negotiations after the Letter was executed is entirely neutral. That, after all, is what the Letter contemplates.

Many of the statements made by both parties after the Letter was executed suggest that they both believed that a binding contract had been arrived at. The change in management that occurred in Precious Metals in 2001 seems to have resulted in a change in attitude regarding the question whether they were bound by the Letter. The commercial decision appears to have been taken by Precious Metals' new management that it was in Precious Metals' interests to negotiate better terms than those contained in the Letter. This change in approach appears to have gathered force after Base Metals had discovered what appeared to be valuable base metals resources.

Precious Metals submitted that the amending agreement of July 2000 indicated that the parties did not intend to enter into binding relations when they signed the Letter. The argument was that the parties' willingness to tie the payments totalling $225,000 to the later agreement then in contemplation indicated that they did not accept that they were bound by the Letter. This is not the only inference that is open. Another is that the parties recognised that they were bound by the Letter, but wished to amend it. They chose to fix the date for the payments in question by reference to the entering into of the contemplated later agreement because they were confident that such an agreement would be concluded. The latter, it seems to me, is the more likely inference.
DOCUMENT 2[4]

In my view, the Letter, the pre-contractual negotiations and the parties’ subsequent conduct indicate that the parties intended the Letter to have binding contractual effect.

**Formal contract.** It is clear that a bargain can be made containing terms regarded as essential whilst the parties recognise that a formal document will eventually be drawn up in the expectation that a number of additional terms will be included in that document. Where the parties contemplate the execution of a formal contract the case may belong to any one of four classes:

1. **The parties may intend to be bound immediately and exclusively by the terms which they have agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.**

2. **The parties may intend to be immediately bound but propose to have the terms restated in a form which will be fuller or more precise but not different in effect.** In this case there is a contract binding the parties to perform whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in executing the formal document.

3. **The parties may intend to make performance of one or more terms conditional on the execution of a formal document.** In this case there is a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

4. **The parties may intend not to make a concluded bargain at all unless and until they execute a formal contract.**

Precious Metals asserts that as a result of clause 6 in the Letter the case falls within the last class. Base Metals argues, on the other hand, that the case falls within the first class.

As I have already pointed out, there are clear indications in the Letter that the parties intended that the document should be a legally binding contract. Clause 6 itself states that the document “forms a heads of agreement which constitutes an agreement in itself”. Mr Master’s signature is appended to the words “I, David Master, for and on behalf of Precious Metals, do hereby agree to accept the terms and conditions set out above.” The statement in clause 6 that the Letter is “intended to be replaced by a fuller agreement not different in substance or form” does not detract from these clear expressions of intent.

The course of negotiations demonstrates that Base Metals wished from the outset to conclude an agreement that would be binding and which would be followed by a more detailed formal agreement. Initially, Precious Metals appears to have been unwilling to agree to this course, hence the fax referring to the proposed agreement “to negotiate a formal agreement”. Base Metals, however, persisted in its desire to conclude what it termed the “heads of agreement” which was to constitute “an agreement in itself”, on the basis that the parties would thereafter negotiate a “fuller agreement”. By signing the Letter Precious Metals concurred in this proposal.

**Uncertainty and incompleteness.** Once the court has determined that the requisite intention is present, it is then necessary to go on to consider whether the contract is so incomplete or uncertain as to be void. There can be no binding contract unless its essential or critical terms have been agreed upon. Thus there is no binding contract where an essential or critical term is expressly left to be settled by future agreement of the parties.
However, a term is not regarded as essential because the court regards it as important. It is for the parties to decide what terms are important or unimportant. Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle to the parties agreeing to be bound now while deferring important matters to be agreed later. In determining whether contracts are void for uncertainty courts should be astute to adopt a construction which will preserve the validity of the contract and should be the upholders of bargains and not their destroyers.

In determining whether essential terms are uncertain, it is important to bear in mind that ambiguity does not mean uncertainty. A term of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. It will ultimately bear that meaning which the court decides is its proper construction. So long as the language employed by the parties is not so obscure that the court is unable to attribute to the parties any particular contractual intention, the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.

Precious Metals argued that the Letter was void for uncertainty and incompleteness.
The matters in respect of which the Letter was said to be incomplete and uncertain were those that were the subject of negotiations after the Letter was executed and can be summarised as follows:

1. It did not deal with the parties' respective rights to title in the Tenements, should base metals be discovered.
2. It did not adequately define the parties' rights to explore, especially where concurrent exploration or might occur.
3. It made no provision for the responsibility for statutory expenditure required to be outlaid in respect to the Tenements.
4. It contained various terms that were inherently uncertain.
5. It did not contain all essential terms.

I will deal with each of these matters in turn.

1. The omission to deal with rights to title. It was unnecessary for the Letter to deal with rights to title. Cl 2 gives Base Metals no immediate proprietary rights to the base metals discovered. Rather, the clause confers upon Base Metals a contractual right to require Precious Metals to confer upon it title in the base metals upon their discovery. That may be done in a number of ways. Precious Metals held the Tenements partly under exploration licence and partly under mining licence. If base metals are discovered on an exploration licence, Precious Metals could apply for a mining lease in its own name and assign that to Base Metals. If base metals are discovered on one of the mining leases, Precious Metals could assign the mining lease to the applicant. Or Precious Metals could allow Base Metals to carry out mining operations and then do whatever is necessary to pass title in the base metals once they have been extracted from the ground.

It must be remembered that it is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract. Similarly it is a general rule that, where in a written contract it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each
agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

As there is more than one way under which Precious Metals could discharge its obligation to confer upon Base Metals a 100 per cent interest in base metals discovered, it would be open to Precious Metals to choose whichever way it preferred: as long as thereby Base Metals earned its promised interest.

2 Concurrent exploration. Under the Letter Base Metals would have sole control over exploration for base metals in the Tenements. I see no element of incompleteness or uncertainty in this respect. In light of the priority granted to Base Metals under cl 5, Precious Metals would have no right to conduct any prospecting activities over the area reasonably required for Base Metals to prospect or mine. This may afford Precious Metals some right to protect any precious metal deposit in the area. While the position may not be entirely clear it is not uncertain in the legal sense. These questions are matters of construction or implication. They are capable of being resolved. The lack of clarity does not mean that the Letter is uncertain or incomplete. It is merely ambiguous in this respect. In fact, Base Metals’ exploration work in regard to base metals had not deterred Precious Metals from exploring for precious metals. The actual situation on site was that the area was being operated on jointly.

3 Responsibility for statutory expenditure. The Letter Agreement is silent as to the responsibility for statutory expenditure requirements relating to the Tenements. It follows that Precious Metals is obliged to comply therewith. That is its statutory obligation. No uncertainty, or even ambiguity, arises.

4 Inherently uncertain terms. Precious Metals submitted that there were terms in the Letter that were inherently uncertain: the words “base metals” and “precious metals”; the word “royalty” in cl 4; and the word “area” and the phrase “greatest recoverable value” in cl 5. The criterion of reasonableness must again be inferred. Thus the “area” referred to in cl 5 would be an area reasonably necessary for the purposes of carrying out mining operations in regard to the resource reasonably identified by exploration. Undoubtedly, these phrases are ambiguous. But the issue is a matter of mere construction. There is no reason why the meaning of these phrases cannot be determined by the usual process which courts apply when construing agreements. It cannot be said that the phrases are incapable of bearing a definite meaning.

5 Does the Letter contain all essential terms? The Letter confers upon Base Metals the right to explore the Tenements for base metals. Base Metals is given the right in priority to any right Precious Metals has to explore for precious metals. The Letter records the consideration for this right and stipulates the amount of money Base Metals is required to spend on exploration and the time over which it is required to do so. Further, Precious Metals confers upon Base Metals the right to mine for base metals over the Tenements and to earn a 100 per cent interest in any base metals discovered. No transfer of title is necessary to enable Base Metals to enjoy such a right and, therefore, there is no need for the Letter to deal with title to the Tenements. In the event of any conflict in regard to areas mined concurrently, the Letter provides for priority. In my opinion, the above matters constitute the essential terms of the agreement the parties intended to conclude.
Conclusion. I have concluded that the express terms of the Letter Agreement indicate in plain language that the parties intended thereby to bind themselves contractually. I consider that the Letter Agreement is neither incomplete nor uncertain such as to render it void. In my opinion Base Metals is therefore entitled to damages.


**Base Metals v Precious Metals**

**JUDGMENT**

The question raised by these proceedings is whether the Letter signed by the parties recording “heads of agreement” constitutes a binding contract. What is at issue is firstly whether, by signing the Letter, the parties intended to be bound to its terms and secondly, if so, whether the terms of the agreement are sufficiently certain to constitute a contract.

The question whether the parties intended to make a concluded contract and the question whether they have succeeded in doing so are distinct questions, although they may be related. Thus, where the parties intended to make a final and binding contract the approach of the courts to questions of uncertainty and incompleteness is rather different from the approach that is taken when the uncertainty or incompleteness goes to contractual intention. Where the parties intended to make an immediately binding agreement, and believe they have done so, the courts will strive to uphold it despite the omission of terms or lack of clarity. However, the principle that courts should be the upholders and not the destroyers of bargains, which is the principle that underlies this approach, is not applicable where the issue to be decided is whether the parties intended to form a concluded bargain. That inquiry need not be approached with any predisposition in favour of upholding anything. The question is whether there is anything to uphold.

In this case I have come to the conclusion that the parties did not intend the Letter to have binding effect.

Where the parties have reduced what they have agreed to writing, the question of their intention is, prima facie, to be resolved objectively, and as a matter of construction of the relevant documents. However, regard may be had to the conduct of and communications between the parties, both before and after the allegedly binding agreement.

In the case before me the evidence shows that, from the very inception of negotiations, the parties intended that their agreement would be put into "formal documentation". This is confirmed by the Letter itself. It is as one would expect in a large complex venture of this kind. Base Metals agreed to spend $500,000 over a three-year period, and royalties up to $10,000,000 might be earned by Precious Metals as the result of Base Metals' mining activities. This was not a simple contract for the sale of a commodity or an interest in the tenements. It was a long-term, large-scale mining venture in prospect in which both parties would concurrently explore for and perhaps mine minerals while on the same tenements.

Of course, I appreciate that a term that there be a "fuller agreement" is not conclusive of the issue of intention to contract. Intention is to be gleaned from all the evidence, including the terms of the document, the conduct of the parties and the importance of the terms left over. But in this case, on all the objective evidence, I think it is entirely unlikely that the parties signed the Letter intending to be immediately bound.
The parties were not inexperienced and must have known that there were further matters than those referred to in the Letter upon which it would be at least highly desirable, if not essential, to reach some measure of agreement.

It is entirely unlikely that the parties intended to enter into a concluded contract of this kind which did not provide for appropriate mining titles in the event of successful exploration. Questions such as whether Base Metals should mine as agent, or should get title in its own name and mine on its own account and, if so, whether the title should be by way of transfer or by way of subletting, are questions which were all left over. It is difficult to accept that the parties intended to conclude a contract altogether silent on these matters.

The Letter has little to say as to the manner in which the parties are to exercise their rights over the tenements concurrently. The Letter makes no provision whatever for the circumstance that both parties may wish to engage in intensive exploration of the same location within the tenements. It was submitted by Base Metals that the court could resolve any dispute about that by construing the Letter. I do not see how. The only way would be to construe the Letter as conferring on one party or the other a pre-emptive right to first explore any area it chose. I do not agree that the Letter can be construed to give either party a right of pre-emption as regards exploration. There is nothing in the Letter or the surrounding circumstances to indicate that the parties had any such intention and, with due respect, there is no basis on which such a term can be implied. These parties were not tyros in the business of mineral exploration and it is extremely unlikely that they would have intended to conclude a split commodity exploration agreement in which there was no provision at all to regulate concurrent exploration activities.

Holders of mining tenements are required to work them. Minimum expenditure conditions are imposed on them by statute. The Letter is silent on which party should have the obligation to maintain each tenement in good standing. Whilst Base Metals are to expend a total of $500,000 over three years, this is not allocated to any particular tenement and insufficient to satisfy the minimum expenditure conditions overall. In my opinion, it is entirely unlikely that these experienced mining companies intended to conclude a binding agreement with such matters unresolved.

There are other matters forming the substance of the arrangement which were dependent on the further agreement of the parties. For example, the terms "base metals" and "precious metals" are not defined. It is very unlikely that the parties intended to finally divide up the respective mineral interests in such an ill-defined manner. It is clear from subsequent negotiations that they were never content to do so. The absence of terms normally to be expected in a binding contract strengthens the inference that the informal agreement was not intended to constitute a binding contract, notwithstanding that the parties may have used the language of agreement.

The parties had not agreed on all the essential terms of the contract. I have already shown that the arrangements contemplated by the parties could not be implemented without further agreement on critical points. The negotiations after the Letter confirm that there was no agreement about title and that the parties regarded it as an essential matter upon which it was necessary to reach agreement. The evidence also shows that the parties regarded other matters to which reference has been made as important and as requiring agreement. These matters were never resolved. At least for the first year after the signing of the Letter the parties were on good terms and co-operating fully with each other in the exploration process. Even so there were differences between them which negotiations in good faith had not resolved.
DOCUMENT 2[4]

For these reasons I conclude that the intention of the parties in this case was only to record what Mr Wood, the chief executive of Base Metals, referred to in cross-examination as "the broad commercial parameters of an agreement".

Even if I am not correct in concluding that the parties lacked the requisite contractual intention, there is another difficulty for Base Metals. If there was a concluded agreement, it was an agreement in which there was a term which positively obliged the parties to enter into a further agreement. Parties may enter into an agreement that contains a binding obligation to execute a further contract containing additional terms. However, the terms must not depend upon or require any further agreement. If the terms which the parties have left unformulated do require further agreement, the agreement to enter into that final agreement is not enforceable, unless the term obliging the parties to agree to the further term or terms is severable.

When parties have agreed to include in their formal contract terms which are "standard" or "reasonable" and not inconsistent with the agreed terms, the court has criteria by which it can resolve any dispute concerning the content of the unformulated term or terms. In so doing, the court is not making an agreement for the parties, but adjudicating on the content of the agreement the parties themselves have made. But the Letter does not refer to standard or reasonable terms. The conclusion is inescapable that the Letter is too uncertain to be enforced.

The claim by Base Metals must therefore be rejected.
Base Metals v Precious Metals

JUDGMENT

C

Base Metals claims that an agreement contained in a Letter signed by the parties constituted a binding contract between them. Precious Metals contends that no contract was made.

The dispute is to be resolved by applying the UNIDROIT Principles of International Commercial Contracts (the Principles). The immediately relevant provisions of the Principles are Articles 2.1, 2.2 and 2.13, which provide:

2.1 A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

2.2 A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

2.13 Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.

Base Metals say that by signing the Letter, Precious Metals accepted an offer from Base Metals on the terms recorded in the Letter. Alternatively signing the letter was conduct of the parties sufficient to show agreement. On either basis, there was a contract under Article 2.1.

Precious Metals denies that there was either the acceptance of an offer or conduct sufficient to show agreement. An intention to be bound is a necessary element of the formation of a contract under Article 2.1. Under this Article a contract is concluded in either of two ways: by acceptance of an offer or by conduct sufficient to show agreement. As to the former, under Article 2 there is no offer without "an indication of the intention of the offeror to be bound". As to the latter, COMMENT 2 to Article 2.1 makes it clear that to establish conduct sufficient to show agreement there must be "evidence of the parties' intention to be bound by a contract".

Article 2.2 also makes it clear that an offer must be "sufficiently definite". Although this is not expressly required of conduct sufficient to show agreement, it can scarcely be otherwise.

Precious Metals says that because of absence of intention and indefiniteness the requirements of Article 2.1 have not been satisfied, and no contract was formed. Although the parties signed the Letter, and agreed on some major terms, nevertheless they omitted so many important matters and described others in such uncertain language that the inference must be drawn that they did not intend to bind themselves to a legally enforceable contract. This inference was supported by their conduct both before and after signing the letter. And even if such an inference could not be drawn, the terms of the Letter were simply not sufficiently definite to constitute a contract.
Precious Metals also rely on Article 2.13. They say that they insisted in the course of negotiations that no contract was to be concluded until the parties signed a formal contract document. As no such document was ever signed, it followed from Article 2.13 that no contract was concluded.

I have come to the conclusion that the arguments of Precious Metals must be rejected, and that the Letter constituted a binding contract between the parties. I will deal with each of the issues raised by Precious Metals – relating to intention to be bound, definiteness and formal document – in turn.

**Intention to be bound.** COMMENT 2 to Article 2.2 indicates that an intention to be bound, unless declared expressly, must be inferred from the circumstances of each individual case.

There are powerful indications in the Letter itself that the parties intended that it should be a legally binding contract. The statement in clause 6 that the document "forms a heads of agreement which constitutes an agreement in itself" speaks for itself. These words are reinforced by the words immediately above Mr Master's signature, namely, "I, David Master, for and on behalf of Precious Metals, do hereby agree to accept the terms and conditions set out above." The reference to a "fuller agreement" does not detract from these clear expressions of intent. (I deal with this point separately below.) Thus, on the face of the document, the parties intended to be bound.

This is confirmed by their prior negotiations as well as their subsequent conduct.

The course of negotiations demonstrates that Base Metals wished from the outset to conclude an agreement that would be binding and which would be followed by a more detailed formal agreement. Initially, Precious Metals appears to have been unwilling to agree to this course, hence the facsimile proposing an undertaking "to negotiate a formal agreement". Base Metals, however, persisted in its proposal of "heads of agreement" which were to constitute an agreement in itself" (clause 6). By signing the Letter Precious Metals concurred in this proposal.

Two weeks after the Letter had been executed, Base Metals paid $25,000 to Precious Metals, as required by cl 1. Not long afterwards it commenced ground-disturbing exploration for base metals on the Tenements. Over the next 16 months Base Metals expended $120,000 on exploration work. The implementation of the Letter supports Base Metals' contention that the document was intended to be a binding contract.

The fact that the parties entered into further negotiations after the Letter was executed does not establish the contrary. That, after all, is what the Letter contemplates. For the first year after the Letter was signed the negotiations were on good terms although differences between the parties had emerged on a number of points. Many statements made by both parties suggest that both believed that a binding contract had been arrived at. It was only after negotiations had been taken over by the new owners of Precious Metals and explorations had revealed the existence of deposits of nickel and cobalt that Precious Metals first asserted that there was no concluded agreement.

The fact that the Letter left indefinite many points which would require clarification in the course of operations under the contract does not necessarily preclude the inference that the parties intended to be bound. This is implicit in COMMENT 2 to Article 2.2, which states: "Generally speaking, the more detailed and definite the proposal, the more likely it is to be
construed as an offer." (Emphases supplied.) It is also implicit in the many means which the Principles provide for overcoming indefiniteness (see below).

In my view, the terms of the Letter and the parties’ prior as well as subsequent conduct indicate that the parties intended the Letter to have binding contractual effect.

**Definiteness.** Precious Metals argued that no contract was formed because the Letter was not “sufficiently definite”. As indicated earlier, I accept that sufficient definiteness is a necessary element of the formation of a contract under Articles 2.1 and 2.2. Definiteness is thus not only relevant in determining whether the parties intended to be bound (see above) but is required independently of and in addition to an intention to be bound. Even if the requisite intention is present, it is necessary consider whether the terms by which the parties intended to be bound are sufficiently definite.

However, as COMMENT 1 to Article 2.2 makes clear:

> Even essential terms ... may be left undetermined in the offer without necessarily rendering it insufficiently definite: all depends on whether ... the missing terms can be determined by interpreting the language of the agreement in accordance with Arts. 4.1 et seq., or supplied in accordance with Arts. 4.8 or 5.2 ... Indefiniteness may moreover be overcome by reference ... to specific provisions to be found elsewhere in [the Principles] ...

A survey of the Articles referred to in this Comment demonstrates that the Principles provide ample means for resolving the ambiguities and supplying the omissions which Precious Metals assert exist in the Letter signed by the parties. I will set out the most important of them here:

4.1(1) A contract shall be interpreted according to the common intention of the parties.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

4.2 (1) The statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention.
(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

4.8 (1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.
(2) In determining what is an appropriate term regard shall be had, among other factors, to
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

5.1 The contractual obligations of the parties may be express or implied.
5.2 Implied obligations stem from
(a) the nature and purpose of the contract;
(b) practices established between the parties and usages;
(c) good faith and fair dealing;
(d) reasonableness.

5.3 Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

In addition to these Articles reference must be made to the overriding principle contained in Article 1.7, described by COMMENT 1 as “a fundamental idea underlying” the Principles:

1.7 Each party must act in accordance with good faith and fair dealing in trade.

(2) The parties may not exclude or limit this duty.

The Letter was said to be indefinite in the following respects:

(a) It did not deal with rights to title in the Tenements, should base metals be discovered.
(b) It did not adequately define the parties' rights to explore, especially where concurrent exploration might occur.
(c) It made no provision for the responsibility for statutory expenditure required to be outlaid in regard to the Tenements.
(d) It contained various terms that were inherently uncertain, such as “base metals”, “precious metals”, “royalty”, “greatest recoverable value”, “area”.

All these difficulties can be resolved by resort to the array of means made available by the provisions of the Principles set out above: the interpretation of statements and conduct according to the meaning that reasonable persons of the same kind as the parties would give to them; having regard to the conduct of the parties and the nature and purpose of the contract; supplying terms appropriate in the circumstances: implying obligations stemming from the nature and purpose of the contract; enforcing practices established between the parties; and imposing duties of good faith and fair dealing and of co-operation.

The Letter confers upon Base Metals the right to explore the Tenements for base metals. The Letter records the payments to be made for this right and stipulates the amount of money Base Metals is required to spend on exploration and the time over which it is required to do so. Further, Precious Metals confers upon Base Metals the right to acquire a 100 per cent interest in any base metals discovered. In the event of any conflict in regard to areas mined concurrently, the Letter provides for priority. In my opinion, the above matters make the agreement recorded in the Letter “sufficiently definite” to constitute a concluded contract under Article 2.1 of the Principles.

**Formal document.** Precious Metals relied specifically on Article 2.13, set out earlier. Precious Metals claimed that they had insisted in the course of negotiations that no contract should be concluded until the agreement was embodied “in a specific form”, that is, in a formal document to be executed after the Letter had been signed.

COMMENT 2 to this Article recognises that parties who have signed an informal document but “at the same time state their intention to provide for the execution of a formal document at a later stage” may nevertheless “consider their contract as already being concluded and the execution of the formal document only as confirmation of the already complete agreement.”

In my opinion, this is such a case. COMMENT 1 to this Article should also be noted: “As a
rule, a contract is concluded if the parties reach agreement on the terms which are essential to the type of transaction involved, while minor terms which the parties have not settled may subsequently be implied either in fact or by law."

As already noted, the course of negotiations demonstrates that, while Base Metals wished from the outset to conclude an agreement that would be binding and which would be followed by a more detailed formal agreement, Precious Metals initially appears to have been unwilling to agree to this course. Base Metals, however, persisted in its proposal of "heads of agreement" which were to constitute "an agreement in itself" (clause 6). By signing the Letter, Precious Metals concurred in this proposal.

Precious Metals submitted that the amending agreement of July 2000 indicated that the parties did not intend to enter into binding relations when they signed the Letter. The parties' willingness to tie payments totalling $225,000 to the execution of the "fulner agreement" provided for in clause 6 of the Letter indicated, so it was argued, that they did not accept that they were bound by the Letter. This is not the only inference that is open. Another is that the parties recognised that they were bound by the Letter, but wished to amend it. They chose to fix the date for the payments in question by reference to the later agreement because they were confident that such an agreement would be concluded. This, it seems to me, is the more likely inference.

Good faith. In support of their case for damages Base Metals also relied on Article 1.7, which provides:

(1) Each party must act in accordance with good faith and fair dealing in trade. (2) The parties may not exclude or limit this duty.

According to COMMENT 1, "’Good faith and fair dealing’ is a fundamental idea underlying [the Principles] …By stating in general terms that each party must act in accordance with good faith and fair dealing para. (1) of this article makes it clear that even in the absence of special provisions in the Principles the parties’ behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing.”

Base Metals argued that Precious Metals had contravened the duty to act in good faith by denying that there was a concluded contract between the parties. It is true that the change in management that occurred in Precious Metals in 2001 resulted in a change in attitude towards the Letter signed by the parties. This change in approach appears to have gathered force after Base Metals discovered valuable base metals resources. The commercial decision appears to have been taken by Precious Metals' new management that it was in Precious Metals' interests to negotiate better terms than those contained in the Letter. Closer scrutiny of the facts might reveal that Precious Metals' denial of contractual obligation was dishonest or prompted by illegitimate motives. In that case a breach of Article 1.7 might be established. However, I find it unnecessary to deal with this point, as I have already concluded on other grounds that Base Metals' claim should be upheld.

In conclusion, I find that the Letter constituted a binding contract and that Base Metals is entitled to damages.
Base Metals v Precious Metals

JUDGMENT

F

Base Metals claims that an agreement contained in a Letter signed by the parties constituted a binding contract between them. Precious Metals contends that no contract was made.

The dispute is to be resolved by applying the UNIDROIT Principles of International Commercial Contracts (the Principles). The immediately relevant provisions of the Principles are Articles 2.1, 2.2 and 2.13, which provide:

2.1 A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

2.2 A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

2.13 Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.

Base Metals say that by signing the Letter, Precious Metals accepted an offer from Base Metals on the terms recorded in the Letter. Alternatively signing the letter was conduct of the parties sufficient to show agreement. On either basis, there was a contract under Article 2.1.

Precious Metals says that there was neither acceptance of an offer nor conduct sufficient to show agreement, as there was neither an intention to be bound nor sufficient definiteness. Under Article 2 there is no offer without "an indication of the intention of the offeror to be bound". COMMENT 2 to Article 2.1 makes it clear that to establish conduct sufficient to show agreement there must be likewise "evidence of the parties' intention to be bound by a contract". Article 2.2 also makes it clear that an offer must be "sufficiently definite". Although this is not expressly required of conduct sufficient to show agreement, it can scarcely be otherwise.

Precious Metals says that because of absence of intention and definiteness the requirements of Article 2.1 have not been satisfied, and no contract was formed. Although the parties signed the Letter, and agreed on some major terms, nevertheless they omitted so many important matters and described others in such uncertain language that the inference must be drawn that they did not intend to bind themselves to a legally enforceable contract. This inference was supported by their conduct both before and after signing the letter. And even if such an inference could not be drawn, the terms of the Letter were simply not sufficiently definite to constitute a contract.

Precious Metals also relies on Article 2.13. It says it insisted in the course of negotiations that no contract was to be concluded until the parties signed a formal contract document. As no such document was ever signed, it followed from Article 2.13 that no contract was concluded.
I have come to the conclusion that the arguments of Precious Metals must be accepted, and that the Letter did not constitute a binding contract between the parties.

My conclusion rests in the first place on Article 2.13. The evidence shows that, from the very inception of negotiations, the parties intended that their agreement would be put into "formal documentation". This is apparent from the exchange of faxes which preceded the execution of the Letter containing the "head of agreement", and is confirmed by clause 6 of the Letter itself. It is as one would expect in a large complex venture of this kind. Base Metals agreed to spend $500,000 over a three-year period, and royalties up to $10,000,000 might be earned by Precious Metals as the result of the Base Metals mining activities. This was not a simple contract for the sale of a commodity or an interest in the tenements. It was a long-term, large-scale mining venture in prospect, in which both parties would concurrently explore for and perhaps mine metals while on the same tenements. This was therefore a case in which the parties, or at any rate one of them (Precious Metals), made it clear that there was no intention to be bound until the formal document was drawn up.

Even if the clause obliging the parties does not prevent a contract under Article 2.13, it is entirely unlikely, on all the objective evidence, that the parties signed the Letter intending to be immediately bound. It follows that there was neither an acceptance of an offer or by conduct of the parties sufficient to show agreement, as required by Article 2.1.

The parties were not inexperienced and must have known that there were matters other than those referred to in the Letter upon which it was essential to reach some measure of agreement.

Thus it is entirely unlikely that the parties intended to enter into a contract that did not provide for appropriate mining titles in the event of successful exploration. Questions such as whether Base Metals should mine as agent, or should get title in its own name and mine on its own account and, if so, whether the title should be by way of transfer or by way of subletting, are questions which were all left over. It is difficult to accept that the parties intended to conclude a contract altogether silent on these matters.

The Letter has little to say as to the manner in which the parties are to exercise their rights over the tenements concurrently. It makes no provision whatever for the possibility that both parties may wish to engage in intensive exploration of the same location within the tenements. These parties were not tyros in the business of mineral exploitation and it is extremely unlikely that they would have intended to conclude a split commodity exploration agreement in which there was no provision at all to regulate concurrent exploration activities.

Holders of mining tenements are required to work them. Minimum expenditure conditions are imposed on them by statute. The Letter is silent on which party should have the obligation to maintain each tenement in good standing. Whilst Base Metals is to expend a total of $500,000 over three years, this is not allocated to any particular tenement and is insufficient to satisfy the minimum expenditure conditions overall. In my opinion, it is entirely unlikely that these experienced mining companies intended to conclude a binding agreement with such matters unresolved.

There are other matters forming the substance of the arrangement which were dependent on the further agreement of the parties. For example, the terms "base metals" and "precious metals" are not defined. It is very unlikely that the parties intended to finally divide up the respective mineral interests in such an ill-defined manner.
For these reasons I conclude that the intention of the parties in this case was not to create legal obligations, but only to record what Mr Wood, the chief executive of Base Metals, referred to in cross-examination as "the broad commercial parameters of an agreement".

Even it could be shown that, notwithstanding all these uncertainties, the parties intended to conclude a binding contract by signing the Letter, the absence or ambiguity of the terms referred to above would preclude the formation of a contract because the Letter was not "sufficiently definite" to constitute an offer under Article 2.2, or to constitute "conduct sufficient to show agreement" under Article 2.1. The arrangements contemplated by the parties could not be implemented without further agreement on such critical points.

Base Metals submitted that the court could deal with these problems by applying the means provided in a number of Articles contained in the Principles for resolving ambiguities and supplying omissions in the Letter signed by the parties. I will set out the most important of these Articles here:

4.1(1) A contract shall be interpreted according to the common intention of the parties.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

4.2 (1) The statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention.
(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

4.8 (1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.
(2) In determining what is an appropriate term regard shall be had, among other factors, to
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

5.1 The contractual obligations of the parties may be express or implied.

5.2 Implied obligations stem from
(e) the nature and purpose of the contract;
(f) practices established between the parties and usages;
(g) good faith and fair dealing;
(h) reasonableness.

5.3 Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

I do not see how these Articles can be utilized to deal with the difficulties I have identified above. The material before the court makes it impossible to identify any "common intention"
of the parties; the absence of such an intention is demonstrated by the fruitless negotiations which followed the execution of the Letter. Nor is it possible to determine how "reasonable persons of the same kind as the parties" would have interpreted the Letter in the same circumstances; or what terms should be supplied that are "appropriate in the circumstances" on the basis of, or implied as stemming from, the nature and purpose of the contract, practices or usages established between the parties, good faith and fair dealing, or reasonableness. Nor does the duty of co-operation imposed on the parties to a contract by Article 5.3 help to give content to these missing or inadequately defined obligations.

**Good faith.** In support of their case for damages Base Metals also relied on Article 1.7, which provides:

(1) Each party must act in accordance with good faith and fair dealing in trade. (2) The parties may not exclude or limit this duty.

According to COMMENT 1, "'Good faith and fair dealing' is a fundamental idea underlying [UPICC] ... By stating in general terms that each party must act in accordance with good faith and fair dealing para. (1) of this article makes it clear that even in the absence of special provisions in the Principles the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing."

Base Metals argued that Precious Metals had contravened the duty to act in good faith by denying that there was a concluded contract between the parties. It is true that the change in management that occurred in Precious Metals in 1997 resulted in a change in attitude towards the Letter signed by the parties. This change in approach appears to have gathered force after Base Metals discovered valuable base metals resources. The commercial decision appears to have been taken by Precious Metals' new management that it was in Precious Metals' interests to negotiate better terms than those contained in the Letter. But given the fact that the Letter did not constitute a binding contract, there was no reason why Precious Metals should not embark on such a course. The obligation to act in good faith does not exclude the legitimate pursuit of commercial self-interest.

I would reject Base Metals' claim for damages, and uphold Precious Metals' claim that no binding contract was made.
DOCUMENT 2[4]

Base Metals v Precious Metals

JUDGMENT

A

The question raised by these proceedings is whether a letter signed by the parties recording 'heads of agreement' (the Letter) constitutes a binding contract. The question is to be resolved by applying the relevant provisions of the Australian Contract Code (the Code). These are:

Article 5
A contract is made only when the parties intend legal obligations to arise.

Article 7
There is no contract if a necessary term is missing, is too vague, or has been left to future agreement.

Article 26
A person who makes an assumption of any kind may require another person to act in accordance with that assumption to the extent that it would be unconscionable not to do so.

Base Metals says that a contract was made by signing the Letter. Base Metals also says that, even if no contract was made, it is entitled to relief on the basis that Precious Metals, by denying that a contract was made, is acting unconscionably under Articles 26 of the Code.

Precious Metals argues that no contract was made because the parties did not intend legal obligations to arise (Article 5), and because necessary terms are missing, vague, or have been left to future agreement (Article 7). Precious Metals denies that it is acting unconscionably.

I think Base Metals' arguments should be accepted and those of Precious Metals rejected. My reasons follow.

Articles 5 and 7

Precious Metals relies on two grounds in support of its contention that the parties did not intend legal obligations to arise. First, it says that clause 6 of the Letter, which records the parties' intention to "proceed to a fuller agreement", shows that no legal obligations were to arise unless and until the parties executed a formal contract document. Second, it says that even if the parties agreed on the points recorded in the Letter, nevertheless they omitted so many important matters and described so many others in such uncertain terms that the inference must be drawn that they did not intend to bind themselves. Precious Metals also relies on these missing and uncertain terms as supplying an independent reason for concluding that there is no contract under Article 7.

It is clear that parties may intend that legal obligations shall arise even though they have agreed to sign a further document in the future, or have failed to articulate points which may need to be addressed at some stage. An agreement does not have to be worked out in
meticulous detail to be legally binding. The course of business often means that this must be so, and it would be a reproach to the law if parties who intended to make a contract, and believed they had done so, were told that no legal obligation had arisen because the law demands a completely worked out agreement.

There are powerful indications in the Letter that the parties intended that it should be a legally binding document. The statement in clause 6 that the document "forms a heads of agreement which constitutes an agreement in itself" speaks for itself. These words are reinforced by the words immediately above Mr Master's signature, namely, "I, David Master, for and on behalf of Precious Metals, do hereby agree to accept the terms and conditions set out above." On the face of the document, the parties intended to be bound.

Nothing in the conduct of the parties detracts from this conclusion. The course of negotiations leading up to the execution of the Letter shows that Base Metals wished from the outset to conclude a binding agreement, although it was to be followed by a more detailed formal agreement. Initially, Precious Metals appears to have been unwilling to agree to this course, as is shown by the fax proposing that Base Metals' chief executive, Mr Wood, should "negotiate a formal agreement". Base Metals, however, persisted in its desire to conclude what it termed "heads of agreement" which were to constitute "an agreement in itself". By signing the Letter Precious Metals expressly concurred in this proposal: see cl 6.

Two weeks after the Letter was executed Base Metals paid $25,000 to Precious Metals, as required by cl 1. Base Metals commenced ground-disturbing exploration, and continued its operations for some 16 months. By October 2001, when it became apparent that there were potentially large deposits of the base metals nickel and cobalt on the Tenements, Base Metals had expended $120,000 on the site. This degree of implementation of the agreement recorded in the Letter supports Base Metals' contention that the document was intended to be a binding contract.

Many of the statements made by both parties after the Letter was executed suggest that they both believed that a binding contract had been arrived at. The fact that the parties entered into further negotiations does not prove the contrary. That, after all, is what the Letter expressly contemplated. At least for the first year after it was signed the parties were on good terms and co-operating fully with each other in the negotiation and exploration process. However, there was a change in attitude on the part of Precious Metals following the change in management that occurred in 2001. A commercial decision appears to have been taken by Precious Metals' new management that it was in its interests to negotiate better terms than those contained in the Letter. This change in approach gathered force after Base Metals discovered valuable base metals resources on the tenements.

Precious Metals submitted that the amending agreement of July 2000 showed that the parties did not intend to enter into binding relations when they signed the Letter. It argued that the parties' willingness to tie payments totalling $225,000 to the future agreement then in contemplation showed that they did not accept that they were bound by the Letter. But this is not the only inference that is open. Another is that the parties recognised that they were bound by the Letter, but wished to amend it. They chose to fix the date for the payments in question by reference to the future agreement because they were confident that such an agreement would be concluded. The latter is the more likely inference.

Precious Metals says that necessary terms are missing from the Letter, or have been left too vague or to future agreement. This demonstrates, it says, both that legal obligations were not intended under Article 5, and that there is no contract by virtue of the operation of Article 7.
In my view all necessary terms were included in the letter. Article 7, Commentary states:

A term is necessary if, without it, it is not possible to discern what benefit each party was intended to get from their promises. Article 7 must be read in conjunction with Article 10. If the intended benefit is clear, then missing detail can be supplied. The court should be ready to adopt a construction which preserves the intended benefit. No narrow or pedantic approach is warranted.

Article 10 states:

- to perform their promises exactly [10.1]
- to do everything that conscience requires to ensure that each gets the benefit intended by their promises. [10.2]

These provisions show that, under the Code, missing, vague or deferred terms prevent the formation of a contract only if without them it is not possible to discern what benefit each party was intended to get from their promises. If it is clear what benefit is intended, an obligation is imposed on each party to do everything that conscience requires to ensure that the other party gets that benefit. Missing detail can be supplied, and vagueness resolved, by applying this general duty to the particular points in dispute between the parties, and by formulating more specific obligations which will ensure the receipt of the intended benefit. These may include obligations to co-operate, to negotiate, and to make reasonable efforts, and to do what is necessary for business efficacy: see Article 10.2, Commentary.

Is it possible in this case, on the basis of the terms of the Letter as they stand, to discern what benefit each party was intended to get from the other party’s promises? I think it is. The benefit which Base Metals was intended to get was the right to explore Precious Metals’ tenements for three years, and to acquire a 100% interest in any base metals discovered on them. The benefit intended for Precious Metals was the receipt of $250,000 in cash, of a royalty of 1% on base metals produced from the tenements, and the results of Base Metals’ explorations (on which Base Metals had agreed to spend $500,000) – which might result in the discovery not only of base metals but also of precious metals. Such precious metals were to be retained by Precious Metals. Where base and precious metals were discovered together on the same site, priority of mining depended on which had the “greatest recoverable value”.

Bearing in mind the Code’s instruction to avoid any “narrow or pedantic approach”, the benefit which each party was to get under the Letter can be thus be discerned without much difficulty from the terms of the Letter as they stand. The terms which Precious Metals says were missing, too vague or left to future agreement were not necessary in the sense in which that word is used in Article 7. They could be left to be worked out by the parties or, if necessary, by the court, applying the standard of conscience as provided for in Article 10.2.

Precious Metals says that the letter should have included terms dealing with:

(a) Rights to title in the tenements on which base metals were discovered.
(b) Regulation of concurrent exploration and mining activities.
(c) Statutory expenditure on the tenements.
(d) Definitions of “base metal”, “precious metal”, “royalty”, and “greatest recoverable value”.

All these matters can be dealt with by determining what conscience requires to ensure that each party gets the intended benefit as described above.
(a) It was unnecessary for the Letter to deal with rights to title. Cl 2 gives Base Metals no immediate proprietary rights to any base metals discovered. Rather, the clause confers on Base Metals a right to acquire such rights. That could be done in a number of ways, including the transfer of relevant tenements or by passing title in the base metals once they had been extracted. It would be open to Precious Metals to choose whichever way it preferred, as long as Base Metals thereby earned its promised 100% interest.

(b) Although clause 5 deals with priority of mining where both base and precious metals are discovered on the same site, Precious Metals raised many other difficulties of a practical nature. It does not follow, however, that it was necessary for the Letter to deal with such difficulties in advance. They could reasonably be worked out by the parties as they went along, bearing in mind their respective intended benefits. In fact, Base Metals’ exploration for base metals did not stop Precious Metals from exploring for precious metals. Areas were in fact being operated on jointly.

(c) The Letter is silent as to who is responsible for statutory expenditure requirements relating to the Tenements. But Precious Metals as the owner of the Tenements is clearly obliged to comply with its statutory obligation. Relief from this obligation is not among the benefits Precious Metals was intended to get.

(d) Undefined terms. These phrases may have their ambiguities, but these can again be resolved by negotiation between the parties, or by court determining what conscience requires under Articles 10.2 and 26.

I conclude that there are no necessary terms which are missing, or which are too vague or have been left to future agreement, so as to preclude the formation of a contract under Article 7. It follows that Precious Metals also cannot rely on such terms as showing a lack of intention under Article 5. In my view, the Letter constituted a binding contract.

Article 26

Under Article 26 Base Metals argued that it made an assumption that the Letter constituted a contract and that it could require Precious Metals to act in accordance with that assumption because it would be unconscionable not to do so I agree that Article 26 applies in this case. The Commentary to this Article states:

This Article ... gives relief against unconscionable departure from any assumption, whether of law or fact, present or future. This includes ... assumptions that a contractual right exists or does not exist ... The court may compel actual adherence to the assumption, or grant any other relief ...

The Commentary to the Code also explains:

'Unconscionable is used in the Code as meaning 'offending against conscience' ... Whether something is unconscionable must necessarily be judged by reference to both the values of the wider community and to the accepted morality of the particular environment in which it occurs. This encompasses the moralities of commercial expectations and risk allocation.

Base Metals obviously made the assumption that there was a contract between the parties. It would not otherwise have paid $25,000 to Precious Metals as required under cl 1 of the Letter, nor embarked on exploration work on which it expended $120,000 before Precious
Metal Put a Stop to in November 2001. It was unconscionable for Precious Metals not to act in accordance with that assumption because Precious Metals, by signing the Letter, had caused Base Metals to make it and to rely on it. Not acting in accordance with the assumption would mean that the money paid and the work done by Base Metals would be wasted, and Base Metals would be deprived of the benefits which it was entitled to expect from mining the base metals which it had discovered. These factors are enough to establish unconscionability even if the motive which prompted Precious Metals to deny the existence of a binding agreement is not taken into account (and about which inferences that are not flattering to Precious Metals might easily be drawn). In the words of the Commentary, Precious Metals' refusal to honour Base Metals' justifiable assumption that Precious Metals was legally obliged to abide by the terms of the Letter offends against conscience because it transgresses "the moralities of commercial expectations and risk allocation".

Accordingly I find that that the Letter signed by the parties constituted a binding contract, or, what amounts to the same thing, that Precious Metals must act in accordance with the assumption made by Base Metals that there was a binding contract. Base Metals is therefore entitled to damages.
Base Metals v Precious Metals

JUDGMENT

D

The question raised by these proceedings is whether a letter signed by the parties recording 'heads of agreement' (the Letter) constitutes a binding contract. The question is to be resolved by applying the relevant provisions of the Australian Contract Code (the Code). These are:

Article 5
A contract is made only when the parties intend legal obligations to arise.

Article 7
There is no contract if a necessary term is missing, is too vague, or has been left to future agreement.

Article 26
A person who makes an assumption of any kind may require another person to act in accordance with that assumption to the extent that it would be unconscionable not to do so.

Base Metals says that a contract was made by signing the Letter. Base Metals also says that, even if no contract was made, it is entitled to relief on the basis that Precious Metals, by denying that a contract was made, is acting unconscionably under Articles 26 of the Code.

Precious Metals argues that no contract was made because the parties did not intend legal obligations to arise (Article 5), and because necessary terms are missing, vague, or have been left to future agreement (Article 7). Precious Metals denies that it is acting unconscionably.

I have come to the conclusion that the arguments of Precious Metals should be accepted, and those of Base Metals should be rejected. My reasons follow.

Articles 5 and 7

Precious Metals relies on two grounds in support of its contention that the parties did not intend legal obligations to arise. First, it says that clause 6 of the Letter, which records the parties' intention to "proceed to a fuller agreement", shows that no legal obligations were to arise unless and until the parties executed a formal contract document. Second, it says that that even if the parties agreed on the points recorded in the Letter, nevertheless they omitted so many important matters and described so many others in such uncertain terms that the inference must be drawn that they did not intend to bind themselves. Precious Metals also relies on these missing and uncertain terms as supplying an independent reason for concluding that there is no contract under Article 7.
The evidence shows that, from the very inception of negotiations, the parties intended that their agreement would be put into a "fuller agreement". This is confirmed by the Letter itself. It is as one would expect in a large complex venture of this kind. Base Metals agreed to spend $500,000 over a three-year period, and royalties up to $10 million might be earned by Precious Metals as the result of Base Metals' mining activities. This was not a simple contract for the sale of a commodity or an interest in land. It was a long-term, large-scale mining venture in which both parties would concurrently explore for and perhaps mine metals on the same tenements.

Of course, I appreciate that a provision for a "fuller agreement" is not conclusive of the issue of intention. But in this case, when one takes into account, on top of that provision, the many matters of detail for which the Letter does not address, I think it is entirely unlikely that the parties intended to conclude a contract intending to be immediately bound.

The parties were not tyros in the business of metals exploration and must have known that there were points not referred to in the Letter on which it would be highly desirable, if not essential, to reach some measure of agreement.

It is entirely unlikely that the parties intended to enter into a concluded contract of this kind which did not provide for appropriate mining titles in the event of successful exploration. Questions such as whether Base Metals should mine as agent, or should get title in its own name and mine on its own account and, if so, whether the title should be by way of transfer or by way of subletting, are questions which were all left over. It is difficult to accept that the parties intended to conclude a contract altogether silent on these matters.

The Letter has little to say as to the manner in which the parties are to exercise their rights over the tenements concurrently. No provision whatever is made for the possibility that both parties may wish to engage in intensive exploration (as distinct from mining, which is dealt with in clause 5) of the same location within the tenements. It is extremely unlikely that the parties would have intended to conclude a split commodity exploration agreement in which there was no provision at all to regulate concurrent exploration activities.

Holders of mining tenements are required to work them. Minimum expenditure conditions are imposed on them by statute. The Letter is silent on which party should have the obligation to maintain each tenement in good standing. Whilst Base Metals is to expend a total of $500,000 over three years, this is not allocated to any particular tenement and insufficient to satisfy the minimum expenditure conditions overall. In my opinion, it is entirely unlikely that these experienced mining companies intended to conclude a binding agreement with such matters unresolved.

There are other matters forming the substance of the arrangement which were dependent on the further agreement of the parties. For example, the terms "base metals" and "precious metals" are not defined. It is very unlikely that the parties intended to divide up the respective mineral interests in such an ill-defined manner.

The absence of terms normally to be expected in a binding contract strengthens the inference that the informal agreement was not intended to constitute a binding contract, notwithstanding that the parties may have used the language of agreement.

For these reasons I conclude that the intention of the parties in this case was not to create legal obligations, but only to record what Mr Wood, the chief executive of Base Metals, referred to in cross-examination as "the broad commercial parameters of an agreement".
Even if I am not correct in concluding that the parties lacked the requisite intention that legal obligations should arise, Article 7 supplies an independent basis for holding that the Letter did not constitute a binding contract. The terms which I have identified above clearly qualify as terms which are missing, too vague or left to future agreement under Article 7. The question is whether they are "necessary" in the sense in which that word is used in the Article. On this point, the Commentary states:

A term is necessary if, without it, it is not possible to discern what benefit each party was intended to get from their promises.

The terms which I have identified all qualify as “necessary” in this sense. Without provisions regulating concurrent exploration activities, defining “base metals” and “precious metals”, providing for appropriate mining titles in the event of successful exploration, and allocating the responsibility for meeting statutory expenditure requirements, it is impossible to say exactly what benefit each party was intended to derive from the promises made in the Letter.

In my opinion under Article 7 the Letter cannot constitute a contract, and I would reject Base Metals’ claim on this ground also.

Article 26

Under Article 26 Base Metals argued that it made an assumption that the Letter constituted a contract and that it could require Precious Metals to act in accordance with that assumption because it would be unconscionable not to do so.

Base Metals obviously made the assumption that there was a contract between the parties. It would not otherwise have paid $25,000 to Precious Metals as required under cl 1 of the Letter, nor embarked on exploration work on which it expended $120,000 before Precious Metals put a stop to it in November 2001. The assumption, moreover, was of a kind to which Article 26, according to its Commentary, clearly applies:

This Article … gives relief against unconscionable departure from any assumption, whether of law or fact, present or future. This includes … assumptions that a contractual right exists …

The question then is whether it is unconscionable for Precious Metals not to act in accordance with that assumption.

The Commentary to the Code explains:

‘Unconscionable is used in the Code as meaning ‘offending against conscience’ … [W]ether something is unconscionable must necessarily be judged by reference to both the values of the wider community and to the accepted morality of the particular environment in which it occurs. This encompasses the moralities of commercial expectations and risk allocation.

In my opinion it is not unconscionable “in the particular environment” of this transaction for Precious Metals not to act in accordance with Base Metals’ assumption that the Letter constituted a contract. This is because such an assumption was wholly unreasonable in that environment, and the result of Base Metals’ own misapprehension of the true state of affairs.
The reasons which I gave earlier in this judgment for concluding that no contract was made also establish that it was wholly unreasonable for Base Metals to assume that it was. As I have explained, it was clear from the first that the parties saw the Letter as a step on the way to a “fuller agreement”. The Letter was silent or unclear about many matters which, in a venture of this kind, were not only to be expected, but were necessary for the proper definition of each party’s entitlements. The parties were not inexperienced in the business of metals exploration and knew that many matters still awaited resolution. In the event they continued negotiations for more than a year and a half and at the end of that time had still not resolved their differences. Mr Wood, Base Metals’ chief executive, conceded in cross-examination that “where a heads of agreement is settled one assumes that both parties will negotiate in good faith a fuller agreement” — a rather different assumption from that on which Base Metals now relies in putting its case under Article 26.

In these circumstances Base Metals’ decision to pay money to Precious Metals under clause 1 of the letter, and to invest money in extensive exploration work on the tenements, must be regarded as involving an acceptance of the risk that the negotiations towards a fuller agreement might never come to fruition and that the contract which Base Metals assumed had been concluded by the Letter might therefore come to an end. In the language of the Code, it is not unconscionable for Precious Metals not to act in accordance with that assumption because, in light of “the moralities of commercial expectations and risk allocation”, the termination of the parties’ relationship, should further negotiations prove inconclusive, was always ‘on the cards’.

I conclude, therefore, that the Letter did not constitute a binding contract, and that Base Metals have no case for damages.
QUESTIONNAIRE

We would like to know what you thought about the judgment that you have just read.

The questions below ask for YOUR opinion. So, for example, you will be asked if you think the decision was fair. We want you to answer this question by applying your own idea of fairness.

Please indicate your response to the statements below by circling a number. Please note the direction of the scale for each question.

Please note that you are expected to add a comment in the space provided after each question.

1. It was easy to read the judgment

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment

2. The judgment used too much legal jargon

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment

3. I agree with the decision made by the judge

   Strongly disagree 1 2 3 4 5 6 7 Strongly agree

   Comment
4. The decision was fair

Strongly disagree \[\:egin{array}{cccccccc}
1 & 2 & 3 & 4 & 5 & 6 & 7
\end{array}\]

Strongly agree

Comment

5. The decision was technical

Strongly disagree \[\:egin{array}{cccccccc}
1 & 2 & 3 & 4 & 5 & 6 & 7
\end{array}\]

Strongly agree

Comment

6. The judgment was logical

Strongly disagree \[\:egin{array}{cccccccc}
1 & 2 & 3 & 4 & 5 & 6 & 7
\end{array}\]

Strongly agree

Comment

7. The judgment took into account all of the important facts in this case

Strongly disagree \[\:egin{array}{cccccccc}
1 & 2 & 3 & 4 & 5 & 6 & 7
\end{array}\]

Strongly agree

Comment
8. The judgment was confusing

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

9. It was easy to follow the Judge's reasoning

Strongly disagree 1 2 3 4 5 6 7 Strongly agree

Comment

What other comments can you make about the judgment?
APPENDIX 3 — SUMMARY OF LAW MODEL, FAIRNESS AND DIFFICULTY EFFECTS ON LAY READER EVALUATIONS OF JUDGMENTS (EXPERIMENT 3)

Law model, fairness and difficulty effects on lay reader evaluations

Significant law model main effects and interactions are discussed in detail in the main text.

'It was easy to read the judgment'

Law model: $F(2, 1788) = 86.34, p = 0.000$ (UPICC and ACC judgments easier to read than Case Law judgments)

Difficulty: $F(1, 1788) = 24.34, p = 0.000$ (judgments in harder cases rated easier to read)

Fairness (court majority and researcher opinion) not significant

Law model X Difficulty: $F(2, 1788) = 17.14, p = 0.000$ (Case Law judgments in easier cases rated hardest to read; ACC and UPICC judgment readability not affected by difficulty)

Fairness (researcher opinion) X Difficulty: $F(2, 1788) = 4.65, p = 0.031$ (unfair judgments in easier cases rated hardest to read)
'The judgment used too much legal jargon'

Law model: \( F(2, 1785) = 43.44, p = 0.000 \) (ACC judgments more jargon-free than UPICC judgments, and UPICC judgments less jargon-laden than Case Law)

Difficulty: \( F(1, 1785) = 7.29, p = 0.007 \) (judgments in easier cases rated more jargon-laden)

Fairness (court majority) not significant

Fairness (researcher opinion) marginally significant: \( F(1, 1785) = 3.55, p = 0.06 \) (unfair judgments rate more jargon-laden)

Law model X Difficulty: \( F(2, 1785) = 7.31, p = 0.001 \) (ACC and UPICC judgment ratings not affected by difficulty; Case Law judgments in easier cases rated most jargon-laden)

Law model X Fairness (court majority): \( F(2, 1785) = 7.901, p = 0.048 \) (fairness made no difference to jargon ratings of Case Law judgments; ACC judgments rated less jargon-laden when fair; UPICC judgments rated less jargon-laden when unfair)

'I agree with the decision'

Law model: \( F(2, 1787) = 3.86, p = 0.021 \) (clear trend for readers of ACC and UPICC judgments to agree more strongly with the decision than readers of Case Law judgments)

Difficulty not significant

Fairness (court majority): \( F(1, 1787) = 30.99, p = 0.000 \) (stronger agreement with fair decisions)

Fairness (researcher opinion): \( F(1, 1787) = 32.36, p = 0.000 \) (stronger agreement with fair decisions)
Difficulty X Fairness (court majority): \( F(1, 1787) = 4.84, p = 0.028 \) (differentiation between fair and unfair decisions greatest in harder cases; fairness had only a small effect in easier cases)

Law model X Difficulty X Fairness (researcher opinion): \( F(2, 1787) = 5.21, p = 0.006 \) (readers of UPICC and ACC judgments differentiated more strongly between fair and unfair decisions in easier cases; readers of Case Law judgments differentiated more strongly in harder cases\(^1\))

'The decision was fair'

Law model: \( F(2, 1788) = 3.27, p = 0.038 \) (trend indicating ACC and UPICC judgments rated fairer than Case Law judgments)

Difficulty not significant

Fairness (court majority): \( F(1, 1788) = 33.54, p = 0.000 \) (fair decisions rated fairer)

Fairness (researcher opinion): \( F(1, 1788) = 55.49, p = 0.000 \) (fair decisions rated fairer)

Difficulty X Fairness (researcher opinion): \( F(1, 1788) = 7.57, p = 0.006 \) (differentiation between fair and unfair decisions greatest in easier cases; fairness had less effect in harder cases)

Law model X Difficulty X Fairness (researcher opinion): \( F(2, 1788) = 4.47, p = 0.012 \) (readers of UPICC and ACC judgments differentiated more strongly between fair and unfair decisions in easier cases; readers of Case Law judgments differentiated more strongly in harder cases\(^2\))

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\(^1\) But see Chapter 4.

\(^2\) But see Chapter 4.
'The decision was technical'

Law model: $F(2, 1784) = 4.08$, $p = 0.017$ (clear trend indicating that ACC judgments rated less technical than UPICC and Case Law judgments)

Difficulty not significant

Fairness (court majority) marginally significant: $F(1, 1784) = 3.40$, $p = 0.065$ (unfair decisions rated more technical)

Fairness (researcher opinion): $F(1, 1784) = 8.00$, $p = 0.005$ (unfair decisions rated more technical)

Law model X Difficulty: $F(2, 1784) = 3.37$, $p = 0.035$ (Case Law judgments in easier cases rated the most technical)

Law model X Fairness (court majority): $F(2, 1784) = 3.98$, $p = 0.019$ (unfair judgments ratings similar but fair ACC judgments rated least technical)

'The judgment was logical'

Law model: $F(2, 1785) = 4.51$, $p = 0.011$ (ACC judgments rated significantly more logical that Case Law judgments; clear trend indicating that UPICC judgments rated more logical than Case Law judgments)

Difficulty not significant

Fairness (court majority and researcher opinion) not significant

Difficulty X Fairness (court majority): $F(1, 1785) = 4.49$, $p = 0.034$ (fairness did not affect logic ratings in easier cases; unfair judgments rated less logical than fair judgments in harder cases)

Difficulty X Fairness (researcher opinion): $F(1, 1785) = 4.22$, $p = 0.04$ (fairness did not affect logic ratings in harder cases; unfair judgments rated less logical than fair judgments in easier cases)
‘The judgment took into account all of the important facts in this case’

Law model: \( F(2, 1785) = 3.07, p = 0.047 \) (trend indicating that UPICC judgments rated higher on consideration of facts than Case Law judgments; ACC ratings in between: but see effect of law model, difficulty and fairness below)

Difficulty not significant

Fairness (court majority) not significant

Fairness (researcher opinion): \( F(1, 1785) = 3.84, p = 0.05 \) (fair judgments rated higher on consideration of important facts)

Difficulty \times Fairness (court majority): \( F(1, 1785) = 4.10, p = 0.043 \) (fair judgments rated higher on consideration of important facts than unfair judgments in harder cases; ratings did not differentiate between fair and unfair judgments in easier cases)

Law model \times Difficulty \times Fairness (researcher opinion): \( F(2, 1785) = 3.28, p = 0.038 \) (readers of ACC judgments differentiated most strongly between fair and unfair judgments in easier cases; readers of Case Law judgments differentiated most strongly between fair and unfair judgments in harder cases;\(^3\) the trend indicating UPICC readers rated unfair judgments higher fair judgments in easier and harder cases)

‘The judgment was confusing’

Law model: \( F(2, 1786) = 53.47, p = 0.000 \) (ACC and UPICC judgments rated significantly less confusing than Case Law judgments)

Difficulty: \( F(1, 1786) = 4.61, p = 0.032 \) (judgments in harder cases rated less confusing; effect, although significant, small and attributable to effect of difficulty on Case Law ratings: see Law Model \times Difficulty)

\(^3\) But see Chapter 4.
Fairness (court majority and researcher opinion) not significant

Law Model X Difficulty: $F(2, 1786) = 3.10, p = 0.045$ (ACC and UPICC ratings not affected by difficulty; Case Law judgments rated even more confusing in easier cases than in harder cases)

'It was easy to follow the Judge’s reasons'

Law model: $F(2, 1788) = 37.66, p = 0.000$ (ACC and UPICC judgments rated significantly easier to follow than Case Law judgments)

Difficulty marginally significant: $F(1, 1788) = 3.10, p = 0.079$ (judgments rated easier to follow in harder cases; effect small and attributable to effect of difficulty on Case Law ratings: see Law Model X Difficulty)

Fairness (court majority and researcher opinion) not significant

Law Model X Difficulty: $F(2, 1788) = 3.06, p = 0.047$ (Case Law judgments rated even less easy to follow in easier cases than in harder cases; UPICC and ACC ratings not affected by difficulty)

Difficulty X Fairness (researcher opinion): $F(1, 1788) = 5.71, p = 0.017$ (unfair judgments rated less easy to follow than fair judgments in easier cases; ratings did not differentiate between fair and unfair judgments in harder cases)
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Fairness (court majority and researcher opinion) not significant

Law Model X Difficulty: $F(2, 1786) = 3.10, p = 0.045$ (ACC and UPICC ratings not affected by difficulty; Case Law judgments rated even more confusing in easier cases than in harder cases)

'It was easy to follow the Judge’s reasons'

Law model: $F(2, 1788) = 37.66, p = 0.000$ (ACC and UPICC judgments rated significantly easier to follow than Case Law judgments)

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Fairness (court majority and researcher opinion) not significant

Law Model X Difficulty: $F(2, 1788) = 3.06, p = 0.047$ (Case Law judgments rated even less easy to follow in easier cases than in harder cases; UPICC and ACC ratings not affected by difficulty)

Difficulty X Fairness (researcher opinion): $F(1, 1788) = 5.71, p = 0.017$ (unfair judgments rated less easy to follow than fair judgments in easier cases; ratings did not differentiate between fair and unfair judgments in harder cases)
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