UNCONSCIONABILITY IN CONSUMER TRANSACTIONS SECTION 52 OF THE TRADE PRACTICES ACT

By

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The title of this seminar "The Scope for Intervention in Commercial Dealings" raises a doctrinal dilemma. If the concepts of "freedom of contract" and "sanctity of contract" mean anything, there is little, if any, cause for intervention. If those concepts have no valid and contemporary application, in what circumstances and according to what criteria should intervention occur?

Although some would argue that intervention has gone too far and that certainty in commercial dealings dictates a need to return to orthodoxy[1], that will not occur.[2] Others tonight will deal with the marked tendency of the High Court of Australia to deal with commercial transactions more readily in terms of restitution, unjust enrichment and constructive trust than in terms of privity and consideration.[3] I will deal with one aspect of a broad legislative movement to provide protection for a class of persons which engages in commercial dealings, namely "consumers". The recognition that inequality of bargaining power, and overreaching had become the hallmarks of consumer transactions, ultimately, saw the Courts and the legislature put the lie to the statement of Jessell M.R. in *Printing and Numerical Registering Co.* v. *Sampson*:-[4]

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty contracting and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.

The central tenet of s.52A of the Trade Practices Act is contained in the admonition in Subs.(1):-

> A Corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person engage in conduct that is in all the circumstances, unconscionable.

The term "unconscionable" is not defined by the Act. However it was intended at least to cover situations which are regarded as unconscionable in equity and indeed to have a wider operation than the equitable doctrine. It is therefore necessary to give some consideration to the equitable concept.

The jurisdiction in equity to set aside unconscientious and catching bargains stands aside from the doctrines of duress and undue influence presumed to exist from recognised

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1. P. Atiyah: *The Rise and Fall of Freedom of Contract,* Clarendon Press 1979.
2. Although it should not be assumed that all the classical notions of freedom of contract have had their day and are now dead. See Cooper "Unconscionable Bargains and The Trade Practices Act: The New Equity" (1987) 24th Australian Convention Papers p.381 at 381-387.
3. See for example; consideration (*Waltons Stores (Interstate) Ltd* v. *Maher* (1987-1988) 164 CLR 387); privity (*Trident General Insurance Co. Ltd* v. *McNeive Bros. Pty Ltd* (1988) 62 ALJR 508); implied contract (*Australia and New Zealand Banking Corporation Ltd.* (1988) 62 ALJR 292).
4. (1875) LR 19 Eq 462 at 465.

relationships of parties to transactions.[5] Its origin lies in the policing of the usury laws, the protection of family estate and the avoidance of "catching" bargains where, for example, a buyer purchased goods at inflated prices on promissory notes and resold the goods at their true market price in order to obtain, in fact, loan funds at exorbitant interest rates. to obtain, in fact, loan funds at exorbitant interest rates.

The gist of the action was equitable fraud and, unlike mistake or undue influence, which were based on the absence or quality of consent,[6] the doctrine acknowledged the existence of a willing consent but given in circumstances where the terms exacted were oppressive or had been exacted by an unconscionable use of power or position.[7] The mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable, or unjust, is not in itself any ground on which the court would set it aside as invalid.

In Australia, the doctrine has had a greater prominence than in the United Kingdom and since the decision of the High Court in *Commercial Bank of Australia Ltd.* v. *Amadio*[8] the principles appear reasonably settled in this country.

> Whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscionable advantage is then taken of the opportunity thereby created

the equitable principle will apply.[9]

Special disadvantage may be constituted by poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.[10] However, the use of broad tests equating with any circumstance affecting a party's ability "to conserve his own interests"[11] or "to make a judgment as to his own interests"[12] indicates that the category is not closed or closely defined. Rather, it will depend upon the particular circumstances but the disadvantage must be serious and special, for example, an ability to understand the English language.[13] Mere inequality or bargaining position will be insufficient, and, in this respect, the dictum of Lord Denning M.R. in *Lloyds Bank* v. *Bundy*[14] to the contrary has been rejected in Australia as it has in the United Kingdom.[15]

It is not sufficient that there be a potential for abuse by the dominant party; the power must in fact be abused because it is the unconscionable use of the power which invoked the intervention of equity.[16]

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5. Although Hardingham argues that the boundary is becoming blurred — A. Hardingham, *Unconscionable Dealing,* in Finn (ed.) Essays in Equity, The Law Book Co. (1985) at 19-24.
6. *Commercial Bank of Australia Ltd* v. *Amadio* (1983) 151 CLR 447 at 474.
7. See Peden, *The Law of Unjust Contracts,* (Butterworths, 1982) at 17-18; Meagher, Gummow, Lehane — *Doctrines and Remedies* (2nd ed.) pars 1601-1611; Cope, "The Review of Unconscionable Bargains in Equity" (1983) 57 ALJ 279; Hardingham, *supra* n. 5.
8. (1983) 151 CLR 447.
9. Per Mason J., *ibid.,* at 462. See also *Blomley* v. *Ryan* (1956) 99 CLR 362 at 415.
10. Per Fullagar J. in *Blomley* v. *Ryan, ibid.,* at 405. It may now be open to question whether there is a quality of special disadvantage attaching to a married woman simpliciter: *European Asian of Australia Ltd* v. *Kurland* (1985) 8 NSWLR 192 at 200; *Commonwealth Bank of Australia* v. *Cohen* (1988) ASC 55-681 at 58, 160; *European Asian of Australia Ltd* v. *Lazich* (1987) ASC 55-564 at 57,920.
11. *Blomley* v. *Ryan, ibid.* at 415.
12. *Amadio supra* n. 6.
13. *Carello* v. *Jordan* [1935] St R Qd 294; *Nobile* v. *National Australia Bank* (1987) 9 ATPR 40-787.
14. [1975] QB 326 at 339.
15. *National Westminster Bank Pty Ltd* v. *Morgan* [1985] 1 AC 686 at 708.
16. *Amadio,* supra n. 6, per Mason J. at 462-463, Deane J. at 474; *Multiservice Bookbinding Ltd and Ors* v. *Marden* [1979] 1 Ch. 84 at 111; *Alec Lobb Garages Ltd. and Ors.* v. *Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at 183, 189.

Further, the party in the dominant position must know, or turn a blind eye in such circumstances as equity will impute knowledge, of the disability.[17] In the absence of direct knowledge the test is whether there were such facts known as would raise in the mind of any reasonable person a very real question as to the other party's ability to make a judgment as to what was in his own interests.[18]

to the agreement[19] or in the terms of the agreement obtained.[20] Unconscionability has nothing to do with general notions of fairness or reasonableness in the absence of some conduct which has the flavour of overreaching; merely to show objective unreasonableness is not enough.[21] The distinction is illustrated in the following extracts from the opinion of the Judicial Committee in *Hart* v. *O'Connor* delivered by Lord Brightman:-[22]

> If a contract is stigmatised as "unfair" it may be unfair in one of two ways. It may be unfair by reason of the improper manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this "procedural unfairness". It may also in some contexts be described (accurately or inaccurately) as "unfair" by reason of the fact that the terms of the contract are more favourable to one party than the other. In order to distinguish this "unfairness" from procedural imbalance it will be convenient to call it "contractual imbalance". The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.[23]

Later his Lordship said:

> . . . historically a court of equity did not restrain a suit at law on the ground of "unfairness" unless the conscience of the plaintiff was in some way affected. This might be because of actual fraud (which the courts of common law would equally have remedied) or constructive fraud, i.e., conduct which falls below the standards demanded by equity, traditionally considered, its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power. An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. "Fraud" in its equitable context does not mean, or is not confined to, deceit; "it means an unconscionable use of the power arising out of these circumstances and conditions" of the contracting parties; *Earl of Aylesford* v *Morris* ((1873) L.R. 8 Ch App 484, 491). It is victimisation which can consist either of active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

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17. *Amadio supra,* n. 6 at 466-467, 479.
18. *Amadio, ibid.* at 467, *Blomley* v. *Ryan, supra,* n.9, at 428; *Hart* v. *O'Connor* [1985] 1 AC 1001 (P.C. overruling the New Zealand Court of Appeal and disapproving of *Archer* v. *Cutler* [1980] 1 NZLR 386 where the Courts had held that knowledge of the disability was irrelevant. See now in New Zealand, *Nichols* v. *Jessup* (1986) 1 NZLR 226.
19. Procedural unfairness or unconscionability.
20. Substantive unconscionability.
21. *Knightsbridge Estates Trust Ltd* v. *Bryne* [1939] Ch. 441 at 457 (C.A.); *G & C Kreglinger* v. *New Patagonia Meat & Cold Storage* [1914] AC 25 at 37, 54; *Multiservice Bookbinding Ltd* v. *Marden supra* n. 16 at 108-109, 110; *Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd. Supra* n. 16 at 183, 189.
22. *Supra* n. 18 at 1017-1018.
23. *Ibid.* at 1024.

Undervalue in a transaction is not per se objectionable. However, the disparity may be so large as to facilitate, as a mechanism of proof, the drawing of an inference that a position of disadvantage existed or that procedural unconscionability has occurred.[24] Nevertheless, a transaction which, ex facie, appears unconscionable, may be shown by the party in the position of apparent dominance not to be the result of any domination or abuse of power, that the terms were in all the circumstances fair, just and reasonable as between the parties, and that the other party had separate and independent advice.[25]

Although it is convenient to talk of a class of persons under special disability, it should be recognised that the categories of unconscionable bargains are not limited or closed and the court will interfere where a bargain has been obtained by an unfair means.[26] Changing times, circumstances and business practices which may arise may make it appropriate to invoke the underlying principle in circumstances or in particular relationships where common experience had not previously called for its application.[27]

As well as the concept of unconscionability in equity, s.52A of the Trade Practices Act was based on two legislative models: The Contracts Review Act 1980 (NSW) and Art. 2-302 of the Uniform Commercial Code of the United States of America. The developments in these two jurisdictions will therefore be of particular importance in assisting in the interpretation and development of s.52A.

For the purpose of this paper it is intended to give detailed consideration only to the decision of the New South Wales Court of Appeal in *West* v *A.G.C. (Advances) Ltd.*,[28] and to provide some general observations on the American decisions, to illustrate the principles reflected in s.52A.

In *West* v *A.G.C. (Advances) Ltd.*, the Court of Appeal had occasion to consider the Act for the first time. The applicant for relief was the owner of a home originally mortgaged to the sum of $23,700.00. The original mortgagee was threatening to exercise its power of sale. Mrs West's husband was an employee of a private company which was in need of carry-on funds and funds for expansion. She was asked by her husband to use the house as security for a loan of money to discharge the existing mortgage and provide funds to the company. This she agreed to do. An application was made by the company and a separate application made by Mrs West for an advance of $85,000.00 from A.G.C. The financier accepted the application of Mrs West to the extent of $68,000.00, on normal commercial terms with security over the house, and rejected the application by the company. Mrs West had been advised by her son, an accountant, against the transaction and by a friend, a barrister, as to the inadequacy of security in the arrangement with the company. She had no independent legal advice. Despite the warnings, she went ahead with the transaction. The company which had undertaken to make the repayments to A.G.C. failed, and the financier sought to exercise its rights, the financial ability to service or discharge the loan being completely beyond Mrs West.

At first instance,[29] Hodgson J. held that having regard to the position of Mrs West and the guarantors of the loan, namely, one where there was an entitlement to contribution and on the assumption that contribution was in fact made, then as Mrs West would not

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24. *Blomey* v. Ryan, supra, n.9, at 405; *Tremills* v. *Benton* (1892) 18 VLR 607, at 620 FC; *Alec Lobb, supra,* n.16, at 182.
25. *Amadio, supra,* n.6, at 474; *National Westminster Bank Pty Ltd* v. *Morgan, supra,* n.15 at 706-707; *Poosathurai* v. *Kannappa Chettiar* (1919) LR 47 IA 1 at 3; *Watkins* v. *Coombes* (1922) 30 CLR 180 at 193-194.
26. *Amadio, supra,* n.6, at 462; *Multiservice Bookbinding Ltd* v. *Marden, supra,* n.16, at 110 approved in *Alec Lobb Ltd, supra,* n.16 at 183, 188, 189.
27. *Amadio, supra,* n.6 at 462.
28. (1986) 5 NSWLR 610.
29. (1986) 5 NSWLR 590.

be the principal debtor under the loan, relief under the Contracts Review Act would be declined. If, however, he was wrong in that view then he would have granted relief for the following reasons:-[30]

(a) the advance was sought from A.G.C. by the company;
(b) the company was and had for some time been in a perilous financial position;
(c) the company proffered no security of its own or from its directors;
(d) the company proffered security from a married woman with no apparent connection with the company other than through her husband's employment;
(e) Mrs West was the principal borrower although she did not have the means to pay the instalments;
(f) she had no solicitor;
(g) A.G.C. selected the particular form of transaction rather than one which reflected its substance, namely, a loan to the company guaranteed by Mrs West.

On appeal to the Court of Appeal, the majority (Hope and McHugh JJ.A.) held that Mrs West failed to establish any entitlement to relief under the Act. Relevantly, they held that the Act operated within the domain of the law of contract:[31]

> The Contracts Review Act 1980 is beneficial legislation. It must be interpreted liberally. But it operates within and not outside the domain of the law of contract, except for one form of ancillary relief available for the benefits of a person not a party to the contract. By executing the deed of loan and memorandum of mortgage, Mrs West agreed to repay the loan which she obtained from A.G.C. She did so as Hodgson J. found with a full appreciation of the consequences and against the advice of her son, a trained accountant. The deed and mortgage were ordinary commercial documents containing no unfair or unjust terms. A.G.C. was guilty of no unfair conduct towards her.

Importantly the majority held that:

(a) it is insufficient for the purposes of the Act simply that it was not in the interests of one party to make the agreement;
(b) a contract is not unjust against a party unless the contract is the product of unfair conduct on the other's part, whether in the terms which it has imposed or in the means employed to make the contract.

It is convenient to deal with the judgment of the majority of the Court under four broad headings:-

(a) the meaning of "unjust" and the relevant issues upon which the Act and Court focus the inquiry;
(b) the role of and need for independent advice;
(c) the need for detriment and the treatment of any benefit received;
(d) the knowledge or absence of it on the part of the party against whom relief is sought.

The whole focus of the legislation is on the contract which has been made by the parties. The issue is whether that contract when made is unjust. Thus the question is not whether it was unjust that, in this case, Mrs West should have borrowed money from a financier on security of her home for the purpose of discharging her existing mortgage and lending the balance to a third party.[32] Nor is it relevant that, from the borrower's standpoint, it was a bad bargain in the sense that it was a bad investment, because bargains which are simply bad investments are not legislated against.[33]

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30. *Ibid.* at 607-608.
31. *Supra,* n.28 per McHugh JA at 631. Hope JA agreed in the judgment of McHugh JA.
32. *Ibid.* at 624.
33. *Ibid.* at 621.

Although s.9(2) is primarily concerned with procedural injustice there are circumstances indicated in the section, for example, s.9(2)(d), where substantive injustice is dealt with and a test of reasonableness is appropriate. Additionally, because the section requires regard to be had to the "public interest" and to "all of the circumstances of the case", there may be cases where the court, notwithstanding that none of the criteria of s.9(2) is applicable, nevertheless comes to the view that the contract is unjust. The difficulty is to find what criteria are to be applied in that circumstance.

> The provisions of s.9(2) are not exclusive and are mostly concerned with injustice. But the Court is entitled to have regard to all of the circumstances of the case subject to s.9(4) and the public interest. In an appropriate case gross disparity between the price of goods or services and their value may render the contract unjust in the circumstances even though none of the provisions of s.9(2) can be invoked by the applicant. Indeed notions of unfairness and unreasonableness will, I think, generally be present when a contract or any of its provisions is declared unjust. This will particularly be the case where procedural injustice is relied on.[34]

It is not to be thought that the reference to the presence of "unfairness or unreasonableness" is indicative of the relevant criteria. The Court made specific reference to the intention that unfairness not be covered by the legislation and contrasted this intention with the position under s.88F of the Industrial Arbitration Act 1940 (NSW) which makes specific reference to contracts being void on the ground they are "unfair".[35] Rather, it is suggested that cases such as gross disparity between price and value of goods or services are to be treated in the same way as in equity, or under Art. 2-302 of the Uniform Commercial Code, namely, as evidence in itself of some procedural injustice, or because the benefit is so disproportionately in favour of the supplier, retention of it would be unconscionable, that is, substantive injustice. If there is some criteria of unreasonableness, then it has a role because "unjust" is a wider concept than, and not limited by, the "tautological trinity" — unconscionable, harsh or oppressive.[36] Further, unreasonableness in a contract or term should, in the writer's view, be regarded as having to be in the genre of a contractual burden which is an "unreasonable burden on the claimant when it was not necessary" to impose it in order to allow the supplier to achieve his reasonable expectations as to price or contractual protection (that is, it is to be approached in essentially the same manner as s.9(2)(d)).[37]

It is of course to be noted that s.52A of the Trade Practices Act is narrower in terms. The statutory test is unconscionability and there is no statutory direction to consider the public interest. Thus the approach outlined above would appear to be the most liberal likely to be applied and the difference indicative of an intention to further limit the role of any general concept of "fairness or reasonableness" under s.52A.

In *West's* case the Court held that the taking of the first mortgage over the house property to secure repayment of the loan was not unnecessary to protect the reasonable interests of the financier. Even if the arrangement was properly construed, as one where Mrs West was a surety giving security to support the guarantee, the arrangement was not unreasonable.[38] In determining which of the interests of A.G.C. it was reasonable to protect in the circumstances which had occurred, the Court in effect tested the position of A.G.C. by reference to the way it treated other customers and its conduct by reference to its competitors.

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34. *Ibid.*
35. *Ibid.* at 621-622.
36. *Ibid.* at 621.
37. *Ibid.* at 620.
38. *Ibid.* at 626.

The Court found the rates were ordinary commercial rates of interest, the taking of security and the terms were a common feature of a secured loan or guarantee, the transaction was "commonplace". These circumstances identified what the reasonable interests were and whether the steps taken to protect them were in themselves reasonable.[39] Although the circumstances of competitors and other customers of a supplier will be highly relevant and of great weight, it remains open to show particular circumstances in any transaction which require protection over and above the commonplace and each case must depend on its own particular facts. It is the relationship between the party seeking relief and the party against whom relief is sought which is the relevant relationship to be examined. In consequence, allegations of undue influence or pressure by a third party, even if a party to the arrangement, are irrelevant to the inquiry unless the party against whom relief is sought was responsible for the conduct or had grounds for suspecting it had occurred.[40] In this respect the situation is the same as at equity.[41] Within the relationship the only duty owed is one of just dealing. There is no duty to advise the other party not to enter the transaction or to warn against it.[42]

The test as to any requirement for independent advice was put in these terms:[43]

> Whether or not a person has obtained independent legal or other expert advice is simply one factor to be taken into account. In some cases the absence of such advice is relevant in considering whether a contract is unjust because it makes it likely that a person has an informed appreciation of the effect of the contract.

The formulation of the test in these terms and the purpose underlying it bears a great similarity in language to the formulation of the test in equity where transactions are to be impugned for undue influence as laid down by the Privy Council in *Kali Bakhsh Singh* v *Ram Gopal Singh*.[44] It is in all cases a question of looking at all the circumstances and determining whether on balance it was a situation which required independent legal advice. For example, if the party seeking relief had a full appreciation of the consequences of the contract, as was found in Mrs West's case, or if the evidence establishes that a party would have entered into the agreement even with independent advice, including advice not to do so, absence of advice will not be sufficient of itself to obtain a declaration that the contract is unjust.[45]

Where the conduct complained of deprives the claimant of a real or informed choice as to whether to enter the contract, it is submitted that no further detriment need be shown, the deprivation of the choice being sufficient in itself. If the contract is neither unjust nor unreasonable so far as the applicant is concerned, the fact that there was inequality of bargaining power, the lack of independent advice or that it was not in the interests of the claimant to make the contract, will not make it unjust.[46] In a sense this formulation is only saying that the statutory or general criteria must be causative of an unjust contract or term. On the other hand, it indicates that the contract must be unreasonable or unfair in the result so that a detriment has been suffered and, if, in the end result, the contractual terms are

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39. *Ibid.*
40. *Ibid.* at 626-627.
41. See *Amadio* (1983) 151 CLR at 467, 478-479.
42. (1986) 5 NSWLR 610 at 631.
43. *Ibid.* at 627.
44. (1913) LR 41 IA 23 per Lord Shaw at 31; see also *Watkins* v. *Combes* (1922) 30 CLR 181 at 196.
45. *Supra,* n.28 at 627; *Bank of Borada* v. *Shah* (1988) 3 All ER 24; *Coldunell* v. *Gallon* [1986] QB 1184; *Commonwealth Bank of Australia* v. *Cohen* (1988) ASC 55-681 at 58,157. Prudence may dictate that an enquiry be made by a party to ensure that the other party has had advice or the opportunity of advice if the contract is other than a normal commercial transaction: *European Asian of Australia Ltd* v. *Lazich, supra,* n.10 at 57, 291; *Broadlands International Finance Ltd* v. *Sly* (1987) NSW Conv R 55-342 at 57, 115.
46. *West, ibid.* at 621.

neither unfair nor unreasonable, the claimant cannot complain unless he or she can demonstrate an effective denial of choice. Where the party seeking relief has sought and obtained a benefit, which is both real and substantial, as in Mrs West's case funds to discharge an existing mortgage where the morgagee was threatening to execute against the property for default, it is submitted that the claimant must demonstrate a burden disproprotionate to the benefit obtained to obtain relief. If such a burden is demonstrated, then it is a question of tailoring the remedy to exclude any unreasonable burden not required to protect legitimate interests, but otherwise the claimant remains bound to perform the burdens undertaken originally in order to obtain the benefit sought and received.

The question of the relevance of knowledge of a party to the existing circumstances was dealt with thus:-[47]

> A question which arises is whether the Court is able to consider circumstances which were not known to the party against whom relief is sought even though those circumstances existed when the contract is made. In my opinion the effect of s.9(1), (2) and (4) is that the Court may have regard to any circumstance existing at the time of the contract whether or not a party was aware of it. But the Court cannot have regard to any injustice arising from a circumstance that was not reasonably foreseeable at the time when the contact was made. Indeed, counsel for A.G.C. conceded that this was so. Nevertheless, while knowledge of a circumstance by a party against whom relief is sought is not a condition precedent to a consideration of that circumstance, his lack of knowledge may render the circumstance of less materiality than it would if he was aware of it.

The formulation of the test is in most respects unobjectionable, save the conclusion that lack of knowledge of a circumstance may nonetheless leave the circumstance as being in any way material to the benefit of the claimant. Suppose the claimant is insane but he presents outwardly as rational and sane and fully in control of his own interests. The insanity is unknown to the other party to the contract. The fact of insanity is relevant to be considered to determine the knowledge, if any, of the other party of it in order to evaluate the conduct by reference to the knowledge. If the fact of insanity becomes obvious after the time of the making of the contract although this circumstance may be taken into account[48] it may only be done so if the circumstnace was reasonably foreseeable.[49] In order to determine whether it was reasonably foreseeable, it is necessary to determine which facts existed and were known or ought to have been known, to a reasonable person in the position of the party against whom relief is sought, and then apply an objective test of foreseeability to those facts. If, objectively, circumstances were not known and ought not reasonably to be known, those facts are irrelevant for the purposes of s.9(4). Therefore, if there were no circumstances known, or which ought reasonably to be known, relating to insanity, the fact of insanity cannot be relevant or material to the benefit of the claimant because no conduct of the other party can be based on taking an unjust advantage of that insanity. If the objection is that contractual terms go beyond what is reasonably necessary to protect interests, then the fact of insanity is, it is submitted, irrelevant. Similarly, if the claimant is both insane and has bad eyesight, knowledge of the latter but ignorance of the former is relevant to a consideration of s.9(2)(g), if the contract is printed in minute print, but the fact of insanity, without knowledge is not relevant to s.9(2)(g), or at all. There are some situations where there is a circumstance which has particular consequences, for example, the bad eyesight,

47. *Ibid.* at 620.
48. S.9 (1).
49. S.9(4).

but knowledge is for the purpose of the inquiry prima facie irrelevant. Assume that the printed form was so small that no person of reasonable vision could, without difficulty, read the terms. The conduct complained of is producing a written contract in that form and the only relevant finding is whether or not because of the way the document was printed the terms were read or understood. The vice is producing such a form in the first place, not, with knowledge of a deficiency of vision on the part of the other party, producing such a document with a view to taking advantage of the deficiency. The situation changes where the print is in normal size and the failure to read is due solely to the deficiency. Here, knowledge is relevant because the act complained of must relate to the taking advantage of the deficiency and for that to occur there must be knowledge.

It is therefore submitted, that knowledge of a circumstance does not become relevant until the claimant seeks to relate that circumstance to the conduct of the other party to establish procedural injustice which involves the unjust taking advantage of the circumstance. In this respect there is no difference of approach between the Act and equity as to knowledge, or imputed knowledge when considering unconscionable contracts.[50]

I turn now to Art. 2-302 of the Uniform Code.[51]

The American jurisprudence divides unconscionability into two types, procedural unconscionability and substantive unconscionability — a distinction drawn by Leff[52] and taken up by others.[53] The distinction lies, on the one hand, with unfairness involved in the process of bargaining the contract (procedural unconscionability) and on the other, the unfair terms or unfair results arising out of the contract itself. In great part the distinction lies in the official comment 1 to the article:-

> "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."

The comment itself reflects the view of the American courts and commentators to develop flexible doctrines to take account of the framework of modern commercial life and business practices, giving due weight to social policy in favour of consumer interests, where the interests of buyer and seller conflict. The learning and recognition of the part equity plays in developing doctrines to overcome "liberty of contract" are brought together in *Henningsen* v *Bloomfield Motors.*[54] The case concerned the ability of an injured party to recover against the manufacturer of a motor vehicle which was defective and crashed and caused personal injury to the driver. One issue in the trial was the effect of disclaimer and limitation of liability clauses. In coming to a decision declaring the disclaimer and limitation void, the Court said[55]:-

> In assessing its [the disclaimer's] significance we must keep in mind the general principle that in the absence of fraud, one who does not choose to read a contract before signing it cannot after relieve himself of its burdens. And in applying that principle the basic tenet of freedom of competent parties to contract is a factor of importance. But in the framework of modern commercial life and business practices, such rules cannot be applied on a strict doctrinal basis.

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50. *Amadio, supra,* n.6 at 467, 479; *Hart* v. *O'Connor, supra,* n.18 esp. at 1028.
51. For a detailed critique of the history and operation of the article see Leff, "Unconscionability and the Code: The Emperor's New Clause" (1967) 145 U Pa L Rev 485; Ellinghaus, "In Defense of Unconscionability" (1969) 78 Yale LJ 757; Peden, *supra,* n.7, ch. 2; King "Developments in Unconscionability Under the Uniform Commercial Code" (1988) 14 N.Z. Rec. L. 357.
52. *Ibid.* at 487.
53. Peden, *supra,* n.7 at 36.
54. 75 ALR (2d) 1 (1960), at 21-32.
55. *Ibid.* at 21.

> . . . legal doctrines, as first expounded often prove to be inadequate under the impact of later experience. In such case, the need for justice has stimulated the necessary qualification of adjustments.

The relevant circumstances that in the instant case required "the necessary qualifications or adjustments" were:-

(i) The warranty which provided for replacement parts at factory but excluded liability for any other loss "gave little and withheld much" and had the air of a "sharp bargain".[56]

(ii) Equity would intervene where the relative positions of the parties were such that one party had unconscionably taken advantage of the necessities of the other.[57].

(iii) The warranty was in standardised form for mass use and was imposed on the consumer who had to accept it if he wished to purchase a car. The capacity of bargaining was so grossly unequal that he was not allowed to bargain at all.[58].

(iv) The form of warranty was common to manufacturers having 93 per cent of the market resulting in inequality of bargaining power because there was no competition between manufacturers in the area of warranty.[59]

(v) The Courts had in the past attempted to avoid a drastic departure from the doctrine of freedom of contract by adopting doctrines of strict construction and notice and knowledgeable consent.[60]

(vi) The warranty, with disclaimer, was on the back of the order form and was not drawn to the attention of the purchaser. The type and style of fine print was such as to promote "lack of attention rather than sharp scrutiny".[61]

(vii) "Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom of contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way".[62]

Henningsen was not a case under the Uniform Commercial Code. It drew together the relevant circumstances as matters going to the public interest. But the criteria remained relevant to the interpretation and application of the article. Francis J., who wrote the opinion in *Henningsen,* delivered the judgment of the Supreme Court of New Jersey eleven years later in *Kegler* v *Romain.*[63] On this occasion he had available Art. 2-302. The case concerned the sale of educational packages of books on time payment for $279.95, to consumers targeted as minority group consumers with limited education and economic means. The sales agreement contained onerous terms and disclaimers, was in small print and was misleading. The books had a wholesale price of $35-$40 and a maximum retail price of $108-$110. The books had little or no educational value. Of unconscionability, Francis J. said[64]:-

> "It is an amorphous concept obviously designed to establish a broad business ethic. . . . The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing. The need for application of

56. *Ibid.* at 21.
57. *Ibid.* at 22-23.
58. *Ibid.* at 30-31.
59. *Ibid.* at 24, 30-31.
60. *Ibid.* at 24-26.
61. *Ibid.* at 28-29.
62. *Ibid.* at 31.
63. 279 A. 2ds 640 (1971).
64. *Ibid.* at 651-652.

the standard is more acute when the professional seller is seeking the trade of those most subject to exploitation — the uneducated, the inexperienced and the people on low incomes. In such a context a material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable.[65]

The Court regarded the exorbitant price, two and half times the retail maximum, coupled with the functional inadequacy of the books, as giving rise to an inference of imposition.

The two themes illustrated in the above cases, namely, gross inequality of bargaining power negating any meaningful choice as to terms and business conduct involving honesty and fair dealing, run consistently through the American cases under Art. 2-302. Each of the cases is in practice an instance decision based upon particular facts. However, the identification of a class within the community with special disability identifies the circumstances where it is likely that departures from an acceptable standard, or a denial of choice, will occur. The American cases therefore build up a body of case-law illustrative of the criteria the courts will apply.[66] The themes and criteria of the American cases are substantially those in s.9 of the Contracts Reivew Act 1980 (NSW) and s.52A(2) of the Trade Practices Act.

Section 52A was inserted in the Act in 1986. In terms it provides:

(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstnaces, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or servies to a person (in this sub-section referred to as the 'consumer'), the Court may have regard to —

(a) The relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods

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65. The equation of "fraud" and "unconscionability" in the context is the same as that made by the Privy Council in *Hart* v. *O'Connor, supra,* n.18 at 1024. Similarly, the requirement of a broad business ethic and conduct departing from it has been cited as the purpose and test of the unconscionability doctrine in Canada; see *Harry* v. *Kreutzeger* (1978) 95 DLR (3d) 231, 449; *A & K Lick-a-Chick Franchises Ltd* v. *Cardiv Ltd* (1981) 119 DLR (3d) 440. For a comparative study useful reference may be made to Ford, "Unconscionable Conduct — A Matter for the Courts or the Legislature" (1985) 13 BLR 307.

66. A review of those cases and an assessment of the effectiveness of the article is contained in Peden, *supra,* n.7, at 37-50. See also King, *supra,* n.51 at 375 ff.

or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person —
   (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
   (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

The purpose of the section was only to provide for relief against unconscionable conduct by appropriate order.[67] Consequently, neither prosecutions[68] nor an action for damages[69] can be brought for a contravention of the section. Any proceedings must be commenced within two years after the day on which the cause of action accrued.[70]

The focus of the section is on "conduct" which is unconscionable in relation to the supply or possible supply of goods and services. This is in contrast to the Contracts Review Act (NSW) where the focus is on the contract which results. In consequence, under S.52A there is less room, if any, for substantive unconscionability to play any part other than as a mechanism of proof of procedural unconscionability. Unfairness or unreasonableness in the result is not a ground for relief. And even where reasonableness is relevant to the need or ambit of a contractual term to protect a legitimate interest[71] it is also the conduct giving rise to the insertion of the term which is the subject of consideration, not merely the reasonableness of the term.

The court is required to consider "all the circumstances"[72] although those circumstances will be limited to those existing at the time of the conduct unless they were reasonably foreseeable.[73]

The operation of the section is limited to consumer transactions and limited to goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption.[74] The use of a particular definition of consumer in the context of the section, coupled with the exclusions in sub-ss. (5) and (6), has the effect of ousting the operation of s.4B of the Act, which includes as consumer transactions those within the prescribed limit of $40,000.00. That the use of a particular definition operates to oust s.4B is supported by the following circumstances. Section 4B includes, for example, a "commercial road vehicle" and covers the purchases by small business, not being trading stock or components

67. S.87 (1A).
68. S.79(1).
69. S.82(3).
70. S.87(1C).
71. S.52A(2)(b).
72. S.52A(1).
73. S.52A(4).
74. S.52A(2); s.52A(5) and (6).

or materials to manufacture trading stock. Section 52A is narrower in terms. It does not include provision for commercial vehicles in the definition of goods for personal domestic or household use or consumption. The failure to use the drafting device of substituting "consumer" for "person", where appearing in the section and leaving out sub-ss. (5) and (6), which would allow an operation for s.4B, is consistent with a narrower operation than that provided by s.4B. The Act also exempts insurance transactions even, if they relate to consumers, from the operation of s.52A.[75]
of s.52A.[75]

"Unconscionable" is not defined in the Act. It is not a technical word nor one which has a received legal meaning. In common parlance, the word has shades of meaning coloured by the circumstances to which it is applied. For example, The Macquarie Dictionary gives three meanings:

"(i) unreasonably excessive
(ii) not in accordance with what is just or reasonable
(iii) not guided by conscience, unscrupulous."[76]

The Collins English Dictionary (Australian Edition) gives two meanings:

"(i) unscrupulous or unprincipled
(ii) immoderate or excessive."[77]

In each of its various meanings there is the sense of overreaching or imposition to an excessive extent which is irreconcilable with what is just or reasonable.

Just as the courts have not closely defined the concept of fraud, so "unconscionable" should not be defined as the American courts have refused to do. It is unlikely that the term will be limited in meaning in Australia. First, the statute is remedial and should be given a liberal interpretation as has been done with similar statutes where the test has applied.[78] Secondly, the Explanatory Memorandum accompanying the Trade Practices Amendment Bill 1985[79] makes it clear that the term was to cover at least conduct which is unconscionable in equity and conduct which otherwise would not be caught at equity as either unconscionable conduct or undue influence.[80]

Notwithstanding that some courts have narrowly construed unconscionable where it appears as part of the phrase "harsh and unconscionable" in the traditional moneylenders legislation,[81] it is submitted that they have refused to limit the circumstances to those which would have been actionable at equity and have treated the word to mean by itself "not in accordance with the ordinary rules of fair dealing".[82]

In the context in which the word is used, that is, consumer transaction, the emphasis will be on the measurement of conduct against a standard of good faith, honesty in fact and fair dealing aimed at achieving a broad business ethic. The equity cases, with their focus on victimisation and the misuse of power arising from a relationship, will therefore be of assistance in categorising conduct as unconscionable but not determinative in the operation of s.52A.

The provision of "guidance" in s.52A(2) to the Court by the legislature again indicates

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75. S.187(1E).
76. The Macquarie Dictionary (1985), at 1844.
77. Collins English Dictionary, Australian Edition, (Sydney, 1981), at 1576.
78. *Samuel* v. *Newbold* [1906] AC 467; *Davies and Anor* v. *General Transport Development Pty Ltd* [1967] AR (NSW) 371 at 372-374; *West* v. *A.G.C. (Advances) Ltd* (1986) 5 NSWLR 610 at 615, 631.
79. Reference 15411/85 Cat. No. 854818X.
80. See, in particular, paras 79, 80 and 81.
81. See Pannam, *The Law of Money Lenders*, (Sydney, 1965), at 277.
82. See *Samuel* v. *Newbold* [1906] AC 461 at 467, 470; *Wilson* v. *Moss* (1909) 8 CLR 146 at 155-156.

that it is conduct, and not the mere existence of disparity of bargaining position nor the particular position of the consumer, which is to be considered.

The effect of s.52A(2)(a) is merely to direct the court to consider the bargaining positions of the parties. It does not follow that if they are unequal relief will be granted. If there is a significant disparity, it means no more than the potential for unconscionable conduct exists. It is then a question of fact and degree as to whether it has occurred. The draftsman properly does not imply the assumption that all corporations will be in a superior position. It is clearly wrong to suggest that it is invariably the case. What does arise, however, is the extent to which any superior position may be used. For example, in times of short supply of particular products where demand far exceeds the available supply, there will be an imbalance in bargaining position. But is it unconscionable to refuse to deal on other than cash terms? One would have thought not. In each case it is a question of degree subject to the overriding requirement that there must be a sense of overreaching or use of the power which goes with the position which is irreconcilable with what is right or reasonable.

The closest the guidelines come to a test of fairness or reasonableness is in s.52A(2)(b) and (e). It is submitted that such a test is not to be imported into the paragraphs as sufficient in itself to grant relief.

The use of the words "as a result of conduct" in s.52A(2)(b) involves a two-stage requirement. First, the section requires that the term must in itself go beyond what is reasonable. Secondly, the term must have resulted from the prescribed conduct. To identify what are the reasonable interests of the supplier will in part be answered by the nature of the transaction, whether the terms are commercial, normal and commonplace.[83] However, if an industry agrees, or historically has had, common terms, for example, exemption clauses of inordinate width, that will not satisfy the test of reasonableness.[84]

Disparity of price between that paid and that available on the market for the same or equivalent goods from another supplier, as dealt with in s.52A(2)(c), does not mean that relief necessarily follows. The use of price disparity is twofold. First, it operates in an evidentiary sense of leading to an inference that procedural unconscionability has occurred. Thus, as in the moneylending situation, excessive interest may lead to a presumption that a transaction is harsh and unconscionable, which, if unexplained, hardens into a certainty,[85] so, excessive price in itself may lead to a finding of unconscionability.[86] But the disparity must be gross and mere variations will not be sufficient. The second use of the inquiry as to price is to establish evidence of detriment or damage. The paragraph does not mean that the availability of cheaper goods from alternative suppliers will result in the price being cheaper. Nor does it mean that the consumer does not have to shop around to get comparative prices and terms. It simply means that a supplier who sells at a price grossly over the market norm, without explanation, may have an adverse inference drawn against him. A consumer, who knowingly buys at a price grossly over the market norm, cannot complain merely on the ground of price and must point to some conduct which is unconscionable and which led to such a purchase before any relief may be obtained.

The ability to understand any documents relating to the sale[87] and undue pressure or influence[88] clearly cover the situations where equity would grant relief. However, they go

83. *West* v. *A.G.C. (Advances Ltd), supra,* n.28 at 626.
84. *Henningsen* v. *Bloomfield Motors* 75 ALR (2d) 1 (1960) at 22-23, 30-31.
85. Per Lord Loreburn in *Samuel* v. *Newbold* [1906] AC at 476, cited with approval by Griffiths CJ in *Wilson* v. *Moss* (1909) 8 CLR at 155-156.
86. See, for example, *Kugler* v. *Romain* 279 A. 2ds 640 (1971) at 653 and cases cited; *Blomley* v. *Ryan, supra,* n.9 at 405; *Alec Lobb (Garages Ltd)* v. *Total Oil (Great Britain), supra,* n.16 at 182.
87. S.52A(2)(c).
88. S.52A(2)(d).

beyond those situations and deal with persons of normal understanding confronted, for example, with documents drafted in legalese and printed in fine or varying prints hiding the onerous and highlighting the comparatively unimportant. Similarly, any pressure or influence comes into consideration. Again it is a question of degree and whether the conduct falls outside a broad business ethic which will determine whether in all the circumstance it was unconscionable.

It should be noted that some of the cases where relief would be granted in equity may not fall within the ambit of s.52A. This is because of the way in which the section is by sub-ss. (5) and (6) limited to consumer transactions. For example, the facts of *Amadio* with the provision of a guarantee to support a business lending, do not easily, if at all, fall within s.52A(5).

The section, while limiting consideration of the circumstances to those existing or reasonably foreseeable at the time the conduct was entered into, does not speak of knowledge of the parties. If, under the Contracts Review Act 1980 (NSW), regard may be had to circumstances unknown to a party because consideration must be given to the "public interest", that rationale does not exist under s.52A. It is submitted that, for reasons outlined earlier in this paper,[89] unknown circumstances have little, if any part to play in the operation of the section.

There has been concern expressed as to how the approach to be taken to the evidence called, the means of proof and attitude to the courts to economic issues, will affect the operation of s.52A, especially s.52A(2)(a) and (b).[90] The problem, it is submitted, is resolved by determining whether "unconscionable" in the section means subjectively unconscionable or objectively unconscionable. That is to be determined by the context in which it appears in the Act.[91] Section 52 involves an objective standard. It is for this reason that evidence that persons were in fact misled is not necessary for the purpose of s.52 but may be admissible to determine whey they were misled.[92] However, s.52 is a general prohibition:

> "A corporation shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The context of s.52A is that the prohibited conduct is centred on "the supply or possible supply of goods or services to a person". Further, the matters in s.52A relate to the position of the particular consumer, not to a general class of persons being "consumers". In the context, it is submitted, the text is subjectively unconscionable. In consequence, what in fact occurred, the provable circumstances peculiar to that consumer, for example, illiteracy, will enable findings to be made as to the circumstances in pars (2)(a)(b)(c) and (d) of s.52A. Evidence of economic models or industry concentration are not necessary to determine bargaining strength, although they may be admissible. Rather, it is the ability to negotiate effectively in one's own interest which determines relative strengths for the purpose of s.52A(2)(a) and the ability in fact to understand documents under s.52A(2)(c) which is relevant. In most cases it will be apparent from the evidence of what in fact occurred.

Although the applicant will, in the writer's view, bear the onus of showing that he or she was subjectively unconscionably dealt with, the question remains whether the consumer must show that he or she acted reasonably in all the circumstances or whether there is an onus on the supplier to show unreasonableness or, indeed, whether reasonableness on the

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89. See pp. 17-19.
90. See Goldring, Pratt and Ryan, "The Contracts Review Act" (NSW) (1981) UNSWLJ 1 at 9-10; Healey, "Section 52A Unconscionable Conduct", CCH Trade Practices Reporter, Vol. 2, 20-818.
91. *Re The Credit Tribunal; Ex parte GMAC* (1977) 137 CLR 545 at 561.
92. E.g., see *Sterling* v. *Trade Practices Commission* (1981) 35 ALR 59.

part of the consumer plays any part at all in the inquiry. In *Parkdale Custom Built Furniture Pty Ltd* v. *Puxu Pty Ltd,* Gibbs C.J. and Mason J.[93] required that conduct under s.52 be tested by reference to reasonable members of the class to which it was directed. However, that approach was in the context of an objective test. The unconscionable cases in equity require the existence of a special disability which has been unconscionably taken advantage of; it is the circumstance of being seriously affected in the ability to make a judgment as to one's own best interest that is important. Thus, it seems that it is implicit that the person under disability should not be subject to tests of reasonableness because those tests involve a person acting reasonably to protect his or her own interest. That s.52A is wider in ambit than the equity cases suggests that reasonableness of conduct plays a part, not as a matter of onus but simply as a circumstance in the overall evaluation of the conduct. Where the circumstances of the consumer are such that it is inappropriate to consider reasonableness, for example, where the consumer is, to the knowledge of the supplier, suffering mental incapacity, reasonableness will be irrelevant. Where, for example, the clause is in fine print and legalese, and the consumer is a solicitor who by choice does not read it, reasonableness will be both relevant and of great weight to the issue of unconscionability.

Similarly, it is suggested that there is no onus on the supplier to prove that the conduct or contract stemming from it was fair or reasonable. However, in a practical sense, if the contract exhibits terms which are individually or collectively prima facie unjust and unreasonable, a failure to call evidence demonstrating that in the circumstances of the particular case they were both fair and reasonable, will enable an inference of unconscionable conduct more easily to be drawn.

The remedies available if unconscionable conduct is proved are contained in s.87(2) of the Act and are broad and flexible. They include powers to enable contracts to be set aside or varied in whole or in part, money to be repaid or compensation paid. However, proceedings must be instituted within two years of the date on which the cause of action accrues.

One further point needs to be made. Generally the unconscionable conduct will relate to the process leading up to supply. There may be circumstances where in the carrying out of the contract there is unconscionable conduct e.g. using contractual terms for purposes which as a matter of construction may be available but clearly as a matter of intention were never meant for that purpose e.g. exercising security rights.[94]

What is striking about s.52A is that, so far as I can discover, it has not been litigated since its introduction in 1986. The reason for this is unclear but a number of possibilities suggest themselves:

(a) the narrow definition of consumer excludes small business which accounts for a large part of the litigation under Part V of the Trade Practices Act. In consequence the boundaries of s.52 and 53 of the Act (misleading and deceptive conduct) have been extended to cover some situations which might reasonably come under s.52A.[95]

(b) The availability of similar provisions in State legislation e.g. the Contracts Review Act (NSW) and the Fair Trading Acts[96] in a number of other States have been used as grounds of defence often in conjunction with the "*Amadio* defence". That is, consumers react to enforcement proceedings by traders in State courts by references to defences available in those courts under State law.

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93. (1982) 149 CLR 191 at 199, 201.
94. See for example the facts and the dissenting judgment of McHugh J.A. in *S.H. Lock (Aust.) Ltd* v. *Kennedy* (1988) ATPR 40-859.
95. Mr Justice J.E. Spender "Unconscionability and Section 52 of the Trade Practices Act in Banking Transactions", 4 May, 1989 Banking Law and Practice Conference, Canberra at p.25 ff.
96. Fair Trading Act (Vic. 1985 s.11A) (NSW s.43) (SA s.57) (WA s.11).

(c) The exclusivity of the Federal Court to deal with claims under s.52A acted as a deterrent because of the costs involved. This situation changed on 1 September, 1987 when the State and Territory courts were invested with federal jurisdiction within the limits of their jurisdiction.[97]
(d) Practitioners dealing with consumer transactions saw unconscionability as being limited to the equitable notion of special disability which is too narrow a view. Additionally many are unaware of the jurisdiction change and reject the institution of proceedings in the Federal Court for reasons of cost.

It is to be hoped that with the broadening of jurisdiction to include State and Territory Courts, including the lower courts, we will see greater use being made of s.52A in the future than has been the case in the past.

97. Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 (Cwth) s.2. Inserting a new s.86 in the Trade Practices Act 1974.