# THE CONTRACTS REVIEW ACT (N.S.W.)

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*The Contracts Review Act 1980 (N.S.W.) represents a change in the basic approach of the law to contracts. The Act is designed as a measure of consumer protection. It contains several novel features, both from the standpoint of the law of contract and as a piece of legislative drafting. This article examines the legislation and attempts to assess its effectiveness in achieving the purpose for which it was apparently intended.*

## I. BACKGROUND

Virtually all systems of law have rules governing the performance of obligations; and in western systems of law, it is a fundamental principle that obligations are to be performed: *pacta sunt servanda.* In English Law, this principle has its application in the rule that contracts are to be performed, and if they are not, the courts will either enforce them by order, or award compensation for breach. The principle itself is not questioned. The theory of English law requires that the basis of contract is a meeting of the minds, that is an agreement between the parties to change their legal position in order to be bound to perform some obligation in return for some benefit. However, the reality is that persons find themselves bound by contractual obligations when they either did not know that as a result of their actions they would become so bound or, that they did not intend to become legally bound although that is the legal consequence of their action. This occurs because the English and Australian law implies the creation of a binding contract from the actions of parties. While many contracts, for example contracts for the sale of land, and a substantial proportion of commercial contracts, are freely negotiated by parties having equal bargaining power, a greater number are not. The vast majority of contracts, especially contracts for the sale of goods and contracts for services, are implied. Even in the case of express contracts, accompanied by some formality, persons may unwittingly subject themselves to obligations due to the 'boiler plate' language commonly found in standard form contracts. In some cases, enforcement of these obligations may have little relation to the primary or substantial object of the agreement or transaction, and may be unjust, unfair, harsh, oppressive or unconscionable. In law, all obligations imposed by the contract are treated equally

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as binding, so long as they may, in formal terms, be shown to have been part of the contractual arrangement. The basis of contractual obligation has recently attracted scholarly attention, most notably in Professor Atiyah's seminal work, *The Rise and Fall of Freedom of Contract.*[1] The analysis of the obligations and their performance has shown that contractual obligations may be of different types. Although this has some bearing on the question whether all obligations ought to be enforced by the law in like manner, such discussion is peripheral to the subject whether, and in what circumstances, persons who have assumed binding obligations ought to be excused from performing them. This issue is dealt with by the Contracts Review Act 1980 (N.S.W.).

Anglo-Australian law has always recognized that not all contracts are the result of a free process of negotiation,[2] and the courts of equity have traditionally granted relief to those who have become subject to contractual obligations the result of fraud, duress, or 'undue influence'. It is, however, difficult for a party to show his or her entitlement to such equitable relief, and there is a presumption of law that all contracts, express or implied, are the result of the free actions of autonomous and economically equal parties. Within our society, however, parties are not economically equal, and as a result of this economic inequality the weaker party may be forced to enter into contracts against their better interests. This has long been the case with moneylending and credit contracts,[3] but is equally true in other spheres, where the economically powerful enjoy the advantage of monopoly or oligopoly,[4] and are able to use standard form contracts which severely limit the rights of the other party.

As Professor Atiyah[5] has demonstrated, this state of affairs was quite consistent with the ideologies of social Darwinism and of the free-market capitalist economy which flourished in Europe and especially in Britain, in the 19th century, where it was considered appropriate that only the economically able survive in the free-market environment.[6] However, the growth of socialism and welfare liberalism led to disillusion with laissez-faire ideology, and a recognition that egalitarianism (to which most politicians paid at least lip-service) demanded positive steps for the protection of the economically handicapped. This recognition, which was probably more marked in Australia than in the United Kingdom, first manifested itself in the legislation dealing with moneylenders (whose economic activities have always been regarded with some moral suspicion). From the early years of this century, New South Wales used similar provisions in other legislation, especially that dealing with consumer credit.[7] It was also determined that contracts of employment which were harsh and unconscionable should be regulated. In view of the strict attitude taken by the common law courts to the enforcement of contracts, jurisdiction (under what Woods and Stein have called a 'radical law'[8]) was given to the Industrial Commission, which, it was felt, would be more sympathetic to the economically disadvantaged.

The growth of consumerism led to a greater consciousness among consumers of their disadvantaged position and consequently part of the reform giving consumers greater protection, was a general prohibition of contractual terms which were harsh or oppressive. This need was acknowledged by the Rogerson[9] and Molomby[10] Committees which inquired into the development of uniform and fair consumer

credit laws. Legislation such as section 65 of the Trade Practices Act 1974 (Cth) and section 1C of the Land Vendors Act 1964 (N.S.W.) introduced the concept of a 'cooling off' period whereby persons would be able to avoid contracts which would otherwise be binding. The working party on consumer affairs for the Australian Capital Territory which was set up by the then Commonwealth Attorney-General to inquire into consumer protection laws made a number of suggestions for reform,[11] including a general law dealing with harsh and unconscionable contracts. The report stimulated opposition from commercial interests and, after the change of government in 1975 the question was referred to the Standing Committee of Attorneys-General from which nothing has emerged. At the same time the Consumers' Association in the United Kingdom was pressing for similar sweeping reforms along the same lines.[12] To some extent, the reforms in the United Kingdom were a response to recommendations made by the Law Commissions concerning the use of exclusion clauses in contracts for the supply of goods.[13] These recommendations, which resulted in the enactment of the Supply of Goods (Implied Terms) Act 1973 had focussed attention on a particular class of contractual provisions which negatived or restricted liability under the implied terms whether at common law, under the Sale of Goods Act or the legislation dealing with consumer credit. It was realised that if this type of unfair contractual practice could be reformed by statute, then so too could other forms of undesirable conduct. As a result, the Unfair Contract Terms Act 1977 was enacted in the United Kingdom as a private members' bill, but not without substantial amendment in the House of Lords. By comparison, the courts in the United States have long taken the attitude that it is their right and duty to strike down unconscionable contractual provisions. The basic rule was set out in Article 2.302 of the Uniform Commercial Code, and has also been enacted as Article 5.108 of the Uniform Consumer Credit Code. Despite gloomy prognostications[14] the commercial activity in that country does not appear to have been greatly disrupted.

In 1976 the New South Wales Government commissioned Professor John Peden, of Macquarie University, to report.[15] He concluded that it was necessary to provide some protection against the use of unfair provisions and practices in connection with the negotiation of contracts. However, there was also a strong need to preserve an atmosphere of predictability and certainty in contracts, so as not to disturb unduly the regularity of commercial dealings made in good faith. With redrafting, and the addition of somewhat broader protections than recommended by Peden, a Bill for a Contracts Review Act was introduced into the New South Wales Parliament in 1978. These provisions provoked a storm of outrage, particularly because the operation of the Act would cover all contracts not merely consumer contracts. The Bill was withdrawn and reintroduced. As ultimately enacted, it was in most respects close to the form originally recommended by Peden, but its scope was considerably narrowed.

## II. COMMON LAW DEVELOPMENTS IN RELATION TO "HARSH AND UNCONSCIONABLE CONTRACTS"

In the United Kingdom, the courts were also developing the common law so that parties to unfair contracts could obtain relief. The high points in this development

must be regarded as *Lloyds Bank Ltd* v. *Bundy,*[16] *A. Schroeder Music Publishing House Co. Ltd* v. *Macauley,*[17] *Clifford Davis Management Ltd* v. *W.E.A. Records Ltd*[18] and, to some extent, *Levison* v. *Patent Steam Carpet Cleaning Co.*[19] The approach of the courts is based on a doctrine developed in the 18th century, but, which appears to have fallen into disuse until recently. The doctrine is not readily applied by the courts, and there is a very heavy onus to establish that the inequality of the bargaining power is such as to make the enforcement of the contract unconscionable. Since the outcome of marginal cases was unpredictable few actions were brought in which the courts had an opportunity to apply, or even to consider, the doctrine of unconscionability. It became clear that the courts, working on a case-by-case approach, could never achieve by judicial technique rules of law which could be considered economically, socially or politically attuned to modern conditions. Legislation was the only way. Nevertheless, the common law remains important.

Despite Lord Denning's attempt in *Lloyds Bank Ltd* v. *Bundy* to extract a "general principle" of wider application than the older doctrine[20] the criterion for its application remains uncertain. These cases can be rationalised on traditional grounds[21] and the *Schroeder Music* case has been severely criticized as a decision based upon faulty analysis and a refusal to examine the commercial reality of the agreement.[22] What was needed was not an ad hoc approach but a careful examination of all the relevant policy issues followed by comprehensive legislation. The result was the Peden Report and the Contracts Review Act.

The approach of the Unfair Contract Terms Act 1977 (U.K.) and of the Contracts Review Act 1980 (N.S.W.), is basically the same although the scope of the New South Wales Act appears considerably wider. Where unconscionability of a contract is alleged, the court does not have a completely free hand: it may vary the contract, declare it void, or grant some other relief.[23] It appears to have been assumed that the courts will apply the presumption that the legislature does not intend to change radically the common law;[24] and that if matters which the court may consider when granting relief are defined in the legislation, the courts will more readily grant the relief than if the legislation was expressed in general terms.

## III. THE PROVISIONS OF THE CONTRACTS REVIEW ACT

1. *Scope*

*Prima facie,* the Act applies to all contracts but there are extensive restrictions on the classes entitled to seek relief. Section 5 provides that the Act binds the Crown, not only in right of New South Wales, but also to the extent to which the Crown can be bound in all its other capacities. However, neither the Crown nor any public authority nor local authority may be granted relief. Similarly no relief will be granted to a corporation except for two types of "home-unit" companies. Nor is relief available to a person in relation to contracts entered into

> in the course of or for the purpose of a trade business or profession carried on by him, other than a farming undertaking (including, but not limited to, an agricultural, pastoral, horticultural, orcharding or viticultural undertaking) carried on by him or proposed to be carried on by him or proposed to be carried on by him wholly or principally in New South Wales.

Section 6(2) would seem, on the basis of *reddendo singulae singulis,* to preclude relief in respect of business contracts, wherever made. Consequently a farmer in the Australian Capital Territory, who enters into a contract in New South Wales would seem to be precluded from relief in respect of the contract to be performed in New South Wales if that contract is entered into in the course of his farming undertaking. However, his next-door neighbour, whose undertaking is carried on in New South Wales, would be entitled to relief in respect of an identical contract entered into in exactly the same circumstances. If one accepts that farmers are entitled to relief, on the ground that they may be the victims of unjust contracts (and the activities of some large pastoral trading companies would seem to provide ample evidence for this), there would seem to be no justification for excluding small businesses, including companies, who are equally the victims of unjust practices. Other restrictions on the operation of the Act are: first, in relation to unjust contracts relating to land and, secondly pursuant to Schedule 2 contracts made or existing at the commencement of the Act are beyond its scope.

The restrictions in section 6 are inconsistent with the recommendations of Professor Peden. When the Bill was first introduced into Parliament, Professor Peden and the Attorney-General believed the exclusion of commercial contracts would be unwise given the relative inequality of bargaining power between some commercial entities. The draft Bill had provided relief for exempt proprietary companies, firms and sole traders and did not (as the Act now does in section 7(2)) deny relief because the contract was entered into in the course of a business or trade carried on by the party seeking relief. Although Professor Peden had recommended that public companies and their subsidiaries be precluded from relief, because of their assured power of self-protection, the bill as first drafted would have covered all contracts. Negative business reaction led to a retreat from a philosophically desirable position and, contributed to the Act's amendment. There are several reasons why the Act should have been passed as Professor Peden had proposed, and indeed these reasons suggest the extension of the Act's protection to all contracting parties in New South Wales regardless of status.

First, and in particular, it is highly unlikely that the courts would apply the legislation to commercial contracts that were anything short of truly abhorrent or, unconscionable; for the very need for the Act stems from deeply ingrained judicial respect for the sanctity of contracts. Given the wide discretion granted by the Act, the courts would probably have striven to maintain commercial certainty by upholding such contracts wherever possible. Justification for this hypothesis is provided by a recent decision of the House of Lords in *Photo Production Ltd* v. *Securicor Transport Ltd.*[25] Although commenced before the Unfair Contract Terms Act 1977 (U.K.) had come into force, the Master of the Rolls attempted to introduce into the common law the criteria for the acceptability of exclusion clauses ('fairness' and 'reasonableness') in standard form contracts as envisaged by the Act.[26] The "radicalism" of the Court of Appeal, no doubt perturbing to the business world, did not survive on appeal. The speech of Lord Wilberforce must have gladdened hearts in boardrooms, for His Lordship virtually emasculated the Act in relation to standard form contracts used between business entities:

> After this Act, in commercial matters generally, when the parties are not of

> unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said... for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.[27]

It would appear, therefore, that freedom of contract will survive in all but the most heinous of circumstances and, despite the differences between the Unfair Contract Terms Act and the Contracts Review Act, it seems certain the New South Wales courts would have adopted the same approach. Despite the current revival of laissez faire views,[28] it is suggested that the New South Wales Act should nevertheless have been extended to cover business contracts and those made by all corporations (including statutory authorities). It is ironic that one of the cases included in the judicial renaissance of a common law doctrine of unconscionability, that influenced Peden,[29] would not be covered by the Contracts Review Act because both parties were corporations and the agreement was made in a commercial setting.[30] There is no reason why small proprietary companies, in effect quasi-partnerships, and indeed large public companies, should not be entitled to relief in appropriate circumstances. It is not a valid argument that because business entities often choose to assume harsh obligations the courts would not be able to apply the Act in a meaningful way. The courts have never developed effective measures of consumer protection, yet have a history of protecting commercial interests; having always been empathetic to the demands of commerce. If an inability to comprehend the nuances of economic masochism is really the perceived flaw in the control of harsh contracts, there is all the more reason for establishing either a special tribunal or administrative controls (possibly with prospective powers of approval of standard form or individual business agreements). A useful model would be section 124 of the Fair Trading Act 1973 (U.K.) which enables the Director-General of Fair Trade to encourage codes of conduct in relation to contractual practices.[31] As a matter of principle, there appears to have been a lot to be gained and little to lose in reverting to Peden's original proposal as to the scope of the Act.

A second, admittedly more contentious, reason in support of the original proposal is that general law reforms, once accepted at a political level, should not be thwarted by purely sectional interests. Must law reform blaze a trail or must it only follow the well beaten track of community opinion? Ultimately law reform must be geared to what is feasible, not to what will be dismantled by a later government.[32] Law reform should never be subject to minority pressure based upon misapprehension and institutionalised conservatism. Business world opposition, based upon unwarranted fears and the belief that only businessmen understand that sometimes bad bargains just have to be made, is reminiscent of the opposition in the United States to the introduction of Section 2-302 of the Uniform Commercial Code.[33] Several State bar associations roundly condemned the section as the "destroyer of bargains" and the death-knell of freely negotiated business agreements. Yet in the relatively short time since its enactment these same groups have expressed dissatisfaction with the section, regarding it as too narrow.[34] To use the American experience it seems fair to say that businessmen could have accepted these terms having to abandon only the most grotesque practices.

Another argument supporting Peden's original proposal is that its provisions

would seldom be used by businessmen having already adopted dispute resolution procedures of their own. Businessmen are not legalistic by nature, for the prevailing attitude in many business circles is that "you can settle any dispute if you keep the lawyers out of it."[35] Presumably such extralegal systems would be equally prevalent in relation to the prevention of the use of harsh contractual terms.[36] Of course, the relatively informal 'give and take' approach to breach of contract can break down, for example where failure to perform harsh terms leads to a dispute as to which of two insurers should bear the loss, in which case business camaraderie fails.[37] Similarly, a monopolistic entity could afford to disregard business ethics. In such cases resort could be made to the Contracts Review Act.

2. *Unconscionability*

The central provision of the Act is section 7(1). This provides a two-step procedure which the court must follow before granting relief. The section reads

> Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result...

grant relief in terms of the provisions of the remainder of the sub-section. The court must first satisfy itself that the contract was unjust in the circumstances at the time it was made. In making this threshold decision, the court is required to take into account the matters specified in section 9. Once satisfied the court must then consider whether it is just to grant relief and, what relief will avoid "as far as practicable an unjust consequence or result". While there might be concern that this requirement precludes the court from granting relief (if any of the consequences of so doing would result in injustice) it would seem that in deciding whether or not relief should be granted, the court would balance the consequences of the relief against the evil to be prevented.

3. *"Justice"*

Section 4(1) defines 'just' to include "unconscionable, harsh or oppressive; and 'injustice' shall be construed in a corresponding manner". The definition of 'unjust' maintains continuity with the substantial body of judicial consideration of the "tautological trinity":[38] 'harsh, unconscionable and oppressive'. In the context of contracts of employment, industrial tribunals have been able to avoid rigidity in defining these terms on the basis that they are not terms of art but, should be understood by a commonsense approach,[39] as words in common usage with no special or technical meaning.[40] However, common law courts have not been as flexible when construing similar phrases in the context of moneylending or hire-purchase legislation.[41] Section 9[42] may influence the courts' consideration of applications for relief.

4. *"Jurisdiction"*

Section 4(1) provides that the Supreme Court has jurisdiction except in one particular class of cases where the District Court has jurisdiction. The provisions of the Act may be used either in actions commenced specially or by way of defence 'in other proceedings arising out of or in relation to the contract'. This provision is important because in New South Wales most claims of unconscionability arise only

when the economically weaker party is sued on the contract, in which case the alleged unconscionability is raised by way of defence. Most actions of this nature are commenced in the District Court, and it is, therefore, important that the court has jurisdiction. The success of section 88F of the Industrial Arbitration Act 1940 (N.S.W.) provided a model for contracts review legislation. Professor Peden attributed the success to the "facility and flexibility" of the Industrial Commission.[43] It would seem to follow that jurisdiction under the Act could have been given to a tribunal such as the Consumer Claims Tribunal, or possibly a special Contracts Review Tribunal. While the courts might consider themselves upholders of contracts and, therefore, seek to limit the applicability of the Act, they may unwittingly frustrate the intention of the Act. If jurisdiction was conferred upon a tribunal a further advantage might be that, unlike the courts, it could fulfil an educative role. One of the main difficulties of establishing consumer protection legislation is that the intended beneficiaries are often ignorant of their rights. Though many claims under the Act may arise by way of defence to actions in the District Court, lack of effective legal aid and unfamiliarity of the parties with both their substantive rights and the procedures of the courts make the tribunal an attractive alternative. They would at least be able to operate without professional legal assistance and, like the present Consumer Claims Tribunals, adopt an inquiry approach towards resolving disputes. However, the elements of certainty and predictability which are characteristic of the court system would favour the granting of jurisdiction to courts. The problem of disseminating information to consumers about their rights remains an educative rather than a judicial problem.

5. *Relief*

Under section 7, the court may make declarations that a contract is void, in whole or in part; may refuse to enforce the contract; may vary the terms of the contract; or, where the contract relates to an interest in land, make an order that an instrument be executed which has the effect of varying the contract or its effect. The First Schedule contains a variety of ancillary powers which may be used by the court to give effect to its orders. However, such orders, by section 19, will not affect an instrument which has already been registered under the Real Property Act. This provision is clearly intended to protect indefeasible title under the Torrens system. Section 8 provides that if, and only if, the court decides to grant relief under section 7, it may grant ancillary relief of the type specified in Schedule 1. It is curious that a Schedule should be used in this manner in Australia. While a Schedule is part of the Act, and the better view seems to be that its contents are enacted,[44] it is clear that these Schedules are substantive and their importance is equal to that of the body of the legislation. The ancillary relief is an integral part of the scheme of the Act.

Section 9 provides the key to the exercise of the discretion conferred by section 7. Legislative intent is usually expressed in general terms and only those which are absolutely necessary to achieve the purpose. However, a general statement may be open to restrictive, as well as expansive interpretations. By specifying the matters which are to be taken into account it both alerts parties to factors which may assist them to gain relief, and gives an indication of what will be taken as proper contractual practice. In his Report, Peden argued strongly[45] for the inclusion of the

guidelines as a means of overcoming the traditional reluctance of the courts to give an expansive interpretation to legislation. It will also aid the courts if they find the statute ambiguous; by indicating the 'objective' meaning of the words the courts will be able to discern the intent of the legislature.[46]

The matters to be considered are as follows. First, the court is required to have regard to 'the public interest'. This could be a means by which the operation of the Act may be considerably limited for it would be open to the courts to find that there is a public interest in the sanctity of contract, in whatever circumstances the contract was made. In the absence of a more specific reference, such as that provided by the remainder of the section, public interest could include such matters as 'social' or 'distributive' justice. Public interest is an umbrella-term the scope of which is flexible depending upon the discretion of the court. Use of the term leads to unpredictability, and in particular throws doubt on the assumption that contracts freely entered into will be enforced by the court. However, the factors listed in section 9(2) indicate that it is intended that there be a public interest in something: for example, in the lessening of relative inequality of bargaining power between persons; in ensuring that parties have an opportunity for negotiation and in obtaining advice before the contract is concluded; in having contracts which are intelligible. The provisions of the section, especially sub-section (2), draw the court's attention to the purpose of the Act. However, this is but one of a variety of possible interpretations and it was open to the draftsman to indicate more precisely the nature of the public interest to be protected. Such specification may have assisted the spirit of the legislation but may also have caused difficulties. The court is also to have regard to all the circumstances of the case. These include the effect of either enforcement of the whole or part of the contract, or of non-compliance with the contract. In setting out his list of relevant criteria Professor Peden seems to have struck a nice balance between the Scylla of unhelpful generality (arguably a defect in Article 2.302 of the Uniform Commercial Code) and the Charybdis of smothering detail (always a danger in the drafting of consumer protection legislation).[47] Despite the long list of matters set out in section 9(2) there is still the opportunity for the court to avoid the Act, by determining that the matters are not relevant to the particular circumstances.

Section 9 raises a number of problems; some of which are evidentiary and others matters of interpretation. For example, in determining the existence and extent of "material inequality in bargaining power between the parties to the contract" (section 9(2)(a)), the range of matters which might be considered by the court is vast, that is until one contemplates the rules of evidence. The relative economic positions of the parties may be proved by use of the results of surveys and economic data. Would this evidence be admissible in the face of the hearsay rule? Could it be admitted if given by a social scientist who conducted the research and interpreted the surveys and, if so how? Would the result of a "Flesch" test (which measures relative ease with which documents may be read) be admissible for purposes of section 9(2)(g) (referring to the intelligibility of documents) other than as evidence given by a duly qualified expert? If expert evidence is required in such cases, can this really accord with the spirit of the legislation? If evidence of this type is not readily

admissible in proceedings under the Act there is a danger that the courts may apply crude, and at times inappropriate, tests. For example, would it be in accordance with the spirit of the legislation to make the annual income (or net worth) of the parties the sole measure of relative economic positions when the real life arithmetical calculations expressed merely in dollars and cents may not truly reflect the situation? In applying section 9(2)(h), (i), (j), (k) and (l) statements made by the parties, their agents and even third parties, though not incorporated in a contract, and perhaps otherwise inadmissible under the general rules of evidence might be admissible as part of the *res gestae.* Industrial tribunals, for example the Industrial Commission of New South Wales exercising jurisdiction under section 88F of the Industrial Arbitration Act, are not limited by the rules of evidence and, are free to inform themselves as they think fit and to act according to the merits.[48] A similar provision in the Contracts Review Act, though appropriate, would probably have been regarded as unduly innovative. The expressions used in some of the provisions of section 9(2) are also expressions which would give wide latitude in interpretation. Paragraph 9(2)(a) refers to "material inequality in bargaining power"; this raises the question of what is material. However, most of section 9(2) does set out concrete examples of situations which may enable the court to find 'injustice' as defined.

Paragraphs (b) and (c) refer to the existence and the type of negotiations, if any, which preceded the making of the contract. For example, whether it was possible for the weaker party to reject or modify any of the terms of the written contract. In practice, this is a most common form of inequality, especially in relation to contracts involving the provision of credit and other standard-form contracts. Often the arrangements are made in places like car showrooms where the dealer has authority to seek and accept applications for credit (at times on conditions which are not reasonable, given the circumstances of the borrower) but, no authority to vary the terms and conditions upon which the finance is offered. If the standard form is varied, by either the borrower or the dealer, the finance company is likely to reject the application for credit. Similar circumstances surround many transactions where the contract is in a standard form, for example contracts for the carriage of goods or passengers by road, rail, sea or air. In these situations the parties are never free to set their own terms and conditions.[49]

Paragraph (d) refers to terms or conditions which are unreasonably difficult to comply with, or which are not reasonably necessary for the protection of one of the parties of the contract. Paragraph (e) refers to the effect of the age, or physical capacity of a party to the contract or his representative. Paragraph (f) to the economic circumstances, educational background and literacy of the party or his representative. The expression in this paragraph is probably wide enough to cover cultural background and, is probably the ground upon which most reliance will be placed. Paragraph (g) refers to the physical form of the document and the complexity of the language used. There is some legislative precedent for this. The legislation dealing with consumer credit of various sorts, and also the Book Purchasers' Protection Acts, have always provided for minimum type sizes. In some American states legislation now requires that certain types of contract, notably insurance[50] and credit contracts, should be expressed in language which is intelligible to the ordinary person. The 'readability' test is based on the research of Flesch and

shows that on his scale only a person with a post-graduate degree is capable of reading and understanding the majority of legislation.[51]

Paragraphs (h) and (i) deal with independent advice. Legal advice is put into a special category, while provision is made for other advice, especially in cases where the terms and contents of the contract are not clear. Paragraph (i) also covers the clarity and accuracy of explanations of the terms of the contract and the practical effects. This paragraph also relates to the question of whether the party understood the terms of the contract and, appears to apply both to oral and written contracts. Paragraph (j) refers to 'undue influence, unfair pressure or unfair tactics'. The first of these expressions is fairly clear to lawyers. The other expressions are general and somewhat vague and it is uncertain how they will be interpreted. Paragraph (k) refers to similar contracts or courses of dealing by the parties. The paragraph refers to such matters where either of the parties has been concerned. It would appear that the intention is to cover the activities of the economically stronger party who has previously engaged in similar conduct. Paragraph (l) refers to the commercial setting of the contract and to its purpose and effect. This would enable the court to make a distinction between strictly commercial contracts and those in which there is genuine economic inequality between the parties.

All these provisions are subject to two general qualifications. Sub-section (4) provides that the court shall not have regard to circumstances which were not reasonably foreseeable for the parties at the time the contract was made. Very often, alleged 'injustice' arises because of changes in, for example, the health or employment of a party. In some of the consumer credit legislation, such circumstances would enable a Court or Tribunal to grant a moratorium on performance of certain obligations.[52] Under the Contracts Review Act it will depend upon how widely the court is prepared to view what is not reasonably foreseeable. In general, the relevant matters are matters which existed, or applied at the time the contract was made. However, section 9(5) permits the court to have regard to the conduct of the parties after the contract was made.

One of the fundamental tenets of the common law of contract is that the courts will decline to judge the adequacy, as against the existence, of consideration.[53] However, the relationship between price and benefit is of importance when vitiating elements such as fraud or undue influence are being discussed. The question is whether the courts will be willing to deem a contract unjust because of a disparity between price and benefit. Exactly how this question will be answered depends largely on the courts' willingness to abandon the case law on the subject. Neither the older nor the more recent 'unconscionability' cases offer much hope to those who would seek relief on the basis of price alone. The most recent decisions are English and it is likely that the New South Wales courts will adhere to their reasoning rather than striking out into the uncertainties of *lex Australis.* Of great interest, therefore, is the judgment of Lord Denning in *Lloyds Bank Ltd* v. *Bundy.*[54] Lord Denning strove to synthesise older doctrines of the law which provided relief for unconscionability. Clearly, the Master of the Rolls was attempting to establish a general rule. However, he stated that grossly inadequate consideration would only give a right to relief if it was coupled with some highly undesirable factor, such as undue influence or excessive and unfair pressure.

The American approach under section 2-302 of the Uniform Commercial Code has been equally demanding. Although the case law on unconscionability has failed to produce a coherent or generally acceptable definition, there has been acceptance of the subsidiary principle that mere inequality between price and benefit will not amount to unconscionability. Just as the English Court of Appeal has required the presence of some other undesirable element associated with the agreement, so have courts in the United States.[55] The Anglo-American law has been concerned with the method of contract formation, not with the terms themselves.[56] Although the Contracts Review Act makes no mention of price as a criterion, it is submitted that the judicial approach outlined above would continue to be applied. If a normal, literate individual chooses to enter into a contract to exchange a Rolls-Royce for an acorn he will be held to his 'bargain'. Although there is substantial inequality in the bargain it has not been preceded by the 'procedural' (to use the American term championed by Leff[57]) unconscionability that the law demands, that is, some form of coercion or other inequality of understanding or bargaining power. In fact the courts have stressed that the procedural unconscionability is of prime importance in forming the ultimate decision.[58] The continuing judicial attitude towards the adequacy of price indicates that the legislation is really being grafted onto the traditional rules of contract. Consumers are still able to make appallingly bad bargains and the principle *caveat venditor* applies only when other inequalities are combined with the unjust consideration.

6. *Orders Against Third Parties*

The orders which the court may make are not limited to the immediate parties to the contract. Under section 10 the Supreme Court, but not the District Court, may make "general orders" on the application of the Minister for Consumer Affairs or the Attorney-General prescribing or restricting the terms or conditions upon which a person may enter into contracts of a specified class. These general orders are not quasi-legislative orders, but are similar to injunctions. The courts are given power to control future conduct of a specified person. In certain cases, the power is narrower than that conferred on the Federal Court by sections 52 and 80 of the Trade Practices Act 1974 (Cth) which restrains by injunction the conduct of "corporations" (which may include natural persons).[59] Under the Contracts Review Act only a Minister may apply for relief and the requirements for the making of a general order are very strict. What is a specified class of contracts? Suppose the defendant is an electrical contractor, how is the class of contracts, from which he is to be prohibited to be defined? If the 'class' is to include contracts to service electrical appliances, electrical motors, electric wiring and fittings, the class would encompass the whole of the defendant's business. The intention of the legislature as to the width of the specified class is unclear. Such orders may only be made where it is established that a person has embarked, or is likely to embark, on a course of conduct likely to lead to the formation of unjust contracts. In view of the wide discretion vested in the court by section 10 it is likely that the courts will require a heavy onus of proof to be discharged before making an order.

The Minister or the Attorney-General is entitled, under section 13, to intervene at any stage of proceedings. Under section 12(2) the court's power is unlimited

provided that the person who is not a party to the contract and, who is the subject of the court's power, has had the opportunity to appear in the proceedings. The experience of section 12(2) is unfortunate: as it appears to be another example of the undesirable drafting device of creating a positive power by providing an exception to an exception. The intention is that the court may make an order in favour of a person, not a party to the contract, in his absence but, it may not make any order affecting the rights of such a person unless either that party has had an opportunity to present his case or, in the absence of such an opportunity, it would not be unjust to make such an order in all the circumstances. Section 12(1) is a radical provision. It permits the court to make orders in favour of, or against, a person who is not a party to the contract. The circumstances in which a non-party could be subject to an order would seem, in some ways, analogous to the circumstances in which the courts of equity would have applied the doctrine of tracing.

Section 17 provides that the Act applies only where the contract is governed by the law of New South Wales or, would be so governed but for a device that purports to apply the law of some other place. This provision is to be expected, for otherwise a choice-of-law clause in a contract might be used to evade the operation of the legislation; section 67 of the Trade Practices Act 1974 (Cth) and section 27 of the Unfair Contract Terms Act 1976 (U.K.) are similar. The remainder of section 17 deals with "contracting out" of the protection given by the Act, which is not only prohibited but may in some circumstances constitute an offence under section 18. The "contracting out" provisions are more comprehensive than those found in other legislation, notably the Trade Practices Act. Section 17(5) provides that the Court may exercise its powers, notwithstanding a provision in the contract referring disputes to arbitration or for settlement in a foreign tribunal. Other sections of the Act deal with transactions affecting land, freedom from stamp duty on instruments executed in pursuance of an order made by the court under the Act, etc. The operation of any other law which provides for the relief of persons who are parties to unjust contracts is preserved under section 22 but, only in so far as it does not limit the application or operation of the Act.

## IV. HOW RADICAL A REFORM IS THE CONTRACTS REVIEW ACT?

The Act is not the first occasion on which legislation has given to the courts a power to intervene in a contract and to rewrite certain provisions where they are unjust. But it is the first time that the court has been given a general power of intervention in this way, despite the restriction of the operation of the Act to certain classes of contract. It can be seen as a determined effort to redress economic imbalance in a time when monetarist economics, which stress the free play of market forces, have some political support. It recognises the demonstrated need for relief for those who suffer as a result of their relative lack of economic power. Yet there are defects. Those who have suffered will often be unaware that the contract by which they are, *prima facie*, bound, is unfair. They will discover it only when they receive a summons, often a District Court default summons, requiring them to pay a debt and, in response to that summons, seek and receive informed legal advice. The

advice may not be enough. The provisions of the Act can only be invoked once there are proceedings in the District or Supreme Court. Yet legal aid for relief in civil cases would appear to be decreasing. The provisions of the Act are not at all certain, so the outcomes are equally uncertain. The language of many of its provisions leave open the possibility of a construction of the Act which is totally at variance with the intentions of the legislature. Many of the expressions giving the court a discretion to intervene and grant relief, are worded in an extremely general way. They could encompass decisions which would run counter to relief which should be given to those suffering under an unjust contract. The definition of 'unjust' itself may be far from satisfactory. It is difficult to decide whether the circumstances to be taken into account should or could be set out with greater perception.

Many may be opposed to the concept of the Act on the ground that it will lead to greater uncertainty in commercial dealings and will lead to added cost for consumers as commercial contractors will attempt to cushion, by means of their prices, the effects of successful actions against them. It is true that in any area of law, certainty and predictability are to be greatly valued. Yet they are not the only social values. In this Act the legislature has made the value-judgment that justice and fairness, no matter how ill-defined, nor how difficult they are to define, are of greater value. It is not certain that the judiciary will share these values, and if it seeks a means by which it can frustrate the apparent purpose of the legislature (as opposed to the expressed intention of the legislature) the principles of statutory interpretation will undoubtedly allow them to do so.

## FOOTNOTES

1. (1979).
2. K. L. Fletcher, "Review of Unconscionable Transactions" (1973-74) *U. of Queensland L.J.* 45; P. H. Clarke, "Unequal Bargaining Power in the Law of Contract" (1975) 49 *A.L.J.* 229; M. J. Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post Benthamite Economics in the House of Lords" (1976) 26 *U.T.L.J.* 359; P. Slayton, "The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy" (1976) 22 *McGill L.J.* 94; S. M. Waddams, "Unconscionability in Contracts" (1976) 39 *Mod. L. Rev.* 369; P. S. Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 *L.Q.R.* 193; A. H. Angelo and E. P. Ellinger, "Unconscionable Contracts — A Comparative Study" (1977-80) 4 *Ogato L. Rev.*300.
3. Money-Lenders and Infants Loans Act 1941 (N.S.W.) s.30(1); Hire-Purchase Act 1960 (N.S.W.) s.32(1).
4. Experience shows that unconscionable clauses also appear in standard form contracts used by businesses in unconcentrated markets: L. A. Kornhauser, "Unconscionability in Standard Forms" (1976) 64 *Calif. L. Rev.* 1151, 1169.
5. Note 1 *supra*.
6. This view still appears to have adherents in academic circles, at least as far as the substantive unconscionability of contractual terms is concerned: R. A. Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 *J. of L. & Econ.* 293, 295.
7. *E.g.* Hire-Purchase Agreements Act 1941 (N.S.W.) s.9; where as Caplowitz has demonstrated the poor pay more and have always done so: *The Poor Pay More* (1963).
8. G. D. Woods and P. L. Stein, *Harsh and Unconscionable Contracts of Work in New South Wales: Section 88F of the Industrial Arbitration Act (N.S.W.) — A Radical Law* (1972).
9. University of Adelaide Law School Committee, *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and Moneylending* (1969).

10. Law Council of Australia Committee, *Reports to the Attorney-General of Victoria on Fair Consumer Credit Laws* (1972).
11. Working Party on Consumer Protection Laws for the Australian Capital Territory, *Memorandum Relating to a Harsh and Unconscionable Contracts Ordinance for the Australian Capital Territory* (1975).
12. Enacted as the Unfair Contract Terms Act 1977 (U.K.).
13. The Law Commission, Working Paper No. 39, *Provisional Proposals Relating to the Exclusion of Liability for Negligence in the Sale of Goods and Exemption Clauses in Contracts of the Supply of Services and Other Contracts* (1971).
14. G. Gilmore, *The Death of Contract* (1974).
15. J. R. Peden, *Harsh and Unconscionable Contracts (Report to the N.S.W. Minister for Consumer Affairs and Co-Operative Societies and the Attorney-General for N.S.W.* (1976)). A study in New Zealand which dealt with a more limited range of issues produced less wide-reaching reforms: Contracts and Commercial Law Reform Committee, *Report on Credit Contracts* (1977).
16. [1975] Q.B. 326. Clarke, note 2 *supra*, examines this case and the *Schroeder* case against the background of the common law developments to 1975.
17. [1974] 1 W.L.R. 1308.
18. [1975] 1 W.L.R. 61.
19. [1978] Q.B. 69.
20. Slayton, note 2 *supra*.
21. In *Lloyds Bank* there was the fiduciary relationship between banker and customer. *Schroeder Music* is primarily a restraint of trade case (as was *Clifford Davis*) and in *Levison* insufficient notice was given of the exclusion clause.
22. Trebilcock, note 2 *supra*.
23. Sections 6(3), 7(3) and (4), 20, 21 and Schedule 2 of the Unfair Contract Terms Act 1977 (U.K.); sections 7-9 and Schedule 1 of the Contracts Review Act 1980 (N.S.W).
24. *E.g. Beswick* v. *Beswick* [1968] A.C. 58.
25. [1980] A.C. 827.
26. [1978] 1 W.L.R. 856.
27. Note 25 *supra*, 289.
28. Note 6 *supra*, 304-305.
29. Note 15 *supra*, 8.
30. Note 18 *supra*.
31. See G. Borrie, "Legislative and Administrative Controls over Standard Forms of Contract in England" [1978] *J. of Business L.* 317, 323.
32. Senate Standing Committee on Constitutional and Legal Affairs on the Processing of Law Reform Proposals in Australia, *Reforming the Law* (P.p. No. 90, 1979) para. 2.08-2.12.
33. *E.g.* the account in W. L. Twining, *Karl Llewellyn and the Realist Movement* (1973) 270.
34. S. Deutch, *Unfair Contracts: the Doctrine of Unconscionability* (1977); Gilmour note 14 *supra*.
35. S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Rev.* 55, 61.
36. *E.g.* H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *Brit. J. of L. and Society* 45; A. L. Diamond, "Commerce, Customers and Contracts" (1978) 11 *M.U.L.R.* 563.
37. *E.g. Lister* v. *Romford Ice & Cold Storage Co. Ltd* [1957] A.C. 555.
38. Per Sheldon J. in *Davies* v. *General Transport Development Pty Ltd* [1976] A.R. (N.S.W.) 371, 373.
39. *Id.*, 374.
40. *E.g. General Motors-Holden Ltd* v. *Davies* [1979] *Industrial Arbitration Service, Current Review* 370; noted in [1979] ALMD 4567, considering the phrase "harsh, unjust or unreasonable" in the South Australian legislation.
41. *Samuel* v. Newbold [1906] A.C. 461; *Re Taylor; Ex parte Swan* (1907) 24 W.N. (N.S.W.) 159; *Bigeni* v. *Drummond* (1955) 71 W.N. (N.S.W.) 242; *Birstins* v. *Associated Securities Ltd* (1960) 77 W.N. (N.S.W.) 877.
42. Discussed *infra*.
43. Note 15 *supra*, 12.
44. Per Brett J. in *Attorney-General* v. *Lamplough* (1878) 3 Ex. D. 214, 229; *cf.* E. A. Driedger, *The Composition of Legislation* (1957) 117.
45. Note 15 *supra*, 20.
46. Per Lord Reid in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 613.
47. See S. M. Waddams, "Legislation and Contract Law" (1978) *U.W.O.L. Rev.* 185.

48. *E.g.* Industrial Arbitration Act 1940 (N.S.W.) s.83.
49. See Lord Denning M.R. in *Thornton* v. *Shoe Lane Parking Ltd* (1971) 2 Q.B. 163, 168.
50. *E.g.* Readability Act 1977 (Massachussetts).
51. G. Lyons and J. Tanner, "Legal Documents: Can Anyone Understand Them?" (1977) 2 *L.S.B.* 283; J. Willis, "Making Legal Documents Readable: Some American Initiatives" (1978) 52. *L. Institute J.* 513.
52. *E.g.* Consumer Transactions Act 1972 (S.A.) s.38.
53. *Chappell & Co. Ltd* v. *Nestle Co. Ltd* [1960] A.C. 87.
54. [1975] Q.B. 326.
55. See the examples cited by Deutch, note 34 *supra*, 141-151.
56. Kornhauser, note 4 *supra*, 1153.
57. A.A. Leff, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 *U. of Penn. L. Rev.* 485, 489.
58. In *Lloyds Bank*, note 54 *supra* the 'substantive' guarantee transactions itself were relatively fair; it was the preceding 'procedural' inequalities which led the court to find the transaction unconscionable.
59. Trade Practices Act 1974 (Cth) s.6, especially s.6(2)(h).