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FORTY-THIRD REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL



**RELATING TO PROPOSED CONTRACTS
REVIEW LEGISLATION**

1979

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

B. R. COX, Q.C., S.-G., *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE WHITE.

D. W. BOLLEN, Q.C.

J. F. KEELER.

D. F. WICKS.

The Secretary of the Committee is Miss J. L. Hill, C/o Supreme Court, Victoria Square, Adelaide 5000.

**FORTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF
SOUTH AUSTRALIA RELATING TO PROPOSED CONTRACTS
REVIEW LEGISLATION**

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration and report the Contracts Review Bill which was considered by Parliament in late 1977 and early 1978. Your reference followed a resolution of the Legislative Council in the following terms—

“That the Bill be withdrawn with a view to the Government referring it to the South Australian Law Reform Committee for its report and recommendations regarding the implementation of the objects of the Bill and that the Bill be re-drafted to allow for its inter-relationship with other Acts and to take into account its effect on international and currency contracts.”

The passing of the Bill by the House of Assembly following the report of a select committee of the House and the terms of the resolution of the Legislative Council indicate, we suppose, that the objects of the Bill were acceptable to both Houses of Parliament. Certainly the Committee takes the view that the law should be altered to enable the courts to reform contracts which are unjust and to modify the application to particular situations of unjust contractual terms so as to avoid the injustice which would otherwise ensue. Judges in the past have done their best to avoid or at any rate mitigate the harsh consequences of unjust contracts and have resorted to interpretations and distinctions which, we fear, at times have been little better than subterfuges in order to avert injustice. That judges should feel impelled to resort to such devices is no credit to the law. All too often, in spite of all efforts, courts have been compelled by existing law to enforce contracts in the knowledge that the result was manifest injustice. In our view this is a reproach to the law and ought to be remedied. We have considered the difficulties and arguments which have been raised against legislation of this kind. The acceptance of the objects of the Bill by both Houses of Parliament makes it unnecessary for us to canvass the arguments. We content ourselves with stating that we have considered the arguments that legislation of this kind may create uncertainty as to whether apparently binding contracts will be enforceable, and that such legislation may be used by the unscrupulous as the basis of litigation in order to delay the enforcement of obligations against them, but that we cannot regard those arguments as decisive. The same arguments could be raised in varying degrees against many of the existing rules of the law of contract including those relating to mistake, misrepresentation, undue influence and, in certain areas, relief against harsh or unconscionable contracts. All rules which protect contracting parties against injustice may produce some uncertainty and may be used unscrupulously for purposes of delay. We are moreover impressed by the trend in continental Europe, the United Kingdom and North America towards legislation restricting the enforceability of unfair contractual terms. We are particularly impressed by the experience of the United States of America. The Uniform Commercial Code of the United States contains an analogous provision. It is to be found in article 2.302 of the Code as it governs sale of goods and the basic provision is in the following terms:—

“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

The Code including this provision has been adopted by almost all the States of the Union and many of them have now had several years of experience. So far as we can gather from the literature, the loss of confidence of businessmen and others in the binding force of contracts, which is predicted by some to be the consequence of such legislation, has not occurred and there is nothing in the literature to suggest that the abuse of the legislation in order to delay enforcement of obligations is greater than the abuse of other rules of law for that dishonest purpose. There is some limited Australian experience (since 1959) with section 88F of the Industrial Arbitration Act (N.S.W.). South Australia has had the experience, for decades, of a provision in the Moneylenders Act empowering courts to interfere with harsh and unconscionable contracts and, since 1972, of the operation of section 46 of the Consumer Credit Act. To our minds, the paramount considerations are that parties should not be able to use the law as the means of imposing injustice on others and that courts of justice should not be made instruments of injustice.

It is apparent that the Bill placed before Parliament was drafted with corresponding overseas provisions in mind and after consideration of points made in discussions here and elsewhere and by writers on the subject. We found it an acceptable basis for our deliberations. We based our discussions on the text of the Bill as received by the Legislative Council from the House of Assembly. We refer hereinafter to that version of the Bill as “the existing Bill”. We have prepared a new draft Bill which differs in some important respects from the existing Bill and we now proceed to discuss those clauses of our recommended Bill which differ from the provisions of the existing Bill, and certain other clauses which call for comment.

Clause 3. The Committee has deleted from its recommended Bill the definition of contract which appears in the existing Bill. Contract is a fundamental legal concept and needs no definition. In our view the definition in the existing Bill serves no purpose and could cause confusion. A collateral contract or agreement is a contract and does not require specific mention. The power conferred on the court by the recommended Bill to avoid a contract or vary its terms enables it to deal with any part or provision of the contract. An arrangement consisting of an inter-related combination or series of contracts or agreements, is either a binding legal contract or it is not. If it is legally binding this Bill applies to it without express mention. If it is not legally binding the remedial provisions of this Bill can serve no purpose in relation to it. We point out however that the provisions of clauses 6 (1) (b) and 8 (1) (b) (ii) of the recommended Bill enable the courts to take account of the existence of any contracts other than those immediately before them in determining whether and in what ways to exercise their powers. Reference to an instrument transferring or creating an interest in land is undesirable. If the instrument is itself a contract, the Bill applies to it without specific inclusion in a definition. If it is not a contract, there is no point in defining it as a contract. Where a contract is avoided or varied, there is power in clause 6 (3) of the recommended Bill for the court to order the reconveyance of land or to make any other

consequential order. This power would enable the court to cancel or vary an instrument transferring or creating an interest in land.

Clause 5. The Committee has deleted clause 5 of the existing Bill. We were uncertain as to the precise effect of the clause and we considered that its presumed purpose could be achieved by other means. Clause 6 (3) of the recommended Bill empowers the court to make consequential orders to give effect to an avoidance of variation of a contract including orders for the reconveyance of land. We recommend amendments to the Real Property Act to provide machinery for the implementation of such orders and to authorise the lodging of a caveat to protect the position of a person seeking to have a contract avoided or varied under this Bill. A proposed Bill to make these amendments to the Real Property Act is appended to this Report.

Sub-clauses (1) and (6) of clause 5 of the recommended Bill are in substitution for clause 9 (1) of the existing Bill. We have considered the criticisms of this provision, but we are of opinion that it is essential, if the legislation is to be effective, that its remedial provisions cannot be defeated by the insertion of a contractual provision making the law of some other place the proper law of the contract or excluding the jurisdiction of the South Australian courts. We have varied the language of the provision in the existing Bill in an effort to strengthen and clarify the expression of the intention. Sub-clauses (2) and (3) are identical with clause 6 of the existing Bill. Sub-clause (5) protects genuine compromises of claims under this proposed legislation from themselves being attacked as being unjust, and also protects agreements already approved by the court.

Sub-clause (4) of clause 5 deals with the question of foreign contracts. The resolution of the Legislative Council specifically provided that the Bill be re-drafted "to take into account its effect on international and currency contracts". It seems to the Committee that there is no sufficient reason for any special provision in relation to what might be regarded as currency contracts. The Committee gave careful consideration, however, to the fears which have been expressed that legislation of this kind might be a deterrent to overseas commercial interests doing business with South Australian interests. It is difficult to know why this should be so. Some uncertainty always attends the enforceability of contracts by reason of the rules of law which are referred to earlier in this Report. Courts which follow the English tradition have always endeavoured to construe contracts in a way which will avoid injustice and this must be well known to all who are concerned with the likely legal effect of commercial contracts. This proposed legislation merely takes the process of avoiding injustice a stage further. Moreover the widespread adoption of similar legislation in the United States of America and of more or less analogous legislation in other important trading countries, makes it unlikely that those interests which are engaged in international trade would be deterred by the proposed legislation in this State. The Committee takes the view, however, that such risk as there might be should be avoided if it can be avoided without undue detriment to the purposes of the Bill. The Committee feels that special provisions are justified in the area of international sale of goods. The parties to contracts for the international sale of goods are normally commercial interests possessing sufficient strength and capacity to protect their own interest. The risk of injustice is therefore slight. For these reasons the Committee takes the view that in such contracts the parties should be permitted to contract out of the provisions of the proposed legislation. In this respect the Committee has followed substantially the corresponding provisions of the Unfair Contract Terms Act 1977 of the United Kingdom.

Clause 6. The Committee has made a distinction between proceedings specifically instituted under this proposed legislation (whether by claim or counterclaim) in a court of competent jurisdiction to avoid or vary a contract on the ground of injustice, and the power of a court in other proceedings to decline to give effect to or to limit the application of a contract in order to avoid an unjust result in those particular proceedings. Clause 6 is concerned only with the former situation. Sub-clause (4) is new and is inserted to assist a court to shape its order so as to produce a just result. Sub-clause (5) (a) is also new. In order to ensure fair dealing in certain types of transaction, the law implies terms in a contract and provides that those terms cannot be excluded or varied by agreement of the parties. The new sub-clause is designed to ensure that there is no conflict between such laws and the operation of the provisions of this Bill. Sub-clause (5) (c) strengthens the position of a third party who has acquired title to property in good faith and for valuable consideration. Under the existing Bill, such a person would have to rely for protection on the right to appear and be heard. The Committee considers that a third party who acquires title should be secure in that title notwithstanding that the party from whom he has acquired title has acquired the property pursuant to an unjust contract. In our view the party suffering the injustice must in those circumstances be left to the remedy of compensation or some other remedy which does not disturb the title of the innocent third party. Sub-clause (6) confers jurisdiction on the various courts to entertain proceedings under the clause. The only change from the corresponding clause of the existing Bill is that jurisdiction is conferred on the Credit Tribunal where the proceedings relate to the terms on which credit has been, or is to be, provided. The Credit Tribunal now exercises a similar jurisdiction under Part VI of the Consumer Credit Act, 1972 as amended and is thought to be the appropriate Tribunal to adjudicate upon the question of the justice or injustice of terms relating to the provision of credit. It is recommended that Part VI of the Consumer Credit Act be repealed and a draft Bill for that purpose is appended to this Report.

Clause 7. This clause deals with proceedings other than those instituted specifically for relief under the proposed legislation. It confers powers on courts in any proceedings in which a contract is found to be unjust to decline to give effect to or to limit the application of the contract so as to avoid an unjust result of those proceedings. The Committee is conscious of the possibility that an issue as to the application of an unjust contract may arise in proceedings relating to a small sum of money or some other matter of limited importance. The contract itself may have a much wider operation than the subject matter of the proceedings and may relate to property or rights of great value. It would be inappropriate for an adjudication in a court of restricted jurisdiction that a contract is unjust, made for the purpose of avoiding an unjust result in proceedings of minor importance, to bind the parties in relation to the operation of the contract generally and in subsequent litigation, perhaps litigation of great importance in the Supreme Court. Where the issue arises in proceedings not instituted under this Bill, the court would be concerned only with the effect of the contract on the outcome of those proceedings, and its finding that the contract is unjust should affect only the outcome of those proceedings. If a determination that the contract is unjust is to affect the operation of the contract generally, an investigation of a different kind, on a different scale and in a different court might be necessary in order to produce a fair result. The clause therefore provides that a finding in proceedings other than proceedings specifically instituted under the proposed legislation, that a

contract is unjust, does not preclude the parties from relitigating that issue in other proceedings. Where the court in which the issue arises considers that the issue should be determined in a way which will bind the parties for all purposes and will affect the operation of the contract generally, there is power for the court to stay the proceedings to enable the issue to be determined in the appropriate court. The powers are not limited to proceedings founded upon a contract or breach of contract as in the existing Bill, but extend as well to all proceedings in which the unjust contractual terms are pleaded in answer to a claim defence or allegation. This change from the existing Bill recognises that unjust contracts may affect the outcome of proceedings not founded on a contract or a breach thereof, for example, an action in tort where a provision in a contract excluding or limiting liability is raised by way of defence.

Clause 8. This clause deals with the matters to which a court shall have regard in determining whether a contract is unjust and whether to exercise its powers. It enables the court to have regard to any relevant factor but directs attention to certain specific matters. Certain of these matters are more pertinent to the question whether the contract is unjust and others are more pertinent to the decision whether to exercise the powers. There is, however, a considerable degree of overlap, and it was considered impracticable to separate the considerations which are relevant to the one issue from the considerations which are relevant to the other. The specific matters mentioned in the existing Bill are extraneous to the contract itself and most relate either to the circumstances of the formation or the performance of the contract. These factors are of great importance, but the Committee feels that attention should also be directed to the terms of the contract as a potential source of injustice. The injustice may, for example, arise from a gross and unjustifiable disproportion between the consideration which a party is required to provide and the benefit which that party is to receive. We have therefore included the terms of the contract among the specific matters to which attention is directed. There has been some re-drafting to clarify the matters to which the court should have regard.

Clause 9 corresponds to clause 8 of the existing Bill. This is a desirable preventive measure which will enable the court on the application of the Attorney-General to prohibit the formation of unjust contracts. It is envisaged for example, that if it becomes known to the Attorney-General that an organisation is using a form of contract which contains unjust provisions, the Attorney-General may use this procedure to test the matter in court and have, in a proper case, the practice prohibited by injunction. This provision is based on North American experience and, in the opinion of the Committee, is a valuable weapon against commercial oppression and unfairness.

Clause 10 nullifies any attempt to evade the provisions of this Bill by inserting waiver or similar provisions in the contract. It is important that such attempts should be punishable offences. The mere presence of such clauses in contracts may, although they are of no legal effect, deceive the unwary into the belief that they have no legal remedy.

Clause 11 retains the onus of proof provision in the existing bill.

Clause 12 has been re-drafted to make the meaning clearer.

Clause 13 provides for the transfer of proceedings instituted under the proposed legislation for the avoidance or variation of a contract, from one court to the other. Proceedings will not fail because they have been brought in the wrong court. However, a court which considers that the

question of the justice or injustice of a particular contract would be better determined in another court will have power to transfer the proceedings to that other court. This flexibility should avoid any problems which might otherwise arise because of the concurrent jurisdiction conferred on the various courts by clause 6 (6).

It is important that the courts, so far as possible, should adopt a uniform approach to the exercise of the powers conferred in the recommended Bill. The Committee is therefore strongly of opinion that the Supreme Court should be empowered to supervise, by way of appeal the exercise of the powers in all jurisdictions. This creates a difficulty in relation to the Industrial Court from which there is at present no appeal to the Supreme Court. We have therefore provided in Clause 14 a right of appeal from the Industrial Court to the Supreme Court restricted to matters pertinent to the exercise of powers conferred by this Act and consequential or related matters.

The Committee gave consideration to the topic, referred to in the resolution of the Legislative Council, of the inter-relationship of this Bill with other Acts of Parliament. There are many statutory provisions in this State which deal with particular types of injustice in contracts or with injustice in contracts relating to particular types of transactions. In particular the body of consumer protection legislation seeks to protect consumers against unjust practices or unjust contractual terms. There is no inconsistency between the proposed Bill and such measures. The general law giving power to courts to avoid or vary unjust contracts should not be regarded as a substitute for specific provisions dealing with specific identifiable problems and in our view should not be regarded as a reason for omitting to legislate to deal with specific abuses as they are identified. The only statutory provision which we would regard as redundant in consequence of the passing of the recommended Bill is Part VI of the Consumer Credit Act and we therefore recommend its repeal.

We have the honour to be—

HOWARD ZELLING
L. J. KING
J. M. WHITE
B. R. COX
D. W. BOLLEN
JOHN KEELER

The Law Reform Committee of South Australia.

29th September, 1978

One member of the Committee, Mr. D. F. Wicks, dissents from the views held by the majority of the Committee on certain aspects of this report and a brief report setting out his views is attached.

MINORITY REPORT

The Contracts Review Bill seeks to enable a Court to reform any contract which it conceives to be unjust or to modify its application to particular situations so as to avoid injustice. The Bill does not attempt to define or confine the term "unjust" but leaves the Court to have regard to any matter which may be relevant. Specific criteria are set out for guidance. These are not expressed to be exclusive but are intended merely as examples of relevant considerations.

I consider that the issue of whether a particular contractual provision is so one-sided as to be unjust is one which will nearly always depend on the particular facts of the case and will often involve a subjective element on the part of the Judge who will find it difficult to divorce the issue in hand from his own social values and his personal background and experience. In this regard, I see the purpose of law as setting standards and guidelines within which to limit judicial discretion. A Judge's personal experience and prejudices can thus be restrained from obtruding into the case in hand.

It may be said that the Judges will in time develop a set of general principles within which to explain and confine the doctrine which the Bill seeks to establish. Many doctrines which are very broad in terms are developed in this way. But the extent to which a general principle laid down by Parliament should be left to the Courts to develop is a matter of degree. It is a most far-reaching development for Parliament to simply give a mandate to the Courts to alleviate injustice and one which I believe goes too far.

Moreover, if South Australia pursues this reform alone, it is difficult to see that sufficient cases will reach appellate courts in the foreseeable future in order to establish a useful body of case law. If I am right in this respect, a very wide diversity of legal opinion on the subject will readily develop devoid of the essential guidance which is needed from Courts of high authority. It is this measure of uncertainty which I think should mitigate strongly against the proposal.

If the proposed reform were to follow a similar reform in the United Kingdom or even in the more populous Australian states, as has often happened in the past, then at least we would have a suitable base from which a reasonable volume of case law could be expected to develop.

We already have a number of troublesome examples of ill-defined concepts. Lawyers have argued over the meaning of the simple phrases which make up Section 92 of the Australian Constitution for most of this century. Section 260 of the Income Tax Assessment Act is perhaps an example of a very general provision which, despite a large volume of case law, is still uncertain and unpredictable in its application. The uncertainty in litigation where the provisions of this Bill are involved will be similar in many respects to that which we now experience in the assessment of general damages; the essential difference being that there will be nowhere near the volume of precedent to assist the litigant and his advisors in predicting the result.

I recognise that there is a need for reform in many aspects of the law of contract. Contracts of adhesion have been taken to inordinate lengths. Exemption clauses, insurance contracts, leases, building contracts and contracts involving the provision of credit or sale or hire of goods all require specific attention. Contracts with consumers are another identifiable class which have already been the subject of substantial and worthwhile reforms. I recommend that attention be

given to the specific rules of law in areas where abuses and unfair practices are known to exist. I have no doubt that in particular areas it will be proper for Judges to be given a measure of discretion to do justice to the case.

In my view the paramount consideration is to strike a reasonable balance between the need for justice and the need for certainty. I do not believe that this proposed law will achieve that balance.

If however, as a matter of principle, the Parliament should decide to proceed with a Bill of this kind, then I support the specific recommendations for change to the Bill which have been proposed by the majority of the Committee.

D. F. WICKS

DRAFT BILL FOR A CONTRACTS REVIEW ACT

An Act to provide relief against unjust contractual terms; and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia with the advice and consent of the Parliament thereof, as follows:

1. This Act may be cited as the "Contracts Review Act, 1978". Short title.
2. This Act shall come into operation on a day to be fixed by proclamation. Commencement.
3. In this Act, unless the contrary intention appears— Interpretation.
 - "court" includes the Credit Tribunal;
 - "industrial matter" means industrial matter as defined in the Industrial Conciliation and Arbitration Act, 1972-1975;
 - "unjust", in relation to a contract, means—
 - (a) harsh or unconscionable;
 - (b) oppressive;or
 - (c) otherwise unjust,and "injustice" has a corresponding meaning.
4. This Act binds the Crown. Crown to be bound.
5. (1) This Act applies, subject to the provisions of this section, to all contracts— Application of this Act.
 - (a) of which South Australian law is the proper law; or
 - (b) of which South Australian law would be the proper law if it were not for some provision of the contract—
 - (i) providing that the law of some other place is to be the proper law of the contract; or
 - (ii) providing that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of some other place, and thus implying that the law of that other place is to be the proper law of the contract.
- (2) Subject to subsection (3) of this section, this Act does not apply in respect of a contract made before the commencement of this Act.
- (3) Where the terms of a contract made before the commencement of this Act are varied after the commencement of this Act, this Act applies, subject to the provisions of this section, to the contract with the following qualifications:—
 - (a) no order shall be made under this Act affecting the operation of the contract before the date of the variation;and
 - (b) a court shall only have regard to injustice attributable to the variation.

(4) The parties to a contract may, by agreement, exclude the contract from the operation of this Act where—

- (a) the contract is a contract for the sale or supply of goods;
- (b) a party to the contract is domiciled or resident outside Australia;

and

(c) the goods are delivered, or are to be delivered—

- (i) from a place outside Australia to a place within Australia;
- (ii) from a place within Australia to a place outside Australia;

or

(iii) from a place outside Australia to another place outside Australia.

(5) This Act does not apply to—

(a) a contract under which a person agrees to withdraw, or not to prosecute, a claim for relief under this Act if—

(i) the contract is a genuine compromise of the claim;

and

(ii) the claim was asserted before the making of the contract;

or

(b) a contract approved by a court in accordance with a law requiring such approval.

(6) The courts of this State have, subject to this Act, jurisdiction to exercise powers conferred by this Act in relation to a contract to which this Act applies notwithstanding that the contract itself provides—

(a) that disputes or claims arising out of, or in relation to, the contract are to be referred to arbitration;

or

(b) that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of some other place.

6. (1) Where, in any proceedings founded upon a claim for relief under this section, a court is satisfied—

(a) that a contract is unjust;

and

(b) that it is possible by the exercise of powers conferred by the section to remedy the injustice in a manner that is reasonable and fair to the contracting parties and any other person who may have become interested in the subject matter of the contract,

the court may, by order—

(c) avoid the contract either *ab initio* or as from some time specified by the court;

or

(d) vary the terms (express or implied) of the contract.

(2) Where a court varies the terms of a contract under subsection (1) of this section, the variation shall have effect as from the date of the contract or some subsequent date stipulated by the court.

(3) The court may, either in addition to or in substitution for an order under subsection (1) of this section, make orders for—

- (a) the return of property (or, in the case of land, the reconveyance of the land);
- (b) the compensation of a party to the contract who has suffered loss by reason of the injustice;
- (c) the compensation of a person who is not a party to the contract and whose interests might otherwise be prejudiced by the granting of relief under this section;
- (d) any other consequential or related matter.

(4) An order under this section may be made upon such conditions as the court thinks fit and specifies in the order.

(5) A court—

- (a) shall not exercise its powers under this section to vary or abrogate a term of a contract that is by statute to be implied in the contract, and is not susceptible of variation or exclusion by the parties to the contract;
- (b) shall not exercise its powers under this section unless—
 - (i) it is satisfied that the exercise of those powers would not prejudice the interests of a person who is not a party to the contract;
 - or
 - (ii) it has given any person, whose interests would be prejudiced by the exercise of those powers, an opportunity to appear and be heard in the proceedings;
- (c) shall not make an order for the return or reconveyance of property where a person who is not a party to the contract has, in good faith, and for valuable consideration, acquired title to that property.

(6) Proceedings for relief under this section in respect of a contract may be instituted—

- (a) in the Supreme Court;
- (b) where the amount or value of the consideration that has passed or would, if the contract were fully performed, pass from one contracting party to another—
 - (i) does not exceed the jurisdictional limit of a local court of full jurisdiction—in a local court of full jurisdiction;
 - or
 - (ii) does not exceed the jurisdictional limit of a local court of limited jurisdiction—in a local court of limited jurisdiction;
- (c) where the proceedings relate to an industrial matter—in the Industrial Court;
- (d) where the proceedings relate to the terms on which credit has been, or is to be, provided—in the Credit Tribunal.

(7) A court shall not entertain proceedings for relief under this section in respect of a contract that has been fully performed by the parties to the contract unless the court is satisfied that—

(a) the proceedings were commenced as soon as was, in the circumstances of the case, reasonably practicable;
and

(b) it is reasonable, in the circumstances of the case, to entertain the proceedings notwithstanding that the contract has been fully performed.

(8) Where, in proceedings for relief under this section, it appears to the court that a person who is not a party to the contract—

(a) is affected directly or indirectly by the proceedings;
or

(b) has shared in, or is entitled to share in benefits derived, or to be derived, from the contract,

the court may—

(c) order that notice be given to that person of the proceedings;
or

(d) order that that person be joined as a party to the proceedings and make such orders against or in favour of that person as may be just in the circumstances.

(9) Where proceedings for relief under this section have been instituted, but not finally determined, the court may, by order, prohibit any party to the proceedings from taking any action, specified in the order, that might, in the opinion of the court, prejudice the granting of relief under this section.

7. (1) Where, in any proceedings to which this section applies, a court is satisfied that a contract is unjust, it may—

(a) decline to give effect to the contract or a part of the contract;
or

(b) limit the application of the contract, or a part of the contract, so as to avoid an unjust result in the proceedings before the court.

(2) A finding in proceedings to which this section applies that a contract is unjust does not operate by way of issued estoppel in any subsequent proceedings.

(3) Where in the opinion of a court it is impracticable or inexpedient to determine a question as to whether a contract is unjust in the course of proceedings to which this section applies, the court may, on the application of any party to the proceedings, stay the proceedings on such terms as may be just to enable the question to be determined in proceedings instituted under this Act.

(4) This section applies to proceedings (other than proceedings instituted under this Act)—

(a) founded upon a contract, or an alleged breach of contract;
or

(b) in which the terms of a contract are pleaded in answer to any claim, defence or allegation.

Powers of court as to unjust contracts in proceedings instituted otherwise than under this Act.

8. (1) In determining whether a contract is unjust, and whether to exercise its powers under this Act, a court shall have regard to—

Criteria for determining whether contract is unjust.

(a) the terms of the contract;

and

(b) the following matters (so far as they may be relevant):—

(i) the public interest;

(ii) any material inequality of bargaining power between the parties to the contract arising from—

(A) infancy or infirmity of mind;

(B) differences in intelligence or mental capacity between the parties to the contract;

(C) differences in the cultural or educational background of the parties to the contract;

(D) differences in the economic circumstances of the parties to the contract;

or

(E) any other factor;

(iii) the commercial or other setting in which the contract was made and the circumstances of, and surrounding, the negotiations leading to the formation of the contract including the extent (if at all) to which the terms of the contract were open to negotiation;

(iv) the question of whether the party seeking relief received legal or other professional advice in relation to the contract, and the extent to which the provisions of the contract were explained to that party at the time the contract was made;

(v) where the contract is wholly or partly in writing, the form of the contract and the kind of language in which it is expressed;

(vi) the conduct of either party in relation to other similar contracts or transactions (if any) to which he has been a party;

(vii) the conduct of the parties in relation to the performance of the contract and the extent to which any party to the contract has changed his position on faith of the contract;

(viii) the question of whether the exercise of powers conferred by this Act would prejudice the interests of any person who is not a party to the contract;

and to any other matter that may be relevant.

(2) In determining whether a contract is unjust a court shall not have regard to any injustice that arises from circumstances that were not reasonably foreseeable at the time of the formation of the contract.

Power of Supreme Court to make orders of general effect in relation to unjust contracts.

9. Where the Supreme Court is satisfied, on the application of the Attorney-General, that a person has embarked, or is likely to embark, on a course of conduct leading, or likely to lead, to the formation of unjust contracts if may, by order, prescribe or restrict, the terms upon which that person may enter into contracts of a stipulated class.

Application of this Act not to be limited by agreement, etc.

10. (1) Except as otherwise provided in this Act, a person is not competent to waive his rights under this Act, and any provision of a contract that purports to exclude, restrict or modify the application of this Act is void.

(2) Where a person submits a document—

(a) that is intended to form the basis of a written contract to which this Act applies;

(b) that has been prepared or procured by him or on his behalf;

and

(c) that includes a provision purporting to exclude, restrict or modify the application of this Act,

to another person for signature by that other person, the person submitting the document shall be guilty of an offence and liable, upon summary conviction, to a penalty not exceeding two thousand dollars.

(3) A person is not estopped from claiming relief under this Act by—

(a) any acknowledgement, statement or representation;
or

(b) any affirmation of the contract or any action taken with a view to performing any obligation arising under a contract.

Onus of proof.

11. In any proceedings in which relief under this Act is sought, the onus of proving entitlement to that relief lies upon the person claiming to be entitled to that relief.

Act not to derogate from existing laws.

12. The rights conferred, and the remedies provided, by this Act are in addition to, and do not derogate from, the rights and remedies conferred by any other law of the State that provides for relief against unjust contracts.

Certain proceedings are to be transferred to more appropriate forum.

13. (1) Where any proceedings founded upon a claim for relief under section 6 of this Act—

(a) are justiciable by some court other than the court in which the proceedings were instituted or to which they have been transferred;

and

(b) would, in the opinion of the court in which the proceedings were instituted or to which they have been transferred, be more appropriately dealt with by that other court,

the court shall, by order, transfer the proceedings to that other court.

(2) Where proceedings are transferred in accordance with this section, the court to which the proceedings are transferred may proceed to hear and determine the proceedings in all respects as if they had been originally instituted in that court.

(3) No appeal lies against a decision of a court to transfer, or not to transfer, proceedings under this section.

(4) The validity of any proceedings, decision or order of a court is unaffected by non-compliance with subsection (1) of this section.

(5) A court may order the transfer of proceedings in pursuance of this section notwithstanding that the court does not itself have jurisdiction to entertain the proceedings.

14. (1) Where in any proceedings the Industrial Court exercises or declines to exercise powers conferred by this Act, an appeal shall lie to the Supreme Court from the judgment of the Industrial Court in those proceedings.

Appeal to lie from judgments of the Industrial Court on questions related to the exercise of jurisdiction under this Act.

(2) The appeal must be instituted within one month of the date of the judgment subject to the appeal or such further period as the Supreme Court may (either before or after the expiration of that period of one month) allow.

(3) The appeal must be confined to—

(a) matters pertinent to the exercise of powers conferred by this Act;

and

(b) consequential or related matters.

(4) Upon an appeal under this section, the Supreme Court may—

(a) confirm, vary or reverse the judgment of the Industrial Court;

(b) quash the judgment of the Industrial Court and remit the matter to the Industrial Court to be dealt with according to the judgment of the Supreme Court;

(c) make orders as to the costs of the appeal or any other ancillary matter.

(5) An appeal under this section shall be heard and determined by the Full Court.

DRAFT BILL FOR A REAL PROPERTY ACT AMENDMENT ACT

An Act to amend the Real Property Act, 1886-1978.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short titles.

1. (1) This Act may be cited as the "Real Property Act Amendment Act (No. 2), 1978".

(2) The Real Property Act, 1886-1978, is hereinafter referred to as "the principal Act".

(3) The principal Act, as amended by this Act, may be cited as the "Real Property Act, 1886-1978".

Commencement.

2. This Act shall come into operation on a day to be fixed by proclamation.

Amendment of principal Act, s.69—Title of registered proprietor indefeasible except in certain cases.

3. Section 69 of the principal Act is amended by inserting after paragraph IX the following paragraph:—

X. Where an order affecting the land is made by a court or tribunal in pursuance of the Contracts Review Act, 1978, and the order has, at the direction of the court or tribunal, been registered under this Act, in which case the title of the registered proprietor shall be subordinated to the terms of the order and, if the order purports to operate in defeasance of the title of the registered proprietor, a person named in the order as the person who is to be registered as proprietor of the land shall, upon registration of the order, become the registered proprietor of the land.

Amendment of principal Act, s.191—Caveats.

4. Section 191 of the principal Act is amended by inserting after the present contents (which are hereby designated subsection (1) thereof) the following subsection:—

(2) A person who—

(a) has in good faith instituted proceedings in pursuance of the Contracts Review Act, 1978;

and

(b) proposes to seek in the course of those proceedings an order affecting the title to any land,

has for the purposes of this section an interest at law in that land.

DRAFT BILL FOR CONSUMER CREDIT ACT AMENDMENT ACT

An Act to amend the Consumer Credit Act, 1972-1973.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

1. (1) This Act may be cited as the "Consumer Credit Act Amendment Act, 1978". Short titles.

(2) The Consumer Credit Act, 1972-1973, is hereinafter referred to as "the principal Act".

(3) The principal Act, as amended by this Act, may be cited as the "Consumer Credit Act, 1972-1978".

2. This Act shall come into operation on a day to be fixed by proclamation. Commencement.

3. Section 3 of the principal Act is amended by striking out the item: Amendment of principal Act, s.3—Arrangement.

PART VI—Harsh and Unconscionable Terms.

4. Part VI of the principal Act is repealed. Repeal of Part VI of principal Act.