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SOUTH AUSTRALIA

SEVENTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

ON THE FURTHER CONSIDERATION OF THE CONTRACTS REVIEW BILL 1978

1986

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

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

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

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

M. F. GRAY, Q.C., S.-G.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

G. F. HISKEY, S.M.

The Secretary of the Committee is Mrs H. Lockwood, c/o Supreme Court, Victoria Square, Adelaide 5000.

SEVENTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA ON THE FURTHER CONSIDERATION OF THE CONTRACTS REVIEW BILL 1978

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us for further consideration the Contracts Review Bill of 1978. This Committee reported to one of your predecessors on that topic in our Forty-Third Report and you have asked us to update that report having regard to subsequent developments of the law in this and other jurisdictions.

In 1978 we recommended as follows:

(1) That the definition of "Contract" be deleted from the Bill.

(2) That amendments be made to the Real Property Act to provide machinery for the implementation of orders for the reconveyance of land and to authorise the lodging of a caveat to protect the position of a person seeking to have a contract avoided or varied under the Bill.

(3) That the language of the clause preventing 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 be varied in an effort to strengthen and clarify the expression of the intention.

(4) That parties to international contracts should be permitted to contract out of the provisions of the proposed legislation.

(5) That a clear distinction be made between proceedings specifically instituted under the proposed legislation and the power of the 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.

(6) That a clause be inserted to ensure that there is no conflict between the operation of the Act, and terms implied in a contract by existing statutes.

(7) That the position of a third party who has acquired title for the property in good faith and for valuable consideration be strengthened.

(8) That the legislation state that jurisdiction to entertain proceedings under the Act is conferred on the Credit Tribunal where the proceedings relate to the terms on which credit has been, or is to be provided.

(9) That Part VI of the Consumer Credit Act be repealed.

(10) That a finding in proceedings other than the proceedings specifically instituted under the proposed legislation, that the contract is unjust, should not preclude the parties from relitigating that issue in other proceedings.

(11) That a Court when determining whether a contract is unjust and whether to exercise its powers under the proposed legislation should be directed to consider the terms of the contract in coming to its conclusion.

(12) That there be power to transfer proceedings under the proposed legislation from one Court to another, so that proceedings will not fail because they have been brought in the wrong Court.

(13) That there be a right of appeal from the Industrial Court to the Supreme Court but that it be restricted to matters pertinent to the exercise of powers conferred under the Act and consequential or related matters.

These recommendations were embodied in a bill which passed the House of Assembly but which was laid aside in the Legislative Council, where the Government of the day did not have a majority, on party lines.

We should say at the outset of this report that a member of the Committee, Mr. Wicks, is opposed to the whole of the recommended reform on philosophic grounds. His views are the same as those stated by him in his dissent to the Forty-Third Report. We record this point of view but it is outside the terms of your remit. If, however, there is to be a Contracts Review Act of general application, Mr. Wicks supports the specific recommendations proposed in this report.

Have advances in the common law made legislative reform unnecessary?

For many years equity has tried to protect those who are particularly susceptible to exploitation because of special disadvantage, such as illness, ignorance, impaired facilities, financial need or inexperience. However, the categories where relief has been granted are isolated and exceptional and the jurisdiction is confined within narrow limits.

The equitable jurisdiction to grant relief from unconscionable contracts has, except in the categories above referred to, usually depended on an allegation of misconduct rather than an abuse of superior bargaining power. However Lord Denning M.R. in *Lloyds Bank Ltd. v. Bundy [1975] 1 Q.B. 326* regarded inequality of bargaining power as the single thread linking the exceptional equitable categories. This is a rationalization of earlier authority in a fashion peculiar to Lord Denning, which may or may not survive scrutiny by the House of Lords.

In *Lloyds Bank (supra)* a guarantee was set aside because the taker of the guarantee, Lloyds Bank, had failed to comply with a fiduciary duty which it owed to the guarantor, who was one of its clients. Lord Denning however was prepared to base his judgment on an additional wider ground which he explained at page 339:

> "Gathering it all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrong-doing."

Sir Eric Sachs, who gave the majority judgment, however, took a different approach. Sir Eric concluded after his examination of the facts that the bank owed Mr. Bundy in the special circumstances of the case a duty of fiduciary care and that the duty had not been discharged.

This case has proved influential in subsequent litigation. In *Clifford Davis Management Ltd. v. W.E.A. Records Ltd. [1975] 1 All E.R. 237*, the defendants appealed against the refusal of a Judge to discharge an

interim injunction restraining them from infringing the plaintiff's copyright in the compositions of two musicians.

Lord Denning examined the terms of the agreement between the musicians and the publisher and characterized it as "restrictive trade". Although careful to say that he need not come to a final opinion since the proceedings were interlocutory, Lord Denning did observe that "it may well be said that there was such inequality of bargaining power that the agreement should not be enforced" (see page 241).

A. Schroeder Music Publishing Co. v. Macaulay (1974) 1 W.L.R. 1308 was a slightly earlier case involving similar facts. In that case a publisher engaged the services of a composer for five years and acquired the exclusive right of publishing all works to be composed by him during that period. However the contract, which was in a standard form used by the publisher, did not impose on him a duty to publish the composer's works. The House of Lords set aside the contract, Lord Diplock observing at page 1315:

> "[W]hat your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to extract from the song writer promises that were unfairly onerous to him."

While these three cases indicate that there has been a drive by the Courts (and in the main Lord Denning M.R.) towards the establishment of an unconscionability doctrine, the Committtee considers that it would be unrealistic to contend that these cases introduce a general doctrine of unconscionability, especially since later judgments have generally been decided upon the basis of breach of duty, with Sir Eric Sach's judgment rather than the judgment of Lord Denning M.R. in *Lloyds Bank*, being referred to and followed.

For example, in the recent case of *National Westminster Bank p.l.c. v. Morgan (1983) 3 All E.R. 85* the Court of Appeal held that a presumption of undue influence arose whenever a transaction was concluded between persons who enjoyed or who were bound in relationship of confidentiality. That relationship was not circumscribed by reference to defined limits but could exist in a wide variety of situations whenever, first, one party relied on the guidance or advice of another party who not only was aware of that reliance but also stood to obtain a benefit from the transaction or had some other interest in it being concluded, and, secondly, when there also existed between the parties an element of confidentiality that went beyond that which might be present between normally trustworthy persons dealing with each other in a business transaction at arm's length. In coming to this decision, the judgment of Sir Eric Sachs in *Lloyds Bank* was extensively referred to.

Likewise in the South Australian case of *Amadio and Amadio v. Commercial Bank of Australia Ltd. (1981) 95 L.S.J.S. 419* where a mortgage-guarantee was set aside as unconscionable, it was the judgment of Sir Eric Sachs rather than that of Lord Denning in the *Lloyds Bank case* which was referred to by the Full Court. This decision was affirmed by the High Court of Australia at *(1983) 56 A.L.J.R. 402.*

Thus it appears that reliance can not be safely placed on the Courts developing a general unconscionability doctrine. The Committee would moreover like to point out that even if Lord Denning's attempt to create a general doctrine had been more successful, this would not negate the need for legislation in the form of this Bill. First, it is by no means clear that the Courts would be prepared or capable of developing the power to grant relief to the degree that is necessary. Secondly, one has to wait

for a case to be decided authoritatively by the High Court or the Full Supreme Court which raises for decision the problem of working out a general basis for relief. This may not happen for years and in any case Courts work inductively from precedent to precedent and are by their discipline wary of creating general rules.

The need for legislation in this field has been discussed in this State in the case of *Henderson v. The Bank of New South Wales (1978) 78 L.S.J.S. 483* where Zelling J. said at page 490:

> "I think that clauses of this kind which make the Bank's demand conclusive evidence against the customer notwithstanding that the customer has good defences to an action by the Bank are grossly improper, but unfortunately until the Unjust Contracts Bill becomes law, courts in this State have no power to do justice against unjust documents which shut people out from their proper remedies in courts of law."

In the intervening period from 1978 to date there have been no significant advances in the common law.

United Kingdom: Unfair Contract Terms Act 1977:

As very little information was available with respect to the United Kingdom Unfair Contract Terms Act 1977 at the time we last reported on this topic, we have decided to examine the scope and effect of that legislation in order to consider whether their scheme is likely to be more appropriate than that proposed in our 1978 draft Bill. In addition, it is useful to determine whether any problems have arisen under their Act which should be dealt with in legislation in this State.

It should be pointed out that the title of the English Act is somewhat misleading. The control imposed by the Act is not limited to contract terms, but extends to non-contractual notices which exclude or restrict liablity in tort. Further, the English Act does not seek to control unfair contract terms generally. It applies for the most part only to terms that purport to exclude or restrict liability; that is to say, to exemption clauses.

The control exercised by the English Act over exemption clauses in contracts is complex in nature and by no means comprehensive. There are three broad divisions of control. First control over contract terms which exclude or restrict liability for negligence. Secondly, control over contract terms which exclude or restrict liability for breach of certain terms implied by statute or common law in contracts for sale of goods, hire-purchase, and in other contracts for the supply of goods. Thirdly, a more general control in limited circumstances over contract terms which exclude or restrict liability for breach of contract or which purport to entitle one of the parties to render a contractual performance substantially different from that reasonably expected of him or to render no performance at all.

However, the provisions of the Act may overlap in any given case, so that, in any such situation, it may be necessary to consider whether more than one section is relevant.

The Act renders some types of exclusion clauses absolutely ineffective—principally those avoiding liability arising from negligence, where the negligence has resulted in death or personal injury. In the majority of other instances, including where the result of an act of negligence was anything but death or personal injury a test of reasonableness is imposed.

It should be noted that some South Australian Acts already deal with specific types of exclusion clause. For example, Section 133 of the Motor Vehicles Act 1959 provides that:

"Any contract (whether under seal or not) by virtue of which a person contracts in advance out of any right to claim damage or any other remedy for the negligence of any other person in driving a motor vehicle shall to that extent be void".

Section 8 of the Misrepresentation Act 1971 provides:

"If any contract contains a provision that would, but for this section, exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that provision shall be of no effect except to the extent (if any) to which in any proceedings arising out of the contract, the Court may allow reliance on it as being fair and reasonable in the circumstances of the case".

The requirement of reasonableness for the purpose of the English Act is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of both parties when the contract is made.

By Section 11 (2) of the English Act, five guidelines are laid down set out in Schedule 2 and regard is to be had to these in determining whether a contract term satisfies the requirement of reasonableness. The guidelines are as follows:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among things, to any custom of the trade and any other previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

As yet, there has not been a great deal of authority in England on which an assessment can be made as to the way in which the courts will approach the test of reasonableness. This is despite the fact that the reasonableness test had already been used in the English Misrepresentation Act 1967 and the Supply of Goods (Implied Terms) Act 1973. However it should be noted that test of reasonableness in those earlier Acts differs significantly from that now placed in the English Unfair Contract Terms Act. The Supply of Goods (Implied Terms) Act spoke of it being fair and reasonable to allow reliance on an exclusion clause: this too was the essence of the matter when it first appeared in the Misrepresentation Act. The present rule however is that a clause is valid if it was reasonable to insert the clause at the time the contract was

made. There is a clear difference here in that a clause could be a reasonable one to insert into a contract at the time of making it, yet the circumstances may be such later that it is not fair and reasonable to allow reliance on that particular clause when the problem comes up for decision.

Unfortunately, to, cases involving the Unfair Contract Terms Act have not been well reported as they have generally arisen in the county courts. However it may nevertheless be helpful to examine quickly the material available.

In *Waldron-Kelly v. Marshall* (Stockport county court, March 17, 1981—1981 Current Legal Year, Paragraph 303), the plaintiff had delivered a suitcase to Stockport railway station for delivery by British Rail to Haverfordwest railway station. The charge was £6.03 and the conditions of carriage provided that British Rail were only to be liable if any loss or delay was caused by their wilful misconduct. If there was a failure to deliver the goods at all then liability was to be assessed by reference to the weight of the goods (a sum considerably less that the real value of the contents). Judge Brown had no doubt that this clause "did not satisfy the test of reasonableness".

In *Woodman v. Photo Trade Processing Ltd.* (Exeter county court, May 7, 1981), noted in an article by Lawson in *131 N.L.J. 933 at page 935,* a reel of film had been given to the defendants for processing. The subject matter was a wedding. Most of the snaps were lost and the defendants pleaded reliance on the following clause—

> "All photographic materials are accepted on the basis that their values does not exceed the cost of the material itself. Responsibility is limited to the replacement of the films.
>
> No liability will be accepted consequential or otherwise however caused."

Judge Clark took the view that the clause was unreasonable.

In *British Airports Authority v. British Airways Board and Others, May 7, 1981* (noted by Lawson (supra) at page 935), the following clauses were in dispute:

> "(i) Neither the Authority nor any servant or agent of the Authority shall be liable for loss of or damage to the aircraft, its parts of accessories or any property contained in the Aircraft, occuring while the aircraft is in the airport or is in the course of landing or taking off at the airport, or being removed or dealt with elsewhere for the purpose of . . . , arising or resulting directly or indirectly from any act, ommission, neglect or default on the part of the Authority its servants or agents unless done with the intent to cause damage or recklessly and with knowledge that damage would probably result.
>
> (ii) The operator will indemnify the Authority its servants or agents against any claim which may be made against the Authority, its servants or agents, for loss, damage or injury (including fatal injury) incurred by any person using or being in an aircraft however such loss, damage or injury may be caused, including (without prejudice to the generality of the foregoing) any claim arising from the act, omission, neglect or default of the Authority, its servants or agents, unless done with intent to cause damage or recklessly and with knowledged that damage would probably result."

Mr. Justice Parker was of the view that the first clause was reasonable. He appears to have been influenced in this finding by the fact that the

clause would enable the Authority to keep its costs down and would free it from involvement in disputes over accidents, the facts of which may to a large extent be unknown to them. That however would exonerate most governmental and local government bodies if applied generally.

As far as the indemnity clause was concerned, the Unfair Contract Terms Act could not apply since the relationship between the parties was plainly not a consumer contract. Even so, Mr. Justice Parker disallowed the clause on the ground that its lack of reasonableness meant that it was ultra vires the Authority. That such a clause would not have survived the Unfair Contract Terms Act is evident from the learned Judge's view that it "smacks of unreasonableness".

In *Walker v. Boyle (1982) 1 W.L.R. 495* a vendor, in response to preliminary inquiries, represented that she was unaware of a boundary dispute connected with the subject property, although she ought to have known that there was such a dispute. In that case it was held that condition 17 of the National Conditions of Sale even with a statement that "accuracy is not guaranteed, and (the replies) do not obviate the need to make appropriate searches, inquiries and inspections" did not meet the test of reasonableness required by Section 11 of the Act.

Another case involving the sale of land was *South Western General Property Co. Ltd. v. Marton (1982) 263 E.G. 1090 and cited in an article by Wilkinson in 1984 Conveyancer 12 at 16.* In that case an innocent misrepresentation was held to have been made in an auctioneer's catalogue when it disclosed a refusal of planning permission to build a house on the land in 1972 on the grounds of design but did not mention that it was unlikely that planning permission would be given for any dwelling on the site on amenity and conservation grounds.

Although the auction catalogue contained disclaimer clauses Croom-Johnson J. found for the purchaser. His Lordship pointed out that people sometimes attend auctions at short notice, as Mr. Marton had done. Although Mr. Marton was a builder by trade he apparently wanted the land to build a house for his own occupation. It is therefore interesting to note that the Judge said that he had to consider whether the conditions were reasonable to be included in a contract "not with property speculators in which they might be reasonable but in a case such as a householder like Mr. Marton who is very clearly concerned, if he wants to buy for himself, with planning matters". He concluded that for the parties to the contract and in the circumstances in which it was made—

> "The plaintiffs have not satisfied me that these are terms which are fair and reasonable to have been included in the contract . . . at the time of this auction. These terms, if they were included, would exclude liability for a failure to tell the purchaser more than only part of the facts which were among the most material to the whole contract of sale."

In *Phillips Products v. Hamstead Plant Hire, October 15, 1982* (noted in paragraph 43 of the March 1983 edition of Current Law year), the plaintiff had contracted with the defendant to hire a J.C.B. and driver on the defendant's standard terms: those of the Contractor's Plant Association. Clause 8 of these conditions provided that the J.C.B. driver should be the servant of the hirer who alone should be responsible for all claims arising in connection with the operation of the plant. The J.C.B. driver negligently damaged the plaintiff's factory while carrying out work at the plaintiff's request.

It was held by Kenneth Jones J. that the defendants were vicariously liable for the J.C.B. driver's negligence. The plaintiffs were steel stockholders and did not regularly hire plant or drivers. The hire period was

short and the plaintiffs had little opportunity to arrange insurance for the driver. The plaintiffs played no part in the driver's selection nor had they control of the way in which he did his job. In the circumstances it was not fair and reasonable for the defendants to exclude liability for their driver's negligence.

From this brief examination of the cases it appears that English Courts have been administering the reasonableness test in a satisfactory manner. However there is a possibility that the courts may place a self-imposed restriction on the circumstances in which the Court should interfere. This possibility is raised because of the speech of Lord Wilberforce in *Photo Production Ltd. v. Securicor Transport Ltd. (1980) A.C. 827* when he said at page 843—

> "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, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

This passage, with all respect to his Lordship, conceals an underlying defect in the use of the words "unequal bargaining power". The parties may have equal bargaining power, but if every supplier in the industry uses the same or similar exclusionary clauses, the hirer is still in a "take it or leave it" situation.

Unfortunately, it is likely to take quite a while before it becomes evident whether there is any significant difference in the English Courts' characterization of "unreasonable" and the Australian courts' characterization of "unjust". It may be that the Courts in both jurisdictions will in similar fact situations give like answers. However the Committee stresses that although there is possibly little difference between the answers when the different tests are used, the situations in which the English test may arise are very limited, while the scope of the New South Wales Act, and even more that of the South Australian Bill, is wider. For as has been stated previously in this report the English Act does not seek to control unfair contract terms generally. It applies, for the most part, only to terms that purport to exclude or restrict liability, that is to say, to exemption clauses.

Other limitations are also imposed on the scope of the English Act. For example the Act in the main applies to exemption clauses involving "business liability". The Act defines "business liability" as "liability for breach of obligations or duties arising:

(a) from things done or to be done in the course of a business (whether his own business or another's); or

(b) from the occupation of premises used for business purposes of the occupier."

Also a distinction is drawn in the Act between cases where a party to a contract "deals as a consumer" in relation to another party, and cases where he does not so deal. In order that a party should have dealt as a consumer, two conditions must be satisfied:—first he must neither make the contract in the course of business, nor hold himself out as doing so. Secondly the other party must make the contract in the course of business.

The question of whether the plaintiff deals as a consumer is of particular relevance in contracts of sale and hire-purchase. It is also of relevance in connection with other contracts for the supply of goods, such as barter, hire and contracts for work and materials. In such instances while certain exclusion clauses are not permitted at all as against consumers, they will

be allowed as against a person dealing otherwise than as a consumer as long as they are considered reasonable.

The fact that the plaintiff deals as a consumer may be of assistance to him in contracts that do not involve the sale or supply of goods; for example, correspondence courses, travel arrangements and contracts for the regular servicing of appliances such as washing machines. In these cases the plaintiff who deals as a consumer may challenge exemption clauses in the contract as being unreasonable. The person who does not deal as a consumer may only challenge such terms on such grounds as if the contract is "on the other's written standard terms of business" (which of course is often the case).

One very distinct advantage for the plaintiff who deals as a consumer is that he may challenge "indemnity" provisions for unreasonableness where a person who deals otherwise than a consumer may not. Another advantage for a plaintiff who deals as a consumer is that a foreign law clause in the agreement does not deprive him of the protection of the Act, provided that he was habitually resident in the United Kingdom when he made the contract and provided that steps necessary for making the contract were taken there.

It appears that the scope of the English Unfair Contract Terms Act may in future be further limited due to the distinction which appears to be being drawn between provisions defining the extent of liability and provisions excluding liability. Samuels adverted to this possibility in an article entitled *Exclusion Clauses and the Unfair Terms Act 1977 127 Sol. Jo. 98* when he said at page 98—

> "There is an important technical distinction between an exception clause, which merely defines the extent of liability, which is not caught by the Act, and an exclusion clause, which purports to restrict or exclude liability, which is caught by the Act. A body of law, some would say legal sophistry is emerging on this distinction, requiring the consumer to take the goods 'sold as seen and inspected', or 'with all their faults' or 'sold as examined' is caught by the Unfair Contract Terms Act because the seller is trying to change a sale by description into a sale of specific goods: *Hughes v. Hall (1981) 125 Sol. Jo. 255; [1981] R.T.R. 430.* By comparison, the exception of the loss of use in an insurance contract is not caught by the Unfair Contract Terms Act: *Davidson v. Guardian Royal Exchange (1981) S.L.T. 81 (Court of Session).* There is apparently also a distinction between a clause excluding liability and one limiting liability: *Ailsa Craig v. Malvern Fishing (1982) 45 M.L.R. 322, N.E. Palmer."*

In *Hughes v. Hall (supra)*, the defendants, who were dealers in secondhand motor cars, sold secondhand cars, giving each purchaser a document which included the phrase "sold as seen and inspected" as a term of the transaction. The defendants were charged with furnishing in the course of a business to a consumer in connection with the carrying out of a consumer transaction a document which included a statement void by virtue of Section 6(2) of the Unfair Contract Terms Act 1977, contrary to article 3(d) of the Consumer Transactions (Restrictions on Statements) Order 1976 as amended and section 23 of the Fair Trading Act 1973. On a submission of no case to answer the Justices were of the opinion that the phrase was too vague for the defendants to avoid civil liability under the Sale of Goods Act 1893 and was, therefore, not void by virtue of Section 6(2) of the Act of 1977, and the informations were dismissed.

On appeal by the prosecutors, Donaldson L.J. and Bingham J., sitting as a Queen's Bench Divisional Court, held, allowing the appeal, that prima facie where the phrase "sold as seen and inspected" was included in a contract, it excluded the implied warranty under Section 13 of the

Sale of Goods Act 1893, but that such exclusion was subject to othe express terms of the contract; that, in any event, the purchaser woul lose some of his rights, so that inclusion of the phrase in the contrac would constitute an offence; and that, accordingly, the case would b remitted to the justices for rehearing.

In *Davidson v. Guardian Royal Exchange Assurance (supra)* a car wa damaged by fire on 28th July, 1976. It was comprehensively insured The insurers, as they were entitled to do under the insurance policy opted to repair the car, which was eventually returned to the owner i April, 1977. The owner raised an action in damages against the insurer in respect of loss of use. He claimed that it was an implied term of th insurance policy that, if the insurers opted to repair his car, they shoul do so within a reasonable time, and that eight weeks would have been reasonable time while the forty weeks that it actually took was unreason able. The insurers denied that the delay was attributable to any breac of contract.

They further maintained that in any event a loss of use claim wa excluded by an exceptions clause in the policy.

The Sheriff Principal said at page 83:

> "... The effect of the exception clause is critical to the whol argument. Like all provisions in contracts of its kind—insuranc contracts in the insurers' standard form—and all exemption clauses it falls to be read contra proferentem. It will not be held to exclud liability for failure in contractual duty by the proferens unless tha is clearly expressed, or unless there is no other liability to which i could refer *(Canada S.S. Lines Ltd. v. R.; Alderslade v. Hendo Laundry).*"

However, on appeal, the Court of Session disagreed with the approac taken by the sheriff principal saying at page 84:

> "The sheriff principal appears to have reached his decision upo the view that the exceptions clause narrated supra must be inter preted contra proferentum and as if it was a clause covering exemp tion from the insurer's negligence, such as in *Canada S.S. Lines Ltd v. R.* and *Alderslade v. Hendon Laundry.* So viewing the matter h had no difficulty in applying the rules laid down in these cases i favour of the pursuer.
>
> We think that the approach by the sheriff principal is incorrect We do not think that the exceptions clause in the policy can b equiparated with the exemption or indemnity clauses which wer considered in the cases mentioned. It is our view that the prope approach is to construe the policy, to ascertain from it the risk o risks covered by s.1 (sc. of the policy) including the exceptions, an to see how far, if at all, a claim for breach of contract, as averre by the pursuer, is covered."

Thus it can be seen that the Court was of the view that there is a clea distinction between "exemption" and "exception" clauses. However, i the end result the Court of Session was able to hold for the pursuer o another ground.

N.E. Palmer in an article entitled *Limiting Liability for Negligenc (1982) 45 M.L.R. 322* said:

> "There is now evidence that the judicial approach to the meanin of exculpatory terms is becoming more selective and that the con struction of such clauses may vary according to their form."

Palmer in propounding this view, cited *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd. (1981) unreported, H.L. delivered Novembe*

1981. In that case Securicor had contracted to provide a patrol service on New Year's Eve 1971-1972 for the benefit of the owners of certain fishing vessels berthed in Aberdeen Harbour. The contract was broken. One vessel (owned by Ailsa) became snubbed under the deck of the quay. Its gallows bore down on another vessel (owned by Malvern) and both sank. There was no dispute that the loss could have been prevented had proper surveillance been provided.

The First Division of the Court of Session held that a clause in Securicor's contract which purported to exclude liability in toto was ineffective but that another clause which purported to limit the recoverable damages was effective. The vessel owners appealed to the House of Lords against that part of the decision.

In upholding the clause, the House of Lords held that there was a distinction for the purposes of construction between indemnity and exclusion clauses on the one hand and limitation of damages clauses on the other hand. The Lords held that limitation clauses will continue to be construed contra proferentem, and that in order to exclude liability for negligence, must be clearly and unambiguously expressed, but that subject to this they must be given their "natural, plain meaning" and are exempt from the specially rigorous standards of precision and candour which govern clauses of greater severity. A limitation clause could therefore protect the proferens against full liability for negligence—in circumstances where an indemnity clause or a clause of total exclusion might not.

Lord Wilberforce held that a limitation clause was entitled to more favourable treatment because it must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration he receives, and possibly also the opportunity of the other party to insure.

It appears therefore that the English legislation may be interpreted as only affecting certain exculpatory terms, and as a result there is scope for the avoidance of the effects of recent protective legislation such as their Unfair Contract Terms Act.

Also of interest is the comment made in the *25th Edition* of *Chitty on Contracts at pages 502-503,* that although the Unfair Contract Terms Act uses the words "except in so far as the term satisfies the requirement of reasonableness", it would appear that the Court's powers under the Act are limited to declaring the term either to be effective or of no effect. Thus the Court could not rewrite the term or sever words which made the term unreasonable so as to render the term reasonable.

This of course means that the Court's powers under the English legislation to grant a remedy in the case of unsatisfactory contractual terms and significantly less than those placed in the New South Wales Contracts Review Act, and in the South Australian draft bill.

Finally, we would like to point out that the English reasonableness test has recently been criticized in an article by *Wilkinson* entitled *Exemption Clauses in Land Contracts (1984) The Conveyancer 12* for the lack of guidelines to help the Court determine what is reasonable. Wilkinson suggests that guidelines should be laid down and the guidelines he has suggested have many similarities to those contained in the New South Wales Contracts Review Act and the South Australian draft bill.

The Committee believes that the proposed Contracts Review Act could and possibly should be supplemented in specific problem areas. For example, specific legislation could be enacted covering exemption clauses. While the Contracts Review Bill's concept of "unjust" could cover matters dealt with in the English Unfair Contract Terms Act, by the requirement of reasonableness, another piece of legislation could specifically

prohibit certain types of exemption clause which were considered partic ularly undesirable.

A similar approach was recommended by John Livermore in a Repor to the Tasmanian Law Reform Commission relating to *Exclusion Clause and Implied Obligations in Contracts for the Supply of Goods and Services* In his report Livermore has drafted a proposed Unfair Contract Term Act (see Appendix D) based on the United Kingdom legislation bu which only deals with express prohibitions of certain exemption clauses and no reference is made to the requirement of reasonableness. Liver more, however, does also recommend the adoption of a provision alon the lines of the Peden Report and the New South Wales Contracts Reviev Act to regulate harsh and unconscionable contracts generally.

A 6:1 majority of this Committee in 1978 recommended the adoptio of the general scheme of this Bill. We draw attention to the enactmen of very similar legislation in New South Wales in 1980. This means tha a useful body of case law should be developed fairly rapidly and thu lessen any uncertainty.

Livermore recently recommended to the Tasmanian Law Reform Commission that a move should be made to attempt to have similar legislation enacted on an Australia-wide basis. It is of interest to note in this regard that the Queensland Law Reform Commission has recently been given the task of looking at possible reforms in the area of exclusion, exemption and unreasonable clauses in contracts. As long ago as 1976, the Australian Capital Territory introduced a Bill dealing in somewhat similar terms as the South Australian Bill with harsh and unconscionable contracts (see Appendix C). Unfortunately the Australian Capital Territory Bill, as in the case of the South Australian Bill, has still not been enacted.

With an increase in the number of jurisdictions having similar protective measures against unjust terms in contract, there is of course a corresponding lessening of any risk which may have otherwise arisen that business may migrate to some State or Territory which does not have similar legislation.

New South Wales: Section 88F Industrial Arbitration Act 1940.

Apart from the Contracts Review Act 1980 which will be discussed later in this report, New South Wales has for a number of years had somewhat similar legislation to that proposed, dealing with unfair practices relating to employment. Section 88F of the Industrial Arbitration Act was introduced into the statute in 1959 and provides—

> "(1) The Commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in an industry on the grounds that the contract or arrangement or any conditions or collateral arrangement relating thereto—
>
> *(a)* is unfair, or
>
> *(b)* is harsh or unconscionable, or
>
> *(c)* is against the public interest. Without limiting the generality of the words "public interest" regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or

(*d*) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(*e*) was designed to or does avoid the provisions of an award, industrial agreement, agreement registered under Part VIIIA or contract determination.

(2) The Commission, in making an order or award pursuant to subsection (1) of this section, may make such order as to payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the Commission to be just in the circumstances of the case.

(3) The Commission may make such order as to payment of costs in any proceedings under this section, as may appear to the Commission to be just in the circumstances of the case.

(4) An application under this section in respect of a contract of carriage to which Part VIIIA applies may be made by a party to the contract or by an association of contract carriers of which a party to the contract is a member."

Thus Section 88F invests the Industrial Commission of New South Wales with a discretion to set aside certain contracts or arrangements. The operation of the section turns upon the answers to three basic questions, namely:

(1) What are the terms of the contract, condition, arrangement or collateral arrangement?

(2) Is the contract, condition arrangement collateral arrangement one "whereby a person performs work in any industry"?

(3) Is the contract or arrangement relevantly unfair, harsh, unconscionable, against the public interest, or otherwise offensive to subparagraphs (*d*) or (*e*) of sub-section (1)?

Of particular interest for our purposes are the answers given by the Commission with respect to question (3). We now look at some of the relevant case law relating to this question of whether the contract or arrangement is relevantly unfair, harsh or unconscionable.

Although each condition set out in Section 88F (1) is considered separately, contracts which are set aside under Section 88F as unfair are also frequently relatively harsh and/or unconscionable. Sheldon J. in *Davies v. General Transport Development Pty. Ltd. 1967 A.R. 371 at 373* described the words "unfair, harsh or unconscionable" as "a tautological trinity", a view which more recently the Commission in Court Sessions in *A. & M. Thompson Pty. Ltd. v. Total Australia Ltd. 1980 A.I.L.R. 204* declined to accept. The Commission said *obiter*:

"There is an perceptible difference between the meaning of the term 'unfair' and that of the terms 'harsh' and 'unconscionable'. What is unfair may not be so unfair as to be harsh."

In *Agius v. Arrow Freightways Pty. Ltd. 1965 N.S.W. A.R. 77 at 89* Beattie J. reasoned that Parliament could not have intended the words "unfair, harsh or unconscionable" to bear any special meaning when Section 88F originally conferred jurisdiction on non-lawyers in the form of conciliation committees. It is apparent from the earlier decisions of Sheldon J. that in his view unfairness, harshness or unconscionability had little to do with the technical meaning of those words and was rather a matter of morals. For example in *Pegan v. Star Carrying Co. Pty. Ltd. 1968 N.S.W. A.R. 119 at 121* Sheldon J. saw Section 88F (1) as a power to "attack transactions at their moral roots".

Contracts which on their face are fair, may because of events late occurring, become unfair. In *Hildred v. Richardson (1971) N.S.W. A.R 1019*, a judgment of McKeon J., a contract charging commission o twenty per cent of the applicant entertainer's gross earnings of $1350 pe week may have been fair if the manager had sufficiently performed hi side of the bargain, so as to justify that charge (see page 1035). Th agreement only became relevantly unfair when the manager failed t perform. The Judge held that it was possible to look at the contrac retrospectively for this purpose (see page 1036). However, where it i claimed that events which occurred after the contract render that contrac unfair, those events must be ones over which the respondent is able t exercise some control. It is not enough that the applicant was the victin of unforeseen circumstances.

From *Agius v. Arrow Freightways Pty. Ltd. (1965) N.S.W. A.R. 77 a 90* it appears that the fact that one party to a contract makes a larg profit does not mean that the contract is unfair, provided the other part to the agreement receives a "fair deal".

The Commission in Court Session has recently reviewed the notion o unfairness. In *A. & M. Thompson Pty. Ltd. and Others v. Total Australi Ltd. 1980 A.I.L.R. 304* the Commission analysed the concept of unfair ness from a historical perspective observing that there had been:

> "a gradual change in judicial attitude towards what was known a the 'sanctity of contract' and towards the concept of 'freedom o contract'.
>
> Whereas there are early cases in the books which appear to tak the attitude that the test of fairness was whether the complainin party had fully understood and appreciated the terms of the agree ment (e.g. *Re Stuart; Ex parte Cathcart [1893] 2 Q.B. 201*) there ha been a distinct move from that view of fairness towards a positio in which the quality and terms of a fully understood bargain an the relative positions of the parties are nevertheless examinable i order to ascertain if the contract or arrangement is really a fair one.'

Smith in Contracts for Work in Industry (New South Wales): Sectio 88F Industrial Arbitration Act at page 55 cites *Thompson's case* as bein authority for the following propositions:

> "(1) In determining what is fair, the Commission applies stand ards which provide a proper balance or division of advantage an disadvantage between the parties to the contract or arrangement.
>
> (2) In determining the fairness of a contract or arrangement th Court is required to consider the conduct of the parties, their capa bility to appreciate the bargain they have made and their comparativ bargaining strengths when entering into the contract or arrangemen
>
> (3) The question of fairness cannot be answered simply by con cluding that the complaining party was fully aware of the nature o the transaction before entering into it.
>
> (4) A contract may therefore be unfair even though it was no induced by fraud, deceit or cheating, and the parties to it understoo fully the terms of the bargain. It is enough that there was no genuin bargaining between the parties prior to their entry into the contrac
>
> (5) No general rules regarding the notion of unfairness can b established. Each case must turn on and be dealt with according t its own merits."

The standard of education, literacy, commercial experience, wealth an bargaining strengths of the parties are therefore all relevant in determin

ing whether a contract or arrangement is unfair. The concept of fairness is relative to the experience and bargaining strengths of the parties. For example, what is unfair to the commercially naive may not be so in respect to an experienced businessman. Also a provision may not be unfair having regard to what it is designed to protect. For example in *O'Brien v. Kalamazoo (Australia) Pty. Ltd. 1977 A.I.L.R. 464* the applicant applied to set aside a restrictive covenant which prohibited him from working in the geographical areas in which he formerly worked as the respondent's employee. Cahill J. held that having regard to the access the applicant had enjoyed to his employer's customers and files in his senior position, the restrictions placed upon him by the convenant were in all the circumstances, fair.

It is of interest to note that Section 88F is regarded as a relatively successful piece of legislation. For example Peden in his Report on *Harsh and Unconscionable Contracts 1976* said at page 12:

> "... section 88F has received considerable use and liberal interpretation. The commission has not regarded itself as trammelled by legal technicalities of agency, privity of contract, the veil of incorporation or exclusion clauses. Thus relief can be given against persons who were not parties to the contract provided they had some clear connection with the contract: *Brown v. Rezitis (1970) 45 A.L.J.R. 41*. The Commission's decisions have tended to reflect the degree of culpability or involvement of the individual respondent in the transaction concerned.
>
> The success of this section, at least in comparison to the money lending and hire-purchase provisions, has been largely attributed to the facility and flexibility of the industrial judges in exercising broad discretions and making value judgments as to what is fair."

While *Woods and Stein* in their text entitled *Harsh and Unconscionable Contracts of Work in New South Wales* say at page 46:

> "It will have been observed that Section 88F is a drastic piece of legislation designed to deal with a situation that was threatening the arbitration system itself. It has been used principally to combat fraud and unfair employment practices in the transport industry. Clearly it has been more successful than similar provisions in money-lending and hire-purchase statutes. The fundamental principles of interpretation of Section 88F are liberality, straight forwardness and lack of technicality, while the outstanding characteristics of the interpretation of the money-lending and hire-purchase provisions are narrowness, legalism and technicality. Inescapably, the experience of the New South Wales Industrial Commission with Section 88F demonstrates that 'reopening' provisions are not intrinsically unworkable."

The apparent success of Section 88F in its given area is regarded by the Committee as an encouraging indication that the proposed Contracts Review legislation is likely to be a useful reform in a wider field.

New South Wales: Contracts Review Act 1980

As New South Wales has had a Contracts Review Act in very similar terms to the proposed South Australian Act since 1980, it would seem wise to examine the operation of that Act in the intervening four years.

Unfortunately for us, there have been very few reported cases. One case which provides some guidance as to the attitude which may be taken in the case of a migrant with limited knowledge of English is *Partyka v. Wilkie 1982 cases Australian Consumer Sales and Credit Law Reporter 55-213*. In that case the plaintiff was a Polish migrant who had

a limited command of the English language. He saw a job advertisemen in a newspaper for work in California and called at the advertiser's office There he was introduced to a man called Andy and a woman. The proceeded to show him maps and photographs of a motel in California and he was told that he would be employed there as a tiler. Andy tol him that if he wanted the job, he would have to invest $6,900 for a on per cent interest in the motel business. Having only $6,600 the plainti procured a bank cheque in the defendant's favour for that amount an arranged that he would pay the balance from his first payment as a tile in California. The plaintiff was then asked by the defendant to sign document which, according to the former, he read and signed but di not understand. The document purported to be a declaration of trust b the defendant, the trust property being a one per cent share in the motel

Subsequently the plaintiff's solicitor wrote to the defendant requestin repayment of the sum to the plaintiff. The plaintiff applied for order under Section 7 of the Contracts Review Act and ancillary orders unde Section 8 and the First Schedule on the ground that the contract wa unjust in the circumstances at the time it was made.

Needham J. of the Supreme Court of New South Wales held that th application should be granted, saying at page 57,004:

> "It was submitted to me that the contract is unjust in the circum stances at the time it was made; principally for the reason that th plaintiff, answering an advertisement for work in California, wa met with a requirement that he pay the sum of $6,900. The adve tisement offered free air tickets and accommodation, and the sub mission was that accommodation and air fares, for which the plainti had to pay $6,900, were anything but free. The position of th plaintiff has also to be considered in the question of whether ther was injustice in the contract and, although the plaintiff does not see an order of a non est factum type, the plaintiff's limited knowledg of the language must be taken into account in considering the justic of requiring him to pay over this large sum of money for a promis about which one would think any realistic person would becom suspicious when seeing the offer being made.
>
> I think the submission should be upheld. I think that the contra was unjust in the circumstances relating to it at the time it wa made, and I would make an order under Section 7(1)*(b)* of th Contracts Review Act, 1980; that is, that the contract entered int by the plaintiff and the defendant on 8th July, 1982 is void. Pursua to section 8 and Schedule 1, I make an order that the defenda repay to the plaintiff the sum of $6,600 with interest at ten p centum per annum from the date of payment to the date of th order, and I order that the defendant pay the costs of the plainti of these proceedings."

This case was commented upon by Guild in an article entitled: *Th Contracts Review Act 1980 (New South Wales): Scotching Beaumont an other developments (1983) 21 Law Society Journal 304* when he said page 305:

> "One muses that if these cases are portents of the future, the A will certainly not fall into decay and become yet another 'toothle tiger'. To the contrary, while not wishing to cast too premature verdict, it would appear that New South Wales is on the thresho of a new era in the actual and practical control of unconscionab contracts. The cases put flight to the argument that the Court wou be reluctant to use its powers under the Act to interfere openly wi the concept of 'freedom of contract'."

Two further cases of interest are *Beaumont v. Helvetic Investment Corporation Pty. Ltd. 1982 Cases Australian Consumer Sales and Credit Law Reporter 55-194,* and *Commercial Banking Co. of Sydney Ltd. v. Pollard and Another [1983] 1 N.S.W.L.R. 74.* Both of these cases were concerned principally with the question whether the Contracts Review Act could be relied upon by way of defence. However the results reached differed in the two cases.

In *Beaumont's case* the appellant was a medical specialist who became interested in an importing business operated by Law Enforcement Equipment Associates Pty. Ltd. (L. Pty. Ltd.) of which his friend and accountant was a director and secretary. The appellant both bought shares in and injected cash into the business of L. Pty. Ltd. L. Pty. Ltd. also borrowed from the respondent company and the appellant was one of the guarantors of this loan. He signed a deed of guarantee in traditional terms. He claimed that he did this at the behest of his accountant friend who assured him that it was something of a formality and without reading it or appreciating its significance.

After L. Pty. Ltd. failed to meet its debts to the respondant, the respondent sought to recover the amount from the appellant and obtained a summary judgment from a Master of the Supreme Court.

The appellant appealed on the ground that the Master was wrong in law in finding that his defences of undue influence and entitlement to relief under the Contracts Review Act 1980 were untenable.

Lusher J. at pages 56,846 and 56,847 in addressing the allegations in the statement of defence, relying upon the Contracts Review Act, said:

> "It seems that a substantive application is called for as the procedure whereby such a matter is to be determined. Here the provisions of the Act are raised by way of a substantive defence to an action and at the same time relief is sought. Assuming the defence was accepted, I find it difficult to see how this can be achieved during the hearing or trial of an action such as this, since the determination of the application for relief and, if the application is successful, the making of an order in relation to the contract, would be a condition precedent to the respondent's capacity to rely upon the contract in its reviewed form and terms in the action. Furthermore, the nature of an order made on an application as contemplated by section 5 may go to the enforceability or otherwise of the contract, the amount claimed or the terms on which it is payable. No argument in relation to this aspect was addressed to me by either counsel nor is it dealt with in the judgment under appeal . . .
>
> In my opinion, although the provisions of the Act as such, in the instant case are not to be raised as a defence, it is nevertheless competent for them to be raised by way of application in proceedings arising out of the Contract (Section 11(1)*(b)*), as these proceedings are, the provisions have been raised and relief sought, although not in the form of an application as envisaged by the section. Bearing in mind the approach of the Court to amendments, it seems to me that this defence is to be regarded as such an application and should if it is to be pursued be heard as a substantive application in the ordinary way and not in the course of an application for summary judgment, with the limitations and other factors imposed on a Court by principle."

Thus Mr. Justice Lusher believed that the Act could only be raised by way of a substantive application in proceedings arising out of contract. This approach to the application and operation of the Act has recently been challenged by another Judge of the New South Wales Supreme

Court. In *Commercial Banking Company of Sydney Ltd. v. W.W. & C.A. Pollard [1983] 1 N.S.W.L.R. 74* Mr. Justice Rogers said at page 77:

> "In my respectful view, in so far as Lusher J. could be taken to be suggesting that the Act could not be relied upon and relief could not be sought by way of defence to an action on the contract claimed to be unjust, that approach should not be followed."

And then at page 78—

> "Whilst it is perfectly open to a defendant in an action to institute separate proceedings claiming relief under the Act, it is not necessary that he should do so. In my respectful opinion the problems envisaged by Lusher J. in *Beaumont's case* are not insuperable so as to call for a separate application, thus denying full effect to section 11(1)*(b)* of the Act. Accordingly, in my view, if otherwise available the Act was properly pleaded in the amended defence."

In the end result Mr. Justice Rogers dismissed the plaintiff's motion for summary judgment, holding that where such a statutory defence is available, the question of its application to the merits of a particular transaction should not be determined on a motion for summary judgment.

Presently the question of the availability of the Act by way of defence remains to be authoritatively determined in New South Wales. The Committee believes however that the present South Australian Bill should not present these problems, as unlike the very brief reference in the New South Wales Contracts Review Act to "other proceedings arising out of or in relation to the contract" (section 11(1)*(b)*), the South Australian Bill in clause 7 deals specifically with proceedings other than those instituted specifically for relief under the proposed legislation. The difficulties of granting relief in such circumstances have already been adverted to and dealt with by this Committee in its Forty-Third Report where it said at pages 6-7:

> "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 issues 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 recognizes that unjust contracts may affect the outcome of proceedings not founded on a contract or breach thereof, for example, an action in tort where a provision in contract excluding or limiting liability is raised by way of defence."

The Committee has come to the conclusion after examining the case law which has emerged from New South Wales since the introduction in 1980 of the Contracts Review Act, that no matter has arisen which needs to be dealt with specifically in the legislation proposed for this State. The major matter which has arisen has we feel already been dealt with sufficiently in the draft bill, where a separate provision sets out the relief which can be granted where the provisions of the Act are raised as a defence to an action.

Adoption of the General Scheme of the Bill

After examining the United Kingdom Unfair Contracts Act (1977) the Committee has come to the conclusion that it would not be suitable to take the place of the proposed Contracts Review Act.

The English Unfair Contract Terms Act really only deals with a very narrow portion of what is proposed to be dealt with by the Contracts Review Bill. Exemption clauses are not the only area in which injustice arises and even if other areas are also dealt with specifically, undoubtedly enterprising persons will be perpetually trying to discover new methods to take improper advantage in business transactions.

Scope of the Bill

A problem which often arises in consumer protection legislation is to determine what classes of persons require protection, and what types of transaction should be regulated.

As the Bill presently stands, apart from international contracts, there is no significant limitation on the scope of the proposed legislation.

The Committee recognises that the question of the scope of the legislation may be one of the most important aspects of the Bill. The Committee expresses its views on the matter as follows:

> The Peden Report on Harsh and Unconscionable Contracts, upon which this Bill is partly based, recommended that public corporations and their subsidiaries and government departments and their instrumentalities be precluded from obtaining relief under the Act (Peden Report page 17 and section 5 of the draft Bill). Thus consumers, sole traders, partnerships and exempt proprietary companies would all be protected.

The Bill introduced into the New South Wales Parliament in December 1979 did however cover all contracts with the minor exceptions of international sale contracts (where the parties so provided) and industrial awards and agreements.

However due to considerable pressure, an amended Bill was introduced in 1980 with a much narrower ambit. Under the 1980 New South Wales Bill and subsequent Act, the following were precluded from obtaining relief:

(a) all corporations except home unit companies (and not only public companies);

(b) any person who entered into a contract in the course of or for the purpose of a trade, business or profession otherwise than a farming undertaking.

Thus, under the New South Wales Contracts Review Act 1980 proprietary companies, and sole traders and partnerships other than farmers, are excluded from relief.

However it is of considerable interest to note that recent commentators on the New South Wales legislation have commented adversely on the restricted application of the Act. *Goldring Pratt and Ryan* in an article entitled *The Contracts Review Act (New South Wales) 4 Uni. N.S.W. L.J. 1* said at page 5:

> "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."

Terry in an article entitled *Unconscionable Contracts in New South Wales: The Contracts Review Act 1980 10 Aust. Business L.R. 311* said at pages 321-322:

> "It is surely one of the greatest ironies in the history of law reform that the very fact situation in *South Australian Railways Commissioner v. Egan (1973) 130 C.L.R. 506*—the case that was cited sc often during the Parliamentary debates as demonstrating the neec for granting the courts a power to review unjust contracts—is itsel beyond the scope of the legislation. The legislation brings about a division in the law of contracts that is not only 'undersirable anc confusing' but also arbitrary and unnecessary.
>
> The division is arbitrary, because, as the Peden Report acknowledged 'There is little difference between an individual consumer, a partnership of individuals and a small proprietary company. In eacl case there will often be a lack of sophistication in commercial matter and no ready access to legal advice' (Peden Report page 15). The small businessman, be he a sole trader, a partner or operating througl a corporate structure is as susceptible to unjust contract provision as the consumer. Indeed the financial and commercial pressure faced by the small businessman may make him even more vulnerabl than the consumer. The problem of abuse of superior bargainin power which is at the root of unconscionability is not selective anc even large corporations and government instrumentalities are no immune to exploitation. No less an institution than the United State Government has sought relief from an unconscionable contract or the ground of inequality of bargaining power. In *United States v Bethlehem Steel Corporation (1942) 315 U.S. 289,* the United State Government sought to recover from the Bethlehem Steel Corporation, one of the most powerful corporations in the country at tha time, vast profits claimed under wartime ship-building contracts The Government claimed that because of a wartime emergency i was compelled to accept the terms of the country's leading ship builder. Although the majority of the Supreme Court decided agains the United States Government partly because it rejected the suggestion that the United States Government was in a position of bargaining inferiority and partly because it held that it was for Congres not for the Court to determine the proper method of obtainin wartime supplies for citizens, Frankfurter J., in a dissenting judgment, held that 'the Court should not permit the Bethlehem Stee Corporation to recover those unconscionable profits and thereb make the Court an instrument of injustice'."

The Committee is of the view that it is important that proper protectio be offered by our Act. Arguments which have been raised at variou

times concerning uncertainty will, to quite an extent, be met by the inclusion of clause 8(1) (b) (x) in the Act which refers to the commercial or other setting in which the contract was made. This provision is taken from Section 2302 of the United States Commercial Code and its importance is explained in the Official Comments to the section:

> "the basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."

The unconscionability or otherwise of a commercial transaction between commercial enterprises is not measured by the standards appropriate to consumer contracts. The American experience has been that commercial contracts are only rarely at risk. In *Re Elkins-Dell Manufacturing Co. Inc. 253 F.Supp. 864 (E.D. Pa. 1966)* a "grossly one-sided" financing arrangement had been found to be unconscionable. The District Court allowed the appeal and sent the case back to the referee because the commercial setting had not been considered. The Court added specific guidelines to assist the referee in deciding this question: the financial position of the debtor, the risks involved in the transaction, the availability of other sources of finance, the commercial needs of the particular trade and whether such harsh terms actually facilitate commerce by making funds available to risky debtors in addition to the possible effects which invalidating such an agreement would have on the financing opportunities of business in similar need. This however means that the debtor who is a poor risk is not protected by the legislation, when, as the common law and equity have long recognised, he is the typical person likely to be involved in an inequality of bargaining situation.

Goldring Pratt and Ryan in their article *"The Contracts Review Act (New South Wales) 4 Uni. N.S.W.L.J. Number 2 page 1"* say at page 5:

> " . . . 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. Justification for this hypothesis is provided by a recent decision of the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827.* 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):" see *[1978] 1 W.L.R. 856.*

However this attempt did not survive on appeal. The speech of Lord Wilberforce virtually emasculated the Act in relation to standard form contracts used between business entities when he said at page 843:

> "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, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

The class of beneficiaries under our legislation should not in the opinion of a majority of the Committee be limited in scope.

Prevention of Evasion of the Act

One matter which has caused this Committee concern is the effectiveness of clause 5 (1) to prevent evasion of the Act.

Peden in the Law of Unjust Contracts when commenting upon a simi provision in the New South Wales Act raised the possibility that stand form contracts could be drafted so as to ensure that the proper law the contract was not that of New South Wales (or in our case Sou Australia).

Davis in a note entitled *The Contracts Review Act 1980 (New Sou Wales) and the Conflict of Laws 54 A.L.J. 572* when adverting to t possibility said at page 572:

> "The 'proper law' of a contract is that system of law with wh it has its closest and most real connexion: *Bonython v. Comm wealth [1951] A.C. 201 at 219* per Lord Simonds. In the absence an express choice of proper law the courts determine the law considering a variety of matters. 'Of these, the principal are the pl of contracting, the place of performance, the places of residence business of the parties respectively, and the nature and subject-mat of the contract': *Re United Railways of the Havana and Re Warehouses Ltd. [1960] Ch. 52 at 91* per Jenkins L.J. It has a been said that a clause providing that disputes under the contr shall be settled (by arbitration or judicial process) in one partic place is a strong indication that the law of that place is the pro law: *Cie d'Armement Maritime S.A. v. Cie Tunisienne de Navigat S.A. [1971] A.C. 572 at 590* per Lord Morris of Borth-y-gest, and 600 per Lord Wilberforce."

While the South Australian bill has, unlike the New South Wales A to some extent tackled the second matter, namely where there i provision that proceedings are justiciable by the courts of some ot place (clause 5 (1) *(b)* (ii) and 5 (6)), the test of the closest and most r connexion is capable of causing difficulties. For example, the nexus the contract with Victoria could be established by arranging that buyer's offer was accepted by the supplier's susidiary company situa in Bendigo, that delivery took place at, the risk passed there, and p ments were made at the company's Bendigo warehouse.

It would appear that in such circumstances the contract may not covered by clause 5 (1) *(b)*, as there would be many matters which wo indicate that the proper law of the contract was in fact Victorian.

Davis (supra) when discussing this difficulty, suggested that it mi be preferable for the Contracts Review Act to provide that it applie all contracts in which one party resides in New South Wales (or in case South Australia).

Possibly this approach could be expanded by utilising section 4 of New South Wales Consumer Credit Act 1981 (which is in part of Act which has not yet been proclaimed). Thus, other nexus, such as delivery of goods for use in sale or bailment within the State, or the of credit facilities within the State could be provided for in the Act.

Also of interest in this regard is Section 27 (2) of the United Kingd Unfair Contract Terms Act 1977, which provides that the Act may ap notwithstanding any contract term which applies or purports to ap the law of some country outside the United Kingdom, where (eithe both):

> "*(a)* the term appears to the court, or arbitrator or arbiter, to h been imposed wholly or mainly for the purpose of enab the party imposing it to evade the operation of this Act;
>
> *(b)* in the making of the contract one of the parties dealt a consumer, and he was then habitually resident in the Un Kingdom, and the essential steps necessary for the makin the contract were taken there, whether by him or by ot on his behalf."

Largely as a response to Davis's comments cited above, this Committee has redrafted clause 5 (1) to include contracts where:

(i) one party resides in South Australia; or

(ii) there has been or is to be a delivery of goods for use, sale, lease or bailment within South Australia; or

(iii) the contract is one in which South Australian credit facilities are to be used to effectuate the contract; or

(iv) chattel security is to be given in South Australia.

The Committee draws to the attention of Parliamentary Counsel the necessity in its opinion for definitions of "chattel security" and "credit facilities"—both expressions used in clause 5—to be placed in the definition section—Section 3.

International Contracts

This Committee in its Forty-Third Report recommended that there be an ability to contract out of the provisions of the Contracts Review legislation in the case of international contracts. For a number of reasons the Committee has shifted slightly from this position, and now recommends that the legislation not apply at all to international contracts for the sale or supply of goods by a South Australian seller to an overseas buyer.

The Law Reform Commissions of England and Scotland expressed three basic reasons for this: first, because the question whether the buyer's rights were being unfairly excluded ought to be tested by the legal system of the country of destination rather than that of origin. Second, because cross-frontier traffic usually involved large transactions between business organizations well able to protect their own interests against unfair exemption clauses. (This may be true of member states of the European Economic Community. It is less true of Australia which is not part of a larger economic unit and has to compete on world markets against the dumping practices of competitors in other nations). Third, because without an exception for international sales the Act might penalize United Kingdom exporters by giving them a legal handicap not carried by their foreign competitors.

The New South Wales legislation is of no assistance on this question, due to the fact that it is not a matter that has had to be dealt with, as a result of the extremely narrow scope of the Act (to consumer contracts).

One further matter which the Committee believes should be dealt with arises from Section 32 (1) of the Sale of Goods Act. Section 32 (1) of the Sale of Goods Act provides:

> "Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is prima facie deemed to be a delivery of goods to the buyer."

As a result of this section it is possible that in some instances there could be held to be delivery from one place in Australia outside South Australia to another place outside South Australia. This possible difficulty could be circumvented by providing:

> "The presumption contained in Section 32 (1) of the Sale of Goods Act 1895 shall not affect the operation of this subsection."

As a consequence of these considerations, the Committee has redrafted clause 5 so as to make actual international contracts where the buyers are outside Australia totally exempt from the provisions of the Act. We have also added an extra sub-paragraph relating to the Sale of Goods

Act, on similar lines to that suggested above, in an attempt to deal wit problems that may have otherwise arisen as a result of the operation c Section 32 (1) of that Act.

"Unjust"

The Committee believes that there is considerable merit in attemptin to avoid unnecessary differences in terminology in the New South Wale and proposed South Australian legislation.

In this respect, the desirability of uniformity in the definition of whe constitutes "unjust" and "injustice" assumes particular importance. Thes are relatively new concepts or terms to the law, and it is important the a body of case law be built up as quickly as possible. Unless Sout Australia and any other of the Australian states which have or decide t introduce similar reforms keep to a reasonably uniform concept of whe is unjust, this may not be easily done, as case law which arises in on jurisdiction may not apply in other jurisdictions whose legislation is nc couched in the same or similar terms.

This, among other reasons discussed later in this report, has led th Committee to recommend the insertion of some further criteria in claus 8 of our projected Act for determining whether a contract is unjust. has also led the Committee to the conclusion that the definition c "unjust" in clause 3 should be slightly altered so as to accord with th definition provided in Section 4 (1) of the New South Wales Act.

The desirability of uniformity however is not the only factor whic has led the Committee to this view. The Committee also believes that is perhaps safer to avoid any confusion which may have otherwise arise from having the term "unjust" included in the definition of the wor "unjust".

A similar result to that intended: namely having a definition that wa wide enough to cover any situation which may arise, is reached by makir the definition inclusive in the manner used by the New South Wal draftsman. Section 4 (1) of the New South Wales Act provides:

> " 'unjust' includes unconscionable, harsh, or oppressive; an 'injustice' shall be construed in a corresponding manner."

A majority of this Committee recommends that this or a like provisic be adopted in the proposed legislation.

One member of the Committee would not have the concept of "unjus in the bill at all.

Contract or part of Contract

The Committee recommends that it be put beyond doubt that for th powers under this Act to be exercised it is sufficient for the Court t find that a provision of the contract is unjust. Although this may be sel evident, due to the power in clause 6 (1) *(d)* to vary the terms of th contract, the Committee believes that some uncertainty could arise. It made quite clear in the New South Wales legislation.

As a result of this recommendation, the Committee has added to th word "contract" at various places in the bill the words "or provision c a contract".

Criteria for determining whether the contract is just

The Committee has added to and to some extent re-arranged th criteria for determining whether a contract is unjust set out in clause 8

Clause 8 (1) *(b)* (ii) is drawn from New South Wales section 9 (2) *(b* While negotiations were mentioned in the 1978 Bill, the Committe believes that the matter should be dealt with separately as it is a

important factor. Standard form contracts are of course typical examples where little or no opportunity for negotiation is provided for the weaker party.

The fact that negotiations did take place would not necessarily mean that relief would not be available, as the nature of the negotiations would also be a relevant factor to be taken into account. *Peden in the Law of Unjust Contracts* when discussing Section 9 (2) *(b)* of the New South Wales Act at page 125, suggests that where the negotiations took place some time prior to the making of the contract and allowed due time for reconsideration, it should be more difficult to attack the contract as unjust than if the negotiations took place immediately prior to the making of the contract, or there were no negotiations. This however is an inexact test given the wide areas of Australia and the slowness of postal delivery.

Clause 8 (1) *(b)* (iii) is drawn from New South Wales clause 9 (2) *(c)*. This was inserted with the view of covering contracts of adhesion, where the stronger party is in a position to say "if you want these goods, these are the only terms on which they are obtainable. Take it or leave it"—see the speech of Lord Diplock in *A. Schroeder Music Publishing Co. Ltd. v. Macaulay [1974] 1 W.L.R. 1306 at 1316.*

Clauses 8 (1) *(b)* (iv) and (v) are merely an expansion of present clause 8 (1) *(b)* (iv) and follow New South Wales section 9 (2) *(h)* and *(i)*.

Clause 8 (1) *(b)* (vii) is taken from Section 9 (2) *(j)* of the New South Wales Act. In providing for undue influence the Committee was largely convinced by the explanation of the New South Wales provision given by *Peden in the Law of Unjust Contracts at page 136* when he said:

> "This criterion includes the central concept of undue influence which at general law embraces cases of (i) actual domination and presssure (e.g. *Symons v. Williams (1875) 1 V.L.R. (Eq.) 199*; *Smith v. Kay (1859) 7 H.L.C. 750)* as well as (ii) presumed undue influence arising, for example, from a fiduciary relationship between the parties such as parent and child: *Bainbrigge v. Browne (1881) 18 Ch.D. 188*; solicitor and client *Wright v. Carter [1903] 1 Ch. 27*, physician and patient *Mitchell v. Homfray (1881) 8 Q.B.D. 587*, spiritual adviser and advisee: *Allcard v. Skinner (1887) 36 Ch.D. 145*, *Chennells v. Bruce (1939) 55 T.L.R. 422*, but not between employer and employee, or landlord and tenant: *Mathew v. Bobbins (1980) noted 54 A.L.J. 744.*
>
> However, taken alone, the common law doctrine of undue influence has been somewhat restricted in practice to well known situations recognised by the case-law. Accordingly the Peden Report recommended the insertion of an additional phrase "unfair pressure", to which has also been added the term "unfair tactics". These additions will enable the court to take cognizance of pressure and tactics applied outside the recognised fiduciary relationships, for example, high pressure selling techniques and psychological pressure arising out of personal, social, political or religious sensibilities.
>
> Subclauses (ii) and (iii) will cover cases of actual or ostensible authority where pressure is exerted by an employee or agent of one party to a contract or by an employee of an associated but separate corporation."

Clause 8 (1) *(b)* (ix) is derived from New South Wales Section 9 (2) *(d)* (xi) and introduces two important elements of sustantive unfairness. The two limbs of subclause (ix) operate independently: they are linked by "or" not "and", and in some cases a condition unreasonably difficult to comply with may be justified as being reasonably necessary for the protection of legitimate interests.

It is envisaged by the Committee that extraneous changes in circumstances rendering conditions of the contract difficult to comply with would not render the contract unjust unless they were reasonably foreseeable at the time the contract was made. These would be more easily taken care of in our recommendations in the Seventy-First Report on frustrated contracts.

The criteria relating to conditions which are not reasonably necessary for the protection of the legitimate interests of a party contemplate a balancing of the protection of the legitimate interests of all parties to the contract.

Peden in his text gives the following examples of conditions which may be held to be not reasonably necessary and possibly also unreasonably difficult to comply with at page 128:

"*(a)* stipulations of short time limits or other strict pre-conditions to bringing of claims or causes of action under contract, including arbitration clauses. These are typical in insurance contracts (But with respect to arbitration clauses see Section 24a of the South Australian Arbitration Act 1891);

(b) exemption clauses of unnecessary breadth;

(c) acknowledgment or counter promise clauses in standard form consumer contracts whereby, for example, the consumer is required to warrant that there have been no prior representations made by the seller, or that the buyer has fully inspected the goods, or by a proponent for insurance that the answers to questions—even where immaterial to the risk—shall form the basis of the contract;

(d) penalty provisions which impose additional obligations upon a party for breach which are wholly disproportionate to the loss or damage caused by the breach;

(e) standard contract clauses in air tickets giving the airline the right to cancel any ticket even though the scheduled flight is not cancelled."

In redrafting the criteria in clause 8 the Committee have, wherever it was thought appropriate, drawn from the New South Wales legislation. This was to ensure that so far as possible there is uniformity as to the criteria used to determine whether a contract is unjust in the relevant Australian jurisdictions.

Arrangements

A further matter which is dealt with in the New South Wales Act, but not this Bill, is collateral arrangements.

Section 15 of the New South Wales Act provides—

"In any proceedings in which relief under this Act is sought in relation to a contract, the Court may if it thinks proper to do so in the circumstances of the case, and it is of the opinion that the contract forms part of an arrangement consisting of an inter-related combination or series of contracts, have regard to any or all of those contracts and the arrangement constituted by them."

This section enables the Court, in considering a particular contract which is the subject of an application for relief, to take into account any larger scheme or arrangement of which the particular contract forms part or to which it is related. Thus the Court may examine the other related contracts for the purpose of determining whether the particular contract is, in the circumstances, unjust.

This appears to be a useful provision and as a result the Committee

has drafted a clause in similar terms, which has been placed at the end of clause 8 (1) *(b)* (viii).

Unjust Exercise of rights and powers under the Contract

Angelo and Ellinger in an article entitled *Unconscionable Contracts—A Comparative Study 4 Otago L.R. 300* suggest that contracts review legislation should incorporate a recommendation made by the New Zealand Contracts and Commercial Law Reform Committee in their 1977 Report relating to Credit Contracts.

In that report it was recommended that relief should be available where there is a harsh and unconscionable exercise of rights conferred by clauses which in themselves may be unobjectionable. The Committee had recommended that a section along the following lines be enacted:

> "Where it appears to the Court that a financier under a credit contract has exercised or intends to exercise in a harsh and unconscionable manner:
>
> *(a)* Any power of forfeiture of property; or
>
> *(b)* Any power of sale of property; or
>
> *(c)* Any power to take possession of property; or
>
> *(d)* Any right conferred on the financier in the credit contract,
>
> then, in any such case, the Court may grant relief under this Act."

Angelo and Ellinger recommended that a similar type of provision be introduced with the required modifications, in a general Act concerning unconscionability.

The Committee can see the usefulness of such a provision, and recommends that a provision along the following lines be adopted:

> "(1) Where upon any intended sale forfeiture seizure or possession of property, it appears to the Court that a party to the contract has exercised or intends to exercise any power or right under a contract in a manner which is unjust the Court may grant relief by (inter alia) making orders which ensure that the powers and rights under the Act are exercised justly.
>
> (2) This section does not apply to any rights exercisable by a receiver or a receiver and manager under any debenture or any order of a Court."

Joining other Transactions

The Committee sees many advantages in the Court having power to join other transactions in the same proceedings. Where a number of contracts, arrangements or other types of transactions are in some way related, it may prove less time-consuming, and less confusing, if all matters are dealt with at once. This would be especially so in the case of a string of contracts, where it should be possible to deal with the head contract, the final contract and any contract in between at the same time.

For example, if A places an unjust exclusion clause into his contract of sale with B and B resells the goods to C with the same or a different unjust exemption clause, it should be possible to deal with both contracts in the one proceeding and modify both clauses.

Such a power could also prove useful where A has contracted with B, C and D on identical unjust terms.

The Committee notes that the Papua-New Guinea Law Reform Commission in their 1977 report relating to Fairness of Transactions recommended that the Court have power to join other transactions, and we make a similar recommendation.

We recommend a provision along the following lines:

10. "Where in any proceedings under this Act it appears to the Court that it is desirable that some other transaction should be dealt with in the same proceedings or at the same time as the original proceedings, the Court may order that the other transaction be so dealt with."

String Contracts

One matter which does not appear to have been dealt with in any of the other jurisdictions which the Committee has examined is the effect of the legislation on a string of contracts, where one or more of the contracts were made and performed interstate.

While the Court will presumably be able to deal with a string of contracts made within the State by joining transactions and parties to the proceedings, this will not necessarily be so when some of the string of contracts were made and are to be performed wholly or partially interstate. For example, it is envisaged that problems could arise where a manufacturer in Victoria contracts on unjust terms with a South Australian retailer, and the retailer brings the goods to South Australia and contracts on identical or similar unjust terms with consumers within the State.

In the Committee's view it would be most unsatisfactory if the Court could grant relief to the customer against the retailer, but that the retailer would be left with no recourse against the manufacturer.

The committee has already recommended that the Court have power to join transactions into the one proceeding and we hold the view that this should be so even where one or more of a number of related transactions happens to have been made and performed wholly or partly interstate.

Thus, in the above example, the consumer would make an application for relief against his contract with the retailer, and the Court at the behest of the retailer could join the interstate manufacturer and deal with both contracts at the same time.

The Committee acknowledges that to deal with these types of situations the legislation would affect contracts that may not be directly connected with South Australia. However, we believe that in this particular instance it is desirable that Courts be empowered and be prepared to deal with and settle the rights of all parties inter se if the contract originally sued on is within jurisdiction. In effect, as with Order 11, the added party is joined because he is a necessary and proper party to proceedings properly brought within the jurisdiction.

That there is power to do this is evident from the judgment of Evatt J. in *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation (1933) 49 C.L.R. 220*, where he said at page 240:

"(1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law. (2) The presence of such non-territorial elements may however call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the 'peace, order and good government' of the Dominion—The words employed in the constitutional statute to define and limit the legislative power. (3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case. (4) The test is not quite, as Sir John Salmond suggested, whether the law is a 'bona fide exercise of the subordinate legislative power' (Law Quarterly Review, Volume 33 page 122), because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts. (5) The

test is whether the law in question does not in some aspects and relations, bear upon the peace, order and good government of the Dominion, either generally or in respect of specific subjects. (6) If it does not bear any relation whatsoever to the Dominion, the Courts must say so and declare the law void. If it bears any real or substantial relation, then it is a law for the peace, order and good government of the Dominion. (7) In the latter event, it may still be ultra vires and void where the legislature of the Dominion has only power to legislate, under its controlling Constitution, with respect to certain matters . . . ".

For "Dominion" in Evatt J.'s statement of the law, substitute "State" for the purposes of this Report.

It is further clear from the judgment of Dixon J. in *Barcelo v. Electrolytic Zinc Co. of Australasia Ltd. (1932) 48 C.L.R. 391* that South Australian Courts will not be empowered to deal with those extraterritorial contracts, unless the legislation makes it clear that they may do so.

As a result the Committee recommends that the proposed legislation empower the Court to deal with certain contracts which have been made and performed interstate.

The following provision is put forward by the Committee as clause 11:

"When—

(a) an application has been made pursuant to this Act with respect to a contract; and

(b) there is another contract relating to the same subject matter which does not come within Section 5 (1) of this Act, and of which the proper law is that of another State or Territory of Australia; and

(c) it is necessary in order to do justice that the Court have all necessary and proper parties before it,

then the Court may upon application grant relief with respect to such other contract (or contracts) as are referred to in subclause *(b)* hereof as it deems just."

The Committee has considered whether such a provision as this, and indeed the Act generally, would run counter to Section 92 of the Australian Constitution. We feel that it would not be impugned on this ground as a result of High Court decisions such as *Samuels v. Reader's Digest Association Pty. Ltd. (1969) 120 C.L.R. 1* which distinguish between prohibitory and regulatory legislation governing interstate trade.

The proposed legislation in providing a remedy for unjust contracts in our view can be regarded only as regulating trade between the States and not as prohibiting it.

General Orders in Relation to Unjust Contracts

The only possible avenue for dealing with persistent conduct which is likely to mislead the consumer is through clause 12 of the Bill, which empowers the Supreme Court to restrain a person from entering into contracts of a specified class or to restrict the terms on which he may do so. However it is unlikely that this clause would be of assistance in some situations as the Court must be satisfied that the person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts. In some of the situations which arise however, it will not be the terms of the contract itself which will be unjust, but rather conduct which misleads persons as to their legal rights under that contract.

Parliamentary Counsel will have to consider the interaction of this clause and the provisions of Section 52 of the Commonwealth Trade Practices Act.

While Section 10 of the New South Wales Contracts Review Act is in identical terms to clause 12 of the South Australian Bill, Sections 15 and 16 of the Victorian Market Court Act 1978 are drawn in wider terms to cover such conduct. Section 15 provides:

> "15. (1) Where it appears to the Director that a trader has in the course of a business repeatedly engaged in conduct that is unfair to consumers the Director may make an application in the prescribed form to the Court for an order under Section 16 (1) and, if the Director thinks fit, for an order under Section 16 (2) in respect of that trader.
>
> (2) For the purposes of this section conduct shall be deemed to be unfair to consumers if—
>
> *(a)* it is misleading;
>
> *(b)* by means of it the trader takes advantage of the consumer, having regard to the consumer's age, experience, means or needs;
>
> *(c)* it consists of offering to enter into or entering into a contract with a consumer the terms or conditions of which (whether as to consideration or otherwise) are such that no reasonable person would regard as just;
>
> *(d)* it consists of anything done or omitted to be done in breach of contract, whether or not civil proceedings, in respect of such breach have been brought; or
>
> *(e)* it consists of a contravention of any enactment which imposes duties, prohibitions, or restrictions in respect of the carrying on of a business, whether or not proceedings in respect of such contravention have been brought."

Sections 16 (1) and (2) provide:

> "16. (1) Where the Court is satisfied that a trader has repeatedly engaged in unfair conduct within the meaning of Section 15, it may make an order prohibiting the trader from engaging in such conduct.
>
> (2) In addition to making an order under subsection (1), the Court may, if it appears to it desirable to do so, (on application made by the Director or without any such application) make an order prohibiting the trader from entering in the course of a business into contracts with consumers unless the contracts are in such form or comply with such terms and conditions as the Court may specify."

This Committee is of the view that it is desirable that the Court have the power to regulate the conduct of persons who deliberately set out to deceive their contractual partners as to their rights under that contract. It would seem sensible that such a power be included in clause 12, and as a result the following clause has been drafted:

> "12. Where the Supreme Court is satisfied, on the application of the Attorney-General that a person:
>
> *(a)* has embarked, or is likely to embark, on a course of conduct leading, or likely to lead, to the formation of unjust contracts; or
>
> *(b)* has repeatedly engaged in conduct relating to contracts which is calculated to deceive, mislead, or intimidate the other party or otherwise to lead to unconscionable harsh or oppressive results,

Stamp Duty

One further way in which the New South Wales Act differs from the South Australian Bill is that it includes a provision with respect to stamp duty.

Section 20 provides:

"(1) No duty is payable under the Stamp Duties Act 1920 in respect of:

(a) an instrument executed pursuant to an order under section 7 (1) *(d)*; or

(b) a disposition of property made pursuant to an order under clause 1 of Schedule 1.

(2) Where the Court makes an order under section 7 in relation to a contract, it may order the refund of the whole or any part of the duty paid under the Stamp Duties Act, 1920, in respect of the contract or any instrument executed consequent on the execution of the contract, and any amount to be so refunded shall be payable by the Treasurer from money provided by Parliament."

This section is intended to ensure that no liability for additional stamp duty is incurred as a result of the making of orders under the Act.

Peden in the Law of Unjust Contracts at pages 156-157 explains the types of situation in which Section 20 may be utilized:

"*(a)* Where a contract of sale of property liable to stamp duty has not been completed and the Court orders it to be wholly cancelled, the Commissioner of Stamp Duties will refund any stamp duty previously paid provided application is made within twelve months: Stamp Duties Act 1920 section 41 (7). The court also has power to order a full refund under section 20 (2) of the Contracts Review Act.

(b) Where a land instrument (e.g. transfer, mortgage or lease) stamped with New South Wales stamp duty and registered under the Real Property Act 1900 is held to be unjust, the Court could order under section 7 (1) *(d)* the execution of a subsequent instrument to vary, terminate or otherwise affect the registered instrument. This subsequent instrument is specifically exempted from duty by section 20 (1); and, where appropriate, the Court could also order under section 20 (2) the refund of the whole or part of the duty paid in respect of the original contract and/or instrument.

(c) Where the court ordered the consideration paid or payable under a contract to be reduced, it would be appropriate to add an order under section 20 (2) that the liability for stamp duty be reduced to that applicable to the lesser consideration, section 20 does not impose or authorize the imposition of additional duty. Under the Stamp Duties Act, 1920, "conveyance" is defined in Section 65 to include an order whereby any property in New South Wales is transferred or vested in or accrues to any person. However, an order increasing the consideration under an existing contract does not convey any property: *Commissioner of Stamp Duties v. Yeend (1929) 43 C.L.R. 235, c.f. Sun Alliance Insurance Ltd. v. Inland Revenue Commissioners [1971] 2 W.L.R. 432.* It is therefore doubtful if additional duty could be collected in respect of an order made subsequent to stamping of the contract and transfer, since the liability to duty arises upon the first execution of the contract in its original form. . . .".

However a reconveyance of property on terms would most probably be stampable as would a variation in security provisions.

The Committee is of the opinion that a similar provision with respect to stamp duty would be useful in the Contracts Review Bill, and has therefore drafted an appropriate clause which has been inserted in the Bill to become clause 6 (4).

One member of the Committee considers that where any order of the Court creates a new obligation which if contained in a document would attract stamp duty, the same amount of stamp duty should be payable on any document drawn to give effect to the order.

Consumer Credit Contracts

In our Forty-Third Report, this Committee recommended the repeal of Part VI of the Consumer Credit Act 1972 which relates to harsh and unconscionable terms. It was at that time believed that the terms of the Contracts Review Act would adequately cover harsh, unconscionable or oppressive terms in credit contracts. Therefore it was with interest that we examined subsequent New South Wales legislation which in the Contracts Review Act 1980 dealt with unjust contracts generally and in the Consumer Credit Act 1981 dealt specifically with unjust credit transactions. The significance of this finding is lessened by the fact that some parts of the Consumer Credit Act (including the relevant provisions) have not yet been brought into operation. However, this has led to the Committee re-examining its stance with respect to credit contracts. It may well be that some provisions dealing specifically with credit contracts should be placed in the legislation. This appears to be the view taken by the Select Committee of the House of Assembly reporting on the Contracts Review Bill in 1979. The Committee said at page 8:

> "The Committee accepts that the Tribunal should continue to have power to look into credit contracts alleged to be unjust and recommends that the Credit Tribunal be given original jurisdiction under the Contracts Review Act with respect to credit contracts to which section 46 now applies. All of the Tribunal's powers under section 46—including the power to look specifically at excessive credit charges—should be preserved in the Tribunal's Credit Review Act jurisdiction and section 46 itself should then be repealed.
>
> This Select Committee did not make any further recommendations in this regard being of the view that the Credit Tribunal could have a parallel jurisdiction over unjust contracts until the proposed overhaul of the Consumer Credit Act 1972."

Repeal of Section 22 (1) of the Consumer Transactions Act

Section 22 (1) of the Consumer Transactions Act provides that the Tribunal may upon the application of a consumer, avoid or modify any term or condition of a consumer lease that is harsh or unconscionable, or such that a Court of Equity would give relief.

In order to prevent any unnecessary overlap between provisions granting relief from the unjust terms of contracts the Committee recommends that Section 22 (1) of the Consumer Transactions Act be repealed. While we have recommended that special provisions be placed in the Contracts Review Act to cover applications which would presently be made pursuant to Section 46 of the Consumer Credit Act, we are of the view that no such special provision need be made with respect to Section 22 (1) of the Consumer Transactions Act. (See draft bill attached, providing for the repeal of Section 22 (1)).

the Court may make an order prohibiting that person from engaging in such conduct and may prohibit that person form entering into contracts unless the contracts are in such form or comply with such terms and conditions as the Court may specify."

One member of the Committee is of the opinion that the right to bring proceedings under this Section should be vested in the Commissioner for Consumer Affairs and not the Attorney-General.

Time for making Application for Relief

One area in which the proposed legislation differs from the New South Wales Act and the recommendations of other law reform agencies, is in relation to the time limits for making an application for relief.

The Bill contains no precise time limit for the bringing of applications. Clause 6 (8) provides that the Court must be satisfied:

"*(a)* that 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."

In comparison, Section 16 of the New South Wales Contracts Review Act provides:

"An application for relief under this Act in relation to a contract may be made only during any of the following periods:

(a) the period of two years after the date on which the contract was made;

(b) the period of three months before or two years after the time for the exercise or performance of any power or obligation under, or the occurrence of, any activity contemplated by, the contract; and

(c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross-action or otherwise) that are pending against the party seeking relief under this Act."

The Law Reform Commission of Papua-New Guinea in their 1977 report relating to fairness of transactions recommended the imposition of a three year limitation period on proceedings under the Act, and also recommended that further applications be allowed concerning the same transaction if new circumstances arise not later than three years after the date of any order made under the proposed legislation. The 1977 Report of the New Zealand Contracts and Commercial Law Reform Committee relating to Credit Contracts recommended the inclusion of a time limit of twelve months from the discharge of the contract, but with the Court having the power to extend time. Our own Consumer Credit Act, of course, provides in Section 46 (5) a time limit of six months.

While the Committee notes this general trend towards precise time limits, it recommends that the present provision should be maintained. Limitation periods are notorious for creating injustices, and in this instance it is recommended that the matter be left in the discretion of the Court. Due to the requirements in clause 6 (8) that the Court be satisfied that the proceedings were commenced as soon as practicable, and that it is reasonable in the circumstances to entertain the proceedings notwithstanding that the contract has been fully performed, applicants for relief under this Act are unlikely to be unduly favoured as a result of this provision, as opposed to a fixed period for the making of applications.

Courts which may grant relief under the Act

A majority of the Committee is concerned over the confusion which may result from the comparatively large number of Courts which may grant relief under the Act, and especially the fact that in some instances there is concurrent jurisdiction over contracts.

This aspect of the 1978 Bill has been criticized from a number of sources. For example, David Quick in a paper delivered to the Industrial Relations Society in 1978 when commenting upon the Contracts Review Bill pointed out at pages 14-15:

> "Different considerations apply to litigation in Civil Courts and in the Industrial Court. For example, the laws of evidence may or may not be applied by the Industrial Court—depending upon the circumstances. This is not the case in a Civil Court. The Industrial Court may refrain from further hearing and application on the ground of public interest. This is not the case with a Civil Court. These two examples illustrate the fact that a different result might be obtained in the same matter depending upon which forum was chosen by the applicant. This is not desirable.
>
> Another matter of some consequence pertaining to the jurisdiction issue, is that of legal costs. Although in the Supreme Court and the Local Court costs are in the discretion of the trial judge, in the main, (and in the case of the Local Court in the absence of a contrary direction) costs are awarded to the successful party. The practice of the Industrial Court of South Australia in the exercise of other than Workmen's Compensation jurisdiction has, however, been to award costs to the successful party only in very rare circumstances ..... It is submitted that the practice and procedure of the Industrial Court, and the fact that costs are unlikely to be awarded against an unsuccessful applicant, will very much appeal to many applicants. The same features and in particular the costs aspect of the matter, may well give a potential defendant an interest in seeing that the proceedings are heard elsewhere. Accordingly, it is likely that there will still be many arguments as to whether or not the matter is an "industrial matter". There is considerable scope for a defendant to exhaust the funds of his opponent by arguing this preliminary point and if needs be, appealing in relation to it. This is very much against the spirit of the legislation".

It should be added at this stage that the last comment made by Quick relating to an appeal is no longer true as a result of clause 16 (3) which provides that no appeal lies against a decision of a court to transfer, or not to transfer, proceedings.

Jurisdiction

The question of what courts should have jurisdiction under the proposed legislation divided the Committee and it was thought proper to give both views and the reasons for them.

The majority view was that the Supreme Court, a Local Court within the limits of its jurisdiction and the Industrial Court in the cases set out in their reasons should have jurisdiction to grant relief under this Act.

Their reasons for so thinking are as follows:

1. The jurisdiction will largely be exercised with a commercial background even in cases with some industrial element. The prime requisite of all commercial law is certainty. This can only be obtained by a vesting as advocated above.

2. The jurisdiction will in many cases interfere with the rights of parties who are interstate or in some cases overseas. Such parties are entitled to be heard in a Court ordinarily dealing with contract jurisdiction.

3. The jurisdiction will in many cases arise in an Order 10 or Order 14 situation, or the equivalent of the latter in the Local Court (assuming the former is not comprehended in the "catch-all" rule at the end of the Local Court rules) and should be dealt with against that background in the ordinary civil courts.

4. The jurisdiction will in many cases bear on the construction of many agreements in common form and will not be part of what might be loosely described as an industrial argument.

5. If jurisdiction is confined to one court or set of courts there is no likelihood of conflicting interpretations adversely affecting the certainty of commercial rights and practices.

6. It is important in a new jurisdiction such as this that there be an authoritative exposition of the sections of the new Act as soon as possible and this can only occur in the Supreme Court either at first instance or on appeal from a Local Court.

7. The Industrial Court should have jurisdiction only in cases where the contract in relation to which the application is made is either:
   (a) an industrial agreement approved by the Industrial Commission under the provisions of Part VIII of the Industrial Conciliation and Arbitration Act 1972; or
   (b) an agreement relating to an award made under that Act; or
   (c) the subject of proceedings already pending in that Court before any relief is sought under the provisions of this Act.

8. In cases where the Industrial Court exercises jurisdiction under this Act, any order so made should, notwithstanding the provisions of Section 92 of the Industrial Conciliation and Arbitration Act, be appealable to the Full Supreme Court.

The minority would give a general jurisdiction in industrial matters as defined in the Industrial Conciliation and Arbitration Act 1972 to the Industrial Court and Commission and in consumer matters to the Commercial Tribunal.

They state their reasons as follows:

1. The Law Reform Committee has been asked by the Honourable the Attorney-General to prepare an updated report on legislation to give effect to the review of unfair contracts. The Committee has been asked to give its report "bearing in mind the extensive debate and comment that ensued when a Bill for a Contracts Review Act was last introduced in the South Australian Parliament—including the report of the Select Committee of the House of Assembly on the Contracts Review Bill 1977".

2. The Bill for a Contracts Review Act referred to in the preceding paragraph contained provisions for concurrent jurisdiction to be exercised by the local courts, the Supreme Court, the Industrial Court and the Credit Tribunal.

3. The present report proposes that the only courts to have jurisdiction under the legislation are to be the local courts of full and limited jurisdiction (within their jurisdictional limits) and the Supreme Court.

4. The recommendation in the report therefore divests the Industrial Court and the Credit Tribunal of jurisdiction under the proposed legislation.

5. The report of the Law Reform Committee expresses concern over concurrent jurisdiction existing in respect of the "comparatively large number of courts which may grant relief under [the proposed legislation]". The report then refers to come comments made by David Quick in a paper delivered to the Industrial Relations Society with reference to the report of the Select Committee. It should be noted that the Bill that David Quick had under consideration did not contain any provisions permitting an appeal to the Supreme Court and that his comments were directed to the virtues of the Industrial Court's jurisdiction and the desirability of avoiding litigation on an industrial matter in a "cost" jurisdiction.

6. Also, in that context, it is important to bear in mind the comments made by the former President of the Industrial Court to this Committee during its consideration in 1978 of the Contracts Review Bill. In speaking about the jurisdiction given to the Industrial Court over contracts of employment the President referred to the manner in which the jurisdiction was being exercised in these terms:

> "This has now become an important jurisdiction within the Industrial Court and is readily availed of because claims are heard quickly, it is a no cost jurisdiction, and parties may be represented either by an agent or by counsel at their option.
>
> Based upon this experience and my knowledge of the attitudes of parties in the industrial environment I think that any proposal not along the general lines of the New South Wales approach will inevitably throw up the practical end result that industrial type contracts will simply not be reviewed. Even given the alternate suggestion which you proffered, the idea of first going to either the Supreme Court or the intermediate court and then having a matter referred would be enough to frighten off most unions and other potential parties to an industrial contract."

7. Clause 14 of the Bill for a Contracts Review Act which was last introduced in the South Australian Parliament provided for an appeal from the Industrial Court to the Full Court of the Supreme Court on any question of law arising from the provisions of the proposed Bill. In view of the fact that the Industrial Commission has recently been given jurisdiction in unfair dismissal cases which may give rise to questions that fall within the purview of any unfair contract terms legislation, it is noted that Section 102 of the Industrial Conciliation and Arbitration Act, 1972 permits the Commission to refer questions of law to the Industrial Court for determination.

8. The Credit Tribunal has been replaced by the Commercial Tribunal (see Statutes Amendment (Commercial Tribunal—Credit Jurisdiction) Act, 1983 which was proclaimed on 1st March, 1984. The Commercial Tribunal Act, 1982 by Sections 19 and 20, confers power upon the Commercial Tribunal to state a case on a question of law and a right of appeal to the Supreme Court. The Tribunal is to be constituted by a District Court Judge or a person qualified for appointment as a District Court Judge.

9. The effect of the appeal provisions is to confer an ultimate supervisory function on the Supreme Court in respect of questions of law arising under the proposed legislation.

10. It would appear that the position has not really changed as far as the industrial jurisdiction or credit tribunal's jurisdiction is concerned since the reports of the Select Committee and this Committee were made. Indeed no alteration has been made to the position in New South Wales consequent upon the enactment of the Contracts

Review Act, 1980 of that State. That Act does not affect the jurisdiction in industrial matters conferred by Section 88f of the Industrial Arbitration Act of that State which provides similar remedies to the Contracts Review Act, 1980 (New South Wales). Therefore, there does not appear to be sufficient justification to reverse the basic premise of those reports that the jurisdiction be exercised concurrently.

11. The reasons for vesting a concurrent jurisdiction in the Industrial Court, Industrial Commission and the Commercial Tribunal, may be summarised as:

    (a) These tribunals are specialist in their function. The essence of the unfair contract terms legislation is to determine the justness of a contract by reference to the circumstances in which it was made. Specialist tribunals are in the best position to do this.

    (b) To remove portion of a specialist tribunal's jurisdiction and vest it exclusively in the common law courts will impair the functioning of such tribunals and create jurisdictional disputes. In the particularly sensitive area of industrial relations such an impairment cannot be expected to receive support from a significant section of the community.

    (c) What is said to be the problems of concurrent jurisdiction can be largely overcome by the provision of a right of appeal on a question of law to the Supreme Court. That will place that body in the position of ultimate arbiter as to the matters which affect the exercise of the discretion under the legislation.

    (d) No new experience, development or reason has been advanced to depart from the considered views of the Select Committee and the report of the former Law Reform Committee on this topic (see e.g. minutes of Law Reform Committee 29 May, 1978 where King J. (as he then was) referred to the matters in *(a)* above as support for the specialist tribunals having this jurisdiction).

Summary

In summary, a majority of the Committee agrees with the general concept of the Bill, being of the belief that the proposed legislation is a more satisfactory method of dealing with the problem than either trusting that the matter will eventually be resolved by the Courts, or taking a piecemeal approach, as in the United Kingdom where only the specific problem of exemption clauses has been tackled by the Unfair Contract Terms Act 1977.

The Committee believes that the wide scope of the Bill should be retained, and that it is just as important for contracts entered into by businessmen to be covered as it is for consumer contracts to be covered. While not inserting such a restriction in the draft bill, the Committee points to the original draft in New South Wales by Peden which excludes the Crown and public corporations, if it is finally decided to put some limitation on scope.

The Committee has slightly altered the definition of "unjust" being of the view that there would be an advantage if, in this matter at least, there is consistency with the New South Wales legislation, and also that it is possible that some confusion may have arisen over the meaning of the previous definition.

The Committee has also at various places throughout the Bill where the word "contract" has appeared, added the words "or provision of a contract" to clear up any difficulty which may have otherwise arisen.

The criteria listed for determining whether a contract is unjust have been added to and rearranged. To a large extent this was as a result of criticisms from various writers that not enough weight was being given to substantive matters when a decision as to injustice was being made. Extra criteria were added in the attempt to make the task of the Court as clear as is practical. Also, some consideration was given to the desirability of having reasonably similar concepts of "unjust" in Australian jurisdiction. As a result we have drawn what we have thought to be appropriate from the criteria laid down in the New South Wales Contracts Review Act.

Provision has been made for the Court in determining whether a contract is unjust to take into account any arrangement which may exist consisting of an inter-related combination or series of contracts.

We have inserted a provision which allows the Court to grant relief in certain cases where a party to a contract has exercised or intends to exercise any power or right under a contract in a manner which is unjust.

Provision has been made for the joining of other transactions in the same proceedings. Also provision has been made for the Court to give relief from contracts made and carried out interstate where that contract is part of a "string" of contracts, one of which is subject to an application under the Act.

The Committee has recommended that the situations in which the Court may make general orders be expanded so as to include the case where a person has repeatedly engaged in conduct relating to contracts which is calculated to deceive, mislead or intimidate.

Also the Committee has placed a provision in the Bill dealing with the non-payment of stamp duty when property is returned or reconveyed, or a security rearranged, pursuant to an order of the Court.

The Committee has recommended that Section 22 (1) of the Consumer Transactions Act 1972 be repealed.

Primarily in order to ensure uniformity in application of the Act a majority of the Committee has recommended that only the Supreme Court, the Local Court and the Industrial Court in the cases mentioned, have jurisdiction to grant relief under the Act. The minority would grant a wider jurisdiction to the Industrial Court and Commission and to the Commercial Tribunal.

In conclusion the Committee is of the view that the Contracts Review Bill with the modifications recommended in this report is both a desirable and workable reform and hence recommends the enactment of legislation following in general the form of the draft attached to this report.

We have the honour to be:

HOWARD ZELLING

CHRISTOPHER J. LEGOE

M. F. GRAY

G. HISKEY

Law Reform Committee of South Australia.

10 August 1984.

Mr. Justice White, Mr. Wicks and Mr. Detmold were absent when this report was signed. The views of Mr. Wicks are set out at page 3 of this report. Mr. Wicks returned from leave too late to raise the other points which he would have wished to discuss.

Mr. Justice White and Mr. Detmold support the conclusions of the report.

Mr. P. R. Morgan did not sign the report.

DRAFT BILL FOR A CONTRACTS REVIEW ACT

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

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 1984".

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

3. In this Act, unless the contrary intention appears:

"interest" includes an interest as assignee, transferee, mortgagee, chargee, or donee, and "interested" includes the same meaning:

"unjust" includes unconscionable, harsh or oppressive, and "injustice" shall be construed in a corresponding manner.

4. This Act binds the Crown.

5. (1) This Act applies, subject to the provisions of this section, to all contracts:

(a) where:

(i) one party resides or carries on business in South Australia; or

(ii) there has been or is to be delivery of goods for use, sale, lease or bailment within South Australia;

(iii) the contract is one in which South Australian credit facilities are to be used to effectuate the contract; or

(iv) chattel security is to be given in South Australia; or

(b) where South Australian law is the proper law of the contract, or 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 in the courts of some other places.

(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 by agreement after the commencement of this Act, this Act applies, subject to the provisions of this section, to the contract with the following qualification:

(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) *(a)* This Act does not apply to a contract where:

(i) the contract is for the sale or supply of goods;

(ii) a party to the contract is not carrying on business in Australia; and

(iii) the goods are delivered or are to be delivered

(A) from a place outside Australia directly to a place within Australia,

(B) from a place within Australia directly to a place outside Australia: or

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

(b) Subclause *(a)* hereof does not apply to any ancillary contract to be performed wholly within Australia.

(c) The presumption contained in Section 32 (1) of the Sale of Goods Act 1895 shall not affect the operation of this subsection.

(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 relevant 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 an award arising from an arbitration is by the terms of the contract a condition precedent to any cause of action arising under the contract; or

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

(7) Any proceedings claiming relief under any provision of this Act may by leave of the Court be served on any defendant who is outside the State of South Australia.

(8) Any person whose interests may be affected by any order sought to be made under the provisions of this Act has standing to apply to be joined as a party to the litigation and to be heard by the Court.

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

(a) that a contract or a provision of 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) (a) No stamp duty is payable under the Stamp Duties Act 1923 in respect of any return or reconveyance of property or any related matter ordered pursuant to this Act.

(b) Where the court makes an order under this Act it may order the refund of the whole or any part of the duty paid under the Stamp Duties Act 1923, in respect of a contract or any other instrument executed consequent on the execution of the contract, and any amount to be so refunded shall be payable by the Treasurer from money provided by Parliament.

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

(6) 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.

(7) Proceedings for relief under this Act may, except in the case of applications under Section 12, be instituted in:

(a) the Supreme Court;

(b) a local Court within the limits of its jurisdiction;

(c) the Industrial Court where the contract in relation to which the application is made is either—

(i) an industrial agreement approved by the Industrial Commission under the provisions of Part VIII of the Industrial Conciliation and Arbitration Act 1972; or

(ii) an agreement relating to an award made under that Act or

(iii) the subject of proceedings already pending in that Court before any relief is sought under the provisions of this Act.

(8) 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.

(9) 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.

(10) 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.

(11) The powers conferred by this Act are exercisable notwithstanding any settlement of account, or any contract purporting to close previous dealings or to create a new obligation.

7. (1) Where, in any proceedings to which this section applies, a court is satisfied that a contract, or a provision of 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 issue 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.

8. (1) In determining whether a contract or a provision of a contract is unjust and whether to exercise its powers under this Act, a Court shall have regard to all the circumstances of the case including:

(a) the terms of the contract; and

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

(i) any material inequality of bargaining power between the parties to the contracts 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, intellectual 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;

(ii) whether or not prior to or at the time the contract was made, its provisions were the subject of negotiation;

(iii) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any or the provisions of the contract;

(iv) whether the party seeking relief received legal or other professional advice, in relation to the contract;

(v) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;

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

(vii) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(A) by any other party to the contract,

(B) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or

(C) by any person to the knowledge (at or before the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;

(viii) The conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party;

(ix) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;

(x) the commercial or other setting purpose and effect of the contract;

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

(xii) the public interest

and to any other matter that may be relevant.

(2) In proceedings for relief under this Act, the Court may, if it think it proper to do so in the circumstances of the case, and it is of the opinion that the contract forms part of an arrangement consisting of an inter-related combination or series of contracts, have regard to the provisions of any or all of those contracts.

9. (1) Where upon any intended sale forfeiture seizure or possession of property, it appears to the Court that a party to the contract has exercised or intends to exercise any power or right under a contract in a manner which is unjust the Court may grant relief by (*inter alia*) making orders which ensure that the powers and rights under the Act are exercised justly.

(2) This section does not apply to any rights exercisable by a receiver or a receiver and manager under any debenture or any order of a Court.

10. Where in any proceedings under this Act it appears to the Court that it is desirable that some other transaction should be dealt with in the same proceedings, the Court may order that the other transaction be so dealt with.

11. When:

(a) an application has been made pursuant to this Act with respect to a contract; and

(b) there is another contract relating to the same subject matter which does not come within Section 5 (1) of this Act, and of which the proper law is that of another State or Territory of Australia; and

(c) it is necessary in order to do justice that the Court have all necessary and proper parties before it,

then the Court may upon application grant relief with respect to any such contract (or contracts) as are referred to in subclause *(b)* hereof as it deems just.

12. Where the Supreme Court is satisfied, on the application of the Attorney-General, that a person:

(a) has embarked, or is likely to embark, on a course of conduct leading, or likely to lead, to formation of unjust contracts; or

(b) has repeatedly engaged in conduct relating to contracts which is calculated to deceive, mislead or intimidate the other party or otherwise to lead to unconscionable, harsh or oppressive results,

the Court may make an order prohibiting that person from engaging in such conduct, and may prohibit that person from entering into contracts unless the contracts are in such form or comply with such terms and conditions as the Court may specify.

13. (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 acknowledgment, 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.

14. 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.

15. 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.

16. (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.

17. An appeal shall lie to the Full Supreme Court from any order made under this Act by the Industrial Court or a Local Court.

18. Rules of Court may be made relating to the exercise of any jurisdiction conferred by this Act.

DRAFT BILL FOR A 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 1984".

(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:

Short titles.

1. (1) This Act may be cited as the "Consumer Credit Act Amendment Act, 1984".

(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".

Commencement.

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

Amendment of principal Act, s.3—Arrangement.

3. Section 3 of the principal Act is amended by striking out the item:

PART VI—Harsh and Unconscionable Terms.

Repeal of Part VI of principal Act.

4. Part VI of the principal Act is repealed.

DRAFT BILL FOR CONSUMER TRANSACTIONS AMENDMENT ACT

An Act to amend the Consumer Transactions Act 1972-   .

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 Transactions Act Amendment Act 1984".

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

(3) The principal Act, as amended by this Act, may be cited as the "Consumer Transactions Act 1972-1984".

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

3. Section 22 (1) of the principal Act is repealed.

BIBLIOGRAPHY

Peden: The Law of Unjust Contracts.

Deutch: Unfair Contracts.

Waddams: The Law of Contracts.

Smith: Contracts for Work in Industry (New South Wales) Section 88F of Industrial Arbitration Act.

Treitel: Contracts 6th Edition.

Waddams: Milner's Cases and Materials on Contracts.

Smith & Thomas: Casebook on Contract.

Tillotson: Contract Law in Perspective.

Puri: Australian Government Contracts.

Thompson: Unfair Contract Terms Act 1977.

Benfield: Social Justice Through Law.

Sutton: Sales and Consumer Law in Australia and New Zealand.

Woods and Stein: Harsh and Unconscionable Contracts of Work in New South Wales.

Smith: Contracts for Work in Industry (New South Wales).

Coote: Exception Clauses.

Ross: Politics of Law Reform.

Reports:

Peden Report on Harsh and Unconscionable Contracts 1976:

Law Reform Commission of Papua New Guinea:

Fairness of Transactions Working Paper No. 5, 1976

Fairness of Transactions Report No. 6, 1977.

Report to the Law Reform Commission of Tasmania (John Livermore):

Exclusion Clauses and Implied Obligations in Contracts for the Supply of Goods and Services 1980.

New Zealand Contracts and Commercial Law Reform Committee:

Credit Contracts 1977.

Select Committee of the House of Assembly:

Contracts Review Bill 1977.

Law Reform Committee of South Australia:

Proposed Contracts Review legislation 1977.

Articles:

Terry: Unconscionable Contracts in New South Wales: The Contracts Review Act 1980 (1982) 10 Aust. Business L.R. 311.

Angelo & Ellinger: Unconscionable Contracts—A Comparative Study (1979) 4 Otago L.R. 300.

Guild: Contracts Review Act 1980 (New South Wales): Scotching Beaumont, and Other Developments (1983) 21 Law Society Journal 304.

Guild: The Contracts Review Act 1980: A Shield or a Sword (1983) 21 Law Society Journal 48.

Slayton: The Unequal Bargaining Doctrine: Lord Denning in Lloyds Bank v. Bundy (1976) 22 McGill. L.J. 94.

Ogilvie: Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract 1981 26 McGill. L.J. 289.

Rees: Contracts Unconscionability—Open Acknowledgment of Unreasonableness as Bar to Enforcement 37 Uni. of Toronto L.R. 127.

Leff: Unconscionability and the Code—The Emperor's New Clause 115 Uni. of Pen. L.R. 485.

Cope: Review of Unconscionable Bargains in Equity 57 A.L.J. 279.

Palmer & Yates: The Future of the Unfair Contract Terms Act 1977 1981 Cam. L.J. 108.

Nicol and Rawlings: Substantive Fundamental Breach Burnt Out: Photo Production v. Securicor 43 M.L.R. 567.

Coote: Unfair Contracts Act 1977 41 M.L.R. 312.

Goldring, Pratt & Ryan: Contracts Review Act (New South Wales) 1981 4 Uni. N.S.W.L.J. 1.

Clarke: Unequal Bargaining Power in the Law of Contract 49 A.L.J. 229.

Samuels: Unfair Contract Terms Act 1977 121 Sol. Jo. 734.

Goldsworth: Unfair Contract Terms Act 1977 1977 N.L.J. 1207.

Dugan: The Application of Substantive Unconscionability to Standardized Contracts—A Systematic Approach 18 New E. L.R. 77.

Palmer: Limiting Liability for Negligence 45 M.L.R. 322.

Ogilvie: The Reception of Photo Production Ltd. v. Securicor Transport Ltd. in Canada: Nec Tamen Consumebatur 27 McGill. L.J. 424.

Reznikoff: The Unconscionable Controversy 17 Am. J. Bus. L.J. 61.

Hall: International Sales and the Supply of Goods (Implied Terms) Act 1973 22 I.C.L.Q. 740.

Mann: The amended Sale of Goods Act 1893 and the Conflict of Laws 90 L.Q.R. 42.

Davis: Contracts Review Act 1980 New South Wales and the Conflict of Laws 54 A.L.J. 572.

Samuels: Exclusion Clauses and the Unfair Contract Terms Act 127 Sol. Jo. 98.

Melville: Breach of Contract and Exclusion Clauses 130 N.L.J. 646.

Lawson: The Unfair Contract Terms Act: A Progress Report 131 N.L.J. 933.

Lücke: Exclusion Clauses and Freedom of Contracts: Judicial and Legislative Reactions: 51 A.L.J. 532.

Wilkinson: Exemption Clauses in Land Contracts 1984 The Conveyancer and Property Lawyer 12.

APPENDIX A

UNFAIR CONTRACT TERMS ACT 1977

1977 c 50

An Act to impose further limits on the extent to which under the law of England and Wales and Northern Ireland civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms and otherwise, and under the law of Scotland civil liability can be avoided by means of contract terms.
[26 October 1977]

PART I

AMENDMENT OF LAW FOR ENGLAND AND WALES AND NORTHERN IRELAND

Introductory

1—(1) For the purposes of this Part of this Act, 'negligence' means the breach—

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(c) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957.

(2) This Part of this Act is subject to Part III; and in relation to contracts, the operation of sections 2 and 4 and 7 is subject to the exceptions made by Schedule 1.

(3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—

(a) from things done or to be done by a person in the course of a business (whether his own business or another's); or

(b) from the occupation of premises used for business purposes of the occupier;

and references to liability are to be read accordingly.

(4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

Avoidance of liability for negligence, breach of contract, etc.

2—(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

3—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

4—(1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.

(2) This section applies whether the liability in question—

(a) is directly that of the person to be indemnified or is incurred by him vicariously;

(b) is to the person dealing as consumer or to someone else.

Liability arising from sale or supply of goods

5—(1) In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage—

(a) arises from the goods proving defective while in consumer use; and

(b) results from the negligence of a person concerned in the manufacture or distribution of the goods,

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods.

(2) For these purposes—

(a) goods are to be regarded as "in consumer use" when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and

(b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.

(3) This section does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed.

6—(1) Liability for breach of the obligations arising from—

(a) section 12 of the Sale of Goods Act 1893 (seller's implied undertakings as to title, etc.);

(b) section 8 of the Supply of Goods (Implied Terms) Act 1973 (the corresponding thing in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

(2) As against a person dealing as consumer, liability for breach of the obligations arising from—

(a) section 13, 14 or 15 of the 1893 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality of fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

(4) The liabilities referred to in this section are not only the business liabilities defined by section 1 (3), but include those arising under any contract of sale of goods or hire-purchase agreement.

7—(1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, subsections (2) to (4) below apply as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.

(2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.

(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

(4) Liability in respect of—

(a) the right to transfer ownership of the goods, or give possession; or

(b) the assurance of quiet possession to a person taking goods in pursuance of the contract,

cannot be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.

(5) This section does not apply in the case of goods passing on a redemption of trading stamps within the Trading Stamps Act 1964 or the Trading Stamps Act (Northern Ireland) 1965.

Other provisions about contracts

8—(1) In the Misrepresentation Act 1967, the following is substituted for section 3—

3. If a contract contains a term which would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement or reasonableness as stated in section 11 (1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.'.

(2) The same section is substituted for section 3 of the Misrepresentation Act (Northern Ireland) 1967.

9—(1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.

(2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

10 A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another's liability which this Part of this Act prevents that other from excluding or restricting.

Explanatory provisions

11—(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of the contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

12—(1) A party to a contract "deals as consumer" in relation to another party if—

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party does make the contract in the course of business; and

(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

13—(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;

and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

14 In this Part of this Act—

"business" includes a profession and the activities of any government department or local or public authority;

"goods" has the same meaning as in the Sale of Goods Act 1893;

"hire-purchase agreement" has the same meaning as in the Consumer Credit Act 1974;

"negligence" has the meaning given by section 1 (1);

"notice" includes an announcement, whether or not in writing, and any other communication or pretended communication; and

"personal injury" includes any disease and any impairment of physical or mental condition.

*   *   *   *   *

PART III

PROVISIONS APPLYING TO WHOLE OF UNITED KINGDOM

Miscellaneous

26—(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3) below.

(2) The terms of such a contract are not subject to any requirement of reasonableness under section 3 or 4: and nothing in Part II of this Act shall require the incorporation of the terms of such a contract to be fair and reasonable for them to have effect.

(3) Subject to subsection (4), that description of contract is one whose characteristics are the following—

(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and

(b) it is made by parties whose places or business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).

(4) A contract falls within subsection (3) above only if either—

(a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or

(b) the acts constituting the offer and acceptance have been done in the territories of different States; or

(c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

27—(1) Where the proper law of a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the proper law.

(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—

(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

(3) In the application of subsection (2) above to Scotland, for Paragraph *(b)* there shall be substituted—

'*(b)* the contract is a consumer contract as defined in Part II of this Act, and the consumer at the date when the contract was made was habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf'.

28—(1) This section applies to a contract for carriage by sea of a passenger or of a passenger and his luggage where the provisions of the Athens Convention (with or without modification) do not have, in relation to the contract, the force of law in the United Kingdom.

(2) In a case where—

(a) the contract is not made in the United Kingdom, and

(b) neither the place of departure nor the place of destination under it is in the United Kingdom,

a person is not precluded by this Act from excluding or restricting liability for loss or damage, being loss or damage for which the provisions of the Convention would, if they had the force of law in relation to the contract, impose liability on him.

(3) In any other case, a person is not precluded by this Act from excluding or restricting liability for that loss or damage—

(a) in so far as the exclusion or restriction would have been effective in that case had the provisions of the Convention had the force of law in relation to the contract; or

(b) in such circumstances and to such extent as may be prescribed by reference to a prescribed term of the contract.

(4) For the purposes of subsection 3 *(a)*, the values which shall be taken to be the official values in the United Kingdom of the amounts

(expressed in gold francs) by reference to which liability under the provisions of the Convention is limited shall be such amounts in sterling as the Secretary of State may from time to time by order made by statutory instrument specify.

(5) In this section,—

(a) the references to excluding or restricting liability include doing any of those things in relation to the liability which are mentioned in section 13 or section 25 (3) and (5); and

(b) "the Athens Convention" means the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974; and

(c) "prescribed" means prescribed by the Secretary of State by regulations made by statutory instrument;

and a statutory instrument containing the regulations shall be subject to annulment in pursuance of a resolution or either House or Parliament.

29—(1) Nothing in this Act removes or restricts the effect of, or prevents reliance upon, any contractual provision which—

(a) is authorised or required by the express terms or necessary implication of an enactment; or

(b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.

(2) A contract term is to be taken—

(a) for the purposes of Part I of this Act, as satisfying the requirement of reasonableness; and

(b) for those of Part II, to have been fair and reasonable to incorporate,

if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.

(3) In this section—

"competent authority" means any court, arbitrator or arbiter, government department or public authority;

"enactment" means any legislation (including subordinate legislation) of the United Kingdom or Norther Ireland and any instrument having effect by virtue of such legislation; and

"statutory" means conferred by an enactment.

30—(1) In section 3 of the Consumer Protection Act 1961 (provisions against marketing goods which do not comply with safety requirements), after subsection (1) there is inserted—

"(1A) Any term of an agreement which purports to exclude or restrict or has the effect of excluding or restricting, any obligation imposed by or by virtue of that section, or any liability for breach of such an obligation, shall be void".

(2) The same amendment is made in section 3 of the Consumer Protection Act (Northern Ireland) 1965.

General

31—(1) This Act comes into force on 1st February 1978.

(2) Nothing in this Act applies to contracts made before the date on

which it comes into force; but subject to this, it applies to liability for any loss or damage which is suffered on or after that date.

(3) The enactments specified in Schedule 3 to this Act are amended as there shown.

(4) The enactments specified in Schedule 4 to this Act are repealed to the extent specified in column 3 of that Schedule.

32—(1) This Act may be cited as the Unfair Contract Terms Act 1977.

(2) Part I of this Act extends to England and Wales and to Northern Ireland; but it does not extend to Scotland.

(3) Part II of this Act extends to Scotland only.

(4) This Part of this Act extends to the whole of the United Kingdom.

SCHEDULES

SCHEDULE 1

Scope of sections 2 to 5 and 7

1. Sections 2 to 4 of this Act do not extend to—

(a) any contract of insurance (including a contract to pay an annuity on human life);

(b) any contract so far as it relates to the creation of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise;

(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;

(d) any contract so far as it relates—

(i) to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or

(ii) to its constitution or the rights or obligations of its corporators or members;

(e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.

2. Section 2 (1) extends to—

(a) any contract of marine salvage or towage;

(b) any charterparty of a ship or hovercraft; and

(c) any contract for the carriage of goods by ship or hovercraft;

but subject to this sections 2 to 4 and 7 do not extend to any such contract except in favour of a person dealing as consumer.

3. Where goods are carried by ship or hovercraft in pursuance of a contract which either—

(a) specifies that as a means of carriage over part of the journey to be covered, or

(b) makes no provision as to the means of carriage and does not exclude that means,

then sections 2 (2), 3 and 4 do not, except in favour of a person dealing as consumer, extend to the contract as it operates for and in relation to the carriage of the goods by that means.

4. Section 2 (1) and (2) do not extend to a contract of employment, except in favour of the employee.

5. Section 2 (1) does not affect the validity of any discharge and indemnity given by a person, on or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting that disease.

SCHEDULE 2

"Guidelines" for Application of Reasonableness Test

The matters to which regard is to be had in particular for the purposes of sections 6 (3), 7 (3) and (4), 20 and 21 are any of the following which appear to be relevant—

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

SCHEDULE 3

Amendment of Enactments

In the Sale of Goods Act 1893—

(a) in section 55 (1), for the words "the following provisions of this section" substitute "the provisions of the Unfair Contract Terms Act 1977";

(b) in section 62 (1), in the definition of "business", for "local authority or statutory undertaker" substitute "or local or public authority".

In the Supply of Goods (Implied Terms) Act 1973 (as originally enacted and as substituted by the Consumer Credit Act 1974)—

(a) in section 14 (1) for the words from "conditional sale" to the end substitute "a conditional sale agreement where the buyer deals as consumer within Part I of the Unfair Contract Terms Act 1977 or, in Scotland, the agreement is a consumer contract within Part II of that Act";

(b) in section 15 (1), in the definition of "business", for "local authority or statutory undertaker" substitute "or local or public authority".

SCHEDULE 4

REPEALS

Chapter	Short title	Extent of repeal
56 & 57 Vict. c. 71.	Sale of Goods Act 1893.	In section 55, subsections (3) to (11). Section 55A. Section 61 (6). In section 62 (1) the definition of "contract for the international sale of goods".
1962 c. 46.	Transport Act 1962.	Section 43 (7).
1967 c. 45.	Uniform Laws on International Sales 1967.	In section 1 (4), the words "55 and 55A".
1972 c. 33.	Carriage by Railway Act 1972.	In section 1 (1), the words from "and shall have" onwards.
1973 c. 13.	Supply of Goods (Implied Terms) Act 1973.	Section 5 (1). Section 6. In section 7 (1), the words from "contract for the international sale of goods" onwards. In section 12, subsections (2) to (9). Section 13. In section 15 (1), the definition of "consumer sale".

The repeals in sections 12 and 15 of the Supply of Goods (Implied Terms) Act 1973 shall have effect in relation to those sections as originally enacted and as substituted by the Consumer Credit Act 1974.

APPENDIX B: UNCONSCIONABLE CONTRACTS LEGISLATION

New South Wales

ANNO VICESIMO NONO

ELIZABETHÆ II REGINÆ

* *

Act No. 16, 1980.

An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts. [Assented to, 15th April, 1980.]

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

Short Title.

1. This Act may be cited as the "Contracts Review Act, 1980".

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Arrangement.

3. This Act is divided as follows:—

PART I.—PRELIMINARY—*ss.* 1-6.

PART II.—RELIEF IN RESPECT OF UNJUST CONTRACTS—*ss.* 7-10.

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SCHEDULE 1.—ANCILLARY RELIEF.

SCHEDULE 2.—EXISTING CONTRACTS.

Interpretation.

4. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"Court" means the Supreme Court of New South Wales, and, in accordance with section 134B of the District Court Act, 1973, and without affecting the jurisdictional limitations referred to in that section, includes the District Court of New South Wales;

"land instrument" means an instrument that transfers title to land, creates an estate or interest in land or is a dealing within the meaning of the Real Property Act, 1900;

"unjust" includes unconscionable, harsh or oppressive; and "injustice" shall be construed in a corresponding manner.

(2) A reference in this Act to a corporation does not include a reference to—

(a) a corporation that is a body corporate constituted under the Strata Titles Act, 1973, by the proprietor or proprietors of lots within the meaning of that Act; or

(b) a corporation owning an interest in land and having a memorandum or articles of association conferring on owners of shares in the corporation the right to occupy certain parts of a building erected on that land,

all or the majority of which lots or parts, as the case may be, are intended to be occupied as dwellings.

Act binds Crown.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Certain restrictions on grant of relief.

6. (1) The Crown, a public or local authority or a corporation may not be granted relief under this Act.

(2) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by him or proposed to be 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 wholly or principally in New South Wales.

PART II.

RELIEF IN RESPECT OF UNJUST CONTRACTS.

Principal relief.

7. (1) 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, do any one or more of the following:—

(a) it may decide to refuse to enforce any or all of the provisions of the contract;

(b) it may make an order declaring the contract void, in whole or in part;

(c) it may make an order varying, in whole or in part, any provision of the contract;

(d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that—

(i) varies, or has the effect of varying, the provisions of the land instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) *(b)* or *(c)*, the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.

Ancillary relief.

8. Schedule 1 has effect with respect to the ancillary relief that may be granted by the Court in relation to an application for relief under this Act.

Matters to be considered by Court.

9. (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of—

(a) compliance with any or all of the provisions of the contract; or

(b) non-compliance with, or contravention of, any or all of the provisions or the contract.

(2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:—

(a) whether or not there was any material inequality in bargaining power between the parties to the contract;

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;

(c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract;

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;

(e) whether or not—

(i) any party to the contract (other than a corporation) was not reasonably able to protect his interests; or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he represented,

because of his age or the state of his physical or mental capacity;

(1) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if he represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from

circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

General orders.

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

PART III.

PROCEDURAL AND OTHER MATTERS.

Application for relief.

11. (1) The Court may exercise its powers under this Act in relation to a contract on application made to it in accordance with rules of court, whether in—

(*a*) proceedings commenced under subsection (2) in relation to the contract; or

(*b*) other proceedings arising out of or in relation to the contract.

(2) Proceedings may be commenced in the Court for the purpose of obtaining relief under this Act in relation to a contract.

Interests of non-parties to contract.

12. (1) Where in proceedings for relief under this Act in relation to a contract it appears to the Court that a person who is not a party to the contract has shared in, or is entitled to share in, benefits derived or to be derived from the contract, it may make such orders against or in favour of that person as may be just in the circumstances.

(2) The Court shall not exercise its powers under this Act in relation to a contract unless it is satisfied—

(*a*) that the exercise of those powers would not prejudice the rights of a person who is not a party to the contract; or

(*b*) that, if any such rights would be so prejudiced, it would not be unjust in all the circumstances to exercise those powers,

but this subsection does not apply in relation to such a person if the Court has given him an opportunity to appear and be heard in the proceedings.

Intervention.

13. The Minister or the Attorney-General, or both, may, at any stage of any proceedings in which relief under this Act is sought, intervene by counsel, solicitor or agent, and shall thereupon become a party or parties to the proceedings and have all the rights of a party or parties to those proceedings in the Court, including any right of appeal arising in relation to those proceedings.

Fully executed contracts.

14. The Court may grant relief in accordance with this Act in relation to a contract notwithstanding that the contract has been fully executed.

Arrangements.

15. In any proceedings in which relief under this Act is sought in relation to a contract, the Court may, if it thinks it proper to do so in the circumstances of the case, and it is of the opinion that the contract forms part of an arrangement consisting of an inter-related combination or series of contracts, have regard to any or all of those contracts and the arrangement constituted by them.

Time for making applications for relief.

16. An application for relief under this Act in relation to a contract may be made only during any of the following periods:—

(a) the period of 2 years after the date on which the contract was made;

(b) the period of 3 months before or 2 years after the time for the exercise or performance of any power or obligation under, or the occurrence of any activity contemplated by, the contract; and

(c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross action or otherwise) that are pending against the party seeking relief under this Act.

PART IV.

MISCELLANEOUS.

Effect of this Act not limited by agreements, etc.

17. (1) A person is not competent to waive his rights under this Act, and any provision of a contract is void to the extent that—

(a) it purports to exclude, restrict or modify the application of this Act to the contract; or

(b) it would, but for this subsection, have the effect of excluding, restricting or modifying the application of this Act to the contract.

(2) A person is not prevented from seeking relief under this Act by—

(a) any acknowledgment, statement or representation; or

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

(3) This Act applies to and in relation to a contract only if—

(a) the law of the State is the proper law of the contract;

(b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State; or

(c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.

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

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

(b) the claim was asserted before the making of the contract.

(5) Without affecting the generality of subsection (1), the Court may exercise its powers under this Act in relation to a contract 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.

Offence.

18. (1) Where a person submits a document—

(a) that is intended to constitute a written contract;

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

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

to another person for signature by that other person, the person submitting the document is guilty of an offence and liable to a penalty not exceeding $2,000.

(2) Proceedings for an offence against subsection (1) shall be disposed of summarily before a court of petty sessions constituted by a stipendiary magistrate sitting alone and may be commenced at any time within 2 years after the offence was committed.

Orders affecting land.

19. (1) An order made under section 7 (1) *(b)* or *(c)* has no effect in relation to a contract so far as the contract is constituted by a land instrument that is registered under the Real Property Act, 1900.

(2) Where an order is made under section 7 (1) *(b)* or *(c)* in relation to a contract constituted (in whole or in part) by a land instrument, not being a land instrument registered under the Real Property Act, 1900, the regulations made under this Act may make provision for or with respect to prescribing the things that must be done before the order, so far as it relates to the land instrument, takes effect.

(3) The Registrar-General and any other person are hereby authorised to do any things respectively required of them pursuant to subsection (2).

Stamp duty.

20. (1) No duty is payable under the Stamp Duties Act, 1920, in respect of—

(a) an instrument executed pursuant to an order under section 7 (1) *(d)*; or

(b) a disposition of property made pursuant to an order under clause 1 of Schedule 1.

(2) Where the Court makes an order under section 7 in relation to a contract, it may order the refund of the whole or any part of the duty paid under the Stamp Duties Act, 1920, in respect of the contract or any instrument executed consequent on the execution of the contract, and any amount to be so refunded shall be payable by the Treasurer from money provided by Parliament.

Application of Act to certain contracts of service and to existing contracts.

21. (1) This Act does not apply to a contract of service to the extent that it includes provisions that are in conformity with an award that is applicable in the circumstances.

(2) In subsection (1), "award" means an award or industrial agreement filed under the Industrial Arbitration Act, 1940, an award made under the Apprentices Act, 1969, or an award or industrial agreement made under the Conciliation and Arbitration Act 1904 of the Commonwealth.

(3) Schedule 2 has effect.

Operation of other laws.

22. Nothing in this Act limits or restricts the operation of any other law providing for relief against unjust contracts, but the operation of any other such law in relation to a contract shall not be taken to limit or restrict the application of this Act to the contract.

Regulations.

23. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A provision of a regulation may—

(a) apply generally or be limited in its application by reference to specified exceptions or factors; or

(b) apply differently according to different factors of a specified kind,

or may do any combination of those things.

Sec. 8.

SCHEDULE 1.

ANCILLARY RELIEF.

1. Where the Court makes a decision or order under section 7, it may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to—

(a) the making of any disposition of property;

(b) the payment of money (whether or not by way of compensation) to a party to the contract;

(c) the compensation of a person who is not a party to the contract and whose interests might otherwise be prejudiced by a decision or order under this Act;

(d) the supply or repair of goods;

(e) the supply of services;

(f) the sale or other realisation of property;

(g) the disposal of the proceeds of sale or other realisation of property;

(h) the creation of a charge on property in favour of any person;

(i) the enforcement of a charge so created;

(j) the appointment and regulation of the proceedings of a receiver of property; and

(k) the rescission or variation of any order of the Court under this clause,

and such orders in connection with the proceedings as may be just in the circumstances.

2. The Court may make orders under this Schedule on such terms and conditions (if any) as the Court thinks fit.

3. Nothing in section 6 limits the powers of the Court under this Schedule.

4. In this Schedule—

"disposition of property" includes—

(a) a conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance or discharge of mortgage;

(b) the creation of a trust;

(c) the release or surrender of any property; and

(d) the grant of a power in respect of property,

whether having effect at law or in equity;

"property" includes real and personal property and any estate or interest in property real or personal, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest.

Sec. 21 (3).

SCHEDULE 2.

EXISTING CONTRACTS.

1. Subject to clause 2, this Act does not apply in respect of a contract made before the commencement of this Schedule.

2. Where the provisions of a contract made before the commencement of this Schedule are varied after that commencement, this Act applies in respect of the contract, but—

   (a) no order shall be made under this Act affecting the operation of the contract before the date of the variation; and

   (b) the Court shall have regard only to injustice attributable to the variation.

In the name and on behalf of Her Majesty I assent to this Act.

A. R. CUTLER,
Governor.

Government House,
Sydney, 15th April, 1980.

APPENDIX C

AUSTRALIAN CAPITAL TERRITORY

A BILL

FOR

AN ORDINANCE

To Reform the Law Relating to Harsh and Unconscionable Contracts

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LAW REFORM (HARSH AND UNCONSCIONABLE CONTRACTS) ORDINANCE 1976

Citation.

1. This Ordinance may be cited as the *Law Reform (Harsh and Unconscionable Contracts) Ordinance* 1976.

Definitions.

2. In this Ordinance, unless the contrary intention appears—

"award" means an award made under the *Conciliation and Arbitration Act* 1904-1975 or a determination;

"contract" includes an agreement and an arrangement, whether collateral or otherwise, other than a contract of employment that is the subject of an award.

Application.

3. This Ordinance applies to and in relation to a contract that is in existence at the date of commencement of this Ordinance.

Court may refuse to enforce harsh or unconscionable contract.

4. *Where—*

(a) in proceedings arising out of a contract; or

(b) on an application made under this section by a party to a contract,

the court finds the contract or a provision of the contract to have been harsh or unconscionable, the court may, by order—

(c) in the case of proceedings referred to in paragraph *(a)*—

(i) refuse to enforce the contract; or

(ii) enforce the remainder of the contract without the harsh or unconscionable provision; or

(d) in any case—

(i) declare the contract void, in whole or in part, either from the time at which the contract was made or from some other time; or

(ii) vary any provision of the contract so as to avoid a harsh or unconscionable result.

Matters to be considered by court.

5. (1) In determining whether a contract or a provision of a contract is harsh or unconscionable, the court shall have regard to all the circumstances of the case.

(2) Without limiting the generality of the foregoing, the matters to which the court may have regard include the following:—

(a) the degree of inequality in bargaining power between the parties to the contract;

(b) where the party seeking relief is not a body corporate—the physical and educational circumstances of that party;

(c) the economic circumstances of the parties;

(d) the physical form of the contract;

(e) whether independent legal advice on the contract was obtained by the party seeking relief;

(f) where independent legal advice was not obtained, whether the terms of the contract and their effect were fully explained to the party seeking relief and whether that party understood the terms and their effect;

(g) whether any undue influence or pressure was exerted on the party seeking relief by the other party to the contract or by a person acting for or on behalf of the other party;

(h) the conduct of the parties since the time the contract was made;

(i) the commercial setting, purpose and effect of the contract.

Court may order payment of money.

6. In making an order under section 4, the court may make such other order, including an order as to the payment of money, in connexion with the contract as the court thinks just in the circumstances of the case.

No contracting out.

7. (1) Where the proper law of a contract would, but for a term that it should be a law of a place other than the Territory, be the law of the Territory, this Ordinance applies to the contract notwithstanding that term.

(2) A term of a contract that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, the application of this Ordinance to that contract is void.

Saving.

8. Nothing in this Ordinance affects the operation of any law of the Territory providing for relief against harsh or unconscionable contracts but the operation of such a law shall not be taken to limit the application of this Ordinance to such a contract.

APPENDIX D

UNFAIR CONTRACT TERMS ACT 1980

A BILL FOR

AN ACT to impose limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms and otherwise.

BE IT ENACTED by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. (1) For the purposes of this Act, 'negligence' means the breach:

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(2) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

(3) A party to a contract "deals as consumer" in relation to another party if:

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party does make the contract in the course of a business;

(4) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

2. (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict any liability of his in respect of the breach; or

(2) claim to be entitled:

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all.

4. (1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract.

(2) This section applies whether the liability in question:

(a) is directly that of the person to be indemnified or is incurred by him vicariously;

(b) is to the person dealing as consumer or to someone else.

5. (1) To the extent that this Act prevents the exclusion or restriction of any liability it also prevents:

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(*b*) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(*c*) excluding or restricting rules of evidence or procedure;

and (to that extent) section 2 also prevents excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) An agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

D. J. WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA