

CERTAINTY IN CONTRACTS, UNCONSCIONABILITY AND THE TRADE PRACTICES ACT: THE EFFECT OF SECTION 52A

*JOHN GOLDRING**

Introduction: The Development and Bifurcation of Contract Law

Much received wisdom (and a good deal of law based on that received wisdom) is often thought of as founded on two basic assumptions:

1. That contracts are agreements voluntarily made by parties of roughly equal strength; and
2. That the primary object of the law of contract is to achieve predictability and certainty in human transactions, especially commercial transactions.

Anyone who has either studied contract law or exercised common sense in recent times would know the first is often little more than myth. However, while certainty and predictability are valued highly by our society, notably, but not exclusively, in our legal system, it is difficult to argue that they remain (if ever they were) the primary object of contract law. The second assumption, like the first, may be largely myth, because of the uncertainty and indeterminacy which is associated with some of the more esoteric rules of law, especially those surrounding doctrines of "unconscionability", "undue influence" and some other associated principles.

Yet these assumptions are the basis for most of the concern about any expansion of rules relating to "unconscionability" or any other rules which may depart from the notion that once a person has made an agreement, or has done some act which the law recognises as giving rise to some legally binding contractual obligation, that person is inescapably bound by that contract. Both the courts and legislatures in various parts of the common law world have, in recent years, moved away from an approach which places supreme value on the absolute certainty of contract to one which accepts both that there may be some notions (such as "justice" or "fairness" – or even "equity" in some sense), upon which society places a higher value than it does upon certainty – though certainty and predict-

* Professor of Law, Macquarie University.

ability are, to some extent, inherent in what is ordinarily meant by "justice". They have also accepted the reality that in substance, the parties to the vast majority of legally binding contracts which are made in modern society are in no sense equal or even free. This is the rationale for most consumer protection legislation, of which the Trade Practices Act 1974 (Cth.) is the most important Australian example.

It is possible now to say that there is not a single body of theory applying to *all* contracts: rather, it seems preferable to say that there are two sub-species of contract, which may, to a greater or lesser extent be included within some of the theories formerly covered by "general principles of contract law".¹ The first may be called "classical" contracts, which are agreements freely entered into by parties of roughly equivalent economic power, and whose basic terms are freely negotiated by the parties. The second group may be described, for this purpose, as "regulated" contracts, and includes the majority of "standard-form" contracts, and also those contracts which are "implied" from the conduct of the parties.

Of course, as with most legal distinctions, there are "grey areas", of which the contract for the sale of land in N.S.W. is a good example. Here the parties do, to a large extent, negotiate about the price, the items of personal property to be included in the sale, and occasionally about special conditions, but basically the terms and conditions of the contract are in a standard form prepared by the Law Society of N.S.W. and the N.S.W. Real Estate Institute, and accepted for virtually every sale of land in the State. Similarly, as a result of State or Commonwealth statutes, and of commercial practice, contracts for credit and insurance, especially those entered into by "consumers", are standard form contracts, whose terms and conditions (apart from specific details about the subject-matter) are prescribed by statute, common law, or by commercial practice supported by the economically dominant party.

The use of standard-form and other "regulated" contracts is a result of a number of factors. While legislative recognition of the imperfections of the market-place is important, the main motivating factor in the use of standard-form contracts is commercial convenience. All transactions are reduced to a standard form, with the result that common occurrences have clearly predictable consequences. Predictability is an important economic consideration in commerce; and it is one of the main contributions of the law generally, and legal rules of contract in particular, to commerce and economic activity.

However most "everyday" contracts are *implied* contracts. They include virtually all contracts for the sale of personal property, which are the contracts most concerning consumers. Such implied contracts are the

¹ For this notion, I am greatly indebted to my former colleague, Dermot Ryan, now of the N.S.W. Bar, who developed it in his work on an LL.M thesis at the Australian National University, and in his teaching of contract law at the Canberra College of Advanced Education and at Macquarie University. He was influenced to some extent by such works as G. Gilmore's *The Death of Contract* (1974) and P. S. Atiyah's *The Rise and Fall of Freedom of Contract* (1979), but developed the ideas himself.

principal target of statutory regulation, in some cases such as the Sale of Goods Act 1893 (U.K.) and its colonial derivatives, representing a codification of judge-made law, but in other cases, such as Part V of the Trade Practices Act 1974 (Cth.), and most state consumer protection legislation, which are a conscious legislative intervention to remedy market imperfections. Legislative interventions of this type are often attacked by commercial interests on the ground that they destroy not only "freedom of contract", but also the predictability and certainty for which commerce looks to the law. The latter criticism was often raised in the debates (both inside and outside Parliament) before the enactment of the Contracts Review Act, 1980 (N.S.W.) and in various speeches and "green papers" published by the Commonwealth Government, it was anticipated that it would also be directed at s. 52A of the Trade Practices Act 1974 (Cth.).

The argument that "classical" and "regulated" contracts should be treated differently in law accepts that "freedom of contract" in practice really never applies to most consumer contracts; it suggests also that while consumers, and other parties to "regulated" contracts undoubtedly value predictability and certainty, other values including those of "fairness" and "equity" may outweigh predictability and certainty in ways that may not apply to "classical" contracts. Consumer protection legislation, including the statutes referred to, is directed not at "classical", commercial contracts, but purely at one class of "regulated" contracts.

Section 52A of the Trade Practices Act 1974 (Cth.), introduces the common law—or, strictly speaking, the *equitable*,—concept of unconscionability into the statutory rules of consumer protection. The section is a consequence of the Trade Practices Revision Act 1986, and was introduced in conjunction with amendments to s. 87 of the Trade Practices Act (Cth.) 1974.

Part V of the Trade Practices Act 1974 (Cth.), which deals with consumer protection, introduced in Division 1 a number of statutory rules dealing with conduct relating to the formation of contracts with consumers, many of which were modelled on similar statutory provisions in the states or in overseas jurisdictions, and in Division 2 set out in statutory form some rules which had their origins in judge-made law, but which had long achieved statutory form, especially in the U.K. Sale of Goods Act 1893 and its colonial imitations. The Trade Practices Act 1974 (Cth.) has always affected the law of contracts.

Section 52 of the Trade Practices Act 1974 (Cth.) supplements the common law rules relating to contract by providing a statutory right to those who suffer loss or damage as a consequence of conduct which is "misleading or deceptive or likely to mislead or deceive", in addition to any common law rights arising from mistake or misrepresentation.² It appeared not to affect the equitable rules relating to relief against "uncon-

² See J. Goldring, L. W. Maher and J. McKeough, *Consumer Protection Law in Australia*, (3rd ed., 1987), (henceforth "Goldring *et al.*") para. [333] and Ch. 7.

scionable" conduct, other than that which fell within the clear meaning of the words of that section. The first review of the Trade Practices Act 1974 (Cth.), by the Swanson Committee in 1976,³ recognised the need for some statutory modification of the law. At about the same time as the Parliament of the United Kingdom was preparing the legislation which became the Unfair Contract Terms Act 1977, the late Professor John Peden of Macquarie University was preparing his report to the Attorney-General of N.S.W. on harsh and unconscionable contracts, which resulted in the enactment of the Contracts Review Act, 1980 (N.S.W.), and the Standing Committee of Commonwealth and State Attorneys-General was also considering the subject.⁴

Recently, the Contracts Review Act, 1980 (N.S.W.) was judicially described in the following terms:

The *Contracts Review Act*, 1980 is revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with "unjust" contracts. Very likely its provisions signal the end of much classical contract theory in New South Wales.⁵

Just as the Contracts Review Act, 1980 (N.S.W.) may have brought about "revolutionary" changes in the law of N.S.W., so s. 52A of the Trade Practices Act 1974 (Cth.) may have had a similar effect on the law of the Commonwealth. Neither Act sets out in clear terms what the consequences of specified actions will be. Rather, they provide some criteria which must be taken into account by a court which is required, after balancing a number of competing interests, to exercise a discretion to grant relief to a party claiming that the transaction, or the circumstances giving rise to it, give rise to a situation which is recognised as being in some sense undesirable.

Since 1970, the courts, both in Australia⁶ and in England⁷ have been developing the equitable rules governing the relief which may be granted to those who claim to be the victims of unconscionable behaviour in the making, in the terms, or in the operation of the contract.

This article will now examine the terms of s. 52A, and then discuss the relationship of the developing jurisprudence of "unconscionability" at common law, and the interpretations of the Contracts Review Act, 1980 (N.S.W.) to see what, if any, light they may throw on the meaning of the provision.

³ Trade Practices Act Review Committee, *Report*, Canberra, AGPS, 1976, paras. 9.59ff.

⁴ Much background material on this, and a useful analysis of the Contracts Review Act, 1980 (N.S.W.) can be found in J. R. Peden, *The Law of Unjust Contracts* (1982).

⁵ *Per* McHugh, J.A. (with whom Hope, J.A. agreed) in *West v. A.G.C. (Advances) Ltd.* (1986) A.S.C. 55-500 at 56,710; see also *per* Kirby, P. at 56,704.

⁶ Especially the High Court in *Commercial Bank of Australia Ltd. v. Amadio and anor.* (1983) 151 C.L.R. 447.

⁷ *E.g.* *A. Schroeder Music Publishing House Ltd. v. Macauley* (1974) 1 W.L.R. 1308; *Lloyds Bank Ltd. v. Bundy* [1975] 2 Q.B. 326; *Clifford Davis Management v. WEA Records Ltd.* [1975] 1 W.L.R. 61; and to some extent *Levison v. Patent Steam Cleaning Co. Ltd.* [1978] Q.B. 69.

Section 52A: The General Scheme

Section 52A reads as follows:

Unconscionable conduct

52A. (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

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

- (a) the relative strengths of the bargaining positions of the corporation and the consumer;
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of goods or services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim, in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person—

- (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) The Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

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

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

The similarity between this provision and ss. 7-10 of the Contracts Review Act, 1980 (N.S.W.) is quite marked.

A number of the expressions used in s. 52A(1) are common to other provisions of the Trade Practices Act 1974 (Cth.). A full account of the operation and meaning of these phrases can be found elsewhere,⁸ and they will be discussed briefly, except where s. 52A gives a special meaning.

"*corporation*" is defined in s. 4(1), to take full advantage of the Commonwealth Parliament's powers with respect to corporations.⁹

"*in trade or commerce*" is also defined in s. 4(1) and the courts have interpreted the phrase so that it is to be given a wide meaning.¹⁰

Sections 5 and 6 of the Trade Practices Act 1974 (Cth.) apply to give the Act the widest possible operation, so that if any other legislative power of the Commonwealth Parliament could be relied upon to support the validity of the legislation, the clear intention is that it should so be relied upon. Therefore even if the conduct complained of is not engaged in by a corporation, or in trade or commerce, it may still be affected by the operation of s. 52A if, for example, it involves some international element, activities in a Territory, the supply or possible supply of goods or services to the Commonwealth or its agencies, or the use of postal, telegraphic, telephonic, radio or televised communication.¹¹

"*in connection with*" is a phrase which probably is intended to be given its ordinary meaning, but subject to the restriction, contained in s. 52A(3), that the taking of action to enforce a claim through the courts or arbitration proceedings is not within the scope of the section, and to the specific direction in sub-section (4) that the court may, in applying s. 52A, have regard to conduct engaged in, or circumstances existing, before both the incident alleged to be a contravention of the section and the commencement of the section's operation, provided that the circumstances are reasonably foreseeable at the time of the alleged contravention.

"*the supply or possible supply*"; "supply" has been defined, also in s. 4(1), as including the sale, lease, hire, hire-purchase of goods, and the provision, granting or conferring of services; this definition is expanded by s. 4C.¹²

⁸ Particularly in Goldring *et al.*, n. 2.

⁹ *Id.* paras. [206], [217].

¹⁰ *Id.*, para. [207-212].

¹¹ *Id.*, paras. [211-213], [217].

¹² *Id.*, paras. [217], [219].

"goods" is defined in s. 4(1) to include not only those things which would be regarded as "goods" at common law, but also crops, minerals, gas, and electricity.¹³

"services" is covered by the wide definition in s. 4(1).¹⁴

The meaning of both "goods" and "services" is affected by subsections 52A(5) and (6). The goods or services must be "of a kind ordinarily acquired for personal, domestic, or household use or consumption", a phrase which raises a number of problems¹⁵ and does not apply to goods which are acquired for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.¹⁶ These subsections show a clear intention that the section is to apply principally for the benefit of the ultimate consumers of goods or services of a non-commercial character. In this sense the class of goods and services to which s. 52A relates is a little narrower than that affected by the Contracts Review Act, 1980 (N.S.W.), where s. 6(2) provides specifically that primary producers may take advantage of the Act. Some importance should be attached to s. 87(1E) which precludes relief under s. 87 (but not under s. 80) in respect of any contract to which the Insurance Contracts Act 1984 (Cth.) applies.

"person" is the expression used in s. 52A, rather than "consumer", the phrase used in other parts of Part V of the Trade Practices Act 1974 (Cth.).¹⁷ In s. 52A(2), the word "consumer" is certainly used, but is specifically stated to refer to the "person" mentioned in sub-section (1), rather than to any statutory definition. This indicates that the conduct may be directed not only at "consumers" as defined in s. 4 of the Act, but at any natural person or body corporate. This contrasts with the application of the Contracts Review Act, 1980 (N.S.W.), which, by s. 4, precludes any relief under that Act for any corporation (other than certain corporations established for the operation of "home unit" buildings). However, it has already been suggested that this wide operation of s. 52A does not indicate an intention to apply generally to "classical" as well as "regulated" contracts; other provisions of the section in fact limits the scope of its application.

"engage in conduct" is clarified by s. 4(2) of the Act, again with the intention of giving the expression a wide application.¹⁸

"that is, in all the circumstances, unconscionable". These words contain the teeth of the section. Their meaning is expanded in the remaining sub-sections, especially sub-section (2), and through them are forged the links with the common law and the Contracts Review Act, 1980 (N.S.W.). The remainder of this article will be directed at examining their import.

¹³ *Id.*, paras. [217], [219].

¹⁴ *Id.*, paras. [217], [219].

¹⁵ *Id.*, paras. [218-219].

¹⁶ *Id.*, para. [219].

¹⁷ The definition of "consumer" in the Trade Practices Act 1974 (Cth.) is discussed by Goldring *et al. op. cit. supra* n. 2 at paras. [218-220].

¹⁸ *Id.*, para. [217].

The Equitable Doctrine of "Unconscionability"

The development, by both English and Australian courts, of equitable principles allowing relief, at least in extreme cases, to parties who have entered into contracts as a result of what may be called "inequality of bargaining power", was mentioned earlier. However, the courts have been reluctant to prescribe specific rules as to when this jurisdiction will be exercised.¹⁹ In both England and Australia, legislative action has been taken, and this legislation has been generally met with reservations from those who place greater value on the predictability and certainty which flows from strict application of the rules of contract law than on concepts such as "equity" and "fairness" whose content is difficult to specify. This attitude may perhaps best be illustrated by a quotation from Lindgren *et al.*:

Is there a basis for equitable relief from a contract not comprehended by the categories of lack of contractual capacity (strictly, incapacity goes to incipient validity *at law* rather than *equitable relief* from a contract binding at law); misrepresentation; duress; undue influence; mistake and public policy directed against unreasonable restraints of trade? Probably every contract involves some disparity between the parties in terms of bargaining power, needs, means and business acumen. Certainty of contract would be destroyed if equity were to relieve upon proof of any such disparity. Moreover, it would be inconsistent with the philosophy of a free enterprise system to attempt to eliminate all negotiating advantage. Finally, a concern with fine differences between the parties' respective negotiating positions would give rise to protracted and costly hearings and great evidentiary difficulties.²⁰ [emphasis in original].

It is probably a summary of the position from which most common lawyers and judges have approached the question. The common law has certainly developed principles which at times may relieve parties who have been treated, unfairly in some sense, provided that they can bring themselves within the quite restrictively defined categories mentioned. What appeared remarkable to some commentators about the statement of Lord Denning, M.R. in *Lloyds Bank Ltd. v. Bundy*²¹ is that it suggests that there is a *general* power in the courts to grant relief in cases where

. . . 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

¹⁹ See, e.g., K. E. Lindgren, J. W. Carter and D. J. Harland, *Contract Law in Australia*, (1986), Ch. 15.

²⁰ *Id.*, 447. A recent example of this type of approach is the judgment of Mahoney, J.A., in *Antonovic v. Volker*, N.S.W. Court of Appeal, 23 December 1986, unreported.

²¹ [1975] Q.B. 326; but see *National Westminster Bank v. Morgan* [1985] 2 W.L.R. 1308, where the views of Lord Denning, M.R. seem to meet with the disapproval of the House of Lords.

his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.²²

This statement seems to collapse any distinction between the doctrines of *undue influence* and those of *unconscionability*. Yet there are similar statements in some decisions of the High Court of Australia,²³ and in *Commercial Bank of Australia Ltd. v. Amadio*²⁴ a majority of the court suggested that, while maintaining the distinction between the closely related doctrines of undue influence and unconscionability, and affirming that, in Australian law, mere inequality of bargaining power is insufficient to justify the Court setting aside the contract, where one party knows that the other is in a position which prevents an independent and informed judgment being made, and takes advantage of that knowledge and superiority, there is unconscionability which may lead the Court to grant relief.

Despite this development in the judge-made law, it is *unclear* precisely what circumstances will need to be proved before the court will grant relief, except that the party alleged to have acted unconscionably must be shown to have some relative strength and the party seeking relief to have some corresponding relative weakness. In a recent case where both the Contracts Review Act, 1980 (N.S.W.) and the equitable rules of unconscionability were considered, Mahoney, J.A. summed up the position most aptly when he said "Unconscionability, as a principle of equity is, I think, better described than defined."²⁵ It is *clear* that, under the judge-made rules, mere inequality of bargaining power is insufficient to warrant judicial intervention. This situation was unsatisfactory, and various legislative measures have been taken to clarify matters. The legislation does take into account various matters which the courts have drawn upon in the cases, and give a fairly specific indication of the types of factor to which the courts should look first. Much of the law relating to undue influence remains in place: the statutes attempt to spell out what will amount to "unconscionability".

The Contracts Review Act, 1980 (N.S.W.)²⁶

The Contracts Review Act, 1980 (N.S.W.) was not the first legislation dealing with "unconscionable" contracts in Australia, as there had

²² *Id.*, 339.

²³ Especially by Fullagar, J. in *Blomley v. Ryan* (1956) 99 C.L.R. 362 at 405.

²⁴ (1983) 151 C.L.R. 447, noted by Ashley Black in (1986) 11 *Sydney Law Review* 134.

²⁵ *Antonovic v. Volker*, N.S.W. Court of Appeal, 23 December 1986, unreported at p. 15. This case is quite remarkable in that it arose out of conduct which occurred at an auction sale. Auction sales have generally been specifically excluded from most consumer protection legislation, so that contracts formed as a consequence of auction sales are generally treated in law as "classic", rather than as "regulated" contracts.

²⁶ This legislation is discussed in detail in Peden, *op. cit. supra* n. 5, and in Goldring *et al. op. cit. supra* n. 2, paras. [307-318].

been several provisions dealing with specific types of contract in some State legislation — particularly in N.S.W.²⁷

As mentioned above, the Act applies to all contracts, but there are some restrictions on the persons who may seek relief under its provisions. In some respects, it may be *narrower* in its operation than other provisions which refer to “unfair” rather than “unjust” contracts.²⁸

The central section of the Act is s. 7(1), which provides:

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

grant relief as provided in the Act. Perhaps the most important feature of the section is that it is directed at contracts, while s. 52A of the Trade Practices Act 1974 (Cth.) is directed at conduct. There are, however, some useful analogies. The term “unjust” is defined in s. 4(1) to include “unconscionable, harsh or oppressive”, which imports the common law associated with each of these terms into the Act, and which may account for some of the dicta of Hodgson, J. in *A.G.C. (Advances) Ltd. v. West*,²⁹ considered below. In *Antonovic v. Volker*, Mahoney, J.A. suggested that the expression includes every form of injustice.³⁰ In N.S.W. considerations which may, before the Act, have led a court of equity to grant relief are certainly comprehended within this definition. Those considerations do not restrict the scope of operations of the Act. As McInerney, J. pointed out in *Paciullo v. W. W. Vallack Real Estate Pty. Ltd.*,³¹ the definition is not all-inclusive. It is apparently not necessary that an action be commenced specifically to invoke the operation of the Act, and it may be invoked at any stage in proceedings in a competent court.³²

For the purposes of attempting to understand s. 52A of the Trade Practices Act 1974 (Cth.), the most important provision of the Contracts Review Act, 1980 (N.S.W.) is s. 9.³³ Sub-section (1) provides:

²⁷ See Goldring *et al. op. cit. supra* n. 2, para. [305]. The most notable and most litigated provision is s. 88F of the Industrial Arbitration Act 1940, but there were also similar provisions in the legislation dealing with consumer credit, which have been continued in the provisions of Part IX of the Credit Act 1984 (N.S.W.). See *id.*, paras. [952-954].

²⁸ E.g. in Australia, s. 88F of the Industrial Arbitration Act 1940: see *per* McHugh, J.A. in *West v. A.G.C. (Advances) Ltd.* (1986) A.S.C. 55-500, at 56,711. The word “unfair” is used in s. 5 of the United States Federal Trade Commission Act, which provided the model for s. 52 of the Trade Practices Act 1974 (Cth.), and while it has been applied by courts in that country to situations which would fall, in Australia, within s. 52 of the Act, its interpretation may also assist the application of s. 52A. The provision is discussed in Goldring *et al., op. cit. supra* n. 2, Chap. 7, to the extent that it may assist in the interpretation of s. 52.

²⁹ (1984) A.S.C. 55-494.

³⁰ N.S.W. Court of Appeal, 23 December 1986, unreported, transcript p. 15.

³¹ (1986) A.S.C. 55-478, at 56,562. To similar effect see *Sharman v. Kunert* (1985) A.S.C. 55-425; and *West v. A.G.C. (Advances) Ltd.* (1985) A.S.C. 55-500, (*esp. per* McHugh, J.A. (with whom Hope, J.A. agreed) at 56,710), where all members of the Court of Appeal agreed in finding that the views of the trial judge on this point were too restrictive.

³² *Commercial Banking Co. of Sydney Ltd. v. Pollard* [1983] 1 N.S.W.L.R. 74; *contra: Beaumont v. Helvetic Investment Corporation Pty. Ltd.* (1982) A.S.C. 55-194.

³³ Considered in greater detail in Goldring *et al., op. cit. supra* n. 2 para. [311].

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

In the Trade Practices Act 1974 (Cth.) there is no reference to "public interest", nor any general injunction of this type. There is, however, a close parallel between s. 9(2) of the Contracts Review Act, 1980 (N.S.W.) and s. 52A(2) of the Trade Practices Act 1974 (Cth.); for convenience, s. 9(2) is set out as Appendix A to this article, with references to the corresponding provisions of s. 52A. It is a much more specific set of provisions than that found in s. 52A, but, it is suggested, the effect is likely to be similar. The specific matters to which the Court must have regard are intended to give some indication of what the legislature intended to be meant by "public interest", though it is clear that the listing of specific matters in the sub-section is not intended to be exhaustive, or, indeed, to limit the circumstances in which a Court might find that the contract was "unjust". Some of the judicial consideration of s. 9 will be considered in relation to the specific construction of s. 52A(2).

Section 7 of the Contracts Review Act, 1980 (N.S.W.)³⁴ provides that the court may make declarations that a contract is void, in whole or in part, may refuse to enforce the contract, may vary its terms, or may order the execution of an instrument affecting land if that is necessary to give effect to the order of the court. The First Schedule to the Act provides for different types of ancillary relief. Section 10 allows the Court, on the application of the Minister, rather than a party, to make orders of a general type. These provisions correspond, in some respects, to the type of relief that may be granted in the Federal Court under ss. 80 and 87 of the Trade Practices Act 1974 (Cth.).

The Specific Provisions of Section 52A(2)

It is clear that the matters listed in s. 52A(2) are not intended to limit the matters that the Court may take into account, and the use of the term "may take into account", while suggesting that a court may be remiss if it *fails* to consider the specified matters, does not indicate what weight, either relatively or absolutely, should be attached to them. This remains entirely within the discretion of the Court, and gives a great deal of scope in interpretation.

"(a) the relative strengths of the bargaining positions of the corporation and the consumer;" This paragraph is clearly intended to

³⁴ Considered in some detail in Goldring *et al.*, paras. [310] and [313].

allow the court to examine the relative *economic* positions of the parties (and is reinforced by the wording of paragraph (e), considered below); but it is not clear whether a mere inequality of bargaining power of itself would be sufficient to justify a conclusion that the conduct was unconscionable. In *West v. A.G.C. (Advances) Ltd.*, McHugh, J.A. made some remarks about ss. 7 and 9 of the Contracts Review Act, 1980 (N.S.W.) which *mutatis mutandis*, could apply equally to sub-sections 52A(1) and (2) of the Trade Practices Act 1974 (Cth.), provided it is accepted that "unjust" in the context of the State Act and "unconscionable" in the Commonwealth Act have similar meanings, and that the former deals with "contracts" and the latter with "conduct":

Under sec. 7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made, or both. Thus a contractual provision may be unjust simply because it imposes an unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision . . . In other cases the contract may be unjust because in the circumstances the claimant did not have the capacity or opportunity to make an informed or real choice as to whether he should enter into the contract . . . More often it will be a combination of the operation of the contract or the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice.³⁵

It would seem that in most cases the "unconscionability" referred to in s. 52A(1) will derive from circumstances falling within several of the paragraphs of s. 52A(2), as well as other types of "weakness" (including, but not limited to, the other circumstances mentioned in s. 52A(2), and circumstances of the types referred to in many of the cases),³⁶ but it would be sufficient that it arise from circumstances falling within only one of the paragraphs, or not falling within any. The terms of s. 52A(2) amount to little more than a "check-list" for the courts to ensure that no matter of the type described in any of the paragraphs is overlooked in the court's consideration of whether the section applies.

³⁵ (1986) A.S.C. 55-500, at 56,711. In *Antonovic v. Volker*, N.S.W. Court of Appeal, 23 December 1986, unreported, Mahoney, J.A. suggested, (at 22) that the features which render the contract unjust must have "substantial weight".

³⁶ Especially those of the type listed by Fullagar, J. in *Blomley v. Ryan* (1956) 99 C.L.R. 362 at 465; which include sickness, infirmity and intellectual handicap.

Nor are the circumstances listed in s. 52A(2) to be read as limited by the extent of the principles developed by the courts in relation to "unconscionability" and, presumably, in connection with any related doctrine, such as the rules relating to undue influence. In *West v. A.G.C. (Advances) Ltd.*,³⁷ the members of the Court of Appeal seemed to think that Hodgson, J.³⁸ had indicated that under the Contracts Review Act, 1980 (N.S.W.), s. 9(2), the general principles developed by the courts in connection with the doctrine of unconscionability were identical to those to be applied under the statute. However, when the case went on appeal,³⁹ all members of the Court of Appeal, though differing in the conclusions they reached on the facts of the case, agreed that the interpretation of the statute was not limited by the doctrines developed by the courts in the development of equitable doctrines of unconscionability.⁴⁰ Perhaps the idea is best expressed in the following words:

The Act seems to me clearly to call for a fresh and direct approach to the individual case, without preconceived notions of conditions on which a Court may set aside or vary a contract derived exclusively from established doctrines, whilst at the same time giving due recognition to the public interest in generally holding parties to their bargains.⁴¹

It is suggested that the words of s. 52A call for a similar approach.

"(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;" This raises questions of what, in the circumstances, is "reasonable" and what the "legitimate interests" of the corporation may be. There was some consideration of the similar provisions of s. 9(2)(d) of the Contracts Review Act, 1980 (N.S.W.) in *West v. A.G.C. (Advances) Ltd.*⁴² In that case, the claimant, Mrs. West, had granted a mortgage of her land and house in favour of the finance company in consideration of a loan, in form to her, but which was applied mainly for the benefit of a business which employed her husband. The majority of the Court of Appeal found that in the circumstances, the legitimate interests of the finance company, which had previously rejected an application for a loan by the business, required some security, and the taking of a mortgage over Mrs. West's property was reasonably necessary to protect those interests. The majority found that though there may have been some question as to whether the transactions between Mrs. West, the company which operated the business, and its principals were "unjust" (a question which

³⁷ (1986) A.S.C. 55-500.

³⁸ *A.G.C. (Advances) Ltd. v. West* (1984) A.S.C. 55-494.

³⁹ *West v. A.G.C. (Advances) Ltd.* (1986) A.S.C. 55-500.

⁴⁰ This view also seems to have been adopted by McInerney, J. in *Paciullo v. W. W. Vallack Real Estate Pty. Ltd.* (1986) A.S.C. 55-478.

⁴¹ *Per Holland, J. in Sharman v. Kunert* (1985) A.S.C. 55-425, at 56,222.

⁴² (1986) A.S.C. 55-500.

they answered in the negative, as they found that the Contracts Review Act, 1980 (N.S.W.) required attention to the *contract*, rather than to the transaction as a whole, the contract embodying the agreement to create the mortgage was not "unjust". Kirby, P., dissenting, took a wider view, which, with respect, would certainly be acceptable in the context of s. 52A of the Trade Practices Act 1974 (Cth.), which refers to "conduct" rather than "contract", but which, in the context of *West's* case, seems less convincing than that of the majority.

In *West's* case, McHugh, J.A. emphasised that at least under s. 9(2)(d) of the Contracts Review Act, 1980 (N.S.W.), the Court is required to examine the position of *both* parties, and that the provision "emphasises that a party to a contract is entitled to insist on such contractual provisions as are necessary to protect his legitimate interests"⁴³ and found that the trial judge was in error in failing to consider this question.

"(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;" This provision is much less specific than the corresponding provisions of s. 9(2) of the Contracts Review Act, 1980 (N.S.W.), which refers specifically to matters such as language and educational background. However, the level of comprehension of the transaction (as opposed to the specific provisions of the contract) appears to have been a factor which influenced the courts in some claims for equitable relief.⁴⁴ Lack of comprehension, especially where the complainant's first language was not English, has been raised in several cases dealing with the Contracts Review Act, 1980 (N.S.W.).⁴⁵ Paragraph (c) would also seem to cover the physical form and expression of any documents, including the complexity of any language used.⁴⁶ However, as sub-section (1) requires that all the circumstances be considered, it is unlikely that a complex technical document (e.g. the finance company mortgage document considered in *West's* case) will necessarily be evidence of unconscionability, because such documents are commonly used in such transactions, and may also be considered reasonably necessary to protect the legitimate interests of a party. The paragraph should not be taken as a general injunction to use "plain English" documentation.

Section 52A of the Trade Practices Act 1974 (Cth.) differs from the Contracts Review Act, 1980 (N.S.W.) in that there is no specific reference in sub-section (2) to the question of whether a party received independent advice; nor as to the possibility of negotiation. The former factor is one upon which Kirby, P., in his dissent in *West v. A.G.C. (Advances)*

⁴³ (1986) A.S.C. 55-500, at 56,714.

⁴⁴ E.g., *Lloyds Bank Ltd v. Bundy* [1975] 1 Q.B. 326; *Commercial Bank of Australia Ltd. v. Amadio* (1983) 151 C.L.R. 447.

⁴⁵ E.g., *Partyka v. Wilkie* (1982) A.S.C. 55-213; *Toscano v. Holland Securities Pty. Ltd.* [1985] 1 N.S.W.L.R. 145; *Sharman v. Kunert* (1985) A.S.C. 55-425.

⁴⁶ See *Cook v. Bank of New South Wales* (1982) 2 B.P.R. 9580.

Ltd.,⁴⁷ placed great emphasis. Paragraph (c) refers to comprehension of *documents*, though the section itself seem to apply to *all* the circumstances of the transaction. Nevertheless, if the Courts are to take seriously the clear intention of the legislature (which, it is suggested, s. 15AA of the Acts Interpretation Act 1901 (Cth.) would require), such matters are clearly relevant to any claim that conduct of a corporation, as defined, contravenes s. 52A.

“(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services;” This paragraph, of all the provisions of the section, probably gives the Courts the greatest latitude. First, it imports, without in any way limiting the matters to be considered, all of the common law dealing with the question of “undue influence”,⁴⁸ a group of principles which were considered in *Lloyds Bank Ltd. v. Bundy*⁴⁹ and are closely related to, if not often confused with, the principles relating to “unconscionability”. These principles would certainly have the effect of raising a presumption that where the parties fall within certain defined relationships, the contract may be unconscionable. Such principles would almost certainly apply in situations where the party entered into a transaction as the result of the influence of a close relative, such as a son (as in *Lloyds Bank Ltd. v. Bundy*⁵⁰ and *Commercial Bank of Australia Ltd. v. Amadio*⁵¹) and possibly of a close acquaintance with whom a working relationship had been formed, such as in *Sharman v. Kunert*.⁵² Secondly, it imports the notion of “pressure” (or possibly “undue pressure”), which is a most unclear concept, but which would appear to cover situations not falling precisely within the common law principles relating to “undue influence”. A similar expression occurs in s. 9(2)(j) of the Contracts Review Act, 1980 (N.S.W.). This was considered in *Antonovic v. Volker*,⁵³ where the Court of Appeal found that the actions of a real estate salesman at an auction of land amounted to “unfair pressure”, but the judgments do not really assist in determining the clear meaning of the expression. Thirdly, another concept, that of “unfair tactics” is introduced. As mentioned above,⁵⁴ the Contracts Review Act, 1980 (N.S.W.) does not import the concept of “unfairness”. However, this phrase is used in s. 88F of the Industrial Arbitration Act 1940 (N.S.W.).⁵⁵ It appears to be far wider than any of the terms “harsh”, “oppressive” or “unconscionable”, but in the context

⁴⁷ (1986) A.S.C. 55-500, discussed below.

⁴⁸ As to which see, e.g. Lindgren *et al.*, *op. cit. supra* n. 19, Chap. 14.

⁴⁹ [1975] 1 Q.B. 326.

⁵⁰ [1975] 1 Q.B. 326.

⁵¹ (1983) 151 C.L.R. 447.

⁵² (1985) A.S.C. 55-425.

⁵³ N.S.W. Court of Appeal, 23 December 1986, unreported.

⁵⁴ See n. 30 and accompanying text.

⁵⁵ Considered in detail in G. Woods and P. Stein, *A Radical Law—Harsh and Unconscionable Contracts of Work in N.S.W.*, Sydney, Law Book Co., 1972, and also in Peden, *op. cit. supra* n. 4.

of s. 52A(2)(d) can apply only to "tactics" related to the supply or possible supply of goods or services to a person.

"(e) *the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.*" This paragraph is clearly related to the question of the relative strengths of bargaining position of the parties, mentioned in paragraph (a). Many of the cases dealing with both unconscionability and undue influence have considered the sufficiency and adequacy of the consideration, and it has also been considered in the context of the Contracts Review Act, 1980 (N.S.W.).⁵⁶ This paragraph clearly invites the court to consider market factors and comparative prices.

The Relevant Circumstances and Time

Section 52A(4) requires that the Court "shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention", but permits it to "have regard to conduct engaged in, or circumstances existing" before the commencement of the section. The use of the expression "reasonably foreseeable" gives the court considerable latitude in determining what circumstances *ought* to be taken into account, and suggests that the standard to be applied is objective. However, it is clear from the second part of the sub-section that evidence of similar conduct by the person alleged to have contravened the section, or, presumably, by others, is relevant to determining whether the conduct complained of is, in all the circumstances, unconscionable. This is particularly relevant when the Minister or the Commission (who are entitled to commence action under s. 80) seek to act to prevent some type of conduct which contravenes the section which forms part of a consistent pattern of conduct on the part of a corporation. In *Paciullo v. W. W. Vallack Real Estate Pty. Ltd.*⁵⁷ the N.S.W. Minister for Consumer Affairs sought, under s. 10 of the Contracts Review Act, 1980 (N.S.W.), to restrain a real estate agent from using a form of agency agreement which was alleged to be unjust, and evidence was given (by the real estate agent) of the frequency of reliance on the allegedly unjust conditions. It would have been equally open to the Minister to rely on similar conduct on the part of the agent.

Section 9(4) of the Contracts Review Act, 1980 (N.S.W.) is in similar terms to s. 53(4) of the Trade Practices Act 1974 (Cth.). In *A.G.C. (Advances) Ltd. v. West*,⁵⁸ Hodgson, J., whose judgment on this point was approved by the Court of Appeal⁵⁹ said that as he read the provision:

⁵⁶ *Sharman v. Kunert* (1985) A.S.C. 55-425.

⁵⁷ (1986) A.S.C. 55-478.

⁵⁸ (1984) A.S.C. 55-494.

⁵⁹ (1986) A.S.C. 55-500.

I have not been referred to any authority on this question. My tentative views on it are as follows:

- (a) the court may have regard to all existing circumstances which are relevant, whether they are known to the party against whom relief is sought or not, though lack of knowledge of such circumstances could affect the exercise of the court's discretion;
- (b) the court may have regard to future circumstances, only if those circumstances were reasonably foreseeable having regard to the existing circumstances;
- (c) the court may have regard to the legal effect of the contract and the circumstances which exist at the time the contract is made whether this effect is appreciated by the party against whom relief is sought or not, although again if that party does not appreciate this effect, then that may be relevant to the exercise of discretion.

In coming to this tentative view, I have had regard to sec. 9(1) which makes reference to future circumstances, and have in effect limited the operation of s. 9(4) to future circumstances.⁶⁰

Provided proper account is taken of any specific differences between the Commonwealth and State legislation, it is suggested that the same considerations should apply to the construction of s. 52A(4). Section 87(1D) provides that in considering whether to grant relief under that section against a contravention of s. 52A, the Court may have regard "to the conduct of the parties to the proceeding since the contravention occurred". Section 87(1C) imposes a limitation period of two years from the date of the contravention within which orders under the section may be made.

Remedies and Relief

Section 52A of the Trade Practices Act 1974 (Cth.) makes no specific provision for relief. Like the other provisions of Part V Division 1 of the Act, enforcement of the section is available under Part VI, and unless s. 86 is amended along lines already foreshadowed by the Commonwealth, is within the exclusive jurisdiction of the Federal Court of Australia.^{60A} However, a right arising by operation of the Trade Practices Act 1974 (Cth.) may, it seems, be raised as a defence in an action brought in a State or Territory Court.⁶¹

However, the relevant provisions of Part VI were amended at the same time as s. 52A was introduced into the Act to provide that no criminal sanctions (generally available under s. 79), actions for damages (under s. 82) or "remedial advertising" orders (under s. 80A) apply to contraventions of s. 52A. The only remedies are those of injunction (under s. 80)

⁶⁰ *A.G.C. (Advances) Ltd. v. West* (1984) A.S.C. 55-494.

^{60A} But see now Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth.) and corresponding state legislation, such as the Jurisdiction of Courts (Cross-Vesting) Act, 1987 (N.S.W.).

⁶¹ This rather involved question is discussed in *Goldring et al., op. cit. supra* n. 2 para. [1042].

and certain types of ancillary relief (under s. 87). This intention was made explicit in both the Minister's second reading speech on the Trade Practices Revision Act 1986 and the explanatory memorandum to that Act.

It is not difficult to envisage situations where a person could suffer loss or damage as a consequence of the sort of conduct that contravenes s. 52A, but it may be that the government considered that the provision was sufficiently controversial without creating a right to claim damages for unconscionable conduct as well. The evolution of equitable principles governing not only unconscionability, but also duress and undue influence has led to a situation where the usual relief against such conduct is in the form of an injunction or declaratory order. The consequences of such relief, however, may affect the position of persons other than parties to a contract, and ss. 7, 8, 10 and 19 and the First Schedule to the Contracts Review Act, 1980 (N.S.W.) specifically provide for the making of orders binding on persons who may be parties to neither the contract questioned nor to the transaction giving rise to the contract.

Section 52A is, of course, concerned with conduct rather than contracts, but the terms of ss. 80 and 87 are adequate, on their face, to allow orders to be made not only against the person found to have contravened s. 52A, but also against any other person, if such orders are necessary to give full relief against the consequences of such a contravention.⁶² The range of remedies available under s. 87 extends from purely declaratory orders to orders for the refund of money or the transfer of property or land or the performance of specified services.

What is, perhaps, most significant, is that the remedies available under ss. 80 and 87 are *discretionary*. Even where the court finds that conduct contravenes s. 52A, it is not obliged to grant relief, but rather to balance all the relevant factors and interests and then to make the judgment it considers most appropriate in the circumstances.⁶³

Although there has, in the past, been some criticism of the insurance industry, s. 87(1E) provides specifically that no order under s. 87 may be made in relation to a contravention of s. 52A in relation to a contract to which the Insurance Contracts Act 1984 (Cth.) applies. However, relief may be granted under s. 80 in respect of such conduct.

Analysis and Conclusions

This account of s. 52A may leave the reader with a sense that matters have not really been clarified, but, it is suggested, the section has in fact clarified a number of issues which were left highly indeterminate by the

⁶² The remedies available under ss. 80 and 87 of the Trade Practices Act 1974 (Cth.) are discussed in Goldring *et al.*, *op. cit. supra* n. 2 paras. [1043-1054].

⁶³ The discretionary nature of the relief to be granted under the terms of the Contracts Review Act, 1980 (N.S.W.), which are also discretionary, received considerable attention from the Court of Appeal, and particularly from Samuels, J.A., in *Antonovic v. Volker*, N.S.W. Court of Appeal, 23 December 1986, unreported. It raises particular difficulties for an appellate court, which must substitute its collective discretion for that of the primary judge.

case law. Is it possible to draw any conclusions about how the courts will interpret s. 52A?

I have tried to suggest that, while the Contracts Review Act, 1980 (N.S.W.) differs in some material respects from s. 52A of the Trade Practices Act 1974 (Cth.), especially in that it is directed at *contracts* rather than *conduct*, it does provide some guidance as to the types of approach that are open to the courts in interpreting s. 52A. In the early cases under the Contracts Review Act, 1980 (N.S.W.), it became apparent that the legislation could be interpreted narrowly⁶⁴ or broadly.⁶⁵ Similar trends may be apparent in the judgments delivered by the members of the N.S.W. Court of Appeal in *West v. A.G.C. (Advances) Ltd.*⁶⁶ That case, it is suggested, can best be explained in terms of the view which the members of the Court of appeal took of the facts. The majority (McHugh and Hope J.J.A.) found on the facts that the contract was not unjust, primarily on the ground that the claimant had received advice about the effect of the contract from her son, a person of some knowledge and experience, and a barrister friend, but chose not to heed that advice, while Kirby, P. considered that in a complex and significant transaction such as the creation of a mortgage over one's home, independent and proper professional advice was required before the contract could be considered just in all the circumstances. It is possible to discern in the judgment of McHugh, J.A. (with which Hope, J.A. agreed), a suggestion that in the absence of the advice which was tendered, advice that could be regarded as informed and competent, they, too would have found that the contract was unjust in the circumstances. Even though s. 52A does not contain as extensive a catalogue of factors which the court should consider as does s. 9(2) of the Contracts Review Act, 1980 (N.S.W.), the words of Kirby, P. may indicate the sort of matters which a court *may* consider. Therefore, by giving this indication, the judicial interpretation of the Contracts Review Act, 1980 (N.S.W.) may provide some guidelines for those "corporations" whose conduct is likely to be affected by s. 52A.

It is worth quoting some passages from the judgments in *West's* case. First, Kirby, P. (dissenting) said:

In his judgment, McHugh, J.A., rightly in my opinion, describes the *Contracts Review Act*, 1980 (N.S.W.) ("the Act") as "beneficial legislation" to be "interpreted liberally". The Act, though it operates in the domain of contract law, signals the end of classical contract theory. It is therefore surprising that, although the Act has now been in force for more than six years, few are the cases in which its relief has been claimed. Fewer still are the cases in which the Court has provided relief. Where such a radical disturbance of time-honoured

⁶⁴ Arguably, as in *Beaumont v. Helvetic Investment Corporation Pty. Ltd.* (1982) A.S.C. 55-194.

⁶⁵ As in the interpretation of the same provision in *Commercial Banking Co. of Sydney Ltd. v. Pollard* [1983] 1 N.S.W.L.R. 74.

⁶⁶ (1986) A.S.C. 55-500.

concepts governing contractual relations between parties intrudes upon settled law, there is a natural disinclination to apply to statute as its language would suggest the Parliament to have envisaged. There is an equal inclination to by-pass the full consequences of such novel provisions by avoiding the application of the statute altogether and relying upon previously settled and more familiar avenues of redress. Alternatively, even where (as here) the statute has been held to apply, the wide jurisdiction given to the Court may be read down, out of deference to concepts of relief which predate the enactment of its beneficial provisions. These inclinations should be recognised so that they may be resisted.⁶⁷

The President went on to discuss the application of various provisions of s. 9(2) of the Contracts Review Act, 1980 (N.S.W.), indicating that the mere fact that a borrower of money does not receive independent legal or other expert advice (referred to in s. 9(2)(h)) will not necessarily make a contract "unjust" within the meaning of the Act. However, he seems to take the view that the operation of the section has the virtual effect of raising a rebuttable presumption of injustice if the absence of independent advice can be shown.

He says:

. . . although sec. 9(2)(h) does not intrude an absolute requirement of independent advice before mortgagors . . . enter loan and mortgage arrangements with finance companies . . . the paragraph is a sufficient indication that, in some circumstances, the finance company will take a risk that the Court may subsequently decide that the contract is unjust, if the mortgagee lender fails, in circumstances that would otherwise suggest this course, to protect itself and the mortgagor borrower by insisting upon the interposition of appropriate independent legal or other expert advice.⁶⁸

It is submitted that there is nothing in the judgment of McHugh, J.A. which suggests that he would disagree, though perhaps he places greater weight on the need to examine *all* the circumstances of any particular case.

If this argument is accepted, then it follows that the effect of the legislation should be to place on notice all those who enter into contracts of the type affected by the particular legislation that they should not risk having the contract set aside by the courts by engaging in such conduct as appears to fall within the range of circumstances to which the court is specifically directed, by the legislation, to consider. Therefore, the degree of uncertainty in the law is reduced. It may be the case that the range of conduct open to a party is restricted, but at least that party is, or ought to be, aware that the consequences of engaging in conduct that may run foul of the legislation may be that the contract may be set aside and that

⁶⁷ (1986) A.S.C. 55-500, at 56,704.

⁶⁸ *Id.* 56,705.

the court may order restitution of property that has passed in the transaction.

The common law tests of what might count as "unconscionable" conduct, for instance those laid down by the High Court in *Blomley v. Ryan*⁶⁹ or *Commercial Bank of Australia Ltd. v. Amadio*⁷⁰ are quite intentionally unspecific,⁷¹ so that the courts could extend the area and grant relief in cases where it considered this to be necessary. Such indeterminacy also gives the opportunity to the court to refuse relief, and to place the value of certainty and predictability above those of equity in the individual case, if it is so minded.

Wherever language is used, it is open to interpretation. Statutes are comprised of language. The courts must interpret that language. However, the language of statutes has a high degree of legitimacy, in that it represents, in theory, the voice of the people, with full legal authority. In enacting legislation such as the Contracts Review Act, 1980 (N.S.W.) and the Trade Practices Act 1974 (Cth.), the legislatures must be taken to have expressed the popular will, which may be at odds with the values developed by judges over the years. But the real virtue of such legislation is that, while it does not and could not entirely eliminate indeterminacy in the law, it does reduce it substantially. In the case of the legislation dealing with "unconscionable" conduct and contracts, this has been done by providing a "check-list" of circumstances which must be considered. That check-list is certainly directed at the Courts, in order to reduce the scope for the importation of indeterminate and unknown factors, such as the attitude of the judges, and to provide publicly known criteria which should reduce the degree of contingency. But it must also be taken into account by parties who value certainty and predictability in their transactions. Each party must take care, in the type of conduct affected by the legislation, to ensure that it conducts itself in a way that is least likely to attract the attention of the court if the other party should take action for relief.

Section 52A of the Trade Practices Act 1974 (Cth.) is expressed in much more general terms than may be found in s. 9(2) of the Contracts Review Act, 1980 (N.S.W.). One can only speculate as to the reasons for this, but it is quite likely (especially in a situation where the government of the time did not control the Senate) that the legislators considered that it was sufficient to express the criteria for relief in relatively general terms, and to leave the rest to the judges. This may not have been the wisest course, as the more that is left to judicial discretion in such cases, the greater the indeterminacy of the law.

In the "classical" type of contract, the parties, in effect, write their own law: the official legal system provides the machinery for enforcing

⁶⁹ (1956) 99 C.L.R. 362.

⁷⁰ (1983) 151 C.L.R. 447.

⁷¹ See also *per Mahoney, J.A. in Antonovic v. Volker* N.S.W. Court of Appeal, 23 December 1986, unreported.

what the parties have agreed upon. In general, however, the contract under which the ordinary person acquires goods and services is an *implied*, and thus a "regulated" contract, whose very existence, as well as its content, arises through the operation of the law. The terms and conditions of regulated contracts are not tailored specifically to the needs of the parties, but consist of general and abstract legal principles which must be applied (in the last resort by the courts) to particular facts and circumstances. If it is possible to reduce the indeterminacy inherent in the process of application of general and abstract principles to particular circumstances, there is greater certainty. To prescribe, in legislative form, a set of criteria by which conduct or a contract can be judged to warrant the judicial granting of relief therefore reduces the uncertainty in the law rather than increasing it. To the extent that legislation such as the Contracts Review Act, 1980 (N.S.W.) and s. 52A of the Trade Practices Act 1974 (Cth.) specify criteria which can guide conduct, they reduce indeterminacy, and that, it is suggested, is the effect of s. 52A of the Trade Practices Act 1974 (Cth.). However, the fact that the remedies which may be granted once the court finds that the criteria are met are totally discretionary may, to some extent, reduce the effectiveness of the legislation in reducing uncertainty.

Appendix A

Contracts Review Act, 1980 (N.S.W.), section 9(2):

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

- (a) whether or not there was any material inequality in bargaining power between the parties to the contract; [cf Trade Practices Act 1974 (Cth.) [henceforth "TPA"] s. 52A(2)(a)];
- (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; [cf TPA s. 52A(2)(b)]
- (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; [some, but not all, of these factors may fall within the terms of TPA s. 52A(2)(d)]

(f) the relative economic circumstances, educational background and literacy of—

(i) the parties to the contract (other than a corporation); and

(ii) any person who represented any of the parties to the contract; [this provision seems, in part, to amplify para.

(a); cf (in part) TPA s. 52A(2)(a) and (d)]

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed; [cf TPA s. 52A(2)(c)]

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;

(i) 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 the Act, and whether or not that party understood the provisions and their effect; [cf (in part) TPA s. 52A(2)(c) and possibly (d)]

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

(i) by any other party to the contract;

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

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any other person acting or appearing or purporting to act for or on behalf of any other party to the contract; [cf TPA s. 52A(2)(d)]

(k) The conduct of the parties to the proceedings in relation to similar contracts or course of dealing to which any of them has been a party; [cf (to a limited extent) TPA s. 52A(4)] and

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