

Trade Practices Act 1974 (Cth), Section 52A and the Law of Unjust Contracts

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Introduction

The law of unjust contracts comprises the equitable doctrines of unconscientious dealing and undue influence, along with a burgeoning array of statutory initiatives including the *Contracts Review Act* 1980 (NSW), the *Credit Act* 1984 (NSW), Part IX and its counterparts in the other States that have adopted the "uniform" credit laws,¹ and s52A of the *Trade Practices Act* 1974 (Cth) and the corresponding provisions in State fair trading legislation.² To this list could be added the reopening provisions of the hire-purchase legislation in those States where it continues to apply,³ the money-lending legislation in Tasmania and the Northern Territory⁴ and s88F of the *Industrial Arbitration Act* 1940 (NSW), which relates to contracts of work that are harsh, unconscionable or contrary to the public interest. The focus of this paper is on s52A of the *Trade Practices Act*. However, a short survey of the other principal laws will first be undertaken,⁵ with a view to putting the section in its context. Cases decided in relation to the other laws will assist in the interpretation of s52A.

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1 *Credit Act* 1984 (Vic) Part IX; *Credit Act* 1984 (WA) Part IX; *Credit Act* 1987 (Qld) Part IX; *Credit Ordinance* 1985 (ACT), Part IX. See also *Consumer Credit Act* 1972-1983 (SA), s46.

2 *Fair Trading Act* 1985 (Vic) s11a; *Fair Trading Act* 1987 (NSW) s43; *Fair Trading Act* 1987 (SA), s57; *Fair Trading Act* 1987 (WA), s11; *Fair Trading Act* 1989 (Qld), s39; *Fair Trading Act* 1990 (Tas), s15; *Consumer Affairs and Fair Trading Act* 1990 (NT), s43.

3 *Hire-Purchase Act* 1959 (Vic), s24; *Hire-Purchase Act* 1959 (WA), s24; *Hire-Purchase Act* 1959-1987 (Qld), s28; *Hire-Purchase Act* 1959 (Tas), s33; *Hire-Purchase Act* 1961-1965 (NT), s36.

4 *Lending of Money Act* 1915 (Tas), s2; *Money-lenders Act and Ordinance* 1903-1970 (NT), s1.

5 But not the hire-purchase or moneylending legislation, or the *Industrial Arbitration Act* 1940 (NSW).

Part 1

The Law of Unjust Contracts: An Overview

(a) Unconscientious Dealing and Undue Influence

(i) Introduction⁶

The common law still adheres to the tradition, firmly established in the nineteenth century, of upholding contracts that were freely entered into and, concomitantly, of refusing to become concerned with the outcome of whatever it was the parties might have agreed to.⁷ The qualification to this approach implicit in the adverb "freely" manifests itself in the rules governing fraud, duress, non est factum and incapacity, which are all directed to particular circumstances affecting the quality of the consent of one or other of the parties to the contract.

These common law grounds for intervention are supplemented by the equitable principles governing undue influence and unconscientious dealing. Equity's approach to intervention is more flexible than that of the common law, but the difference has always appeared to be only one of degree. For instance in equity, as at common law, the presumption is in favour of upholding contracts, not striking them down. This much emerges from remarks made by Latham CJ in *Wilton v Farnworth*, a case involving unconscientious dealing:

[w]here a man signs a document knowing that it is a legal document relating to an interest which he has in property, he is in general bound by the act of signature... He may not trouble to inform himself of the contents of the document, but that fact does not deprive the party with whom he deals of the rights which the document gives to him. In the absence of fraud or some other of the special circumstances mentioned, a man cannot escape the consequences of signing a document by saying and proving that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions.⁸

Additionally, in equity, as at common law, the focus is on the bargaining process, not the bargaining outcome: the concern ultimately is with abuse of the former, not the quality of the latter.⁹ In *Allcard v Skinner*, Lindley LJ, speaking of the doctrine of undue influence in its application to gifts, said:

6 Text at nn6-14 is taken from Duggan, Begg and Lanyon, *Regulated Credit: The Credit & Security Aspects* (1989) par10.2.1.

7 Subject to rules such as those governing illegality and public policy.

8 (1948) 76 CLR 646 at 649.

9 Other equitable doctrines do focus more explicitly on outcomes, eg, the rules relating to penalties and forfeiture. See especially, *Legione v Hateley* (1983) 152 CLR 106 and *Stern v McArthur* (1988) 165 CLR 489. However, the High Court itself is not yet agreed on the extent to which this is desirable, and recent trends in the case law remain open to debate: Finn, "Equity and Contract" in Finn (ed), *Essays in Contract* (1987) at 104.

In the United States, the dichotomy between process and outcomes is expressed in terms of procedural and substantive unconscionability: see Leff, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 *University of Pennsylvania LR* 485.

[t]he principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion, the doctrine of undue influence is founded on the second of these two principles... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with... On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.¹⁰

There are, however, tensions in the equitable approach to intervention which are papered over in the two passages just quoted. For one thing, although it may be said that the concern of equity is with process, not outcomes, the courts, in cases involving unconscientious dealing, have always been prepared to draw inferences about abuse of process from apparently one-sided outcomes. The line between drawing inferences from outcomes about process and making judgments about outcomes in their own right is a fine one. The tension is perhaps most apparent in the courts' attitude to inadequacy of consideration. It is said that inadequacy of consideration is never of itself a ground for intervention (the concern not being with outcomes as such), but that inadequacy of consideration may nevertheless be important in two respects: "firstly, as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion".¹¹ Where, as is often the case, inadequacy of consideration is only one of a number of factors from which the inference of disadvantage is drawn, there may be no cause to question this sort of approach, but the fewer or the less compelling the extraneous circumstances that are called in aid, the more readily will it be apparent that a substantive judgment is being made about the outcome of the transaction itself.¹²

Another source of tension in the equitable rules stems from the fact that the distinction drawn by Lindley LJ in *Allcard v Skinner* is more elusive than appears at first glance. Successful victimisation depends on a combination of folly on the part of the victim and guile on the part of the exploiter. There is always bound to be disagreement as to the ratio of guile to folly required to justify intervention. It is, in this light, not at all surprising that the leading cases on unconscientious dealing, *Blomley v Ryan*,¹³ and *Commercial Bank of Australia Ltd v Amadio*,¹⁴ were both subject to strong dissents: in the one case by Kitto J and, in the other, by Dawson J. The latter's judgment in particular has a strong libertarian flavour to it. For those who are not of that persuasion, it at least serves as a caution that some sacrifice of self-esteem is likely to be entailed for the party complaining in a case of unconscientious dealing. The

10 (1887) 36 Ch D 145 at 182-183.

11 *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J.

12 See *Brusewitz v Brown* [1923] NZLR 1106 at 1109-10 per Salmond J.

13 (1956) 99 CLR 362.

14 (1983) 151 CLR 447.

lower the ratio of guile to folly required before intervention, the greater the sacrifice is likely to be.¹⁵

(ii) *Unconscientious dealing*

The doctrine of unconscientious dealing can be summarised as follows:¹⁶

- (1) a presumption of unconscientious dealing arises "whenever one party to a transaction is at a special disadvantage when dealing with the other party, because illness, ignorance, inexperience, impaired facilities, financial need or other circumstances affect his ability to conserve his own interests and the other party unconscientiously takes advantage of the opportunity thus placed in his hands".¹⁷ To this list may be added age, gender and lack of assistance or explanation where assistance or explanation is necessary,¹⁸ as well as unfamiliarity with the English language;¹⁹
- (2) it is not sufficient that the party complaining is under a disability. It must further be shown that the other party took advantage of the situation. This usually involves proof that the other party knew of the disability, because otherwise there would be no opportunity for exploiting it. However, it may be sufficient to show that the other party was aware of facts from which the disability might reasonably be inferred;²⁰
- (3) the adequacy of the consideration moving from the stronger party to the weaker party is not decisive. However, it would usually have to be shown that the party complaining suffered some detriment, otherwise there would be no exploitation.²¹ It may be sufficient in this connection for the party complaining to show that he or she would not have entered into the contract but for the stronger party's conduct;
- (4) the stronger party may rebut a presumption of unconscientious dealing by showing that:

15 See, eg, the remarks of Rogers J in *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192 at 197-199:

"I have encountered great difficulty in attempting to describe Mrs Kurland in a way which avoids giving offence... Although the holder of a Bachelor of Science degree from a South African University, Mrs Kurland presented as the archetype of a female with a total lack of interest in anything outside her household... I found it difficult to accept that in present day Australia one can find a University graduate, in her thirties, with such a restricted view of the world and her place in it. I was suspicious that it was an assumed role for the purposes of the case. Rereading the transcript still left me uneasy. In the end I concluded I should accept the picture the defendants painted. To hold otherwise would require me to find that Mrs Kurland had an ability as an actress which I am not prepared to attribute to her".

16 For a fuller account, see Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985); Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (2nd edn, 1984) Chapter 16; Cheshire and Fifoot, *Law of Contract in Australia* (5th Aust edn, 1988) Chapter 8.

17 *Blomley v Ryan* (1956) 99 CLR 362 at 415 per Kitto J.

18 *Id* at 405 per Fullagar J.

19 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

20 *Ibid*.

21 *Id* at 475 per Deane J. Cf *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J.

- (a) the consideration was not, after all, inadequate (or that the contract was not otherwise detrimental to the party complaining); or
- (b) the party complaining had been alerted to the need for independent advice and either:
 - (i) had been given the opportunity of obtaining it;²² or
 - (ii) was advised appropriately by the stronger party;
- (5) if the presumption is not rebutted the court may, depending upon the circumstances, disallow enforcement of the contract at the suit of the stronger party, or order that the contract be rescinded in whole or part;
- (6) the absence of independent advice does not itself make a contract unconscionable. It is only after a presumption of unconscientious dealing arises that the question as to whether independent advice has been received becomes relevant, and even then it is not decisive.²³

(iii) *Undue influence*

The following points can be made about the doctrine of undue influence:²⁴

- (1) a presumption of undue influence can be established in two ways:
 - (a) there are certain categories of relationship where the risk of undue influence in relation to a disposition by the weaker party to the stronger is considered to be unusually high. These are: parent and child; guardian and ward; doctor and patient; solicitor and client; fiancé and fiancée; and religious or spiritual advisers and their devotees.²⁵ In such cases, a presumption of undue influence may arise merely out of the relationship;
 - (b) in other cases, where such a relationship does not exist, a presumption of undue influence may arise if the party complaining can point to factors showing that the other party was in a position of ascendancy or influence. The relationship of husband and wife is not one which automatically gives rise to a presumption of undue influence,²⁶ but a presumption of undue influence by one spouse over another may still arise if special circumstances can be pointed to.²⁷ In some circumstances, the banker-customer relationship may give rise to a presumption of undue influence, at least if the relationship is a long standing one and the customer has come to rely on the bank for advice;²⁸

22 As a general rule. If, for example, the advice obtained by the weaker party is, to the knowledge of the stronger party inadequate, the presumption of unconscientious dealing may not be rebuttable.

23 See, eg, *White v Ormsby* (1988) ASC 55-665 (S Ct NSW); Sneddon, "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1991) 14 *University of New South Wales LJ* (forthcoming), TAN 68-71.

24 For a fuller account, see Cope, above n16; Meagher, Gummow and Lehane, above n16, Chapter 15; Cheshire and Fifoot, above n16.

25 The last category may seem arcane, but for a recent example of a case where the relationship was in issue, see *Luffram v ANZ Banking Corp Ltd* (1986) ASC 55-483 (Vic Small Claims Trib) (a case decided under *Credit Act* 1984 (Vic), Part IX.).

26 *Yerkey v Jones* (1939) 63 CLR 649.

27 *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423.

- (2) many of the cases involve contracts of guarantee. In this context, undue influence might be exerted directly by the credit provider on the intending guarantor.²⁹ Alternatively, in certain circumstances, undue influence exerted by the debtor on the guarantor may be imputed to the credit provider (for example, where the debtor and guarantor are husband and wife, and the credit provider leaves it to the debtor to obtain his wife's signature to the guarantee),³⁰ or where the credit provider had notice of the debtor's conduct;³¹
- (3) once the presumption is established, the onus shifts to the other party to rebut it. This can be done by showing that the transaction resulted from the free exercise of independent will. Methods of rebutting the presumption include proof that: (a) the weaker party received independent advice; (b) the transaction was explained fully by the stronger party; or (c) the terms of the contract were not manifestly disadvantageous to the weaker party;
- (4) where reliance is placed on independent advice having been obtained, the court will scrutinise the advice given. It will usually not be sufficient for the adviser to explain the contents of the relevant documents to the weaker party. The advice must extend to the propriety of the transaction, and this requires that the adviser be made aware of all the material facts³² (this point is equally applicable where it is unconscionable dealing that is alleged);
- (5) where the stronger party itself assumes the responsibility of supplying the advice, it must be accurate. If it is not, the presumption of undue influence will continue to apply (unless it can be rebutted on other grounds), and also there is a danger of liability being incurred for misrepresentation;³³
- (6) if the presumption is not rebutted, the contract may be set aside;
- (7) there is a substantial overlap between the doctrines of unconscientious dealing and undue influence and it may be that they are converging.³⁴

28 *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326 (CA).

29 See, eg, *National Australia Bank Ltd v Nobile* (1988) ASC 55-657 (Full Fed Ct) and *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326 (CA).

30 *Yerkey v Jones* (1939) 63 CLR 649 at 683-690 per Dixon J; *Coldunell Ltd v Gallon* [1986] 1 QB 24; *Bank of Credit and Commerce International SA v Aboody* [1989] 2 WLR 759 (CA). The English cases take a somewhat different approach on the issue from the one suggested by Dixon J. Both approaches are analysed in Sneddon, above n23, TAN 31-53.

31 *Bank of New South Wales v Rogers* (1941) 65 CLR 42; *Bank of Credit & Commerce International SA v Aboody* [1989] 2 WLR 759 (CA).

32 *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127, 135-136 (JC); *McNamara v Commonwealth Trading Bank* (1984) 37 SASR 232, 241 per King CJ; *Guthrie v ANZ Banking Group Ltd* [1989] NSW Conv Rep s55-463 (Sup Ct of NSW, Cohen J).

33 See, eg, *National Australia Bank Ltd v Nobile* (1988) ASC 55-657 and *Cornish v Midland Bank Ltd* [1985] 3 All ER 513.

34 Hardingham, "Unconscionable Dealing" in Finn (ed), *Essays in Equity* (1985) 1 at 18. Cf *National Westminster Bank plc v Morgan* [1985] AC 686, where the House of Lords rejected the synthesis attempted by Lord Denning MR in *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326.

(b) *Contracts Review Act 1980 (NSW)*

The *Contracts Review Act 1980* is based on recommendations made to the New South Wales Government in 1976 by the late Professor John Peden.³⁵ These recommendations were, in turn, partly inspired by the unconscionability clause contained in Article 2-302 of the United States *Uniform Commercial Code*.

The Act provides for the reopening of a contract if it is found by a court to be unjust.³⁶ "Unjust" is defined to include "harsh, unconscionable or oppressive".³⁷ In deciding whether a contract is unjust, the court is directed to have regard to the public interest and all the circumstances of the case,³⁸ as well as to a list of other factors, including:³⁹ (a) whether or not there was any material bargaining inequality between the parties; (b) whether or not the provisions of the contract were the subject of negotiation; (c) whether or not it was reasonably practicable for the party seeking relief to negotiate for alteration or removal of any of the provisions of the contract; (d) whether or not any of the provisions of the contract imposed conditions which are unreasonable; (e) whether or not a party to the contract was able to protect their interests because of age or physical or mental incapacity; (f) the relative economic circumstances, educational background and literacy of the parties; (g) the form and intelligibility of the contract; (h) whether or not independent advice was obtained by the party seeking relief; (i) the extent to which the contract was explained to, and understood by, the party seeking relief; (j) whether there was any undue influence, unfair pressure or unfair tactics exerted on the party seeking relief; (k) the conduct of the parties in relation to similar dealings; and (l) the commercial setting of the contract.

The Act binds the Crown but the Crown may not be granted relief under the Act.⁴⁰ Also barred from seeking relief are public and local authorities, corporations and a person who enters into a contract in the course of, or for the purpose of, a trade business or profession (other than a farming undertaking). In its application to buyers, the Act is therefore effectively limited to consumer dealings. However, subject to the limitations just mentioned, a supplier can claim relief under the Act in a case where the contract is unjust on the ground of misconduct engaged in by the buyer.

Whether a contract is unjust must be judged as at the time it was entered into. However, in determining whether a contract is unjust, the court may have regard to circumstances that were reasonably foreseeable at the time the contract was made.⁴¹ In determining whether it is just to grant relief, the court may have regard to the conduct of the parties in relation to the performance of the contract since it was made.⁴²

35 *Peden Report on Harsh and Unconscionable Contracts* (1976). See also Peden, *The Law of Unjust Contracts* (1982).

36 Section 7(1).

37 Section 4(1).

38 Section 9(1).

39 Section 9(2).

40 Section 5.

41 Section 9(4).

42 Section 9(5).

In granting relief, the court may: refuse to enforce all or any of the provisions of the contract; declare the contract void in whole or part; or vary the contract.⁴³ The Act may be relied on either by way of application to the court, or as a defence to an action brought against the party claiming relief.⁴⁴ An application for relief must be made: (a) within two years of the date of the contract; (b) within three months before or two years after the time for the exercise or performance of any power or obligation under the contract, or of the occurrence of any activity contemplated by it; or (c) while maintainable proceedings are pending, arising out of or in relation to the contract against the party seeking relief under the Act.⁴⁵ There is provision for the making of orders for or against any third party having an interest in the contract,⁴⁶ and also for the protection of third party rights.⁴⁷ The court may make an order in the nature of an injunction, at the suit of the Minister or the Attorney-General, to restrain a person from entering into unjust contracts.⁴⁸

The Act is similar in its operation to the equitable doctrines of unconscientious dealing and undue influence, and it is often pleaded in the alternative with them. Nevertheless, there are differences. The most important is that, whereas the equitable doctrines are (notionally at any rate) concerned with the bargaining process (that is to say, "procedural unconscionability") the statute seems to allow the courts greater scope to take account of bargaining outcomes ("substantive unconscionability"). In equity, inadequate consideration or unfair terms do not themselves justify intervention, though they may be evidence of unconscientious dealing or undue influence (as the case may be).⁴⁹ By contrast, in *West v AGC (Advances) Ltd*, McHugh JA held that a contract might be unjust within the meaning of the *Contracts Review Act* "because of the way it operates in relation to the claimant or because of the way it was made or both":⁵⁰

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.⁵¹

McHugh JA went on to suggest that "in an appropriate case" a contract might be held to be unjust under the Act simply on account of gross disparity between the price of goods or services and their value, and even though none of the specific (process-oriented) criteria set out in the legislation is applicable.⁵²

43 Section 7(1).

44 *Commercial Banking Co of Sydney Ltd v Pollard* (1983) 1 NSWLR 74.

45 Section 16.

46 Section 12(1).

47 Section 12(2).

48 Section 10.

49 See p141, above.

50 (1986) 5 NSWLR 610 at 621.

51 *Ibid.*

52 *Id* at 622.

(c) *Credit Laws*

The re-opening provisions in the uniform credit legislation are closely modelled on the *Contracts Review Act*. However, they are narrower in scope, being restricted to regulated credit contracts and mortgages that are unjust. An application for relief may be made by a debtor, mortgagor or guarantor.⁵³ A guarantor may apply for relief on the ground that the credit contract is unjust, but not on the ground that the contract of guarantee is unjust. Accordingly, a case like *Amadio* could not be brought under the Credit Acts.⁵⁴ A contract or mortgage is "unjust" if it is "unconscionable, harsh or oppressive" (as in the case of the *Contracts Review Act*), and also if the annual percentage rate is excessive.⁵⁵ The reference to excessive rates derives from the money-lending legislation. It was held in the context of the money-lending legislation that "transactions may be perfectly honest, straightforward, open and above-board in every respect... but if notwithstanding all that, the interest is excessive, then the law allows the agreement to be re-opened."⁵⁶ The *Credit Act* provision is likely to be interpreted in the same way. It is a clear reference to substantive unconscionability.

The other main difference between the Credit Acts and the *Contracts Review Act* has to do with jurisdictional arrangements. Except in Queensland, jurisdiction to determine applications for re-opening under the Credit Acts is vested exclusively in Tribunals.⁵⁷ The Tribunals are not bound by the rules of evidence, and are permitted to determine their own procedures. There are restrictions on the right of appeal from a Tribunal's decision.⁵⁸ In some States, there are restrictions on the right to legal representation where the amount in dispute is below a certain figure.⁵⁹ In Victoria, costs may not be awarded where the amount in dispute is below a certain figure.⁶⁰ These restrictions are designed principally to remove obstacles to litigation in cases involving small claims. The Victorian system is the most generous to small claimants and, not surprisingly, this has resulted in a large number of applications for relief.

53 *Credit Act* 1984 (NSW), s146(1).

54 This point is occasionally overlooked: see, eg, *Luffram v Australia & New Zealand Banking Group Ltd* (1986) ASC 55-483 (Vic Small Claims Trib); *Hammon v Alliance Acceptance Co Ltd* (1989) ASC 55-931 (NSW Comm Trib).

55 *Credit Act* 1984 (NSW), s145.

56 *Wilson v Moss* (1909) 8 CLR 146 at 163-164 per O'Connor J.

57 The Commercial Tribunal (NSW & WA); Credit Tribunal (ACT); Small Claims Tribunals (Vic). In Queensland, jurisdiction is given to the District Courts.

58 The nature of the restriction varies from State to State. In Victoria, where the amount in dispute does not exceed \$3,000, the Tribunal's decision may only be reviewed on the ground that the Tribunal lacked jurisdiction or denial of natural justice: *Administrative Law Act* 1978 (Vic) s4(3). In NSW, appeals are restricted to questions of law: *Commercial Tribunal Act* 1984 (NSW), s20(3)-(4). In the ACT, an appeal as of right lies to the Supreme Court only where the amount in dispute is \$2,000 or more; otherwise the leave of the Supreme Court must be obtained: *Credit Ordinance* 1985 (ACT), s210(3). In Western Australia, an appeal lies as of right to the District Court on a question of law, and with the leave of the Tribunal or the Court in any other case: *Commercial Tribunal Act* 1984 (WA) s20.

59 Vic: *Credit (Administration) Act* 1984, s70(2); NSW: *Commercial Tribunal Act* 1984, s23. The figure is currently \$3,000.

60 The figure is currently \$3,000: *Credit (Administration) Act* 1984, s72.

The exclusive nature of the jurisdiction vested in the Tribunals can give rise to difficulties where the credit provider commences court proceedings against the debtor, and the debtor has a counter-claim for relief under the re-opening provisions.⁶¹ In that case, the only avenue open to the debtor will be to commence separate proceedings in the Tribunal. The Tribunal may exercise its jurisdiction even if the court has already given judgment in favour of the credit provider: given the exclusive nature of the Tribunal's jurisdiction in relation to the debtor's claim, the principles of *res judicata* and issue estoppel do not apply.⁶²

Except in Victoria, there are provisions dealing with unjust conduct by credit providers.⁶³ These provisions empower the Commissioner for Consumer Affairs (Registrar of Commercial Acts in Queensland) to apply for a restraining order against a credit provider who has repeatedly engaged in unjust conduct. Applications are to be made to the Tribunal (District Court in Queensland). There is also provision for a credit provider to enter into a voluntary deed of compliance with the relevant authority, as an alternative to formal proceedings being taken. "Unjust conduct" means conduct that is dishonest or unfair, that consists of anything done or omitted to be done in breach of contract, that is in contravention of the credit legislation or (in Queensland only) that consists of varying the annual percentage rate under credit sale or loan contracts so that the resultant rate is excessive.

(d) Trade Practices Act 1974 (Cth), Section 52A

(i) Introduction

Section 52A of the *Trade Practices Act 1974 (Cth)* deals with unconscionable conduct. It was inserted by the *Trade Practices Revision Act 1986* and implements recommendations made by the Swanson Committee in 1976.⁶⁴

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

The provision can be seen as an extension of s52(1) of the Act, which prohibits conduct which is misleading or deceptive. Division 1 of Part V is headed "Unfair Practices". However, the concept of unfairness extends beyond conduct that is misleading (though both may be characterised as fraud in equity), and the enactment of s52A is an implicit recognition of this point.⁶⁵

61 See, eg, *Morlend Finance Corp (Vic) Pty Ltd v Levine* (1989) ASC 55-710 (S Ct Vic, O'Bryan J) and *Morlend Finance Corp (Vic) Pty Ltd v Bartlett* (1989) ASC 55-926 (S Ct Vic, McGarvie J).

62 *Morlend Finance Corp (Vic) Pty Ltd v Levine* (1989) ASC 55-927 (S Ct Vic, Tadgell J).

63 *Credit (Administration) Act 1984 (NSW)*, Part II; *Credit (Administration) Act 1984 (WA)*, Part III; *Credit Act 1987 (Qld)*, Part IX, Div. 1; *Credit Ordinance 1985 (ACT)*, Part XIV.

64 Trade Practices Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976), pars 9.56-9.62 ("*Swanson Committee Report*").

65 *Id.*, par 9.60.

(ii) *Scope*

Subject to section 6, the provision only applies to conduct engaged in by a corporation as defined.⁶⁶ The conduct must be engaged in "in trade or commerce",⁶⁷ and it must be in connection with the supply or possible supply of goods or services to a person. Consequently, relief under the section is limited to buyers. By contrast, relief under the *Contracts Review Act* may be claimed by a seller where the contract is found to be unjust on account of conduct engaged in by the buyer (subject to the limitations on the scope of the Act adverted to earlier).

The expressions "goods" and "services" are defined in s4(1),⁶⁸ but a qualification is imposed by s52A(5), which limits the reference in s52A to

66 Section 6 and the definition of "corporation" in s4(1) are discussed in Duggan, *Regulated Credit: The Sale Aspect* (1986), pars 1.3.2 and 1.3.3.

67 "Trade or commerce" means "trade or commerce within Australia or between Australia and places outside Australia" (s4(1)). In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 139 Bowen CJ stated that the "terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport, and the delivery which comprise commercial arrangements... The word 'trade' is used with its accepted English meaning: traffic by way of sale or exchange or commercial dealing." Deane J at 167, said "The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of development of trade, commerce and commercial communication, the terms are clearly of the widest import... They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profitmaking." See also *O'Brien v Smolonogov* (1983) 53 ALR 107 and *Bevanere Pty Ltd v Lubidineuse* (1985) 59 ALR 334.

68 "Goods" includes:

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity.

"Services" includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(a) a contract for or in relation to:

- (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
- (ii) the provision of, or the use or enjoyment of facilities for amusement, entertainment, recreation or instruction; or
- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance;

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d) any contract for or in relation to the lending of moneys;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

See also s4C, which provides in relevant part as follows:

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;
- (c) a reference to the supply or acquisition of goods includes a reference to the supply or

"goods or services" to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. "Supply" is also defined in s4(1),⁶⁹ but again there is a qualification, this time in s52A(6), which provides that a reference in s52A to the "supply or possible supply of goods" does not include a reference to the supply or possible supply of goods for the purposes of resupply⁷⁰ or for the purpose of using them up or transforming them in trade or commerce.

The consequence of s52A(5) and (6) is to limit the section to consumer dealings. There is a definition of "consumer" in section 4B, but it is not relevant to s52A. This is significant, because the wording of s52A(5) and (6), though derived from section 4B, is more restrictive. Examples of transactions where the purchaser would be a "consumer" within the meaning of section 4B, but not within the meaning of s52A include the following: (1) a contract for the supply of a commercial vehicle;⁷¹ (2) a contract for the supply of industrial equipment where the cash price is \$40,000 or less;⁷² and (3) a contract for the supply of office stationery.⁷³

On the other hand, there is nothing to prevent s52A from applying simply because the purchaser is a body corporate. This is in contrast to the *Contracts Review Act* and the credit laws. Section 52A may apply where the contract relates to the supply of capital equipment to a business enterprise (provided the equipment comprises goods of a kind ordinarily acquired for personal, domestic or household use or consumption). The *Contracts Review Act* does not apply in such a case (except where the customer is a farmer). Correspondingly, the purchase of goods that are not of a kind ordinarily acquired for personal, domestic or household use or consumption for non-business purposes is not subject to s52A, though it may fall within the *Contracts Review Act*.⁷⁴

acquisition of goods together with other property or services, or both;

(d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both...

69 "Supply", when used as a verb includes: (a) in relation to goods-supply (including resupply) by way of sale, exchange, lease, hire or hire-purchase; and (b) in relation to services-provide, grant or confer, and when used as a noun has a corresponding meaning.

70 As to which see s4C(e): "In this Act, unless the contrary intention appears...

(e) a reference to the re-supply of goods acquired from a person includes a reference to:

(i) a supply of the goods to another person in an altered form or condition; and

(ii) a supply to another person of goods in which the first-mentioned goods have been incorporated."

71 Under s4B, a person who purchases a commercial vehicle is a consumer, regardless of the price, unless it is purchased for re-supply. Under s52A, a person who purchases a commercial vehicle is not a consumer because a commercial vehicle is not goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

72 Under s4B, a person who purchases industrial equipment is a consumer, even if it is not goods of a kind ordinarily acquired for personal, domestic or household use or consumption, unless it is purchased for re-supply or the cash price is more than \$40,000. Under s52A, if the equipment is not goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the purchaser cannot be a consumer.

73 Under s4B, if the goods are acquired for "the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, *in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land*", the purchaser is not a consumer. The underlined phrase is not reproduced in s52A.

74 The re-opening provisions in the Credit Acts apply to transactions involving the acquisition of a commercial vehicle or farm machinery where the purchaser is not a body

Difficulties arise in the application of s52A to loan contracts, and also to contracts of guarantee to the extent that it must seriously be doubted whether a claim like the one in *Amadio* could be brought under the statute. This appears to be the case notwithstanding that *Amadio* was expressly referred to in the Explanatory Memorandum accompanying the introduction of s52A as representing just the kind of fact situation that would fall within the scope of the provision.⁷⁵ The issues are complex, and are canvassed in some detail below.

(iii) *The prohibition*

Section 52A(1) prohibits "unconscionable conduct". The epithet "unconscionable" was deliberately chosen by the Swanson Committee in preference to "unjust". The Committee was attracted to "unconscionable" because it was a concept familiar to Australian law, having been employed previously in State money-lending and hire-purchase legislation, and s88F of the *Industrial Arbitration Act* 1940 (NSW), as well as by the courts of equity.⁷⁶ The thinking which underlies the *Contracts Review Act* was the opposite. There, the search was for a concept that was unfamiliar, the idea being to liberate the courts from established doctrines.⁷⁷ Thus the Commonwealth came to embrace as a virtue what the States plainly conceived of as being a vice.

"Unconscionable" is not defined, but in the only reported case to date dealing with s52A, *Zoneff v Elcom Credit Union Ltd*, Hill J stated:

In general terms, it may be said that conduct will be unconscionable where the conduct can be seen in accordance with the ordinary concepts of mankind to be so against conscience that a court should intervene. At the least the conduct must be unfair. It invites comparison with doctrines of equity... where inequality of bargaining power or absence of the ability to bargain freely will be relevant to the finding that there has been an unfair advantage taken by one person of the other.⁷⁸

Section 52A(2) lists factors which the court may take into account in determining whether there has been a contravention of s52A(1). The court is not obliged to take account of these factors in reaching its decision, and the list is not exhaustive. It reads as follows:

- (a) the relative strengths of the bargaining positions of the corporation and the consumer;⁷⁹
- (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;

corporate. However, their application to cases involving other kinds of capital equipment is unclear. It turns on the meaning of the *Business Finance Exemption Order* made pursuant to s19: See Duggan, Begg and Lanyon, above n6, par2.1.46.

⁷⁵ *Trade Practices Revision Bill 1986: Explanatory Memorandum* at 22.

⁷⁶ *Swanson Committee Report*, par9.60.

⁷⁷ See Peden, above n35 at 107-110.

⁷⁸ (1990) ATPR s41-009 at 51, 158; affirmed (1990) ATPR s41-058 (Full Fed Ct).

⁷⁹ It is stated in the opening words of the subsection that "consumer" is used to refer to the person to whom goods or services are or may be supplied.

- (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 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;⁸⁰ 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.

Section 52A(4) provides that the court may not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention.

The focus of s52A is on "conduct", not "contracts". "Conduct" includes the making of a contract (section 4(2)), so that the making of a contract which is unconscionable may amount to unconscionable conduct for the purposes of the Act.⁸¹ It also includes giving effect to a contract, so that the unconscionable enforcement of a provision which, in the abstract, is not itself unconscionable may contravene the section. For example, a clause in a chattel mortgage or hire-purchase agreement requiring the debtor to notify the credit provider of any change of address is not itself unjust, but injustice could conceivably occur were the credit provider to institute default proceedings under the contract following inadvertent failure by the customer to comply with the provision.⁸² Similar problems could arise in relation to pre-existing illness clauses in insurance policies.⁸³ On the other hand, the institution of legal proceedings in relation to the supply of goods or services does not itself amount to unconscionable conduct.⁸⁴ Nor, it seems, does the making of a demand in anticipation of legal proceedings.⁸⁵ Under both the *Contracts Review Act* and the credit legislation, the terms of inquiry are explicitly limited to circumstances existing at the time the contract was entered into.

80 Section 84(2) provides:

Any conduct engaged in on behalf of a body corporate —

(a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

81 This point is sometimes overlooked: see, eg, Evans, *Outline of Equity and Trusts* (1988), par646 and Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts* (3rd edn, 1989), par1410, where it is implied that s52A is narrower in its application than the *Contracts Review Act* 1980 (NSW). On the contrary it is, at least in some respects, broader.

82 Cf *Zoneff v Elcom Credit Union Ltd* (1990) ATPR s41-009 at 51, 158.

In the example given in the text, s52A might be relied on as an alternative to claiming relief under the equitable rules governing forfeiture: see n9, above.

83 Relief under s87 of the Act would not be available in such a case but an injunction might be awarded pursuant to s80.

84 Section 52A(3).

85 *Zoneff v Elcom Credit Union Ltd* (1990) ATPR s41-009 at 51, 158 per Hill J.

The focus of s52A on conduct also means that the provision may apply regardless of whether the contract eventually made with the corporation is unconscionable or, for that matter, of whether any contract is made at all. So, for example, the use by a corporation of harassing selling techniques might form the basis of a claim under the section,⁸⁶ as might unconscionable conduct in connection with promotional schemes and give-aways.⁸⁷

(iv) *Relief*

As in the case of s52, contravention of s52A is not an offence.⁸⁸ In contrast to the case of s52, a contravention of s52A does not give rise to a claim for damages under section 82.⁸⁹ However, an injunction may be awarded to restrain a contravention of s52A, at the suit of the Minister, the Trade Practices Commission or any other person (including the aggrieved consumer).⁹⁰ In addition, relief may be sought in the form of an order made pursuant to section 87 by any person who has suffered loss or damage, or is likely to do so, as a result of the contravention. The making of orders pursuant to section 87 is discretionary.⁹¹ The court is limited only by the requirement that any order it makes should be compensatory in nature. The kinds of order the court might make are expressed to include, but not to be limited to: an order avoiding a contract, or varying it, or refusing to enforce it; an order directing the refund of money or the return of property to the person seeking relief; and an order for payment of compensation.⁹²

An order may be sought under section 87 in any one of three ways: (1) in proceedings brought by the consumer; (2) by way of defence or counterclaim in proceedings brought against the consumer by the corporation; or (3) in proceedings brought by the Minister or the Trade Practices Commission for an injunction, pursuant to section 80. (In this third case, if the respondent is found to have contravened s52A, the Commission may make an application for relief on behalf of named consumers who have suffered loss).⁹³ An application must be commenced within two years after the day on which the cause of action accrues.⁹⁴ Jurisdiction to hear an application under section 87 is vested in the Federal Court.⁹⁵ However, the jurisdiction is not exclusive. Section 86(2) invests States courts with federal jurisdiction and then proceeds

86 In this connection, there is some overlap with s60, which provides that a corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

87 In this connection, there is some overlap with s52.

88 Section 79.

89 Section 82(3).

90 Section 80. Compare *Contracts Review Act 1980 (NSW) s 10*; *Credit (Administration) Act 1984 (NSW)*, Part II (see n63, above).

91 The court may have regard to the conduct of the parties since the contravention occurred (s87(1D)).

92 An order may not be made under s87 in relation to a contravention of s52A in relation to a contract of insurance to which the *Insurance Contracts Act 1984 (Cth)* applies (s87(1E)).

93 Section 87(1B). This is a limited form of representative or class action. It is limited in the sense that the members of the class must: (i) be named in the application; and (ii) give their consent to the application in advance. See Francis Galbally's contribution to this seminar for a discussion of representative actions.

94 Section 87(1CA).

95 Section 87(1).

to confer upon them jurisdiction, subject to jurisdictional limits imposed by State laws, with respect to any matter arising under Div 1 or 1A of Part V in respect of which a civil proceeding is instituted by a person other than the Minister or the Trade Practices Commission.

It could be argued that, notwithstanding the express reference to compensation orders in section 87, compensation is nevertheless not available in respect of a contravention of s52A; the non-availability of a claim for damages under section 82 in such a case could be taken as reflecting a general intention on the part of the legislature that monetary awards should not be made based on s52A. The alternative view is that, in closing off relief under section 82, the legislature was merely seeking to channel all claims through section 87.

One reason for doing this would be to preserve the discretionary nature of the remedy in s52A cases. As a general rule, damages are not available in equity as an alternative to avoidance of the contract on the ground of unconscientious dealing or undue influence.⁹⁶

Compensation may be awarded under the *Contracts Review Act* 1980 (NSW), but only by way of ancillary relief. The position appears to be the same under the *Credit Acts*. However, there is no reason in principle for this limitation. If section 87 is read so as to allow a claim for compensation to be made in an appropriate case, it would mean that the court had a wider range of options at its disposal for doing justice between the parties from case to case. This outcome is clearly consistent with broad equitable principles.

(e) *Fair Trading Laws*

The State fair trading laws incorporate provisions that mirror s52A, except that they are not limited in their application to corporations.

Part 2

Section 52A: *The Grounds for Intervention*

(a) *General*

There is no significant body of case law yet on s52A. However, cases decided under the *Contracts Review Act* and the *Credit Acts* are clearly relevant.⁹⁷ Accordingly, the observations made about the *Contracts Review Act* in *West v AGC (Advances) Ltd* are applicable to s52A.⁹⁸ The section relates to both procedural unconscionability and substantive unconscionability. Accordingly, it may be contravened by engaging in unconscionable conduct in the course of pre-contractual negotiations, or by making a contract that the court considers to be one-sided or unfair. Section 52A(2)(e) is important in this last

96 Except where the parties are in a fiduciary relationship. This has put pressure on the courts in some cases to find a fiduciary relationship, blurring the fiduciary concept in the process: See Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) at 1. To some extent, the *Trade Practices Act* provisions obviate this problem.

97 Making due allowances for the differences of wording: See *Custom Credit Corporation Ltd v Lupi* (Sup Ct Vic (FC), judgment delivered 12 December 1990).

98 See text at nn50-51, above.

connection. It directs the court to have regard to the adequacy of the consideration given by the corporation under the contract, and is clearly outcome-oriented. There is no counterpart to this provision in the *Contracts Review Act*, though in the light of what was said in *West v AGC (Advances) Ltd* the omission is probably not significant.

A related issue is whether it must be established that the party complained against was aware of the other party's disability or disadvantage at the time of contracting. In *West v AGC (Advances) Ltd*, McHugh JA (with whom Hope JA agreed) held that it need not.⁹⁹ However, he went on to say that a contract would not be held to be unjust under the Act:

unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed or in the means which he has employed to make the contract.¹⁰⁰

The two propositions do not sit well together.¹⁰¹ In *Collier v Morlend Finance Corp (Vic) Pty Ltd*,¹⁰² Hope JA was less equivocal. He said that a contract might be held unjust on the basis of a disability of which the party complained against was unaware, but said that the state of knowledge of the party complained against might be relevant to the exercise of the court's discretion to grant relief. Meagher JA, in the same case, suggested that it would be extremely rare for a court to exercise its discretion under the Act in favour of setting aside a contract against an innocent party.

If what Hope JA said in *Collier's* case is right, the statute is to be contrasted with the position in equity, where a contract will only be regarded as unconscionable if the stronger party knew, or at least had reason to know, of the weaker party's disadvantage.¹⁰³ The abandonment of this requirement would mark a significant shift in policy. It would allow intervention on the basis of the weaker party's misfortune, whether or not there was any exploitative behaviour by the party complained against. In the one case, the concern is with freedom of contract (free choice, or welfare) considerations. In the other, it is with redistributive concerns (commutative or distributive justice).

The question has recently been considered again by the Full Court of the Supreme Court of Victoria in *Custom Credit Corporation Ltd v Lupi*.¹⁰⁴ Murphy J, referring to McHugh JA's judgment in *West's* case, pointed out that though it may not be necessary to show that the stronger party was aware of the weaker party's disadvantage before it can be concluded that a contract is unjust, it must nevertheless be established that the circumstance was

99 (1986)5 NSWLR 610, 620.

100 *Id* at 622.

101 Nor it is easy to square McHugh JA's reference to s9(4), which prevents the courts from taking account of circumstances that were not reasonably foreseeable at the time the contract was made, with the first proposition referred to in the text. He made no attempt at reconciliation himself.

102 (1989) ASC 55-716.

103 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

104 (Unreported, judgment delivered 12 December 1990). This was a *Credit Act* case, being an appeal from a decision of the *Small Claims Tribunal* under Part IX. However, the Court's observations are directly relevant to the *Contracts Review Act*, given the similar wording.

reasonably foreseeable at the time the contract was entered into.¹⁰⁵ He interpreted "reasonably foreseeable" as meaning reasonably foreseeable *to the credit provider*, and went on to say:

I do not consider that because, for example, it is known in human experience that people of all ages contract diseases of different debilitating kinds, or suffer incapacitating accidents when least expecting to do so, or that houses are burnt down, or that breadwinners die — that circumstances of this kind can therefore be said to have been "reasonably foreseeable at the time the contract was entered into".

...

In my opinion unless there is something in the facts of the case which makes the particular circumstance "reasonably foreseeable" by the credit provider, then the circumstance, although causing injustice to the borrower to arise, is not a circumstance to which the Tribunal may have regard when "determining whether a contract... is unjust".¹⁰⁶

McDonald J placed a similar construction on the reasonable foreseeability requirement. However, the main ground of his decision was that a contract cannot be unjust in the absence of unfair conduct on the part of the credit provider, and it is implicit that this requirement will not be satisfied in a case where the credit provider was unaware of the customer's disadvantage (or at least could not reasonably have been expected to know of it). O'Bryan J expressed similar views. The difference between the Victorian approach, as represented by *Lupi*, and the New South Wales approach, as represented by *West* and *Collier*, may be more apparent than real, particularly given the equivocal nature of McHugh JA's judgment in *West*, and the reservations expressed by Meagher JA in *Collier*. To the extent that there is an inconsistency, *Lupi* represents the most considered analysis of the issue to date, and is therefore to be preferred, pending a final pronouncement by the High Court. The decision is, of course, binding in Victoria.

It has been held to be wrong to take a mechanistic approach to the circumstances set out in the statutory lists. The presence of one or more of them in a particular case is not decisive. Nor is their absence. If the position were otherwise, every standard form contract would be open to attack, and that can hardly have been the intention.¹⁰⁷ Ultimately, the court's function is to determine whether the contract was unjust, and that must be done by reference to either or both of the contracting process (procedural unconscionability) or the contractual outcome (substantive unconscionability). If the consumer was not taken advantage of in one or other of these senses, the contract cannot be re-opened.¹⁰⁸ It has been held in relation to the Credit Acts

105 *Credit Act 1984 (Vic)*, s147(4) (*Contracts Review Act 1980 (NSW)*, s9(4)).

106 On this construction, the reasonable foreseeability requirement serves to limit the Court's (Tribunal's) discretion (account may only be taken of a circumstance if it was reasonably foreseeable). However, it seems that the original intention underlying the requirement was the opposite, namely, to expand the courts discretion (account may be taken of circumstances that arise after the contract is entered into if they were reasonably foreseeable). The original intention is not immediately obvious from a reading of the statute, because the proposition has been expressed negatively (regard may *not* be had...), whereas in the *Peden Report* it was expressed affirmatively (regard *may* be had...): See Duggan, Begg and Lanyon, above n6, par10.3.18.

107 See further, p163 below.

108 *Esanda Finance Corp Ltd v Murphy* (1989) ASC 55-703 (S Ct of NSW, David Hunt J) (a

that the Tribunal may not rely in its decision on any of the listed factors unless it has been specifically pleaded and the credit provider has been given the opportunity of presenting an argument in relation to it.¹⁰⁹

(b) Relative Bargaining Strength

Section 52A(2)(a) directs the court to the relative strengths of the bargaining positions of the corporation and the consumer in deciding whether conduct is unconscionable. The corresponding reference in the *Contracts Review Act* is to material inequality of bargaining power. The provision calls to mind Lord Denning MR's judgment in *Lloyds Bank Ltd v Bundy*.¹¹⁰ The provision does not explicitly require proof of abuse of superior bargaining position, but Peden contemplated that such a requirement would be read in.¹¹¹ The focus, in other words, is supposed to be on process.

Numerous factors may affect the relative bargaining strength of the parties. For example, there may be a disparity if the consumer suffers from a physical, intellectual or emotional disability, lack of education or financial necessity. These are the kinds of circumstances that are fastened on in equity. Many of these circumstances are separately enumerated in the *Contracts Review Act*. The fact that they are not specifically mentioned in s52A(2) is probably not significant, because they are subsumed under the general reference to relative bargaining strength in paragraph (a).¹¹² In any event, it is expressly stated that the factors listed in s52A(2) are not to be taken as limiting the court's discretion under s52A(1).

Information imbalance may also affect relative bargaining strength, but the application of the statute to this kind of case is more contentious. This is perhaps not surprising, given the uncertainty that surrounds the case law governing liability for non-disclosure. There is no unifying theme.¹¹³ However, the issue has recently attracted renewed interest in the theoretical literature, and this is useful as a basis for predicting when the statute might apply.¹¹⁴ Clearly, if the consumer has been misled by the corporation, the section may apply.¹¹⁵ On the other hand, the section will probably not apply simply on the basis that the corporation possessed superior information. If the position were otherwise, nearly every contract would be susceptible to attack, because it is rarely the case that both parties are equally well informed. Trade in a free market economy depends on use being made of information that has been legitimately obtained. The harder cases lie between these two extremes.

Credit Act case). See also *Custom Credit Corporation Ltd v Lupi* (Sup Ct Vic (FC), judgment delivered 12 December 1990).

109 *Esanda Finance Corporation Ltd v Murphy* (1989) ASC 55-703.

110 [1975] 1 QB 326 (CA).

111 Above n35 at 124.

112 And also the reference to undue influence in par (d): see below.

113 Liability for non-disclosure is based on a mix of doctrines, including the law of misrepresentation, the principles governing contracts of the utmost good faith, and the equitable rules governing fiduciaries.

114 See especially: Finn, "The Fiduciary Principle" in Youdan (ed), above n96 at 1; Kronman, "Mistake, Disclosure, Information and the Law of Contracts" (1979) 7 *Journal of Legal Studies* 1; and Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1987).

115 See, eg, *Parkes v Commonwealth Bank of Australia* (1990) ASC 56-020 (S Ct NSW).

On this middle ground, intervention might be justified in situations such as the following:¹¹⁶

- (1) where the corporation possesses superior information, relevant to the transaction, that is not reasonably accessible to the consumer.

(Example: A real estate agent sells to a Victorian buyer a house in Queensland that, to the knowledge of the agent, lies in a flood-prone area. The agent does not disclose the information);

- (2) where the consumer, to the knowledge of the corporation, is relying on the corporation for the provision of information that is relevant to the transaction.

(Example: A bank enters into a contract of guarantee with a consumer. The risk of default by the debtor is unusually high, for reasons that are peculiarly within the knowledge of the bank. The bank fails to disclose the information);

- (3) where the parties are in a fiduciary or quasi-fiduciary relationship, requiring loyalty to the consumer on the part of the corporation.¹¹⁷

(Example: An investment adviser persuades a client to place money with an enterprise which is unusually risky. The adviser has an interest in the enterprise, but fails to disclose this, or the extent of the risk).

To this list might be added the case where the corporation knows the consumer is mistaken as to a material aspect of the transaction, and takes advantage of the situation.¹¹⁸ On the other hand, in a case where the consumer makes a mistake that was not induced by the corporation, and of which the corporation is unaware at the time of transacting, a court would be unlikely to intervene, at least if the views expressed in *Customer Credit Corporation Ltd v Lupi* prevail.¹¹⁹

It is commonly assumed that the use of standard form contracts is a manifestation of bargaining inequality.¹²⁰ However, not all standard form contracts are unconscionable. The difficulty lies in knowing where to draw the line. The issue is a complex one, and is canvassed further below.¹²¹

(c) *Harsh Terms*

Section 52A(2)(c) directs attention to 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. Given that "conduct" extends to the making of a contract, this provision would be relevant in any case where a contract contains harsh terms. In this respect, it is clearly outcome-oriented. In

116 See especially, Finn, "The Fiduciary Principle" in Youdan (ed) above n96 at 6-24.

117 See, eg, *McKenzie v McDonald* [1927] VLR 134; *Haywood v Roadknight* [1927] VLR 512.

118 *Taylor v Johnson* (1983) 151 CLR 422.

119 See p154, above.

120 See, eg, *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 (HLE).

121 See p163, below.

*Westpac Banking Corporation Ltd v Sugden*¹²² certain clauses in Westpac's standard form of guarantee were held to be not reasonably necessary for the legitimate protection of the bank, so that the contract was unjust within the meaning of the *Contracts Review Act*. The guarantors were commercially unsophisticated, were asked to sign without explanation and were providing a mortgage over their home to support business debts.¹²³ As Sneddon notes, "the decision involved a combination of procedural and substantive unconscionability, and it would seem that only a small amount of procedural unconscionability (if any) is necessary to lead to a conclusion of injustice if the provisions of the contract are substantively unconscionable."¹²⁴

(d) *Consumer's Understanding*

Paragraph (c) of s52A(2) refers to whether the consumer was able to understand any documents relating to the supply or possible supply of goods or services. The corresponding reference in the *Contracts Review Act* is to the intelligibility of the document. The difference is that, in the one case, the issue is whether the person claiming relief was able to understand the document, while in the other it is whether the document, viewed objectively, is intelligible. If a document is readily legible and drafted in plain English, that is a factor that may no doubt be taken in account under either statute. On the other hand, the fact that a document is not drafted in plain English can hardly be decisive.¹²⁵

The *Contracts Review Act* refers expressly to whether the complaining party received independent advice before contracting. There is no corresponding reference in s52A. However, the omission does not matter, because whether or not independent advice was obtained can be taken into account in considering whether the consumer was able to understand the transaction. It may also be relevant in connection with relative bargaining strength, and with the use of undue influence.

(e) *Undue Influence*

Section 52A(2)(d) refers to the use of undue influence or pressure, or unfair tactics. There is a similar provision in the *Contracts Review Act*. The reference to "undue influence" will no doubt be interpreted in the light of the cases decided in equity. The expressions "unfair pressure" and "unfair tactics" were added to enable account to be taken of, for example, "high pressure selling techniques and psychological pressure arising out of personal, social, political or religious sensibilities".¹²⁶ In *Luffram v Australia & New*

122 (1988) NSW Conv R s55-377 (Sup Ct of NSW, Brownie J).

123 The clauses provided that: (1) if the bank released or lost any security it held or failed to recover any of the moneys secured, the sureties would nevertheless remain liable; (2) a bank officer's certificate of the amount owing was conclusive evidence as to the amount; and (3) the guarantee was fully binding on the sureties for the full amount, notwithstanding the failure of other contemplated sureties to sign later.

124 Above TAN 111. As to the dangers of holding a contractual term to be unconscionable in the absence of procedural unconscionability, see Duggan, Begg and Lanyon, above n6, par10.3.10.

125 See Goldring, "Certainty in Contracts, Unconscionability and the Trades Practices Act: The Effect of Section 52A" (1988) 11 Syd LR 514 at 527.

126 Peden, above n35 at 136.

Zealand Banking Group Ltd,¹²⁷ a *Credit Act* case, the applicant was induced by the debtor to give a mortgage to the respondent as security for an advance made to the debtor. The debtor was the applicant's spiritual adviser, and the applicant was found to be influenced by, and subject to, his will. The respondent's representative failed to explain the true nature of the mortgage transaction, and there was no independent legal advice offered to the applicant. It was held that undue influence, unfair pressure and unfair tactics were used against the applicant by the debtor and the respondent's representative and, accordingly, also by the respondent itself. The ground was also relied on in *Tirant v LNS Autos Pty Ltd*,¹²⁸ where the respondent (a car dealer) had used bait advertising and high pressure selling tactics to complete a sale, and additional unfair tactics to prevent the applicant from subsequently exercising a right of rescission.

(f) *Consideration*

Paragraph (e) of s52A(2) refers to the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services elsewhere. The reference is to the adequacy of the consideration moving from the corporation, or in other words, to whether the consumer made a bad bargain. The issue goes to substantive unconscionability. There is no corresponding provision in the *Contracts Review Act*. However, in view of what was said in *West v AGC (Advances) Ltd*, this difference probably does not matter. It follows that, under both statutes, inadequacy of consideration may be a sufficient basis for intervention. However, it is not a necessary condition. For example, in an appropriate case, relief might be granted even though the price paid by the consumer was reasonable, if it is established that had the corporation not acted the way it did, the consumer would not have entered into the contract in the first place.¹²⁹

Part 3 Some Particular Applications

(a) *Loan Contracts*

Difficulties may arise in the application of s52A to loan contracts. There is no doubt that a loan contract involves the provision of "services" within the meaning of the Act. However, it cannot so confidently be asserted that the services in question are "of a kind ordinarily acquired for personal, domestic or household use or consumption." Loans are taken for a wide range of purposes, some fitting this description, others not. It could no doubt be said that loans are *frequently* taken for personal, domestic or household purposes, but that is not the same as saying that they are *ordinarily* taken for these purposes. "Ordinarily" implies a high level of frequency.¹³⁰ If this is correct,

127 (1986) ASC 55-483 (Vic Small Claims Trib).

128 (1986) ASC 55-470 (Vic Small Claims Trib) (a *Credit Act* case)

129 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, especially the judgment of Deane J.

130 Cf Sneddon, above TAN 117.

it would appear to follow that loan contracts are not subject to s52A, and debtors would have to look to the other statutory provisions, or to equity, for relief. If it is not correct, then it would appear to follow that all loans fall within the scope of s52A, and that can hardly have been the legislature's intention either.

A possible solution might be to take account of the kind of loan in question when asking whether s52A applies. For example, in the case of a personal loan, it might be argued that the services supplied are of a kind ordinarily acquired for personal, domestic or household use or consumption (that is to say, for the acquisition of cars, boats, swimming pools, and the like). By contrast, a term loan is ordinarily taken out for business purposes, as are bank overdrafts.¹³¹ An alternative approach might be to argue that in the case of, say, a personal loan made by A to B to finance the purchase by B from C of a motor vehicle, the section applies to the loan contract on the footing that the making of the contract by A is conduct that is engaged in connection with the supply of goods (that is to say, the motor vehicle) by B to C (the goods being of a kind ordinarily acquired for personal, domestic or household use or consumption). The trouble is that, while s52A(1) is drafted widely enough to support such a construction, s52A(2) is not. Section 52A(2) clearly presupposes a bipartite form of transacting. In particular, it assumes that the corporation engaging in the unconscionable conduct and the person supplying the goods or services will be one and the same. However, the matters listed in s52A(2) are expressed not to limit the considerations to which the court may have regard in determining whether conduct is unconscionable. On this basis, purchase money loan contracts might come within the ambit of the section. By extension, it could be argued that continuing credit contract schemes, such as Bankcard, were caught on the footing that the making of the continuing credit contract by the financier with the customer is conduct that is engaged in in connection with the "possible supply" to the consumer by a retailer of goods or services (of a kind ordinarily acquired for personal, domestic or household use or consumption). On the other hand, the argument would not be open in the case of a non-purchase money loan (where there are no restrictions on the purposes to which the loan funds might be applied), because in that case it could not be said that the making of the loan contract was conduct engaged in "in connection with" the supply of goods or services to which the section applies.¹³²

A prominent concern of consumer groups in recent years has been the problem of debtor over-commitment in relation to loan contracts. Several attempts have been made to use the unconscionability laws as a basis for arguing that a credit provider owes a duty to the debtor to assess the debtor's ability to repay before extending credit. However, the courts have been unsympathetic. The leading case is *Australian Securities Group Financial Services (NSW) Ltd v Bogan*,¹³³ a case decided under the *Credit Act 1984*

131 Ibid.

132 Where a loan is made for mixed purposes, eg, to finance the acquisition of a motor vehicle and also to pay off the debtor's business debts, the section may apply: the loan contract is made in connection with the supply of goods to which the section applies (ie, the motor vehicle), notwithstanding that it is also made for another purpose.

133 (1989) ASC 55-938 (Sup Ct of NSW, Campbell J). See also *Esanda Finance Corp Ltd v Murphy* (1989) ASC 55-703 (Sup Ct of NSW, David Hunt J).

(NSW). It was held there that "[n]either the Act nor the law support the proposition that not to seek confirmatory evidence of matters going to ability to repay is alone sufficient to make a contract unjust... Clearly what is required is something more".¹³⁴ The judgment offers no guidance as to what kinds of additional factors might be relevant. However, one possibility is where the credit provider knows that there is a high risk of default by the debtor but makes the loan anyway, protecting itself by taking comprehensive security either from the debtor or a third party guarantor. That kind of conduct might be characterised as advantage taking, or unfair tactics. A more contentious case is where the credit provider has a general policy of not requiring proof of credit-worthiness before transacting, and is indifferent as to the debtor's ability to repay. The more rapidly credit applications can be processed, the larger the volume of business the credit provider will be able to transact. The resulting gains to the credit provider may more than offset the higher incidence of bad debts. Some credit card operations are reputedly conducted on this basis. *Bogan's* case would probably apply in these circumstances to preclude a finding that (without more) any contract transacted by the credit provider was unjust within the meaning of the *Credit Act*. The same conclusion would follow under s52A. Under changes to the *Credit Act* that are presently being considered, a contract might be re-opened if there is a high risk of default by the debtor and the credit provider knew of the risk at the time of transacting, or could have discovered it by reasonable enquiry. The aim is apparently to catch both of the cases referred to above.

(b) Contracts of Guarantee

As Sneddon has indicated, there are problems with the application of s52A to contracts of guarantee.¹³⁵ Sneddon's analysis can be summarised as follows:

- (1) a contract of guarantee is not a contract for the supply of services within the meaning of the Act by the credit provider to the guarantor because no "rights, benefits, privileges or facilities" are "provided, granted or conferred" on the guarantor. Accordingly, s52A cannot apply on this footing;
- (2) the making of a contract of guarantee may be conduct engaged in by the credit provider "in connection with" the supply of services (the loan) by the credit provider to the debtor. Assuming the loan contract can be characterised as involving the supply of services of a kind ordinarily acquired for personal, domestic or household use or consumption, the contract of guarantee may be subject to s52A on this footing. However, it may be difficult to characterise a loan contract in this way, for the reasons discussed above;
- (3) in any event, the application of s52A to a contract of guarantee should depend on the status of the guarantor not the character of the loan. Business loans are commonly guaranteed by persons who have no involvement in the debtor's business, but who are motivated by ties of personal or family loyalty to the debtor or an associate of the debtor. *Amadio* was just such a case. Ironically, it is unlikely that the

134 (1989) ASC 55-938 at 58, 562.

135 Above TAN 111-118.

Amadio's would have been able to rely on s52A as it is presently drafted.

Problems typically arise in relation to a contract of guarantee where the guarantor: (1) is elderly or uneducated, or speaks English poorly; (2) is not given information that is material to the risk at the time of contracting; or (3) misunderstands the nature of the transaction. A guarantor's imperfect understanding of the transaction may be compounded by feelings of personal or family loyalty to the debtor, particularly if the debtor plays on these ties as a means of putting pressure on the guarantor to sign.

The most obvious solution to these kinds of difficulty is for the credit provider to ensure that the guarantor is independently advised (preferably by a solicitor) before signing, and in certain circumstances, this course of action is made mandatory by statute.¹³⁶ However, this will not be a viable solution in every case. The costs involved may outweigh the anticipated benefits. As Young J noted in *Goldsbrough v Ford Credit Australia Ltd*:

[w]hilst it could be said that less problems [sic] would occur if in each case a solicitor or other independent expert advised a guarantor, it must be remembered that those services do not come for free and that the more the law requires either by regulation or by trend of judicial decision finance companies to be at risk unless they ensure lenders have independent expert advice the greater the cost of finance.¹³⁷

As the law presently stands, failure by a credit provider to ensure that the guarantor is independently advised will not necessarily result in a finding that the contract is unjust.¹³⁸ On the other hand, the fact that independent advice has been obtained is not conclusive in favour of the credit provider. For instance, the court may conclude that the advice was inadequate.¹³⁹ Where the court disapproves of the transaction, or is moved by the plight of the guarantor, the temptation may well prove irresistible to conclude that the advice given was inadequate. At that point, procedural unconscionability merges into substantive unconscionability.

Independent advice obtained by a guarantor at the insistence of a credit provider in most cases is limited to an explanation of the contract of guarantee itself. Where the obtaining of advice is made mandatory by statute, the nature of the advice that must be given is similarly limited. For example, the hire-purchase legislation requires the adviser to:¹⁴⁰

136 See, eg, *Hire-Purchase Act 1959* (Vic), s19; *Consumer Transactions Act 1972-1983* (SA), s44.

137 (1989) ASC 55-946 at 58, 588 (Sup Ct of NSW) (a case decided under the *Contracts Review Act*).

138 *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 620 per McHugh JA; *White v Ormsby* (1988) ASC 55-665 (Sup Ct of NSW); *Commonwealth Bank of Australia Ltd v Cohen* (1988) ASC 55-681 (Sup Ct of NSW); *S H Lock (Australia) Ltd v Kennedy* (1988) 12 NSWLR 482 (CA). Cf Goldring, above at 533, citing *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 613 per Kirby P.

139 For example, *Collier v Morlend Finance Corp (Vic) Pty Ltd* (1989) ASC 55-716 CA (NSW); *Beneficial Finance Corporation v Adams* (unreported, Sup Ct of NSW, Giles J, 19 May 1989).

140 For example, *Hire-Purchase Act 1959* (Vic), s19(2). See also *Consumer Transactions Act 1972-1983* (SA), s44(1).

- (1) read over and explain the agreement to the guarantor;
- (2) examine the guarantor "touching his knowledge of the agreement";
and
- (3) be satisfied that the guarantor understands "the true purport and effect of the agreement".

Advice of this nature will not necessarily be sufficient to head off a challenge to the contract under the unconscionability legislation. In *Beneficial Finance Corporation Ltd v Adams*¹⁴¹ guarantees were given in support of a loan taken out to finance the acquisition of a business. The guarantors received advice from an independent solicitor along the lines just outlined. However, the contracts were held to be unjust within the meaning of the *Contracts Review Act 1980* (NSW) because the debtors were depending on the business income to service the loan, and in these circumstances, the guarantor should also have been given advice about: (1) the viability of the business being purchased; and (2) the risk of the debtors' defaulting under the loan.¹⁴² It is true that a case like *Adams* could probably not be brought under s52A for the reasons that have already been canvassed. On the other hand, the case underscores the need for any independent advice that is given to a guarantor to encompass the risks of transacting, including factors known to the credit provider that are likely to affect the debtor's ability to repay the loan. In this broader sense, the decision is relevant to s52A.

(c) *Standard Form Contracts*

On a casual reading, the *Contracts Review Act 1980* (NSW) could be taken to mean that all standard form contracts are at least prima facie unjust. This is because at least four of the items included in the statutory check-list are standard features of such contracts: (1) they entail "material inequality of bargaining power", at least in the sense that the contract is the supplier's document and the individual consumer has little or no say in its content, little or no opportunity to read it before signing, and little or no prospect of understanding the subsidiary terms; (2) the provisions of a standard form contract will rarely be the subject of negotiation; (3) standard form contracts are typically presented to consumers on a "take-it-or-leave-it" basis, so that it will not have been "reasonably practicable for the applicant to negotiate for the alteration" of any of the provisions; and (4) the form of the contract is a separate factor to be taken into account, and a standard form contract might be regarded as per se unjust for the reasons already given. In the case of s52A, the check-list is shorter, and it includes only the first of the four items just referred to. Accordingly, its potential impact on standard form contracts is perhaps not as immediately obvious. Nevertheless, it is hardly less significant. A standard form contract might be attacked under s52A on the grounds, for example, of bargaining inequality, or the inability of the consumer to understand the document before signing.

It has been held, in relation to the *Contracts Review Act*, that "the mere fact that a party to a contract can point to circumstances that fall within the

141 (Unreported, Sup Ct of NSW, Giles J, 19 May 1989).

142 See also Sneddon, above n23, TAN 126.

words of one or more paragraphs in s9(2)... does not mean that there is an arguable case for relief".¹⁴³ Something more is required. It is necessary to look at "the substance of the circumstances preceding and surrounding the execution of the contract" in order to determine whether the contract is unjust.¹⁴⁴ In other words, it is wrong to apply the factors listed in the statute mechanically, without regard to the contracting process.

In the light of these observations, when might a standard form contract be unconscionable? The following observations are relevant. Standard form contracts are not, as is commonly supposed, indicative of market power and are not, on that account, the product of bargaining inequality. There are countless instances of the use of standard form contracts in markets which are manifestly not uncompetitive.¹⁴⁵ Standard form contracts serve the important economic function of reducing transactions costs, to the benefit of both parties.¹⁴⁶ A standard form contract is not necessarily unjust simply because it is presented to the consumer on a take-it-or-leave-it basis. The question is whether the consumer, if choosing to leave it, has access to a workably competitive range of alternative sources of supply. If so, other things being equal, there can be no grounds for complaint. The use of standard form contracts, even in uncompetitive industries, is not necessarily unjust. There is no *a priori* reason for supposing that monopolists have a preference for taking profits from harsh terms rather than higher prices. On the contrary, a more plausible view is that, if there is sufficient consumer demand for a particular term, the monopolist will have the same incentive to provide it as a firm operating in a competitive market.¹⁴⁷ Accordingly, lack of alternatives is more likely to be due to insufficient consumer demand than to monopoly or collusion between suppliers. Ordinarily, failure to supply a commodity for which there is insufficient demand cannot be labelled unjust, and this applies as much to the terms on which a product is sold as it does to the product itself. Inadequate demand for subsidiary contractual terms may be attributable to market failure, in the form of chronic consumer ignorance of the significance of the term in question. However, it needs to be borne in mind that consumer ignorance, even if widespread, is unlikely to be universal: the demand generated by the marginal informed consumer may be sufficient to influence market outcomes to the benefit of consumers across the board.¹⁴⁸

The problem for the decision-maker is to know when contract terms offered by a supplier reflect consumer preferences, and when they do not. Courts, in particular, are not well placed to make this kind of assessment, because they lack both the data and the expertise.¹⁴⁹ Accordingly, problems

143 *Hogan v Howard Finance Ltd* (1987) ASC 55-594 at 57, 539 per Hope JA (CA (NSW)).

144 *Commonwealth Bank of Australia Ltd v Cohen* (1988) ASC 55-681 at 58, 159 per Cole J (emphasis added). See also *Esanda Finance Corp Ltd v Murphy* (19889) ASC 55-703 (Sup Ct of NSW), David Hunt J)

145 See Trebilcock, "The Doctrine of Inequity of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 *University of Toronto LJ* 359 at 363-365.

146 *Ibid.*

147 Schwartz, "A Re-examination of Non-substantive Unconscionability" (1977) 63 *Virginia LJ* 1053.

148 Schwartz and Wilde, "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" (1979) 127 *University of Pennsylvania LR* 630.

149 See Schwartz, "Unconscionability and Imperfect Information: A Research Agenda" (1990) (shortly to be published in a Festschrift for Jacob Ziegel).

endemic to standard form contracts are best left to be dealt with systematically by the legislature (if this is possible), rather than being entrusted to the courts to resolve on an *ad hoc* basis pursuant to unconscionability laws. On the other hand, judicial intervention may be appropriate in cases where standard form contracts are abused, for example, where: (1) the supplier uses fine print, or takes advantage of the consumer's limited opportunity for reading the document before signing, to impose unreasonable terms on the consumer; or (2) where the supplier knows the consumer to be under a misapprehension about the terms of the contract, and does nothing to correct the situation.¹⁵⁰

Conclusion

The main components of the law of unjust contracts are: (1) the equitable doctrines of unconscientious dealing and undue influence; (2) the *Contracts Review Act* 1980 (NSW); (3) the credit laws; and (4) the *Trade Practices Act* 1974 (Cth) s52A and the corresponding provisions in State fair trading legislation. While there is considerable overlap between these laws, they do not entirely cover the same ground. In particular:

- (1) the equitable doctrines, in contrast to their statutory counterparts, are not limited to consumer dealings, and therefore have a wider sphere of operation than the statutory provisions. Moreover, except where the *Contracts Review Act* applies, the equitable doctrines may be the only source of relief for guarantors;
- (2) the scope for intervention under the *Contracts Review Act* is wider than in equity. For example, a contract may be unjust within the meaning of the Act even if the party complaining is not under a disadvantage of the kind contemplated in *Amadio* and there is no special relationship that could give rise to a presumption of undue influence between the parties. More particularly, the *Contracts Review Act* allows greater weight to be given to substantive unconscionability than is permissible in equity;
- (3) section 52A of the *Trade Practices Act* prohibits conduct that is unconscionable, and therefore, in contrast to the *Contracts Review Act*, it is not limited in its application to contracts. For example, it may be possible to claim relief under the *Trade Practices Act* in respect of the enforcement of a contractual term where the term itself is not unconscionable. In contrast to the *Contracts Review Act*, a body corporate is not precluded from claiming relief under s52A. On the other hand, the uncertainties surrounding the application of s52A to loan contracts and contracts of guarantee is a significant drawback;

150 As in the case of a contract of insurance where the insured, at the time of taking out the policy, patently misunderstands the nature or extent of the cover. Query whether a court would be prepared to intervene where the insured's mistake is not induced by the insurer (in particular, was not attributable to any defect in the documents), and was unknown to the insurer at the time of contracting (see p154, above).

- (4) a wider range of remedies is available under the *Trade Practices Act* than under the other laws (in particular, compensation arguably can be awarded as an alternative to the contract being set aside); and
- (5) the singular advantage of the *Credit Act* provisions, from a consumer's perspective, is that jurisdiction with respect to them is vested in Tribunals, rather than the courts. This has significant access to justice implications, particularly in relation to small claims. On the other hand, the application of the provisions is limited to consumer credit contracts. The inability of a guarantor to claim relief in respect of a contract of guarantee is a drawback.

The overlap between the statutory initiatives is absurd, and there is a clear need for rationalisation. Nowhere is this more evident than in New South Wales, where there is the potential for a single transaction to be subject to up to four sets of statutory unconscionability laws, namely: (1) the *Contracts Review Act* 1980; (2) the *Credit Act* 1984; (3) s52A of the *Trade Practices Act* 1974 (Cth); and (4) section 43 of the *Fair Trading Act* 1987. This overlap is made the more intolerable by the inconsistencies that exist between the various State laws. For example, under the *Contracts Review Act* and the *Credit Act*, a body corporate as a general rule is denied relief, but under the *Fair Trading Act* it is not. Again, the *Contracts Review Act* refers to "unjust" contracts, while the *Fair Trading Act*, for precisely the opposite reason, employs the epithet "unconscionable".¹⁵¹ Serious consideration really ought to be given to collapsing the various State laws into a single set of provisions. The best alternative would be to use the *Fair Trading Act* model, so as to preserve uniformity with the *Trade Practices Act*, though amendment at both the State and Commonwealth levels might be needed to clarify the application of the legislation to loan contracts and guarantees. Jurisdiction to determine applications under these new provisions in cases involving credit contracts could be vested in the Tribunals, so as to preserve whatever advantages may be perceived to attach to the current jurisdictional arrangements in that area.

It remains to express a view on the efficacy of the legislation at a general level. It was a stated aim of the *Contracts Review Act* 1980 (NSW) to revitalise the law governing unconscionable dealings, and to make it "sharp in focus, conceptually sound and explicit in its policy underpinnings",¹⁵² and the same concerns presumably motivated the other statutory initiatives. In a similar vein, Goldring has suggested that:

[i]f 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 (NSW) and s52A 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 s52A of the *Trade Practices Act* 1974 (Cth).¹⁵³

151 See p150, above.

152 Peden, above n35 at 95.

153 Goldring, above n125 at 535

The opposite is true. On major policy questions, s52A remains indeterminate, notwithstanding the inclusion of the statutory checklist. In particular, as discussed above, the courts are given no guidance as to:

- (1) the extent to which the concern of the legislature was with contractual outcomes, regardless of the contracting process;
- (2) whether awareness in the stronger party of the weaker party's disadvantage is meant to be a precondition to relief;
- (3) the relevance of information imbalance to inequality of bargaining power; and
- (4) the intended impact of the legislation on standard form contracts.

The basic problem is that the legislation lacks a coherent philosophy. It is nowhere stated, and has probably never been determined, whether the concern is with the behaviour of the stronger party, or the plight of the weaker. If it is the former, the legislation could easily be reconciled with welfare ("freedom of contract") principles. If it is the latter, the legislation would serve an equity (distributive) function. If it is a mix of the two, it needs to be asked, first, what sort of mix is intended, and secondly, whether it is possible simultaneously to pursue competing policy goals.

The same ambivalence about underlying values is evident in cases concerning the equitable doctrine of unconscientious dealing. Finn identifies the following questions to which recent developments in this area give rise:

[s]hould the law promote relational ("neighbourhood") responsibilities in the contracting process or should it merely curb the excesses of self-interested action? Should the courts, by insisting upon an information exchange (or on conduct capable of securing an equivalent effect for example the recommendation of independent advice), seek to procure some degree of equality of understanding in the decision to contract? Or should they merely concern themselves with compelling that level of assistance without which one party is left open to grave exploitation?...

...To what extent should a person be obliged to bear the undesirable consequences of his own actions when he should reasonably anticipate that the task he has assumed is one for which he is ill-qualified? Should the law be reluctant to increase transaction costs by creating the de facto need for independent advice? Is it relevant that the terms to which objection can be taken are ones customarily used by the advantaged party and on a take it or leave it basis? To what extent can one rely upon another's effective use of professional advisers as a cause of "transactional disadvantage"? Should the uninitiated or untutored be entitled to an explanation of the nature and effects of the dealing offered? Should the law acknowledge some minimum standard of relational responsibility in one party for the other?...

...[C]an the terms embodied in a contract proffered for signature themselves create "a need for assistance or explanation" when the party proffering them knows or has reason to know (i) that they have not been read by the signatory and (ii) that, in the circumstances, the signatory could not reasonably expect them to be in the contract given the nature and purpose of the bargain?¹⁵⁴

Until these questions are explicitly addressed, it cannot possibly be hoped that a coherent body of principle will emerge. It is currently fashionable to look for unifying themes that run through apparently disparate doctrines, and to collapse the doctrines accordingly. The High Court lately has been particularly active in this regard.¹⁵⁵ Section 52A represents a legislative attempt at the same sort of exercise. Reductionism may have the advantage of simplifying the law by doing away with overlap and inconsistencies.¹⁵⁶ However, it really only goes to matters of form, leaving untouched the deeper issues identified above. The danger is that a preoccupation with formal concerns may cause decision-makers to overlook the underlying values. This is what Leff meant when he wrote, in relation to Article 2-302 of the *Uniform Commercial Code* (the precursor of the Australian statutory initiatives):

it is easy to say nothing with words. Even if those words make one feel all warm inside, the result of sedulously preventing thought about them is likely to lead to more trouble than the draftsman's cosy glow is worth.¹⁵⁷

There are pressures for s52A to be extended to cover small business and other commercial dealings.¹⁵⁸ These pressures should be resisted, until a principled basis has been identified for the legislation as it presently stands.

154 Finn, above n96 at 132-33.

155 See, eg, recent developments in the law of estoppel: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385; and *The Commonwealth v Verwayen* (1990) 64 ALJR 540.

156 But see Dixon, "Concerning Judicial Method" (1955) 29 ALJ 468 at 476:

"The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor charts. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system indistinguishable from systems which we least admire."
(Quoted in Meagher, Gummow & Lehane, above n16, par 1722 as a caution against judicial imperialism in the context of estoppel).

157 *Id* at 559.

158 See Taperell, "Unconscionable Conduct and Small Business: The Possible Extension of Section 52A of the Trade Practices Act 1974" (1990) 18 *Australian Business LR* 370.