The Contracts Review Act *1980 (NSW) — 20 Years On*

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1. Introduction

In October 1976, a series of reforms to the law of contract in New South Wales were recommended in a report[1] commissioned by the Minister for Consumer Affairs and authored by Professor John Peden of Macquarie University (hereinafter *Peden Report*). The *Peden Report* argued that there were significant inadequacies in both common and statutory law pertaining to harsh and unconscionable contracts, and that there remained as a result a significant potential for abuse in both consumer and other transactions for which no remedy was available under existing law.

Many of the recommendations contained within the *Peden Report* were subsequently accepted by the then government of New South Wales which responded by introducing the Contracts Review Bill 1979 (NSW) to Parliament in November 1979. In at least one significant respect however, the Bill went further than the reforms which had been envisaged in the *Peden Report*. There were to be no exclusions from the scope of relief and protection afforded by the proposed legislation in relation to any unjust contract. The Government of the day had decided that delineating between those classes of individuals, entities or enterprises which were deserving of protection and those to whom protection would be denied was a task fraught with difficulty and better dealt with via the discretion of the courts than some blunt statutory instrument. This approach signified that not only consumer type contracts but also commercial contracts could be the subject of review, and hence uncertainty, under the proposed legislation.

Andrew Terry, in his authoritative article[2] on the *Contracts Review Act* 1980 (NSW), (hereinafter, *Contracts Review Act*) captured the essence of the response to the proposed *Contracts Review Act* by the community at large, in particular the business community, and described the outcome thus:

> as a result of the reaction of the business community at large, a reaction described by the Minister of Consumer Affairs as bordering on the hysterical, the government suspended the passage of the legislation to hear further submissions and a revised Bill which drastically restricted the scope of the legislation was introduced and later passed without amendment.[3]

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1 John Peden, Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and The Attorney-General for New South Wales (1976).

2 Andrew Terry, 'Unconscionable Contracts in New South Wales: The Contracts Review Act 1980' (1982) 10 *ABLR* 311 at 319–320.

3 Id at 320.

The legislation as enacted, with minor exceptions,[4] precludes corporations[5] from obtaining relief under the Act, and also largely excludes contracts entered into for some business purpose from being the subject of review[6] and relief. As a result, its scope for action is far more limited than originally envisaged by either the government as it then was or the author of the *Peden Report.*

Nevertheless, the effect of the *Contracts Review Act* on the law of contracts in New South Wales has been described as nothing short of 'revolutionary'[7] and as a 'radical disturbance of time honoured concepts governing contractual relations'.[8] Accepting that to be the case,[9] it is intriguing that a recent report by the New South Wales Law Reform Commission[10] notes that 'while the *Contracts Review Act* was described as revolutionary when enacted nearly 20 years ago, there has been no research into its operation or effectiveness.'[11] That is not to say that there was not speculation about the likely impact of the Act. On the one hand for example, it was predicted that the Act would become a model for similar legislation in other jurisdictions.[12] On the other hand it was said that the Act failed to provide the general criteria necessary for the development of an efficacious doctrine of unconscionability, with the result that decisions under the Act would most likely fail to accumulate useful experience rendering orderly and uniform interpretation less likely.[13] For much of the period since the inception of the Act, an analytical silence has blanketed its field of operation. In the early to mid 1980s, there was a brief flurry of publishing interest focused closely on the Act[14] which quickly waned to the point where references to the Act in more recent literature have become rarer,[15] more oblique and are now largely restricted to brief synopses in generalised texts on the law of contract.[16] It is the objective of this paper to narrow this identified gap in the extant literature.

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4 Home unit companies are not precluded from claiming relief.

5 Section 6(1), *Contracts Review Act.* This section also precludes the Crown, and public and local authorities from obtaining relief. The Act purports to bind not only the Crown in right of New South Wales, but also, insofar as legislative capacity of parliament permits, the Crown in right of all of its other capacities.

6 Id s6(2).

7 Above n2 at 311.

8 *West v AGC (Advances) Ltd & Ors* (1986) 5 NSWLR 610 at 612 (Kirby P).

9 Given the eminence within the profession of those who have adopted such an approach to describing the nature of the Act, it would seem churlish not to begin from the same premise.

10 Law Reform Commission of New South Wales, *Issues Paper 17 – Guaranteeing Someone Else's Debts* (2000).

11 Id at 11.

12 Andrew Terry, id at 312. This has not been borne out, though it might be argued that the growth in the breadth of actions possible under the *Trade Practices Act 1974* (Cth) is a partial vindication of the statement.

13 Above n2 at 326. In defence of the approach adopted by the courts, a clear notion of procedural versus substantive unconscionability would appear to have developed, see above n8 at 610.

14 See for example, above n2; AG Lang, 'How will the Contracts Review Act 1980 Affect Conveyancing Transactions?' (1980) 18 *Law Society Journal* 499; J Goldring, J Pratt & D Ryan, '*The Contracts Review Act* (NSW)' (1981) 4 *UNSWLJ* 1; John Peden, *The Law of Unjust Contracts including the Contracts Review Act* (1982); Peter Hall, *Unconscionable Contracts and Economic Duress* (1985); Malcolm Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985); Kevin Lindgren, 'Injustice and Relief under the Contracts Review Act' (1987) 15 *ABLR* 173.

2. *Slow Beginnings*

The principal feature of the Act is the jurisdiction it grants to the court[17] via s7, in the event that a contract or a provision of a contract is found to be unjust,[18] to refuse to enforce any or all of the provisions of a contract, make a declaration that a contract is void, wholly or in part, vary in whole or part any provisions of a contract and, in cases where a contract relates to an interest in land, make orders for instruments to be made securing or terminating the provisions of a land instrument.[19] In addition, the court has the discretion to grant forms of anticipatory relief, for example by restraining a future course of conduct which would lead to the formation of unjust contracts.[20] The court also has the power to alter the rights of persons who are not parties to contracts which are the subject of litigation where those contracts are held to be unjust and relief appropriate.[21] Clearly, the manner in which a court may intervene into contractual affairs is far broader under the Act than under the general law. It is this breadth of remedial possibility which led to the observation that 'the Act, although it operates in the domain of contract law, signals the end of much classical contract theory'.[22] No longer could it be said that the principles of freedom and sanctity of contract reigned supreme. A new, potentially profound force had arrived.

Yet it is as well not to overstate the uniqueness of the contract re-opening provisions of the Act. There existed, prior to the *Contracts Review Act*, several pieces of legislation in Australia which gave courts the power to re-open and review contracts and transactions. *The Moneylending Acts*[23] as they existed in a

15 For a brief but rare recent discussion see; David Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective', in Roger Brownsword, Norma Hird and Geraint Howells (eds), *Good Faith in Contract – Concept and Context* (1999).

16 Two Australian texts which devote some space to a discussion of the role and effect of the Act are: David Harland & John Carter, *Contract Law in Australia* (3rd ed, 1996); Nicholas Seddon & Manfred Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th ed, 1997).

17 Either the District Court or the Supreme Court of NSW, depending on the monetary jurisdictional limit of the District Court.

18 *Contracts Review Act* at s4(1) defines 'unjust' and 'injustice' in the terms unconscionable, harsh or oppressive.

19 *Contracts Review Act* at s7(1) (a) (b) (c) (d). Note however that in relation to land instruments, s19 notes restrictions on the ability of the court to make orders in relation to land instruments registered under the *Real Property Act* 1900 (NSW).

20 *Contracts Review Act* at s10. During the course of the research for the preparation of this paper, only one case in which this provision was invoked was identified; *Minister for Consumer Affairs v WW Vallack Real Estate Pty Ltd & Ors* [1986] ASC 55–478. The real estate agency in question had been covertly inserting a term in an otherwise standard agency agreement which purported to give the agency an estate or interest in the property being sold for the purposes of guaranteeing recovery of fees. This clause was struck out as unjust and unnecessary and the agency directed not to use it in future, though another unusual clause was allowed.

21 *Contracts Review Act* at s12(1).

22 Above n8.

23 *Lending of Money Act* 1915 (Tas) s2(1) (a) (c); *Moneylenders Act* 1912 (WA) s4(1); *Moneylenders Act* 1958 (Vic) s28(1); *Moneylending Act* 1941 (NSW) s30; *Moneylenders Act* 1916 (Qld) s4(1).

variety of jurisdictions represent a useful example of this. Under the Moneylending Acts, moneylending contracts could be revisited under a range of conditions, including on the grounds that interest charged on loans was excessive, or that other charges were excessive or punitive or that the transaction was harsh or unconscionable such that a court of equity would give relief. Where moneylending contracts were reviewed by the courts, wide powers of reformulation were available. Hire-Purchase legislation[24] as it existed in a variety of jurisdictions also provided courts with the power to revisit and revise contractual agreements where appropriate.[25] Elsewhere in the consumer law arena there were provisions in several pieces of legislation prohibiting the exclusion of certain implied conditions and warranties in consumer contracts,[26] while in the industrial relations arena, there had long been provisions relating to the granting of relief from unfair[27] contracts of work.[28]

Why then was the *Contracts Review Act* so potentially different? One response relates to the mode of regulation of contracts adopted under the Act. It has been noted in relation to the regulation of contracts that:

> Legislative control of unfair agreements generally takes one of two forms. The first is the advance prohibition (or, in some cases, the positive prescription) of particular contractual terms and clauses, a technique that works well when it is possible to isolate desirable or undesirable terms in more or less standardised transactions. The second form is to give the court a discretion to strike down agreements that are harsh and unconscionable or that are not fair and reasonable. This second form of legislative intervention is of more general applicability.[29]

24 *Hire Purchase Act* 1959 (Vic) s24; *Hire Purchase Act* 1960 (NSW) s32; *Hire Purchase Act* 1960 (WA) s24; *Hire Purchase Act* 1959 (Tas) s33; *Hire Purchase Agreements Act* 1971 (SA) s24; *Hire Purchase Act* 1959 (Qld) s28.

25 Moneylending and Hire Purchase Acts were later disbanded and replaced with a single piece of legislation which in most jurisdictions is referred to as either a *Consumer Credit Act* or a *Credit Act*.

26 *Trade Practices Act* 1974 (Cth) s68. See also the *Sale of Goods Act* 1923 (NSW) which has been amended to include similar provisions.

27 Note that in this respect the provisions of the *Industrial Arbitration Act* 1940 (NSW) s88F and its modern equivalent the *Industrial Relations Act* 1996 (NSW) s106 are broader than the *Contracts Review Act* s7 in that they allow a contract to be overturned or adjusted on the basis of mere 'unfairness' whereas 'unfair' is a concept, without more, foreign to the operation of the *Contracts Review Act*. For a detailed discussion of this point see *Baltic Shipping Company v Dillon* [1991] 22 NSWLR 1 at 51–52 (Mahoney JA).

28 *Industrial Arbitration Act* 1940 (NSW) s88f. This has now been replaced by the *Industrial Relations Act* 1996 (NSW) s106 which confers jurisdiction on the Industrial Relations Commission to review any contract whereby a person performs work in any industry, and provides for a wide range of possible orders of relief.

29 Stephen Waddams, 'Unconscionability in Contracts' (1976) 39 *Mod LR* 369 at 390.

Clearly, the Act conforms to the latter mode of regulation, being very general in its approach. Indeed, notwithstanding the exclusions from remedy noted previously,[30] the scope of the Act was wider than any pre-existing legislation which contained the possibility of re-opening and reviewing contracts.[31]

A second related factor sheds the matter in a clearer light. Parliament intended that the Act be used to carve out an entirely new environment for a statute based doctrine of unconscionability in contract. The *Peden Report* stated:

> It is intended to confer on the courts a new and wide discretion to determine the existence and extent of harshness in a contract and thereby to develop a doctrine of unconscionability suitable to present and future business and community needs and standards.[32]

Judicial approaches to interpretation of the Act have clearly endorsed such an approach. Thus it has been said:

> The Act seems to me clearly to call for a fresh and direct approach to the individual case, without preconceived notions of conditions on which courts may set aside or vary a contract derived exclusively from established doctrines, whilst at the same time giving due recognition to the public interest in generally holding parties to their bargains.[33]

Similar sentiments continue to resonate in a succession of later decisions.[34] An interesting counterpoint is to consider the attitude apparently taken by the Commonwealth Government to the role and operation of s51AA of the *Trade Practices Act* 1974 (Cth), also a statutory unconscionability provision. During his second reading speech, the Honourable Michael Duffy, Attorney-General, noted that the section would not:

> extend the equitable principles of unconscionability beyond their current limits. All transactions covered by the new provision are already covered by the equitable doctrine.[35]

Thus with the *Contracts Review Act*, the NSW Parliament had recognisably created a legislative instrument which had the capacity to allow the development of an entirely new, statute based approach to unconscionability, unfettered by previous doctrine or dogma.

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30 That is, a remedy unavailable to corporations, the Crown or public authorities and not available in relation to trade, business or professional contracts: *Contracts Review Act* at s6(1)–6(2).

31 It is true that the *Industrial Arbitration Act* 1940 (NSW) s88F had been construed very widely. Nonetheless, it is not controversial to argue that the *Contracts Review Act* provided a broader platform for review of contracts than had existed in any previous legislation.

32 Above n1 at 25.

33 *Sharman v Kunert* [1985] 1 NSWLR 225 at 231 (Holland J).

34 See for example; *Beneficial Finance Corporation v Karavas* (1991) 23 NSWLR 256 at 268 (Kirby P); *Arbest Pty Ltd & Ors v State Bank of New South Wales Ltd* [1996] ATPR 41–481 at 41,981 (Kirby ACJ).

35 Commonwealth of Australia House of Representatives, *Parliamentary Debates (Hansard)*, 3 November 1992 at 2408.

Some things, as the old cliché notes, are easier said than done. The *Contracts Review Act* had provided a fertile environment for the discovery of a new set of principles, yet it was as if the scale of the possibilities brought into being by the Act had temporarily stunned the legal profession into collective denial of the features of the new and unfamiliar terrain. Kirby P (as he then was) provided a notable call to action in 1986 when he made the following observations.

> It is ... surprising that, although the Act has now been in force for more than six years, few are the cases in which relief has been claimed. Fewer still are the cases in which the court has provided relief. Where such a radical disturbance of time-honoured concepts governing contractual relations between parties intrudes upon settled law, there is a natural disinclination to apply the statute as its language would suggest Parliament to have envisaged. There is an equal inclination to by-pass the full consequences of such novel provisions by avoiding the application of the statute altogether and relying upon previously settled and more familiar avenues of redress. Alternatively, even where the statute has been held to apply, the wide jurisdiction afforded to the court may be read down, out of deference to concepts of relief which predate the enactment of its beneficial provisions. *These inclinations should be recognised so that they may be resisted.*[36] [Emphasis added].

Slow beginnings indeed. Nevertheless, the passage of time would see increased recourse to the Act[37] and a greater flexibility in its application by the courts.

3. *Mapping the Path*

This study was motivated by an apparent lack of research into the operation and effect of the *Contracts Review Act* over the past 20 years. Therefore, the approach taken to developing a clearer picture of the nature of the Act on a relatively broad scale is to take an empirical perspective using decided cases as the dataset. This required the identification of as many cases as possible in which reference to the *Contracts Review Act* had been made and the selection of a sample of those cases for close review.[38] A total of 160 cases in which some form of reference to the Act had been made was identified. A random sample of 50 per cent of this 'population'[39] was selected for close review, and relevant case reports examined.[40] After initial consideration, a further 20 cases were judgmentally deleted from the sample as a result of references to the Act which were either peripheral or oblique,[41] leaving a final sample of 60 cases. The focus pertaining to the Act of these cases is summarised in Table 1.

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36 Above n8.

37 Though not necessarily meritoriously so.

38 It would be erroneous to refer to the resulting list of cases as the population, since gaps in both paper based and electronic case citators, databases and search tools, particularly with respect to unreported decisions, may be significant. Nevertheless, a significant sample was able to be collected.

39 Ibid.

40 This proportion was judged high enough to provide the potential for generalisable results to be distilled from the data, taking into account likely data wastage resulting from non-useable sample components.

Table 1: Focus of Cases

Focus of Case	Number of Cases	Percentage
Mortgage Contracts & Lending Guarantees	44	73.33
Contracts for the Sale of Land	4	6.67
Option Contracts	4	6.67
Contracts of Release from Litigation	3	5.0
Miscellaneous	5	8.33
Total	**60**	**100**

The earliest case included in the sample was decided in 1982 and the most recent in 2000. No year or cluster of years was significantly over or underrepresented in the sample. The data strongly suggests that the largest single category of cases in which argument pursuant to the Act is likely to be made is in relation to mortgage contracts and related security or guarantee provisions. Given the 'consumer' focus of the legislation and the relatively high value of this type of contract vis a vis other 'consumer' contracts, this is perhaps relatively unsurprising. Assuming an 'efficient market' for the selection of legal strategy however, the results may be interpreted as indicating that recourse to the provisions of the Act may be particularly advantageous for parties seeking relief from contracts of mortgage and guarantee when compared to other approaches. This is a phenomenon which will be examined in more detail below. A determination of the frequency with which relief has been granted is also important in grasping the nature of the Act in operation. This data is displayed in Table 2.

41 See for example, *Hussmann Australia Pty Ltd v Walker* (1993) 31 NSWLR 189 at 198 (Hill J), a very fleeting reference to the *Contracts Review Act* is made by the court indicating that the action brought in that case (which had been brought under the *Industrial Arbitration Act* 1940 (NSW) s88F) might just as well have been brought under the *Contracts Review Act* or indeed the *Trade Practices Act* 1974 (Cth).

Table 2: Frequency of Relief

Nature of Case	Number of Cases in which Relief was Granted	Percentage	Number of Cases in which Relief was Denied	Percentage
Mortgage Contracts & Lending Guarantees	21	47.7	23	52.3
Contracts for the Sale of Land	3	75	1	25
Option Contracts	2	50	2	50
Contracts of Release from Litigation	3	100	0	0
Miscellaneous[42]	1	50	1	50

The data should be interpreted with caution. In particular, it is difficult to attach significance to the findings with respect to options contracts, contracts for the sale of land and miscellaneous situations, mainly due to the very small number of observations. The sample size in relation to contracts of release from litigation is also very small, but the results are potentially more generalisable due to a high degree of observed consistency in fact scenarios and judicial approach in those cases.[43] Without benchmark data, it is difficult to assess the significance of the finding with respect to success in gaining relief in cases relating to mortgages and guarantees. Understanding the significance or otherwise of the rate at which relief has been granted under the Act would be enhanced by statistics demonstrating success rates in actions pleaded on other grounds – for example purely on equitable grounds.

42 Table 1 shows 5 cases in the 'miscellaneous' category. That is the correct total. However, in three of the cases in this category, relief was either not sought or not an issue for contemplation by the Court. In *Australian Bank Ltd v Stokes & Anor* (1985) 3 NSWLR 174, the issue at hand was whether or not a particular type of undertaking should be excluded from potential relief by way of operation of the *Contracts Review Act* s6(2). In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242, the relevant issue was whether the ability to plead for relief pursuant to the *Contracts Review Act* constituted a sufficiently significant juridical advantage to warrant the denial of a stay of proceedings or a finding of *forum non conveniens*. In *Abriel v Australian Guarantee Corp* (Federal Court of Australia, Brennan J, 5 February 1999), the issue was the capacity of an order pursuant to the *Contracts Review Act* to supercede or alter an order made pursuant to the *Federal Court of Australia Act* 1976 (Cth). (No such capacity exists.)

However, in working towards a tentative conclusion, the following observations seem pertinent. In 18 out of the 21 mortgage or guarantee cases in which relief was granted, the party seeking to assert rights under a mortgage or contract of guarantee was a bank or financial institution. It is not unreasonable to assume at least a reasonable degree of sophistication in the lending practices of these organisations and at least some awareness throughout those organisations of the impact of decisions at general law such as *Yerkey v Jones*,[44] *Amadio*[45] and *Garcia*,[46] as well as relevant statutory provisions such as the *Contracts Review Act*. That being the case, it is not unrealistic to assume at least some 'defensiveness' in the behaviour of these professional lending institutions, particularly with regard to ensuring that contracts are drafted not to contain clearly harsh or oppressive terms. Indeed, the data bears that expectation out. In only one[47] of the 18 mortgage or guarantee cases in which relief was granted and to which a financial institution was a party was a contract held to be unjust by reason of the harshness or oppressiveness of the terms of the contract itself. Rather, the sting in the tail of s7 of the Act is by way of its reference to injustice in the circumstances relating to the contract at the time it was made. These circumstantial factors are generally far more difficult to manage via the imposition of internal procedural controls by lending institutions, and indeed may not even be salient to lenders at the time contracts are entered into, either in an actual or a constructive sense.[48]

That having been said, in 10 out of the 21 mortgage or guarantee cases in which relief of some form was granted to borrowers or sureties by the court, there had either been no independent legal advice,[49] or the quality of the advice was in some

43 The three cases were; *Baltic Shipping Co v Dillon* (1995) 22 NSWLR 1; *Baltic Shipping Co v Merchant* (1995) 36 NSWLR 361; *Amcor Limited t/as Australian Paper Manufacturers v Watson & Anor* [2000] NSWCA 21. These cases provide a salutary warning that the policy ideal of holding parties to their bargains is not one necessarily clung to tightly by the courts. The reason for providing relief was not injustice in the terms of the contracts of release entered into, nor in general conduct vulnerable to being impugned as improper. Rather these cases demonstrate the great weight attached to 'circumstance' when deciding whether contracts are unjust according to the *Contracts Review Act* s7. Particularly unsettling is the suggestion in both *Baltic Shipping Co v Dillon* and *Amcor v Watson* that the prospect of ongoing litigation held out as a carrot to induce early settlement represents (in part) a factor salient to the finding of injustice relating to the formation of the subsequent contract.

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

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

46 *Garcia v National Australia Bank* (1998) 155 ALR 614; (1998) 194 CLR 395.

47 *Cook & Ors v Bank of New South Wales* [1982] ASC 55-223.

48 Unlike the equitable concept of unconscionability, this is not a necessary bar to relief being awarded; see *Beneficial Finance Corporation Ltd v Karavas & Ors* (1991) 23 NSWLR 256; *Peters v Commonwealth Bank of Australia* [1992] ASC 56-135.

49 *Borg Warner Acceptance Corporation (Australia) Limited v Diprose* (1987) 4 BPR 97279; *Clarke v Baker* (1987) 4 BPR 97289; *Lam v Ausintel Investments Australia Pty Ltd* (1988) ASC 55-693; *Parkes v Commonwealth Bank of Australia* [1990] ASC 56-020; *Beneficial Finance Corp Ltd v Comer & Anor* [1991] ASC 56-042; *Bridge Wholesale Acceptance (Australia) Ltd v GVS Associates Pty Ltd & Ors* (1991) ASC 56-105; *Moray v Scandinavian Pacific Ltd* (1992) 5 BPR 97419; *National Australia Bank v Hall* (1993) ASC 56-234; *State Bank of New South Wales v Muir & Anor* (1997) 8 BPR 97651; *The State Bank of New South Wales Limited v Vecchio & Anor* (NSW Supreme Court, Kirby J, 10 November 1998).

way compromised, for example by way of a solicitor working for both the borrower and the lender. In eight of those 10 cases, a financial institution was involved, a disquieting thought given the well known admonitions in the general law as to the desirability of independent legal advice, not to mention clear statutory acceptance of that proposition.[50] While many circumstantial factors may not be salient to lenders, the question as to whether or not a borrower or surety has received independent legal advice must surely be readily determinable, even if the quality of the advice received is not so easily assessed. Despite this apparent control breakdown, the better side of the argument is probably that a success rate approaching 50 per cent in deflecting, at least to some extent, the claims of professional lending institutions, whose function is to lend money and obtain the necessary security to balance the risks associated with doing so, whose access to legal advice and whose experience of the types of transactions so apparently frequently impugned far surpass those available to typical borrowers or sureties, is of significance.

An alternative perspective on relief granted to contracting parties pursuant to the Act is to examine the nature of relief granted (where relevant). For the purpose of operationalising this variable, two states, 'complete' and 'partial' relief were measured. Complete relief denotes a situation where in granting relief, the purported contract was voided ab initio, or some other arrangement was reached whereby the effect of the purported transaction on the party seeking relief was cancelled completely. Partial relief denotes situations where contractual obligations are only avoided above a certain limit[51] or where, for example, contractual obligations are delayed such as where it is ordered that a lender not enforce a security during the lifespan of a surety.[52] The results are presented in Table 3.

50 See *Contracts Review Act* at s9(2); *Trade Practices Act* 1974 (Cth) s51AC 3(c).

51 See for example *The State Bank of New South Wales Limited v Vecchio & Anor* (NSW Supreme Court, Kirby J, 10 November 1988) in which an approach to relief reminiscent of that adopted in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 was adopted. For another example of that approach see *ANZ Banking Group Ltd v Petrik* [1996] 2 VR 638.

52 See for example; *Melverton v Commonwealth Development Bank of Australia & Anor* [1989] ASC 55-921.

Table 3: Nature of Relief

Nature of Case	Number of Cases Granting Complete Relief	Percentage	Number of Cases Granting Partial Relief	Percentage
Mortgage Contracts & Lending Guarantees	11	52.4	10	47.6
Contracts for the Sale of Land	3	100	0	0
Option Contracts	2	100	0	0
Contracts of Release from Litigation	2	66.67	1	33.33
Miscellaneous[53]	0	0	1	100

This data yields its most interesting insights when viewed not as a cross section (as above) but as a time-series. Viewed chronologically, the data suggests a far lower tendency to grant complete relief in more recent decisions, with a commensurate shift to partial relief. This suggests a willingness on the part of courts to more fully exploit the remedial possibilities entailed by the Act, informed perhaps by a growing recognition that relief need not be an all or nothing affair, particularly where relief is discretionary and to be granted for the purpose of avoiding unjust outcomes.[54]

In addition to the observations noted above, the case analysis identified three factors of importance to the determination of the nature and effect of the Act in practice. These are, the approach to defining injustice, and the indicia thereof, the requirement as to knowledge of special disability on the part of a contracting party, and the effect thereof on the availability of relief under the Act and the width as a matter of practice of the business contract exclusionary provisions as enunciated by s6(2) of the Act. Each is discussed in turn.

53 Above n42.

54 *Contracts Review Act* at s7(1).

4. *Justice and Injustice*

Section 4 of the Act defines unjust to include the terms unconscionable, harsh or oppressive. Given that the remedial focus of the Act is unjust contracts or provisions thereof,[55] the manner in which this term is construed is of obvious significance. For most of the period of operation of the Act, courts have unhesitatingly defined the term broadly. In an early but leading statement on the matter, McHugh JA (as he then was), made the following observations:

> The definition of unjust in s4 is not exclusive. It is in my opinion a mistake to think that a contract or one of its terms is unjust only when it is unconscionable, harsh or oppressive. Contracts which fall within any of those categories will be unjust. But the latter expression is not limited to the so called tautological trio.[56]

Thus it also appears that contracts procured through some misrepresentation made during the bargaining process can be held unjust,[57] and there seems no doubt that contracts procured as a result of undue influence, undue pressure and the like can also be impugned as unjust under the Act.[58]

A complicating factor in relation to the determination of justice or the lack thereof, is the 'shopping list' (albeit a non-exhaustive one) of variables to be taken into account by the court as relevant contained in section 9(2). These factors include the degree to which an imbalance in bargaining power between the parties existed, whether or not the terms of the contract were or were able to be the subject of negotiation, whether conditions imposed by the contract were harsh or unnecessary, whether the contract was intelligible and understood by the party seeking relief, whether independent advice was taken by the party seeking relief, the circumstances of the parties, including their economic circumstances, educational background and state of mind as well as the conduct of the parties to the contract.[59] These matters are theoretically to be treated by the courts not as hallmarks of injustice, but rather, as items for consideration in the ultimate determination of the characterisation of the contract.[60]

It is submitted that all of this lends itself to considerable uncertainty. While a list of indicia is provided by the Act, no instruction is provided in relation to the weighting of these factors by courts when reaching decisions as to injustice. This means that decisions in which a contract is found to be unjust may have very little

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55 Ibid.

56 *West v AGC (Advances) Ltd & Ors* (1986) 5 NSWLR 610 at 620–621 (McHugh JA).

57 *Ashfind Pty Ltd v McDonald* (1989) 5 BPR 97344. This decision suggests that a party relying on a misrepresentation to avoid a contract need only show that the misrepresentation was one of the factors which induced the contract. This will be taken into account for the purpose of determining the availability of relief pursuant to the Act.

58 *Contracts Review Act* at s9(2)(j).

59 Apparently anomalously, the *Contracts Review Act* s9(2) (l) refers to the 'commercial or other setting, purpose and effect' of the contract. Given the s6(2) exclusions from relief in relation to contracts entered into for the purpose of trade, business or a profession carried on or proposed to be carried on by the person, this seems a strange reference indeed.

60 *Amcor Limited t/as Australian Paper Manufacturers v Watson & Anor* (NSW Court of Appeal, Meagher, Sheller and Heydon JJA, 3 March 2000).

precedential value because they reflect one court's predilections at a particular point in time rather than the result of a standardised process of consideration. Hence it has been stated that:

> In my opinion, such an Act as this is best applied upon a case to case basis rather than by seeking to derive from it general rules applicable to every case or every case of a particular class. Stereotyping, of persons and of circumstances is, in my respectful opinion, apt to lead to error. This is particularly so where, as in the present case, the decision depends essentially upon the view which is taken of the facts and circumstances of that case.[61]

It is this individual case by case approach to the determination of injustice which also contributes to the likelihood that a court of appeal will be strongly hesitant to overturn the decision of a lower court in relation to injustice, presuming no clear error of law, because of an aversion for substituting an appellate perspective on matters of fact to that adopted by a court of original instance.[62]

At almost every turn, confusion and uncertainty protrude from the body of decided cases. At times it is suggested that the striking of a bad bargain is not, of itself indicative of injustice,[63] while in other situations a sufficiently bad bargain has been supposed to indicate injustice in the contract.[64] On one hand, it is suggested that 'fairness' is not an appropriate indicator of injustice for the purposes of determining the availability of relief under the Act,[65] while on the other hand it is suggested that nothing much turns on the distinction between injustice and unfairness because the two are close fellows.[66] And of course, several cases incant quasi-religiously the fable of the distinction between an unjust contract and an unjust transaction,[67] while in other decisions the reasoning revolves almost entirely around the 'fairness'[68] of the 'transaction'.[69] One wonders whether this is explained merely as thoroughly sloppy language or as an assertion of an even wider field of operation for the Act than had previously been thought appropriate.

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61 *Gough v Commonwealth Bank of Australia* [1994] ASC 56–270 (Mahoney JA). Cited with approval subsequently by Hunter J in *Teachers Health Investments Pty Ltd v Wynne* (1994) 6 BPR 97480.

62 *Gough v Commonwealth Bank of Australia* [1994] ASC 56–270 (Kirby P).

63 *Citicorp Australia Ltd v O'Brien* [1996] 40 NSWLR 398.

64 *Vakele Pty Ltd v Assender* (1989) 4 BPR 97305. The assumption appears to be that even though the manner in which the contract was procured may not appear to have been unjust, and the terms, prima facie, appear similarly without blemish, the fact that a bargain so bad has been struck nevertheless allows the supposition of sufficient lurking injustice to strike down the contract, wholly or in part.

65 *Beneficial Finance Corp Ltd v Comer & Anor* [1991] ASC 56–042 at 56,685 (Rogers CJ). By way of contrast, the *Industrial Relations Act* 1996 (NSW) s106 does allow a contract to be reviewed on the grounds of unfairness.

66 Above n8 at 621 (McHugh JA).

67 Ibid. Repeated in many cases since.

68 Bear in mind previous comments about the appropriateness or otherwise of this term. This was the actual term used in *Australian Guarantee Corp v McClelland* [1993] ATPR 41–254 at 41,415.

69 *Australian Guarantee Corp v McClelland* [1993] ATPR 41–254 at 41,415 (James J).

Even the question of the source of purported injustice is vexed. On one account, it is suggested that there is nothing in the language of s7 of the Act which warrants reading down the opening words of that section so that the injustice the court is required to consider is limited to injustice only between the parties to the contract. On that approach it is contended that the concept of injustice must be viewed generally because it is possible that injustice caused by a third party may render a contract or a provision unjust in the circumstances.[70] Subsequently the New South Wales Court of Appeal appears to have rejected this notion in the case of *Bosnjak v Farrow Mortgage Services Pty Ltd (in liq)* (hereinafter *Bosnjak*).[71] In that case, a party to a mortgage contract claimed to have entered into the lending agreement as a result of the misleading and deceptive conduct of a co-venturer. Kirby P had stridently argued in previous decisions that:

> I consider that it is a mistake to read into the language of s9 an obligation to show that the contract was unjust because it was produced by unfair conduct[72] or unjust conduct on the part of one of the parties to it... a contract may be unjust because of peculiarities inherent in the circumstances of one of the parties of which the other party was quite ignorant. It may be unjust although the other party has acted quite honourably and lawfully. This is not such a shocking notion.[73]

In *Bosnjak* however, Kirby P was content to concur in a decision in which it was held that the individual suffering from apparent third party induced injustice[74] had no remedy. This concurrence took place without so much as a mention of his previous, contradictory statements on the *possibility* that such a fact scenario might lead to a finding of relevant injustice. Still the wheel turns, its destination unknown.

Changing focus yet again, a question which has been raised on several occasions is the extent to which parties to contracts, but in particular lenders, have a duty to provide some form of commercial advice to potential borrowers in order to exorcise the possibility of the subsequent transaction being deemed unjust. This question was examined in *Goldsbrough & Anor v Ford Credit Aust Ltd,*[75] though the necessity for such a consideration given the facts of the case is uncertain. The plaintiffs provided guarantees in relation to truck leases entered into by one of their relatives. In doing so, they did not receive independent legal advice, and were presented with a contract for signature which, while perhaps not unusual or harsh in its terms, was nevertheless complicated and included important clauses buried deep within clauses of otherwise rather low materiality. In short, they claimed they did not understand the contract they signed.[76]

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70 *Hogan & Anor v Howard Finance Limited & Anor* [1987] ASC 55–594 (Kirby P). Kirby P made his statement in dissent in this matter, but returned to the argument again in *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 20, this time putting the argument even more forcefully than he had previously and without apparent rejection of his views by the other members of the Court of Appeal. Kirby P formed part of the majority in the latter case.

71 *Bosnjak v Farrow Mortgage Services Pty Ltd (in liq)* [1993] ASC 56–225.

72 Note the lapse into ignoring distinctions between 'unfair' and 'unjust' – presumably an indication that this is not a distinction worthy of a great deal of heed.

73 *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 20.

74 Normatively that is probably a decision for the better, but it appears to contrast strikingly with a line of argument which had existed only a short while previously.

75 *Goldsbrough & Anor v Ford Credit Aust Ltd* [1989] ASC 55–946.

The ill fated would be trucking magnate meanwhile, turned out to have had a poor credit history and rating, while the supportive relatives, to add to their list of complaints, could point to poor education, inequality of bargaining power at the point of signing the contract, as well as an inability to negotiate the terms of the contract. This was a case where most of the s9(2) shopping list of injustice indicia could be comfortably ticked off and a finding of injustice made without undue controversy. Yet the first reason given by the court for finding the contract invalid was none of these, but rather that where there appears to be a high risk of default, the contract of security procured by a lender will often be unjust merely because thorough commercial advice as to the nature and extent of these risks has not been provided by the lender to the guarantor. This is an apparent construction of a positive duty to advise, or suffer the consequences of having contracts struck down as unjust.[77] Almost as soon as Young J had begun constructing this doctrine, Meagher JA saw fit to commence demolition, stating in his characteristically robust manner that 'there is no duty on an financier to provide either a borrower or a third party guarantor with any commercial advice.'[78] Later still, Kirby P attempted resurrection of the doctrine in *Bosnjak*[79] where he withheld support for Meagher JA's previously stated position.

The clearest statement of principle which can be derived from the case experience as analysed is summed up by Samuels JA's prescient observation that the term unjust is 'a slippery word of uncertain content'.[80] Certainly it cannot be argued that the approach to defining injustice has been a materially limiting factor in the operation of the *Contracts Review Act*. The same may not be able to be said of other matters, to which we now turn.

5. *Knowledge*

In *Amadio,*[81] Deane J set out a two stage process for the determination of whether the equitable doctrine of unconscionability was an applicable avenue for remedy in a given case. The first involved the transaction having been procured in circumstances where one party was at a special disability with respect to the other. The second necessary condition was that the special disability was sufficiently evident to the other party that it became unfair or unconscionable for that party to take advantage from the contract. The knowledge component is therefore integral to any finding of unconscionable behaviour.

It is not possible to come to such a firm conclusion in relation to the operation of the *Contracts Review Act*. Meagher JA considered the matter in some detail in *Collier v Morlend Finance Corporation (Vic) Pty Ltd*[82] and expressed the view

76 The case notes that although the guarantors appeared to spend some time reading through the contract, they did not ask any questions about it. One wonders whether willful blindness to risk constitutes a factor which largely removes the rationale for relief.

77 Given the potential to then be cast in the role of a fiduciary adviser, see; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.

78 *Beneficial Finance Corporation Limited v Karavas & Ors* (1991) 23 NSWLR 256 at 276.

79 Above n71 at 58,327.

80 *Antonovic v Volker* (1986) 7 NSWLR 151 at 157.

81 Above n45 at 474.

that there is jurisdiction under the Act to make orders in favour of a party to a contract who proves that at the date of the contract he or she suffered from a relevant disability even though the other party to the contract was unaware of that disability. This view was later restated by Meagher JA, who continued to adhere to the general principle, while acknowledging that in general the jurisdiction would not be exercised under those circumstances.[83] On this approach, lack of knowledge is a material factor which will affect the court's exercise of discretion, by allowing such exercise only in extraordinary circumstances. In other words, knowledge is not necessary for the grant of relief, but there is a strong presumption that a party seeking relief under the Act will be denied relief unless knowledge can be demonstrated.[84] Even under this conservative knowledge doctrine, it is possible to gain relief under the Act if the court can be convinced that the circumstances justify such action.

It is possible that another, less conservative doctrine lurks in the jurisprudence on this topic. Once again, this more radical approach can be traced to Justice Kirby. His approach to the issue of knowledge of disability is built on the philosophy that the *Contracts Review Act* is remedial and beneficial legislation which should be given liberal interpretation.[85] He does not emphasise the need for extraordinary circumstances in order to justify relief where a party seeking to assert rights under a contract procured that contract without knowledge of a relevant disability on the part of the other party. He is simply silent on the matter.

However, it is submitted that given Kirby J's stated position with respect to third party injustice, also quite radical, his silence on this issue speaks volumes. Had Kirby J seen the need to place a limitation on the possibility of remedy in situations where there was no knowledge of a relevant disability, it is submitted that he would have made this explicit. While the better view is that restraint in the provision of relief will theoretically be exercised where no knowledge of a relevant disability can be demonstrated, it is interesting to note that recently, the silence with respect to this limitation has returned in a decision of the NSW Court of Appeal.[86]

In resolving the riddle, it is perhaps best to allow the record of decided cases to speak for itself. In seven of the cases in the sample studied, lack of knowledge of the relevant disability suffered by the party seeking relief was taken into account from the perspective of the conservative knowledge doctrine. That is, in each of the decisions, the Court, when giving reasons for decisions acknowledged that lack of knowledge would in most cases bar relief. Nevertheless, in a majority of the cases, relief was granted.[87] In practice therefore, it appears that irrespective of the doctrinal position espoused by the courts, relief is certainly well within reach even

82 *Collier v Morlend Finance Corporation (Vic) Pty Ltd* [1989] ASC 55–716 at 58,433.

83 Above n78 at 277.

84 On this point see additionally; *Peters v Commonwealth Bank of Australia* [1992] ASC 56–135; *Teachers Health Investments Pty Ltd v Wynne* (1994) 6 BPR 97480; *Bradbury v Australian Guarantee Corporation limited & Ors* (NSW Court of Appeal, Meagher, Beazley and Stein JJA, 1 July 1997); *Esanda Finance Corporation v Tong & Ors* (1997) 41 NSWLR 482.

85 Above n73 at 20; Above n8 at 631 (McHugh JA).

86 Above n60.

where there has been no knowledge of relevant disability. This sets the position under the *Contracts Review Act* clearly apart from the position under the equitable doctrine of unconscionability.

6. *Business Transaction Relief Limitations*

It is not a matter of controversy that a corporation,[88] the Crown, a public or local authority may not be granted relief under the *Contracts Review Act*.[89] Less obvious is the extent to which the Act operates to exclude relief in relation to contracts entered into in the course of or for the purpose of a trade, business or profession carried on or proposed to be carried on by the person seeking relief.[90] One area of exception to the exclusion of relief is where contracts are entered into for the purpose of farming undertakings.[91] It appears that this exception will be interpreted broadly by the courts. For example, a contract by which a landowner granted quarrying rights over part of his property was deemed to fall within the ambit of a farming operation for the purposes of the Act, and thus not excluded from the possibility of relief.[92] With respect, that is a very generous interpretation of the term 'farming undertaking' indeed.

It also appears that contracts entered into for the purpose of acquiring or divesting a business have a good chance of being deemed to fall outside the s6(2) exclusion clause,[93] even though on a narrow reading of that clause both types of contract could probably be excluded from relief, especially acquisition contracts, noting that the section includes reference to contracts relating to a trade, business or profession 'proposed to be carried on'.

The approach used by the courts to defining the terms 'business', 'trade' and 'profession' has not been a subject of controversy in relation to litigation with reference to the *Contracts Review Act*.[94] However, what has proved to be an interesting issue is the approach which has been taken to the interpretation of the terms 'carried on' and 'proposed to be carried on' which appear in s6(2). The case

87 Relief granted in; *Clarke v Baker* (1987) 4 BPR 97289; *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256; *Peters v Commonwealth Bank of Australia* [1992] ASC 56–135; *Essanda Finance Corporation Ltd v Tong & Ors* (1997) 41 NSWLR 482. Relief denied in; *Collier v Morlend Finance Corporation (Victoria) Pty Ltd* (1989) 6 BPR 97462; *Teachers Health Investments Pty Ltd v Wynne* (1994) 6 BPR 97480; *Bradbury v Australian Guarantee Corporation Limited & Anor* (NSW Court of Appeal, Meagher, Beazley and Stein JJA, 1 July 1997). Thus in a majority of cases in which the conservative knowledge doctrine was invoked, relief was nevertheless granted. Furthermore, in 75 per cent of cases where relief was granted, relief was complete, or a full vindication (in the case of appeals) of complete relief already granted. This is a higher rate of complete relief than was observed across the sample of relief cases as a whole.

88 Noting the minor exceptions set out in the *Contracts Review Act* s4(2), which relate to strata corporations or the like.

89 *Contracts Review Act* at s6(1).

90 Id at s6(2).

91 Ibid.

92 *Ellison v Vukicevic* (1986) 7 NSWLR 104.

93 *Central Commodities Services Pty Limited v Hertzog* [1989] ASC 55–706; *Coombs v Bahama Palm Trading Pty Ltd* [1991] ASC 56–097.

94 For a useful review of the approach to defining these terms, see Hall, above n14 at 163–167.

of *Toscano & Anor v Holland Securities Pty Ltd & Anor*[95] provides a useful illustration. Mr Toscano carried on business as an earthmoving contractor in partnership with his wife. A variety of contracts were entered into with Holland Enterprises Pty Ltd in relation to a construction project being carried on by that company. The contracts were entered into in about 1977. In September 1979, Mr Toscano, at the advice of his accountant, folded his partnership interests into a company known as F Toscano Enterprises Pty Ltd. Although the original contracts entered into by Mr Toscano as principal for the partnership were not novated, at law, it was held that after September 1979, it was the company rather than the partnership or the principals of that partnership which was carrying on business.

Later still, there were problems with the construction project, the fault for which could apparently be tracked to the earthmoving work which had been carried out by Mr Toscano (or Toscano Enterprises Pty Ltd). On 25 March 1981, Mr Toscano entered into two deeds[96] indemnifying certain companies related to Holland Enterprises Pty Ltd in relation to the cost of rectification and providing certain guarantees and security in relation to the deed of indemnification. Subsequently, Mr Toscano sought relief under the *Contracts Review Act*. Despite the apparent business or trade nature of the contracts in respect of which relief was sought, Mr Toscano was not precluded from seeking relief by the Court. This is because the Court held that it was not Mr Toscano, but rather Toscano Enterprises Pty Ltd which was carrying on business, leaving him free to claim relief. In a subsequent decision revolving around very similar facts,[97] Rogers J captured the absurdity of the position forced by the terms of s6(2) by observing that:

> It seems illogical in the extreme that Parliament should have excluded, from the purview of the Act, relief to a two dollar company which is carried on by the corner grocer and to the grocer carrying on business in his own name, yet if that grocer carries on business in the name of the two dollar company and then gives a guarantee in respect of the business of the company, on the face of it he is not carrying on business for the purposes of s6(2) and the Act operates in relation to a guarantee.[98]

In adopting a liberal view of the purpose and intent of the *Contracts Review Act,* the courts have not seen fit to pierce the corporate veil. This is a windfall for those who have ordered their affairs to escape the exclusionary provisions of s6(1) and (2), but nevertheless leaves an uneasy feeling in the remainder of cases. Surely serendipity is not a suitable ground for the availability of relief from unjust contracts? Notwithstanding the frustration expressed by the courts in relation to the structure and content of s6(1) and (2),[99] Parliament has not seen fit to amend the section in any way. Therefore, the exclusionary provisions of the Act still represent a major impediment to claims of relief, though the analysed cases demonstrate that the courts have interpreted the provisions as liberally as possible.

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95 *Toscano & Anor v Holland Securities Pty Ltd & Anor* (1985) 1 NSWLR 145.

96 Id at 148 (McLelland J). Deeds constitute contracts for the purposes of the *Contracts Review Act* s7.

97 *Australian Bank Ltd v Stokes & Anor* (1985) 3 NSWLR 174.

98 Id at 176.

99 Id at 177.

7. *Yesterday's Legislation?*

Much ground has been traveled since the introduction of the *Contracts Review Act* in 1980. Of particular significance has been the addition of s51AA[100] and s51AC[101] to the *Trade Practices Act* 1974 (Cth). A point of distinction between these provisions (as well as s51AB) and s7 of the *Contracts Review Act* is that whereas the former concentrate on unconscionable conduct, the latter uses the arguably wider term 'unjust'. On the other hand, the focus of the *Contracts Review Act* is theoretically on contracts,[102] while the focus of the *Trade Practices Act* provisions, on conduct, is arguably broader. If a broad notion of unconscionability is adopted by courts when interpreting ss51AA, 51AB and 51AC, then any juridical advantage formerly reposed via the *Contracts Review Act* by virtue of its use of the language of 'injustice' rather than 'unconscionability' will be diminished if not lost. There is strong reason to believe that broad rather than narrow unconscionability marks and will mark the interpretation of the *Trade Practices Act* provisions.[103] This is particularly so in relation to s51AC, where for example, behaviour described as 'unreasonable, unfair, bullying and thuggish'[104] has been held to be relevantly unconscionable. It is submitted that at least insofar as the protection of consumers from the unjust and unconscionable contractual behaviour of corporations is concerned, the *Contracts Review Act* offers little if anything not available in the *Trade Practices Act*. The existence of provisions such as s106 of the *Industrial Relations Act* 1996 (NSW) as well as the continued development and expansion[105] of common law and equitable doctrines for harsh, unjust, oppressive or unconscionable contracts has further crowded the space once inhabited more exclusively by the *Contracts Review Act*. Given these developments, the continued exclusion of corporations from claiming relief under the *Contracts Review Act* on the grounds that this would result in an unwelcome addition to uncertainty seems a proposition difficult to sustain.

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100 In 1992.

101 In 1998.

102 Though note earlier comments about the apparent difficulty which has been experienced by courts applying the provisions of the *Contracts Review Act* in distinguishing between 'contracts' on the one hand and 'transactions' on the other, especially given the non exhaustive shopping list of indicia in s9(2).

103 For detailed discussion of this proposition see; D Clough, 'Trends in the Law of Unconscionability' (1999) 18 *Aust Bar Rev* 34; WD Duncan, 'Section 51AC of the Trade Practices Act 1974: An "Excocet" in Retail Leasing' (1999) 27 *ABLR* 280; A Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone Too Far' (1999) *Anglo American LR* 470; David Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective', in Brownsword, Hird and Howells (eds), *Good Faith in Contract* (1999); David Knoll, 'Protection against Unconscionable Business Conduct – Some Possible Applications for s51AC of the Trade Practices Act 1974' (1999) 7 *Competition and Consumer Law Journal* 54.

104 *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (Federal Court of Australia, Sundberg J, 22 September 2000).

105 Consider the broad picture of unconscionability painted in *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227, the development of the doctrine of estoppel as expressed in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 as well as the possible growth of a doctrine of good faith in contract entertained in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

One factor which may continue to set the *Contracts Review Act* apart despite the velocity of developments noted since its enactment is the somewhat lowered importance, as a factor shaping propensity to grant relief, of moral culpability or wrongful conduct on the part of the person seeking to assert rights under a contract. A contract can be held unjust under the Act even though the behaviour of the party seeking to assert rights under that contract is blameless.[106] It is questionable whether the same result could be delivered by the operation of equitable doctrine alone.[107] Furthermore the case experience which has developed over the period of operation of the Act suggests that a remedy for an unjust contract is probably more readily attainable under the Act[108] than under the doctrine of unconscionability.[109] To the extent that these observations hold true the Act as it currently operates may still enjoy a competitive advantage vis a vis alternative avenues to remedy.

However, there are some notable failures with respect to the operation of the *Contract Review Act.* Prominent amongst these is the apparent lack of impact on the terms of standard form contracts used by companies in consumer transactions, or at least so it would seem given the lack of disputes relating to such contracts or provisions noted in the case analysis undertaken in this paper. This is despite the strong expectations on the part of the architects of the Act that this would be an area where the legislation would make a strong impression.[110] The case experience has also failed to distill consistently recognisable principles in relation to injustice, making for a significant level of uncertainty in the operation of the Act.

At present, litigation under the purview of the *Contract Review Act* continues apace,[111] an indicator that room still exists for the Act and that its provisions still represent a body of beneficial remedial legislation. That the vast majority of litigation conducted under the Act relates to such a narrow segment of 'consumer' transactions, namely mortgage and guarantee contracts however, speaks volumes about the need for Parliament to revisit this legislation in order to reinvigorate it.

106 Above n73.

107 David Harland, above n103 at 258.

108 Exclusionary provisions of the Act aside.

109 *Melverton v Commonwealth Development Bank of Australasia* [1989] ASC 55–921; *Robinson v ANZ banking Group Ltd* [1990] ASC 55–979; *The State Bank of New South Wales Limited v Vecchio & Anor* (NSW Supreme Court, Kirby J, 10 November 1998).

110 See John Peden, *The Law of Unjust Contracts* (1982) at 126–127.

111 Recent cases include *Mahlo & Ors v Westpac Banking Corporation Ltd* (NSW Court of Appeal, Spiegelman, Mason and Sheller JJA, 1 October 1999); *Conley v Commonwealth Bank of Australia* (NSW Court of Appeal, Handley, Powell and Heydon JJA, 4 May 2000); *Drury v Stone* (NSW Court of Appeal, Powell, Beazley and Fitzgerald JJA, 16 March 2000), notably all mortgage or guarantee cases.