



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles International and Comparative Law Review

---

Volume 14  
Number 3 *Symposium on Unconscionability  
around the World: Seven Perspectives on the  
Contractual Doctrine*

---

Article 7

7-1-1992

### Unconscionability in Australian Law: Development and Policy Issues

Mark Sneddon

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Mark Sneddon, *Unconscionability in Australian Law: Development and Policy Issues*, 14 Loy. L.A. Int'l & Comp. L. Rev. 545 (1992).

Available at: <https://digitalcommons.lmu.edu/ilr/vol14/iss3/7>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# Unconscionability in Australian Law: Development and Policy Issues

MARK SNEDDON\*

## I. INTRODUCTION

Since 1980, there has been a great expansion in the availability of equitable and statutory relief for unconscionable contracts and unconscionable conduct in Australia. Beginning in 1980, Australian state parliaments enacted new provisions providing remedies for unjust, unfair, or unconscionable provisions in certain classes of contracts, usually consumer related.<sup>1</sup> Moreover, the High Court of Australia instilled new vigor into the old equitable doctrine of unconscionable dealing when it expanded the classes of parties entitled to benefit from the doctrine.<sup>2</sup> As a result of the increased availability of statutory and equitable relief, the number of sureties seeking to use the theory of unconscionability to avoid their obligations has burgeoned. Furthermore, the federal parliament recently expanded the doctrine to proscribe unconscionable *conduct* when it relates to the supply of goods or services in a consumer context.<sup>3</sup>

---

\* Senior Lecturer in Law, Monash University, Melbourne, Australia; Barrister and Solicitor; Visiting Professor of Law at Loyola Law School, 1991. B.Sc., University of Melbourne, 1983; LL.B. (Hons.), University of Melbourne, 1983; LL.M., University of Michigan, 1986. I owe a special debt of thanks to Professor Tony Duggan of Monash University for developing my interest, and engaging me, in the policy debate surrounding relief for unfair contracts. I would also like to thank Professor Duggan and Mark Davison of Monash Law School for their helpful comments on this Article.

1. The Contracts Review Act of 1980 provides for the reopening of contracts that are "unjust in the circumstances relating to the contract at the time it was made." Contracts Review Act, 1980, § 7 (N.S.W.). However, contracts relating to a person's profession, trade, or business cannot be reopened. *Id.* § 6(2).

Part IX of the "uniform" Credit Act of 1984, adopted in New South Wales, Queensland, Victoria, Western Australia, and the Australian Capital Territory, permits a debtor or surety to a regulated credit contract to apply for relief on the ground that the credit contract is unjust. See, e.g., Credit Act, 1984 (N.S.W.); Credit Act, 1987, No. 52 (Queensl.); Credit Act, 1984 (Vict.); Credit Act, 1984 (W. Austl.); Credit Ordinance, 1985 (A.C.T.).

2. *Commercial Bank of Australia v. Amadio*, 151 C.L.R. 447 (1983) (Austl.). Australia inherited the doctrine from England, and has used it more consistently, although not often to benefit guarantors. This case, however, did apply the doctrine to relieve guarantors from their liability to a lender. See *id.*

3. Trade Practices Act, 1974, § 52A. Each of the six states has adopted an identical provision. See *infra* note 58 and accompanying text.

Several justices of the High Court of Australia have suggested that the prevention of unconscionable conduct is the unifying rationale for equitable estoppel,<sup>4</sup> and for the imposition of remedial constructive trusts.<sup>5</sup> This approach, however, requires the doctrine to bear a considerable burden of legal principle.<sup>6</sup>

Not everyone believes that the concept of unconscionability can carry this weight, at least not in its present stage of development. The concept itself, the statutory initiatives, and, to a lesser extent, the equitable doctrine of unconscionable dealing, have been criticized as being uncertain of meaning and application. It has been suggested that the policies supporting the statutory provisions were neither well reasoned nor clearly articulated, resulting in decisions that lack uniformity and serve disparate and conflicting goals.<sup>7</sup> Conversely, there are those who strongly favor the statutory provisions. In fact, these proponents seek removal of the consumer limitations in the statutes so that the law can benefit small business and other contracting parties.<sup>8</sup> This Article analyzes the evolution of the Australian methods of relief from unconscionable dealing both in equity and under statute, and attempts to answer some of the questions raised.

## II. UNCONSCIONABILITY IN EQUITY

### A. *The Equitable Doctrine of Unconscionable Dealing*

Australia inherited the equitable approach of rescinding unconscionable transactions from England. The roots of the doctrine trace back at least as far as 1615.<sup>9</sup> Until 1888, English courts used the doctrine to give relief to expectant heirs who had been duped into selling

---

4. See *Commonwealth v. Verwayen*, 95 A.L.R. 321 (1990) (Austl.) (opinions of Mason, C.J., Deane, Brennan, Dawson & McHugh, JJ.); see also *Waltons Stores Ltd. v. Maher*, 164 C.L.R. 387 (1988) (Austl.); *Foran v. Wight*, 168 C.L.R. 385 (1989) (Austl.).

5. *Muschinski v. Dodds*, 160 C.L.R. 583, 615 (1985) (Austl.) (Deane, J.); see also *Baumgartner v. Baumgartner*, 164 C.L.R. 137, 148 (1987) (Austl.).

6. The movement towards synthesis and unification of equitable doctrines around "unconscionability" in the High Court of Australia merits an article in itself and will not be discussed here. This Article is confined to the equitable doctrine providing relief from unconscionable dealing and statutory adaptations thereof. However, the later discussion in this Article of criticisms of the unconscionability concept based on indeterminacy is relevant to developments in the High Court.

7. A.J. Duggan, *Trade Practices Act 1974 (Cth), Section 52A and the Law of Unjust Contracts*, 13 SYDNEY L. REV. 138 (1991).

8. Geoffrey Q. Taperell, *Unconscionable Conduct and Small Business: Possible Extension of Section 52A of the Trade Practices Act 1974*, 18 AUSTL. BUS. L. REV. 370 (1990).

9. See *Earl of Oxford's Case*, 21 Eng. Rep. 485, 486 (1615).

their reversions at substantial undervalues.<sup>10</sup> After 1888, use of the doctrine in England virtually disappeared.<sup>11</sup> In Australia, however, state courts continued to use the doctrine throughout the late nineteenth and early twentieth centuries.<sup>12</sup> Additionally, the High Court of Australia has applied it on three occasions in modern legal history.<sup>13</sup>

Equitable jurisdiction attaches when two elements are present: (1) one party to a transaction is at a special disadvantage in dealing with the other party because of illness, inexperience, ignorance, impaired faculties, financial hardship, age, or unfamiliarity with the language of the transaction; and (2) the other party unconscientiously takes advantage of this situation of special disadvantage.<sup>14</sup> If the two elements are proven, the court will set aside the transaction unless the advantaged party can show that the transaction was fair, just, and reasonable under the circumstances.<sup>15</sup> For example, the court may find that the contract is valid if the advantaged party can show that it was not detrimental to the disadvantaged party,<sup>16</sup> or that the disadvantaged party received adequate independent advice.<sup>17</sup>

As a remedy, the court may set aside the transaction in whole or in part. If, for example, the disadvantage suffered was the result of a

---

10. See, e.g., *Earl of Ardglass v. Muschamp*, [1684] 1 Vern. 237 (Eng.); see also A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts—A Comparative Study*, 4 OTAGO L. REV. 300 (1979). *Fry v. Lane*, 40 Ch. D. 312 (1888) (Eng.), was one of the last cases to use the doctrine.

11. *Cresswell v. Potter*, [1978] 1 W.L.R. 255 (Eng.), is one of the few English cases since 1888 to mention the doctrine.

12. See, e.g., *Symons v. Williams*, 1 V.L.R. 199 (1875) (Vict.); *Sinclair v. Elderton*, 21 N.S.W.L.R. 21 (1900); *Carello v. Jordan*, Q. St. R. 294 (1935) (Queensl.).

13. See *Commercial Bank of Australia v. Amadio*, 151 C.L.R. 447 (1983) (Austl.) (guarantee executed in situation of disadvantage known to bank); *Blomley v. Ryan*, 99 C.L.R. 362 (1956) (Austl.) (sale at an undervalue under pressure while vendor intoxicated); *Wilton v. Farnworth*, 76 C.L.R. 646 (1948) (Austl.) (an improvident gift).

14. *Blomley*, 99 C.L.R. at 405-06 (Fullagar, J.), 415 (Kitto, J.); *Amadio*, 151 C.L.R. at 459. To satisfy the second element, it is necessary to show that the advantaged party knew of the other party's disadvantage or at least was aware of facts from which that disadvantage could reasonably have been inferred. *Amadio*, 151 C.L.R. at 462, 466-68 (Mason, J.).

15. *Fry*, 40 Ch. D. at 321.

16. The fact that the disadvantaged party has suffered a detriment as a result of the transaction could be viewed as an implicit third element of the doctrine. If no detriment occurred, the court would not grant relief. This implicit element is analogous to the requirement that a party complaining of undue influence must show that the transaction was manifestly disadvantageous to him or her. See *National Westminster Bank v. Morgan*, 1985 App. Cas. 686 (appeal taken from Eng.); *European Asian Bank of Australia v. Kurland*, 8 N.S.W.L.R. 192 (1985).

17. Mark Sneddon, *Unfair Conduct in Taking Guarantees and the Role of Independent Advice*, 13 U. N.S.W. L.J. 302 (1990).

misunderstanding about the maximum liability under a guarantee, the court might set aside the guarantee to the extent it imposed liability in excess of the maximum amount the disadvantaged party mistakenly anticipated.<sup>18</sup>

### B. *Limits on the Scope of the Equitable Doctrine*

Section 2-302 of the Uniform Commercial Code ("U.C.C.") distinguishes between two types of unconscionability: procedural and substantive.<sup>19</sup> Procedural unconscionability refers to unfairness in the process of negotiating a contract.<sup>20</sup> Substantive unconscionability refers to unfair terms in a contract or a contract's unjust effect.<sup>21</sup> The equitable doctrine concerns only the procedural aspect of unconscionability. Thus, a gross imbalance in the rights and duties of the parties or unfair terms in the contract do not in themselves justify equitable relief. Instead, the existence of these substantive inequities may provide evidence of procedural unconscionability, thereby leading to equitable relief.<sup>22</sup>

Practically, of course, the distinction between substantive and procedural unconscionability may be more apparent than real. To the extent courts infer procedural unconscionability from apparently unfair outcomes, they are essentially providing equitable relief for substantive unconscionability.<sup>23</sup> In general, however, relief from substantive unconscionability must be obtained by statute, not in equity.

Moreover, the equitable doctrine is concerned with unconscionable dealings or transactions. It examines conduct *leading to* a contract or disposition of property, rather than conduct at large. Other equitable doctrines, such as estoppel or relief against forfeiture, may remedy unconscionable conduct in other contexts. Relief may also be obtained under statute.

---

18. See *Amadio*, 151 C.L.R. at 480, 481 (Deane, J.).

19. See U.C.C. § 2-302 (1990). Professor Leff is credited with being the first to articulate this distinction. See Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

20. Leff, *supra* note 19, at 487.

21. *Id.*

22. *Blomley*, 99 C.L.R. at 405 (Fullagar, J.).

23. A.J. DUGGAN ET AL., *REGULATED CREDIT—THE CREDIT AND SECURITY ASPECTS* 537-39 (1989).

C. *The Decision in Commercial Bank of Australia v. Amadio and Its Impact*

*Commercial Bank of Australia v. Amadio*<sup>24</sup> advanced the doctrine of unconscionability in several respects. The defendants in *Amadio* emigrated to Australia from Italy some years prior to the transaction at issue in the case. Under pressure from their son, they guaranteed the debts of a building company that he controlled without a proper appreciation of the guarantee's terms or the company's financial condition.<sup>25</sup> When the company proved unable to pay its debts, the Amadios risked losing their principal assets, which they had put up as collateral.

The court had the option of setting aside the guarantee by finding that the bank's conscience was bound by the son's undue influence over the Amadios.<sup>26</sup> Instead, the court held that the bank itself was directly liable for its unconscionable conduct in dealing with the sureties.<sup>27</sup>

This holding advanced the doctrine of unconscionable dealing in several respects. For example, the court in *Amadio* applied the doctrine to set aside a guarantee and mortgage<sup>28</sup> rather than use it in the more traditional context of an improvident gift<sup>29</sup> or an undervalued sale.<sup>30</sup> Moreover, the case updated and expanded the existing categories of special disadvantage. The necessary relationship of special disadvantage consisted of several elements including the age of the Amadios; their limited grasp of written English; their lack of business experience in the field in which their son and his company operated; the fact that they had been misinformed by their son that the guarantee was limited in time and amount when it was unlimited in both respects; their mistaken belief that the building company was in good financial shape; and their reliance on their son's financial advice.

The *Amadio* holding is also illustrative of the apparent ease with which the court found an unconscientious taking advantage. It ex-

---

24. 151 C.L.R. 447 (1983) (Austl.).

25. *Id.* at 448-49.

26. The case probably would have been argued this way in England, although the result may well have been different. For a discussion of this type of case and its different treatment in England and Australia, see Sneddon, *supra* note 17, at 305-16.

27. *Amadio*, 151 C.L.R. at 460.

28. The doctrine had been applied to this end once or twice before. See, e.g., *Bank of Victoria v. Mueller*, 1925 V.L.R. 642, 649 (1914) (Vict.). However, it was the decision in *Amadio* that started an avalanche of such claims.

29. *Wilton*, 76 C.L.R. at 646.

30. *Blomley*, 99 C.L.R. at 362.

isted merely because the lender proceeded with knowledge or at least enough information to lead to a reasonable belief that the Amadios were disabled from making a decision in their best interests.<sup>31</sup> Justice Mason held that the bank was liable for unconscionable conduct because, although the bank manager was aware of a "reasonable possibility" that the Amadios lacked the ability to decide what was in their best interests due to the relationship of special disadvantage, he proceeded with the transaction without inquiring or disclosing such facts as would have enabled the Amadios to form a proper judgment for themselves, or counselling them to seek independent advice.<sup>32</sup> Accordingly, if the relationship of special disadvantage arises where a party has a limited grasp of the language or a lack of business sophistication, the "stronger" party must be vigilant to determine whether explanation, disclosure, or independent advice is necessary.<sup>33</sup>

Three additional factors strongly influenced the court's decision on unconscientious taking advantage. First, Mr. Amadio mentioned to the bank manager while executing the guarantee that he thought it was only for six months.<sup>34</sup> The manager explained that it was unlimited in time.<sup>35</sup> The court held that this exchange should have put the manager on notice that the Amadios did not have an adequate understanding of the terms or effect of the guarantee and that they required additional assistance and advice.<sup>36</sup> Second, because of the parlous state of the debtor company's finances, the bank had colluded with the son by selectively honoring and dishonoring checks in order to give the company the false appearance of solvency.<sup>37</sup> Finally, the bank knew the son was the only person advising the Amadios on the state of the company's finances.<sup>38</sup> Therefore, the bank manager

---

31. *Amadio*, 151 C.L.R. at 466-67 (Mason, J.), 479 (Deane, J.).

32. *Id.* at 467-68.

33. The implicit third element suggested by this Article, that the disadvantaged party suffer detriment from the transaction, is usually easy to establish in the case of volunteer guarantors like the Amadios, where it is self-evident on the facts of the case. However, it is possible that on appropriate facts a lender could argue that the transaction was fair, just, and reasonable under the totality of the circumstances because the guarantor benefitted from the financial accommodation extended to the principal debtor, such as a family company.

34. *Amadio*, 151 C.L.R. at 448-49.

35. *Id.*

36. The manager also knew that neither the Amadios nor their son had an opportunity to read the guarantee document prior to its execution, and that the only person who might have explained the transaction to them was the son, whose company was in grave financial difficulties. *Id.*

37. *Id.* at 464-65.

38. *Id.* at 466.

should have suspected that the Amadios required disclosure of the true financial position and independent advice.<sup>39</sup>

On its facts, the decision in *Amadio* is not surprising as to unconscientious taking advantage. The manager tried to salvage the bank's position on a delinquent account by helping the son mislead his creditors. Despite his knowledge of the son's scheme and the fact that he should reasonably have suspected that the sureties misunderstood the transaction, the manager still pressed the sureties to sign the guarantee to procure the additional security.

In practice, the stronger party may avoid liability once it is aware of the other party's special disadvantage by providing such explanation, disclosure, or advice as would redress the special disadvantage. Once the stronger party has done this, it can proceed with the transaction in the reasonable belief that the special disadvantage has been ameliorated. In this situation, there is no unconscionable taking advantage.<sup>40</sup>

*Amadio* undoubtedly makes it easier to obtain relief under the doctrine of unconscionable dealing. Business interests have expressed concern about the scope of the dicta in *Amadio*, criticizing both a perceived lack of certainty and the additional onus of care imposed on stronger parties dealing with persons in special disadvantaged categories. However, subsequent decisions have demonstrated that it is more difficult to obtain relief than some feared from the dicta in *Amadio*. Like *Amadio*, most of the equitable doctrine cases have involved fairly obvious situations of disadvantage, often coupled with some willful blindness or significant non-disclosure on the part of the stronger party.<sup>41</sup> *Amadio*'s most obvious legacy has been the boom in unconscionable dealing claims made by sureties seeking relief from their contracts with lenders.<sup>42</sup> These claims are usually coupled with

---

39. *Id.* at 468.

40. On the role of independent advice, including whether merely urging such advice is sufficient protection, see Sneddon, *supra* note 17, at 319-20, 324-28.

41. See, e.g., *Guthrie v. ANZ Banking Group Ltd.*, 1989 N.S.W. Conv. R. para. 55-463 (holding that the lender failed to disclose that a guarantee to cover a surety's husband's purchase of a boat also covered liability of the husband under a guarantee of a company's debts which he had executed three days earlier); *National Australia Bank v. Nobile*, 100 A.L.R. 227 (1988) (Austl.).

42. Claims in the more traditional categories of improvident gift and sale at an under-value have also continued, including a novel application in the context of an unrequited love. In *D v. L*, 14 Fam. 139 (1990) (Eng.), D, a lawyer, whose love for L was never reciprocated, bought L various items of household furniture and ultimately bought her a house and had it transferred into her name. He performed these acts even though she did not directly ask for such gifts and made it clear she did not want to marry D or have a sexual relationship with



claims of undue influence, which are outside the scope of this Article, and applications for relief under the various statutory unconscionability provisions.

### III. RELIEF FROM UNCONSCIONABILITY UNDER STATUTE

Prior to 1980, legislative proscription of unconscionable contracts was confined to state laws dealing with money-lending,<sup>43</sup> hire-purchases,<sup>44</sup> and, in one state, employment contracts.<sup>45</sup> The concern with consumer credit contracts is illustrated by the majority of states' adoption of a nearly uniform Credit Act that permits a debtor or surety to apply for relief from a regulated credit contract or mortgage on the ground that the contract is "unjust." A credit contract or mortgage is considered unjust if it is "unconscionable, harsh[,] or oppressive," or if it charges an excessive annual percentage rate.<sup>46</sup> Additionally, two more general provisions were enacted, the New South Wales Contracts Review Act of 1980, and section 52A of the federal Trade Practices Act of 1974.<sup>47</sup>

#### A. *Contracts Review Act of 1980 (N.S.W.)*

The Contracts Review Act of 1980 ("Act") was the model for the federal act. It was partially inspired by section 2-302 of the U.C.C.<sup>48</sup> The Act provides an extensive list of factors to determine whether a contract is "unjust in the circumstances relating to the contract at the time it was made."<sup>49</sup> "Unjust" is defined as "harsh, un-

---

him. Eventually D sued to set aside the transfer of the house. The court found that L had played on D's love and manipulated him into transferring the house to her. The special disadvantage was D's emotional dependence on L, and L had behaved unconscionably in using that dependency to obtain such a large gift. The court ordered L to repay D the purchase price of the home. *See id.*

43. *See, e.g.,* Lending of Money Act, 1915, 6 Geo. V, No. 14, § 2 (Tas.).

44. A "hire-purchase" is an arrangement whereby goods are leased with an option to purchase at a nominal value at the end of the lease period. *See, e.g.,* Hire-Purchase Act, 1959, No. 6531, § 24 (Vict.).

45. Industrial Arbitration Act, 1940, No. 2, § 88F (N.S.W.).

46. *See, e.g.,* Credit Act, 1984, § 145 (N.S.W.). There are equivalent provisions in part IX of the Credit Act, 1984 (Vict.), Credit Act, 1984 (W. Austl.), Credit Act, 1987, No. 52 (Queensl.), Credit Ordinance, 1985 (A.C.T.); *see also* Consumer Credit Act, 1972, No. 134, pt. VI, § 46 (S. Austl.).

47. There is a provision identical to section 52A in each of the six states. *See infra* note 58.

48. U.C.C. § 2-302. The influence of the U.C.C. can be seen in the report that served as the foundation for the legislation, the Peden Report on Harsh and Unconscionable Contracts for the New South Wales Government (1976).

49. *See* Contracts Review Act, 1980, § 7 (N.S.W.).

conscionable[,] or oppressive.”<sup>50</sup>

The Act directs the court to consider

(a) whether or not there was any material inequality in bargaining power between the parties to the contract; (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 unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party; (e) whether or not a party to the contract was not reasonably 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 legal or other expert advice was obtained by the party seeking relief; (i) the extent to which the provisions of the contract and their legal and practical effect 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 or other setting, purpose and effect of the contract.<sup>51</sup>

This list of factors is not intended to be exhaustive. Rather, the court may also look to other matters it considers relevant. The purpose of the list was to provide more guidance than supplied by U.C.C. section 2-302 as to when a situation merits relief.

Unlike the equitable doctrine, the Act does not confine its attention to procedural unconscionability. Instead, the Act also considers substantive unconscionability or injustice.<sup>52</sup> In *West v. AGC Advances Ltd.*,<sup>53</sup> Justice McHugh of the New South Wales Court of Appeal analyzed the statute and stated that “a contract may be unjust 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.”<sup>54</sup> While most unjust contracts involve a combination of procedural and

---

50. *Id.* § 4(1).

51. *Id.* § 9(2).

52. The terms “unconscionable” and “unjust” are treated as interchangeable for the purposes of this Act.

53. 5 N.S.W.L.R. 610 (1986).

54. *Id.* at 621.

substantive injustice, Justice McHugh suggested that a contract could be held unjust because of a gross disparity between the price of goods or services and their value, even though no procedural injustice in the bargaining process was apparent.<sup>55</sup>

If a contract is found to be unjust, the court may grant relief by refusing to enforce part or all of the contract, declaring the contract void in whole or in part, or varying the contract.<sup>56</sup> Relief is effectively limited to consumers because corporations, governmental authorities, and persons who enter into a contract in the course of or for the purposes of a trade, business, or profession, excluding farming, are barred from seeking relief.

### *B. Section 52A of the Trade Practices Act*

Section 52A was made part of the Trade Practices Act in 1986,<sup>57</sup> but is only now beginning to receive judicial consideration. It has been incorporated into the state law in all six states.<sup>58</sup>

Section 52A(1) provides, "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."<sup>59</sup> Following the model of the Contracts Review Act, section 52A(2) provides a non-exhaustive list of factors for the court to consider in determining whether conduct was unconscionable:

- (a) the relative strengths of the bargaining positions of the corporation and the consumer;
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

---

55. *Id.* at 622.

56. Contracts Review Act, 1980, § 7(1) (N.S.W.).

57. See Trade Practices Act, 1974, § 52A.

58. See, e.g., Fair Trading Act, 1985, § 11A (Vict.); Fair Trading Act, 1987, § 43 (N.S.W.); Fair Trading Act, 1987, § 43 (S. Austl.); Fair Trading Act, 1987, § 11 (W. Austl.); Fair Trading Act, 1989, § 39 (Queensl.); Fair Trading Act, 1990, § 15 (Tas.). For constitutional reasons, the federal legislation essentially reaches both the conduct of corporations wherever occurring and the conduct of any person in interstate trade. It does not reach the intrastate conduct of a natural person. In contrast, the state law covers the conduct of all corporations and persons. Only the federal act has been featured in the reported cases so far. The federal act may be the only law applied so far because the state acts are more recent.

59. Trade Practices Act, 1974, § 52A(1).

- (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; 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.<sup>60</sup>

As with the Contracts Review Act, the mixture of factors in section 52A(2) suggests that relief may be given for conduct resulting in substantively unconscionable outcomes, as well as for conduct that is procedurally unconscionable. Specifically, both paragraphs (b) and (e) point to substantive outcomes.

In proscribing unconscionable *conduct*, section 52A has a broader scope than the Contracts Review Act and the equitable doctrine, because it arguably covers pre-contractual activity, such as sales promotion, as well as some post-contractual activity, such as the exercise of contractual rights. It also addresses activities directed toward enforcement, such as debt collection tactics.<sup>61</sup> "Conduct" is defined to include both making and enforcing a contract. Therefore, the creation of an "unfair" contract, or the unconscionable enforcement of a contractual right, may be deemed to be unconscionable conduct. This latter aspect, if developed, could give section 52A something of the character of the good faith obligation in civil law jurisdictions.<sup>62</sup>

Section 52A is narrower than the equitable doctrine because it is limited to conduct in connection with the supply of goods or services to a person. Thus, the person seeking relief usually will be an acquirer of goods and services, whereas the equitable doctrine and the Con-

---

60. *Id.* § 52A(2).

61. The Trade Practices Act provides that the institution of legal proceedings or the referral of a dispute to arbitration by a corporation in relation to the supply of goods or services does not in itself constitute unconscionable conduct. *Id.* § 52A(3). A demand made in anticipation of legal proceedings also does not constitute unconscionable conduct. See *Zoneff v. Elcom Credit Union*, 94 A.L.R. 445 (1990) (Austl.). Possible unconscionable enforcement may also exist. See Duggan, *supra* note 7, at 151-52.

62. See, e.g., BÜRGERLICHES GESETZBUCH [BGB] art. 242, translated in GERMAN CIVIL CODE AS AMENDED TO JANUARY 1, 1975 (Ian S. Forrester trans., 1975) ("The debtor is bound to effect performance according to the requirements of good faith, having regard to common usage."). "Debtor" has a wide meaning and may be more accurately translated as "promisor." See Angelo & Ellinger, *supra* note 10, at 323.

tracts Review Act could apply equally to protect suppliers.<sup>63</sup> Along with this implicit consumer orientation are two express consumer limitations. Section 52A(5) limits the goods and services referred to in section 52A to goods or services of a kind ordinarily acquired for personal, domestic, or household use, or consumption.<sup>64</sup> Section 52A(6) provides that the supply or possible supply of *goods* covered by the section does not include the supply or possible supply of goods for the purpose of resupply or for the purpose of transforming them in trade or commerce.<sup>65</sup>

Violation of section 52A is not a criminal offense. Instead, an injunction may be awarded under section 80 to restrain a breach of the section, and an order may be made under section 87(1A) to compensate any person who has suffered loss or damage as a result of the breach. The court has the discretion to decide whether to make an order under section 87(1A). Thus, a wide variety of orders may be made under the section. For example, the court may set aside a contract, vary it, refuse to enforce it, order that money or property be returned to the person seeking relief, or order that compensation be paid.<sup>66</sup>

### C. Substantive Unconscionability

As suggested above, the language of both the Contracts Review Act and section 52A of the Trade Practices Act is broad enough to permit courts to grant relief against substantive unconscionability, including unfair contract terms or unjust effects of the operation of the contract. If utilized, this potential will have significant impact. Two areas that would be affected are standard form contracts and the role of the conscience of the stronger party in assessing liability.

#### 1. Standard Form Contracts

A standard form contract is one in which the consumer is presented with a trader's standard set of terms on a take it or leave it basis. This inability to negotiate terms may be viewed as "unfair,"

---

63. Injunctive relief may be sought by any person, not just an acquirer. For example, a competitor of a supplier may seek to enjoin an unconscionable sales promotion under Trade Practices Act, 1974, § 80 or obtain other orders under Trade Practices Act, 1974, § 87(1A).

64. Trade Practices Act, 1974, § 52A(5).

65. *Id.* § 52A(6). The Act does not envisage services being resupplied.

66. *Id.* § 87(2).

especially if there are no competitive alternatives available.<sup>67</sup> Lack of negotiating opportunity alone probably does not amount to procedural unconscionability in equity because it is not a recognized category of special disadvantage. Relief from unconscionable provisions in standard form contracts must therefore be sought under statute.<sup>68</sup>

In *Westpac Banking Corp. v. Sugden*,<sup>69</sup> a case decided under the Contracts Review Act, four provisions in a bank's standard form of guarantee were held to be unjust. On its facts, this case involved very little procedural injustice. The clauses at issue provided that if the bank released or lost any security it held, or failed to recover any of the moneys secured, then the guarantors would remain fully liable. Other clauses stated that a bank officer's certificate as to the amount owing was conclusive evidence of that amount, and that the guarantee was fully binding upon the sureties for the full amount, notwithstanding the failure of other contemplated sureties to sign later. The court held that the clauses, which are not at all uncommon in lenders' guarantee forms, were not reasonably necessary for the protection of the legitimate interests of the bank. No relief was given at that point in the proceedings because it was not yet clear whether the unjust terms would operate unfairly by causing loss to the guarantor plaintiffs.

Another standard form contract case decided under section 52A of the Trade Practices Act involved a realtor's standard form sole agency agreement.<sup>70</sup> Under this agreement, a vendor of land appointed a realtor as sole agent for sale of the property for a limited period that the parties negotiated and specified in the agreement. One of the provisions, contained in the fine print, stated that if the property had not been sold at the expiration of the stated agency period, and the vendor did not terminate the agency in writing, the agent was entitled to commission on a sale made at any time thereafter, regardless of the agent's connection with the sale. The court held that it was unconscionable conduct to imbed into a *pro forma* contract<sup>71</sup> a term that was inconsistent with its purpose. This deceptive impression was a type of procedural unconscionability. The court also found it un-

---

67. M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359 (1976).

68. Other equitable doctrines, such as relief from penalties and forfeiture, which may apply to specific types of provisions, are not included.

69. 1988 N.S.W. Conv. R. para. 55-377.

70. *George T. Collings (Aust) Pty Ltd. v. H.F. Stevenson (Aust) Pty Ltd.*, [1991] A. Trade Practices R. para. 41-104 (Vict.) (Nathan, J.).

71. A "*pro forma*" contract is a limited term sole agency agreement.

conscionable to impose a contingent liability on a vendor to pay a commission for an indeterminate period after the expiration of the exclusive term. The judgment involving this term clearly dealt with its substantive unconscionability.

Affording relief for substantive unconscionability has attracted criticism because it undermines the sanctity of contracts that are entered into freely. However, relief for procedural unconscionability can be reconciled with the sanctity of contract because it can be viewed as vitiating the process of bargaining and free consent that led to the contract. Striking down one-sided terms in the absence of procedural unconscionability involves a shift in the underlying philosophy of intervention and a much greater qualification of *pacta sunt servanda*.<sup>72</sup>

It is unclear whether the legislature was cognizant of the shift involved. Indeed, it did not explain a new policy basis, being content merely to provide a list of factors involving both process and substance for the courts to consider. The courts, however, will be aware of the shift. Thus, it will be interesting to see whether the courts will treat the provision as a legislative mandate to remake substantively unfair bargains or remain tied to procedural injustice. I suspect that because most fact situations will continue to contain some procedural unfairness, the initial effect of the legislation will be to allow the courts to take account of substantive unfairness and give relief in cases that involve less procedural unfairness than is required to trigger the equitable doctrine, but contain enough procedural injustice to avoid the impression of a complete break from the precedent and policy that support the equitable doctrine. The question of how far the courts will go in giving relief for essentially substantive unconscionability has not yet been answered.

## 2. Relevance of the Conscience of the Stronger Party

The equitable doctrine attempts to uncover the conscience of the stronger party by asking if the stronger party knew of and took advantage of the plight of the weaker party. Given the combination of procedural and substantive factors in the Contracts Review Act and

---

72. Duggan, *supra* note 7, at 167-68. Relief for substantive unconscionability could be justified on equity grounds, such as achieving a fair distribution of wealth—or at least unwinding certain “unfair” transfers of wealth—or on paternalistic grounds where the court treats some contract outcomes as undesirable regardless of the preferences of the parties involved. See A.J. Duggan, *Some Reflections on Consumer Protection and the Law Reform Process* (Sept. 1991) (Paper delivered to the 27th Australian Legal Convention in Adelaide).

section 52A of the Trade Practices Act, the question remains whether it is necessary to focus on the conscience of the corporation, or merely to discover if the conduct was objectively unfair to the consumer. The issue has been considered under the Contracts Review Act and the credit legislation reopening provisions.<sup>73</sup>

In one case, the New South Wales Court of Appeal decided that a contract can be held unjust on the basis of a weaker party's disability even if the stronger party was unaware of it.<sup>74</sup> The court also found, however, that the state of knowledge of the stronger party would be relevant to the court's exercise of discretion whether or not to grant relief.<sup>75</sup> It was suggested that it would be extremely rare for a court to exercise its discretion to set aside a contract against a subjectively innocent party.<sup>76</sup>

The Full Court of the Supreme Court of Victoria has taken a different approach. It has held that a credit contract cannot be unjust in the absence of unfair conduct on the part of the credit provider.<sup>77</sup> In other words, the credit provider must have been aware, or have had knowledge of facts from which it ought reasonably to have been aware, of the consumer's disadvantage.<sup>78</sup> Thus, the Victorian case seems to represent a policy choice by the courts to use the credit statute as a weapon against knowing exploitation by the stronger party rather than to relieve the misfortune of the weaker party in the absence of exploitation. Under this view, unconscionability under the credit statute maintains a link to the state of the stronger party's conscience.

However, if relief is granted for substantively unfair conduct, this link back to the equitable doctrine may be more apparent than real. Indeed, if intervention is based on substantive unfairness in the terms or operation of the contract, as opposed to procedural unfairness, it may be that the stronger party need only be aware of the unfair substance of the transaction to have the requisite guilty conscience. For example, if a supplier sold a product knowing it to be grossly overpriced compared to market alternatives, and on terms excluding all

---

73. See *Collier v. Morlend Fin. Corp. (Vic) Pty Ltd.*, 1989 A.S.C. para. 55-716 (N.S.W. C.A.).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Custom Credit Corp. v. Lupi* (unreported decision) (Dec. 12, 1990) (Vict.).

78. *Id.*



liability to the consumer,<sup>79</sup> does that constitute unconscionable conduct on the basis of sections 52A(2)(b) and (e)? At common law, *caveat emptor* would protect the supplier by putting the onus on the buyer to look after his or her own interests. Section 52A, however, would leave it to a court to find the transaction substantively unconscionable and the supplier guilty of unconscionable conduct because it knew the transaction was substantively unconscionable. Such a result amounts to a policy decision that selling at this price, on these terms, in this market, is unacceptable.

Common law courts, however, have been reluctant to condemn this example of a purely economic exploitation. Instead, these courts have confined themselves to redressing the knowing exploitation of particular classes of disadvantaged people who could not take care of themselves. Thus, courts have shown resistance in judging the fairness of a merchant's terms of trade in the abstract without the aid of clear legislative guidelines. Rather, courts might choose to leave alone those issues traditionally left to the market to regulate.

If courts balk at the prospect of imposing liability on the supplier for purely substantive unfairness, how much knowledge by the supplier of procedural unfairness or disadvantage of the consumer must be added before relief is granted? For example, if the supplier had actual knowledge that the consumer was not aware of the market alternatives,<sup>80</sup> does this knowledge of the consumer's ignorance, coupled with the substantive unfairness of the transaction, make the supplier guilty of unconscionable conduct? The supplier knows, and takes advantage, of the consumer's disadvantage, and to that extent the supplier has a guilty conscience. The decision whether relief will be granted depends on whether the policy chosen puts the responsibility on the supplier or the consumer.

Equity would not afford relief because a lack of information that could be readily obtained<sup>81</sup> is not a special disadvantage.<sup>82</sup> Equity

---

79. Certain types of liability cannot be excluded. Sections 68 through 72 of the Trade Practices Act prevent the exclusion of certain statutory implied warranties in consumer sales and supply contracts. Trade Practices Act, 1974, §§ 68-72.

80. For example, if the salesman asked the time honored question of "How many other dealers have you visited?"

81. I am assuming that information on market alternatives was readily available if the consumer made inquiries.

82. The facts could be varied again to increase the personal nature of the consumer's disadvantage. Assume the consumer is old, relatively immobile, and unable to check the market alternatives for this product without great difficulty, and this is obvious to the supplier. Again, there is a "guilty conscience" and equity would probably afford relief in such a case

does not, however, limit the scope of the statute. In the common case where the supplier knows, or reasonably suspects, consumer ignorance of alternatives, the requirement of a "guilty conscience" would seem to be satisfied. A guilty conscience will often be present in the sense that the supplier knows of the consumer's disadvantage. The true policy issue is whether trading on unfair terms in reliance on consumer ignorance constitutes unconscionable conduct. Unfortunately, very little legislative guidance exists to define what constitutes substantively unconscionable conduct. Inevitably, such a gap has created uncertainty in the application of statutory unconscionability provisions. This uncertainty is one of the major criticisms of the unconscionability statutes.

#### IV. CRITICISMS OF UNCONSCIONABILITY

One criticism of U.C.C. section 2-302 is that it provides no guidance as to the meaning of "unconscionable."<sup>83</sup> In terms of procedural unconscionability, section 2-302 does not reveal what conduct in the bargaining process invites judicial scrutiny. Similarly, for substantive unconscionability, there is no guidance as to how to identify when a provision is "bad."<sup>84</sup>

With regard to section 52A of the Trade Practices Act, Duggan has criticized the absence of a coherent policy basis:

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 behavior 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 second[ ], whether it is possible simultaneously to pursue competing policy goals.<sup>85</sup>

This Article first considers the criticism of uncertainty in general terms. Then, it considers the equitable doctrine of unconscionability and the statutory provisions in light of the criticisms of uncertainty, as well as the lack of a principled policy basis.

---

because there is a special disadvantage in that the information is not readily available to this consumer.

83. See U.C.C. § 2-302; see also E. ALLAN FARNSWORTH, *CONTRACTS* 310 (1982).

84. See *Leff*, *supra* note 19.

85. Duggan, *supra* note 7, at 167.

### A. Uncertainty of Meaning and Application

A power to give relief against unconscionable contracts or conduct necessarily involves some uncertainty of application. At the most general level, unconscionable conduct is conduct that offends the conscience of society, as determined by the courts.<sup>86</sup> That interpretation will be highly fact sensitive, responding to numerous factors in a multitude of situations. Presumably, that conscience may change over time. Expressed as a standard at this high level of abstraction, unconscionable conduct is a concept better described than defined.<sup>87</sup> This apparent indeterminacy makes some lawyers, especially commercial lawyers, despair. If *pacta sunt servanda* is undermined by a general doctrine of relief based on conscience, lawyers believe that uncertainty and increased litigation will be the likely result.<sup>88</sup> Accordingly, lawyers and business people would prefer rules that would minimize the discretion of the decision maker and provide clear guidance for future conduct.

Equity according to conscience requires a flexible standard and not a set of rules that leave no room for discretion. Because equity insists on adhering to a standard of fair dealing, a lesser degree of certainty inevitably will be the result. Therefore, a difficulty arises because the value of certainty and predictability in the law conflicts with the value of ensuring equity according to conscience.

Critical legal studies scholars have noted that because the law holds these two values in tension, we can expect continuing debate, oscillation, and unsettled conclusions.<sup>89</sup> Thus, law makers must decide whether to use rules that are certain but inflexible, or flexible standards that bring uncertainty.<sup>90</sup>

A discretionless rule for enforcing contracts would uphold all contracts where both parties receive something. This outcome would be the same regardless of how the bargain was made or the propor-

---

86. As one wit has put it, "Unconscionable conduct is always conduct that offends someone else's conscience."

87. *Commonwealth v. Verwayen*, 95 A.L.R. 321, 322 (1990) (Austl.) (Deane, J.); see also *National Westminster Bank v. Morgan*, 1 All E.R. 821, 831 (1985) (Eng.) (Lord Scarman) ("Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.").

88. Donovan W.M. Waters, *Equitable Doctrines: Canadian Experiences*, in *EQUITY, TRUSTEES AND FIDUCIARIES* 432 (Timothy G. Youdan ed., 1989).

89. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 14-15 (1987); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

90. KELMAN, *supra* note 89, at 14-15.

tionality of the parties' rights and obligations. An unpredictable standard for contract enforcement would hold that contracts that, in the opinion of the courts, are unfair in the method of their making or in their terms should not be enforced.<sup>91</sup> Neither extreme seems palatable. Some discretion to give relief against injustice and uncertainty must be admitted. At the same time, some guidance for judges and citizens also must be provided. The question, however, is where the balance should be struck.

One argument suggests that even without an explicit doctrine of unconscionability, English courts already give relief against unconscionable conduct in the bargaining process, unfair contract terms, and unfair use of contract terms through a variety of devices and doctrines.<sup>92</sup> In the application of these rules or techniques, the concern for fairness or reasonableness has seldom been explicit. In some cases, such a concern may have been the unstated rationale for the original rule, but failure to make it explicit later led to rigid application of the rule in circumstances where there was no unfairness. The failure to recognize a broad principle of unconscionability may lead to distortion of the rules being made to serve as proxies for an unconscionability rule. Moreover, the hiding of the true rationale means that later courts may apply the proxy rule in such a way as to thwart the original policy aims of the unconscionability doctrine.<sup>93</sup> Concealing the true rationale of unconscionability in these decisions will also produce uncertainty.<sup>94</sup>

As long as courts seek flexibility to do justice in individual cases, some degree of uncertainty remains inevitable. Therefore, it is appropriate to consider whether the equitable and statutory doctrines of unconscionability strike the right balance between fairness and certainty.

---

91. *Id.* at 19-20.

92. Stephen M. Waddams, *Unconscionability in Contracts*, 39 MOD. L.R. 369 (1976). English courts, out of a concern for fairness, have resisted the incorporation of one-sided documents into contracts, construed terms against the party inserting them, read down exemption clauses (for example, by finding that there was insufficient notice of their terms to exclude certain types of liability), stretched the absence of true consent defenses, such as undue influence, given relief against penalties and forfeitures, and sometimes withheld discretionary remedies. *Id.*

93. *Id.* at 379.

94. Anyone who has had to advise on the efficacy of an exclusion clause in a standard terms form that is incorporated by reference can attest to this phenomenon. Indeed, Professor Leff recognized the validity of this argument but disputed that unguided statutory power to give relief was the answer. See Leff, *supra* note 19, at 527.

### B. *The Equitable Doctrine of Unconscionable Dealing*

Like many other equitable doctrines, unconscionable dealing began as a general rule of conscience and has been refined into a set of principles that delimit its scope of operation and permit prediction of its application. The doctrine only operates where there is a relationship of special disadvantage and the stronger party unconscientiously takes advantage of that situation.<sup>95</sup> The policy rationale is clear. The doctrine is designed to prevent exploitation by the stronger party in the contract formation process of a weakness or disability suffered by the other party, and not simply to remedy poor substantive outcomes for the weaker party. If one party receives a bad deal, the equitable doctrine will not assist that party unless the outcome was caused by a special disadvantage of the types recognized: the stronger party knew of and took advantage of that disadvantage by proceeding with the transaction without taking some steps to redress the disadvantage, and the advantage taken was unconscientious.<sup>96</sup> In my opinion, this doctrine is limited enough in scope and application to ensure reasonable certainty. The categories of special disadvantage, though not closed, are sufficiently clear to put the stronger party on notice that additional disclosure, explanation, or counsel may be required when dealing with parties in those categories. Although unconscionable dealings cannot be described as indeterminate, room exists for discretion and value judgment,<sup>97</sup> and the doctrine is flexible enough to expand into new areas.

Some commentators suggest that unanswered questions about the doctrine's application in different types of cases reveal confusion about underlying values.<sup>98</sup> In my view, many of those questions can today be answered for the equitable doctrine.<sup>99</sup> As to the rest, many

---

95. An implicit third condition requires that the weaker party suffer some detriment as a result; otherwise, there would be no exploitation, and usually no lawsuit.

96. *Verwayen*, 95 A.L.R. at 321.

97. One area of discretion is in the description of a special disadvantage. For example, it is unlikely that both parties will have the same amount of information about a product or service, and most such information imbalances will not amount to a special disadvantage. Likewise, not all advantage taking is unconscientious. Instead, this requires a judicial value judgment as to what is a legitimate bargaining advantage and what is exploitation of a weakness.

98. Duggan, *supra* note 7, at 167.

99. Some of the questions posed by Finn ask what the policy of the law should be as much as what it is, but my present concern is with the criticism that we cannot be sure in some respects what the policy of the doctrine of unconscionable dealing is. I believe there is more clarity in the current position than Duggan implies, and, based on the discussion in this Article, I proffer answers to some of Finn's questions. For example:

will be answered as necessary in time through the normal process of developing and refining legal principles in the common law. There are few, if any, legal doctrines with unanswered questions about their scope and application and the detail of their underlying rationale. Further, some aspects of equitable doctrines may never be finally and exhaustively described as a set of certain rules, and it is undesirable that they should. An equitable doctrine based on conscience cannot and should not be reduced to a set of rigid rules, for to do so is to convert equity into law. There must be principles to guide citizens' conduct and judges' discretion, but because the nature of equitable jurisdiction based on conscience is to be self-renewing and adaptable, it is incapable of being corralled into the pens of precedent.

### *C. Statutory Unconscionability Provisions*

The criticisms of uncertainty and lack of coherent philosophy apply especially to statutory provisions. For the most part, the criticisms are justified because the lawmakers and the drafters did not think through the policy values. Rather, they gave the courts little or no textual guidance regarding the underlying rationale. Thus far, the courts have had limited opportunity to expound on some of these provisions and develop the principles that the legislation omitted. As a result, the policy basis and application of the statutes remain unclear.

When section 52A of the Trade Practices Act was first proposed, it was strongly attacked by various business groups for its uncertainty and its consequent potential to increase litigation and costs of busi-

---

Q. Should the law promote relational (neighborhood) responsibilities in the contracting process or should it merely curb the excesses of self-interested action?

A. The doctrine of unconscionable dealing seeks only to do the latter by relieving against oppression.

Q. Should the courts, by insisting upon an information exchange (or on conduct capable of securing an equivalent effect[, such as] 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?

A. The doctrine of unconscionable dealing only does the latter. In fact, merely counselling the weaker party to take independent advice and giving a real opportunity for that to occur can be enough, depending on the facts, to give the stronger party a clean conscience about proceeding.

Q. Should the uninitiated or untutored be entitled to an explanation of the nature and effects of the dealing offered?

A. If their ignorance is reasonably apparent to the stronger party, the stronger party should provide the explanation, or counsel them to seek it from an independent adviser.

ness.<sup>100</sup> In an attempt to ameliorate the uncertainty, the drafters of section 52A, like the drafters of the Contracts Review Act, departed from the model of U.C.C. section 2-302 by providing a non-exhaustive checklist of factors to which the court may look when deciding whether the contract or conduct is unconscionable. It was thought that the prescription of such criteria would reduce the uncertainty inherent in applying general and abstract principles, such as injustice or unconscionability to particular circumstances.<sup>101</sup> Certainly the addition of such a checklist provides a focus for the analysis and discussion of particular contracts or conduct, and the factors paint a word-picture of some archetypical dramas the legislature had in mind.<sup>102</sup> Although these images can warn business people and their advisors when they are in dangerous areas, an archetype does not enable prediction of the outcome of cases that bear only partial resemblance to the archetype. The argument remains that, on major policy questions, section 52A is still indeterminate notwithstanding the statutory checklist.<sup>103</sup>

I agree that there is no clear legislative guidance to the policy rationale behind section 52A. It is clear that the legislature wanted to endorse and perhaps extend the equitable doctrine's attack on procedural unconscionability. In addition, it seems likely that the legislature wanted to extend the net to some pre-contractual and post-contractual conduct and perhaps to introduce a limited form of good faith obligation in so doing. Although the legislature may have sought to strike at some forms of substantive unconscionability, it offered no clues to finding a principled balance between such a power and the general principle of freedom of contract.<sup>104</sup>

In substance, section 52A is a grant of power by the legislature to the courts to develop a doctrine of unconscionable conduct in relation

---

100. David Ford, *Unconscionable Conduct—A Matter for the Courts or the Legislatures?*, 13 AUSTL. BUS. L. REV. 307 (1985).

101. John Goldring, *Certainty in Contracts, Unconscionability and the Trade Practices Act: The Effect of Section 52A*, 11 SYDNEY L. REV. 514, 527 (1988).

102. Some examples may be a consumer dealing with a supplier who is in a superior bargaining position; a consumer unable to understand documents relating to the supply contract; documents containing onerous conditions for the consumer that are not reasonably necessary for the protection of the supplier; undue influence or unfair tactics used against the consumer; and the consumer signing up for goods or services on terms that are most unfavorable when compared with those offered by competing suppliers.

103. Duggan, *supra* note 7, at 167.

104. This is shown by the above discussion of standard form contracts and the relevance of the advantaged party's conscience if relief can be given for substantive unconscionability.

to the supply of goods and services in a consumer context. It is appropriate to criticize the legislature for passing the responsibility of significant policy making to the courts, but such conduct is not unprecedented. The response of the courts and the profession to this development is what matters now. Is the statute to be treated merely as window dressing for the equitable doctrine, or does it launch us into the brave new world of substantive unconscionability and good faith? Is there instead some acceptable middle course?

The easy response is to ignore or neutralize provisions like section 52A so that they do nothing more than equity. Such a course fits the prevailing common law philosophy of freedom of contract and involves no change. Reading section 52A this way may bring the correct result, but the reasoning is wrong. Having recognized that the legislature has in effect transferred its policy making function on these issues to the courts, lawyers need to assist the courts in determining what principles should guide the use of these provisions. That guidance requires a policy dialogue, not inertia. Although I do not yet have a final view to recommend on the appropriate policy and application for section 52A, I offer the following thoughts.

In Australia's market economy, although *pacta sunt servanda* will continue to be the guiding principle of the law of contracts, its rigid application can produce real injustice, particularly to the less powerful in society. This is evidenced by the many devices common law courts have used to mute the rigor of the principle while paying lip service to it over many years,<sup>105</sup> and the explosion in consumer protection legislation in particular fields in the last twenty years. Late twentieth century Australia, with its social security and consumer protection systems, is many steps removed in its zeal for sanctity of contract from eighteenth and nineteenth century England. It may be that a general power to relieve against unconscionable conduct is simply the next step away from that era. A power to give relief for substantive unconscionability could present great opportunities for good. That said, it is necessary to find principles to guide the power so the result is not a morass of uncertainty and endless litigation where the rule of law has become the discretion of the judges. Such a result is not the inevitable consequence of these provisions.<sup>106</sup> The best way to

---

105. See Waddams, *supra* note 92.

106. Germany and the United States have lived with general unconscionability provisions for many years. See Angelo & Ellinger, *supra* note 10, at 318; see also U.C.C. § 2-302 (1990). Even Professor Leff predicted that the uncertainty in section 2-302 would not be the end of the



avoid it is for Australian lawyers to direct their energies to finding the principles that will balance fairness with certainty and make provisions like section 52A work.

---

world and that the courts would bring order where the legislature had provided none. See Leff, *supra* note 19, at 558.