The Law Society of New South Wales

170 Phillip Street
Sydney NSW 2000
DX 362 Sydney
Tel (02) 9926 0333
Fax (02) 9231 5809
www.lawsociety.com.au

ACN 000 000 699

OPTIONS FOR UNFAIR WORK CONTRACTS JURISDICTION

The Law Society of New South Wales
Employment Law Committee

Contact Officer:

Sarah Sherborne-Higgins

ssh@lawsocnsw.asn.au

02 9926 0354

OPTIONS FOR "UNFAIR WORK CONTRACTS" JURISDICTION

A. Introduction

1. The purpose of this Submission is to present for the consideration of the Federal Government, in the context of its current program of reform of Federal workplace relations law, options for statutory remedies in the area of unfair work contracts or arrangements (for both employees and independent contractors).

2. Statutory remedies for the relief of a party or parties from an "unfair" bargain (whether that bargain be by way of a contract or some less formal arrangement) has been a feature of Australia's legal framework for a very long time. In 1992 an eminent New South Wales jurist, Justice Lance Priestley QC, then of the New South Wales Court of Appeal, made these observations in the course of his judgment in *Renard Constructions (ME) Pty Limited –v- Minister for Public Works* (1992)[1] at 268:-

> "The final matter I wish to mention … ; that is, the effect of certain statutes. This development is a very strong one in this country if the New South Wales experience is typical of all states, as, broadly speaking, I believe it is. In New South Wales, since 1900 there has been an ever growing number of statutes permitting courts to remould particular kinds of contract in the interest of fairness. This is an oversimplified description; for the detail [of] the statutes themselves must be read. The principal ones have been the *Money Lenders and Infants Loans Act 1905*, the *Hire Purchase Agreement Acts* of 1941 and 1960, Section 88F of the *Industrial Arbitration Act 1940,* inserted in 1959 and expanded in 1966, the *Contracts Review Act 1980*, the *Credit Act 1984* and Section 51A of the *Trade Practices Act 1974* (Cth), inserted to operate from 1986.
>
> Although each of these Statutes deal with carefully defined types of contract, in their totality they covered contractual situations affecting a great many people, so that, to repeat something I have said elsewhere, "A very large area of everyday contract law is now directly affected by statutory unconscionability provisions carry with them broad remedies."

With respect, there can be no doubt that his Honour's observations quoted above are correct. Perhaps the phenomenon to which his Honour drew attention might be put down to a long entrenched characteristic of Australian society, which is embodied in the expression "a fair go". Australian Parliaments (not just a New South

---

[1] 26 NSWLR 234 at page 268.

Wales Parliament) have repeatedly acted over the last 100 years to provide statutory remedies that aim to ameliorate if not totally overcome the harsh effects of the common law of contract, particularly for those in a position of bargaining disadvantage.

3. In the area of work relationships, the clearest example of this phenomenon is the "unfair contracts" jurisdiction now residing in the Industrial Court of New South Wales pursuant to Section 106 of the *Industrial Relations Act 1996* (NSW). This jurisdiction is of course the current manifestation of a jurisdiction that was originally conferred on the Industrial Commission of New South Wales in 1959 being Section 88F of the *Industrial Arbitration Act 1940* (NSW).

   However, this jurisdiction is by no means the only instance where an Australian Parliament has considered it appropriate to enact a remedy to provide relief from unfair work contracts or arrangements – two other current examples are Section 276 of the *Industrial Relations Act 1999* (Qld) and Part 3 of the *Independent Contractors Act 2006* (Cth).

4. Running contrary to this long established statutory trend was the inclusion in the previous Federal Government's "WorkChoices" legislation, from 27 March 2006, of a specific provision which had the effect of excluding the (currently existing or potential) jurisdictions of State courts and tribunals to set aside or vary employment contracts or arrangements on "unfairness" grounds for any employment relationship embraced by Federal workplace law (most particularly of course any employment contract to which a "constitutional corporation" was the employer party). Section 16(1)(d) of the *Workplace Relations Act 1996* (Cth) (as from 27 March 2006) relevantly provides as follows:-

   > "This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
   >
   > …
   >
   > (a) A law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;…

   While "WorkChoices" excluded State court/tribunal jurisdiction over unfair work contracts for the vast majority of the Australian employed workforce, no provision was included by that legislation to provide any form of substitute remedy for employees brought under Federal law by WorkChoices.

5. The gross injustice of this initiative by the previous Federal Government can be readily demonstrated as follows.

   (i) The effect of Section 16(1)(d) of the *Workplace Relations Act 1996* (Cth) ("the Federal Act") was to exclude from "unfair work contract" remedies, those employees falling within the

scope of Federal jurisdiction – it did not exclude access to the remedy for all employees, only those unfortunate enough to be within the scope of the "WorkChoices" legislation.

(i) While the former Federal Government deemed it appropriate to exclude as many employees as possible from the protection of the "unfair work contract" remedies, it nevertheless moved, as part of its legislation relating to independent contractors, to extend to independent contractors a specific new Australia-wide "unfair contract" remedy under Federal law.

(ii) Employees not embraced by the Federal Act (for example, State public servants and employees of sole traders or partnerships) retained their right to access State unfair work contract remedies, a privilege from which their private sector counterparts throughout the nation are now excluded.

6. It is respectfully submitted that the fundamental underpinning philosophy of the current Federal Government's "Forward with Fairness – Policy Implementation Plan" is the restoration of fairness and balance in the workplace. That being so, it is further submitted that the fulfilment of this policy should involve a reintroduction of some form of "unfair work contract" jurisdiction for all Australian workers – whether employees or independent contractors. Such an initiative would indeed be "Forward with Fairness" writ large.

Furthermore, the "Forward with Fairness Policy Implementation Plan" of August 2007 highlights that with the abolition of statutory individual agreements, common law agreements for employees will have a central role in the new industrial relations system for Australia.

The references in the "Forward with Fairness - Policy Implementation Plan" include:

- reference on page 1 to Labor's plan for flexibility having three main elements, including more flexible common law agreements for employees earning $100,000.00 or more per year and the award system not applying when employees are on pay arrangements above $100,000.00;

- reference on page 2 to sensible transitional arrangements being made either through Labor's modernised awards, enterprise agreements or the new flexibilities offered by, more contracts;

- reference on page 4 to the substantial difference between AWAs and individual common law agreements, being that AWAs enabled award conditions to be stripped away without compensation, whereas common law agreements ensure an employee does not lose the protection of the safety net;

- reference on page 6 to Labor's belief that common law agreements can offer flexibility, provided that the award safety net is simple, modern and enables fair and flexible arrangements

and that common law agreements will be required to respect Labor's modern, simplified safety net and not be able to undermine the safety net as AWAs had done;

- reference on page 10 to employees being free to have common law agreements in any form that suits them, building on the base of Labor's 10 legislated minimum conditions.

It is submitted that in circumstances where there will be an increased and significant role for common law contracts in the new industrial relations system, (and where this role is recognised as being interrelated to other components of the system), that there is a concomitant need for a system of regulation of common law contracts where there is unfairness.
It would not be satisfactory to simply rely on actions for breach of contract being able to be taken in a Court of competent jurisdiction without reference to the concepts of unfairness established and recognised by the New South Wales unfair contracts jurisdiction.

7. In the remarks below, this submission addresses, in a summary way, some matters of relevance that will inform consideration of the options we propose. Those matters are:-

(iii) A brief summary of the history of the unfair work contract jurisdiction of New South Wales;

(iv) The "gap" that an unfair work contracts jurisdiction fills in a fair system of workplace laws;

(v) A discussion of some other "unfair work contract" remedies that have operated or currently operate in Australia and which may give some guidance in the consideration of future policy; and

(vi) The options we propose for legislative reforms.

B. Legislative History and Background to Section 106 *Industrial Relations Act 1996* (NSW)

8. The following brief background summary outlines the legislative development and key cases that have arisen in the evolution of what is now known as the "unfair contracts" jurisdiction of the Industrial Court of New South Wales under section 106 of *Industrial Relations Act 1996* (NSW).

9. The first unfair contracts provisions were introduced into the New South Wales *Industrial Arbitration Act 1940* in 1959 by the inclusion of section 88F, as a cognate provision with a new Section 88E (which deemed certain persons performing work to be employees). The prime purpose of the 1959 legislative reforms of which Section 88F formed part, was to safeguard the industrial arbitration and award system from subversion by the terms and conditions of various types of contractors, particularly those who operated as milk

vendors, bread carters and contract labour in the construction industry. At that time, there was little commentary or coverage in the media on this development. In his Second Reading Speech in Parliament the Minister for Labour and Industry stated that the new provisions were designed to support parts of the Act intended to counter *'the growth of abuse of the contract system, particular in the building trades'*.[2] He went on to say that:

> *'…many building projects are now contracted almost entirely under the contract system. This system can be tolerated only if award standards are constantly maintained.'*

10. It was not until 1965 that the first case under Section 88F was reported, being *Agius v Arrow Freightways Pty Ltd*[3] where it was decided that a contract for the sale of a truck and a parcel delivery run for an exorbitant price was unfair, harsh and unconscionable. This decision also revealed a short-coming in the legislation, in that there were no effective means of enforcing the finding of unfairness by any form of ameliorative orders. In December 1966, the State Government amended the Act to allow monetary compensation to be ordered and enforced, and to remove the power of conciliation committees to make the relevant orders.

11. Justice Sheldon's decision in 1967 in *Davies v General Transport Development Pty Limited*[4], another contract of carriage case, is now seen the seminal authority on the breadth of the remedy then contained in Section 88F. In his judgement his Honour observed that section 88F was limited to contracts or arrangements with an "industrial colour or flavour" but in relation to such transactions the Section operated with 'drastic and pervasive effect….[and] plays havoc with the classic principles relating to contracts.' His Honour foresaw that the remedy allowed the Commission a wide range of options, including "renovating" or "patching up" the transaction concerned.

12. Until 1968 the Commission only heard cases related to transport industry, usually involving the sale of a "truck in work", but from that year onwards the range of contracts considered under section 88F began to broaden, and the initial view that the Section only applied to a contract or arrangement that had an "industrial colour or flavour" came under challenge.

---

[2] New South Wales Parliamentary Debates (Legislative Assembly) 18 November 1959 at p 2130.
[3] [1965] AR (NSW) 77
[4] [1967] AR (NSW) 371.

13. In *Stevenson v Barham*[5] in 1972 the High Court decided, by a narrow majority of 3-2, that the jurisdiction of the Commission extended to any contract or arrangement that led directly to a person performing work in any industry, and was not limited to those classes of contracts that possessed an "industrial colour or flavour". That decision laid the first foundation for what turned out to be, over the next 30 years, a massive expansion in the jurisdiction. In that regard judges and commentators have repeatedly emphasised the very wide potential coverage of the provisions. In *Stevenson v Barham*[6], the Chief Justice of the High Court, Sir Garfield Barwick, appeared to accept this broad coverage with some reluctance, when he commented that the language of section 88F was:

'intractable and must be given effect according to its width and generality. The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality or whose labour was not being oppressively exploited.'

14. Also in 1972, the High Court decided *Brown v Rezitis*[7] ruling that the Commission had extensive powers under Section 88F (2) as to the orders it might make when it found a contract or arrangement to be unfair, including who might be joined as a party in the proceedings. This decision was the other great High Court foundation for the expansion of the jurisdiction in the years that followed.

By 1994 Justice Kirby, in *Walker v Industrial Court of NSW*[8] was able to make this comment about the accepted width of the jurisdiction:

> *'The large jurisdiction afforded under section 88F(2) to do what appears 'just in the circumstances of the case' is not without controlling limits. But those limits are cast very widely by the plain language of the statute. And necessarily so because of the great variety of circumstances that arise under section 88F of the Industrial Arbitration Act and the large power needed to repair any unfairness, harshness or unconscionability found.'*

15. In the 30 year period after *Stevenson v Barham* and *Brown v Rezitis,* the types or categories of contracts or arrangements involving work by individuals that have been the subject of applications before the Industrial Relations Commission or the Industrial Court, and the potential variety of orders that could be made, became very wide

---

[5] (1976) 136 CLR 190..
[6] Ibid, at 192.
[7] (1970) 127 CLR 157
[8] (1994) 53 IR 121 at 136.

(although not limitless – the subject contract would still need to lead directly to the performance of work in an industry, and any orders made had to have a direct connection to the contract etc avoided or varied).. Examples of the types of contracts or arrangements that could be subject to attack, and remedial orders under Section 88F (and its successors) included:

- Franchise agreements;
- superannuation arrangements;
- restaurant and hotel leases;
- retail leases in shopping centre complexes;
- share-farming arrangements;
- music royalty agreement with a pop star; and
- footballers' contracts.

16. Initially there was some doubt as to whether the remedy applied to employment contracts, but from 1984 onwards it was accepted that employment contracts were covered by the provisions, thereby opening up a very significant area of coverage for the jurisdiction.[9] From about the mid-1990s up until the commencement of the "WorkChoices" legislation in March 2006, claims in relation to employment contracts steadily increased and by early in this Century employment related claims comprised the majority of "unfair contract" claims in the Commission's list.

17. The "unfair contracts" jurisdiction has been the subject of a number of legislative changes and refinements. In 1985 provisions designed to allow the Commission to make preventative orders (following the making of specific orders) were added to section 88F as sections 2(A), 2(B) and 2(C). In early 1992, the *Industrial Arbitration Act 1940* was repealed and replaced by the *Industrial Relations Act 1991*, and with that initiative Section 88F became sections 275 and 276, with little change in effect. In 1996 the 1991 Act was repealed and replaced by the *Industrial Relations Act 1996*, which resulted in a further renumbering of the relevant provisions as Section 105 to 109 inclusive. The 1996 Act did effect some changes to the jurisdiction, the most significant of which, in practice, was a provision for compulsory conciliation of any claim by a member of the Commission prior to hearing (Section 109). In December 1998, Section 109A was inserted into the 1996 Act in an attempt to prevent unfair dismissal claims being "dressed up" as unfair contract claims, but the effect of that Section was held to be very limited by the Commission in *Beahan v Bush Boake Allen Australia Limited* (1999) 93 I.R.1. However, the most significant amendments were made in June 2002 and December 2005, and these will be referred to in sequence below.

18. The scope of the unfair contracts jurisdiction has been the subject of debate and disagreement among judges, academics and legal practitioners for a very long time, perhaps as much as 40 years. The

---

[9] *Ronan v University of Wollongong* (1984) AILR 9.

essential issue in this regard, at the risk of oversimplifying it, is whether the jurisdiction is confined to those transactions where the performance of work by an individual is at the core of the challenged transaction, or whether the jurisdiction extends to any transaction where the performance of work is a direct consequence of the transaction (which latter approach is alleged to lead to the Commission trenching upon the "commercial" jurisdiction of other courts). The extent of the Commission's jurisdiction has thus ebbed and flowed over the last 40 years depending upon which of these two approaches held judicial ascendency.

19. The original view in the 1960s was that the jurisdiction was confined to the narrow approach, such that it was often said that Section 88F was only enlivened for those relationships where "one party worked for the other". But this view was undermined by the New South Wales Court of Appeal in *Ex Parte VG Haulage Services; Re Industrial Commission*[10] where Jacobs JA stated:

> *"The transaction must directly lead to work in industry – that is what gives the industrial colour or flavour…"*

This approach was adopted by a majority of the High Court in *Stevenson v Barham*[11] with the test described as follows by Mason and Jacobs JJ at 201:

> *"If the contract is one which leads directly to a person working in any industry it has the requisite industrial character – it is a contract 'whereby a person performs work in any industry.' This is the relevant jurisdictional fact which needs to be established."*

In a later case following Barham's Case (above), *F Sharkey & Co Pty Ltd v Metropolitan Water Sewage and Drainage Board*,[12] the Commission set aside an agreement between the Water Board and its union in relation to the granting of contracts for the construction of drainage work on new subdivisions to its employees rather than external contractors. As a consequence of that decision, the predecessor of section 108 was introduced to the jurisdiction to restrict standing to apply under the jurisdiction.[13]

20. Following the decision in *Stevenson v Barham*[14] and a subsequent decision of the Privy Council in *Caltex Oil (Australia) Pty limited v*

---

[10] [1972] 2 NSWLR 81
[11] (1977) 136 CLR 190.
[12] *[1981] 2 NSWLR 824*
[13] Phillips J, and Tooma M, '*Law of Unfair Contracts - NSW*', 1994 Law Book Company.
[14] Above n 13.

Feenan[15], it seemed to have been accepted for some years that the Commission's jurisdiction extended to situations of sale and purchase of business where, after the completion of the transaction, there was no ongoing relationship between vendor and purchaser, provided work was performed in the business after the transaction was completed. However, in *Production Spray Painting & Panelbeating v Newnham*[16] this type of transaction was held by the NSW Court of Appeal not to be embraced by the jurisdiction. In that decision their Honours Priestley and Handley JJA held at 657:

> *"It is not sufficient to establish jurisdiction that a contract involves the provision of goods and services, with a consequent performance of work in an industry…the impugned contract etc., therefore must directly, that is pursuant to its terms, provide for the performance of work in an industry. Accordingly, the contrast drawn…is between a contract which leads directly to the performance of work in an industry on the one hand, and on the other a contract which does so only indirectly or in a remote or consequential manner."*

Their Honours went on to say that it seemed *"…unlikely in the extreme that in 1959 Parliament intended the section to reach contracts of sale which lead to work for the purchaser or the purchaser would work for himself."*[17]

These observations were later endorsed in *Mitchforce v Industrial Relations Commission*[18] where the Court of appeal expressed its concern about the expansion of the jurisdiction into what the Court regarded as the "commercial" arena reserved for the ordinary courts such as the District Court and the Supreme Court. Spigelman CJ therein observed:

> *"It is apparent that the jurisprudence of the Commission has travelled a long way from an 'industrial' context to encompass arrangements which would not ordinarily be described as having an 'industrial colour or flavour'."*[19]

21. Subsequently, in *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW*[20] the New South Wales Court of Appeal

---

[15] (1981) 1 NSWLR 169
[16] (1991) 27 NSWLR 644.
[17] Ibid at 656.
[18] [2002] NSWCA 151.
[19] Ibid at 39.
[20] [2004] 208 ALR 328.

confirmed its policy of confining the jurisdiction of the Commission to transactions with an “industrial colour or favour”, holding that the key issue in determining whether a contract is within the Commission's jurisdiction is whether it leads directly to a person working in any industry. The court held that for a contract etc to meet this requirement, it must both:

- "directly envisage" the performance of work, and
- have a "recognisable impact on the conditions of that work."

The High Court rejected an appeal from that decision[21], in effect agreeing with the Court of Appeal.[22]But by that time, the Section had been amended by the State Parliament in December 2005, by adding a new sub section 106(2A) that provided that “A contract that is a related condition or collateral arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and (b) the performance of work is a significant purpose of the contractual arrangements made by the person.” The intention and effect of that amendment was to limit at least to some extent the effect of the run of decisions referred to above.

22. Thus by the time that the WorkChoices legislation commenced in March 2006 the extent of the jurisdiction of the (now) Industrial Court to deal with contracts and arrangements under Section 106 had been the subject of extensive superior court (including High Court) authority, coupled with legislative change impacting on that authority, such that the law in this are had become relatively settled and reasonably clear.

23. The 1990s saw another major development in the exercise of the “unfair contracts” jurisdiction, namely the very significant growth in the number of cases brought by employees against their former employers. *Walker's case*[23] demonstrated the potential use of the jurisdiction in relation to employee grievances about their employment (including the conduct of an employer at the point of dismissal of the employee). Probably the first case of note which showed the potential in this area for employee claims was *Cukeric v David Jones Limited*[24] and *David Jones Limited v Cukeric*[25], where the Commission set aside a deed of release between the parties, varied the contract after it had been terminated and awarded Mr Cukeric substantial monetary compensation.

---

[21] *Fish v Solution 6 Holdings Limited* [2006] HCA 22
[22] (2006) 225 CLR 180
[23] Above n 6.
[24] (1996) 70 IR 26
[25] (1997) 78 IR 430

24. Under the 1996 Act, the Commission saw an increasing number of claims brought by executive employees under Section 106 claiming significant monetary loss on termination of their contractual arrangements. One particular case that attracted media attention at the time was *Canizales v Microsoft Corporation, Microsoft Australia Pty Ltd and Ninemsn Pty Ltd*[26]*.* This case involved a Microsoft employee who was seconded to work in a joint venture and was subsequently made redundant. The applicant made a claim under section 106 and sought a declaration from the Commission that the contract was unfair, seeking orders that his period of notice was unreasonable and unfair, his severance payment be paid in accordance with the Microsoft severance plan and that he be entitled to exercise share options granted to him in 1995. His Honour Justice Peterson found that the applicant's secondment arrangement was unfair, harsh or unconscionable and the option and severance plans were unfair in the circumstances. It was also found that Microsoft giving virtually no notice of retrenchment was unfair and unconscionable, and that a deed of release operated unfairly. Mr Canizales ended up with a compensation award of over $1.3million, a fact that his Honour Peterson J thought many would find surprising but nevertheless on his view a logical consequence of the development in the authorities on this subject. This case showed that notwithstanding a generosity of remuneration, common law employment contracts could be reviewed to determine whether they operated fairly in all the circumstances and substantial compensation awarded.

25. Almost as a direct consequence of decisions such as *Canizales*, in June 2002 the State Government brought in substantial amendments to the 1996 Act to restrict access to Section 106 (see *Industrial Relations (Unfair contracts) Amendment Act* 2002). The main limitations introduced by the 2002 amendments were:

(a) a limitation on access to the jurisdiction by employees, namely that a claim was not available where, at the date of termination of the employment, or the date of filing of proceedings (as the case may be) the employee had earned or was entitled to receive in excess of $200,000 remuneration from all sources in the relevant employment (section 108A);
(b) a requirement that any claim be filed within 12 months of the date of termination of the contract or arrangement (Section 108B) (subsequently amended in December 2005 to allow the Court in “exceptional circumstances” to allow a claim to be filed up to three months after the expiry of the 12 month period).

26. **Conclusion** The brief history above has highlighted the main “milestones” on the journey of the NSW “unfair contracts” jurisdiction over the almost 50 years since its introduction. In that time the

[26] [2000] NSW IRC 118

scope and significance of the jurisdiction has ebbed and flowed, but even with the judicial and statutory limitations imposed on it since the start of this Century, it remained of considerable significance for all types of "workers" in this State up until the commencement of Section 16 (1) (d) of the Federal Act under WorkChoices.
It is submitted that by the time of the commencement of Section 16 (1) (d) the jurisdiction had reached a point where its scope was well understood by practitioners from judicial pronouncements (even if some thought the interpretation adopted was somewhat over limiting) and access had been limited by legislation to prevent claims by highly remunerated employees (as instanced by the *Canizales* case).

C. The "gap" that the "unfair work contract" remedy fills in Australian industrial law

Each of the case studies discussed below are based on real cases, although the names have been changed or disguised. The point of the case studies is to highlight the gap in the law that an effective unfair work contracts remedy like that in NSW fills for independent contractors, who may arguably be engaged in circumstances more analogous to that of employees, and are now denied the opportunity of seeking relief because of either Commonwealth law, which denies access to existing remedies in New South Wales and Queensland or because the Commonwealth alternative is often of little (if any) practical utility

Case Study 1

27. A Sydney newspaper publisher engaged independent contractors to perform deliveries of newspapers. The contracts between the newspaper and the drivers engaged in performing work in the metropolitan areas recognised the right of the contract carriers to include in any prospective sale of their vehicles an additional amount or premium (i.e. goodwill component) in connection with the entry of the purchaser into the head contract of carriage with the principal. The publisher's contracts with contract carriers engaged to perform work delivery papers in country areas did not include the same 'goodwill' component. His contract did not include a goodwill component unlike those drivers performing work exclusively in metropolitan areas. The newspaper publisher sought to buy out its metropolitan driver's good will to extinguish all future liability in respect to potential claims for compensation arising under Chapter 6 of the *Industrial Relations Act* 1996 (NSW) should it rationalise its transport delivery requirements. A driver who performed work partly in outer metropolitan areas north west of Sydney and also partly in the Sydney metropolitan area was classed as a country driver because of his outer metropolitan work and as such the publisher refused to recognise any goodwill despite the fact that when he purchased his vehicle he had paid a premium for it because he gained the right to deliver papers for the publisher and the publisher was aware of this fact. In this case there was no

remedy under Chapter 6 of the *Industrial Relations* Act because the contract of carriage had not been terminated. An application was made pursuant to section 106 of the *Industrial Relations* 1996 (NSW) and the matter settled. Had the matter not been filed prior to enactment of section 12 of the *Independent Contractors Act* then the driver would not have been able to obtain monetary compensation, which in this case, is the only way the driver could have been placed on the same footing as his city counterparts and, as a consequence, redress the unfairness.

Case Study 2

28. A parcel delivery company and its contract carriers included in their contract a term which stated that the carrier could assign the contract to another contractor at the discretion of the principal and that the principal would not unreasonably withhold its consent to any such assignment. A number of carriers wanted to sell their businesses and when they advertised the principal issued a directive to all contractors to the effect that the principal would no longer permit any assignment or sale of contractor businesses. The principal was not just failing to comply with a term of the contract but arguably seeking to vary it. In this case there was no remedy pursuant to Chapter 6 of the *Industrial Relations Act* because the contracts of carriage had not been terminated, however, a section 106 claim was filed just prior to the coming into effective of *Independent Contractors Act* which would otherwise had extinguished that option. In this case section 12 of the *Independent Contractors Act* would not provide any remedy for these drivers because of an unfairness ground because the unfairness did not arise at the date it was entered into but at a subsequent time or because of its operation.

Case Study No. 3 Spiros

29. Spiros saw an advertisement in a metropolitan paper placed by the X which said “earn $1,250 per week and be your own boss”. The advertisement directed the reader to a website for more information and when Spiros looked at that web site he saw that there were several locations or areas advertised for sale within the franchisors’ network. Spiros telephoned X and arrangements were made for Spiros to come and meet X’s manager. Spiros saw the manager (hereafter referred to as Y) and a discussion occurred about which area or location might be most suitable area for Spiros. Spiros told Y that he had $30,000 in savings. Y told Spiros that he should purchase a licence for a particular locality in the eastern suburbs because a local retailer with a large internet and mail order customer base whose premises was in that area was certain to come on board. X’s manager also said to Spiros words to the effect; “once [this retailer] comes on board you will earn well above the guaranteed weekly earnings”. Over the next week or so there were several more discussions between Spiros and Y throughout which Y made further representations. At the end of this period Spiros paid a deposit for the Kensington run. Spiros then told Y that

he was going to purchase a Ford 'Transit' van. Y told Spiros that this would not be sufficiently large enough to meet the demands of the new client and he would have to get something bigger. Y told him to go out into X's depot and have a look at the Mercedes '. Spiros phoned Mr Y and said he did not think he could cope with the repayments on the bigger van and Mr Y said words to the effect; "When the new client comes on board none of this will be an issue. You'll be laughing". On the basis of these representations Spiros bought the van and signed the Franchise agreement with X.

30. The big client that he was promised would come on board did not eventuate and he was finding it difficult to recover his business costs and make money because he had overextended himself by purchasing an oversized van that he did not need

31. In Spiro's case unfairness arose because he was induced to enter into the contract on the promise that the big customer would make it profitable. This representation was not translated into a contractual right as Spiros expected. To the contrary, the written contract included a complete contract clause which extinguished any previous representations. Therefore, the unfairness arises from the operation of the contract including the pre-contractual statements and the affirmation of this unenforceable promise during the life of the contract. This and the fact that the appropriate remedy is compensation are two factors which means the *Independent Contractors Act* is of no practical assistance but may serve only to prevent Spiros from accessing the NSW unfair contracts jurisdiction.

D. Other "unfair work contract" remedies – guidance and limitations

1. The Independent Contractors Act 2006 (Cth)

32. The *Independent Contractors Act* ('the ICA') substantially removed independent contractors from the provisions of the *Industrial Relations Act* 1996 (NSW), particularly the deeming provisions (section 5 and schedule 1) and the unfair contract provisions (section 106).

Despite the then Government's expressed intention to remove industrial regulation from contracts for services because of the view that they are more appropriately regulated by commercial law[27], the Government did not seek to repeal the federal unfair contracts

[27] For example, common law, relevant parts of the *Trade Practices Act* 1974 and State and Territory fair trading legislation. .

remedy altogether. Instead it repealed it from *Workplace Relations Act* 1996[28] and re-enacted it in section of the ICA[29].

This could infer that the Howard Government saw a need for independent contractors to have a remedy for unfair dealing in their work contracts and implicit recognition that the common law and other statutory remedies were not enough. This begs the question why was it necessary to deny independent contractors in NSW and Queensland access to adequate existing state remedies. The Minister in his second reading speech said that creating a single jurisdictional remedy for independent contractors would:

> "*alleviate the current confusion of having concurrent state and federal unfair contracts jurisdictions operating in New South Wales and Queensland … [and] provide a cheaper and more accessible unfair contracts regime than the current federal system, as the Federal Magistrates Court will be vested with jurisdiction to hear unfair contracts cases though the Federal Court will continue to have a role".*

The Opposition Senators at the time, who included members of the now current Labor Government, believed these protections would have no effect in stopping the unfairness that they purported to regulate. The Senators were critical that neither the *Workplace Relations Amendment (Independent Contractors) Bill* or the *Independent Contractors Bill* recognised 'the fact of dependent contractors' who they claimed are often de-facto employees and are vulnerable and present a weak bargaining capacity because they are usually tied to a single principal. The Opposition Senators' report endorsed a submission by the CEPU to the effect that sub-contractors working for head contractors engaged by Telstra were not in a position to negotiate remuneration or working conditions because these were determined by Telstra after a bidding war by competing head contractors. The Senators argued that the protection of deeming provisions and other State and Territory laws, which positively prescribed conditions or terms of engagement for certain classes of dependent contractors, gave certainty to parties in work contracts and that leaving it to the common law alone to

---

[28] Sections 832-834 of the *Workplace Relations Act* 1996 were repealed by clause 7 of Schedule 2 of the *Workplace Relations Amendment (Independent Contractors) Act* 2006.
[29] Parliament has not re-enacted the remedy but extended the coverage of that remedy to incorporated entities (where work for which the contract relates is wholly or mainly performed by a director of the body corporate or a member of the family of the director of the body corporate (see section 11(1)(b) *ICA).*

determine the status of the contractual relationship was to create an incentive for the unscrupulous to manipulate employment relationships for the purpose of reducing labour costs to the detriment of the worker. The Senators further argued that the chances of an employee contesting in a court that the contract was a contract of service rather than a reputed contract for services was negligible given most employees would not have the means resources or capacity to pursue it.

In recent article appearing in the Journal of the Law Society of New South Wales, Joe Catanzariti and Abraham Ash from Clayton Utz, noted that the scope of protection available to independent contractors for unfair dealing had been considerably narrowed by their exclusion from NSW unfair contracts jurisdiction[30]. Whilst they left open the question of whether that result was intended, they considered that a reduction in rights and protections that has occurred is not in the interests of justice and with up to 2 million Australians affected by the ICA, there were *"… compelling reasons for ensuring the protection of these workers from the vagaries of unfair work arrangements"*[31].

33. Section 12(1) provides for review of a contract that is "unfair" or "harsh".
Professor Joellen Riley in her book "*Independent Work Contracts*"[32], notes that while the word "unconscionable" (as used in section 106 of the *Industrial Relations Act 1996* and the *Trade Practices Act 1974*) is absent from section 12 that, nevertheless, the use of the concept of "unfairness" raises the prospect that the extensive jurisprudence developed around that concept in state jurisdictions may be drawn upon as guidance by the Federal Court and Federal Magistrate's Court.

Professor Riley also notes that the Explanatory Memorandum to the *Independent Contractors Act* (at [58], page 38) states that the concepts of "unfair" or "harsh" "would take their common law meanings", thus confirming the approach to interpretation adopted by Munro J in*Re Transport Workers Union of Australia* where his Honour said (at 214):

> *"It is both well-established and widely recognised that industrial tribunals have avoided rigidity in defining terms such as "unfair" and "harsh". Those words are not terms of art. They should be understood by a commonsense approach, as words in common usage with no special technical meaning."*

---

[30] J. Catanzariti & A. Ash, "Shrinking Rights in the federal sphere", *The Law Society Journal*, May 2008, p52 at p54.
[31] Ibid.
[32] Riley, J *Independent Work Contracts*, Thomson Legal, September 2007, at page 118

34. Section 12(3) and (4) provides that:

> *"(3) In reviewing a services contract, the Court must only have regard to:*
>
> *(a) the terms of the contract when it was made; and*
>
> *(b) to the extent that this part allows the Court to consider other matters - other matters as existing at the time when the contract with made.*
>
> *In terms of the section (4) for the purposes of this Part, services contract includes a contract to vary a services contract.*
>
> Note: *The effect of subsection (4) is that a contract to vary a services contract can be reviewed under this Part, as the contract to vary will itself be a services contract."* (emphasis added)

35. In contrast to the unfair contract jurisdiction of section 106 of the NSW IR Act, the provisions of the *Independent Contractors Act* do not support an action based on allegedly unfair conduct of a party "subsequent" to the making of the contract. While the provisions of the Independent Contractors Act are, in this important respect, significantly more limited than the NSW IR Act unfair contracts jurisdiction, the Federal legislation will, in the writer's view, nevertheless, have a significant role to play in litigation in appropriate circumstances.

36. Reasonable notice on termination of a contract

In *Harding 1999 v EIG Ansvar Limited*[33], Spender J of the Federal Court held that a 30 day notice provision (which would commonly be regarded as standard) in a contract for an insurance agent who worked exclusively for one principal, was not sufficient even though the contract had only run for eight months.

Spender J held (at paragraphs 56-58):

> *"Notwithstanding my view that Mr Harding was remiss in looking after his own interests, I think it is fair to conclude first that, in the case of this agent, whose sole insurer was Ansvar, the 30 days' notice was unfairly short and required a premature disposal in a very short timeframe of the asset value in the clients register by a person who was not experienced in the ways of conducting a general insurance agency.*
>
> *Notwithstanding that the evidence does not establish what in fact his premium income was for the year prior to the termination of his policy, I think on the evidence that a fair*

[33] (2000) 95 IR 349.

estimate is in the order of $10,000 to $12,000. There is very little evidence as to what damage in fact has been suffered by Mr Harding as a result of what I hold to be the unfairly short period of notice of termination of the agency agreement without cause. Much of that difficulty of course is from the conduct of Mr Harding, and the impressions and views that he entertained.

Notwithstanding my acceptance of the criticisms of his conduct, I do think it right to order the payment of a sum, which I assess only in a broad-brush way, as being the loss caused by the unfairly short notice period in the agency agreement. I acknowledge that the figure of $5,000 which I assess is somewhat arbitrary, being about half or perhaps a bit less than half, of the premium income in the year prior to the termination of the agency agreement."

The Court in consequence made an order that the contract be varied so that, upon termination of the contract, the respondent pay the applicant the sum awarded. No order was made as to costs.

His Honour had no difficulty accepting that there was nothing unfair or unjust in a provision in a general insurance contract for termination without cause on reasonable notice. The case is instructive in that 30 days was not seen as reasonable notice. Factors which his Honour took into account in determining that the express contractual provision for 30 days' notice was unfair or harsh, included:

- the applicant had not obtained an agency with another insurer during the notice period (paragraphs 43-44);
- the loss of commission on premiums signed before the giving of notice, but which were not actually paid until after termination (paragraph 45); and
- the applicant had lost his "agency business" which he had spent several months developing (paragraph 52).

The value of a case such as *Harding* in the context of section 12 of the *Independent Contractors Act* is that it illustrates a vehicle for litigation where none otherwise appear available. For example, no common law breach of contract claim readily appears available. Similarly, the facts as discussed in the judgment do not appear to give rise to a Trade Practices claim.
Clearly, however, the applicant, even though engaged for only nine months, had suffered real loss.[34]

37. Comparison with earnings as an employee

[34] See also cases decided under the former section 127A - 127C: *Finemores v Papa* (1995) 61 IR 88; and *Transport Workers Union of Australia Bus Freight Pty Limited* [1995] AILR 3003

A second area for potential unfair contracts litigation arises from a comparison between the earnings of an independent contractor and the earnings that person would have received as an employee under the terms of an appropriate award or agreement (whether as a permanent or a casual). A significant reason for many employers seeking to transfer existing or future work to independent contracts is that it is seen to avoid penalty obligations and payments pursuant to an otherwise applicable award.

In *Buchmueller v Allied Express Transport Pty Limited*[35] Dowsett J of the Federal Court was concerned with the remuneration received by a truck driver engaged for a period of only nine months, compared with what the driver would have received as a casual employee. His Honour took account of the considerable benefits which a casual employee would have received, which were not received as an independent contractor, including:

- an entitlement to long service leave (even though the value of that benefit would not vest until an employee had worked 10 years);
- superannuation contributions;
- a comparison of the hourly rate for work undertaken;
- allowance for the costs associated with running a vehicle; and
- that representations were made by the principal as to the earnings which could be expected.

His Honour stated (at paragraphs 42-43):

> *"I accept that a mere discrepancy between the actual return pursuant to a contract and the notional return pursuant to an award does not compel a finding that the contract was unfair or harsh. There may be reasons for a person choosing to be a contractor rather than an employee. He or she may hope for long-term financial benefits despite short-term disadvantages, or the flexibility of working hours may offer some special attraction. In the present case, however, there were no factors sufficient to offset the substantial financial disadvantage incurred by the applicant. To some extent, this disadvantage was contributed to by the applicant's inexperience, but the bulk of it was attributable to the unfairness of the contracts. In the absence of other significant attractions for the applicant, it could not be fair to expect him to accept substantially less than the value of the award for somebody in a similar position.*
>
> *I have demonstrated the fact of unfairness by reference to the award. In view of my findings as to the vagueness of the applicant's evidence concerning the initial representations, it is*

[35] (1999) 88 IR 456; [1999] FCA 319,

not possible to do so by reference to them. It follows that any compensating order should also be based on the award. Section 127B(2) compels this approach. In particular, I propose to use the award formula to compensate for the cost of providing the motor vehicle, as opposed to the calculations made by Mr Lockwood, based upon the book to which Mr Biagnini referred. This approach has at least two advantages. First, the award formula was obviously approved by the Commission. If the Biagnini book was as widely accepted as was asserted in evidence, it was presumably taken into account in the award. Secondly, by using the award, I avoid the need to consider difficult questions concerning the age of the vehicle and other conditions peculiar to the applicant. The award formula presumably takes such matters into account. See the notes to Sch 2." (emphasis added)

Orders were made varying the contract between the applicant and the principal contractor by inserting a further clause as follows into the written contract and consequently there being an award for the varied sum:

> *"Upon termination hereof, the principal contractor will pay to the contract carrier the sum of $13,080.00, and upon such payment all rights and liabilities of the parties hereto arising pursuant to this contract or pursuant to another contract, made this day between the same parties, will be released and discharged."*[36]

The above ground which remains available under section 12 of the *Independent Contractors Act* has been a significant ground of unfairness under section 105 of the NSW IR Act which defines an unfair contract to include one which:

- ***"provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or***
- ***that is designed to, or does, avoid the provisions of an industrial instrument."***

38. **Limitations and remedies**

Pursuant to the *Independent Contractors Act* regulations, a claim must be made within 12 months of the date on which the service contract ends.
There appears limited provision, however, pursuant to regulation 5(2) for a person to satisfy a Court that there are exceptional circumstances justifying an extension of time (in this respect the *Independent Contractors Act* is less restrictive than section 108B of the NSW IR Act which precludes any extension of time.)

---

[36] Ibid, at paragraph 46

39. Section 15 of the *Independent Contractors Act* provides that in reviewing a services contract, the Court may have regard to:

> ***"15 Powers of Court***
>
> ***(1) In reviewing a services contract in relation to which an application has been made under subsection 12(1), the Court may have regard to:***
>
> ***(a) the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and***
>
> ***(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and***
>
> ***(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and***
>
> ***(d) any other matter that the Court thinks is relevant."* (emphasis added)**

After considering the matters listed above, the Court is then required to record its opinion stating whether the opinion relates to the whole or a specified part of the contract. After the Court has recorded its opinion it may then make orders under section 16 *"placing the parties to the services contract as nearly as practicable on such a footing that the ground on which the opinion is based no longer applies"*. This was essentially the approach taken by the Court in the cases discussed above of *Harding* and *Buchmueller*.

40. Notwithstanding the foregoing comments there is no doubt that the remedies available under the Independent Contractors Act are more limited than those available under the existing State laws in New South Wales and Queensland.

The major areas in which the court's jurisdiction to review services contracts covered by the Act on "unfairness grounds" are more limited than the New South Wales and Queensland jurisdictions are as follows:

- The court is limited to determining whether there was an unfairness in the relevant services contract as at the date that the contract was entered into (see s 12(3)) — which is a much more limited review jurisdiction than that which applies in New South Wales and Queensland, where the relevant authority has the power to set aside or vary a particular contract that was either unfair at inception or was fair at inception but at some later time became unfair.
- The court's power, when it finds a contract to be unfair, is limited to setting aside or varying the contract (see s 16(1) and (2)). It has no power to award compensation to the aggrieved party (which of course is unlike the jurisdictions in New South Wales and Queensland where the power to set aside or vary a contract is coupled with a power to award compensation to the aggrieved party).
- The court does not have a general power to award costs in relation to any proceedings before it, it may only award costs in circumstances of unreasonable behaviour by one party (see s 17) (which is to be contrasted with the position in New South Wales where costs normally follow the result — i.e. the successful party obtains a costs order against the unsuccessful party or parties).

2. Industrial Relations Act 1999 (Qld)

41. The Queensland unfair work contract provisions have been redrafted several times. The first provisions were found in the 1967 Act. These were redrafted slightly in 1990 and substantially redrafted in 1996 and again in 1999. From 1967 till 1990 the provisions were directed at work which would have been performed by an employee subject to an award but for the fact that the subject contract was designed to avoid the provisions of an award. It was also directed at preventing contracts or arrangements which were unfair, harsh or unconscionable, against the public interest or provided a total remuneration less than that which an employee performing the same work would have received. In 1996, the public interest and total remuneration considerations were removed. In the *Industrial Relations Act 1999* (Qld), those two considerations were re-included in s 276. This section has not been amended since its inception.

42. Section 276 empowers the Queensland Industrial Relations Commission to vary a contract or make orders in relation to a

contract which it find is unjust. An unjust contract means a contract which is:

(a) harsh;

(b) unconscionable;

(c) against the public interest;

(d) provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or

(e) is designed to, or does, avoid the provisions of an industrial instrument.

43. In determining whether a contract is unjust the Commission may have regard to:

(a) the relative bargaining power of the parties to the contract and, if applicable, anyone acting for the parties;

(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;

(c) an industrial instrument or this Act;

(d) the Queensland minimum wage;

(e) anything else the commission considers relevant.

A contract can be considered unfair if it was an unfair contract when it was entered into or if it became an unfair contract after it was entered into because of the conduct of the parties, variation of the contract or for any other reason which the Commissioner considers.

While a contract may not be harsh, unconscionable or unfair, in the s 276(7)(a) sense, it may be unfair in a general sense because it is against the public interest for any number of policy grounds.

44. In *Tomac Enterprises Pty Ltd and Newmont Pajingo Pty Ltd*[37] the Commission held that the contract became unfair because, amongst other things, the Respondent's representatives led the Applicant to believe that it was entering into a long-term relationship. The Commission stated that it is well settled that unfairness can arise not just from the parties' initial negotiations but can also arise from later

[37] No. B782 of 2004, 23 December 2004.

events, usually the conduct of one party or another during the life of the contract.

45. In *Gersten v Cape York Land Council Aboriginal Corporation*[38] the Commission accepted Mr Gersten's claim that the contract operated unfairly because it did not contain a term requiring the employer to pay the difference between the workers' compensation payments he received, and his usual remuneration.

46. Section 276 of the *Industrial Relations Act 1999* (Qld) was modelled on s 106 of the *Industrial Relations Act 1996* (NSW). Section 276 applies to both:

- contracts for services; and
- contracts of service that are not covered by an award or agreement.

The Commission cannot review:

- applications from a person who has applied for reinstatement under the state unfair termination laws;
- private sector contracts above the remuneration cap (currently $101,300).

47. Given the non-exhaustive and extended definition of the word "contract" in s 276(7), it is clear that the general scope of the section goes beyond contracts in the formal, legal sense of the word. "Contract" is defined in s 276(7) to include "an arrangement or understanding" and "a collateral contract relating to a contract". The use of the words "an arrangement or understanding" potentially gives a very broad scope to the section. This is certainly the case under s 106 of the NSW Act.

48. It is apparent from the second limb of the definition of "contract", that a contract of, or for, services collateral to a main contract (that may not be one of service or for services) may also be caught by the section. In *Micmon Investments Ltd & Bradbury International Inc v Hayes*[39] Vice President Linnane found that there was a prima facie case that a share option deed was a collateral contract to a contract of service and/or that it was an arrangement or understanding relating to a contract of service for the purposes of s 276. Thus, an arrangement or understanding of service or for services, which may not meet the necessary elements to create a contract at law, or, a collateral contract of service (not covered by an industrial instrument) or for services will prima facie fall within the scope of s 276.

---

[38] [2004] QIC 14.
[39] [2000] QIRComm 110.

49. In *Minter v Queensland Teachers' Union of Employees*[40] it was held that s 276 allowed the Commission to vary contracts that have been completed as well as those that are on foot. Commissioner Fisher in *Woods v Aub Security & Nieborg*[41] considered this decision and applied similar reasoning in finding that the *Workplace Relations Act 1996* does not only apply to contracts that are on foot.

50. The use of the noun "party" suggests that an application may be brought by a natural person or a corporation. This was the view of Commissioner Blades, obiter dictum, in *Braunack v Couriers Please*[42].

51. The Qld provisions are very similar to s 106 of the *Industrial Relations Act* 1996 (NSW). Nevertheless, s 276 has been used far less often than its NSW counterpart. This is undoubtedly explained by the relatively lower remuneration cap; making challenging contracts less economically viable.

3. Contracts Review Act 1980 (NSW)

The provisions in the *Contracts Review Act 1980* (NSW) (**CRA**) relating to varying or declaring void contracts have not been amended since the CRA's inception.

52. According to s 7 of the CRA, a court can make an order to vary or declare void a contract or a part of a contract if it considers it unjust in the circumstances at the time it was made. Section 9 of the CRA provides a shopping list of factors that the court shall consider, to the extent that they are relevant.

(i) the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of compliance with any or all of the provisions of the contract / non-compliance with, or contravention of, any or all of the provisions of the contract;

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

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

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

---

[40] (1994) 146 QGIG 189.
[41] (1997) 155 QGIG 794.
[42] [2000] QIRComm 159.

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

(vi) whether or not any party to the contract (other than a corporation) was not reasonably able to protect his or her interests because of his or her age or the state of his or her physical or mental capacity;

(vii) whether or not any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented because of his or her age or the state of his or her physical or mental capacity;

(viii) The relative economic circumstances, educational background and literacy of the parties to the contract (other than a corporation) or any person who represented any of the parties to the contract;

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

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

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

(xii) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act: by any other party to the contract, by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;

(xiii) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and the commercial or other setting, purpose and effect of the contract;

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

In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

53. The judgments of McHugh JA and Kirby P in *West v AGC (Advances) Ltd*[43] are often cited as providing the foundation principles for interpretation of the Act: the statute is to be interpreted liberally; in the absence of relevant conduct by the other party, a contract will not be unjust simply because it was not in the best interests of the party seeking relief, or because they had no independent advice; there is a distinction between an *unjust* contract (which is the subject of the Act) which is the result of unfair conduct and an unfair contract.

54. Section 6 of the CRA prevents s 7 from applying to employment contracts. Section 6 states that "a person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person… carried on by the person or proposed to be carried on by the person wholly or principally in New South Wales."

55. In line with the jurisdictional limitations of the ICA, it does not appear that it has ever been attempted to be applied in relation to an employment related contracts. That may well be because there has been in s106 of the *Industrial Relations Act*, and its predecessors, a specialist and broader form of relief. However, the principles have been widely applied in relation to commercial contracts confirming the policy supporting this type of relief.

4. "Amadio unconscionability"

56. The courts of equity will provide relief to a party to a contract where there is unconscionable conduct on the part of another party to a contract. The grounds for relief, however, are confined to circumstances where the injured party[44];

- was suffering from some special disability. that they suffered from 'some disability or other circumstance' putting them at 'a serious disadvantage in the negotiation of the contract';

---

[43] (1986) 5 NSWLR 610.

[44] The principle arises from the often cited case of *Commercial Bank of Australia v Amadio*[44].

- that they were 'unable to make a proper judgment' as to their best interest; and
- that the other party knew (or ought to have known) of the disadvantage and 'took unfair advantage' of their 'superior position'.

57. Compared to the industrial unfair contracts statutory provisions, the equitable remedy has a very narrow application.

5 Federal 'Sham' Contracts Provisions

58. The *Workplace Relations Act* 1996 includes provisions, which according the then Minister for Employment and Workplace Relations, were intended to protect against "'sham' contracting arrangements, sometimes used by unscrupulous employers to avoid payment of legitimate employee entitlements"[45]. Those amendments can be seen in sections 900 to 905 of the *WRA*. A person contravenes section 900 of WRA if they are in a contract with an individual and represent the contract as being a contract for services when in fact it is a contract of employment. A person contravenes section 901 if, when making an offer to a person to enter into a contract, they represent that contract as a contract for services when in fact it is a contract of employment. An employer contravenes section 902 of the WRA if they dismiss, or threaten to dismiss and individual who is an employee and performs work as an employee, if the sole and dominant purpose in dismissing, or threatening to dismiss the individual is to engage the individual as an independent contractor to perform the same work, or substantially the same work under a contract for services. Finally, a person contravenes section 903 if they employ a person, or at anytime employed a person, and they knowingly make a false with the intention of inducing that person to enter into a contract for services to perform the same work or substantially the same work.

59. Whilst the Federal Government thought it necessary to protect employees from being exploited it is noted that these laws are easy to manipulate and difficult to prove and the consequence is that they are far less effective in protecting employees from sham contracts and providing appropriate relief than the industrial unfair contracts remedies in NSW and Qld.

60. This is chiefly because the provisions are primarily aimed at outlawing the conduct and sanctioning transgressors rather than providing direct relief to employees. Whilst relief such as compensation or back pay may be obtained by employees, this can only be achieved by way of an ancillary order after a contravention has been proven.

D. The Options for Legislative Reform

[45] The Hon Kevin Andrews MP, Media Release, "New protections in Independent Contractors Bill", Wednesday 3rd May 2006.

61. It is respectfully submitted that doing nothing to disturb the currently unjust and discriminatory state of the law in this area is not an option. The history and breadth of the judicially determined relief demonstrates the case for the creation of an effective means of relief. The options for reform may well be many. The following are those options that most readily come to mind to those preparing these submissions. They are not presented hereunder in any order of preference, for it is not the purpose of this submission to advocate any particular model or remedy. The options are all proposed simply for discussion, with the only agenda of this submission being that the current injustices be remedied as part of the Federal Government's substantive legislative package of workplace law reform due to commence by January 2010.

Option 1 – Repeal of Section 16(1)(d) of the Federal Act

This option would simply have the effect of restoring the status quo as it was prior to the commencement of the WorkChoices regime on 27 March 2006. It would mean that the unfair work contracts jurisdictions in New South Wales and Queensland would become available again to all employees in those jurisdictions, and leave the other states with the option to enact their own equivalent jurisdictions if they should so desire. However, this option would have the difficulty that independent contractors who would have previously had access to the New South Wales and Queensland unfair work contracts jurisdictions would remain under the "unfair contracts" regime prescribed by the *Independent Contractors Act* 2006 (Cth). If a cognate amendment was made to the latter Act to allow independent contractors to again access state unfair work contract jurisdictions, that would then mean that independent contractors would have different unfair contract remedies depending upon which state jurisdiction applied to their contract or arrangements – i.e. for New South Wales and Queensland the State unfair work contract jurisdictions would apply, but in other states the Federal Act would continue to apply.

62. **Option 2 – A Uniform National Remedy for Employees and Contractors**

This option would involve the enactment of one uniform unfair work contracts remedy for all "workers", whether employees or independent contractors, ideally contained in the one Federal statute. This option is of course consistent with the Federal Government's desire to establish a uniform national system for the private sector throughout Australia. However, any such initiative would break new ground in providing a remedy nation-wide to all workers (not just employees and independent contractors in certain states or contractors under Federal jurisdiction) so care would be needed to ensure that the remedy was a balanced one. Striking that balance would need input from all stakeholders, however, the following guidelines are suggested for consideration.

(i) An appropriate remuneration "cap" on access would be needed – in New South Wales the "cap" on access has been $200,000 total remuneration from all sources in employment since June 2002, and appears a ready benchmark (but of course any "cap" should be revised upwards at reasonable intervals to take account of inflation).

(ii) An appropriate "cap" on compensation that may be awarded in respect of a contract or arrangement found to be unfair – at least for the initial few years of the new remedy's operation. A compensation "cap" equal to total remuneration for one year would be reasonable (noting that no "cap" on compensation exists under current State remedies).

(iii) The courts or tribunals endowed with jurisdiction in this area should be given the full range of powers that currently exist under State law, and not the more restricted jurisdiction under the Independent Contractors Act – in particular, powers to set aside or vary a contract or arrangement either from its beginning ("ab initio") or some later time, together with a power to award reasonable costs for successful parties (so as to ensure an effective remedy and an effective deterrent to unreasonable claims).

Depending on the model that is ultimately agreed upon for the establishment of a national workplace system, this new national jurisdiction for "unfair work contracts" could be conferred either on Federal courts or State courts or both, with applicants to have the right to choose the forum for their grievance, somewhat like the situation that currently applies to s52 *Trade Practices Act* claims.

63. **Option 3 – A Combination of Options, Option 1 and Option 2 – Immediate Introduction of Option 1 and Gradual Replacement in Time by Option 2**

While Option 2 has its attractions in terms of national uniformity and equal justice for all Australian "workers", a more gradual approach could be contemplated by the Federal Government implementing Option 1 for an interim period (say three years), thus allowing a return to the status quo in this area in New South Wales and Queensland (while giving other States the ability to initiate their own remedies in this area in the interim period), with the ultimate aim being to institute a uniform national remedy at sometime during the life of the next Parliament. That would allow sufficient time for close consideration of all the appropriate elements to be contained within a comprehensive national remedy.