

CONTRACTS REVIEW BILL, 1980 (No. 2)

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The District Court (Contracts Review) Amendment Bill, 1980, is cognate with this Bill.

The object of this Bill is to empower the Supreme Court to grant relief against harsh, oppressive, unconscionable or unjust contracts. The District Court is, by the District Court (Contracts Review) Amendment Bill, 1980, to be given the same jurisdiction as is proposed to be given to the Supreme Court by this Bill, but only in respect of contracts where the consideration passing does not exceed the jurisdictional limit of the District Court (at present \$20,000).

Clause 1. Short title.

Clause 2 provides for the proposed Act to commence on a proclaimed date.

Clause 3. Arrangement of the proposed Act.

Clause 4. Interpretation. One of the definitions is that of "unjust", which is defined to include harsh, oppressive or unconscionable.

Clause 5 enacts that the proposed Act binds the Crown.

Clause 6 prevents relief being granted under the proposed Act to—

- (a) the Crown, a public or local authority or a corporation; or
- (b) a person who entered into a contract in the course of or for the purposes of a trade, business or profession carried on or proposed to be carried on by him, other than a farming undertaking.

Clause 7 empowers the Court, if it finds a contract to have been unjust at the time the contract was entered into, to grant the following kinds of relief:—

- (a) the Court may refuse to enforce the whole or a part of the contract;
- (b) the Court may declare the whole or a part of the contract to be void;
- (c) the Court may vary the whole or a part of the contract;
- (d) the Court may order the execution of an instrument varying or terminating the operation of a land instrument (i.e., an instrument transferring title to land or creating an estate or interest in land or a dealing as defined in the Real Property Act, 1900).

Clause 8 and Schedule 1 empower the Court to grant ancillary relief, including orders for the payment of compensation, the supply or repair of goods, and the supply of services, and orders in respect of property of any kind.

Clause 9 (1) requires the Court, when deciding whether a contract is unjust at the time it was entered into, to have regard to the public interest, and all the circumstances of the case, including the foreseeable consequences of carrying out the contract and of defaulting under the contract.

Clause 9 (2) lists some of the matters which the Court shall have regard to, including bargaining inequality, opportunity for negotiations, the ability of a party to protect his interest, the language of the contract, the use of unfair tactics, similar dealings, the subsequent conduct of the parties, and the commercial setting of the contract.

Clause 10 empowers the Supreme Court to grant orders to restrict the making of contracts by a person.

Clause 11 empowers the grant of relief in cases specially commenced to obtain relief or in other proceedings already commenced.

Clause 12 enables orders to be made against or in favour of non-parties to the contract, subject to specified safeguards.

Clause 13 enables the Minister or the Attorney General to intervene in proceedings under the proposed Act.

Clause 14 permits relief to be given under the proposed Act notwithstanding that the contract has been fully executed.

Clause 15 enables the Court to treat a contract or agreement as forming part of an arrangement, if the Court thinks it proper to do so.

Clause 16 requires application for relief to be commenced within 2 years of the making of the contract, or within 3 months before or 2 years after the exercise or performance of any power or obligation under the contract, or during the pendency of certain other proceedings relating to the contract.

Clause 17 (1) prevents contracting out. Clause 17 (2) prevents relief from being denied because of any acknowledgment of validity or past performance. Clause 17 (3) provides that the proposed Act is not prevented from applying to a contract by reason only that a provision of the contract excludes New South Wales law as the proper law of the contract. Clause 17 (4) provides that the proposed Act does not apply to genuine compromises of claims for relief. Clause 17 (5) prevents relief from being denied because the contract requires disputes to be referred to arbitration or determined by the courts of some other place.

Clause 18 makes it an offence to submit for signature a contract which excludes, restricts or modifies the application of the proposed Act.

Clause 19 limits the operation of orders varying or declaring void contracts where instruments affecting land (including land subject to the provisions of the Real Property Act, 1900) are involved.

Clause 20 provides that stamp duty is not payable on instruments executed pursuant to orders of the Court made under the proposed Act and enables the Court to order the refund of duty paid.

Clause 21 (1) protects contracts made in conformity with awards.

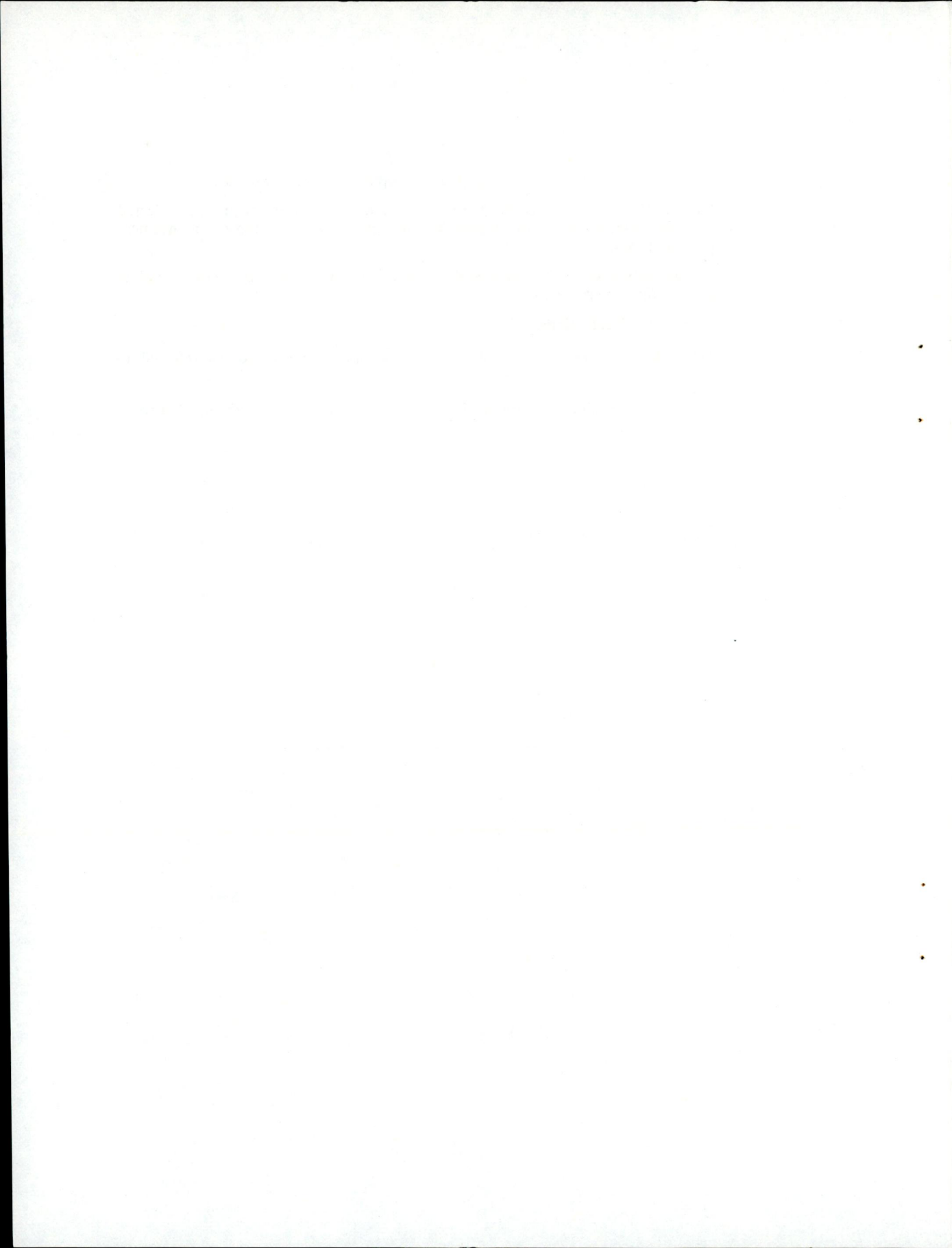
Clause 21 (3) and Schedule 2 provide that existing contracts are not affected by the proposed Act, except to the extent that they are varied after the commencement of the proposed Act.

Clause 22 states that the proposed Act is additional to any other law providing relief against unjust contracts.

Clause 23. Regulations.

Schedule 1 specifies the ancillary relief that may be granted, as referred to above in connection with clause 8.

Schedule 2 specifies the application of the proposed Act to existing contracts, as referred to above in connection with clause 21 (3).



CONTRACTS REVIEW BILL, 1980 (No. 2)

No. , 1980.

A BILL FOR

An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts.

[MR EINFELD—19 *March*, 1980.]

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

5

PART I.

PRELIMINARY.

1. This Act may be cited as the "Contracts Review Act, 1980". Short title.

2. (1) This section and section 1 shall commence on the date of assent to this Act. **Commence-
ment.**

10 (2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3. This Act is divided as follows :— **Arrange-
ment.**

15 **PART I.—PRELIMINARY—ss. 1-6.**

**PART II.—RELIEF IN RESPECT OF UNJUST CONTRACTS—
ss. 7-10.**

PART III.—PROCEDURAL AND OTHER MATTERS—ss. 11-16.

PART IV.—MISCELLANEOUS—ss. 17-23.

20 **SCHEDULE 1.—ANCILLARY RELIEF.**

SCHEDULE 2.—EXISTING CONTRACTS.

4. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires— **Interpre-
tation.**

25 "Court" means the Supreme Court of New South Wales, and, in accordance with section 134B of the District Court Act, 1973, and without affecting the jurisdictional limitations referred to in that section, includes the District Court of New South Wales;

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“land instrument” means an instrument that transfers title to land, creates an estate or interest in land or is a dealing within the meaning of the Real Property Act, 1900;

5 “unjust” includes unconscionable, harsh or oppressive; and
“injustice” shall be construed in a corresponding manner.

(2) A reference in this Act to a corporation does not include a reference to—

10 (a) a corporation that is a body corporate constituted under the Strata Titles Act, 1973, by the proprietor or proprietors of lots within the meaning of that Act; or

(b) a corporation owning an interest in land and having a memorandum or articles of association conferring on owners of shares in the corporation the right to occupy
15 certain parts of a building erected on that land,

all or the majority of which lots or parts, as the case may be, are intended to be occupied as dwellings.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits,
20 the Crown in all its other capacities. Act binds Crown.

6. (1) The Crown, a public or local authority or a corporation may not be granted relief under this Act. Certain restrictions on grant of relief.

(2) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in
25 the course of or for the purpose of a trade, business or profession carried on by him or proposed to be carried on by him, other than a farming undertaking (including, but not limited to, an agricultural, pastoral, horticultural, orcharding or viticultural undertaking) carried on by him or proposed to be carried on by
30 him wholly or principally in New South Wales.

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PART II.

RELIEF IN RESPECT OF UNJUST CONTRACTS.

7. (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following :—

Principal relief.

- 10 (a) it may decide to refuse to enforce any or all of the provisions of the contract;
- (b) it may make an order declaring the contract void, in whole or in part;
- (c) it may make an order varying, in whole or in part, any provision of the contract;
- 15 (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that—
- (i) varies, or has the effect of varying, the provisions of the land instrument; or
- 20 (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.

30 8. Schedule 1 has effect with respect to the ancillary relief that may be granted by the Court in relation to an application for relief under this Act.

Ancillary relief.

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9. (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such 5 consequences or results as those arising in the event of—

Matters to be considered by Court.

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

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

- 15 (a) whether or not there was any material inequality in bargaining power between the parties to the contract;
- (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;
- 20 (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract;
- 25 (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;
- (e) whether or not—
 - (i) any party to the contract (other than a corporation) was not reasonably able to protect his interests; or
 - 30 (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he represented, because of his age or the state of his physical or mental capacity;

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- (f) the relative economic circumstances, educational background and literacy of—
- (i) the parties to the contract (other than a corporation); and
 - 5 (ii) any person who represented any of the parties to the contract;
- (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed;
- 10 (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;
- 15
- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act—
- 20
- (i) by any other party to the contract;
 - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or
 - 25 (iii) 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;
- 30 (k) 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

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

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if he represented 5 the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) 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 10 at the time the contract was made.

(5) 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 15 since it was made.

10. Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts, it may, by order, prescribe or 20 otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

General orders.

PART III.

PROCEDURAL AND OTHER MATTERS.

11. (1) The Court may exercise its powers under this Act in 25 relation to a contract on application made to it in accordance with rules of court, whether in—

Application for relief.

(a) proceedings commenced under subsection (2) in relation to the contract; or

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(b) other proceedings arising out of or in relation to the contract.

(2) Proceedings may be commenced in the Court for the purpose of obtaining relief under this Act in relation to a contract.

5 **12.** (1) Where in proceedings for relief under this Act in relation to a contract it appears to the Court that a person who is not a party to the contract has shared in, or is entitled to share in, benefits derived or to be derived from the contract, it may make such orders against or in favour of that person as may be just in
10 the circumstances.

Interests
of non-
parties to
contract.

(2) The Court shall not exercise its powers under this Act in relation to a contract unless it is satisfied—

- 15 (a) that the exercise of those powers would not prejudice the rights of a person who is not a party to the contract; or
- (b) that, if any such rights would be so prejudiced, it would not be unjust in all the circumstances to exercise those powers,

20 but this subsection does not apply in relation to such a person if the Court has given him an opportunity to appear and be heard in the proceedings.

13. The Minister or the Attorney General, or both, may, at any stage of any proceedings in which relief under this Act is sought, intervene by counsel, solicitor or agent, and shall thereupon
25 become a party or parties to the proceedings and have all the rights of a party or parties to those proceedings in the Court, including any right of appeal arising in relation to those proceedings.

Inter-
vention.

14. The Court may grant relief in accordance with this Act in relation to a contract notwithstanding that the contract has been
30 fully executed.

Fully
executed
contracts.

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15. In any proceedings in which relief under this Act is sought in relation to a contract, the Court may, if it thinks it proper to do so in the circumstances of the case, and it is of the opinion that the contract forms part of an arrangement consisting of an inter-related combination or series of contracts, have regard to any or all of those contracts and the arrangement constituted by them. Arrangements.

16. An application for relief under this Act in relation to a contract may be made only during any of the following periods :— Time for making applications for relief.

- 10 (a) the period of 2 years after the date on which the contract was made;
- (b) the period of 3 months before or 2 years after the time for the exercise or performance of any power or obligation under, or the occurrence of any activity contemplated by, the contract; and
- 15 (c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross-action or otherwise) that are pending against the party seeking relief under this Act.

 20 PART IV.

MISCELLANEOUS.

17. (1) A person is not competent to waive his rights under this Act, and any provision of a contract is void to the extent that— Effect of this Act not limited by agreements, etc.

- 25 (a) it purports to exclude, restrict or modify the application of this Act to the contract; or
- (b) it would, but for this subsection, have the effect of excluding, restricting or modifying the application of this Act to the contract.

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(2) A person is not prevented from seeking relief under this Act by—

- (a) any acknowledgment, statement or representation; or
- 5 (b) any affirmation of the contract or any action taken with a view to performing any obligation arising under the contract.

(3) This Act applies to and in relation to a contract only if—

- (a) the law of the State is the proper law of the contract;
- 10 (b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State; or
- 15 (c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.

(4) This Act does not apply to a contract under which a person agrees to withdraw, or not to prosecute, a claim for relief 20 under this Act if—

- (a) the contract is a genuine compromise of the claim; and
- (b) the claim was asserted before the making of the contract.

(5) Without affecting the generality of subsection (1), the Court may exercise its powers under this Act in relation to a 25 contract notwithstanding that the contract itself provides—

- (a) that disputes or claims arising out of, or in relation to, the contract are to be referred to arbitration; or

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- (b) that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of some other place.

18. (1) Where a person submits a document—

Offence.

5 (a) that is intended to constitute a written contract;

(b) that has been prepared or procured by him or on his behalf; and

(c) that includes a provision that purports to exclude, restrict or modify the application of this Act to the document,

10 to another person for signature by that other person, the person submitting the document is guilty of an offence and liable to a penalty not exceeding \$2,000.

(2) Proceedings for an offence against subsection (1) shall be disposed of summarily before a court of petty sessions
15 constituted by a stipendiary magistrate sitting alone and may be commenced at any time within 2 years after the offence was committed.

19. (1) An order made under section 7 (1) (b) or (c) has
no effect in relation to a contract so far as the contract is con-
20 stituted by a land instrument that is registered under the Real
Property Act, 1900.

Orders
affecting
land.

(2) Where an order is made under section 7 (1) (b) or
(c) in relation to a contract constituted (in whole or in part) by
a land instrument, not being a land instrument registered under
25 the Real Property Act, 1900, the regulations made under this Act
may make provision for or with respect to prescribing the things
that must be done before the order, so far as it relates to the land
instrument, takes effect.

(3) The Registrar-General and any other person are here-
30 by authorised to do any things respectively required of them
pursuant to subsection (2).

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20. (1) No duty is payable under the Stamp Duties Act, Stamp
1920, in respect of— duty.

(a) an instrument executed pursuant to an order under
section 7 (1) (d); or

5 (b) a disposition of property made pursuant to an order
under clause 1 of Schedule 1.

(2) Where the Court makes an order under section 7 in
relation to a contract, it may order the refund of the whole or any
part of the duty paid under the Stamp Duties Act, 1920, in respect
10 of the contract or any instrument executed consequent on the
execution of the contract, and any amount to be so refunded shall
be payable by the Treasurer from money provided by Parliament.

21. (1) This Act does not apply to a contract of service to
the extent that it includes provisions that are in conformity with an
15 award that is applicable in the circumstances. Application
of Act to
certain
contracts
of service
and to
existing
contracts.

(2) In subsection (1), “award” means an award or industrial
agreement filed under the Industrial Arbitration Act, 1940, an award
made under the Apprentices Act, 1969, or an award
or industrial agreement made under the Conciliation and
20 Arbitration Act 1904 of the Commonwealth.

(3) Schedule 2 has effect.

22. Nothing in this Act limits or restricts the operation of any
other law providing for relief against unjust contracts, but the
operation of any other such law in relation to a contract shall not
25 be taken to limit or restrict the application of this Act to the
contract. Operation
of other
laws.

23. (1) The Governor may make regulations, not inconsistent
with this Act, for or with respect to any matter that by this Act is
required or permitted to be prescribed or that is necessary or
30 convenient to be prescribed for carrying out or giving effect to this
Act. Regulations.

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- (2) A provision of a regulation may—
- (a) apply generally or be limited in its application by reference to specified exceptions or factors; or
 - (b) apply differently according to different factors of a specified kind,
- 5 or may do any combination of those things.

SCHEDULE 1.

Sec. 8.

ANCILLARY RELIEF.

1. Where the Court makes a decision or order under section 7, it may
- 10 also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to—
- (a) the making of any disposition of property;
 - (b) the payment of money (whether or not by way of compensation) to a party to the contract;
 - 15 (c) the compensation of a person who is not a party to the contract and whose interests might otherwise be prejudiced by a decision or order under this Act;
 - (d) the supply or repair of goods;
 - 20 (e) the supply of services;
 - (f) the sale or other realisation of property;
 - (g) the disposal of the proceeds of sale or other realisation of property;
 - (h) the creation of a charge on property in favour of any person;
 - 25 (i) the enforcement of a charge so created;
 - (j) the appointment and regulation of the proceedings of a receiver of property; and
 - (k) the rescission or variation of any order of the Court under this clause,
- 30 and such orders in connection with the proceedings as may be just in the circumstances.

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SCHEDULE 1—*continued.*

ANCILLARY RELIEF—*continued.*

2. The Court may make orders under this Schedule on such terms and conditions (if any) as the Court thinks fit.

5 3. Nothing in section 6 limits the powers of the Court under this Schedule.

4. In this Schedule—

“disposition of property” includes—

- 10 (a) a conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance or discharge of mortgage;
- (b) the creation of a trust;
- (c) the release or surrender of any property; and
- (d) the grant of a power in respect of property,
- 15 whether having effect at law or in equity;

20 “property” includes real and personal property and any estate or interest in property real or personal, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest.

SCHEDULE 2.

Sec. 21 (3).

EXISTING CONTRACTS.

1. Subject to clause 2, this Act does not apply in respect of a contract made before the commencement of this Schedule.

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SCHEDULE 2—*continued.*

EXISTING CONTRACTS—*continued.*

2. Where the provisions of a contract made before the commencement of this Schedule are varied after that commencement, this Act applies in
5 respect of the contract, but—

- (a) no order shall be made under this Act affecting the operation of the contract before the date of the variation; and
- (b) the Court shall have regard only to injustice attributable to the variation.

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1980
(35c)

Statute Book

CHAPTER 2

Contract - contract

- 2. Where the provisions of a contract made before the commencement of this Schedule are varied after the commencement, they shall apply in respect of the contract as varied.
- (a) no order shall be made under this Act affecting the operation of the contract before the date of the variation and
- (b) the Court shall have regard only to written instruments in the variation.