



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 25 – Part II**

**Legal Capacity of Minors**

**WORKING PAPER**

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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## **TERMS OF REFERENCE**

The Commission has been asked to consider the recommendations contained in the New South Wales Law Reform Commission's Report on *Infancy in Relation to Contracts and Property*<sup>1</sup> as they relate to the laws in Western Australia and make recommendations in relation thereto.

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<sup>1</sup> Law Reform Commission of New South Wales, *Report on Infancy in Relation to Contracts and Property* (1969) No. 6.

## **PREFACE**

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the tentative views summarised in Chapter 4 (see blue pages below), or on the paper as a whole are invited. Submissions on any other aspect coming within the terms of reference which has not been considered in the paper are also invited. The Commission requests that any comments, criticisms or submissions be made available to it by 1 September 1978.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

## INTRODUCTION

The Commission's predecessor, the Law Reform Committee, first considered this matter in 1972 when it issued a working paper and report on Legal Capacity of Minors. The working paper<sup>1</sup> was divided into two parts. The first dealt with reduction of the age of majority, and the second with codification of the law of legal capacity of minors.

In its report,<sup>2</sup> the Committee dealt with changes to be made to the law to give effect to the Government's decision in 1971 to lower the age of majority to eighteen years. The recommended changes were adopted in the *Age of Majority Act 1972*.<sup>3</sup> With regard to the legal capacity of minors, the Committee considered that the reduction of the age of majority would take much of the urgency from the need to reform the law in this area and would permit an opportunity to assess the operation of recent New South Wales legislation<sup>4</sup> to see whether it provided a satisfactory model for adoption in this State.

Having now had the opportunity of assessing the New South Wales legislation,<sup>5</sup> and of making further comparison with legislation existing or proposed in other jurisdictions, the Commission has decided to issue a further working paper on the subject of reform and codification if necessary of the law of legal capacity of minors with particular reference to minors' contracts. The paper summarises in Chapter I the law in Western Australia, New South Wales and New Zealand dealing with minors' contracts and property. In Chapter II, using examples which could commonly arise in Western Australia, a comparison is made of the different solutions offered by the law in each jurisdiction. Chapter III contains issues for discussion and the Commission's tentative views. These views are summarised in Chapter IV.

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<sup>1</sup> Law Reform Committee of Western Australia, *Legal Capacity of Minors*, (28 January 1972) Project No. 25 Working Paper.

<sup>2</sup> Law Reform Committee of Western Australia, *Legal Capacity of Minors* (11 April 1972) Project No. 25 Report.

<sup>3</sup> The age of majority was reduced to eighteen by virtue of s.5 of the *Age of Majority Act 1972*.

<sup>4</sup> *Minors (Property and Contracts) Act 1970* (NSW).

<sup>5</sup> In assessing the New South Wales legislation the Commission received assistance from Mr. G.H. Treitel of the University of Oxford when he was visiting Professor of Law at the University of Western Australia. The Commission expresses its gratitude to Mr. Treitel.

# CHAPTER 1

## ANALYSIS OF THE PRESENT LAW RELATING TO MINORS' CONTRACTS AND PROPERTY IN WESTERN AUSTRALIA, NEW SOUTH WALES AND NEW ZEALAND

### PART A - THE LAW IN WESTERN AUSTRALIA

#### Introduction

1.1 The law in Western Australia governing minors' contracts is based on English case law with the addition of a limited number of statutory provisions dealing with specific types of contracts.<sup>1</sup> In text books dealing with the subject, it is not uncommon to find propositions supported by cases decided in the 17th-19th centuries. The rationale and effect of many of these early cases are obscure and sometimes inappropriate in the social climate of today. In addition many English cases deal with legislation affecting minors' contracts which is not found in Western Australia.<sup>2</sup>

1.2 There would appear to be little evidence that the existing law in Western Australia relating to minors' contracts is causing difficulty in practice. There are no recent cases on the subject and the experience of several persons with expertise in various fields, who have been approached by the Commission, has been that litigation involving contracts by minors is rare. Nevertheless, the existing law in Western Australia on this topic, summarised in the remainder of this part of this chapter, is full of uncertainty and in many cases can give rise to quite unsatisfactory results.

1.3 The question is whether in the absence of significant practical difficulties reform is necessary or desirable. Some members of the community may take the view that the reason for the absence of practical difficulties is that the number of minors who enter into contracts or property dealings in Western Australia and the amounts involved are insignificant, particularly since the age of majority has been reduced to eighteen. If this were so, a pragmatic view might be that reform is unnecessary.

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<sup>1</sup> See Appendix I.

<sup>2</sup> For example, the *Infants Relief Act 1874* (UK).

1.4 The Commission would, however, tentatively reject such a view. It is difficult to determine the number, range and value of contracts entered into by minors but there are several reasons for believing that the teenage market force is not as insignificant as some might think. The school leaving age is fifteen years. This gives minors two years of employment before they become adults. Savings of several hundred dollars or more could be accumulated in this period. Others may spend money or deal with property given to them by their parents, or from a family trust. It might also be reasonable to assume that increasing availability of credit opens the way for minors to enter into a greater number of more expensive contracts.<sup>3</sup>

1.5 The Commission has been informed that it is common in Western Australia for minors to enter into contracts concerning not only consumer goods but also motor cars, shares and real estate. Against this background it might not be true that the lack of evidence of practical difficulties and litigation demonstrates that there are in fact no problems in this area. It is more likely to be the case that problems have arisen but that they have not surfaced. Potential actions may have been settled with the assistance of the minor's parents, or because the parties have been reluctant to litigate especially if the amount involved, is small, the law is complex and the cost of litigation is high.

1.6 The law in Western Australia distinguishes between five different categories of contract entered into by minors. They are -

1. contracts for necessities;
2. contracts of service which are beneficial to the minor;
3. contracts which are absolutely void;
4. contracts which are binding on the minor until he repudiates;
5. contracts which are never binding on the minor.

1.7 Different legal consequence flow from each of these categories and it is proposed to deal separately in this part with each in turn. Contracts falling within categories 3, 4 and 5 raise questions relating to the rights of the parties to the contract to recover money or property (real or personal) which has passed pursuant to the contract. The rights of third parties might

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<sup>3</sup> The Ontario Law Reform Commission, *Report on the Age of Majority and Related Matters* (1969) at 33 makes this suggestion pointing out that credit granting to teenagers has become large-scale in North America.

also be affected. It is one thing for the law to permit a minor to repudiate liability and obligations under a contract, but in the many cases where property or money has changed hands, the parties (and perhaps even third parties) may wish to know what happens in respect of that property if the minor does repudiate. In categories 3, 4 and 5, therefore, the law relating to the binding effect of the relevant contracts is amalgamated with a consideration of property rights flowing therefrom, assuming in each case the absence of fraud by the minor. If the minor has been fraudulent, equitable rights arise and these are considered separately below.<sup>4</sup> Other matters considered are -

- (a) the minor's liability for torts connected with a contractual liability;<sup>5</sup>
- (b) the liability of a person who guarantees a minor's contract;<sup>6</sup>
- (c) the law relating to minors and agents;<sup>7</sup>
- (d) the law relating to non-contractual dealings involving minors such as gifts by or to a minor.<sup>8</sup>

### **The binding nature of minors' contracts**

#### (1) *Contracts for necessities*

1.8 A minor is bound by a contract for necessary goods or services as if he were an adult. It is not clear, however, in the case of goods, whether his liability is simply to pay a reasonable price for goods actually supplied,<sup>9</sup> or whether he is contractually bound to receive and pay for goods yet to be delivered. This category of binding contracts is intended to

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<sup>4</sup> See paragraphs 1.40 to 1.42 below.

<sup>5</sup> Ibid.

<sup>6</sup> See paragraphs 1.43 to 1.44 below.

<sup>7</sup> See paragraphs 1.45 to 1.47 below.

<sup>8</sup> See paragraphs 1.48 to 1.50 below.

<sup>9</sup> For necessary "goods", s.2 of the *Sale of Goods Act 1895* applies and contains the following definition: "goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery". Being required to pay only a reasonable price and not the contract price would suggest that the minor's liability is not contractual and this section is said to be declaratory of the common law. See also Cheshire and Fifoot, *Law of Contract* (3rd Aust. ed. 1974) at 463-464 and Harland, "The Contractual Capacity of Minors - A New Approach" (1973) 7 Sydney LR No. 1 41 at 43.

introduce an element of certainty into the law so that adults will not be reluctant to enter into contracts for necessities with minors.<sup>10</sup>

1.9 It is arguable whether the development of the law relating to necessities has achieved its objective. There remains a considerable element of uncertainty. For example, the contract is not binding unless the item concerned is necessary for the minor having regard to his means, his station in life and whether he is already adequately supplied with the same.<sup>11</sup> Even with knowledge of the minor's circumstances it might be difficult to determine what is or is not a necessary. Much may depend on changing social conditions. For example, it might not follow because it was held in Ontario in 1922<sup>12</sup> that the purchase of a motor car for a minor's business was not a necessary, that it would not be a necessary in the same circumstances in Western Australia today.

1.10 There are doubts as to whether the goods or services must be necessary at the time of the contract, or at the time they are delivered or performed or both.<sup>13</sup> Having established that his contract is for necessities, the adult may still fail if it contains unreasonable and oppressive terms.<sup>14</sup>

1.11 It is not only the adult supplier of the goods or services who might be interested in the question whether they are necessities. The question might also affect any person who has lent money to the minor. This is because to the extent to which the minor has spent the money on necessities, the lender is subrogated in equity to the rights of the supplier to recover from the minor the costs of such necessities. It is not clear, however, whether this would be the actual

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<sup>10</sup> In *Zouch d Abbot and Hallet v Parsons* [1558-1774] All ER Rep 161 at 163 Lord Mansfield said:  
 "...miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessities, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others if they were bound by no act".

<sup>11</sup> *Nash v Inman* [1908-10] All ER Rep 317.

<sup>12</sup> *Pyett v Lampman* [1923] 1 DLR 249 and see *Mercantile Union Guarantee Corporation Ltd v Ball* [1937] 3 All ER 1.

Obviously the intended use of the car is relevant. For a more recent example, in *Re Mundy* [1963] ALR 264, a minor purchased a car under hire purchase for his own private purposes and occasionally for transport to his place of employment - a distance of 8-10 miles. It was held that the car was not a necessary as it was not purchased for use in the minor's business. In *Scarborough v Sturzaker* (1905) 1 Tas LR 117 it was held that a bicycle to be used occasionally for transportation to work - 12-14 miles distant was a necessary. In *Mercantile Credit Ltd. v Spinks* [1968] QWN 32 the car was held to be a necessary to enable the minor to earn his living as a salesman.

<sup>13</sup> s.2 of the *Sale of Goods Act 1895* refers to goods being necessary at the time of sale and delivery, and this is generally regarded as being declaratory of the common law, see paragraph 1.8 n.9 above. However, Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 6 says that the common law requirement was simply that the goods were necessary at the time of delivery. Sutton, *Sale of Goods* (2nd ed. 1974) at 44 seems to support this view.

<sup>14</sup> *Re Mundy* [1963] ALR 264.

or reasonable costs. A good illustration of this principle is *Wong v Kim Yee*.<sup>15</sup> In this case the minor borrowed money for car repairs, payment of a life insurance premium, a school transfer fee, daily use, school books and a jacket. Of these, only the school transfer fee, the school books and the jacket were regarded as necessities. Repayment of the loan for the other purposes was unenforceable.<sup>16</sup>

(2) *Contracts of service which are beneficial to the minor*

1.12 Like contracts for necessities, contracts of service, that is contracts of apprenticeship,<sup>17</sup> for education or instruction in a trade or profession or to fit the minor to earn his own living, are binding provided that they are wholly or substantially for the benefit of the minor.<sup>18</sup> The category has been extended by analogy to contracts which enable the minor to support himself whether or not any element of education is involved,<sup>19</sup> but it quite clearly does not extend to trade contracts. The distinction, however, is often difficult to draw. Treitel points out:<sup>20</sup>

"An infant haulage contractor is a trader, but probably an infant racing driver would not be. An infant house painter would probably be regarded as a trader; but not an infant portrait painter".

(3) *Contracts which are absolutely void*

1.13 There would appear to be two situations at common law where a contract with a minor is absolutely void. One is where the minor is too young to understand the nature of the agreement.<sup>21</sup> The other is a more uncertain category consisting of contracts which are not just

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<sup>15</sup> (1961) 34 WWR 506.

<sup>16</sup> The payment of life insurance premiums creates an interesting question. In Australia s.85 of the *Life Insurance Act 1945* (Cwth) gives full capacity to minors sixteen years of age or more to enter into life insurance contracts. However, it does not follow that such a contract will always be one for necessities. In the instant case, life insurance was not deemed a necessary for an unmarried minor.

<sup>17</sup> It is possible in Western Australia for apprenticeship agreements to be regulated under Part VIII of the *Industrial Arbitration Act 1912*.

<sup>18</sup> *De Francesco v Barnum* [1886-90] All ER Rep 414.

<sup>19</sup> See for example *Doyle v White City Stadium Ltd* [1934] All ER Rep 252 and *Chaplin v Leslie Frewin (Publishers) Ltd* [1965] 3 All ER 764.

<sup>20</sup> *The Law of Contract* (4th ed. 1975) at 374.

<sup>21</sup> Harland, *Law of Minors* (1974) at 8, paragraph 203.

non-beneficial to the minor but are prejudicial to him.<sup>22</sup> These comprise mainly contracts with penal provisions but the category may be wider to include those which are manifestly unfair.<sup>23</sup> Thus in *Beam v Betty*<sup>24</sup> a minor sold shares to an adult with an undertaking to indemnify him in the event that he later sold the shares at a loss. The contract was held to be absolutely void.

1.14 There is some justification for the creation of a category of absolutely void contracts. The parties are able to recover their property or money,<sup>25</sup> and, as a nullity cannot be ratified, a minor can obtain relief in spite of conduct which might for other contracts amount to ratification.<sup>26</sup>

1.15 On the other hand in some circumstances these consequences might be undesirable. Third parties, for example, may not obtain good title to goods which have been the subject of a void contract.<sup>27</sup> It may subsequently be for the benefit of a minor to ratify and thereby enforce a void contract. In such a case an adult may be in a position where he is benefiting from his repugnant contract. Finally, return of goods and money may be an inadequate remedy if, for example, the goods have been damaged, or the money has been spent.

1.16 The Commission tentatively supports suggestions made<sup>28</sup> that the law relating to voidable contracts<sup>29</sup> is capable of providing sufficient protection for minors subject, however, to suitable reforms in that area. A category of absolutely void contracts would then be unnecessary.

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<sup>22</sup> Halsbury, *Laws of England* (3rd ed. 1957) vol. 21 at 138 paragraph 310 and Harland, *Law of Minors* (1974) at 10-11, paragraphs 206-207.

<sup>23</sup> See Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 32-34.

<sup>24</sup> (1902) 4 OLR 554.

<sup>25</sup> See generally Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 34-36 and *Upper v Lightning Fasteners Employees' Credit Union* (1967) 9 CBR (NS) 211; *Re Staruch* [1955] 5 DLR 807; *Corpe v Overton* (1833) 10 Bing. 252; 131 ER 901. This could be the reason why the words "absolutely void" were adopted in s. 1 of the *Infants Relief Act 1874* (UK): see Treitel, *The Law of Contract* (4th ed. 1975) at 382-384. However, it is not the way in which the courts in England have interpreted them.

<sup>26</sup> *De Garis V Dalgety & Co Ltd* [1915] SALR 102.

<sup>27</sup> Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 36 says:

"If a third party were to purchase goods from an infant which the latter had obtained from the original seller under a void contract, then presumably the goods could be recovered by the original seller under the rule *nemo dat quod non habet*".

<sup>28</sup> *Ibid.*, at 32-36 and Ontario Law Reform Commission, *Report on the Age of Majority and Related Matters* (1969) at 34.

<sup>29</sup> See paragraphs 1.30 to 1.39 below.

(4) *Contracts which are binding until repudiated*

1.17 There are a number of contracts which are regarded as binding on the minor and require a positive act of repudiation on his part either before<sup>30</sup> or within a reasonable time from when he reaches full age, if the minor wishes to avoid liability. These include contracts dealing with shares, partnership agreements, marriage settlements and land.

1.18 The explanation for this special category of contracts is that the minor is by virtue of his contract receiving long term benefits in exchange for a continuing obligation and therefore he ought to be bound by his agreement, at least until he repudiates. This might be true in the case of a partnership agreement or a tenancy agreement, but it is hardly applicable to a contract to purchase paid up shares or a freehold interest in land. The continued existence of this special category has been criticised on the basis that it is founded on "social and economic factors which have long since passed away".<sup>31</sup>

1.19 The most likely contracts in this category to arise in practice are contracts to purchase shares or land and tenancy agreements. Although the same basic principles apply to all contracts within this category, they each give rise to different practical considerations. It is therefore convenient to deal first with contracts to purchase shares and tenancy agreements, followed by a separate consideration of the property rights of the parties and third parties. Contracts for the purchase of land merit separate consideration because of the effect of specific legislation in this area.

**(a) Contracts for the purchase of shares and tenancy agreements**

1.20 The Commission has been informed that it is not uncommon for minors to purchase shares through the stock exchange, usually at the instigation of their parents, as a form of investment, provided such a dealing is permitted by the company's articles of association. In fact school competitions have been formed to encourage an active interest by young persons in the stock market. According to the Commission's information, with one or two exceptions during the mining boom period of the early 1970's, there have been no problems in practice. The problems during the boom period involved brokers who entered into contracts with a

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<sup>30</sup> An election made before a minor reaches full age is not binding on him and may be reversed when he attains his majority: *North Western Railway Co. v M'Michael* (1850) 5 Exch 114; 155 ER 49.

<sup>31</sup> Treitel, *The Law of Contract* (4th ed. 1975) at 378.

minor to purchase shares for him on credit, only to find that when the time came for the minor to pay for the shares, he refused to do so thereby repudiating his contract and avoiding liability.<sup>32</sup> The brokers might, however, have a lien over the shares in these circumstances enabling them to sell the shares to recoup part or possibly the whole of their loss.<sup>33</sup>

1.21 The only other situation where a minor may wish to repudiate a contract concerning shares is where he may become liable for unpaid capital. In this case on repudiation the shares revert to the transferor but the minor having received what he bargained for is unable to recover any money<sup>34</sup> or property with which he has parted.<sup>35</sup> Obviously this would have a disruptive effect on the stock exchange but the problem is unlikely to occur frequently in practice as the Commission is informed that companies do not as a rule issue contributing shares to minors. If a minor endeavoured to obtain an interest in these shares, the company would probably refuse to register the transfer.

1.22 In the case of a tenancy agreement, the minor may repudiate his agreement at any time during the term agreed. He thereby avoids liability for rent for the unexpired period of the agreed term and he would probably be able to recover his bond notwithstanding that it was part of the agreement that this be forfeited if he failed to complete the full term. He would be unable to recover any portion of the rent paid. It is open to doubt whether he could be sued for unpaid arrears owing at the time of repudiation.<sup>36</sup>

#### **(b) Property rights affecting the parties and third parties to voidable contracts**

1.23 Problems regarding the property rights of the parties to a voidable contract and third parties are unlikely to arise in practice in the context of share transactions or tenancy agreements. The rule, however, is that the minor<sup>37</sup> and the adult<sup>38</sup> parties cannot recover

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<sup>32</sup> Treitel (ibid., at 375-376) seems to suggest that in these circumstances a repudiation after liability has accrued may be too late.

<sup>33</sup> See Bowstead, *Agency* (14th ed. 1976) at 226-228.

<sup>34</sup> *Steinberg v Scala (Leeds) Ltd.* [1923] All ER Rep 239 and see Harland, *Law of Minors* (1974) at 24 paragraph 225.

<sup>35</sup> See Harland, *Law of Minors* (1974) at 23 paragraph 224 citing *Pearce v Brain* [1929] All ER Rep 627. However, this case was decided under the provisions of the *Infants Relief Act 1874* (UK) and, furthermore, as it involved the purchase of a motor car in exchange for a motor cycle, would have fallen at common law into the category of contracts which are never binding: see paragraphs 1.30 to 1.39 below. There is a line of authority, however, to say that the recovery of property, or at least land, depends not fortuitously on whether he has received any part of what he bargained for, but on whether he can effect restitution: see Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 22-23.

<sup>36</sup> See Treitel, *The Law of Contract* (4th ed. 1975) at 377.

<sup>37</sup> See paragraph 1.21 above.

money paid unless there has been a complete failure of consideration. The same rule applies to property with a possibility that it may also be recovered if restitution is possible.<sup>39</sup> If a minor purports to repudiate while he is a minor, on one view, title in any property concerned goes into suspense.<sup>40</sup> The better view, however, might be that a voidable title reverts to the original transferor.<sup>41</sup>

1.24 If a minor disposes of property to a third person before repudiating his contract, the third party would obtain good title.<sup>42</sup> A difficulty could arise, however, where a minor obtains property without paying for it (possibly as part of a partnership agreement) repudiates liability, then disposes of the property to a third person. The problem would be whether the property reverts back to the transferor,<sup>43</sup> or whether the rights of the third party take precedence. In many cases, legislation relating to the sale of goods may operate giving statutory protection to the third party.<sup>44</sup>

### (c) Contracts involving land

1.25 The only statutory provision in Western Australia relating to a minor's capacity to deal with land is s.150 of the *Land Act 1933*. This provides that a person under eighteen years of age who is the holder of any conditional purchase lease or other holding or permit or licence under that Act shall be capable of dealing with it as if he were of full age. Power is given to the Supreme Court to review the terms of any such dealing.

1.26 Most of the land in Western Australia is now under the provisions of the *Transfer of Land Act 1893*. Section 159 of that Act provides that if a registered proprietor of land is a minor, this fact shall be noted on the title.<sup>45</sup> The purpose of this requirement would appear to be to inform those dealing with the land that they are dealing with a minor and that they may not obtain an indefeasible title if he elects to repudiate.<sup>46</sup> Where the Registrar is aware that a registered proprietor is a minor, he enters a caveat on the title to protect the minor's interests.<sup>47</sup>

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<sup>38</sup> See Harland, *Law of Minors* (1974) at 24 paragraph 225.

<sup>39</sup> See paragraph 1.21 n.35 above.

<sup>40</sup> *NorthWestern Railway Co. v M'Michael* (1850) 5 Exch 114; 155 ER 49.

<sup>41</sup> Harland, *Law of Minors* (1974) at 13 paragraph 210.

<sup>42</sup> Percy, *The present Law of Infants' Contracts* (1975) 53 CBR No. 1 at 30.

<sup>43</sup> As it would if third parties were not involved, see paragraph 1.21 above.

<sup>44</sup> See paragraphs 1.38 to 1.39 below.

<sup>45</sup> cf. s.67 of the *Land Transfer Act 1952* (NZ) which contains an identical requirement.

<sup>46</sup> Francis, *Torrens Title in Australia* (1973) Vol. 2 at 3-4.

<sup>47</sup> *Transfer of Land Act 1893*, s.188(iii).

The result appears to be that although there is no legal barrier to a minor dealing on his own behalf in land,<sup>48</sup> in practice he is unable to do so until the Registrar's caveat is removed. This normally involves an application under s.82 of the *Trustees Act 1962* which entitles the Supreme Court, where it considers that to do so is necessary or desirable in the interests of the minor, to appoint a trustee to sell, lease or mortgage the minor's land.

1.27 Because of these practical obstacles to a minor dealing with land, it is a common practice in Western Australia for the land to be purchased initially not by the minor, but by an adult as trustee for the minor. The minor's interests are protected by filing a declaration of trust in the Titles Office. Although this cannot be noted on the title itself<sup>49</sup> it is given a registration number and is held in the Titles Office so that the trust provisions can be checked for the necessary powers whenever there is a dealing with that land.

1.28 The situation becomes more complex if a minor deals in land without disclosing that he is a minor. There is no statutory requirement for a minor to state his age when purchasing land and, unless his suspicions are aroused by the signature on the transfer or other relevant documents, the Registrar does not as a rule make enquiries in this respect. It appears that a person dealing with a minor may or may not obtain an indefeasible title to land depending on whether he is aware of the minor's age.<sup>50</sup> It has been held that a purchaser should make enquiries at least as to whether the previous registered proprietor is of full age before being entitled to rely on the indefeasibility of title principle.<sup>51</sup> The better view might be, however, that in the absence of actual knowledge of the transferor's age, the purchaser ought to be concerned only with the information on the certificate of title.<sup>52</sup>

1.29 Assuming the absence of fraud, the indefeasibility of title principle would apply to subsequent dealings with property not involving the minor.<sup>53</sup>

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<sup>48</sup> cf. *Law of Property Act 1925* (UK), s.1(6).

<sup>49</sup> *Transfer of Land Act 1893*, s.55.

<sup>50</sup> See generally Adams, *Land Transfer Act* (2nd ed. 1971) at 107-108 paragraph 102; Voumard, *The Sale of Land* (2nd ed. 1965) at 166-167 and at 470 n.1, and Baalman, *The Torrens System in N.S.W.* (2nd ed. 1974) at 145-146.

<sup>51</sup> *Coras v Webb & Hoare* [1942] QSR 66.

<sup>52</sup> See Adams, *Land Transfer Act* (2nd ed. 1971) at 107-108 paragraph 102 and *Percy v Youngman* [1941] VLR 275.

<sup>53</sup> The general principle is that a person dealing with land ought to have no need to check to see whether the previous registered proprietor has an indefeasible title: see Adams, *Land Transfer Act* (2nd ed. 1971) at 10 paragraphs 5-6.

(5) *Contracts which are never binding on the minor*

1.30 Contracts falling within this category include contracts to purchase or sell such items as motor cars,<sup>54</sup> cycles, television sets, or hi fi equipment (provided none of these are regarded in law as necessities<sup>55</sup>), or contracts to receive a course of non-necessary services such as a health and fitness programme. Such contracts are unenforceable against the minor for all time, even after he becomes an adult unless he ratifies the contract in writing<sup>56</sup> (that is, declares it to be binding) after he reaches full age. The minor is able to enforce the contract against the adult but not by way of specific performance as this is an equitable remedy and the parties are not in an equal position.<sup>57</sup> If the minor were to bring an action against an adult for breach of contract one might expect that in all fairness the minor ought to be bound to complete his contractual obligations. However, it is doubtful whether this would be so.<sup>58</sup>

1.31 Apart from the inherent uncertainty in these contracts from the adult's point of view, the law relating to non-binding contracts with minors is unsatisfactory in three respects which relate to rights over property passing pursuant to such contracts. It should be noted, however, that most text books and case law on this topic deal with English legislation declaring these contracts "absolutely void".<sup>59</sup> There is no equivalent legislation in Western Australia. Theoretically, our courts could develop a fresh approach to the existing problems on the basis that there is a material distinction between contracts which are made absolutely void by

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<sup>54</sup> In Western Australia a minor may obtain a motor driver's licence when he reaches the age of seventeen years, but if he is below this age and can show undue hardship if he is denied a licence, the Road Traffic Authority is authorised to issue a licence provided it has the consent of a parent or guardian or employer: *Road Traffic Act 1974*, s.42 (2) (a).

<sup>55</sup> See paragraph 1.9 above.

<sup>56</sup> *Lord Tenterden's Act* (1828) 9 Geo IV c 14, s.15 imposes the requirement for writing. The Act was received as part of the common law of England into Western Australia: see *De Garis v Dalgety & Co. Ltd.* [1915] SALR 102. This requirement for writing creates a sometimes artificial distinction between ratification of a contract and entry into a fresh contract by a minor when he reaches full age. The latter requires fresh consideration, but is not defeated by an absence of writing.

<sup>57</sup> *Flight v Bolland* [1824-34] All ER Rep 372; *Kell v Harris* (1915) 15 SR (NSW) 473.

<sup>58</sup> Harland, *Law of Minors* (1974) at 20 paragraph 219 says:

"It has been suggested that the granting of a judgment in favor of the infant would render the contract binding on him (Hartwig, *Infants' Contracts in English Law* (1966) 15 I & CLQ 780 at 808. See also Treitel, *Law of Contracts* (3rd ed. 1970) at 487), but, as the courts generally had no power to approve a contract on behalf of an infant and thus render it binding on him, this must be regarded as very doubtful."

See also the Report of the New South Wales Law Reform Commission on *Infancy in Relation to Contracts and Property* (1969) LRC 6 at 22 paragraph 5 where it is suggested that the minor would be bound in these circumstances but that the point does not appear to have been decided.

<sup>59</sup> *Infants Relief Act 1874* (UK), s. 1.

statute, and contracts which are voidable at common law. In this respect, Canadian cases, having developed from common law principles, may be more relevant than English cases.<sup>60</sup>

1.32 The first difficulty relates to the minor in that he may benefit from the protection of the law only if he has not fulfilled his contractual obligations. If he has executed the contract, for example by paying the purchase price or handing over his property in exchange for the item he requires, it is only in exceptional circumstances that he can recover it. In the case of money, he can recover only if he has not received any part of the consideration.<sup>61</sup> On this view, if the minor purchases and receives an expensive stereo set and then repudiates the contract (assuming the set is not a necessary) he cannot recover his money even if he has not used the set and is willing to return it.

1.33 The rigour of the law relating to recovery of money has recently been relaxed in Canada. In *Bo Lassen v Josiassen*<sup>62</sup> the plaintiff aged seventeen purchased a motor bike from a dealer for \$130. He did not use the bike and sought to recover his money. It was held that as the minor could effect *restitutio in integrum* (that is, return the adult to his original position) he ought to be entitled to recover his money provided he returned the bike.

1.34 In the case of recovery of property, the cases tend to establish that this depends on whether the minor is able to effect *restitutio in integrum*, although there is a suggestion that recovery is still not permissible if the minor has received any part of the consideration.<sup>63</sup> It might be possible, based on a judgment in a recent English case,<sup>64</sup> to apply different rules relating to recovery of property depending on whether it passes by delivery or by document. Denning L.J. took the view that a minor could recover a copyright he had assigned to the defendants on the basis that the latter had a voidable title only, which reverted back to the minor on his avoidance of the contract. The majority took the orthodox view that recovery depended on whether *restitutio in integrum* were possible, which it was not on the facts.

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<sup>60</sup> Much assistance in this respect has been obtained from an excellent article by Percy, *The Present Law of Infants' Contracts* (1975) 53 CBR No. 1 particularly at 24-30.

<sup>61</sup> *Holmes v Blogg* (1818) 8 Taunt 508; 129 ER 481. The rule is similar to contracts dealing with shares and land: see paragraphs 1.21 and 1.23 above.

<sup>62</sup> [1973] WWR 317 and see also *Valentini v Canali* [1886-90] All ER Rep 883 and Sutton, *Sale of Goods* (2nd ed. 1974) at 57-59.

<sup>63</sup> See Harland, *Law of Minors* (1974) at 23 paragraph 224 but there are doubts as to whether this applies to non-binding contracts as opposed to contracts which are binding unless repudiated.

<sup>64</sup> The judgment of Denning L.J. in *Chaplin v Leslie Frewin (Publishers) Ltd.* [1965] 3 All ER 764, a case in point as it was decided on common law principles and not influenced by s.1 of the *Infant's Relief Act 1874* (UK).

1.35 The second difficulty relates to the position of an adult. His rights are perhaps more uncertain and in many respects more unsatisfactory than those of the minor. It appears to be doubtful whether he can recover money even if there is a total failure of consideration.<sup>65</sup> With regard to property it has been said that an adult cannot recover non- necessary goods supplied even if these have not been paid for.<sup>66</sup> However, such comments are based on English cases decided under s.1 of the *Infants Relief Act 1874* (UK). In Canada, where there is no such legislation, it has been held that an infant who refuses to pay for goods supplied is obliged to return them.<sup>67</sup>

1.36 There are several possible steps which might in practice be taken by the adult party to protect his interests in view of his uncertain rights. For example, he may -

- (a) be selective when granting credit taking into account such matters as whether the minor is still at school or employed, his age, his parents' credit records and the extent of his family ties in Western Australia;
- (b) obtain an indemnity from the minor's parents;<sup>68</sup>
- (c) threaten the minor with a bad credit record which might affect his chances of obtaining credit elsewhere and perhaps his employment prospects;
- (d) retain title in the goods so that he may repossess them if the minor fails to meet his payments - this being a particularly common practice in the case of sales of motor vehicles;
- (e) seek assistance from the minor's parents or sue the minor as a matter of course in the hope that he will be reluctant to incur further expense by seeking legal advice and may simply pay.

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<sup>65</sup> See the much criticised decision of *Cowern v Nield* [1911-13] All ER Rep 425 and Harland, *Law of Minors* (1974) at paragraph 225.

<sup>66</sup> See for example Treitel, *Law of Contract* (4th ed. 1975) at 390 and Harland, *Law of Minors* (1974) at 23-24 paragraph 225. But see Sutton, *Sale of Goods* (2nd ed. 1974) at 60-65 for a discussion of authority to the contrary.

<sup>67</sup> *Louden Manufacturing Company v Milmine* (1907) 14 OLR 532, affirmed (1908) 15 OLR 53.

<sup>68</sup> It may be important to obtain an indemnity rather than a guarantee: see paragraphs 1.43 to 1.44 below.

1.37 The third difficulty concerns rights of third parties. If either party has a right to recover property which has been transferred pursuant to the contract what happens if that property has been transferred to a third party? If, for example, a minor exchanges his motor bike for a car which is never delivered and the adult meanwhile sells the motor bike to a third person and disappears with the proceeds, a question may arise as to whether the minor can recover the bike from the third person. As one commentator has said:<sup>69</sup>

"It was clearly laid down at common law that a conveyance of real property made to or by an infant was voidable by him. Even a bona fide purchaser without notice would not be protected against a subsequent repudiation by an infant interested in a conveyance forming part of the chain of title. There was also some, though curiously little, authority that the same rule applied to a disposition of personal property. (See e.g. Williams, *Treatise on the Law of Vendor and Purchaser*, 4 ed. (1936), at 847-850)."

1.38 The operation of such a principle with its obviously disruptive effect on the market has been considerably restricted by sale of goods legislation. Section 23 of the *Sale of Goods Act 1895* provides that where the seller of goods has a voidable title but sells them before his title is avoided, a person who buys the goods in good faith and without notice of the seller's defect in title obtains good title to the goods.

1.39 Even if an adult were to sell the goods after the minor has repudiated the contract, a bona fide purchaser may be protected under s.25(2) of the *Sale of Goods Act 1895*. This protection arises where the seller (e.g. the adult) has himself bought or agreed to buy the goods from another (e.g. the minor) and is in possession of the goods with the consent of that other.<sup>70</sup>

### **The effect of fraud by a minor and his liability in tort**

1.40 So far, the Commission has dealt with the situation regarding minors' contracts and the property rights flowing therefrom in the absence of fraud. If the minor has been fraudulent, this allows the adult to have access to more favourable equitable remedies. However, the aim of equitable remedies is to effect restitution. They fall short of enforcing a contract by a minor. Thus if a minor fraudulently misrepresents that he is of full age, he cannot be sued in tort for deceit since this would render him liable in damages and would leave him in much the

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<sup>69</sup> Harland, *The Contractual Capacity of Minors – A New Approach* (1973) 7 Sydney LR No. 1 at 55.

<sup>70</sup> See generally Greig, *Sale of Goods* (1974) at 80-91.

same position as he would be if he had been sued for breach of contract.<sup>71</sup> If he were liable for deceit, adults might require in every contract a representation that the minor was of full age.

1.41 A similar attitude has been taken in respect of other tortious wrongs committed by the minor, that is, he is not liable if this would have the effect of enforcing his contractual obligations. Thus in *Jennings v Rundall*<sup>72</sup> a minor was not liable in tort for negligently injuring a hired horse while riding it. However, if he departs altogether from the contract he may leave himself open to suit. This is illustrated by a case where a minor was sued in detinue where he hired an amplifier and microphone and could not return it having wrongfully disposed of it to a third person.<sup>73</sup>

1.42 Although an adult may not be able to sue a fraudulent minor in deceit, it is well established that the minor's fraud prevents him from enforcing outstanding contractual obligations.<sup>74</sup> In addition, a fraudulent minor cannot profit from his fraud and, under the law relating to restitution, he may be compelled at least to return goods or money remaining in his possession,<sup>75</sup> and possibly any proceeds of sale if he has disposed of them to a third person.<sup>76</sup> The adult might also have rights to trace property or its proceeds in the hands of the minor and possibly further into the hands of a third party.<sup>77</sup>

### **Guarantors and indemnifiers**

1.43 It is common practice for an adult on entering into a contract with a minor to obtain a guarantee or an indemnity from the minor's parents in case the contract turns out to be unenforceable. It has been held that only an indemnity confers liability on the parents. They are not liable if they guarantee payment of a debt by a minor if the minor is not obliged in law

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<sup>71</sup> There may be an argument, however, that a fraudulent minor ought to be estopped from setting up his defence of infancy in respect of an action to enforce the contract - Sutton, *Sale of Goods* (2nd ed. 1974) at 53 n.57.

<sup>72</sup> (1799) 101 ER 1419.

<sup>73</sup> *Ballett v Mingay* [1943] 1 All ER 143 and see *Burnard v Haggis* (1863) 143 ER 360 where a minor was liable when he lent the horse to a friend who jumped it in spite of an express prohibition on jumping in the contract. Liability arose because he had departed wholly from the contract.

<sup>74</sup> In *Lempriere v Lange* (1879) 12 Ch D 675 a landlord was able to set aside a lease he had granted to a fraudulent minor even though the latter wished the lease to continue.

<sup>75</sup> This is not such a great advantage if it were accepted that the minor always has this obligation when he is not bound by a contract - a view which prevails in Canada: see paragraphs 1.33 and 1.35 above.

<sup>76</sup> *Stocks v Wilson* [1913] 2 KB 235, but see *R. Leslie Ltd. v Shiell* [1914-15] All ER Rep 511 where it was held that this principle did not extend so far as to require a minor to repay a loan.

<sup>77</sup> The recovery of property is discussed at some length by Sutton, *Sale of Goods* (2nd ed. 1974) at 52-65.

to discharge it.<sup>78</sup> However, this proposition is based on the *Infants Relief Act 1874* (UK) which renders contracts "absolutely void" not voidable, and it might be argued that its application ought to be so restricted. For example, in *Land and Homes (WA) Ltd. v Roe*<sup>79</sup> it was held in respect of a voidable contract<sup>80</sup> that a guarantor was liable at least until the minor repudiated the contract. However, if the basic principle is unsatisfactory, it is equally unsatisfactory to limit its operation by creating further fine and possibly illogical distinctions. It might be better to abolish the basic principle.<sup>81</sup> The distinction between a guarantor, who is liable only through the principal debtor, and an indemnifier, who is primarily liable, is a technical one, often difficult to draw and which certainly prejudices an adult who enters into a contract on the strength of the guarantee.

1.44 One alternative is for the adult to contract jointly with the minor and an adult. The latter would then be liable jointly and severally.<sup>82</sup>

### Minors and agents

1.45 There has been some controversy as to whether a minor is bound by his contract with an adult agent.<sup>83</sup> The point may be relevant if the minor is sued for his commission. It appears that the agency contract ought to be placed in the same category as the type of contract which the agent was appointed to enter into although this approach is not free from criticism.<sup>84</sup> Thus, if the agent is appointed to purchase necessities, not only will the infant be bound as principal in respect of the agent's contracts, but normally he will also be bound by his agency contract; if it is to buy land, both contracts will be binding until repudiated, and so on. However, there might be cases where the agency contract should be classified separately. For example, if a minor out of extravagance or laziness employs an agent to purchase necessities which he was capable of purchasing himself, although bound by the agent's contracts, the minor might not be bound by his contract with the agent.<sup>85</sup>

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<sup>78</sup> *Coutts & Co. v Browne-Lecky* [1946] 2 All ER 207.

<sup>79</sup> (1936) 39 WALR 27.

<sup>80</sup> As the case name suggests it was a contract creating an interest in land.

<sup>81</sup> *Coutts & Co. v Browne-Lecky* has been criticised - (1961) 24 MLR 645 - and was not followed in *First Charter Financial Corp. Ltd. v Musclow* (1974) 49 DLR (3<sup>rd</sup>) 138.

<sup>82</sup> See Harland, *Law of Minors* (1974) at 92 paragraph 625.

<sup>83</sup> See for example the conflicting views of Lord Denning M.R. in his judgments in *Shepherd v Cartwright* [1953] 2 All ER 608 at 619 and *G(A) v G(T)* [1970] 3 All ER 546 at 549 and see Webb, "The Capacity of an Infant to Appoint an Agent" (1955) 18 MLR 461 and O'Hare, "Agency, Infancy and Incapacity" (1970) 3 *U Tas LJ* No. 3 at 312.

<sup>84</sup> See O'Hare, "Agency, Infancy and Incapacity" (1970) 3 *U Tas LJ* No. 3 at 312.

<sup>85</sup> See generally Percy, "The Present Law of Infants' Contracts" (1975) 53 *CBR* No. 1 at 47-50.

1.46 A minor may be appointed as agent and may enter into contracts which bind his adult principal. However, his own contract with his principal may not be binding depending on whether it is regarded as a necessary or as a contract for service. On principle it would appear that the minor as agent ought not to be liable on his contracts with a third person either as acting for an undisclosed principal or for breach of any warranty of authority.

1.47 A minor cannot create a valid power of attorney.<sup>86</sup>

### **Non-contractual dealings by minors**

1.48 In practice most questions concerning rights of property where minors are involved arise out of contractual obligations, and have been considered with special emphasis in this context.<sup>87</sup> A minor may, however, enter into other dealings involving transfers of property and the question may arise in these cases whether he is or ought to be bound by his dealing. A gift of property by or to a minor is probably the most likely dealing of this nature to arise in practice. Others include the exercise of a power by the minor to dispose of property, a disclaimer or discharge or other release from liability and elections made under a will.

1.49 The general rule is that a minor is not bound by any dealings entered into by him unless it is a contract for necessaries, or for service or one of the special category of contracts which are binding until repudiated.<sup>88</sup> Consequently, if a minor makes a gift of property whether real or personal, he may avoid this at any time on the basis that he was by reason of age incapable of giving the necessary assent.<sup>89</sup> The same consequences follow even if the gift is made in the form of a deed.<sup>90</sup>

1.50 Where property is given to a minor, it vests in the minor immediately upon the gift being completed. A gift *inter vivos* to a minor cannot afterwards be revoked.<sup>91</sup> However, a minor who has taken a freehold or leasehold estate in land may, on reaching full age,

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<sup>86</sup> *Zouch d Abbott and Hallet v Parsons* [1558-1774] All ER Rep 161.

<sup>87</sup> See paragraphs 1.14 to 1.15, 1.23 to 1.24 and 1.31 to 1.39 above.

<sup>88</sup> See paragraphs 1.17 to 1.29 above.

<sup>89</sup> Halsbury, *Laws of England* (3rd ed. 1957) Vol. 18 at 369 paragraph 701 where a decision in *Taylor v Johnston* (1882) 19 Ch D 603 to the effect that a minor is bound by a gift made unless there has been undue influence is considered to be wrong.

<sup>90</sup> *Ibid.*, and see Vol. 21 at 160, paragraph 356.

<sup>91</sup> Halsbury, *Laws of England* (3rd ed. 1957) Vol. 21 at 159 paragraph 353.

repudiate the grant, whereupon the estate re-vests in the grantor.<sup>92</sup> The same applies as regards personal property.<sup>93</sup>

## **PART B: THE LAW IN NEW SOUTH WALES**

### **Introduction**

1.51 In New South Wales the *Minors (Property and Contracts) Act 1970* has reduced the age of majority to eighteen years.<sup>94</sup> The Act does not affect the law relating to the capacity of a person who is too young to have the necessary understanding to be bound by his actions,<sup>95</sup> but it governs all other matters concerning a minor's rights in respect of property generally. In summary it applies to all persons under eighteen in respect of -

- (a) contracts;
- (b) elections to determine a contract for fraud, breach or mistake;
- (c) dispositions of property;
- (d) disclaimers;
- (e) receipts for property;
- (f) discharges;
- (g) the exercise of a power under a contract or settlement;
- (h) assents or consents or acquiescence in respect of property or contracts;
- (i) releases of any cause of action;
- (j) grants of any leave or licence;
- (k) elections under a will;
- (l) acts done in respect of partnerships or associations;
- (m) any other act relating to contractual or proprietary rights except making wills.<sup>96</sup>

These matters are defined in the Act as "civil acts" and the provisions of the Act apply basically to them all. This avoids the situation at common law where the law relating to dispositions of property has developed on separate lines to that relating to contractual capacity.

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<sup>92</sup> Williams, *Vendor and Purchaser* (4th ed. 1936) Vol. 2 at 847.

<sup>93</sup> Halsbury, *Laws of England* (3rd ed. 1957) Vol. 21 at 158 paragraph 351.

<sup>94</sup> *Minors (property and Contracts) Act 1970* (NSW), ss.8-9.

<sup>95</sup> *Ibid.*, s.18.

<sup>96</sup> *Ibid.*, s.6(1).

1.52 The aim of the Act is to alter the protection traditionally given to minors and shift the balance more towards the interests of the adult person dealing with a minor. The basic scheme is to bind a minor to civil acts which are for his benefit. The court is given wide powers to adjust the property rights of parties and to grant compensation where a minor repudiates a non-binding civil act. However, the legislation is complex and requires a detailed analysis. Consideration is given below to -

- (a) the five ways in which a minor may be bound by a civil act;
- (b) repudiation of a non-binding act;
- (c) the court's power to adjust rights on repudiation;
- (d) the effect of the Act on matters relating to minors and agents;
- (e) liability of guarantors;
- (f) a minor's liability in tort connected with a contract.

### **Civil acts which are presumptively binding<sup>97</sup>**

#### *(1) Civil acts which are beneficial to the minor*

1.53 If participation by a minor in any civil act is beneficial to him at the time of his participation it is presumptively binding on him as if he were of full age.<sup>98</sup> Such an act cannot be repudiated and consequently there can be no opportunity for a court to make any adjustment as to the parties' rights by way of orders for compensation.<sup>99</sup> Presumably the onus rests on the party seeking to enforce the contract to establish that it is beneficial to the minor.

1.54 In effect this provision is based on the concept underlying the common law categories of contracts for necessities and beneficial contracts of service;<sup>100</sup> that is, that a minor should be bound by any contract or disposition which is for his benefit. No doubt contracts which were binding at common law under these categories would be beneficial for the minor and

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<sup>97</sup> The Act does not affect any other grounds upon which a minor may avoid liability such as for fraud, misrepresentation etc. and this is why the Act adopts the term "presumptively binding" rather than simply "binding". The Act is not designed to place minors in a worse position than adults.

<sup>98</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.19.

<sup>99</sup> *Ibid.*, s.35(1) and see paragraphs 1.68 and 1.74 below.

<sup>100</sup> See paragraphs 1.8 to 1.12 above.

would therefore be binding on a minor in New South Wales even if still executory.<sup>101</sup> However, the New South Wales legislation appears to be wider although its exact scope is not clear.

1.55 The meaning of "benefit" in the *Minors (Property and Contracts) Act 1970* does not appear to have been considered yet in any reported case. However, one might assume that benefit ought not to be considered in abstract but ought to depend on whether it was prudent for the particular minor to enter into the civil act. Thus, even though a minor may purchase a motor car and obtain a fair deal, the contract may still not be for his benefit if he does not have the means to pay for it.<sup>102</sup> If on the other hand the car is worth more than what he paid for it, the contract might be binding regardless of his ability to pay in that he might be able to sell it again at a profit.

1.56 Doubts may arise as to the degree of benefit which a minor ought to derive before being bound by the civil act. Contracts commonly include terms which for each party are both beneficial and detrimental. Presumably the plaintiff would not have to establish that the contract contained no detrimental provisions for the minor, and it may be equally undesirable to allow a minor to escape liability on the basis that he has since discovered he could have obtained a better deal elsewhere.<sup>103</sup> Many cases may involve a fine question of balance to determine whether the contract is beneficial.

1.57 Although in its original state a contract may not be beneficial for the minor, there is a procedure whereby a court may modify the contract and make it binding. This procedure is possible under s.37. On repudiation by the minor the court is given power to confirm the whole or part of the contract. It has been suggested,<sup>104</sup> however, that the power would allow the court to delete offending provisions only but not rewrite the contract, for example, by altering the consideration.

1.58 The concept of benefit may go beyond material advantage. For example, in *Re Clore's Settlement Trusts*,<sup>105</sup> a court, in considering whether a trustee ought to dispose of some of a minor beneficiary's entitlement to a charity founded by the beneficiary's deceased father, held

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<sup>101</sup> The common law is unclear on this point: see paragraph 1.8 above.

<sup>102</sup> See Harland, *Law of Minors* (1974) at 84-85 paragraph 615.

<sup>103</sup> *Ibid.*, at 84 paragraph 614.

<sup>104</sup> *Ibid.*, at 142 paragraph 1020.

<sup>105</sup> [1966] 2 All ER 272.

that he could do so as the beneficiary owed a moral duty to provide for the charity and, having regard to her wealth, it was for her benefit to discharge that duty.

(2) *Affirmation of non-binding civil acts*

1.59 Civil acts which are not binding may be affirmed and thereby made binding by the minor once he reaches full age. The Court may, on the application of the minor or any other person interested in the civil act, affirm such act for a minor below full age if this is for the minor's benefit.<sup>106</sup> There is some incentive for the minor to affirm or have a non-binding civil act affirmed, for, unlike the position at common law, he is not able to enforce a non-binding contract.<sup>107</sup> The Act has taken the equitable principle which prevents a minor from obtaining a decree of specific performance<sup>108</sup> and expanded it to apply to the enforcement of contracts generally.

1.60 No formality is required for affirmation by the minor on reaching full age and it might be difficult in some cases to establish whether it has occurred.<sup>109</sup> For example -

- (a) if goods are obtained on credit pursuant to a non-binding civil act would it amount to affirmation if the minor retains the goods after he reaches full age?
- (b) does affirmation, whether by positive act or by inaction as in (a) above, depend on knowledge by the minor of his right to repudiate?

(3) *Binding dispositions of property including money*

1.61 There are a number of grounds upon which a minor may be bound by a disposition of property. The theme of the Act is to provide greater certainty in the law relating to property where minors are involved. Thus a minor is bound by a disposition where this is -

- (a) beneficial to the minor;<sup>110</sup>

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<sup>106</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.30.

<sup>107</sup> *Ibid.*, s.39.

<sup>108</sup> See paragraph 1.30 above.

<sup>109</sup> s.30(5) provides that an affirmation may be by words, written or spoken or by conduct, and it does not have to be communicated to anyone.

- (b) made wholly or partly as a gift which is reasonable;<sup>111</sup>
- (c) made for consideration which is not manifestly inadequate at the time of the disposition and which is wholly or partly received by the minor;<sup>112</sup>
- (d) made for consideration and pursuant to a certificate granted by the Public Trustee or by a solicitor employed independently of any party to the disposition;<sup>113</sup>
- (e) made pursuant to a binding contract;<sup>114</sup>
- (f) followed by a third person obtaining an interest in the property, either for valuable consideration, or otherwise than by way of gift where he alters his position, in circumstances where he does not have notice of the minority.<sup>115</sup> In this case, however, the disposition may be binding only in so far as it affects the third party and not binding as against any other party.

A disposition to a minor is binding if made for consideration which is not manifestly excessive at the time of the disposition<sup>116</sup> or if made pursuant to a certificate of the Public Trustee or an independently instructed solicitor.<sup>117</sup>

1.62 The breadth of the circumstances where a disposition is binding can cause curious results. The most important of these is that a minor may be bound by a disposition of money or property where the consideration is not manifestly<sup>118</sup> inadequate even though it may have been completely unwise and non-beneficial for him to have purchased the item in the first

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<sup>110</sup> *Minors (property and Contracts) Act 1970* (NSW), s.19. In this way the minor could be bound by a gift, for example if the principle in *Re Clore's Settlement Trusts* [1966] 2 All ER 272 were followed: see paragraph 1.58 above.

<sup>111</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.21.

<sup>112</sup> *Ibid.*, s.20(1).

<sup>113</sup> *Ibid.*, s.28.

<sup>114</sup> *Ibid.*, s.22.

<sup>115</sup> *Ibid.*, s.24. Harland, *Law of Minors* (1974) at 128-129 paragraph 909 suggests that this means actual notice. This would mean that there would be no obligation on a third party to make inquiries as to the possible rights of minors regardless of how suspicious the circumstances may be.

<sup>116</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.20(2).

<sup>117</sup> *Ibid.*, s.29.

<sup>118</sup> It has been suggested (Harland, *The Law of Minors* (1974) at 102 paragraph 703) that "manifest" in this context means "clear" or "obvious" and not necessarily "gross".

place. Compensation **may**<sup>119</sup> be payable if the minor repudiates the executed contract,<sup>120</sup> but it is difficult to see how this could be ordered where there is no defect in the item purchased.

1.63 Another consequence flowing from the provisions in the Act rendering dispositions binding is that a minor might in some cases be unable to reject a disposition to him of an asset with liabilities. Thus, if a minor acquires a lease with onerous obligations to perform, he may be bound by the lease if what he paid was not manifestly excessive even though it might have been non-beneficial for him to have entered into the transaction in the first place.

1.64 Another difficulty may arise where a minor disposes of property on credit to an adult. The problem is evident in the following situation - <sup>121</sup>

"...if a minor transfers goods on payment of 10% of the total purchase price and gives credit terms for the balance of the purchase price then, assuming that title has passed to the purchaser, the disposition of property will be presumptively binding on him even though he never in fact receives any further payment. The practical result is that in the event of the purchaser being in financial difficulties the minor would be unable to repudiate the transfer of title and his rights against the purchaser would be purely in personam."

122 As one commentator has pointed out - <sup>122</sup>

"It is surely typically youthful inexperience which would lead minors to extend the kind of easy credit involved in Professor Harland's example."

The same commentator suggests however, that the courts may find ways of avoiding this situation. <sup>123</sup>

"One could, for example, judge the adequacy of the consideration by taking into account not only the amount payable according to the contract but also the minor's real prospects of actually receiving the money, in particular the purchaser's financial standing".

1.65 Criticism has also been made of the procedure for making dispositions under a certificate from the Public Trustee or a solicitor.<sup>124</sup> It is said that the type of determination to

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<sup>119</sup> The extent to which the court may adjust the rights of parties to an executed contract is an important issue which, as far as the Commission is aware, remains unresolved: see paragraph 1.75 below.

<sup>120</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.37.

<sup>121</sup> Harland, *The Law of Minors* (1974) at 103 paragraph 704.

<sup>122</sup> See the review of Professor Harland's book by Lucke (1975) 5 *Adelaide LR* No. 3 at 336.

<sup>123</sup> *Ibid.*

be made is normally made by a court, and, although obviously intended as a time and cost saving procedure, it may be doubtful whether the Public Trustee or in particular a solicitor will be prepared in practice to make the determination. The alternative and possibly a better alternative is for the disposition to be made, leaving it to any party who wishes to uphold it to satisfy the court under s.20 that the consideration was not manifestly inadequate or excessive as the case may be.

(4) *Civil acts approved in advance by a court*

1.66 A magistrate can approve a proposed civil act up to a value of \$750 and the Supreme Court can grant full capacity for such acts.<sup>125</sup> Limits to the court's power do not apply to a proposed disposition to a minor.<sup>126</sup> No order can be made unless it is for the benefit of the minor. An order made by the Supreme Court may be rescinded at any time. There is no requirement as to notice in respect of any such rescission so that it would be in the interests of any person proposing to deal with a minor on the basis of any Supreme Court order to check to make sure the order has not in the meantime been rescinded. Although the adult might be able in some cases to bring an action for fraud against the minor,<sup>127</sup> this would result only in compensatory damages. It would not permit the adult to recover damages for loss of profits as he would if the contract were binding.

(5) *Failure to repudiate*

1.67 All civil acts whether originally binding or not are binding on a minor unless he repudiates within one year of obtaining full age, or unless a court repudiates on his behalf whilst he is still a minor.<sup>128</sup> With typically youthful inaction the consequence of this provision is that a minor might inadvertently find himself bound in later life by a particularly harsh contract which he entered into only because of his immaturity.

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<sup>124</sup> Harland, *The Law of Minors* (1974) at 210 paragraph 1508. This procedure was not considered by the New South Wales Law Reform Commission in its report leading to this legislation.

<sup>125</sup> *Minors (Property and Contracts) Act 1970* (NSW), ss.26-27.

<sup>126</sup> *Ibid.*, s.27(2) and (5).

<sup>127</sup> See paragraph 1.79 below where a minor's liability in tort is considered.

<sup>128</sup> *Minors (Property and Contracts) Act 1970* (NSW), ss.31 and 38.

## Non-binding civil acts and repudiation

1.68 There are three important limitations on a minor's ability to repudiate civil acts, namely that no repudiation is effective if -

- (a) the civil act is binding, as for example it would be if it were beneficial when the minor entered into it.<sup>129</sup>
- (b) the civil act although not originally binding is for the minor's benefit at the time repudiation is contemplated;<sup>130</sup>
- (c) it is not in writing and served on the person to be affected thereby.<sup>131</sup>

1.69 Several aspects of the provisions relating to repudiation deserve comment. First, there has been criticism of the requirement that the repudiation must be formalised in writing and served.<sup>132</sup> Such formality may add to the danger that, through inadvertence or inaction, minors may bind themselves in later life to detrimental contracts.<sup>133</sup> Perhaps some less formal indication communicated to the party concerned that the minor does not wish to be bound by the civil act ought to suffice.

1.70 Secondly, doubts may arise as to the binding nature of a repudiation by a minor when he is still a minor. On one view this might be in itself a civil act and provided it is not binding under the provisions of the Act<sup>134</sup> the minor would be able to repudiate his repudiation. Another view, however, is that the general provisions of the Act do not apply to "internal" civil acts, such as repudiations, which are expressly permitted under s.31, and, that in the interests of certainty, these should always be binding.<sup>135</sup>

1.71 Thirdly, the adult may want to know at an earlier stage whether the civil act is binding. He can ask the court to make an order while the minor is under eighteen, but once the minor reaches that age, there may be a year of uncertainty surrounding the civil act. The problem

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<sup>129</sup> Ibid., s.19.

<sup>130</sup> Ibid., s.31(2).

<sup>131</sup> Ibid., s.33.

<sup>132</sup> Harland, *The Law of Minors* (1974) at 208 paragraph 1506.

<sup>133</sup> See paragraph 1.67 above.

<sup>134</sup> In most cases the repudiation would be for the minor's benefit and would be binding under s.19.

<sup>135</sup> Harland, *The Law of Minors* (1974) at 136 paragraph 1011.

might be overcome if the court were empowered to order a minor to make an election either to affirm or to repudiate the contract during that year.

1.72 Fourthly, it may appear strange that an adult should be permitted to seek relief on the basis that a civil act is not binding. Of course, he cannot repudiate his liability under it, but he may ask the court to affirm or repudiate the contract if it is not binding on the minor.<sup>136</sup>

1.73 Finally, if a civil act is repudiated a court may, nevertheless, on application by any person interested, confirm the whole or part of the civil act.<sup>137</sup> It is also provided expressly that the court may confirm a repudiated civil act if it appears that any party was induced to enter it by fraudulent misrepresentations by the minor as to his age or capacity.<sup>138</sup> It has been suggested that in practice this provision will allow the court to give less weight to the non-beneficial aspects of a civil act.<sup>139</sup>

### **Adjustment of rights**

1.74 Section 37 of the *Minors (Property and Contracts) Act 1970* (NSW) gives the court wide powers to adjust the rights of the parties if a civil act is repudiated.<sup>140</sup> However, problems may arise under this provision.

1.75 The most important issue is whether a court may make orders adjusting the rights of parties where the contract has been executed. For example, if a minor purchases for a reasonable price a dilapidated motor car which he cannot afford to repair, he may wish to repudiate his contract. He is bound to keep the car because the disposition is binding under s.20(2). However, he may seek some adjustment in respect of the purchase price. Professor Harland seems to suggest<sup>141</sup> that this would be possible under the court's powers to award compensation even though the contract has been executed. On the other hand, it has been suggested that this view is difficult to sustain.<sup>142</sup> The difficulty is that just as the disposition of the motor car to the minor is binding, so too is the disposition of money (the purchase price)

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<sup>136</sup> *Minors (property and Contracts) Act 1970* (NSW), s.36.

<sup>137</sup> *Ibid.*, s.37(1).

<sup>138</sup> *Ibid.*, s.37(2).

<sup>139</sup> Harland, *The Law of Minors* (1974) at 143 paragraph 1021.

<sup>140</sup> It is expressly provided that no orders can be made affecting the interest of any person without his consent where the contract is presumptively binding and no orders can be made where the contract is confirmed by the court: see ss.37(3), (4) and (8).

<sup>141</sup> Harland, *The Law of Minors* (1974) at 147-148 paragraph 1026.

<sup>142</sup> Beale, (1976) 39 *MLR* 358 at 361.

from the minor to the adult. Professor Harland's view would in effect lead to the situation where the court is upsetting a binding disposition, and this is expressly prohibited under s.37(3). As far as the Commission is aware, this important issue has not yet been resolved.

1.76 The court is directed to make orders for the minor to make just compensation for property or services he has derived under the repudiated civil act but only to the extent that these were for his benefit.<sup>143</sup> Other parties to the civil act must make just compensation for property and services derived regardless of benefit.<sup>144</sup> It would therefore appear that if a minor receives and enjoys property under a non-binding contract which he repudiates, and if the enjoyment of the property is not for his benefit, he may not be required to make compensation. This leaves an element of uncertainty for the adult which may be undesirable.<sup>145</sup> Subject to any compensatory orders required to be made, the court is to restore the parties as far as is possible to their original position.<sup>146</sup> For this purpose it may make orders for the delivery of goods and the payment of money, but of course an order for the delivery of goods would not be possible if the civil act were binding in favour of a third party.

### **Agency**

1.77 Section 46 permits a minor to appoint an agent by power of attorney<sup>147</sup> or otherwise, and contracts entered into by the agent for his minor principal and the agency contract itself fall within the general provisions of the Act relating to civil acts. A minor may also be appointed as an agent to act for an adult principal.

### **Guarantors**

1.78 Section 47 avoids the confusion and doubts created by the decision in *Coutts & Co. v Browne-Lecky*<sup>148</sup> and makes it clear that a guarantor is liable for the principal debt owed by the minor, whether or not this is binding on the minor.

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<sup>143</sup> *Minors (property and Contracts) Act 1970* (NSW), s.37(4) (a).

<sup>144</sup> *Ibid.*, s.37(4)(b).

<sup>145</sup> See also Harland, *The Law of Minors* (1974) at 143-146 paragraphs 1023-1024 for a discussion of other difficulties with this provision.

<sup>146</sup> *Minors (Property and Contracts) Act 1970* (NSW), s.37(4) (c).

<sup>147</sup> At common law a minor could not enter into a valid power of attorney.

<sup>148</sup> [1946] 2 All ER 207.

## **Liability in tort**

1.79 Section 48 provides that a minor may be liable in tort whether or not the tort is connected with a contract or is in substance a cause of action also in contract.

## **PART C: THE LAW IN NEW ZEALAND**

### **Introduction**

1.80 In New Zealand, the age of majority is twenty.<sup>149</sup> Contracts by persons below that age are governed by the *Minors' Contracts Act 1969* (NZ). However, the legislation distinguishes between contracts by minors under eighteen years of age and contracts by minors aged from eighteen to twenty years. It therefore provides two possible models for consideration in Western Australia. In general terms the effect of the Act is to make contracts by minors eighteen or over prima facie binding, while those made by minors under eighteen prima facie non-binding or unenforceable. Each of these categories is given separate consideration in this part of the working paper, along with the generous powers of a court to adjust the rights of parties to a contract with a minor. This is followed by a brief discussion of some of the specific provisions of the Act dealing with such issues as -

- (a) whether a married minor ought to be given full contractual capacity;
- (b) the approval of contracts in advance by a court;
- (c) the liability of guarantors;
- (d) the liability of a minor in tort connected with his contract.

### **Contracts which are prima facie binding**

1.81 Contracts by minors eighteen or over, and contracts by any minor for life insurance or for service are binding.<sup>150</sup> However, if a court is satisfied that at the time the contract was entered into the consideration for the minor's part was so inadequate as to be unconscionable,

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<sup>149</sup> *Age of Majority Act 1970* (NZ), s.4.

<sup>150</sup> *Minors' Contracts Act 1969* (NZ), s.5(1).

or if any provision imposes an obligation on the minor which at that time was harsh or oppressive, it may cancel the contract or declare it unenforceable in whole or in part.<sup>151</sup> The court thereby has power to strike out offensive parts of the contract but it is not clear whether the legislation would permit it to rewrite the contract, for example, by reducing the consideration paid by a minor for defective goods. A court may make orders by way of compensation or restitution as it thinks fit but, it has been submitted, only on making an order cancelling a contract or declaring it to be unenforceable.<sup>152</sup>

1.82 A number of points should be noted in respect of these provisions. First, a "contract of service" as defined in the Act may be different from a contract of service which is binding on the minor<sup>153</sup> at common law. For example, at common law, contracts of service are only binding if they are beneficial for the minor. Another point of difference is that contracts which are analogous to contracts of service can be upheld at common law, but a statutory term may not lend itself to such flexibility.<sup>154</sup>

1.83 Secondly, it has been suggested that the grounds upon which a court may upset a contract are too narrow.<sup>155</sup> For example, it may not be clear whether a contract with a harsh or oppressive exemption clause would be included, the reason being that an exemption clause does not impose an obligation on the minor. A court would have greater flexibility if the test were whether the contract or any term or provision thereof is harsh or oppressive.

1.84 Thirdly, a minor is not able to avoid a contract, for example, to buy shares, where the price drops after the contract is made but before he acquires them. The minor is bound provided the consideration at the time of the contract is not unconscionable. Furthermore, the word "unconscionable" implies unconscientious conduct. If so, it may not be sufficient that the consideration is simply inadequate, the minor might have to show in addition that the adult was aware of this and sought to take advantage of him.<sup>156</sup>

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<sup>151</sup> Ibid., s.5(2).

<sup>152</sup> Although s.5 alone might suggest that adjustments may be made whether or not the contract is binding, the combined effect of ss.5 and 7 would appear to limit the court's power to award compensation or restitution: see Burrows, "The Minors' Contracts Act 1969" (NZ) (1973) 47 ALJ 657 at 659-660.

<sup>153</sup> See paragraph 1.12 above.

<sup>154</sup> See Burrows, "The Minors' Contracts Act 1969" (NZ), (1973) 47 ALJ 657 at 658.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid., at 659.

1.85 Fourthly, unlike the common law, the statute gives no protection to a minor who is pressured by hard salesmanship into buying a luxurious item which he can ill afford unless there is inadequate consideration or oppressive obligations. One commentator says - <sup>157</sup>

"An argument can doubtless be presented that since this section applies only to eighteen- and nineteen- year-olds we should not waste too much sympathy, for they are old enough to look after themselves. But, if so, why give them any protection at all".

1.86 Fifthly, with regard to the court's power to order compensation or restitution, it may do this by making orders for the transfer of property and there would appear to be nothing to prevent the title of an innocent third party from being upset. It has been suggested that - <sup>158</sup>

"Presumably such a disruption of security of title would be resorted to only in an exceptional case."

It would also appear unlikely that an order would be made unless the third party could otherwise be compensated.

1.87 Finally, if the contract has been procured by a fraudulent misrepresentation by the minor, the court is directed to take this into account when granting relief, <sup>159</sup> but apart from this, there are no statutory guidelines provided for the court as to the factors it ought to take into account when granting compensation or restitution. There are criteria listed elsewhere in the Act in a different context which might however be useful and these are listed immediately below. <sup>160</sup>

### **Non-binding contracts**

1.88 A contract made by a minor under eighteen, other than for life insurance or a contract of service, is unenforceable against the minor, but otherwise has full effect as if the minor were an adult. <sup>161</sup> However, if a court, on application made to it, finds that the contract was fair and reasonable when it was entered into, it may enforce it or declare it to be binding in whole or part. <sup>162</sup> If it finds that the contract was not fair and reasonable it is not obliged to make any

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<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> *Minors' Contracts Act 1969* (NZ), s.15(4).

<sup>160</sup> See paragraph 1.89 below.

<sup>161</sup> *Minors' Contracts Act 1969* (NZ), s.6(1).

<sup>162</sup> Ibid. , s.6(2).

order but it may cancel the contract or make an order entitling the minor on conditions to cancel it.<sup>163</sup>

1.89 In the exercise of its discretion the court may take into account -

- (a) the circumstances surrounding the making of the contract;
- (b) the subject matter and nature of the contract;
- (c) the nature and value of any property;
- (d) the age and means of the minor;
- (e) all other relevant circumstances.<sup>164</sup>

If it is shown that the contract was procured by a fraudulent misrepresentation by the minor, this shall be taken into account.<sup>165</sup>

1.90 The court may also grant orders for compensation or restitution and, unlike the case where it is dealing with a contract which is prima facie binding,<sup>166</sup> such an order does not depend on any order being made as to enforcement of the contract.<sup>167</sup>

1.91 It is interesting to note that as a result of these provisions minors under eighteen years of age in New Zealand have greater protection than they had at common law. They are no longer bound by contracts even for necessities unless the court so orders. The common law right of the minor to bind the adult party to the contract, however, is retained. This must give rise to considerable uncertainty in such contracts from an adult's point of view, although the court's wide powers to grant relief will hopefully prevent him from being out of pocket as a result of his dealing.

1.92 It is the contract itself which must be unfair and unreasonable, not the method adopted for securing it. Thus if a minor were to fall victim to hard sell techniques, the adult could establish that the contract was nevertheless fair and reasonable. Even so, the court is not

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<sup>163</sup> Ibid., s.6(2)(b).

<sup>164</sup> Ibid., s.6(3).

<sup>165</sup> Ibid., s.15(4).

<sup>166</sup> See paragraph 1.81 above.

<sup>167</sup> *Minors' Contracts Act 1969* (NZ), s.7(1).

obliged to make any order, and, in exercising its discretion having regard to the circumstances in which the contract was made,<sup>168</sup> it could in such a case decline to make any order.

It can still order compensation and restitution if necessary.

1.93 Another significant departure from the common law is that the Act makes no provision for long term contracts, such as leases, to be binding unless repudiated within a reasonable period of attaining full age. Neither does it make provision for contracts to become binding by ratification. Consequently, possible injustice might result to an adult who has entered into an unfair and unreasonable contract with long term obligations which are unenforceable by him. However, the Act enables him to make an application to the court for an order that the contract is unfair and unreasonable, and the Court may make an order for his relief even though this means that he is relying on his own wrong.<sup>169</sup>

### **Married minors**

1.94 A contract by a minor who is or has been married is binding as if he were of full age.<sup>170</sup> This is a somewhat controversial provision. It might be supported on the basis that a married minor has reached a certain level of maturity and ought to have free access to the market. Others<sup>171</sup> doubt whether a conferral of full contractual capacity on a minor would have any substantial effect in this regard.

Moreover even if it did enable married minors more readily to enter into binding contracts, these persons with the responsibility of caring for a family might, in their eagerness to obtain goods and services for this purpose, be the very persons who require protection.

### **Contracts approved by the court**

1.95 A magistrate's court has power to approve any contract in advance to be made by a minor.<sup>172</sup> Although no criteria are laid down for the guidance of the court it is suggested that in practice the court will take into account those matters which are relevant to the exercise of its discretion in determining whether a contract with a minor under eighteen years of age is

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<sup>168</sup> As it is entitled to: see paragraph 1.89 above.

<sup>169</sup> See paragraphs 2.4 and 2.5 below for possible examples.

<sup>170</sup> *Minors' Contracts Act 1969* (NZ), s.4.

<sup>171</sup> For example Burrows, "The Minors' Contracts Act 1969" (NZ) (1973) 47 ALJ 657.

<sup>172</sup> *Minors' Contracts Act 1969* (NZ), s.9.

fair and reasonable.<sup>173</sup> This is not only convenient, but it would also avoid any embarrassment which could arise if a court took into account different criteria depending on whether it was considering a proposed contract or a contract already entered into. The court may refer the matter for a report to a guardian of the minor, the Public Trustee, a solicitor nominated by the court to the Maori Trustee or to any other person.

### **Liability of guarantors**

1.96 A guarantor is liable on his guarantee to the same extent as he would be if the principal debtor were an adult.<sup>174</sup>

### **Minors and tort liability**

1.97 The legislation expressly does not alter the common law relating to tort liability of minors. Consequently, a minor is not liable in tort where this action would have the effect of enforcing a contract which otherwise would not be enforceable.<sup>175</sup> However, if a contract has been procured by fraudulent misrepresentations by the minor as to his age or any other matter this shall be taken into account by the court in exercising its various powers and discretions conferred by the Act.<sup>176</sup>

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<sup>173</sup> See paragraph 1.89 above.

<sup>174</sup> *Minors' Contracts Act 1969* (NZ), s.10.

<sup>175</sup> *Ibid.*, s.15.

<sup>176</sup> *Ibid.*, s.15(4).

## CHAPTER 2

# A COMPARISON OF THE PRACTICAL CONSEQUENCES OF THE LAW RELATING TO MINORS' CONTRACTS IN WESTERN AUSTRALIA, NEW SOUTH WALES AND NEW ZEALAND

### Discussion of typical cases

2.1 *A minor trades in his motor cycle on a motor car and agrees to pay the balance over a period of time. The car breaks down. The minor cannot afford to repair and wants to avoid the contract and get his motor cycle back.*<sup>1</sup>

#### Western Australia

The motor car will probably not be regarded as a necessary but much may depend on the minor's intended use.

If it is a necessary the minor is bound to complete the contract.

If it is not a necessary, he may refuse to make any further payment. However, he would be unable to obtain any refund of purchase price or his motor cycle even if he is prepared to return the car. Furthermore if his motor cycle has been sold to a third person, that person would obtain a good title under the *Sale of Goods Act 1895*.

Unless he has retained title in the car, the car seller will be unable to recover it from the minor.

The result is that the minor would be able to reject further payments and keep the car. The car seller gets no relief. He could recover from an indemnifier if there is one but may be unable to recover from a guarantor.

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<sup>1</sup> The purchase of shoddy cars by minors has recently been drawn to public attention in Western Australia: see *The West Australian* 20 February 1978 at p.21. The main problems have been public safety and the need to review trading licences. However, the Consumer Affairs Bureau has revealed that young persons are easy prey for unscrupulous car dealers and that some cars often cost over \$800 to make them roadworthy. Although legislation is in force imposing statutory obligations on dealers to provide a warranty on their vehicles (*Motor Vehicle Dealers' Act 1973*) these last for a limited time (3 or 2 months depending on whether the car is sold for more or less than \$1,000, s.34) and the very type of car most tempting for minors, that is "bombs" sold for less than \$500, are not covered at all: s.34(3) (e). Even those that are covered by warranty are alleged to be simply patched up.

## **New South Wales**

The minor's only relief is to show that the contract was not beneficial for him at the time the contract was entered into. Although a car may not be a necessary it might still be beneficial to the minor. The question is decided having regard to the situation known at the time of the contract.

If the contract was beneficial when entered into, the minor is bound to complete it and is bound by dispositions of property made pursuant to it.

If the contract was not beneficial, the minor may be able to stop further payments, but may be unable to recover his bike unless he can show that the consideration for it (the trade in price) was manifestly inadequate. If he were to stop further payments and keep the car, the court may award compensation to the seller for the outstanding purchase price. The court might also be able to award compensation to the minor.

Even if the minor were able to recover his motor cycle from the seller he would be unable to do so if a third party acting otherwise than as a volunteer and without notice of the minor's incapacity, had obtained an interest in it.

Guarantors as well as indemnifiers would be liable.

## **New Zealand**

Under the legislative scheme for minors eighteen or over (scheme A), he would prima facie be bound, but could bring an action to show that the contract imposed an obligation that was harsh or oppressive or that the consideration was so harsh as to be unconscionable. Provided the car was sold at a fair price for what was known about it at the time, relief would be unlikely for the minor.

Under the scheme for minors under eighteen (scheme B) he would not be bound to complete. The car seller might be able to force him to complete by obtaining an order showing that the contract was fair and reasonable. In any event the court has a free hand to order restitution or compensation. This would in exceptional cases, allow it to

order a third person who had bought the bike to return it to the minor, subject to his receiving full compensation.

If the minor is or has been married, he would be bound as if he were an adult.

Guarantors as well as indemnifiers would be liable.

2.2 *A minor purchases a motor car for \$400 cash but it breaks down costing \$100 to repair. He is willing to keep the car but in the circumstances wants an adjustment made to the purchase price.*

### **Western Australia**

No relief is available.

### **New South Wales**

Relief will be available as long as neither the contract nor the disposition is binding. Difficulties arise if the contract is non-binding but the disposition is binding, for example, if the price for the car was not manifestly excessive. It is not completely clear whether a court can order compensation when this has the effect of altering the price paid by the minor which is in itself a binding disposition.

### **New Zealand**

Relief would be unlikely under scheme A but is clearly available under scheme B even if the contract was fair and reasonable.

2.3 *A minor is persuaded by hard pressure salesmanship into purchasing a set of encyclopaedias. Later he is disappointed and considers that they are an expensive luxury but he is too late to take advantage of the special protection provided in the Door to Door Sales Act 1964. He seeks to return them undamaged for a refund of the purchase price less a small amount for his use.*

### **Western Australia**

If the encyclopaedias were regarded as a necessary he would be bound by his contract. Otherwise he would not be bound, but would be unlikely to be able to return the books in exchange for a cash refund once he has received them. He might, however, be able to do so if they are completely unused.

### **New South Wales**

The minor can obtain relief only if he can show all of the following, namely that -

- (a) the disposition of the books was not for his benefit;
- (b) the contract was not for his benefit;
- (c) the disposition was for a consideration which was manifestly excessive;
- (d) the disposition of the books is not for his benefit at the time he seeks to repudiate.

Relief would be unlikely.

### **New Zealand**

Under scheme A the minor would be bound unless he could show that the consideration was so inadequate as to be unconscionable or that he had obligations imposed on him which were harsh or oppressive.

Relief would be unlikely.

Under scheme B he would obtain relief. Whether or not the contract is fair and reasonable the court may under s.7 make orders for restitution or compensation as it thinks fit. What is proposed by the minor seems reasonable provided he has not waited too long, for example till long after he has reached full age, before taking action.

2.4 *A group of young entertainers form a partnership and agree to play on Saturday nights at a local hotel. One is a minor. Later he wishes to pullout and go solo thereby forcing the group to disband and break their contract with the hotel.*

### **Western Australia**

The minor is bound by his partnership agreement unless he repudiates within a reasonable time of reaching full age. His act in pulling out of the group no doubt would be construed as repudiation. It is not clear whether this absolves him from liabilities already accrued.

He may be liable to the hotel for breach of contract if this is regarded as a beneficial contract of service.

### **New South Wales**

Both the partnership and hotel contracts might be binding if they were beneficial to the minor when he entered into them. It would be irrelevant that by reason of unforeseen success it is no longer beneficial for him to be so engaged. Even if not beneficial, both contracts become binding if he does not repudiate in writing (served on every person to be bound thereby) before he reaches nineteen years of age.

### **New Zealand**

In New Zealand the minor would probably be bound under scheme A assuming no question of inadequate consideration or harsh and oppressive obligations at the time the contracts were entered into.

Under scheme B, even though the contracts are fair and reasonable the court is not obliged to make any order and may decline to enforce them against the minor. However, it may order compensation or it may declare the contracts to be binding in part only.

If not a fair and reasonable contract, it remains unenforceable against the minor for all time, even long after the minor reaches full age. It may be possible to establish a fresh

agreement by the minor when adult, but if not, the adult may be able to obtain some compensation for the money he has spent even though this necessitates reliance on his own unreasonable dealings with the minor.

2.5 *A minor enters into a lease of a flat for twelve months. The landlord is dissatisfied with the tenant and although he is not in breach of any condition in the lease serves a notice to quit after three months. There is evidence available that the rent is excessive. The minor wants to remain in the premises as the location suits him and he would prefer to have the rent adjusted to a reasonable sum.*

### **Western Australia**

The minor can enforce the agreement and he may remain in the premises for the full term. No alteration to the rent could be made. The minor is also bound until he repudiates.

### **New South Wales**

Enforcement by the minor depends on whether the contract is beneficial to him. While the rent may be excessive, the court may take the view that this detriment is outweighed by the benefit derived from having a convenient place to stay. If the contract was beneficial from the outset it could be enforced by the minor. On the other hand if it only subsequently became beneficial he would have to obtain a court order affirming the contract on his behalf while still a minor. Curiously, the Act contemplates a third person being able to enforce a non-beneficial contract against a minor, but it has no power to enforce such a contract at the instigation of the minor. If this course were adopted, no adjustment to the rent could be made.

If the adult were able to persuade the court that the contract was not beneficial to the minor, he could frustrate the minor's attempts to enforce it.

Possibly the best solution for the minor would be for him to repudiate the contract, assuming no benefit neither at the time it was entered into nor at the time he seeks to repudiate. The court then has power to confirm the contract in whole or part. This would enable it possibly to enforce the contract and adjust the rent. Such a procedure

however gives rise to the strange result that to enforce the contract on fairer terms, the minor must first repudiate his liability under it.

### **New Zealand**

Under scheme A, although the minor would not be bound by the contract, because of the excessive consideration, he could nevertheless enforce it against the other party. Consequently, the minor could remain in the premises but, in the absence of an order cancelling the contract or declaring it to be unenforceable against him, it might be difficult for him to obtain any compensation in respect of the excessive rent.

Under scheme B although the contract may be unfair and unreasonable the court is not obliged to cancel the contract and it could refuse to make any order, which would mean that the minor could enforce the contract and the court could grant compensation in the form of a reduction in rent for the remainder of the term to the minor.

Injustice might result to the adult if the minor could enforce the contract against the adult, but at the same time refuse to pay rent or otherwise perform his obligations. In this situation, a court may be prepared to cancel the contract at the instigation of the adult, even though this means that the adult is escaping because of his own unreasonable dealing.

*2.6 A minor is given a valuable family stamp collection. He subsequently sells it grossly under price and it passes into the hands of a purchaser who has no idea that it belonged to the minor. The minor realises his error and endeavours to recover the collection from the third party.*

### **Western Australia**

There is nothing the minor can do. He may be able to recover goods only if he has received no consideration for them. In any event his rights to recover may not defeat the title of the third party who receives good title if he obtains the goods prior to repudiation by the minor. Even if the third party obtains the goods after the minor has repudiated the contract, he will be most likely to obtain a good title by virtue of the *Sale of Goods Act 1895*.

### **New South Wales**

Neither the contract nor the disposition would be binding on the minor and on repudiation he might be able to recover compensation from the first purchaser. He is bound, however, by the disposition of the stamps to the third party and would be unable to recover them without his consent.

### **New Zealand**

Under both schemes the minor would not be bound by the contract and might be able to obtain a court order for compensation. He might also be entitled to an order for the return of the stamps subject to the third party receiving full compensation.

*2.7 A minor sells a motor car to an adult for \$300, \$10 payable immediately, the balance repayable over three years. He delivers it on receipt of the \$10. He has difficulty obtaining the balance and wishes to take legal action.*

### **Western Australia**

He is able to take legal proceedings for the recovery of the balance of the purchase price, but having received some consideration he cannot recover the car.

### **New South Wales**

Although the consideration for it may be reasonable the terms of the contract spreading repayments over a three year period may not be for his benefit. Consequently, he would be unable to enforce the contract until he reaches his majority and affirms it. He would also be unable to recover the car if the consideration is not manifestly inadequate.

As the contract is non-beneficial to the minor a court may not be permitted to confirm it on behalf of the minor. But if the minor repudiates his liability under the contract this, oddly enough, would enable the court to come to his assistance by confirming the contract in whole or in part, thereby making it presumptively binding. This would be unfortunate if the minor subsequently discovered that the car was worth \$600.

## **New Zealand**

The minor may enforce the contract, whether or not it is fair and reasonable. If he subsequently discovers the true value of the car he would not be prevented at that stage from repudiating the contract and asking the court for compensation or restitution of the car.

### **An assessment**

2.8 The discussion of the typical cases above illustrates that the different legal approaches in Western Australia, New South Wales and New Zealand to minors' contracts can give rise to significantly different practical consequences. In the Commission's view, however, the discussion also tends to show that each system has its advantages and disadvantages.

2.9 The existing law in Western Australia appears to have the least to recommend it. In most cases either it fails to provide any remedy at all, or the remedy given fails to deal fairly with all parties to the contract. The New South Wales legislation in most cases is capable of providing a fair result but the legislation appears to be unnecessarily complex. The New Zealand provisions, particularly those relating to minors under eighteen in that country, are sufficiently flexible to enable a fair result to be obtained in any case. However, the price of that flexibility may be a lack of certainty for both parties as to the outcome of a contractual dealing.

2.10 In the following chapter, the Commission discusses the advantages and disadvantages of the various legislative schemes in greater detail and offers tentative suggestions for reform.

## **CHAPTER 3**

### **THE COMMISSION'S TENTATIVE VIEWS**

#### **THE NEED FOR REFORM**

3.1 The Commission does not regard the existing law in Western Australia relating to minors' contracts as being satisfactory. As one commentator has said:<sup>1</sup>

"...despite the reduction in the age of majority, the law in this area is indeed ripe for reform. Probably the most serious defect is that much of the present law is extremely uncertain, even on basic questions. Instances of this uncertainty are to be found on such fundamental issues as the nature of an infant's contract for non-necessaries, whether it is truly voidable or non-binding unless ratified or even void, the requirement of ratification itself and especially the restitutionary obligations of an infant when he elects to avoid his contract. It may be speculated that there is not much prospect that this unpredictability will be diminished by the development of the common law, because many of the basic principles are now obscured in a mass of conflicting decisions and because few cases on infants' contracts now reach the higher courts, perhaps for the reason that they rarely involve large sums of money.

Those rules which can be discerned in the current law often create arbitrary and rather irrational distinctions. Their roots are to be found in the nineteenth century and even earlier periods and they often bear little relationship to present day realities. It is perhaps only necessary to refer to the strangely disparate group of contracts classified as truly voidable and to the treatment of the fraudulent infant in contrast to the innocent infant to support this contention".

#### **POSSIBLE REFORM**

3.2 If legislation were considered to be desirable, consideration could be given to the adoption of either New South Wales or New Zealand legislation in toto. Both legislative schemes have desirable features, but in the Commission's tentative view, they both have major disadvantages.<sup>2</sup> The best solution might be to enact unique legislation for Western Australia comprising an amalgum of the more desirable aspects of the New South Wales and New Zealand legislation and possibly the common law.

3.3 Possible reform measures are considered under the following heads -

(a) The binding nature of a contract

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<sup>1</sup> Percy, "The Present Law of Infants' Contracts" (1975) 53 *CBR* No.1 at 55.

<sup>2</sup> See paragraph 2.9 above.

- (i) contracts binding on the minor;
- (ii) contracts binding on the adult;
- (iii) pre-contractual approval;
- (iv) property rights.
- (b) Protection for married minors.
- (c) Minors and tort liability including fraud.
- (d) Liability of guarantors.
- (e) Minors and agents.
- (f) Non-contractual dealings by minors

**(a) The binding nature of a contract**

*(i) Contracts binding on the minor*

3.4 The aim of the New South Wales legislation in this area is to make contractual and property dealings with minors more certain for adults. The minor is in general bound by his dealings if these are beneficial to him. However, there are at least three situations in which a minor may be bound by a non-beneficial dealing. These are where -

- (i) he is bound by a disposition of property because the consideration for it is not manifestly excessive or inadequate;<sup>3</sup>
- (ii) he is not bound initially by a contract but he fails to repudiate liability before he reaches the age of nineteen;<sup>4</sup>
- (iii) a third person acquires an interest in the property.<sup>5</sup>

Some relief may be possible in the first situation if a court could order payment of compensation on the minor's repudiation of the non-binding contract, but whether this is possible is open to challenge.<sup>6</sup> Subject to this, however, the minor in each of the three situations above could be bound by the consequences of his contract even though it was not to

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<sup>3</sup> See paragraphs 1.61 to 1.64 above.

<sup>4</sup> See paragraph 1.67 above.

<sup>5</sup> See paragraph 1.61 above.

<sup>6</sup> See paragraph 1.75 above.

his benefit to have entered into it in the first place. It might be better if he were able to return the property or recover his property with suitable financial adjustments.

3.5 The Commission also shares doubts as to whether the law is made more certain by a minor being bound if the contract is beneficial rather than if it is for a necessary.<sup>7</sup> Both tests involve some knowledge of the minor's financial resources and his needs at the time of the contract. The effect may simply be to widen the range of contracts which are binding on the minor.

3.6 One alternative<sup>8</sup> is to allow an adult to enforce a contract against a minor if he satisfies the court -

- " (a) that at the time the contract was made the adult party believed it to be fair and reasonable in itself and in the circumstances of the minor; and
- (b) that his belief was reasonable...

[having] regard only to the circumstances which were or should have been known to the adult party".

3.7 Although there has been some criticism of this formula,<sup>9</sup> much of this is levelled at a following suggestion that even if a court were satisfied that a contract should be enforceable it should have a discretion not to enforce it and to order compensation or restitution. This, it is said, does not aid the cause of certainty. However, it is also claimed that the formula alone holds little certainty for the adult in that his belief must be reasonable, and he is expected apparently to make reasonable enquiries to determine matters which he ought to have known.

3.8 Turning to the New Zealand alternative, there are in effect two possible schemes available, but it is the Commission's view that scheme A, which applies to persons aged eighteen and nineteen, who in New Zealand are still minors, provides insufficient protection for those who are minors in this State. The reason for the rejection of scheme A is that a minor may be bound under it by a contract which is non-beneficial. This could occur for example if the item being purchased is a luxury or if the contract contains onerous exclusion clauses, because in neither case would it necessarily follow that the consideration is so

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<sup>7</sup> Others who have expressed doubts are Beale, review of Harland, "Law of Minors" (1976) 39 *MLR* 358 at 360 and Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 26.

<sup>8</sup> Recommended by the Alberta Institute of Law Research and Reform *Minors' Contracts* (1975) Report No.14 at 29-32.

<sup>9</sup> Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 30.

inadequate as to be unconscionable or that the contract imposes obligations on the minor which are harsh or oppressive.<sup>10</sup>

3.9 By contrast, the other scheme in New Zealand (scheme B), applying to persons under eighteen, goes to the other extreme. No contract is binding on the minor unless the adult can show that it was fair and reasonable when entered into. Even if it is binding, the court has a discretion not to make any order or to order compensation or restitution.<sup>11</sup> In the Commission's view this goes too far. In truth there is no contractual obligation at all. Furthermore the criterion of "benefit" might be more satisfactory than the criterion whether the contract is "fair and reasonable". There may be cases where a contract is eminently fair and reasonable but is undesirable for the particular minor.

3.10 In December 1977 the Law Reform Committee of South Australia, in a report on the contractual capacity of minors, made recommendations opposing both the New South Wales and New Zealand approaches.<sup>12</sup> In opposition to the New South Wales approach it considered that the need to protect minors from exploitation justified retention of the basic principle that in general a minor should not be bound by his contracts. The New Zealand procedure, permitting a court to declare a contract already entered into to be binding, was rejected as the South Australian Committee considered that it rendered the status of all contracts uncertain at the time of their making. A minority in the South Australian Committee, following the proposal of the Latey Committee (U.K.), went as far as to recommend that no contract should be binding on a minor. The majority, however, recommended retention of the common law exceptions binding a minor to contracts for necessities and beneficial contracts of service.

3.11 The Commission's tentative view, like that of a majority in the South Australian Committee, is that there may be no need to abandon the common law principle that a minor should be bound by a contract for necessities and a contract for service provided these do not contain any harsh or onerous provisions and provided the consideration is reasonable. There is some case law guidance on the subject<sup>13</sup> and it is hoped that the retention of this will provide some certainty in this area. In most cases items such as food, clothes and lodgings will clearly be necessities. It should be stipulated, however, that the minor should be bound by an

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<sup>10</sup> See paragraphs 1.83 and 1.85 above.

<sup>11</sup> See paragraph 1.90 above.

<sup>12</sup> Law Reform Committee of South Australia, *Contractual Capacity of Infants* (1977) Report No. 41 at 6.

<sup>13</sup> See paragraph 1.9 above.

executory as well as an executed contract for such items,<sup>14</sup> and that the relevant time to determine whether the items concerned are necessary should be the time of the contract.<sup>15</sup>

3.12 The Commission does not, however, share the South Australian view that contracts which are not for necessities or for service should be unenforceable against a minor. It considers that a fairer balance would be obtained if a minor were bound also by any contract which was beneficial to him when entered into. This result could be achieved if a court were given power to declare the whole or part of such a contract to be binding on the minor provided this did not involve any rewrite of its terms. Application for such an order could be made by any party to the contract or other person interested, for example, as a guarantor. This means that a minor would be unprotected if the contract, although initially beneficial, subsequently turned out to be non-beneficial for him. But this is a risk that he could fairly be expected to take, for an adult might otherwise refuse to deal with him. Any contract which is not for a necessary or for service or is otherwise not beneficial to a minor should be unenforceable against him.

3.13 If an adult enters into a contract with a minor which is not binding and which he cannot enforce, it is undesirable that he should be obliged to wait in uncertainty while the minor makes up his mind whether or not he is going to perform his obligations. The Commission sees merit in a provision enabling the adult to make application to a court for enforcement of the contract or part of the contract (in the sense of excising undesirable portions) if the contract, or what is left of it, is beneficial at that time for the minor, or for cancellation of the contract if it is not. He ought to follow this procedure even if the minor purports to repudiate the contract as the repudiation itself may not be binding on the minor. This would appear to be more desirable than providing for a minor to be bound by any repudiation of the contract.

3.14 A minor on reaching full age should be bound by a contract which he then ratifies in writing, words or otherwise and whether communicated to the enforcer or not.<sup>16</sup> If he does not ratify it, the adult ought to be able to apply to the court for an order requiring the "minor" to make a decision either to ratify or to repudiate the contract. In view of this procedure it might

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<sup>14</sup> The common law is not clear on this point: see paragraph 1.8 above.

<sup>15</sup> See paragraph 1.10 above.

<sup>16</sup> The South Australian Committee recommended retention of the existing requirement that ratification be in writing: see paragraph 1.30 above and Law Reform Committee of South Australia, *Contractual Capacity of Infants* (1977) Report No. 41 at 7-8.

be unnecessary and undesirable to provide that any contract with a minor should be automatically binding if not repudiated before he attains the age of nineteen.<sup>17</sup>

3.15 The Commission's tentative view is that -

1. *A minor should be bound by a contract whether executed or executory for service or for necessities, provided the consideration and the terms of the contract were fair and reasonable when the contract was made.*
2. *All other contracts should be prima facie unenforceable against a minor unless a court is satisfied that the contract was beneficial for the minor at the time it was made.*
3. *During the minority of a party, a court ought to be able to confirm wholly or in part, or cancel an unenforceable contract.*
4. *On reaching majority a minor should be entitled informally to ratify an unenforceable contract, and may be ordered by a court to make such a determination.*

(ii) *Contracts binding on the adult*

3.16 In Western Australia, although an adult is unable to enforce a non-binding contract against the minor, he in turn is bound to complete his obligations at the suit of the minor. This approach is retained in the New Zealand legislation.<sup>18</sup> In New South Wales, however, a minor cannot enforce a contract against an adult as of right. He must first show that the contract is binding on both parties.<sup>19</sup>

3.17 The Commission's tentative view is that the New South Wales approach might place the minor at a disadvantage. It would, for example, allow an adult simply to defend any action against him by the minor by alleging that the contract is not binding on the minor. This would then place the onus on the minor to show that he is bound. This additional burden might make minors more inclined to cut their losses and less inclined to press their strict legal rights. Because most minors presumably will have limited resources, they are likely to be more dubious about legal proceedings than the adults with whom they are dealing. However, it is the Commission's tentative view that if a minor chooses to enforce a contract against an adult party, he should then be bound by the contract.

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<sup>17</sup> cf. the New South Wales legislation: see paragraph 1.67 above.

<sup>18</sup> See paragraph 1.88 above.

<sup>19</sup> See paragraph 1.59 above.

3.18 The Commission's tentative view is that -

*A minor should be able to enforce any contract against an adult, but his action in doing so should render him liable to perform any of his outstanding contractual obligations.*

(iii) *Pre-contractual approval*

3.19 The Commission sees merit in any reasonable measure designed to ensure greater certainty as to the binding nature of contracts with minors, and, in its view, the most satisfactory method of achieving this goal is to introduce a simple, expedient and inexpensive procedure for approval in advance to be given to minors' contracts.

3.20 One possible approach would be to make a contract binding on a minor if it were entered into with the approval of his parents or guardian. The concept has initial appeal. If the minor needs protection who better to provide it than those who are supposed to be looking after him? Why should the adult with whom the minor is dealing have to suffer hardship if the dealing met with the approval of the minor's parents?

3.21 There is no rule in Western Australia that the minor<sup>20</sup> or his parent<sup>21</sup> is bound simply because the parent approved of the transaction.<sup>22</sup> A cautious trader in these circumstances would deal directly with the parent as the contracting party or as one of the parties or as a trustee for the minor or as an indemnifier.

3.22 One difficulty with the implementation of such a proposal is that there would be varying degrees of responsibility shown by parents. For example, in a case where the minor has left home, the parent may be prepared to approve any transaction whether or not it is in his child's best interests. The procedure might also lead to family tensions between parent and child.

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<sup>20</sup> *Field v Moore* (1855) 44 ER 269 at 274-5.

<sup>21</sup> A modern illustration of the principle that the parent is not bound can be seen in *Saywell v Yiu* (1976) 14 SASR 56. In this case a dentist brought an action against a parent to recover the cost of dental treatment for his sixteen year old daughter. It was held that unless the dentist could show that the father had expressly or implicitly (e.g. by arranging the appointment) agreed to pay the costs, he was not liable. Of course, the treatment being a necessary the minor was liable, but presumably was unable to pay.

<sup>22</sup> cf. ss.13-16 of the *Marriage Act 1961* (Cwth) where a minor needs the consent of his parents or parent, to his proposed marriage but with provision for a Magistrate to give consent where a parent refuses to do so.

3.23 These problems may be eased if provision were made as suggested in the next paragraph for the contracting parties to obtain the consent or approval of a magistrate or some other suitable body in default of agreement by the parent. It might also be desirable to provide a limit on the value of the contract which a parent or guardian may approve. Perhaps \$500 would be a suitable ceiling.

3.24 Although New South Wales and New Zealand provide for pre-contractual approval of proposed contracts by minors by magistrates within jurisdictional limits,<sup>23</sup> the Commission wishes to stress that such applications should be informal, inexpensive and quickly dealt with. The prospect of delay or expense in obtaining an order might make entry into the contract unattractive for both parties.

3.25 The Small Claims Tribunal with an extended jurisdiction might be an appropriate body in Western Australia to consider applications for approval of minors' contracts informally and expeditiously. Alternatively, the Public Trustee or even a solicitor with a certain number of years experience who is employed independently from the parties to the proposed contract could be given the relevant power to approve contracts. However, the Commission favours the use of magistrates in Local Courts. Such courts are available throughout Western Australia, and magistrates, because of their experience, are suited to making assessments of this kind and perform a similar role when called on to consent to a proposed marriage by a minor in lieu of consent by the minor's parent/s or guardian/s.<sup>24</sup> There is also a ready-made appeal procedure from decisions by Local Courts if appeals were to be permitted under legislation dealing with minors' contracts.

3.26 The involvement of solicitors in the New South Wales legislation who may approve dispositions of property by or to minors<sup>25</sup> was not part of the recommendations of the New South Wales Law Reform Commission and it has subsequently been criticised.<sup>26</sup> It has been said that the type of decision to be made in these dispositions of property cases is the type of determination one would normally expect to be left to the courts.<sup>27</sup> In the Commission's tentative view this comment applies with even greater force to a decision whether a minor ought to be bound by a proposed contract. Admittedly solicitors may perform a similar

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<sup>23</sup> \$750 in New South Wales; \$2,000 in New Zealand.

<sup>24</sup> *Marriage Act 1961* (Cwth), s.16.

<sup>25</sup> See paragraphs 1.61 and 1.65 above.

<sup>26</sup> Harland, *Laws of Minors* (1974) at 108 paragraph 708 and at 210 paragraph 1508.

<sup>27</sup> *Ibid.*, at 210 paragraph 1508.

function when requested by the court to provide an opinion as counsel for the purpose of approving a compromise of a claim by a minor in the Supreme Court.<sup>28</sup> But it may be doubtful whether solicitors would accept the responsibility associated with the approval of minors' contracts where they have no other relationship with the parties.

3.27 If Local Courts were to be allocated the function of approving contracts proposed by minors, the present jurisdictional limit of \$3,000<sup>29</sup> would seem to be appropriate. Above this limit, application could be made either to the District Court within its jurisdictional limit of \$20,000<sup>30</sup> or to the Supreme Court. It might also be desirable to empower the court concerned, if it considers it necessary in a particular case to do so, to refer the matter to a parent or guardian or to the Public Trustee or an independent solicitor with the object of obtaining a report or for that referee to appear in court on the hearing of the application.<sup>31</sup>

3.28 Another provision in which the Commission sees merit is one which allows the Supreme Court to grant capacity to a minor not just to enter into a particular contract, but to enter into a certain type or category of contracts, or to enter into contracts generally. Such a provision is found in the New South Wales legislation<sup>32</sup> and in the Commission's view would be particularly useful where a minor proposes to establish a business.

3.29 The Commission's tentative view is that -

1. *A minor should be bound by contracts up to a value of \$500 which have been approved in writing in advance by his parents or parent or guardian.*
2. *In the event of a dispute or if approval from parent/s or guardian/s is not forthcoming, application for approval could be made to a magistrate for contracts up to a value of \$3,000 or to the District Court for contracts up to a value of \$20,000 or to the Supreme Court.*
3. *The Supreme Court, or possibly the District Court, should have power to grant capacity to a minor to enter into certain types or categories of contracts, or contracts generally.*

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<sup>28</sup> *Rules of the Supreme Court 1971*, Order 70 rules 10-11.

<sup>29</sup> *Local Courts Act 1904*, s.30.

<sup>30</sup> *District Court Act 1969*, s.50(1) (a). With the consent of the parties the court has unlimited jurisdiction: s.50(1) (e).

<sup>31</sup> cf. *Minors (Property and Contracts) Act 1970* (NSW), s.43 and *Minors' Contracts Act 1969* (NZ), s.9(3) and (4), and cf. the function of solicitors acting as counsel for the purpose of approving compromises of claims by minors in the Supreme Court: see paragraph 3.26 above.

<sup>32</sup> See paragraph 1.66 above.

4. *A court when considering an application for approval for a contract should be empowered to obtain a report or other assistance from a minor's parent/s, guardian/s, the Public Trustee or possibly a solicitor instructed independently of the parties.*

(iv) *Property rights*

3.30 In any case where a contract made by a minor is repudiated, or where it is cancelled or partially confirmed by a court the Commission takes the view that a court should have a wide discretion to effect restitution or to order compensation, so as to ensure that the parties suffer as little loss as is possible. There may even be rare circumstances where it may be desirable for a court to be able to make orders affecting the title of innocent third persons to the property involved, provided of course that it is possible to compensate that third person adequately.<sup>33</sup>

3.31 The Commission is not persuaded at this stage that it is necessary to go as far as the New South Wales legislation has gone in its endeavour to achieve greater certainty in the law in so far as it affects dispositions of property. Apart from the complexity of that legislation, the Commission has doubts as to the desirability of adopting provisions which would bind the minor to the consequences of performing a non-beneficial contract simply because the consideration was not manifestly excessive.<sup>34</sup>

3.32 The Commission therefore suggests that the New Zealand provision as to compensation and restitution<sup>35</sup> would be desirable in legislation in this State but with two modifications. First, the Commission considers it to be unnecessary and undesirable for a court to be able to make such orders where the disposition of property has been made pursuant to a binding contract. In this respect it agrees with the New South Wales approach.<sup>36</sup> Secondly, it considers that some legislative guidance as to the relevant factors to be taken into account would be helpful.

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<sup>33</sup> As in New Zealand: see paragraph 1.86 above.

<sup>34</sup> See paragraphs 1.61 to 1.64 and 3.4 above.

<sup>35</sup> See paragraphs 1.81, 1.86 to 1.87 and 1.90 above.

<sup>36</sup> See paragraph 1.74 above.

3.33 It has been suggested<sup>37</sup> that the New Zealand legislation in a different context provides a list of suitable model criteria namely -

- (a) the circumstances surrounding the making of the contract;
- (b) the subject matter and nature of the contract;
- (c) the nature and value of any property involved;
- (d) the age and means of the minor;
- (e) all other relevant circumstances.

The Commission tentatively supports inclusion of these statutory guidelines for the assistance of the court in making orders for compensation or restitution in any proposed legislation for Western Australia, but it would suggest the addition of two more, namely -

- (f) whether the contract was instigated by the minor's fraud;
- (g) the rights of third parties who have received an interest in the property whether they have done so with or without knowledge of the minor's interests.

3.34 To avoid confusion as to the ownership of property passing pursuant to a contract with a minor, and to ensure protection for third parties, it could be provided that any disposition of property pursuant to a contract whether binding or non-binding on the minor should pass good title.<sup>38</sup> In the case of a non-binding contract, however, this should be subject to any powers exercisable by a court to order restitution or compensation.

3.35 The Commission's tentative view is that -

1. *Subject to the court's powers in section 2 below, property passing pursuant to any contract with a minor should pass good title to the transferee.*
2. *In the case of a non-binding contract whether repudiated by the minor or confirmed or cancelled by a court, any party should be able to obtain compensation or orders for restitution of property but only on application to a court.*

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<sup>37</sup> Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 31-32.

<sup>38</sup> This follows the British Columbia Law Reform Commission's recommendation: *Minors' Contracts* (1976) at 43. That recommendation is difficult to reconcile, however, with the view expressed in the text by that Commission that for the purposes of passing title to property unenforceable contracts should be treated as if they were voidable contracts.

3. *In making any such order a court should endeavour to return the parties to the position they were in prior to entry into the contract but otherwise having regard to -*
- (a) *the circumstances surrounding the making of the contract;*
  - (b) *the subject matter and nature of the contract;*
  - (c) *the nature and value of any property involved;*
  - (d) *the age and means of the minor;*
  - (e) *whether the contract has instigated by the minor's fraud;*
  - (f) *the rights of third parties who have received an interest in the property whether they have done so with or without knowledge of the minor's interests;*
  - (g) *all other relevant circumstances.*

**(b) Protection for married minors**

3.36 A matter of some controversy is whether minors who are or have been married ought to be bound by all contracts as if they were adults. This measure has been adopted in New Zealand<sup>39</sup> and can be justified on the basis that having entered into such a position of responsibility the minor ought not to be placed at any disadvantage through a failure by adult traders to deal with him.

3.37 On the other hand there is no such provision in New South Wales legislation, and the British Columbia Law Reform Commission was divided on the subject.<sup>40</sup> Initially the majority view supported the New Zealand proposal, the minority taking the view that the conferral of full contractual capacity was discriminatory and that marriage did not transform the minor into a person capable of protecting himself from an unfair or unwise dealing.

3.38 However, after considering comments received, a majority of the British Columbia Law Reform Commission formed the view that no special provision should be made for married minors - that they should receive the same protection as any other minor. The argument of those who commented was that married minors were in need of as much if not more protection as unmarried minors as the former were likely to enter into a larger number and range of contracts. If married minors were to encounter difficulty because of their general incapacity it would be possible to obtain court approval, either for specific contracts or conferring full contractual capacity if the minor could demonstrate that he was sufficiently responsible.

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<sup>39</sup> See paragraph 1.94 above.

<sup>40</sup> Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 32-33.

3.39 The Commission tentatively agrees with this argument and supports the majority view of the British Columbia Law Reform Commission that it would be an undesirable situation if a minor were bound by all contracts as if he were an adult merely because he is or has been married.<sup>41</sup> It is reasonable to suggest that the range of necessities for a married minor would be enlarged and as the Commission has suggested that the rule that a minor should be bound by a contract for necessities could be retained,<sup>42</sup> it does not foresee any particular difficulty for married minors in the market place. If such difficulty were encountered, the better solution would seem to be to grant specific or general contractual capacity in individual cases.

3.40 The Commission's tentative view is that -

*Minors who are or have been married should receive the same protection in law regarding their entry into contracts as unmarried minors.*

**(c) Minors and tort liability including fraud**

3.41 Another difficult question is whether a minor should be liable in tort when this has the effect of enforcing a contract.<sup>43</sup> The most common situation where this might occur is where a minor fraudulently represents to the adult that he is over eighteen years of age. Liability may, however, arise in other situations, for example where a minor negligently damages hired goods and a term of the hire contract is that the hirer shall be liable for damage to the hired goods.

3.42 The Latey Committee in England in a report on minors' contracts in 1967<sup>44</sup> suggested that a minor should be liable in tort for deceit even if the effect would be indirectly to enforce the contract.<sup>45</sup> But in the case of fraudulent misrepresentations as to age it foresaw that contracts could become standardised with a clause representing that every contracting party is

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<sup>41</sup> The South Australian Law Reform Committee also shares this view: see *Contractual Capacity of Infants* (1977) Report No. 41 at 6. See also Burrows, "The Minors Contracts Act 1969" (NZ) (1973) 47 *ALJ* 657 who considers it to be a pity that the protective supervision of the Magistrates' Court in New Zealand is not available to married minors.

<sup>42</sup> See paragraph 3.11 above.

<sup>43</sup> Although liability in tort and for breach of contract may be similar they do not always overlap. The measure of damages may differ. In tort, damages are compensatory to replace actual loss, whereas in contract the successful party may recover losses flowing from the breach including items such as loss of anticipated profit: see Harland, *The Law of Minors* (1974) at 194-195 paragraph 1312.

<sup>44</sup> Cmnd 3342,74-101 paragraphs 271-391.

<sup>45</sup> *Ibid.*, at 92 paragraph 351.

over eighteen. If this were false the adult would probably be able, in each case, to bring an action for damages for deceit. In this way it foresaw that protection for minors could be severely eroded. Consequently, the Committee suggested that a minor should not be liable for the tort of deceit arising out of fraudulent misrepresentations as to his age.<sup>46</sup> As to other torts, the Committee recommended no change to the existing law which excuses a minor from liability if the effect of holding him liable is indirectly to enforce an unenforceable contract.<sup>47</sup>

3.43 In New South Wales a minor is liable for any tort, including deceit for misrepresentations as to age, whether or not the tort is connected with any contractual obligation.<sup>48</sup> Furthermore, a court may enforce a non-binding contract against a minor where this has been procured by a fraudulent misrepresentation by him as to his age.<sup>49</sup>

3.44 New Zealand preserves the common law rule that a minor ought not to be liable for any tort including deceit where his liability is associated with a contractual obligation. However, the court is expressly authorised to take into account that the contract has been procured by any fraudulent misrepresentation by the minor, including a misrepresentation as to his age, when exercising its discretion as to the relief it should allow to the parties under the Act.<sup>50</sup>

3.45 The British Columbia Law Reform Commission preferred the New Zealand approach preserving the common law immunity from tort liability but expressly providing for the court to take into account fraudulent misrepresentations by the minor when considering its discretionary powers under the Act.<sup>51</sup> However, it added two provisos: Firstly, that mere proof that the minor signed a contract containing a clause that he was of full age should not be sufficient proof of an intention to deceive, and secondly, that an adult must have reasonable grounds for supposing the minor's representation to be true and consequently for acting on it.

3.46 Of these possible alternatives, the Commission favours the recommendations of the Law Reform Commission of British Columbia. It supports the common law rule that an adult who enters into a non-binding contract with a minor, presumably having done so knowing full

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<sup>46</sup> Ibid., at 92 paragraph 353.

<sup>47</sup> Ibid., at 93 paragraph 355.

<sup>48</sup> See paragraph 1.79 above.

<sup>49</sup> See paragraph 1.73 above.

<sup>50</sup> See paragraphs 1.87 and 1.89 above.

<sup>51</sup> Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 36-37.

well that it is unenforceable against the minor, ought not to be permitted to seize a fortuitous opportunity of enforcing the same obligation under another legal head of liability. Nevertheless it agrees that where the minor has been fraudulent, he ought not to be permitted to shelter behind his own wrong. In many cases the minor would be subject to criminal sanctions.<sup>52</sup> The fairest result would seem to be to allow the court to take into account such fraud when exercising its discretionary powers but not where the adult has been instrumental in the form of his contract in procuring the making of the representation, or where he ought to have known that the minor in spite of his representation is under age.

3.47 Where a minor who has induced a contract by fraud seeks to enforce it against the adult party, the latter may at common law avoid the contract just as if he were dealing with an adult.<sup>53</sup> This would appear to be a satisfactory result and the Commission sees no need to effect any change in the law on this question.

3.48 Finally, it should be noted that if full discretionary powers were given to a court to adjust the rights of the parties to a contract involving a minor,<sup>54</sup> there would be no need to retain the special rules which have been developed in equity to deal with property matters where a minor has been fraudulent.<sup>55</sup>

3.49 The Commission's tentative view is that -

1. *A minor should not be liable for a tort if, in effect, this has the same result as if he were sued for breach of an unenforceable contract.*
2. *If a contract with a minor has been entered into by an adult by reason of fraudulent misrepresentations including misrepresentations as to age by a minor, a court should be entitled to take this into account*
  - (a) *when making an order confirming or cancelling an unenforceable contract;*
  - (b) *when exercising its discretion to grant orders as to compensation or restitution.*
3. *A court should not exercise its discretion to make an order against the interests of a minor if the only evidence of fraud is that the minor*

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<sup>52</sup> *Criminal Code 1913*, ss.408-411.

<sup>53</sup> See Cheshire and Fifoot, *Law of Contract* (3rd Aust. ed. 1974) at 316-319.

<sup>54</sup> See paragraphs 3.30 to 3.34 above.

<sup>55</sup> See paragraphs 1.40 to 1.42 above.

*signed a clause in a written contract to the effect that he has over eighteen or if the adult knew or ought to have known that the minor in spite of his representation had not reached the age of eighteen.*

**(d) Liability of guarantors**

3.50 There has been much criticism of the decision in *Coutts & Co. v Browne-Lecky*<sup>56</sup> exempting a guarantor, as opposed to an indemnifier, from liability in respect of a failure by a minor to perform his non-binding contractual obligations. The distinction is a technical one without merit and constitutes a trap for an unwary draftsman. Reforms in New South Wales,<sup>57</sup> New Zealand<sup>58</sup> and proposed in British Columbia<sup>59</sup> and South Australia<sup>60</sup> all favour abolition of the exemption so that guarantors are made liable on their guarantee notwithstanding the minority of the principal. This seems to the Commission to be an appropriate measure to adopt.

3.51 The Commission's tentative view is that -

*An adult guarantor should be liable on his guarantee to the same extent as he would be if the principal debtor were an adult.*

**(e) Minors and agents**

3.52 The Commission's tentative view is that some clarification if not change to the common law<sup>61</sup> would be achieved if it were expressly provided that -

1. *A minor should by contract be able to appoint an agent, the enforcement of such contract to be governed in the same manner as any other contract involving a minor having regard to the purposes for which the agent was appointed.*
2. *Any contract made by the agent on behalf of a minor should be enforceable against the minor as if he had made it himself.*
3. *A minor should be able to execute a valid power of attorney.*

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<sup>56</sup> [1946] 2 All ER 207.

<sup>57</sup> See paragraph 1.78 above.

<sup>58</sup> See paragraph 1.96 above.

<sup>59</sup> Law Reform Commission of British Columbia, *Minors' Contracts* (1976) at 43.

<sup>60</sup> Law Reform Committee of South Australia, *Contractual Capacity of Infants* (1977) Report No. 41 at 8.

<sup>61</sup> See paragraph 1.45 above.

4. *A minor should be capable of being appointed by contract as an agent for an adult but should not be liable on contracts made with another by him as agent for an undisclosed principal unless such contracts would have been enforceable if entered into by the minor on his own account. The enforcement of the minor agent's contract with his principal should be governed in the same manner as any other contract by a minor.*

**(f) Non-contractual dealings by minors**

3.53 The emphasis in this paper has been directed towards minors' contracts and property consequences flowing from these because it is in this area where practical difficulties are more likely to arise. However, the Commission considers that the task of reforming the law relating to property dealings by minors would be incomplete if provision were not made to deal with non-contractual matters.

3.54 The general rule that a person can at any time avoid a gift or other non-contractual arrangement made or entered into during minority<sup>62</sup> gives rise to some uncertainty. In the Commission's view it would be desirable to specify occasions when such avoidance should not be permitted. This could be so where it was reasonable for the minor to have entered into the arrangement in the first place or unreasonable, for example through lapse of time, or having regard to the changed position of the parties, to allow the minor to avoid his responsibilities when he seeks to do so.

3.55 The Commission would also tentatively support a procedure to enable advance approval to be given with the object of binding the minor to gifts or other non-contractual dealings which are reasonable in the circumstances when made. Approval could be given by the same person or body authorised to give approval to minors' contracts, namely parents, guardians or the court. For the reasons expressed above,<sup>63</sup> the Commission is doubtful whether the Public Trustee or a solicitor independently instructed ought to be given power to approve such dispositions. Provided the court is able to deal with applications for approval of non-contractual dealings where a minor is involved quickly and inexpensively, the Commission considers that a court would be the preferable body to make the necessary decision, in the absence of approval by a parent or guardian.

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<sup>62</sup> See paragraph 1.49 above.

<sup>63</sup> See paragraphs 3.25 to 3.26 above.

3.56 The Commission's tentative view is that -

1. *A minor should be bound by any reasonable non-contractual dealing or any dealing which has been approved in advance at his request by his parent/s or guardian/s, or in the event of a dispute, or in the absence of such approval, by a court provided the dealing is reasonable in the circumstances.*
2. *Non-binding dealings by a minor should be voidable by him at any time, provided that he should not be able to avoid his dealing if this is unreasonable, for example, because of unnecessary lapse of time, alteration of position by the parties concerned or where rights of third parties are involved.*

## **CHAPTER 4**

### **A SUMMARY OF THE COMMISSION'S TENTATIVE VIEWS**

4.1 In the Commission's view there are seven main issues relating to reform of the law of minors' contracts and property for consideration. They are -

- (a) In what circumstances should a minor be bound by his contract?
- (b) In what circumstances should an adult be bound by a contract with a minor?
- (c) If a minor is able to avoid a contract what is the best method for dealing with any property involved?
- (d) Should a minor be liable in tort, including the tort of deceit for misrepresentations as to his age, where this has the result indirectly of enforcing an unenforceable contract against him?
- (e) Should a guarantor of a minor's contract be excused liability if the contract is unenforceable against the minor?
- (f) Should a minor be able to appoint an agent or be appointed an agent and, if so, what effect should this have on the minor's liability for the various contracts involved?
- (g) In what circumstances should a minor be bound by non-contractual dealings?

4.2 The Commission's tentative views are summarised as follows -

#### **(1) Contracts binding on a minor**

##### *Contracts for necessities and for service*

1. A minor should continue to be bound by a contract whether executed or executory for service or for necessities provided the consideration and the terms of the contract were fair and reasonable when the contract was made.

(paragraph 3.11)

*Beneficial contracts*

2. A court should be entitled on the application of a party to a contract or any other interested person to declare a contract binding in whole or in part on a minor if satisfied that the contract was beneficial to the minor when entered into.

(paragraph 3.12)

*Ratification*

3. A minor should be bound by any contract if on reaching full age he demonstrates formally or informally an intention to perform it.

(paragraph 3.14)

*Court order*

4. A court should have power on the application of any party to the contract, or any other interested person, to make an order confirming or cancelling an unenforceable contract whether in whole or part.

(paragraph 3.13)

5. A court should be empowered to make an order calling on a person who has reached full age to elect whether he intends to perform a contract entered into by him when he was a minor.

(paragraph 3.14)

*Pre-contractual approval*

6. A minor should be bound by any contract up to a value of \$500 entered into by him with the written approval of his parent/s or guardian/s.

(paragraphs 3.20 to 3.23)

7. A minor should be bound by any contract up to the value of \$3,000 approved in advance by a magistrate, a contract up to the value of \$20,000 approved in advance by the District Court, or any contract entered into with the approval of the Supreme Court.

(paragraphs 3.25 to 3.27)

8. The Supreme Court or possibly the District Court should be empowered to grant to a minor capacity to enter into certain types of contracts, or contracts generally.

(paragraph 3.28)

9. A court should approve a contract only if satisfied that it is for the minor's benefit. The court should be empowered to obtain an independent report or assistance in making its determination from a minor's parent/s, guardian/s, the Public Trustee or perhaps a solicitor.

(paragraph 3.27)

*Proceedings by a minor to enforce an unenforceable contract*

10. If a minor takes steps to enforce a contract against another party, he should be bound to perform his own outstanding contractual obligations, whether these were otherwise enforceable or not.

(paragraph 3.17)

*Married minors*

11. A minor should not be bound by his contracts by reason only of the fact that he is or has been married.

(paragraph 3.39)

**(2) Contracts binding on an adult**

An adult should be bound by any contract entered into with a minor unless or until he obtains a court order cancelling the contract or the minor repudiates the contract.

(paragraphs 3.13 and 3.17)

**(3) Adjustment of property rights arising out of a contractual dealing by a minor**

1. Unless the parties agree to the contrary, title to property transferred pursuant to any contract with a minor should pass to the transferee.

(paragraph 3.34)

2. If a minor is not bound by his contract or any part thereof whether resulting from his election, or by order of a court, a court should have a wide discretion, on the application of any interested party, to make orders for compensation and restitution of property.

(paragraph 3.30)

3. The court's power to order restitution should empower it to order the return of property (other than land) by third parties provided the court is satisfied that the third party can be adequately compensated.

(paragraph 3.30)

4. In making an order for compensation or restitution a court should endeavour to return the parties to the position they were in prior to entry into the contract but otherwise have regard to -

- (a) the circumstances surrounding the making of the contract;
- (b) the subject matter and nature of the contract;
- (c) the nature and value of any property involved;
- (d) the age and means of the minor;
- (e) whether the contract was instigated by the minor's fraud;
- (f) the rights of third parties who have received an interest in the property whether they have done so with or without knowledge of the minor's interests;
- (g) all other relevant circumstances.

(paragraph 3.33)

#### **(4) Liability in tort**

1. A minor should not be liable for any tort, including deceit for misrepresentations as to his age, if this would have the same effect as enforcement against him of an unenforceable contract.

(paragraph 3.46)

2. If a contract with a minor has been entered into by an adult by reason of fraudulent misrepresentations including misrepresentations as to age by the minor, a court should be entitled to take this into account

- (a) when making an order confirming or cancelling an unenforceable contract;
- (b) when exercising its discretion to grant orders as to compensation or restitution.  
(paragraphs 3.33 and 3.46)

3. A court should not exercise its discretion to make an order against the interests of a minor if the only evidence of fraud is that the minor signed a clause in a written contract to the effect that he was over eighteen, or if the adult knew or ought to have known that the minor, in spite of his representation, had not reached the age of eighteen.  
(paragraph 3.46)

#### **(5) Liability of guarantors**

A person who guarantees the performance by a minor of his contractual obligations should be liable on his guarantee notwithstanding that the contract is unenforceable against the minor.  
(paragraph 3.50)

#### **(6) Minors and agency contracts**

1. A minor should by contract be able to appoint an agent, the enforcement of such contract to be governed in the same manner as any other contract involving a minor having regard to the purposes for which the agent was appointed.

2. Any contract made by the agent on behalf of a minor ought to be enforceable against the minor as if he had made it himself.

3. A minor should be able to execute a valid power of attorney.

4. A minor should be capable of being appointed by contract as an agent for an adult but should not be liable on contracts made with another by him as agent for an undisclosed principal unless such contracts would have been enforceable if entered into by the minor on his own account. The enforcement of the minor agent's contract with his principal should be governed in the same manner as any other contract by a minor.  
(paragraph 3.52)

**(7) Non-contractual dealings**

1. A minor should be bound by any reasonable non-contractual dealing or any dealing which has been approved in advance at his request by his parent/s or guardian/s, or in the event of a dispute, or in the absence of such approval, by a court provided the dealing is reasonable in the circumstances.

(paragraph 3.54)

2. Non-binding dealings by a minor should be voidable by him at any time, provided that he should not be able to avoid his dealing if this is unreasonable, for example, because of unnecessary lapse of time, alteration of position by the parties concerned or where rights of third parties are involved.

(paragraph 3.55)

## APPENDIX I

### Legislation in Western Australia relevant to minors' contracts

Legislation	Summary
<i>Age of Majority Act 1972</i> , s.5	Lowers the age of majority to eighteen years
<i>Land Act 1933</i> , s.150	Permits a minor to deal with land under the Act as if he were an adult, subject to a review of the terms of such dealing by the Supreme Court
<i>Sale of Goods Act 1895</i> , s.2	Renders a minor liable to pay a reasonable price for goods delivered which are necessaries at the time of sale and delivery
<i>Transfer of Land Act 1893</i> , s.159	Requires the registrar to make a note on the title if he is aware that the registered proprietor is a minor
s.188	Requires the registrar to enter a caveat to protect the interests of a registered proprietor who is a minor
<i>Lord Tenterden's Act (UK) (Statute of Frauds Amendment Act 1828-1829 (9 Geo V C14))</i> s.15 having been received in Western Australia as part of the common law of England - see Cheshire and Fifoot, <i>Law of Contract</i> (3rd Aust. ed., 1974) at 460 n.5 and <i>De Garis v Dalgety &amp; Co Ltd.</i> [1915] SALR 102	A minor may be liable for a contract which he ratifies on reaching full age but only if this is in writing and signed by the party to be charged
<i>Life Insurance Act 1945</i> (Cwth), s.85	A minor aged between ten and sixteen may with the written consent of his parents take out life insurance. A minor over sixteen can take out life insurance without consent, but needs consent before he can mortgage or assign his policy

There is other legislation enabling orders to be made affecting minors' contracts. For example Part VIII of the *Industrial Arbitration Act 1912* permits the Western Australian Industrial Commission to regulate apprenticeship agreements and s.7 of the *Masters and Servants Act 1892* permits justices on complaint by summons to direct fulfilment of or annul a contract of service. However, unlike the provisions listed above in this schedule, these do not relate solely to minors.