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## **MINORS' CIVIL LAW CAPACITY**

**REPORT No 50**

Queensland Law Reform Commission  
December 1996

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**REPORT No 50**

**Queensland Law Reform Commission  
December 1996**



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Previous Queensland Law Reform Commission publication on this reference:

Draft Report *Minors' Civil Law Capacity*

(WP 45, April 1995)



To: The Honourable Denver Beanland MLA  
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on *Minors' Civil Law Capacity*.

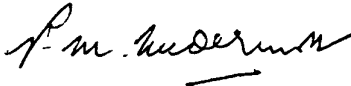
The Commission hopes to be involved in the development of any draft legislation implementing its recommendations.



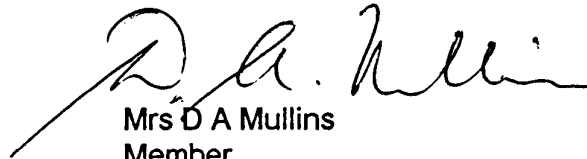
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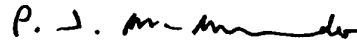
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# CHAPTER 1

## INTRODUCTION

### 1. TERMS OF REFERENCE

This reference was given to the Commission by the Attorney-General in its Fourth Program of work.<sup>1</sup> The full terms of the reference are set out in items 1 and 7 of the Program:

1. Examine the law relating to infancy, and, in particular, the civil law capacity of infants.
7. Examine the laws relating to the employment of children.

The terms of reference are very broad. Apart from matters of age discussed below, "civil law capacity" could extend to mean the legal capacity to do any act, other than an act which is prohibited by law.

The *Children's Services Act 1965* (Qld), which contains provisions regarding child protection and the employment of children, is currently under review. It is the view of the Commission that further detailed examination of those laws is not necessary at this stage as it could pre-empt this review and involve a duplication of work. Further, much of the traditional common law on "infancy" has been overtaken by the *Family Law Act 1975* (Cth) which now applies to all children, including children who are not "children of a marriage".<sup>2</sup>

Accordingly, the Commission has elected to concentrate on the civil law capacity of a minor to enter into contracts (including employment contracts and real property transactions) and any problems which arise from that limited capacity. This Report does not, for example, contain any discussion of the civil law capacity of a minor in so

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<sup>1</sup> September 1990.

<sup>2</sup> See *Commonwealth Powers (Family Law - Children) Act 1990* (Qld).

far as that capacity relates to the law of trusts,<sup>3</sup> the law of wills,<sup>4</sup> the law of associations<sup>5</sup> or the law of torts.<sup>6</sup>

## 2. TERMINOLOGY

Legislation, case law, legal writing and everyday usage vary considerably in the use of expressions denoting persons who are not of full legal capacity because they have not attained the legal age of majority. The terms "infant", "juvenile", "child", "young person", "youth" and "minor" are used widely and often interchangeably. In the Commission's terms of reference set out above, the words "infancy", "infants" and "children" are used.

In the view of the Commission, the term "minor" is well understood in the community as connoting a person who is not of full legal capacity. For example, it is well known and understood that a person must not sell liquor to a minor. The term "minor" is also the most commonly used expression in the relevant legislation.

The term "minor" is used throughout this Report except where the terms of original materials preclude it.

## 3. DRAFT REPORT

In April 1995, the Commission published a Draft Report on *Minors' Civil Law Capacity*.<sup>7</sup>

The purpose of the Draft Report was to outline the present state of the law, to identify

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<sup>3</sup> The existence of legal capacity is an issue which is relevant to the law of trusts in a number of respects. For example, legal incapacity - whether it arises out of minority or some other disability - affects a person's capacity to be a trustee and the power of a beneficiary of full age and capacity to terminate a trust. These issues are complex, as is their relationship with - and impact on - other areas within the law of trusts. Accordingly, the Commission is of the view that a review of these issues should not take place in a piecemeal fashion but should be carried out in the context of a full review of the law of trusts as a whole.

<sup>4</sup> The capacity of a minor to make a will and the jurisdiction of courts to authorise the making of a will for a minor has already been considered by the Commission: see Queensland Law Reform Commission, Miscellaneous Paper, *Uniform Succession Laws: Wills* (MP 15, February 1996) at 4-7.

<sup>5</sup> Note that all members of the management committee of an incorporated association must be adults: see s 32A(2) of the *Associations Incorporation Act 1981* (Qld).

<sup>6</sup> The capacity of a minor to consent to health care that, without a valid consent, would constitute the tort of trespass to the person has already been considered by the Commission: see Queensland Law Reform Commission, Discussion Paper, *Consent to Medical Treatment of Young People* (WP 44, May 1995) and the Commission's forthcoming Report on *Consent to Health Care of Young People*.

<sup>7</sup> Queensland Law Reform Commission, Draft Report, *Minors' Civil Law Capacity* (WP 45, April 1995).

potential areas of difficulty with the law and to make preliminary recommendations for reform. The Draft Report also sought submissions on the report as a whole and, in particular, on the merits of the Commission's preliminary recommendations.

In order to identify what issues should be included in the Draft Report, the Commission held preliminary informal consultations with representatives of a number of organisations, including trader and employer organisations, government and statutory agencies, educational organisations, accommodation services and youth organisations.<sup>8</sup> Very few issues or problems were identified during these preliminary consultations.

As a result of the preliminary consultations, the Commission formed the provisional view that, despite the complexity and antiquity of the law on minors' civil law capacity, the detrimental impact of that law on the everyday life of both minors and adults did not, on the whole, warrant a full scale review.

However, the Commission was able to identify three issues or problems with the law on minors' civil law capacity that required further consideration. Those issues were:

1. the capacity of a minor to enter into a residential tenancy agreement;
2. the question whether a guarantee of a minor's obligation is enforceable; and
3. the remedies that are available for a breach of contract where the contract is unenforceable because one of the parties to the contract is a minor.

In the Draft Report,<sup>9</sup> the Commission made the following preliminary recommendations:

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<sup>8</sup> Organisations informally contacted were: Arts Law Centre, Australian Bureau of Statistics, Australian Finance Conference, Brisbane Junior Chamber of Commerce, Queensland Department of Education, Financial Counselling Service, Logan Youth Legal Service, Liquor, Hospitality and Miscellaneous Union, Office of Consumer Affairs (Qld), Queensland Association of State Secondary School Principals, Queensland Chamber of Commerce and Industry, Queensland Council of Parents and Citizens' Associations, Queensland Retail Traders and Shopkeepers' Association, Queensland University of Technology Counselling Services, Queensland University of Technology Student Guild, Retailers Association of Queensland, Tenants' Union of Queensland Inc, Trades and Labour Council/Australian Council of Trade Unions, University of Queensland Counselling Services, University of Queensland Union: Students Legal Service, Youth Advocacy Centre, and Youth Affairs Network of Queensland.

<sup>9</sup> At 40.

1. that section 19 of the *Residential Tenancies Act 1994* (Qld) be replaced with a provision that a minor has, in relation to a residential tenancy agreement for the provision of accommodation for the minor or his or her family, the same capacity as if the minor had attained majority; and
2. that the *Property Law Act 1974* (Qld) be amended to include a provision like section 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) to make a guarantee of a minor's contractual obligations enforceable as if the minor had attained majority; and
3. that the *Property Law Act 1974* (Qld) be amended to include a provision that where a contract is unenforceable by reason of a party's minority, a court of competent jurisdiction may, on application of a party to the contract, order on such terms as the court thinks just another party to make -
  - (a) restitution of any property that passed; or
  - (b) compensation for any services performed,under the contract.

In the Draft Report,<sup>10</sup> the Commission also raised, but did not express a concluded view on, the following issues:

1. Whether the *Property Law Act 1974* (Qld) should be amended to include a provision to the effect that a guarantee of a minor's contractual obligation is not enforceable unless the guarantee contains a warning to the guarantor in similar terms to subsection 136(2) of the *Credit Act 1987* (Qld) and subsection 55(3) of the *Consumer Credit (Queensland) Code* (Qld).
2. Whether damages for breach of contract should be available to adults in respect of goods or services that a minor has agreed to supply but has not supplied.
3. Whether a fraudulent misstatement as to age, made by a minor in the course of entering into a contract, should entitle a party to the contract who is defrauded by the minor's misstatement to seek compensation.

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<sup>10</sup> At 37-38.



#### 4. SUBMISSIONS

The Commission sought submissions on all issues raised in the Draft Report and on the preliminary recommendations. Submissions were sought from persons and organisations with a particular interest in the law relating to minors and from persons in the general community.

Copies of the Draft Report were sent to interested organisations and individuals. Advertisements were placed in *The Courier-Mail* setting out the Commission's preliminary recommendations and calling for submissions.

Twenty-seven written submissions<sup>11</sup> were received by the Commission. Informal submissions were also made by agencies and organisations with a particular interest in the right of a minor to enter into a residential tenancy agreement.

The submissions have been most helpful to the Commission in the preparation of this Report and the Commission greatly appreciates the assistance given to it by all respondents.

#### 5. THE COMMISSION'S RECOMMENDATIONS

In this Report, the Commission makes its final recommendations in light of the submissions received in response to the Draft Report.

The Commission has had some regard to the *United Nations Convention on the Rights of the Child*,<sup>12</sup> which provides that, in legal and administrative matters, "the best interests of the child shall be a primary consideration",<sup>13</sup> and that a child who is capable of forming views has the right to express them and have them taken into account.<sup>14</sup>

In reviewing the law on minors' civil law capacity, the Commission has endeavoured to balance firstly, the desire to protect minors from being exploited because of their immaturity and inexperience and secondly, the need to ensure that the law does not unnecessarily prejudice the interests of third parties who enter into contractual relationships with minors.

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<sup>11</sup> A list of the submissions to the Draft Report is set out in Appendix A to this Report.

<sup>12</sup> Adopted by the United Nations General Assembly on 20 November 1989.

<sup>13</sup> Article 3(1) of the Convention.

<sup>14</sup> Article 12 of the Convention.

**The Commission recommends that:**

- 1. section 19 of the *Residential Tenancies Act 1994 (Qld)* be replaced with a provision that a minor has, in relation to a residential tenancy agreement for the provision of accommodation for the minor and/or his or her family, the same capacity as if the minor had attained majority;**
- 2. the *Property Law Act 1974 (Qld)* be amended as follows:**
  - \* to include a provision like section 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*<sup>15</sup> to make a guarantee of a minor's contractual obligations enforceable as if the minor has attained majority;**
  - \* to include a provision like subsection 55(3) of the *Consumer Credit (Queensland) Code (Qld)*<sup>16</sup> providing that a guarantor will not be liable for the obligation of a minor unless the guarantee document contains a prominent warning to the guarantor to the effect that he or she may not have a right to recover from the minor amounts that the guarantor is liable to pay under the guarantee;<sup>17</sup>**
- 3. the *Property Law Act 1974 (Qld)* be amended to include a provision that where a contract is unenforceable because one of the parties to the contract was a minor when the contract was entered into, a court of competent jurisdiction may, on application of a party to the contract, order on such terms as the court thinks just another party to make -**
  - (a) restitution of any property that has passed; or**
  - (b) compensation for any services performed,****under the contract;**

<sup>15</sup> This section is reproduced in Appendix D to this Report.

<sup>16</sup> This section is reproduced in Appendix B to this Report.

<sup>17</sup> Subsection 55(3) of the *Consumer Credit (Queensland) Code (Qld)* is set out in Appendix B to this Report. See note 92 of this Report for a discussion of the operation of, and the relationship between, the *Consumer Credit (Queensland) Code* and the *Credit Act 1987 (Qld)*.

4. the *Property Law Act 1974 (Qld)* be amended to include a provision like section 6 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*<sup>18</sup> to allow a minor or any other party to a proposed contract to apply to a court for an order approving the terms of the contract and to make an approved contract, once entered into, as effective as if the minor had attained majority before entering into the contract.

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<sup>18</sup> This provision is reproduced in Appendix D to this Report.

## CHAPTER 2

### AGE AND ITS SIGNIFICANCE

#### 1. GENERAL

The law has always distinguished between the acts of a young person and the acts of an adult. This distinction is usually attributed to the inexperience and lack of judgment which is common to most young people. It is generally considered to be unfair to attach the legal effect of an adult act to the act of a young person.

Difficulties in applying these principles on a case by case basis - depending on the individual young person's actual capacity and understanding - have meant that arbitrary ages have been fixed, below which a young person is presumed - to a greater or lesser extent - to be incapable of carrying out certain legally effective acts.

In England, the age of majority was 14 years up until the Middle Ages. Under feudal systems of government, a regular incident of adulthood was service under arms. With the introduction of heavy armour at about that time, young adults became physically incapable of bearing armour. As a result, the age of majority was increased to 21 years.<sup>19</sup> This accident of history had an effect which long outlived its rationale.

In its Report on *Infancy in relation to Contracts and Property*, the New South Wales Law Reform Commission reviewed the evidence about fluctuating ages of physical maturity in recent centuries and observed:<sup>20</sup>

Since about the middle of the nineteenth century there has been a secular trend toward earlier maturity. The trend, which still continues, is that boys and girls mature about one year younger than did similar boys and girls born 30 years earlier.

Of course, this says nothing about emotional, intellectual and personal maturity, which might well provide a more accurate indication of the civil law capacity to be accorded to young people.

In the late 1960s and early 1970s, there was a general tendency in common law jurisdictions to lower the age of majority from 21 years to, in most cases, 18 years.<sup>21</sup>

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<sup>19</sup> Carter JW and Harland DJ, *Contract Law in Australia* (3rd ed 1996) ("Carter & Harland") at 271-272 (para 802).

<sup>20</sup> New South Wales Law Reform Commission, Report, *Infancy in relation to Contracts and Property* (LRC 6, August 1969) at 9.

<sup>21</sup> Some of the legislation and associated law reform proposals from various Australian and international jurisdictions are referred to in The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988) at 10-14; Greig DW & Davis JLR, *The Law of Contract* (1987, read with 5th (1993) cumulative supplement) ("Greig & Davis") at 757-758; and Carter & Harland at 272-273 (para 803).

In Queensland, this change was effected by the *Age of Majority Act 1974* (Qld).<sup>22</sup> Subsection 5(1)(a) of that Act provides that “a person who ... attains the age of eighteen years attains full age and full capacity on attaining that age”. The age of majority is also prescribed by the *Law Reform Act 1995* (Qld). Section 17 of that Act provides that “the age of majority is 18 years”.

The *Acts Interpretation Act 1954* (Qld) contains a number of definitions that are consistent with the statutory definitions of “age of majority” referred to above. It defines “adult” as an individual who is 18 or more, and both “minor” and (where age rather than descendency is relevant) “child” as an individual who is under 18.<sup>23</sup> However, the *Children’s Services Act 1965* (Qld) defines “child” for the purposes of that Act as “a person under or apparently under the age of 17 years”.<sup>24</sup>

The significance of age (and the significant age itself) varies across a wide variety of aspects of life (for example, criminal responsibility, motor vehicles, marriage, liquor and voting). Some of these are noted below.<sup>25</sup>

## 2. CRIMINAL RESPONSIBILITY

In Queensland, a person under the age of 10 years is not criminally responsible for any act or omission.<sup>26</sup> A person who is between the ages of 10 and 14 (inclusive) may be criminally responsible for an act or omission, but only if, at the time of doing the act or making the omission, the person had the capacity to know that he or she ought not do the act or make the omission.<sup>27</sup>

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<sup>22</sup> Although this Act was repealed by s 5(1) and schedule 6 of the *Statute Law Revision Act (No 2) 1995* (Qld), it is still effective to prescribe the age of majority because s 5(3) and schedule 9 of the *Statute Law Revision Act (No 2) 1995* (Qld) provide that the *Age of Majority Act 1974* (Qld) is a law to which s 20A of the *Acts Interpretation Act 1954* (Qld) applies.

<sup>23</sup> See s 36 of the *Acts Interpretation Act 1954* (Qld).

<sup>24</sup> See s 8 of the *Children’s Services Act 1965* (Qld).

<sup>25</sup> This survey is far from exhaustive. Many laws under which age is significant (for example, s 59 of the *Public Trustee Act 1978* (Qld) and s 199 of the *Life Insurance Act 1995* (Cth)) have not been reviewed.

<sup>26</sup> See s 29(1) of the *Criminal Code* (Qld).

<sup>27</sup> See s 29(2) of the *Criminal Code* (Qld). If cl 12 of the *Criminal Law Amendment Bill 1996* (Qld) is enacted, s 29(2) of the *Criminal Code* will be amended so that it applies to all persons between the ages of 10 and 13 (inclusive).

### 3. MOTOR VEHICLES

Subsection 106(2) of the *Traffic Regulation 1962* (Qld) provides that a superintendent must not issue a provisional or open licence to a person who has not turned 17 years.

### 4. MARRIAGE

The *Marriage Act 1961* (Cth) prohibits the solemnisation of a marriage of a minor without the written consent of the minor's parents or guardians.<sup>28</sup>

The Act also prohibits<sup>29</sup> and declares void<sup>30</sup> a marriage where either party is not of marriageable age. Section 11 provides that "a person is of marriageable age if the person has attained the age of 18 years". Under section 12, a Judge or magistrate may, in exceptional and unusual circumstances, make an order authorising a person who is 16 or 17 years of age to marry a particular person who is of marriageable age.

Because the two prohibitions are cumulative, a marriage of a minor will not be valid unless the minor obtains both the written consent of his or her parents or guardians and a court order authorising the minor's marriage to a particular person who is of marriageable age. This overlap appears to stem from a time when the marriageable age was lower than the age of majority.<sup>31</sup>

### 5. LIQUOR

Certain provisions in Part 6 of the *Liquor Act 1992* (Qld) affect minors. Under subsection 155(3), a licensee, permittee or other person in control of licensed premises commits an offence if a minor is on the premises. Under section 156, a person must not supply liquor to a minor, or permit or allow liquor to be supplied to, or consumed by, a minor on, or adjacent to, licensed premises. Section 157 makes it an offence for a

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<sup>28</sup> See ss 13 and 95(2) of, and the Schedule to, the *Marriage Act 1961* (Cth). The term "minor" is defined in s 5(1) to mean a person who has not attained the age of 18 years. Note that, under s 15, it is possible for this requirement to be dispensed with.

<sup>29</sup> See ss 95(1) and 100 of the *Marriage Act 1961* (Cth).

<sup>30</sup> See ss 23(1)(e) and 23B(1)(e) of the *Marriage Act 1961* (Cth).

<sup>31</sup> Until 1991, the marriageable age was 16 for females and 18 for males, although a Judge or magistrate could, in exceptional and unusual circumstances, authorise the marriage of a female who had attained the age of 14 or a male who had attained the age of 16. In 1991, the *Marriage Act 1961* (Cth) was amended to raise the marriageable age for all persons to 18: see s 12 of the *Sex Discrimination Amendment Act 1991* (Cth).

minor to be on licensed premises, or to consume or be in possession of liquor on licensed premises or in a public place. The Act also contains detailed provisions as to the enforcement of age requirements.<sup>32</sup>

## 6. VOTING

Subsection 64(1)(a) of the *Electoral Act 1992* (Qld) provides that a person is entitled to be enrolled to vote if the person is entitled to be enrolled to vote under the *Commonwealth Electoral Act 1918* (Cth). Subsection 93(1)(a) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person who has attained the age of 18 years (and who satisfies certain other criteria) shall be entitled to enrol to vote.<sup>33</sup>

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<sup>32</sup> See ss 158-160 and 167 of the *Liquor Act 1992* (Qld).

<sup>33</sup> Subsection 93(2) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person whose name is on the electoral roll for a Division is entitled to vote at an election of members of the Senate for the State that includes that Division and at an election of members of the House of Representatives for that Division.

## CHAPTER 3

### CONTRACTS

#### 1. GENERAL - POLICY ISSUES

There are two main objectives behind the common law rules relating to minors' contracts.<sup>34</sup> The first objective is the protection of minors from the consequences of their own immaturity and inexperience. The second is to ensure that the law does not unnecessarily prejudice those adults who are prepared to enter into contracts with minors for the supply of necessary goods and services.<sup>35</sup> Some other objectives include the prevention of unjust enrichment by minors, the protection of parents and relatives of minors and the protection of family property.<sup>36</sup>

Attempts by the common law to reconcile these two main objectives have led many commentators to argue that the common law rules are unclear and too complicated. For example, the general rule that a minor's contract is not enforceable against the minor but is enforceable by the minor is subject to numerous qualifications. Most commentators have explained these qualifications by dividing minors' contracts into two distinct categories.

The first category is comprised of those minors' contracts that are binding on a minor. The second category is comprised of those minors' contracts that are not binding on a minor.<sup>37</sup>

#### 2. CONTRACTS THAT ARE BINDING

The general rule is that a contract entered into by a minor is not enforceable against the minor.<sup>38</sup> However, the contract is not entirely without legal effect. A minor may

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<sup>34</sup> In this Chapter, the term "minors' contracts" is used in its widest sense, so as to include those contracts that are void or unenforceable against a minor.

<sup>35</sup> Treitel GH, *The Law of Contract* (9th ed 1995) ("Treitel") at 494; and Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987) at 7.

<sup>36</sup> Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (January 1987) at 177. For a comprehensive review of the different objectives of the law of minors' contracts, see The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988) at Ch 4.

<sup>37</sup> Authorities which have dealt with this area of the law include Greig & Davis; Carter & Harland; Treitel; The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988); The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984); and Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987).

<sup>38</sup> *Dillon v Wood* (1881) 2 NSW 298; and *Rubinovich v Emmett* (1901) 27 VLR 265.



enforce against an adult any rights resulting from a contract entered into between the minor and the adult, without being liable in any action brought on the contract.<sup>39</sup> This rather one-sided rule is subject to two exceptions. Contracts for the supply of necessities, and beneficial contracts of service and analogous contracts are binding on a minor.

### (a) Contracts for necessities

The first exception to the general rule that a contract is not binding on a minor is that a contract for the supply of necessities to a minor is binding on both the adult party and the minor, provided that the terms of the contract are not harsh or oppressive.<sup>40</sup> The rationale for the exception is that a minor should not be compromised by the reluctance of a supplier to deal with the minor because of uncertainty about the enforceability of any ensuing contract.

The term “necessaries” is incapable of precise definition. It is not confined to the bare essentials of life but, on the other hand, does not generally extend to luxuries.<sup>41</sup> It may include both goods and services.<sup>42</sup> Whether goods or services are in fact necessities in any particular situation must be determined in the context of factors such as the minor’s age, means and social position.<sup>43</sup> Regard must be had to the type of goods or services which someone in the minor’s situation might reasonably have been expected to acquire<sup>44</sup> and, further, whether the minor was already adequately supplied with goods or services of that kind.<sup>45</sup>

Even if a contract is held to be for “necessaries”, it will not be enforced against a minor

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<sup>39</sup> Greig & Davis at 774; Carter & Harland at 273-274 (para 804); *Bruce v Warwick* (1815) 6 Taunt 118, 128 ER 978; and *Zouch v Parsons* (1765) 3 Burr 1794, 97 ER 1103.

<sup>40</sup> Greig & Davis at 758. Some commentators have argued that the true basis of a minor’s liability is not contractual, but quasi-contractual. This argument is consistent with the general theory of non-capacity for minors: see Carter & Harland at 282-283 (para 816); Greig & Davis at 763-764 (and 187 of the supplement); Treitel at 496-498; Landon PA, “Note on *Doyle v White City Stadium Ltd* [1935] 1 KB 110” (1935) 51 LQR 270; Pearce DC, “Fraudulent Infant Contractors” (1968) 42 ALJ 294; and Winfield PH, “Necessaries under the *Sale of Goods Act 1893*” (1942) 58 LQR 82.

<sup>41</sup> *Peters v Fleming* (1840) 6 M&W 42, 151 ER 314; and *Nash v Inman* [1908] 2 KB 1.

<sup>42</sup> Greig & Davis at 761; and Carter & Harland at 278-279 (para 811).

<sup>43</sup> For example, in *Mercantile Credit Ltd v Spinks* [1968] QWN 32, Wanstall J held that a motor vehicle was a necessary for a minor who was a salesperson.

<sup>44</sup> *Wharton v McKenzie* (1844) 5 QB 606.

<sup>45</sup> *Sultman v Bond* [1956] St R Qd 180 per Stanley J at 189.

if it is harsh or oppressive, and therefore not beneficial to the minor.<sup>46</sup> Conversely, benefit to a minor is not sufficient to make a contract enforceable against a minor.<sup>47</sup> Both the “necessaries” and the “benefit” tests must be satisfied before a contract will be held to be enforceable against a minor.

The common law in relation to goods that are classified as “necessaries” has been modified in Queensland by the *Sale of Goods Act 1896* (Qld). Subsection 5(2) of that Act provides, in effect, that a minor need pay only a reasonable price for goods that are sold and delivered to the minor (which may be less than the price which the minor agreed to pay).<sup>48</sup>

However, subsection 5(2) of the *Sale of Goods Act 1896* (Qld) does not apply unless goods have been delivered to a minor. If the goods have not been delivered, any dispute arising under the contract must be determined according to the common law. Unfortunately, it is not clear whether, at common law, an executory contract<sup>49</sup> can be enforced against a minor if, for example, the minor repudiates<sup>50</sup> the contract before the goods have been delivered. The answer depends on the true basis for the minor’s liability.<sup>51</sup> The minor will not be liable if the basis for the minor’s liability is a benefit actually received. However, the minor will be liable under the contract - even though it is terminated while still executory - if the basis for the minor’s liability is contractual.

### (b) Employment, apprenticeship and training contracts

The second exception to the general rule that a contract is not binding on a minor is that a minor is bound by a contract that provides the minor with employment, a livelihood, or training for a trade or profession if the contract, taken as a whole, is for

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<sup>46</sup> Greig & Davis at 760 and 762; Carter & Harland at 280-281 (para 814); *Re Mundy* (1963) 19 ABC 165; and *Alliance Acceptance Co Ltd v Hinton* (1964) 1 DCR (NSW) 5.

<sup>47</sup> In *Bojczuk v Gregorcowicz* [1961] SASR 128, Ross J held that a promise by the defendant minor to repay a fare which the plaintiff had paid to enable the defendant to emigrate from Poland was not a contract for necessities. He also rejected an argument that the promise was nevertheless enforceable because it was for the defendant’s benefit. Some commentators regard this result as anomalous in light of the two main objectives of the law on minors’ contracts: see, for example, Greig & Davis at 762. This issue is discussed in further detail in Ch 5 of this Report.

<sup>48</sup> This provision fortifies the arguments of those commentators who say that the basis of a minor’s liability for necessities is not contractual, but rather is based on the benefit actually received: see note 40 of this Report. For a commentary on the finer points arising under the equivalent English legislation, see Winfield PH, “Necessaries under the *Sale of Goods Act 1893*” (1942) 58 *LQR* 82.

<sup>49</sup> That is, a contract where obligations under the contract are still to be performed.

<sup>50</sup> “Repudiation” is “words or conduct indicating that a person does not regard himself [or herself] as being bound by an obligation, for example, a party may repudiate a contract by refusing to perform according to its terms”: see *Osborn’s Concise Law Dictionary* (eds Rutherford L and Bone S, 8th ed 1993) at 288.

<sup>51</sup> See note 40 of this Report.

the minor's benefit.<sup>52</sup>

An employer does not need to show that a contract of employment is necessary for a minor because employment is presumed to be necessary. However, as with contracts for necessities, an employment contract must be for a minor's benefit to be enforceable.<sup>53</sup>

Unlike a contract for necessities, an employment contract may be repudiated by a minor once (but not before) he or she attains his or her majority.<sup>54</sup>

Modern statute law has reduced the significance of these common law rules on the employment of minors.<sup>55</sup>

### 3. CONTRACTS THAT ARE NOT BINDING

The general rule is that a minor is not bound by any contract that he or she enters into during his or her minority. The category of contracts that are not binding on a minor is usually divided into two further subcategories.

The first subcategory is comprised of those contracts that are binding on a minor unless repudiated.<sup>56</sup> The second subcategory is comprised of those contracts that are not binding on a minor unless they are ratified by the minor after he or she attains his or her majority.

However, any adult who enters into either type of contract with a minor is still bound by the contract. An adult party to a contract is not entitled to avoid his or her obligations under the contract simply because the minor lacks capacity.<sup>57</sup>

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<sup>52</sup> There is a question whether contracts of this kind form a separate category of enforceable minors' contracts or are a subcategory of contracts for necessities. The New South Wales Court of Appeal appeared to favour the latter view in *Blennerhassett's Institute of Accountancy Pty Ltd v Gairns* (1938) 55 WN (NSW) 89.

<sup>53</sup> Treitel at 498-499. Once the employment or apprenticeship contract has been established, the courts readily find the contract to be for the minor's benefit: see *Doyle v White City Stadium Ltd* [1935] 1 KB 110; and *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71. For a rare exception, see *Toronto Marlboro Major Junior "A" Hockey Club v Tonelli* (1979) 96 DLR (3d) 135. In New Zealand, it is not necessary to establish that a contract of service is for a minor's benefit: see s 5(1)(c) of the *Minors' Contracts Act 1969* (NZ).

<sup>54</sup> Greig & Davis at 764; and *Hamilton v Lethbridge* (1912) 14 CLR 236 per Isaacs J at 261-262.

<sup>55</sup> See Ch 4 of this Report.

<sup>56</sup> It is arguably a nonsense to talk of a contract being "binding" on a minor who can repudiate it at any time.

<sup>57</sup> The principle that the general law of contract, for example, the law relating to undue influence, misrepresentation and unconscionable conduct, applies to all contracts is not affected by the minority of any party or parties.

### (a) Contracts that are binding unless repudiated

There are certain contracts which have been held to be binding on a minor unless and until (if ever) the minor elects to repudiate them. Although the exact scope of this category of minors' contracts is unclear, it includes:<sup>58</sup>

- contracts under which a minor agrees to buy or sell land or under which a minor takes or grants a leasehold interest in land;
- marriage settlements entered into by a minor;
- contracts under which a minor incurs a liability for calls on shares in a company; and
- partnership agreements.

The common feature of these contracts is the acquisition of an interest in property of a permanent nature or in property with continuing obligations attached to it.

Contracts that fall into this category are binding on a minor unless repudiated during minority<sup>59</sup> or within a reasonable time of attaining majority. What is a reasonable time will depend on the circumstances of each case.<sup>60</sup> Unless the contract is repudiated within a reasonable time of the minor attaining his or her majority, the contract will be binding on the minor, irrespective of whether it is for the minor's benefit. There is some suggestion that repudiation during minority is not in itself binding and may later be withdrawn.<sup>61</sup> The effect of repudiation is prospective: a minor is freed from any further obligation under the contract.<sup>62</sup>

It has been observed that there is no satisfactory reason for the existence of this separate category.<sup>63</sup> It has, however, been suggested that all contracts involving

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<sup>58</sup> Greig & Davis at 767-771 (and 187-188 of the supplement); and Treitel at 501-502.

<sup>59</sup> Employment contracts can be repudiated only after a minor attains his or her majority: see note 54 of this Report.

<sup>60</sup> Treitel at 503. In *Hamilton v Lethbridge* (1912) 14 CLR 236, the High Court was assisted in reaching its conclusion that a clerk had not repudiated his articles of clerkship by the fact that the clerk had continued to serve under the articles for two years after he attained his majority. On the other hand, in *Norman Baker Pty Ltd (in liq) v Baker* (1978) 3 ACLR 856, a shareholder who had taken up shares whilst she was a minor, was held to be entitled to repudiate the allotment of shares two years after she attained her majority.

<sup>61</sup> *North Western Railway Co v M'Michael* (1850) 5 Ex 114 at 127, 155 ER 49 at 55; and *Hamilton v Lethbridge* (1912) 14 CLR 236 per Isaacs J at 261-262.

<sup>62</sup> Treitel at 503; and *Norman Baker Pty Ltd (in liq) v Baker* (1978) 3 ACLR 856.

<sup>63</sup> Carter & Harland at 284 (para 818).

continuing rights and duties under which a minor has taken a benefit should be included in this category,<sup>64</sup> although this proposition is by no means universally accepted.<sup>65</sup>

**(b) Contracts that are not binding unless ratified**

If a contract is not for the supply of necessities,<sup>66</sup> or a beneficial contract of service,<sup>67</sup> or one that is binding unless repudiated,<sup>68</sup> it falls into the general residual category of contracts that are not binding unless ratified.<sup>69</sup> Such contracts are not binding on a minor unless they are ratified within a reasonable time of the minor attaining his or her majority.

It is not necessary for a minor to repudiate a contract that is not binding unless ratified, in order for the minor to avoid any obligations under the contract. The minor is not bound by any obligations arising under the contract, irrespective of whether those obligations have accrued.

To ratify a contract entered into during minority, a person must take positive steps to show that he or she intends to recognise and be bound by the contract.<sup>70</sup>

A contract that is not ratified will still be effective to some extent against an adult party to the contract. However, money paid by a minor under such a contract is not

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<sup>64</sup> *Hamilton v Lethbridge* (1912) 14 CLR 236 per Barton J at 256 which is cited in Carter & Harland at 284 (para 818).

<sup>65</sup> The Australian courts have more readily taken the broader view than have the English courts: see Greig & Davis at 769-771 (and 187-188 of the supplement). For example, in *Hamilton v Lethbridge* (1912) 14 CLR 236, the High Court was concerned with a covenant in restraint of trade in articles of clerkship between a solicitor and the solicitor's clerk. The court considered that the articles were a "continuing obligations" contract, and thus could have been repudiated (although on the facts they were not). The alternative view, that the articles were an employment contract, would have meant that the clerk could not have repudiated the articles until after he had attained his majority.

<sup>66</sup> See this Report at 13-14.

<sup>67</sup> See this Report at 14-15.

<sup>68</sup> See this Report at 16-17.

<sup>69</sup> Under s 6 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report), the Supreme Court or a local court of full jurisdiction can approve the terms of a contract that is proposed to be entered into by a minor, including a contract that is not binding on a minor unless ratified. Once approved, the contract has effect as if the minor were an adult. Under s 8 of the same Act, the court can appoint a person to act as a minor's agent. Liabilities incurred by the agent are enforceable against the minor. In New Zealand - where the age of majority is 20 (see s 4(1) of the *Age of Majority Act 1970* (NZ)) - all minors' contracts - apart from contracts by married minors, contracts by minors who are 18 or 19 years old, contracts of service and certain life insurance contracts - are unenforceable against a minor: see ss 4-6 of the *Minors' Contracts Act 1969* (NZ). The New Zealand legislation and the South Australian legislation are discussed in more detail at 23-24 and 26-27 of this Report.

<sup>70</sup> Treitel at 504-505.

recoverable by the minor unless there has been a total failure of consideration.<sup>71</sup>

In some jurisdictions, the ratification must be in writing.<sup>72</sup> In Victoria, certain minors' contracts are declared void and any purported ratification, whether written or not, is ineffective.<sup>73</sup> Other provisions make void any agreement made after majority to repay a loan advanced during minority, or any ratification after majority of a promise made during minority.<sup>74</sup>

### (c) Remedies

In Australia, it is generally accepted that - at least in the case of contracts that are binding unless repudiated - obligations accrued prior to, but remaining unperformed at, the time of repudiation are enforceable against a minor. There is, however, some doubt as to whether such obligations are enforceable against a minor who purports to repudiate a contract that is not binding unless ratified.<sup>75</sup>

<sup>71</sup> *Curruth v Moro* (1966) 60 QJPR 106. See notes 76 and 78 of this Report.

<sup>72</sup> Section 5 of the *Statute of Frauds Amendment Act 1828* (UK) (which still applies in Western Australia and the Northern Territory, although repealed in the United Kingdom by the *Statute Law Revision Act 1875*); s 15 of the *Mercantile Law Act 1962* (ACT); and s 4 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report). A similar provision was located in s 12 of the *Statute of Frauds and Limitations Act 1867* (Qld) until it was repealed - on the recommendation of the Queensland Law Reform Commission - by the *Statute of Frauds Act 1972* (Qld) (which Act was in turn repealed by the *Property Law Act 1974* (Qld)).

<sup>73</sup> Sections 49 and 50 of the *Supreme Court Act 1986* (Vic). Those provisions and ss 1 and 2 of the *Infants' Relief Act 1875* (Tas) were reproduced from ss 1 and 2 of *The Infants Relief Act 1874* (UK). The Tasmanian and English provisions were repealed by the *Minors Contracts Act 1988* (Tas) and the *Minors' Contracts Act 1987* (UK) respectively (the English legislation is set out in Appendix E). The repeals were recommended by the Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987) at 14 and The Law Commission (UK), Report, *Law of Contract - Minors' Contracts* (R 134, June 1984) at 23 respectively. See note 74 of this Report for a summary of the position in other jurisdictions.

<sup>74</sup> Section 51 of the *Supreme Court Act 1986* (Vic). That provision and s 10 of the *Money Lenders Act 1916* (Qld) were modelled on s 5 of the *Betting and Loans (Infants) Act 1892* (UK). The Queensland and English provisions were repealed by the *Credit Act 1987* (Qld) and the *Minors' Contracts Act 1987* (UK) respectively. For a sample of the extensive (but now, outside Victoria, redundant) literature on these unfortunate provisions and those cited in note 73 above, see Greig & Davis at 777-780 (and 188 of the supplement); Davis JLR, "Continuation in Victoria of anachronistic English statutory provisions" (1987) 61 ALJ 265; Treitel GH, "The Infants Relief Act 1874" (1957) 73 LQR 194; Atiyah PS, "The Infants Relief Act 1874: A Reply" (1958) 74 LQR 97; Treitel GH, "The Infants Relief Act 1874: A Short Rebutter" (1958) 74 LQR 104; and Clark RW, "Contracts for the Sale of Non-Necessary Goods; Vendor's Remedies against an Infant Purchaser" (1981) 7 U Tas LR 85.

<sup>75</sup> Greig & Davis at 772; and Graw S, *An Introduction to the Law of Contract* (2nd ed 1993) at 100-101, both citing *Norman Baker Pty Ltd (in liq) v Baker* (1978) 3 ACLR 856 in support of the proposition that obligations already accrued prior to repudiation of a contract that is binding unless repudiated remain binding after repudiation. Carter & Harland at 286-287 (para 820) are somewhat more equivocal, recognising that a minor may be bound by those obligations that have already become due prior to repudiation under a contract that is binding unless repudiated - such as arrears of rent already due at the time of the repudiation of a lease of a flat - but not by accrued obligations that are due under a contract that is not binding unless ratified (the latter contract not requiring repudiation). In England, the matter is attended by doubt in both the cases and the texts. Some authorities that support the view in *Norman Baker Pty Ltd (in liq) v Baker* include: *Ketsøy's Case* (1631) Cro Jac 320, 79 ER 274; *Cork & Bandon Railway Co v Cazenove* (1847) 10 QB 935, 116 ER 355; *Leeds & Thirsk Railway v Fearnley* (1849) 4 Ex 26, 154 ER 1110; and *Blake v Concannon* (1870) 1 R 4 CL 323. Some authorities that support the opposite view include: *Cheshire GC, Fifoot CHS and Furnmston MP, Law of Contract* (13th ed 1996) at 448-449; *Lowe v Griffith* (1835) 1 Scott 458, 4 LJCP 94; *Newry & Enniskillen Railway Co v Coombe* (1849) 3 Ex 565, 154 ER 970; and *North Western Railway Co v M'Michael* (1850) 5 Ex 114, 155 ER 49. Some Canadian authorities that support the view that

A minor who performs his or her obligations under a contract prior to repudiation of the contract - by, for example, paying the purchase price or delivering goods to another party - can recover such money or goods only if there has been a total failure of consideration.<sup>76</sup> However, because a contract of this kind is binding on an adult party to a contract, irrespective of a minor's position, property which has passed under the contract cannot be recovered from the minor, irrespective of whether the minor has provided full, partial or no consideration.<sup>77</sup>

These rules clearly offend elementary considerations of justice and fairness. A minor who inadvisably parts with property and receives only a small portion of the promised consideration cannot recover the property,<sup>78</sup> whereas a rogue who takes advantage of his or her minority to obtain the benefit of a contract without honouring his or her own obligations under the contract can escape liability under the contract.<sup>79</sup>

In some cases, the law (aside from the law of contract) may provide a more just result. For example, a court with equitable jurisdiction may decide to order the return of identifiable property to its rightful owner.<sup>80</sup> In other cases, it may be possible for an

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antecedent liabilities are not binding include: Hudson AH, "Contracts Relating to Property of a Permanent Nature: Accrued Liability of Infants" (1957) 35 *Can Bar Rev* 1213; and *Re Central Bank and Hogg* (1890) 19 OR 7.

<sup>76</sup> *Treitel* at 503; *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 which was followed in the District Court (at Brisbane) in *Curruth v Moro* (1966) 60 QJPR 106. Both aspects of this rule have been abrogated in South Australia: see s 7 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report).

<sup>77</sup> *Cowern v Nield* [1912] 2 KB 419 where it was held that an adult party who had properly rejected defective goods under a contract with a minor could not recover moneys paid by him under that contract. The court endorsed the proposition that minors are not liable *ex contractu* [arising out of a contract], but that an action for money had and received can be maintained against a minor if the substance of the action is that the minor has obtained the money *ex delicto* [arising out of a wrong - such as fraud]. On that basis, the court ordered a new trial on the issue of whether the plaintiff's money had been obtained by fraud. The decision has been criticised for suggesting that if fraud were proved the plaintiff would succeed. See Pearce DC, "Fraudulent Infant Contractors" (1968) 42 *ALJ* 294 at 301, where it is suggested that the fraud could not be regarded as independent of the contract and the discussion of the case in *Treitel* at 512-513, where the order of a new trial on the question of fraud is also criticised.

<sup>78</sup> For an explanation of the historical basis for this approach, see McCamus JD, "Restitution of Benefits Conferred under Minors' Contracts" (1979) 26 *UNBLJ* 89 who states at 102-103 that "[T]he historical explanation for this doctrine [that a minor cannot recover the value of benefits conferred unless there has been a total failure of consideration] would appear to be that the claims in question are claims for the recovery of money had and received, and as such were thought to be subject to the total failure of consideration requirement which was recognized as a necessary element of quasi-contractual money claims in other contexts ... The total failure of consideration analysis ... dictates an all-or-nothing approach."

<sup>79</sup> The common law and equitable rules surrounding minors, fraud and restitution are complex in the extreme: see Atiyah PS, "The Liability of Infants in Fraud and Restitution" (1959) 22 *Mod LR* 273; and Pearce DC, "Fraudulent Infant Contractors" (1968) 42 *ALJ* 294.

<sup>80</sup> Some commentators disagree about the circumstances that must be shown before the return of property will be ordered. One view is that, despite the common belief that fraud must be proved in order to invoke the equitable doctrine of restitution against a minor, there is in fact no such requirement or, if there is, then merely refusing to pay for goods, or to repay a loan, is itself fraudulent. On this view, the fraud consists of the minor's attempt to abuse the privilege of minority by seeking to retain a benefit without making any recompense for it, rather than of a reckless or dishonest statement which would be required to constitute fraud at common law: see Atiyah PS, "The Liability of Infants in Fraud and Restitution" (1959) 22 *Mod LR* 273 at 275 and 286; and Greig & Davis at 784. The alternative view is that restitution is available only when a minor has been guilty of legal fraud, for example, by deliberately misrepresenting his or her age: see *Treitel* at 510. For a discussion of these competing views, see Pearce DC, "Fraudulent Infant Contractors" (1968) 42 *ALJ* 294 at 298-299.

adult to sue a minor in tort for the recovery of property,<sup>81</sup> provided that the tort is not directly connected with a contract that the minor would be entitled to avoid.<sup>82</sup>

In some jurisdictions, courts are given wide statutory powers to order restitution in cases involving minors.<sup>83</sup>

#### 4. STATUTORY INTERVENTION

Although the rules that regulate minors' contracts that are entered into in Queensland (or are otherwise subject to Queensland law) are derived from the common law, they are to some extent affected by the operation of statute. One example that has already been referred to is subsection 5(2) of the *Sale of Goods Act 1896* (Qld).<sup>84</sup> Some other statutes are discussed below.

##### (a) Consumer protection legislation

##### (i) Prohibition of certain conduct

Although the consumer protection provisions in legislation such as the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1989* (Qld) are of general application, they address one of the main objectives of the common law relating to minors' contracts. That is, they serve to protect minors from their own inexperience.

The provisions that prohibit conduct, carried out in trade or commerce, that is misleading or deceptive<sup>85</sup> or unconscionable,<sup>86</sup> have probably reduced the need for the common law rules to protect minors in particular.

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<sup>81</sup> Pearce DC, "Fraudulent Infant Contractors" (1968) 42 ALJ 294 at 299-301.

<sup>82</sup> *R Leslie Ltd v Sheil* [1914] 3 KB 607 per Lord Sumner at 611.

<sup>83</sup> See s 37 of the *Minors (Property and Contracts) Act 1970* (NSW) (which is set out in Appendix C to this Report); s 7 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report); s 3 of the *Minors' Contracts Act 1987* (UK) (which is set out in Appendix E to this Report); s 16.3 of the *Infants Act* (RSBC 1979 c 196); s 7 of the *Minors' Contracts Act 1969* (NZ); and McCamus JD, "Restitution of Benefits Conferred under Minors' Contracts" (1979) 28 UNBLJ 89.

<sup>84</sup> See this Report at 14.

<sup>85</sup> See s 52 of the *Trade Practices Act 1974* (Cth) and s 38 of the *Fair Trading Act 1989* (Qld).

<sup>86</sup> See ss 51AA and 51AB of the *Trade Practices Act 1974* (Cth) and s 39 of the *Fair Trading Act 1989* (Qld).



(ii) Enforcement of guarantees

Another problem of the common law which has been partially addressed by consumer protection legislation is the question of enforceability of the guarantee of a minor's obligation, in circumstances where the minor's obligation is unenforceable. It has been held in England that a guarantee of a promise which is void under *The Infants Relief Act 1874* (UK)<sup>87</sup> is not enforceable.<sup>88</sup> It is arguable that the principle is not applicable in jurisdictions like Queensland in which no legislation equivalent to *The Infants Relief Act 1874* (UK) exists.<sup>89</sup> Nevertheless, in order to remove any uncertainty, law reform agencies in all jurisdictions which have reviewed this subject have recommended legislation to provide that such a guarantee is not unenforceable merely because of the principal obligor's minority.<sup>90</sup> Such legislation has been enacted in most of those jurisdictions.<sup>91</sup>

The *Credit Act 1987* (Qld) subsection 136(1) makes a guarantor liable for the guaranteed obligation of a minor (but only under a regulated credit contract) to the same extent as if the minor had not been a minor. By subsection 136(2), subsection 136(1) does not apply unless the guarantee document included a prominent notice to the effect that the guarantor may not have a right to recover from the minor amounts that the guarantor is liable to pay under the guarantee.

Subsection 55(3) of the new *Consumer Credit Code* (Qld), which commenced on 1 November 1996, is in these terms:

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<sup>87</sup> See note 134 of this Report.

<sup>88</sup> *Coutts & Co v Browne-Lecky* [1947] KB 104.

<sup>89</sup> *Carter & Harland* at 294 (para 826).

<sup>90</sup> See, for example, New South Wales Law Reform Commission, Report, *Infancy in relation to Contracts and Property* (LRC 6, August 1969) at 52 and 88; Alberta Institute of Law Research and Reform, Report, *Minor's Contracts* (R 14, January 1975) at 41-42; Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976) at 43-44; Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977) at 8; Law Reform Commission of Ireland, Report, *Minors' Contracts* (LRC 15, August 1985) at 155-157; The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984) at 12-13; Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987) at 10 and 14; Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987) at 186 and 212; and The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988) at 102-107.

<sup>91</sup> See, for example, s 47 of the *Minors (Property and Contracts) Act 1970* (NSW) (which is set out in Appendix C to this Report); s 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report); s 2 of the *Minors' Contracts Act 1987* (UK) (which is set out in Appendix E to this Report); s 4 of the *Minors Contracts Act 1988* (Tas); s 16.6 of the *Infants Act* (RSBC 1979 c 196); s 10 of the *Minors' Contracts Act 1969* (NZ); s 55(3) of the *Consumer Credit (Queensland) Code* (Qld) (which is set out in Appendix B to this Report); and s 136(1) of the *Credit Act 1987* (Qld) (which is set out in Appendix B to this Report).

A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.

However, these provisions relate only to certain credit contracts to which the Act and Code respectively apply.<sup>92</sup> There is no provision in Queensland law similar to section 47 of the *Minors (Property and Contracts) Act 1970 (NSW)*<sup>93</sup> or section 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*<sup>94</sup> which apply to guarantees of the contractual obligations of minors generally. These sections ensure that a guarantee of a minor's contract is enforceable against the guarantor.

## (b) Anti-discrimination legislation

The common law is also affected by the *Anti-Discrimination Act 1991 (Qld)*, which prohibits direct and indirect discrimination on the basis of age<sup>95</sup> in a number of areas. For example, a person may not discriminate in relation to the supply of goods and services.<sup>96</sup> Similarly, a person may not discriminate in relation to accommodation.<sup>97</sup> Both these prohibitions are subject, however, to a general exemption<sup>98</sup> which provides that:

### Legal incapacity

112. A person may discriminate against another person because the other person is subject to a legal incapacity if the incapacity is relevant to the transaction in which they are involved.

Example -

It is not unlawful for a person to refuse to enter into a contract with a minor, or a person

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<sup>92</sup> The *Consumer Credit (Queensland) Code* (Qld), which commenced operation on 1 November 1996, is part of a new national scheme on credit law. Credit contracts and guarantees related to credit contracts entered into on or after 1 November 1996 are regulated by this Code. The *Credit Act 1987* (Qld) does not apply to credit contracts or guarantees related to credit contracts entered into on or after 1 November 1996. However, it continues to apply to credit contracts (other than continuing credit contracts) and guarantees related to credit contracts entered into before that date. See ss 21A and 21B of the *Credit Act 1987* (Qld), inserted by s 8 of the *Consumer Credit Legislation Amendment Act 1996* (Qld).

<sup>93</sup> This section is set out in Appendix C to this Report.

<sup>94</sup> This section is set out in Appendix D to this Report.

<sup>95</sup> See s 7(1)(f) of the *Anti-Discrimination Act 1991* (Qld).

<sup>96</sup> See s 46(1) of the *Anti-Discrimination Act 1991* (Qld).

<sup>97</sup> See ss 82-84 of the *Anti-Discrimination Act 1991* (Qld).

<sup>98</sup> See s 112 of the *Anti-Discrimination Act 1991* (Qld).

whose estate is being managed under Schedule 5 of the *Mental Health Act 1974*, if the contract cannot be legally enforced.

## 5. THE LAW IN OTHER JURISDICTIONS

In the last thirty years, the complexity of the common law rules governing minors' contracts has led to consideration of legislative reform in a number of Australian States and in some Commonwealth countries.<sup>99</sup> As a result, legislation has been enacted in a number of jurisdictions. This legislation is summarised below, together with proposals for change that have not been implemented. The most significant departure from the common law has taken place in New South Wales.<sup>100</sup> Few other jurisdictions have adopted such far reaching changes, preferring specific reform in particular problem areas.

### (a) New Zealand

The age of majority in New Zealand is 20<sup>101</sup> and the *Minors' Contracts Act 1969* (NZ) distinguishes between contracts entered into by minors under the age of 18 and contracts entered into by minors over the age of 18. The Act provides:

- (i) Contracts made by minors over 18 years and contracts of service and certain contracts of insurance are given full force and effect as though made by an adult.<sup>102</sup> However, the court still has power to declare such contracts unenforceable against the minor and to make orders for compensation and restitution where the consideration is inadequate or where the contract is harsh or oppressive to the minor.<sup>103</sup>
- (ii) Contracts made by minors under the age of 18 are prima facie unenforceable

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<sup>99</sup> See, for example, New South Wales Law Reform Commission, Report, *Infancy in relation to Contracts and Property* (LRC 6, August 1969); Victorian Chief Justice's Law Reform Committee, Report, *Infancy in relation to Contracts and Property* (R 3, 1970); Alberta Institute of Law Research and Reform, Report, *Minor's Contracts* (R 14, January 1975); Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977); The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988); Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987); The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984); Law Reform Commission of Ireland, Report, *Minors' Contracts* (LRC 15, August 1985); Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987); and Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976).

<sup>100</sup> See this Report at 24-26.

<sup>101</sup> See s 4(1) of the *Age of Majority Act 1970* (NZ).

<sup>102</sup> See s 5(1) of the *Minors' Contracts Act 1969* (NZ).

<sup>103</sup> See ss 5(2) and 7 of the *Minors' Contracts Act 1969* (NZ).

against the minor.<sup>104</sup> However, if the court finds that a contract was fair and reasonable when it was entered into, it may enforce it or declare it binding in whole or in part.<sup>105</sup> The court has regard to the circumstances surrounding the making of the contract, the subject matter and nature of the contract, the nature and value of property to which the contract relates, the age and means of the minor, whether the contract was procured by the minor's fraudulent misrepresentation, and all other relevant circumstances.<sup>106</sup> The court can also order restitution or compensation, regardless of whether the contract is enforced.<sup>107</sup>

- (iii) Married minors have full contractual capacity.<sup>108</sup>
- (iv) Guarantees of minors' contracts are enforceable against the guarantor.<sup>109</sup>
- (v) If a minor wishes to enter into a contract, any party to the proposed contract may apply to a Magistrate's Court to approve the contract. A contract that is approved by a Magistrate's Court has effect as though the minor were an adult.<sup>110</sup>

## (b) New South Wales

The common law rules in relation to minors' contracts have been replaced in New South Wales by a code of minors' civil law capacity,<sup>111</sup> the *Minors (Property and Contracts) Act 1970* (NSW). The broad scheme of the Act is to reverse the general principle that a contract is not binding on a minor. The Act provides that a "civil act" (which is defined to include any act relating to contractual or proprietary rights or obligations)<sup>112</sup> in which a minor participates, and which is for the minor's benefit at the

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<sup>104</sup> See s 6(1) of the *Minors' Contracts Act 1969* (NZ).

<sup>105</sup> See s 6(2) of the *Minors' Contracts Act 1969* (NZ).

<sup>106</sup> See ss 6(3) and 15(4) of the *Minors' Contracts Act 1969* (NZ).

<sup>107</sup> See s 7(1) of the *Minors' Contracts Act 1969* (NZ).

<sup>108</sup> See s 4 of the *Minors' Contracts Act 1969* (NZ).

<sup>109</sup> See s 10 of the *Minors' Contracts Act 1969* (NZ).

<sup>110</sup> See s 9 of the *Minors' Contracts Act 1969* (NZ).

<sup>111</sup> For a detailed discussion of this Act, see Harland DJ, *The Law of Minors in relation to Contracts and Property: An analysis of the Minors (Property and Contracts) Act 1970* (NSW) (1974).

<sup>112</sup> See s 6 of the *Minors (Property and Contracts) Act 1970* (NSW).

time of the civil act, is “presumptively binding” on the minor provided he or she has the understanding necessary to participate in that civil act.<sup>113</sup>

Other relevant provisions are as follows:

- (i) The Supreme Court may grant a minor capacity to enter into a specific civil act, a type of civil act or all civil acts if it is for the minor’s benefit.<sup>114</sup> The court may also affirm a civil act on behalf of a minor during his or her minority if the court considers that it is for the minor’s benefit.<sup>115</sup>
- (ii) On attaining majority a minor may affirm a civil act in which he or she participated during minority.<sup>116</sup> A minor may repudiate a contract which is not for his or her benefit either during minority or within one year of obtaining majority.<sup>117</sup>
- (iv) The court may repudiate a contract on behalf of a minor if it finds that the contract is not for the minor’s benefit.<sup>118</sup> Any person interested in a contract with a minor may apply to the court for an order affirming or repudiating a contract on behalf of a minor.<sup>119</sup>
- (v) If the court repudiates a contract, it may adjust the rights of the parties, to restore them as far as practicable to their respective positions.<sup>120</sup>
- (vi) A contract guaranteeing the performance of a minor’s contract can be enforced against the guarantor.<sup>121</sup>
- (vii) A minor may be liable in tort whether or not the cause of action for the tort is

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<sup>113</sup> See ss 18 and 19 of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>114</sup> See s 26 of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>115</sup> See s 30 of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>116</sup> See s 30(1)(b) of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>117</sup> See s 31 of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>118</sup> See s 34 of the *Minors (Property and Contracts) Act 1970* (NSW).

<sup>119</sup> See s 36 of the *Minors (Property and Contracts) Act 1970* (NSW).

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

<sup>121</sup> See s 47 of the *Minors (Property and Contracts) Act 1970* (NSW).

connected with a contract or is in substance a cause of action in contract.<sup>122</sup>

**(c) Victoria**

The Victorian Chief Justice's Law Reform Committee recommended in 1970 that the Victorian Parliament enact legislation along the lines of the *Minors (Property and Contracts) Act 1970 (NSW)*.<sup>123</sup> The Committee's recommendation has not been implemented.

**(d) South Australia**

The Law Reform Committee of South Australia considered and rejected the following:<sup>124</sup>

- (i) the approach of the New South Wales Law Reform Commission in codifying the law of minors' contracts;
- (ii) the New Zealand approach that gives married minors full contractual capacity, and the Magistrates' Courts power to approve contracts;<sup>125</sup> and
- (iii) a proposal that age limits be set for enforceability of particular contracts.

The Committee was unanimous in its view that the law should continue to protect minors against exploitation by others and against their own immaturity, and that the general rule that contracts should not be enforceable against minors should not be altered.

The Committee noted that, for all its seeming complexity, the law had caused few difficulties in practice for many years, most problems having been dealt with by the lowering of the age of majority from 21 to 18 years. The Committee made a number of specific proposals for reform, most of which were enacted by the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*.

The Act does not depart in principle from the general common law rule of unenforceability, but amends it as follows:

- (i) It provides that any ratification after a person attains majority of a contract which

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<sup>122</sup> See s 48 of the *Minors (Property and Contracts) Act 1970 (NSW)*.

<sup>123</sup> See Victorian Chief Justice's Law Reform Committee, Report, *Infancy in relation to Contracts and Property* (R 3, 1970).

<sup>124</sup> See Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977).

<sup>125</sup> See ss 4, 6 and 9 of the *Minors' Contracts Act 1969 (NZ)*.

would be unenforceable because it was entered into during the person's minority, must be in writing.<sup>126</sup>

- (ii) It confirms that guarantees of minors' obligations are enforceable against the guarantor.<sup>127</sup>
- (iii) It accommodates a minor who wishes to contract, in that it allows the minor to apply to a court before entering into the contract for an order approving the contract, or appointing an agent to conduct business on behalf of the minor.<sup>128</sup>
- (iv) It provides broad powers for a court to order restitution of a minor's property if a contract has been avoided on the grounds of minority.<sup>129</sup>

#### (e) Tasmania

The Law Reform Commission of Tasmania carefully considered the position in all other jurisdictions, but did not recommend any wide reaching changes.<sup>130</sup>

The Commission identified a series of defects in the common law, but noted that in Tasmania little difficulty had been experienced in operating under that law. For this reason reform was recommended only for those few aspects of the law which caused most difficulty or injustice in practice. The Commission's recommendations were that the *Infants' Relief Act 1875* be repealed, and that guarantees of minors' obligations be enforceable. These recommendations were implemented by the *Minors Contracts Act 1988 (Tas)*.<sup>131</sup>

#### (f) United Kingdom

A number of reports has been published in the United Kingdom recommending reform of the common law relating to minors' contracts.<sup>132</sup> The general approach of the Law

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<sup>126</sup> See s 4 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*.

<sup>127</sup> See s 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*.

<sup>128</sup> See ss 6 and 8 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*.

<sup>129</sup> See s 7 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*.

<sup>130</sup> See Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987).

<sup>131</sup> See ss 4 and 5 of the *Minors Contracts Act 1988 (Tas)*.

<sup>132</sup> See for example *Report of the Committee on the Age of Majority* (1967) Cmnd 3342; The Law Commission, Report, *Law of Contract: Minors' Contracts* (R134, June 1984).

Commission in its final report on this topic was that the principle underlying the existing law was sound, and should be retained.<sup>133</sup> The Commission specifically rejected a proposal that capacity be the deciding factor, and that all contracts should be binding on a minor aged 16 years and over, and unenforceable on minors under 16 years. The Commission recommended reform of only those aspects of the existing law which caused real difficulties or injustice.

The *Minors' Contracts Act 1987* (UK) implemented these proposals and repealed *The Infants Relief Act 1874* and the *Betting and Loans (Infants) Act 1892*.<sup>134</sup> The *Minors' Contracts Act 1987* does not alter the common law, except to provide for the enforceability of guarantees of minors' contracts and for restitution of property to the adult party to an unenforceable or repudiated minor's contract.<sup>135</sup>

### (g) Western Australia

The Law Reform Commission of Western Australia (and its predecessor, the Western Australia Law Reform Committee) considered the question of the law relating to minors' contracts in 1972<sup>136</sup> and again in 1978,<sup>137</sup> and the Commission made its final report in 1988.<sup>138</sup>

In its 1978 Working Paper, the Commission reviewed the New South Wales and New Zealand legislation. Although the Commission concluded that the legislation from these jurisdictions was more desirable than the common law, it also found major disadvantages with both schemes. Its preliminary recommendations adopted what it regarded as the most desirable aspects of the New South Wales and New Zealand legislation and the common law.

The Commission delayed its final recommendations in order to take advantage of the findings of the English Law Commission's report.<sup>139</sup>

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<sup>133</sup> See note 132 of this Report.

<sup>134</sup> The *Minors' Contracts Act 1987* (UK) and extracts from *The Infants Relief Act 1874* (UK) and the *Betting and Loans (Infants) Act 1892* (UK) are reproduced in Appendix E to this Report.

<sup>135</sup> See ss 2 and 3 of the *Minors' Contracts Act 1987* (UK).

<sup>136</sup> See Western Australia Law Reform Committee, Working Paper, *Legal Capacity of Minors* (Project 25, April 1972).

<sup>137</sup> See The Law Reform Commission of Western Australia, Working Paper No 2, *Legal Capacity of Minors* (Project 25, June 1978).

<sup>138</sup> See The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988).

<sup>139</sup> See The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984).



In its Report, the Law Reform Commission of Western Australia recommended that:

- (i) subject to the other recommendations of the Commission, any contract to which a minor is a party should bind all parties to the contract;
- (ii) a minor who has entered into a contract should be able to apply to a court for relief. The court should grant relief where it is satisfied that the contract viewed as a whole is, at the time of judgment, prejudicial to the best interests of the minor. In granting such relief the court should do what is fair, just and reasonable in all the circumstances of the case;
- (iii) the court should be able to grant relief in a wide range of forms, including amendment of the terms of the contract, rescission of the contract, restoration of the parties to the contract to their former position, repayment and compensation; and
- (iv) a minor who induces a contract by misrepresentation of age or capacity should not be estopped from seeking relief.

No legislation has been enacted to implement these recommendations.

#### (h) British Columbia

Many of the recommendations made by the Law Reform Commission of British Columbia in its Report on Minors' Contracts<sup>140</sup> were implemented by the *Law Reform Amendment Act 1985* (SBC 1985 c 10)<sup>141</sup> which amended the *Infants Act* (RSBC 1979 c 196). The Act makes a contract unenforceable against a minor.<sup>142</sup> This rule is subject to numerous qualifications. The contract is enforceable against the minor if it is:

- (i) specified as enforceable under any other legislative enactment;
- (ii) affirmed by the minor on attaining the age of majority;
- (iii) performed or partially performed by the minor within one year after attaining the age of majority; or

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<sup>140</sup> Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976).

<sup>141</sup> See ss 1, 2 and 10 of the *Law Reform Amendment Act 1985* (SBC 1985 c 10).

<sup>142</sup> See s 16.2(1) of the *Infants Act* (RSBC 1979 c 196).

- (iv) not repudiated by the minor within one year after attaining the age of majority.<sup>143</sup>

The court has wide powers to order compensation or restitution to a party to a minor's contract which has been breached or repudiated.<sup>144</sup>

The court may make an order granting a minor the capacity to contract.<sup>145</sup>

An adult who contracts with a minor may, within one year of the minor attaining the age of majority, request that person to either affirm or repudiate the contract.<sup>146</sup>

**(i) Alberta**

The Alberta Institute of Law Research and Reform examined the issue of minors' contracts in 1975. In its Report the Institute made the following major recommendations:<sup>147</sup>

- (i) contracts made by minors should be unenforceable against them unless the law expressly makes them enforceable;
- (ii) a court should have power to order relief by way of compensation or restitution;
- (iii) contracts should be enforceable against minors if a court is satisfied that an adult contracting with a minor had, at the time the contract was made, a reasonable belief that the contract was "fair and reasonable in itself and in the circumstances of the minor";<sup>148</sup> and
- (iv) a court should nevertheless refuse to enforce a contract if it is satisfied that the contract was improvident in the minor's interest and that restitution or compensation would put the adult in as good a position as if the contract had not been made.

No legislation has been enacted to implement these recommendation.

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<sup>143</sup> See s 16.2(1)(a)-(d) of the *Infants Act* (RSBC 1979 c 196).

<sup>144</sup> See s 16.3(2) of the *Infants Act* (RSBC 1979 c 196).

<sup>145</sup> See s 16.4(1) of the *Infants Act* (RSBC 1979 c 196).

<sup>146</sup> See s 16.9(1) of the *Infants Act* (RSBC 1979 c 196).

<sup>147</sup> See Alberta Institute of Law Research and Reform, Report, *Minors' Contracts* (R 14, January 1975) at 28-33.

<sup>148</sup> See Alberta Institute of Law Research and Reform, Report, *Minors' Contracts* (R 14, January 1975) at 32. This was the majority view. However, a minority believed that the establishment of this specific category of contracts would lead to uncertainty and complexity.

## (j) Ontario

In 1987 the Ontario Law Reform Commission published a Report on *Amendment of the Law of Contract* which examined the issue of minors' contracts. The Commission recommended that:<sup>149</sup>

- (i) subject to other recommendations of the Commission and to the provisions of other legislation, contracts should not, as a general rule, be enforceable against a minor;
- (ii) consistent with the approach of the Law Reform Commission of British Columbia, legislation should provide that minors who have attained their majority can affirm contracts entered into during minority;
- (iii) a party who contracts with a minor may, upon the minor attaining majority, require the minor to either affirm or repudiate a contract;
- (iv) a court should be given broad powers to order any such relief as may be just where a contract is unenforceable against a minor because of minority;
- (v) a contract should be enforceable against a minor where a court is satisfied that the contract was in the best interests of the minor or alternatively, where it is approved by the court;
- (vi) a court should have power to grant to a minor the capacity to enter into contracts generally or into any description of contract; and
- (vii) guarantees of minors' obligations should be enforceable against the guarantor.

No legislation has been enacted to implement these recommendations.

## 6. CONCLUSION

The common law rules governing minors' contracts are complex and outdated. As a result, these rules have undergone extensive review in the past thirty years by various Australian States and Commonwealth countries.<sup>150</sup> The reforms proposed or implemented have ranged from reforming particular problem areas<sup>151</sup> to replacing the

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<sup>149</sup> See Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987) at 210-213.

<sup>150</sup> See note 99 of this Report.

<sup>151</sup> See for example the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) and the *Minors Contracts Act 1988* (Tas).

common law rules with a code of minors' civil law capacity.<sup>152</sup>

Chapter 5 of this Report examines the need for reform and makes recommendations for reform of the law of minors' contracts in Queensland.

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<sup>152</sup> See for example the *Minors (Property and Contracts) Act 1970* (NSW).

# CHAPTER 4

## EMPLOYMENT

### 1. COMMON LAW

The common law did not, apart from rules incidental to employment such as those relating to contractual capacity,<sup>153</sup> develop any particular principles as to the employment of minors. This is perhaps a consequence of medieval and feudal notions of minors as property<sup>154</sup> and serfs in general as unemancipated labour to whom the notion of a freely entered commercial arrangement would have been quite foreign.

At common law, a contract for the services of a minor was binding on the minor only if the contract, taken as a whole, was beneficial to the minor.<sup>155</sup> If the contract was not beneficial, it was not binding on the minor unless the minor ratified it within a reasonable time of attaining majority.<sup>156</sup> There were no special rules as to conditions or minimum age applying to the employment of children.

The industrial revolution saw the beginning of statutory regulation, particularly of conditions in factories, as a reaction against the worst features of rapid industrialisation in the early 19th century. Following the barbarism of the industrial revolution, child welfare statutes began to appear. In England, for example, the position of minors in industry gradually improved to the point where, pursuant to the *Employment of Women, Young Persons and Children Act 1920* (UK) and the *Children and Young Persons Act 1933* (UK), minors could not be employed in "industrial undertakings" or, in the case of minors under 13, could not be employed at all. Minors could not work more than two hours on a school day, and then only between specified hours.<sup>157</sup>

However, in the post-industrial era, where workplace health and safety measures are quite sophisticated and of general application,<sup>158</sup> measures specific to the protection of minors are becoming less common.

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<sup>153</sup> See this Report at 14-15.

<sup>154</sup> Bates F, "Children as Property: Hindsight and Foresight" (1988) 13 *Aust Child and Family Welfare* 3.

<sup>155</sup> *De Francesco v Barnum* (1890) 45 Ch D 430; and *Doyle v White City Stadium Ltd* [1935] 1 KB 110. For further discussion of this issue, see this Report at 14-15.

<sup>156</sup> See this Report at 17-18.

<sup>157</sup> See generally, Carby-Hall JR and Boruta I, "The Contractual Position of Minors and the Prohibition on Employment" in *Children and the Law* (ed Freestone D, 1990) at 32.

<sup>158</sup> For further discussion of this issue, see this Report at 37-38.

## 2. TRAINING LEGISLATION

Numerous statutes now affect the legal position of persons undergoing work training.

### (a) *Education (Work Experience) Act 1996 (Qld)*<sup>159</sup>

The *Education (Work Experience) Act 1996 (Qld)* provides that a work experience student is not to be treated as an employee.<sup>160</sup> In particular, any law "prohibiting employment or regulating working conditions does not apply to work experience".<sup>161</sup> However, the *Workplace Health and Safety Act 1995 (Qld)* and any law which prohibits the employment, or regulates the working conditions, of persons without particular qualifications applies to work experience placements.<sup>162</sup>

Student work experience is, however, subject to certain conditions.<sup>163</sup> For example, where a student is a minor, a parent of the student must give written consent to the work experience placement; a student must not receive work experience for more than 30 days in a year;<sup>164</sup> a student may not be employed outside the ordinary working hours of the workplace; and a student may not be paid for the work experience.

### (b) *Vocational Education, Training and Employment Act 1991 (Qld)*

Apprenticeships and other training programs are now provided for by the *Vocational Education, Training and Employment Act 1991 (Qld)*. That Act provides for an integrated State-wide training system. Under the Act, an approved training scheme

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<sup>159</sup> This Act was assented to on 9 May 1996 but has not yet commenced. The Commission has been advised that it is likely to commence on 28 January 1997. Section 15 of the *Education (Work Experience) Act 1996 (Qld)* repeals the *Education (Student Work Experience) Act 1978 (Qld)*.

<sup>160</sup> See s 10(1) of the *Education (Work Experience) Act 1996 (Qld)* and s 9 of the *Education (Student Work Experience) Act 1978 (Qld)*.

<sup>161</sup> See s 10(2) of the *Education (Work Experience) Act 1996 (Qld)* and s 4(1) of the *Education (Student Work Experience) Act 1978 (Qld)*.

<sup>162</sup> See s 10(3) of the *Education (Work Experience) Act 1996 (Qld)* and s 4(2) of the *Education (Student Work Experience) Act 1978 (Qld)*.

<sup>163</sup> See s 12(1) of the *Education (Work Experience) Act 1996 (Qld)* and s 8(1) of the *Education (Student Work Experience) Act 1978 (Qld)*.

<sup>164</sup> A principal may approve work experience for a student who is a person with a disability for more than 30 days per year: see s 12(3) of the *Education (Work Experience) Act 1996 (Qld)*.

may consist of a traineeship or an apprenticeship.<sup>165</sup> Employment under training schemes is regulated generally by Part 3. Age and educational qualifications for training schemes are determined by the State Training Council.<sup>166</sup> A “youth” (under 21) cannot be employed in an apprenticeship calling unless the youth is an apprentice or tradesperson in that calling.<sup>167</sup> The Industrial Relations Commission may fix wages and other conditions for training schemes.<sup>168</sup> A person who employs an apprentice or trainee at under-award rates commits an offence.<sup>169</sup> An apprentice or trainee cannot be required to join a union.<sup>170</sup> The State Training Council has disciplinary powers over trainees and apprentices.<sup>171</sup> Expedient procedures for the recovery of underpaid wages or other entitlements are available.<sup>172</sup>

Section 106 of the Act provides that, despite any other Act, a minor is permitted to be on any premises for employment purposes.

Sections 12 and 13 of the *Vocational Education, Training and Employment Regulation 1991 (Qld)* safeguard young people by restricting the circumstances in which they can be employed as trainees or apprentices in electrical and other hazardous work.

**(c) *Vocational Education and Training (Industry Placement) Act 1992 (Qld)***

The *Vocational Education and Training (Industry Placement) Act 1992 (Qld)* provides for industry placement of vocational students. Section 6 of the Act provides that, with some exceptions, “any Act or law (other than the *Anti-Discrimination Act 1991 (Qld)*) relating to the prohibition or regulation of the employment of persons on the basis of their age does not apply to an industry placement student”. An industry placement in excess of 240 hours is subject to the supervision of the Industrial Relations Commission.<sup>173</sup> All industry placements require the consent of a parent or guardian if

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<sup>165</sup> See s 68 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>166</sup> See s 77 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>167</sup> See s 78 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>168</sup> See ss 83, 86 and 87 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>169</sup> See s 99 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>170</sup> See s 76 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>171</sup> See s 96 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>172</sup> See ss 100-104 of the *Vocational Education, Training and Employment Act 1991 (Qld)*.

<sup>173</sup> See s 13 of the *Vocational Education and Training (Industry Placement) Act 1992 (Qld)*.

the student is under 18.<sup>174</sup> Placements under 240 hours need not be paid, and must start and finish in the same academic year.<sup>175</sup>

### 3. EMPLOYMENT LEGISLATION

A number of enactments deal with the employment of minors, either directly in that they refer specifically to minors, or indirectly in that they relate to employment generally so as to be for the benefit of all workers, including minors.

#### (a) *Children's Services Act 1965 (Qld)*<sup>176</sup>

The *Children's Services Act 1965 (Qld)* Part 11 makes provision for the employment of children under the care and protection of the Director-General of the Department of Families, Youth and Community Care. It also makes provision for the employment of children generally. The major provisions are that:

- (i) a "child"<sup>177</sup> must not be used in street trading<sup>178</sup> unless the street trading by the child is authorised;<sup>179</sup>
- (ii) street trading by a child is authorised if -<sup>180</sup>
  - (a) the child is a male person of at least 12; and
  - (b) the trading is carried on between 6.00 am and 10.00 pm; and
  - (c) if the child is of compulsory school attendance age - the trading is not carried on when attendance is required;

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<sup>174</sup> See s 15(1)(a) of the *Vocational Education and Training (Industry Placement) Act 1992 (Qld)*.

<sup>175</sup> See s 15(1)(b) and (c) of the *Vocational Education and Training (Industry Placement) Act 1992 (Qld)*.

<sup>176</sup> The *Children's Services Act 1965 (Qld)* is currently under review.

<sup>177</sup> Section 8 of the *Children's Services Act 1965 (Qld)* defines "child" as a person under or apparently under the age of 17.

<sup>178</sup> Section 8 of the *Children's Services Act 1965 (Qld)* defines "street trading" to include canvassing for orders for the supply of goods whether ascertained or to be ascertained and whether such canvassing occurs in a public place or premises adjacent to a public place or in any other place.

<sup>179</sup> See s 114 of the *Children's Services Act 1965 (Qld)*.

<sup>180</sup> See s 113 of the *Children's Services Act 1965 (Qld)*.



- (iii) a person must not counsel or procure a child, or allow a child in the person's custody -<sup>181</sup>
  - (a) to beg or receive alms;
  - (b) where the child is under school leaving age - to be employed in the racing industry;
  - (c) to engage in any dangerous or indecent performance;
  - (d) where the child does not have a permit under section 116 of the Act - to be employed or used in performance, advertisement or public entertainment;
- (iv) the Director-General may issue permits under section 116 for the employment of children for specified purposes.

**(b) *Education (General Provisions) Act 1989 (Qld)***

Section 62 of the *Education (General Provisions) Act 1989 (Qld)* makes it an offence for a parent to employ or allow to be employed a minor during school hours, if the minor is of the age of compulsory attendance, unless the parent has a dispensation granted under subsection 58(1) of the Act.<sup>182</sup>

**(c) *Workplace Health and Safety Act 1989 (Qld)***

The *Workplace Health and Safety Act 1989 (Qld)* provides a system of self-regulation. It imposes general duties on employers and employees to ensure their own and each other's health and safety. The Act also prohibits the performance by a person of work in dangerous occupations prescribed by the *Workplace Health and Safety Regulation 1989 (Qld)* Part 5 (for example, crane operator, demolisher, plant and machinery operator, rigger, scaffolder, welder) unless the person holds a certificate of competency. Thus, although the legislation does not make special provision for minors, its general provisions protect all employees, including minors.

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<sup>181</sup> See s 115 of the *Children's Services Act 1965 (Qld)*.

<sup>182</sup> Section 3 of the *Education (General Provisions) Act 1989 (Qld)* defines "age of compulsory attendance" to mean "not less than six nor more than 15 years of age". Sections 57 and 60 compel a parent of a child who is of the age of compulsory attendance to enrol and ensure the attendance of the child at a State or non-State school or at the School of Distance Education. The Minister may dispense with that requirement under s 58. A parent who does not comply commits an offence under s 61, punishable by a fine (presently \$300 for a first offence and \$600 for a subsequent offence).

**(d) *Industrial Relations Act 1990 (Qld)*<sup>183</sup>**

The *Industrial Relations Act 1990 (Qld)* is also relevant to the employment of minors. The effect of the Act is that minimum conditions of employment are safeguarded for all kinds of employees (including minors) by Parts 12 (General conditions of employment) and 18 (Wages). The Act also contains scattered provisions which further fortify the position of minors. The most relevant provisions of the *Industrial Relations Act 1990* are reproduced in Appendix B to this Report.

#### **4. ANTI-DISCRIMINATION LEGISLATION**

The *Anti-Discrimination Act 1991 (Qld)* prohibits direct and indirect discrimination on the basis of age<sup>184</sup> in a number of areas. For example, a person may not discriminate in relation to numerous matters relevant to employment (such as hiring, terms, training, dismissal and partnership).<sup>185</sup> This prohibition is subject to a number of specific exemptions.<sup>186</sup> For example, section 25 provides that “[a] person may impose genuine occupational requirements for a position”. Section 33 provides that “[a] person may remunerate a worker who is under 21 years of age according to the worker’s age”. Similarly, a person may not discriminate in relation to superannuation and insurance.<sup>187</sup> All three of these prohibitions are subject, however, to the general exemption in relation to legal incapacity discussed above.<sup>188</sup>

#### **5. CONCLUSION**

In the Draft Report,<sup>189</sup> the Commission noted that there have been several recent reviews of both specific and general legislation covering the employment of minors. Neither the Commission’s preliminary consultations nor the submissions received in

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<sup>183</sup> The Queensland government is proposing to replace the *Industrial Relations Act 1990 (Qld)* with a new set of industrial laws: see the *Workplace Relations Bill 1996 (Qld)* and the *Industrial Organisations Bill 1996 (Qld)*. Subsection 494(a) of the *Workplace Relations Bill 1996*, if enacted, would provide that the *Industrial Relations Act 1990* is repealed.

<sup>184</sup> See s 7(1)(f) of the *Anti-Discrimination Act 1991 (Qld)*.

<sup>185</sup> See Ch 2, Part 4, Division 2, Subdivision 1 of the *Anti-Discrimination Act 1991 (Qld)*.

<sup>186</sup> See Ch 2, Part 4, Division 2, Subdivision 2 of the *Anti-Discrimination Act 1991 (Qld)*.

<sup>187</sup> See Ch 2, Part 4, Division 2, Subdivisions 5 and 6 of the *Anti-Discrimination Act 1991 (Qld)*.

<sup>188</sup> See s 112 of the *Anti-Discrimination Act 1991 (Qld)* and this Report at 22-23.

<sup>189</sup> Queensland Law Reform Commission, Draft Report, *Minors’ Civil Law Capacity (WP 45, April 1995)* at 2, 38.

response to the Draft Report revealed any major problem, either theoretical or practical, with the existing law relating to employment of minors. General employment law appears sufficiently effective in protecting the interests and welfare of workers below the age of majority and their families.<sup>190</sup>

The Commission's attention was drawn to occasional difficulties experienced by young people, particularly in the casual employment sector, in relation to the payment of under-award wages. In the Commission's view, it is unlikely that those difficulties will be remedied by any reform of the law; they are problems of enforcement, which in any event are possibly insuperable in transient sectors of the economy.

The Commission considers that there is no need to make any recommendations for reform of the law relating to employment of minors.

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<sup>190</sup> Australian Law Reform Commission, Report, *Child Welfare* (ALRC 18, 1981) at 369.

## CHAPTER 5

### THE NEED FOR REFORM

#### 1. INTRODUCTION

The preliminary investigations made by the Commission prior to the release of the Draft Report did not reveal any pressing need for general reform of the "law relating to infancy and ... the civil law capacity of infants".<sup>191</sup> Over twenty organisations were informally approached to identify issues for inclusion in the Draft Report (including youth organisations, accommodation services, trader and employer organisations, service industry organisations, government and statutory agencies and education related organisations).<sup>192</sup> However, the only areas of concern raised with any consistency were in relation to accommodation and employment.

The main difficulty facing young people in the context of accommodation appears to be a reluctance by landlords to enter into tenancy agreements with them. Under the current law, to be enforceable against a minor, a tenancy agreement must be regarded as an agreement for necessities.<sup>193</sup> In the context of employment, it appears that there are no major problems with the law itself; the difficulties experienced by some young people relate rather to enforcement of the existing law.<sup>194</sup>

In the Draft Report,<sup>195</sup> the Commission identified three areas of law which it considered to be in need of reform in relation to minors' contracts:<sup>196</sup>

- (1) The capacity of a minor to enter into a residential tenancy agreement;
- (2) The question whether a guarantee of a minor's obligation is enforceable; and
- (3) Restitution in cases of non-enforceable minors' contracts.

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<sup>191</sup> The terms of the reference answered by the Commission.

<sup>192</sup> The organisations informally contacted by the Commission prior to the release of the Draft Report are listed at note 8 of this Report.

<sup>193</sup> See s 19 of the *Residential Tenancies Act 1994* (Qld) and this Report at 13-14.

<sup>194</sup> See this Report at 39.

<sup>195</sup> Queensland Law Reform Commission, Draft Report, *Minors' Civil Law Capacity* (WP 45, April 1995).

<sup>196</sup> At 15-17, 35-38.

The Commission received twenty-seven written submissions in response to the Draft Report. Twenty of those submissions were received from university law students. These were the only written submissions received predominantly from young people.<sup>197</sup> Seven submissions were received from other respondents. Two of these submissions were from organisations specifically representing young people.<sup>198</sup>

The limited response to the Draft Report serves to reinforce the Commission's preliminary opinion that the community does not perceive any immediate need for general reform. No new issues were identified in the submissions; nor was the Commission's approach in limiting the scope of the reference generally criticised.

Only one submission disagreed with the Commission's view that a full scale review is not warranted. The National Children's and Youth Law Centre saw it as essential that Queensland implement a full scale review of the law affecting children and their civil rights in line with the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission's inquiry into children and the legal process. The terms of reference of that inquiry relate mainly to issues such as criminal law, court proceedings, trial issues, family law, evidence and sentencing, although there is a subsection about protecting minors as consumers.<sup>199</sup>

A review of this scope is outside this Commission's terms of reference in that it involves the review of areas of criminal law and of Federal law.

## 2. RETENTION OF THE COMMON LAW

### (a) The Commission's preliminary recommendations

In the Draft Report, the Commission acknowledged that the common law relating to minors' contracts is complex and outdated, having developed largely as a result of economic and social conditions from the 19th century which are no longer applicable. However, the Commission concluded that extensive legislative intervention, similar to that undertaken in New South Wales,<sup>200</sup> was not warranted.<sup>201</sup>

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<sup>197</sup> These students were from James Cook University and were required to make the submission as part of their assessment.

<sup>198</sup> Submissions were received from the Bar Association of Queensland; the Office of Consumer Affairs Queensland; the Department of Family and Community Services (now the Department of Families, Youth and Community Care); the National Children's and Youth Law Centre; Tenants' Union of Queensland Inc; South-East Queensland Youth Accommodation Coalition and a legal academic.

<sup>199</sup> The terms of that reference are set out in Appendix F to this Report.

<sup>200</sup> *Minors (Property and Contracts) Act 1970* (NSW). See this Report at 24-26 for a discussion of this legislation.

<sup>201</sup> At 33-35.

In reaching this conclusion, the Commission took into account the fact that the age of majority had been lowered from 21 to 18, thus limiting the extent of any potential difficulty by significantly reducing the number of young people affected by the existing law. The New South Wales legislation was introduced before the age of majority was lowered in that State.

The Commission also queried whether legislative reform would in fact change the realities of the existing situation. It noted that if, for example, a credit provider, as a matter of general policy, will not knowingly contract with a minor alone, so as to avoid the possible repercussions of an unenforceable contract, a change in the law may not result in a change of policy. Enforceability would ultimately depend on ability to repay and, even if the law were changed, credit may continue to be withheld from minors unless accompanied by a guarantee from an adult with financial capacity to repay.

The Commission's overall approach in the Draft Report was not to alter the common law except to address the three deficiencies identified in its preliminary investigations. It was not proposed that the general rule of unenforceability of minors' contracts be altered. There was a presumption in the Draft Report that such a rule should continue for the same policy reasons as it was developed.<sup>202</sup>

#### **(b) Response to the Commission's preliminary recommendations**

A number of submissions supported the Commission's approach.<sup>203</sup> The Bar Association of Queensland commented:<sup>204</sup>

Whilst mindful of those who argue strongly in favour of uniform "reform" legislation based on the New South Wales model, the Association is not of the view that blind repetition of the latest "model" is necessarily productive of the best result. In the Association's view the appropriate approach to law reform is to identify those areas where reform is needed and to make such change as is necessary to overcome adverse impacts in practice.

Some submissions disagreed with the Commission. Notwithstanding the Commission's view that comprehensive reform of the law would have little practical effect, these submissions supported the New South Wales model of codification, primarily on the basis that the current common law is complex, confusing, unjust and discriminatory.<sup>205</sup>

However, none of the submissions which claimed that the present law is unjust and discriminatory provided any information to support their claims or any evidence of

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<sup>202</sup> See this Report at 12.

<sup>203</sup> Submissions 1, 2, 5, 7, 9 and 24.

<sup>204</sup> Submission 24.

<sup>205</sup> Submissions 3, 4, 8, 11, 13, 14, 15 and 25.

practical difficulties. Rather, they emphasised the complexity of the law, which the Commission readily acknowledges.

The Queensland Anti-Discrimination Commission receives very few complaints from minors. Only 5.8% of the complaints received under the *Anti-Discrimination Act 1991* (Qld) in 1995-1996 were on the grounds of age discrimination, and of those thirty-six complaints, only three were in relation to goods and services.<sup>206</sup>

This Commission's investigations revealed some of the reasons why the law in relation to minors' contracts is of relatively little practical importance. For example:

1. Certain statutory schemes override common law notions of capacity, for example, consumer protection legislation.<sup>207</sup>
2. Commercial practices have developed which overtake any practical need to rely on the common law. As a general rule banks, retailers, finance companies and other credit providers do not knowingly enter into contracts with minors. They prefer to consider all contracts with minors unenforceable, for financial and moral reasons.<sup>208</sup> Traders commonly insist on cash transactions or on a guarantee or indemnity.
3. Transactions are usually of an informal nature, made with family members or friends. There is often no intention to create legal relations.
4. Small amounts are usually involved.
5. The resolution of disputes can be greatly affected by non-legal issues. These issues include the willingness of parents to accept moral responsibility for their child's contract even when there is no legal liability on the parent or the child, the adverse publicity associated with pursuing minors through the courts, and doubts about the enforceability of any judgment obtained against a minor with no income or assets.

A small number of respondents disagreed with the Commission's acceptance of the

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<sup>206</sup> Human Rights and Equal Opportunity Commission, *Annual Report 1995-1996* at 137. Thirty complaints about discrimination on the basis of age concerned employment, and two concerned accommodation. Accommodation is discussed at 40 and 50-53 of this Report. Employment is discussed at 38-39, 40 of this Report.

<sup>207</sup> See this Report at 20.

<sup>208</sup> The Commission's informal inquiries revealed that the Australian Retail Finance Network has arrangements with most credit providers which do not allow minors to hold credit cards. Most banks have similar policies (for example, the Commonwealth Bank of Australia and the Queensland Country Credit Union). Lending institutions require potential borrowers to satisfy requirements in relation to stability of employment and residence, saving patterns etc, which minors would generally have difficulty satisfying.

policy underlying the existing law,<sup>209</sup> which is to protect minors from the consequences of their own immaturity and inexperience whilst, on the other hand, ensuring that the law does not unnecessarily prejudice adults who deal with minors so that the needs of minors for goods and services may be met. The general theme of these submissions was that today's teenagers do not need or deserve the protection provided by the common law because they are mature enough to have equal rights and responsibilities in relation to contracts.

One respondent commented on Chapter 2 of the Draft Report:<sup>210</sup>

It is interesting, then, to ask why, if a person can leave school at 15 years of age, be criminally responsible for his or her actions at ... 15 years, be in charge of a motor vehicle at ... 17 years, marry at 16,<sup>211</sup> be under 18 and earn a living and operate within the economy, effect a life insurance policy at 16 and be liable in tort if he or she is old enough to appreciate the seriousness and consequences of his or her action, a person of similar age cannot be held legally bound by a contract.

However, the Commission received strong support for its view that the general law relating to the unenforceability of minors' contracts be retained, both during its informal investigations and from submissions received in response to the Draft Report.<sup>212</sup> Notwithstanding that minors are given adult rights/responsibilities in other areas, it was considered that, in the context of contractual liability, minors still need the protection offered by the existing law.

Of those respondents who disagreed with the Commission, the most common ground of dissatisfaction with the common law rules was in relation to the "necessaries rule".<sup>213</sup> It was considered uncertain, outdated, too restrictive and too difficult to satisfy to justify its retention.

Suggestions for reform included:

**(i) Modernising the definition of necessaries**

Several submissions contained case law examples to support the argument that the definition of necessaries is outdated.<sup>214</sup> One respondent suggested that the

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<sup>209</sup> Submissions 4, 8, 11, 16, 17 and 25.

<sup>210</sup> Submission 17.

<sup>211</sup> In 1991, the *Marriage Act 1961* (Cth) was amended to raise the marriageable age for all persons to marry to 18. See this Report at 10.

<sup>212</sup> Submissions 1, 7, 12 and 18.

<sup>213</sup> Submissions 3, 4, 8, 9, 11, 12, 13, 14, 15, 19 and 25.

<sup>214</sup> Submissions 3, 4, 5, 10, 13, 15 and 16.



test for necessities should be “a dynamic one, sensitive to the conditions in which a minor exists”.<sup>215</sup>

The Commission agrees that the case law is outdated, but suggests that this is simply because there has been no litigation arising from minors’ contracts in recent times, because there are so few problems in practice with the current law.

(ii) **A presumption of enforceability**

**A. Beneficial contracts**

By virtue of the common law rules, a minor’s contract must not only be for necessities, but must also be beneficial to the minor before it will be enforceable.<sup>216</sup> Commentators have suggested that, if a contract is for a minor’s benefit, then it should not also have to be for necessities, and that the common law should be replaced with a test of benefit alone.<sup>217</sup> It has been said:<sup>218</sup>

... a principal concern of the law is the protection of minors against their own inexperience, and it would appear that if a contract were regarded as beneficial to the minor that concern is met, even though the contract may not be for “necessaries”. To look to the benefit of the minor, rather than the classification of the subject matter of the contract, would also assist the second goal of the law in this area, the protection of adults who deal with minors. It is surely easier for such an adult to know whether a particular contract is beneficial to the minor, than it is for him [or her] to determine the circumstances and station of the minor (and consequently what may or may not be “necessary”) and whether the minor is already adequately supplied with things of that sort.

This view has been implemented in New South Wales. Section 19 of the *Minors (Property and Contracts) Act 1970* (NSW) provides that, subject to the test of capacity in section 18, a contract is presumed binding on a minor if it is for the benefit of the minor.<sup>219</sup> The purpose of this provision was to “put a single simple rule in place of the many distinctions which are drawn, or appear to be drawn, by the present law”.<sup>220</sup> However, section 19 provides no guidance as to how “benefit” is to be determined, and has been criticised as containing difficulties

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<sup>215</sup> Submission 12.

<sup>216</sup> See Ch 3 of this Report for a summary of the common law position.

<sup>217</sup> Salmond and Williams, *Principles of the Law of Contracts* (1945) at 310; and Greig & Davis at 762.

<sup>218</sup> Greig & Davis at 762.

<sup>219</sup> Sections 18 and 19 of the *Minors (Property and Contracts) Act 1970* (NSW) are set out in full in Appendix C to this Report.

<sup>220</sup> New South Wales Law Reform Commission, Report, *Infancy in Relation to Contracts and Property* (LRC6, August 1969) at 85.

in construction and application.<sup>221</sup>

Harland suggests that to determine whether a contract is for a minor's benefit, the contract must be looked at as a whole.<sup>222</sup> Not only must the terms of the contract be fair and reasonable, but it must be beneficial for the minor to enter into a contract of that type, regardless of the terms. To determine whether a contract is fair and reasonable and contains no unduly harsh or onerous terms, the court will no doubt seek guidance from the many common law decisions arising under the "necessaries" test. To determine whether the particular type of contract is beneficial for the minor to enter into, it will be necessary for the court to consider the minor's age, means and current supply of the goods or services contracted for. In other words, many of the factors relevant under the common law rule relating to necessaries will still have to be considered.

Some respondents supported the benefit test on the basis that it would be easier to satisfy than the current rules,<sup>223</sup> but in light of the above, the Commission finds it difficult to see how this test is significantly less onerous than the existing law.

Other submissions suggested that the New Zealand test of "fair and reasonable" in relation to terms, age, and situation<sup>224</sup> was more appropriate.<sup>225</sup> Again, the Commission is not convinced that this test is any easier to satisfy than the current rules. It would also require recourse to the common law decisions that have arisen under the necessaries test.

It also may be more difficult for a lay person to determine if a contract is for a young person's benefit, whereas most people would understand the concept of "necessaries".

The Commission agrees that a test of benefit alone seems at first glance to be more flexible than the technical concept of necessaries. However, it is not convinced that, after a more indepth analysis, the benefit test provides any greater certainty than the common law rules.

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<sup>221</sup> Harland DJ, "The Contractual Capacity of Minors - a New Approach" (1973) 7 Syd Law Rev 41; and Harland DJ, *The Law of Minors in relation to Contracts and Property: An analysis of the Minors (Property and Contracts) Act 1970 (NSW)* (1974).

<sup>222</sup> Ibid.

<sup>223</sup> Submissions 3 and 4.

<sup>224</sup> See s 6(2) and (3) of the *Minors' Contracts Act 1969* (NZ). This Act is discussed at 23-24 of this Report.

<sup>225</sup> Submissions 15 and 20.

## B. Fixed age capacity

Some respondents suggested a rule that minors be able to enter into and be bound by contracts at a fixed age, for example 16 years, regardless of their capacity to understand the implications of their actions.<sup>226</sup>

This proposal has the advantage of certainty for a party who deals with a minor, on proof of the minor's age. However, it would effectively lower the age of majority in relation to the law of contract, and there would be no escape for an inexperienced minor who entered into a contract which was not for his or her benefit. This would conflict with the policy objective of the common law.

## C. Actual capacity

A number of respondents suggested that, as an alternative to the necessities rule, a contract should be presumed binding on a minor provided the minor has the capacity to understand it.<sup>227</sup> It was suggested that, while a ten year old may not be able to be held liable for his or her actions, there is no reason why a 16 year old who understood the nature and consequences of his or her contract should not be bound by it.<sup>228</sup>

A small number of respondents proposed a court power to make a declaration of capacity which would allow a minor to enter into an enforceable contract.<sup>229</sup>

A test based on capacity would provide more protection for a minor than a fixed age rule, although there would still be no requirement that the contract be for the benefit of the minor. A test based on capacity would also be less certain than one based on a fixed age.

The New South Wales Act contains a proviso that a civil act is not binding on a minor who lacks the understanding necessary for participation in that civil act.<sup>230</sup> Even if a minor has the requisite capacity, a contract is presumed binding on the

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<sup>226</sup> Submissions 3, 9, 12 and 16.

<sup>227</sup> Submissions 3, 8, 9, 13, and 25.

<sup>228</sup> See the Commission's Discussion Paper on *Consent to Medical Treatment of Young People* (WP 44, 1995) and its forthcoming Report on *Consent to Health Care of Young People* for a detailed discussion of the law relating to young people's ability to consent to their own health care.

<sup>229</sup> Submissions 5 and 14.

<sup>230</sup> See s 18 of the *Minors (Property and Contracts) Act 1970* (NSW).

minor only if it is for the minor's benefit. The Commission is not aware of any Commonwealth jurisdiction that holds all contracts binding on minors who have the capacity to understand them, with no proviso in relation to benefit or reasonableness. This would conflict with the policy objective of protecting minors from their own immaturity and inexperience.<sup>231</sup>

The Commission is not convinced that minors should be deprived of the protection that the common law currently provides, and believes that submissions which suggest a presumption of enforceability go too far in their attempts to simplify the law.

### (iii) Reversal of the onus of proof

It was submitted by some respondents that it is too onerous to require an adult who contracts with a minor to prove that goods supplied under the contract are necessities for a particular minor.<sup>232</sup> Suggestions for reform included:

If the adult contractor can satisfy the court that he/she reasonably believed at the time of making the contract that the terms were reasonable, the onus shifts to the minor ... to show that the contract was improvident of his [or her] interests.<sup>233</sup>

The adult need only have a reasonable belief based on an objective test that ... the goods were necessary for that particular minor, or ... the minor must prove it wasn't a necessary.<sup>234</sup>

The Commission believes that shifting the onus of proof to the minor would place an unnecessary burden on a minor. A minor is unlikely to have the resources (including financial resources) available to satisfy the onus and would almost certainly not have the same resources that an adult would have.

### (c) Recommendation

On balance, the Commission is not persuaded that radical change of the common law rules is necessary, or that a fundamental change in the policy underlying those rules

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<sup>231</sup> In its Discussion Paper on *Consent to Medical Treatment of Young People* (WP 44, 1995), the Commission proposed a legislative scheme which would enable a health care provider to treat a young person under 16 years of age upon the young person's consent, provided the health care provider believes the young person understands the nature and consequences of the treatment. However, the health care provider would also have to believe that the health care was in the best interests of the young person's health and well-being. For further discussion and development of the Commission's recommendations relating to consent to health care of young people, see the Commission's forthcoming Report on *Consent to Health Care of Young People*.

<sup>232</sup> Submissions 4 and 15.

<sup>233</sup> Submission 15.

<sup>234</sup> Submission 4.

is desirable. It does not believe that modernising the common law test would alter commercial reality. It is clear that commercial reality, not age, will continue to dictate who contracts with whom. In the Commission's view, some of the reform options outlined above would not necessarily provide the contracting parties with any greater certainty in relation to the enforceability of the contract than does the existing law and would in some cases provide less protection for the minor.

The Commission remains in agreement with the conclusions reached by the majority of Commonwealth law reform agencies that have considered the law relating to minors' contracts during the last thirty years.<sup>235</sup> It endorses the following conclusion reached by the English Law Commission:<sup>236</sup>

[I]n spite of the numerous criticisms that could justifiably be made of the existing law, its defects and uncertainties [give] rise in practice to relatively few difficulties of importance. The reduction of the age of majority to 18, the enactment in recent years of "consumer protection" legislation and the fact that minors can nowadays obtain credit only in very exceptional circumstances, unless at the same time an adult agrees to indemnify the creditor, have combined to make most of the problems which might be caused by the unsatisfactory state of the law more theoretical than real.

Subject to the specific recommendations discussed below, the Commission does not recommend general legislative reform of the common law on minors' contracts.

### 3. SPECIFIC RECOMMENDATIONS FOR REFORM

In the Draft Report, the Commission made suggestions for reform of the law relating to minors' contracts in the three specific areas where it had identified problems.<sup>237</sup> Those areas together with the Commission's preliminary recommendations and the submissions made in response to the Draft Report, are discussed below:

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<sup>235</sup> The law reform agencies that have recommended the retention of the common law principle of "qualified unenforceability" (with consequential amendments involving restitution, adjustment of rights, fortification of guarantees and other ancillary matters) include: Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977); Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987); The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984); Law Reform Commission of Ireland, Report, *Minors' Contracts* (LRC 15, August 1985); Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987); and Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976). The only law reform agencies that have recommended more thorough reforms are the New South Wales Law Reform Commission, Report, *Infancy in relation to Contracts and Property* (LRC 6, August 1969) and the Alberta Institute of Law Research and Reform, Report, *Minor's Contracts* (R 14, January 1975). In its Report on *Infancy in relation to Contracts and Property* (R 3, 1970), the Victorian Chief Justice's Law Reform Committee recommended the adoption of the New South Wales model but this recommendation has never been implemented. The principal recommendations of the major law reform reports are summarised in Appendix G to this Report. The *Minors (Property and Contracts) Act 1970* (NSW) and the *Minors' Contracts Act 1969* (NZ) are the only Acts on minors' contracts that operate as a code.

<sup>236</sup> The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984) at 8.

<sup>237</sup> Queensland Law Reform Commission, Draft Report, *Minors' Civil Law Capacity* (WP 45, April 1995) at 35-38.

**(a) Residential tenancies**

The Commission recommended that section 19 of the *Residential Tenancies Act 1994* (Qld) be amended.

At present section 19 provides:

A minor has the capacity to enter into a residential tenancy agreement if it is an agreement for necessities.

The Explanatory Notes read when the legislation was introduced into Parliament show that the intention of section 19 was to allow minors to enter into and be bound by residential tenancy agreements.

The Commission expressed the view that the effect of section 19 was merely to restate the common law. In other words, the onus would still be on a landlord to prove firstly, that a tenancy agreement with a minor was a contract for necessities and, secondly, if that test was satisfied, that the tenancy agreement was for the minor's benefit.

The Commission recommended that section 19 be replaced with a provision that:

A minor has, in relation to a residential tenancy agreement for the provision of accommodation for the minor or his or her family, the same capacity as if the minor had attained majority.

The Commission's recommendation was a result of the Commission's informal consultations which revealed that young people, typically those in their early years of tertiary training and education, and also homeless young people, experience difficulty in obtaining accommodation because of their incapacity at law to enter into a residential tenancy agreement unless the contract satisfies the necessities and the benefit tests.<sup>238</sup> Landlords are understandably reluctant to commit to a contract the validity of which is subject to those two variables, and which in practice must be a matter of vagueness and uncertainty.

The Commission concluded that, in light of the increased social and economic mobility of young people in today's society, the law should expressly state that a young person has capacity to enter into a contract for the provision of residential accommodation for that person and his or her family.

The Commission's recommendation was based on the importance of certainty for both landlords and tenants. The Commission remains of the view that it would create more certainty if both the test for necessities and the test for benefit were abrogated by statute, and all tenancy agreements with minors were enforceable. This would be the

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<sup>238</sup> Submissions received from young tertiary students confirmed this problem, as did the Commission's informal discussions with university counselling services and legal services, the Youth Affairs Network, the Logan Youth Legal Service, the South East Queensland Youth Accommodation Coalition and the Tenants' Union of Queensland Inc.

result if the amendments to the *Residential Tenancies Act 1994* (Qld) recommended in the Draft Report were implemented. As the provision recommended in the Draft Report stands, a landlord could enforce any contract for residential tenancy against a minor, regardless of the minor's age or the terms of the contract, subject to consumer protection laws.

Although no submission disagreed with the Commission's preliminary recommendation that section 19 should be amended to allow minors to enter into binding residential tenancy agreements, issues were raised in some submissions that prompted the Commission to examine whether there should be any limitations on its preliminary recommendation. The issues raised were as follows:

**(i) that the benefit test be retained**

Under the Commission's preliminary recommendation, neither the necessities nor the benefit elements of the common law rule need be satisfied. It could be argued that residential tenancies should be placed in the same class at common law as contracts of employment, so that although they are deemed to be contracts for necessities, they still must be beneficial before they are enforceable. This would satisfy both the need to protect a minor from his or her own immaturity and inexperience, and also the need to protect an adult who deals with a minor.

It has been suggested that it would be easier to prove that a contract is for a minor's benefit than to determine whether it is for necessities. However, it seems that even the benefit test requires knowledge of the circumstances and station in life of the minor and whether the minor is adequately supplied with the subject matter of the contract.<sup>239</sup>

Accordingly, it is difficult to see how this test would provide any more certainty for landlords and minors wishing to enter into binding residential tenancy agreements.

**(ii) that a test of capacity be introduced**

A compromise was suggested in the form of a test of capacity, so that, provided a minor was able to understand the contract, he or she would be bound by it, regardless of whether the contract was for necessities or whether it was for the minor's benefit. The proposed test would be more certain than a benefit test, while still protecting minors who do not have the capacity to understand the nature and consequences of the contract.

Although a test of capacity seems important in the protection of minors, it could

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<sup>239</sup> See Harland DJ, *The Law of Minors in relation to Contracts and Property: An analysis of the Minors (Property and Contracts) Act 1970 (NSW)* (1974) at 85 (para 616).

also be argued that commercial reality provides satisfactory protection.<sup>240</sup> Landlords are reluctant to enter into an agreement with a prospective tenant unless they have some evidence of an ability to make rental payments. In most cases only a minor over compulsory school leaving age, that is 15 years old, and in receipt of income either from employment or social security, or parental support while he or she undertook tertiary studies, would be able to satisfy this requirement. Such a minor would usually have the capacity to understand the nature of a residential tenancy agreement.

If the concept of capacity were introduced, it would be necessary to consider whether the legislation should specify a deemed age of capacity, or whether a general test of actual capacity should be implemented.

The Bar Association of Queensland suggested that the Commission's proposed amendment be limited to minors who are over the age of compulsory school attendance. The Association found it difficult to accept that those below that age could make a mature judgment about entering into such agreements.<sup>241</sup> Although a fixed age test of capacity would provide more certainty, it would create a gap for younger independent minors who are mature enough to understand the contract. Commercial reality would also provide an additional safeguard.

**(iii) that a tribunal should have to approve the contract**

One submission suggested that the common law tests of necessities and benefit be abolished and that a specialist tribunal be created for residential tenancies with power to investigate the financial status of minors, to approve contracts and to declare them binding on both parties.<sup>242</sup>

However, in the view of the Commission the costs in establishing and operating such a specialist tribunal could not be justified in view of the small number of minors who would be likely to avail themselves of the tribunal's jurisdiction.

After carefully considering the issues raised by the submissions the Commission is not convinced to change its preliminary recommendations. Therefore the Commission recommends that section 19 of the *Residential Tenancies Act 1994* (Qld) be replaced with a provision that:

*A minor has, in relation to a residential tenancy agreement for the provision of accommodation for the minor and/or his or her family, the same capacity as if the*

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<sup>240</sup> The Tenants' Union of Queensland Inc. made this observation in informal discussions with the Commission.

<sup>241</sup> Submission 24 and the Youth Affairs Network of Queensland during the course of informal discussions with the Commission.

<sup>242</sup> Submission 18.



*minor had obtained the age of majority.*<sup>243</sup>

**(b) Guarantees**

**(i) Enforceability**

In the Draft Report, the Commission recommended that Part 6 Division 2 of the *Property Law Act 1974* (Qld) be amended to add a provision like section 5 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA)<sup>244</sup> which provides:

When a person (other than a minor) guarantees the performance by a minor of his obligations under a contract, the guarantee shall be enforceable against the guarantor to the same extent as if the minor had, before entering into the contract to which the guarantee relates, attained his majority.

The Commission expressed the view that the artificial distinction between guarantees and indemnities, which renders the former unenforceable in relation to the obligations of minors, should be abolished.<sup>245</sup>

The Commission considered existing legislation relating to enforcement of guarantees of minors' obligations to be only partially adequate. The *Credit Act 1987* (Qld) and the *Consumer Credit (Queensland) Code 1994* (Qld) confirm that a guarantee of a minor's obligation under a regulated credit contract is enforceable.<sup>246</sup> The Commission expressed the view that a similar provision of general application should be enacted.

No respondent disagreed with the Commission's general recommendation. However, a number of submissions recommended that subsection 47(1) of the *Minors (Property and Contracts) Act 1970* (NSW)<sup>247</sup> be adopted, rather than its

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<sup>243</sup> A minor change in the drafting has been made to the provision from the Draft Report. The minor can now contract for accommodation for himself or herself and his or her family.

<sup>244</sup> This section is set out in Appendix D to this Report.

<sup>245</sup> This view has been also expressed by review bodies in other jurisdictions and has been implemented by several legislatures. See note 90 of this Report.

<sup>246</sup> See s 136(1) of the *Credit Act 1987* (Qld) and s 55(2) of the *Consumer Credit (Queensland) Code 1994* (Qld). The *Credit Act 1987* (Qld) does not apply to any credit contracts or guarantees related to credit contracts entered into on or after 1 November 1996. It does, however, continue to apply to credit contracts (other than continuing credit contracts) and guarantees related to such credit contracts entered into prior to 1 November 1996: see ss 21A and 21B of the *Credit Act 1987* (which sections were inserted by s 8 of the *Consumer Credit Legislation Amendment Act 1996* (Qld)). Credit contracts and guarantees related to credit contracts entered into on or after 1 November 1996 are regulated by the *Consumer Credit (Queensland) Code* (Qld).

<sup>247</sup> This section is set out in Appendix C to this Report.

South Australian counterpart.<sup>248</sup>

Subsection 47(1) of the New South Wales legislation is similar to subsection 5(1) of the South Australian Act. Both provisions make guarantees enforceable against the guarantor as if the minor had attained majority. However, the New South Wales section makes the minor liable for his or her civil act in relation to the loan, whereas the South Australian section is silent. The general scheme of the South Australian legislation is not to alter the common law by making minors' contracts enforceable. The Commission agrees with this approach.

The Commission does not change its recommendation on this question.

**(ii) Warning to guarantors**

The *Credit Act 1987* (Qld) and the *Consumer Credit (Queensland) Code 1994* (Qld) provide that a guarantee of an obligation undertaken by a minor under a regulated credit contract cannot be enforced unless the guarantee document contains a prominent warning to the guarantor that the guarantor may not be able to recover from the minor amounts that the guarantor is liable to pay under the guarantee.<sup>249</sup>

In the Draft Report, this Commission called for submissions on whether such a requirement should attend any general provision as to the enforceability of guarantees of minors' obligations.

Two respondents proposed that the warning be included; the remainder were silent on the issue.<sup>250</sup> The Bar Association of Queensland commented:<sup>251</sup>

[O]bviously the prospect of the guarantor being unable to obtain an indemnity against the debtor may be very relevant to the guarantor's preparedness to enter into the guarantee. It is not a matter which would be readily known by prospective guarantors ... Such provisions apply currently in relation to credit laws and the Association sees no reason why they should not be extended to provisions such as are proposed.

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<sup>248</sup> Submissions 8 and 14.

<sup>249</sup> See s 136(2) of the *Credit Act 1987* (Qld) and s 55(3) of the *Consumer Credit Code 1994* (Qld).

<sup>250</sup> In the Draft Report, the Commission observed that the Law Reform Commission of Western Australia did not see the need for such a warning. See The Law Reform Commission of Western Australia, Report, *Report on Minors' Contracts* (Project No 25 Part II, 1988) at 106-107. The Law Reform Commission of Western Australia did not explain the basis for its view regarding a warning.

<sup>251</sup> Submission 24.

The Office of Consumer Affairs (Queensland) commented:<sup>252</sup>

It is imperative that any parties considering guaranteeing minors contracts should be made aware of the fact that they may be required to honour their guarantee obligations without having the opportunity to redeem the money from the minor.

The inclusion of a warning is obviously desirable to protect unsuspecting guarantors from unfinancial minors, and from their own generosity. Warnings are often contained in approved documents for the benefit of the parties contracting to ensure that the parties have equal bargaining power. If consumer credit legislation includes this requirement, then there is no reason why it should not apply generally to all guarantees of minors' contractual obligations.

The Commission recommends that the *Property Law Act 1974* (Qld) be amended to include a provision of general application, based on subsection 55(3) of the *Consumer Credit (Queensland) Code*. The Commission believes that the Code provision is a more appropriate model than the provision from the *Credit Act 1987* because the Code provision is part of a new national scheme on credit law (and thus has received national support) and the provision from the *Credit Act 1987* now has limited application in Queensland.<sup>253</sup>

### (c) Restitution

In the Draft Report, the Commission recommended that the *Property Law Act 1974* (Qld) be amended to include a provision that where a contract is unenforceable by reason of a party's minority, a court of competent jurisdiction may, on the application of a party to the contract, order, on such terms as the court thinks just, another party to make restitution of any property that passed, or compensation for any services performed, under the contract.

The Commission made this recommendation to remedy the possible injustice resulting from the application of the common law and equitable principles of restitution.<sup>254</sup> Broad powers of adjustment have been a regular feature of recommendations of the various bodies which have considered this area of the law.<sup>255</sup>

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<sup>252</sup> Submission 1.

<sup>253</sup> See note 246 of this Report.

<sup>254</sup> See this Report at 18-19 for examples of the problems associated with the application of these principles.

<sup>255</sup> See New South Wales Law Reform Commission, Report, *Infancy in relation to Property and Contracts* (LRC 6, August 1969) at 44-46 and 87; Alberta Institute of Law Research and Reform, Report, *Minors' Contracts* (R 14, January 1975) at 28-29; Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976) at 31-32; Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977) at 8; Law Reform Commission of Ireland, Report, *Minors' Contracts* (LRC 15, August 1985) at 109-110; The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984) at 14-16; Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987) at 204 and 211; and The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project 25 Part II, May 1988) at 65-84.

The Commission recommended that a provision similar to section 7 of the *Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)*<sup>256</sup> be adopted, with the following adaptations:

1. Its scope should not be limited to restitution of property, but should extend to compensation for services performed under a contract which is unenforceable because of the minority of one of the parties.
2. The right to apply for restitution should not be limited to the minor alone, but to all parties to the contract.

No submissions specifically disagreed with this recommendation, although some respondents preferred the equivalent provisions in the New South Wales legislation.<sup>257</sup> The Bar Association of Queensland<sup>258</sup> supported the thrust of the recommendation, subject to a proviso in relation to capacity. The Association acknowledged that the question of how to protect minors without unfairly prejudicing adults is a vexed one, which should be determined by issues of policy and fairness. It suggested that:

... the arguments in favour of permitting restitutionary orders and damages awards to be made against minors are greatest in circumstances where the minor is close to the age of majority, is of an age where it is more usual for the minor to have commercial dealings with others and has a satisfactory understanding for the subject transaction and his obligations thereunder.

The respondent suggested that the proposed amendment be limited to those minors who are above the age of compulsory school attendance. It maintained that the policy reasons behind the scheme of non-enforceability are stronger for those below that age.

The Commission is not convinced that it is necessary to limit the application of a

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<sup>256</sup> This section provides as follows:

- (1) Where -
  - (a) a person has avoided a contract on the grounds of his minority; and
  - (b) before the avoidance of the contract, property passed thereunder to some other contracting party,

a court may, on an application made by or on behalf of the minor, order restitution of that property.
- (2) An order under this section -
  - (a) may be made on such terms and conditions as the court considers just; and
  - (b) may be made notwithstanding that the minor has received some benefit under the contract, or that any other party to the contract has partly performed his obligations under the contract.

<sup>257</sup> Submissions 3, 4 and 13.

<sup>258</sup> Submission 24.

restitution provision. Under the Commission's preliminary recommendation the court would be given broad powers to order restitution and compensation to an aggrieved party. A court would only make an order if it were fair and equitable in the circumstances. Circumstances such as the minor's lack of capacity to understand the contract would be taken into account.

The Commission confirms its preliminary recommendation.

#### 4. OTHER ISSUES

In the Draft Report the Commission did not reach a final view on the following questions, and called for submissions on them.<sup>259</sup>

- (a) **Should damages for breach of contract be payable to adults in respect of goods or services which a minor has agreed to supply, but has not supplied?**

The Commission was concerned that, in the context of a general scheme of non-enforceability, such compensation would amount in effect to enforcing minors' contracts. The Commission called for submissions on this question but received only a very limited response. Only four respondents specifically commented on the issue,<sup>260</sup> although a number of other submissions supported the New South Wales legislation of presumed enforceability, which diminishes the relevance or significance of the question.<sup>261</sup>

Two respondents specifically supported an adult's right to claim damages from a minor for breach of contract, subject to a proviso in relation to the capacity of the minor.<sup>262</sup>

A lecturer from a Queensland law school supported the right to claim damages for breach of contract from a minor only in circumstances where the parties to the contract had equal bargaining power and the need to protect the minor is reduced.<sup>263</sup> The respondent gave the following examples:

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<sup>259</sup> Queensland Law Reform Commission, Draft Report, *Minors' Civil Law Capacity* (WP 45, April 1995) at 38.

<sup>260</sup> Submissions 1, 3, 24 and 25.

<sup>261</sup> Submissions 4, 8, 9, 11, 13 and 14.

<sup>262</sup> Submissions 13 and 24.

<sup>263</sup> Submission 6.

- If the minor induces the contract by fraudulently representing his or her age and the other party suffers a loss.
- If the minor has agreed to supply goods or services in the course of a business carried on by the minor.

The Office of Consumer Affairs (Queensland) considered that damages should not be payable because it would mean that the contract was being enforced.<sup>264</sup>

The Commission agrees with the Office of Consumer Affairs. From the Commission's consultative process, it would appear that the existing law in this area does not cause any practical difficulties. Therefore, the Commission does not recommend that damages for breach of contract be payable to third parties in respect of goods or services which a minor has agreed to supply, but has failed to supply.

**(b) Should a fraudulent misstatement by a minor as to his or her age in the course of forming a contract entitle the party defrauded to seek damages by way of compensation?**

In the Draft Report, the Commission left this question open because it appeared to be inconsistent with the general policy of unenforceability.<sup>265</sup> A number of respondents submitted that reform was needed and that fraudulent minors did not deserve the protection currently given to them by the common law.<sup>266</sup>

It has been observed that:<sup>267</sup>

An infant who fraudulently induces another person to enter into a contract should not be able to shelter behind his immunity from contractual action to escape liability for his fraud. Subject to proof that the misrepresentations did in fact bring about the contract, a fraudulent infant should not be able to take advantage of a person. A person should be able to rely on the representations of an infant in the same way as he can those of an adult. If they are false, he/she should be given his remedy.

One respondent commented:<sup>268</sup>

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<sup>264</sup> Submission 1.

<sup>265</sup> In some circumstances, a court of equitable jurisdiction may order the return to the rightful owner of identifiable property in a minor's possession. However, commentators disagree about the circumstances which must be shown before the return of property will be ordered. For further discussion of this issue see note 80 of this Report.

<sup>266</sup> Submissions 4, 6, 8, 13, 16, 19, 20, 22, 24 and 25.

<sup>267</sup> D C Pearce, "Fraudulent Infant Contractors" (1968) 42 *ALJ* 300.

<sup>268</sup> Submission 20.

The law must be seen as the guardian of innocence and not a protector of young thieves.

Another argued:<sup>269</sup>

If a minor fraudulently misrepresents his age to induce a contract ... he should be estopped from repudiating it ... a minor conspiring in such a way, with the knowledge that the adult would hesitate in contracting with him on the grounds of his age, should be imputed with having the necessary knowledge to comprehend the nature of contracts ... [and] should therefore, be bound by his actions.

Other respondents supported the proposal with provisos. The Bar Association of Queensland supported the right of a defrauded party to seek compensation provided that he or she acted in reliance on the fraudulent statement, and it was reasonable for the party to so rely.<sup>270</sup>

A lecturer from a Queensland law school also submitted that reform in this area was required.<sup>271</sup> The respondent suggested that if the restitution provision:

... is drafted widely or expressly includes contracts induced by fraud, a person will be able to apply to the court for an order that goods be restored or services paid for. There would also need to be an additional recommendation that the court be empowered to order the repayment of monies paid by reason of a fraudulent misrepresentation.

Only one submission responded to this question in the negative.<sup>272</sup> The Office of Consumer Affairs (Queensland) submitted that compensation should not be available in these circumstances as this:

... would effectively result in the enforcement of a minor's contract, which conflicts with the notion that minors should not be permitted to assume the responsibilities associated with contractual relationships.

The submission sets out the results of enquiries made of the Australian Retail Financial Network, which provides services for a number of major retailers. Those enquiries revealed that stringent checks are carried out on all credit applications, which ensure that fraudulent misrepresentations as to age by minors in forming credit contracts are rare. If misrepresentation does occur and the minor cannot or will not repay, the debt does not usually represent a significant liability and is usually written off. This finding supports the Commission's view that, in practice, commercial reality dictates that substantial changes to the common law will not change the contractual environment.

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<sup>269</sup> Submission 8.

<sup>270</sup> Submission 24.

<sup>271</sup> Submission 6.

<sup>272</sup> Submission 1.

The Commission does not recommend that a party defrauded by a fraudulent misstatement as to age by a minor in the course of forming a contract should be entitled to seek damages.

## 5. TWO FURTHER ISSUES

### (a) Recording minority in the freehold register

In the Draft Report,<sup>273</sup> the Commission pointed out that, although difficulties could arise from subsection 28(1)(d) of the *Land Title Act 1994* (Qld) - which requires the Registrar of Titles to record a registered landowner's date of birth if the registered landowner is a minor - no difficulties have in fact been brought to the Commission's attention.

The submissions received in response to the Draft Report did not identify any problems with the current law in relation to minors' contracts and real property. The Commission understands that subsection 28(1)(d) of the *Land Title Act 1994* (Qld) is not causing any practical problems for the Registrar of Titles.

As no problems in this area have been identified to the Commission, the Commission has not undertaken any further work on the issue and, accordingly, the Commission recommends no change to subsection 28(1)(d) of the *Land Title Act 1994* (Qld).

### (b) Approval of a minor's contract by the court

The South Australian legislation includes a provision that before a contract is entered into, a minor or any other party to the contract can apply to the court for an order approving the terms of the contract. The court's approval of the contract makes it effective as if the minor had obtained his or her majority before the contract was entered into.<sup>274</sup>

This provision was recommended by the Law Reform Committee of South Australia<sup>275</sup> after reviewing similar provisions in New Zealand and New South Wales. The Committee accepted that it would be unlikely that recourse to such a provision would

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<sup>273</sup> Queensland Law Reform Commission, Draft Report, *Minors' Civil Law Capacity* (WP 45, April 1995) at 30-32.

<sup>274</sup> See s 6 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) (which is set out in Appendix D to this Report). See also s 26 of the *Minors (Property and Contracts) Act 1970* (NSW) (under which the Supreme Court may grant a minor the capacity to enter into a particular civil act, a particular type of civil act or all civil acts if such an order is for the benefit of the minor); s 27 of the *Minors (Property and Contracts) Act 1970* (NSW) (under which a court of petty sessions may approve a contract or disposition of property that is proposed to be made by a minor); s 9 of the *Minors' Contracts Act 1969* (NZ); and s 16.5 of the *Infants Act* (RSBC 1979 c 196).

<sup>275</sup> Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977) at 8.



be frequent, but argued that there may be circumstances in which such a power in the court would be useful.

A provision allowing for the approval of a minor's contract by a court would provide certainty to all contracting parties in relation to the enforceability of the contract.

The Commission agrees with the reasoning of the Law Reform Committee of South Australia and recommends that the *Property Law Act 1974* (Qld) be amended to include a provision similar to section 6 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA).<sup>276</sup> The Commission believes that section 6 of the South Australian Act is the most suitable model for a provision of this kind.<sup>277</sup>

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<sup>276</sup> Section 6 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) is set out in Appendix D to this Report.

<sup>277</sup> The Magistrates, District and Supreme Courts should all have the power to approve the terms of minors' contracts. Any statutory limit on the jurisdiction of these courts will, of course, apply to an application for approval of the terms of a minor's contract. For example, the monetary limit for a Magistrates Court application is \$40,000 (see s 4 of the *Magistrates Courts Act 1921* (Qld)) and the monetary limit for a District Court application is \$200,000 (see s 68 of the *District Courts Act 1967* (Qld)). There is no monetary limit to the Supreme Court's jurisdiction: see ss 200 and 201 of the *Supreme Court Act 1995* (Qld).

# APPENDIX A

## RESPONDENTS TO THE DRAFT REPORT

Bar Association of Queensland

Campbell, Ms K

Christensen, Ms S

Cuzzilla, Ms B

Department of Family and Community Services (now the Department of Families, Youth and Community Care)

Fabbro, Miss R and Xinos, Miss D

Fatiaki, Ms L

Hannan, Mr D

Hayward, Mr J

Leckey, Mr T

Lip, Mr B

Ma, Miss M

Macaulay, Ms J

Martinez, Ms L

Menkens, Ms A

Munson, Miss W

National Children's and Youth Law Centre

Office of Consumer Affairs (Qld)

Prescott, Ms R

Robertson, Miss J

Savu, Ms L and Tsang, Ms V

South East Queensland Youth Accommodation Coalition

Sullivan, Ms S and Sloan, Ms A

Talbot, Ms J

Tenants' Union of Queensland Inc

Theocharous, Ms T and Sadowski, Mr B

Thompson, Miss T M

## APPENDIX B

### QUEENSLAND LEGISLATION

#### *Industrial Relations Act 1990 (Qld)*<sup>278</sup>

#### PART 2 - INTERPRETATION

##### Meaning of terms

5 In this Act -

“award” means an award of the Industrial Commission made ... under this Act and an award as varied for the time being ...

“certified agreement” means an agreement certified under Part 11, Division 2 ...

“employee” means a person employed in any calling ...

“employer” means -

- (a) a person employing, or who usually employs, 1 or more employees, on behalf of that person or of any other person;

...

“enterprise flexibility agreement” means an agreement approved for implementation under Part 11, Division 3 ...

“industrial agreement” means an agreement in writing relating to an industrial matter [defined in section 6] and approved by the Industrial Commission [under Part 10 Division 2] ...

“permit” means a permit granted under this Act ...

#### PART 4 - INDUSTRIAL RELATIONS COMMISSION

##### Division 3 - Specific powers of Commission

##### Power to vary or void contracts

40(1) If an individual ... is required [by a contract or arrangement] to perform work, the Industrial Commission may vary ... the terms and conditions ... if -

- (a) ... ; or
- (b) ... ;

on the ground that the [contract or arrangement] is -

- (c) unfair; or

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<sup>278</sup> The Queensland government is proposing to replace the *Industrial Relations Act 1990 (Qld)* with a new set of industrial laws: see the *Workplace Relations Bill 1996 (Qld)* and the *Industrial Organisations Bill 1996 (Qld)*. Subsection 494(a) of the *Workplace Relations Bill 1996*, if enacted, will repeal the *Industrial Relations Act 1990*.

- (d) harsh or unconscionable; or
- (e) against the public interest; or
- (f) provides ... a total remuneration less than that which a person performing the work as an employee would have received.

## **PART 11 - PROMOTING BARGAINING AND FACILITATING AGREEMENTS**

### **Division 2 - Certified agreements**

#### **Commission to protect interests of certain employees**

**164(2)** The Commission must identify the employees who may be covered by the agreement [which is the subject of an application for certification] but whose interests may not have been sufficiently taken into account in the negotiations for, or the terms of, the agreement.

**(3)** Examples of employees whose interest may not have been taken into account are -

...

- (c) young persons.

### **Division 3 - Enterprise flexibility agreements**

#### **Commission to protect interests of certain employees**

**184(2)** The Commission must identify any employees who may be covered by the agreement [which is the subject of an application for approval to implement the agreement] but whose interests may not have been sufficiently taken into account in the negotiations for, or the terms of, the agreement.

**(3)** Examples of employees whose interest may not have been taken into account are -

...

- (c) young persons.

### **Division 6 - Provisions common to certified agreements and enterprise flexibility agreements**

#### **Employer not to discriminate between union members and non-union members when negotiating agreements**

**217(1)** When negotiating the terms of [a certified or enterprise flexibility] agreement ... an employer must not discriminate between ... employees -

- (a) because some of the employees are members of an industrial organisation of employees while others are not members; or
- (b) because some of the employees are members of a particular industrial organisation of employees, while others are not members or are members of a different industrial organisation.

**PART 12 - GENERAL CONDITIONS OF EMPLOYMENT****Division 1 - Conditions other than leave conditions****Student's work permit**

**226(1)** On application, the Industrial Registrar and, on appeal from the registrar, the Commission, may grant to a student participating in a tertiary study course a permit to work for a period in a calling.

**(2)** The student must provide satisfactory proof on the application that the period of work in the calling is necessary to complete the course.

**(3)** The registrar or Commission granting the permit must determine and specify in the permit -

- (a)** the period of work; and
- (b)** the rate of the student's wage.

...

**(5)** This section applies despite any award, industrial agreement, certified agreement or enterprise flexibility agreement.

**Aged or infirm persons**

**227(1)** An aged or infirm person alleged to be unable to earn the minimum wage provided for by any award ... or ... agreement applicable to the calling in which the person wants to be employed, or an Industrial Inspector on behalf of the person, may apply to an Industrial Magistrate for a permit to work in the relevant calling for less than such minimum wage.

**(2)** Subject to this Act, an Industrial Magistrate has jurisdiction to determine whether, and on what conditions, such a permit should be granted.

**PART 14 - INDUSTRIAL ORGANISATIONS****Division 8 - Membership of industrial organisations****Membership of persons under 18**

**381(1)** A person is not to require or compel an employee who has not attained the age of 15 years to become or remain a member of an industrial organisation.

**(2)** A person who has not attained 18 years of age -

- (a)** may be a member of an industrial organisation ...
- (b)** ... may enjoy all the rights of a member of the industrial organisation;
- (c)** may execute all instruments and give all acquittances required by the rules of an industrial organisation;

but cannot be a member of the committee of management, trustee or treasurer of an industrial organisation.

### Division 13 - Miscellaneous

#### Prejudice of employee by reason of non-membership of industrial organisation

**477(1)** Except where membership of an industrial organisation is a condition of a contract of employment, an employer is not -

- (a) to dismiss, or threaten to dismiss, an employee;
- (b) to injure, or threaten to injure, an employee in employment;
- (c) to alter, or threaten to alter, an employee's position to the employee's prejudice;

by reason that the employee is not a member of an industrial organisation or intends to terminate membership of an industrial organisation.

### PART 18 - WAGES

#### Division 2 - Payment and recovery of wages

##### Minor may sue

**547** A person under 18 years of age may sue, or bring other proceedings under this Division, in respect of wages due and payable in respect of the person as an employee, in the same manner and to the same extent as if the person were of the age of 18 years.

### PART 19 - OFFENCES

#### Publication of statement re employment at less than lawful rates

**598(1)** A person who publishes ... a statement that can be reasonably construed to indicate -

- (a) on the part of an employer, that the employer is ready and willing to employ a person; or
- (b) on the part of a person seeking employment, that the person is ready and willing to be employed;

at a rate of wages that is less than the rate provided for in the award ... or ... agreement relevant to the employment in question, commits an offence against this Act, unless such less rate is permitted under the terms of a permit held by the person.

#### Breaches of awards etc generally

**600(1)** A person who breaches a relevant award ... agreement or permit commits an offence against this Act.

### Consumer Credit (Queensland) Code (Qld)

#### Unenforceable contracts

**55(2)** Nothing in subsection (1) prevents a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's ... incapacity or any other act or omission by, or circumstance affecting, the debtor.

**Debtors under 18 years of age**

(3) A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.

***Credit Act 1987 (Qld)*****Guarantee of obligations of minor**

**136(1)** Subject to subsection (2), a guarantor of the obligations of a debtor under a regulated contract where the debtor is a minor is liable under the contract of guarantee to the same extent as the guarantor would be liable if the debtor had not been a minor when the regulated contract was made.

(2) Subsection (1) does not apply with respect to a contract of guarantee unless, when it was made, it included a prominent statement appearing immediately above or below the place where the guarantor signed the contract to the effect that a person who enters into a contract of guarantee in respect of the obligations of a debtor who is a minor may not have a right to recover from the debtor amounts that the guarantor is liable to pay under the contract.

***Residential Tenancies Act 1994 (Qld)*****Minors**

**19** A minor has the capacity to enter into a residential tenancy agreement if it is an agreement for necessities.

# APPENDIX C

## NEW SOUTH WALES LEGISLATION

### *Minors (Property and Contracts) Act 1970 (NSW)*

#### PART 1 - PRELIMINARY

...

#### Definitions

**6(1)** In this Act, unless the context or subject matter otherwise indicates or requires:

“Civil act” means:

- (a) a contract;
- (b) an election to rescind or determine a contract for fraud, mistake, breach or otherwise;
- (c) a disposition of property;
- (d) a disclaimer;
- (e) an acknowledgment of receipt of property;
- (f) a discharge or acquittance;
- (g) an exercise of a power under a contract or under a settlement, will or other instrument;
- (h) an assent or consent to, acquiescence in, or acknowledgment or waiver of, any matter by a person affecting his [or her] rights or obligations under a contract or relating to property;
- (i) a release of any cause of action;
- (j) a grant of any leave or licence;
- (k) an election in relation to rights under a will or other instrument, or in relation to conversion as between realty and personalty; or
- (l) an act done:
  - (i) in relation to the formation;
  - (ii) in relation to becoming or ceasing to be a member or officer; or
  - (iii) as a member or officer:  
of a partnership, or of an association, company or society, whether a corporation or not;
- (m) without limiting the generality of the foregoing, any act relating to contractual or proprietary rights or obligations or to any chose in action:



whether having effect at law or in equity.

“Disposition of property” includes:

- (a) a conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance or discharge of mortgage;
- (b) the creation of a trust;
- (c) the release or surrender of any property; and
- (d) the grant of a power in respect of property:

whether having effect at law or in equity.

“Minor” means a person under the age of 18 years; and “minority” has a corresponding meaning.

“Minor participant”, in relation to a civil act, means a person who, while he [or she] is a minor, participates in the civil act.

“Party”, in relation to a civil act, includes a person who does, makes, accepts, suffers or joins in the civil act; and “participate” and “participant” have corresponding meanings.

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

(2) The making of a will, whether in exercise of a power of appointment or otherwise, or the revocation of a will, is not a civil act and is not a disposition of property for the purposes of this Act.

(3) Where a person participates in a civil act while a minor and by this Act the civil act is or becomes presumptively binding on him [or her]:

- (a) the civil act is, at and after the time of his [or her] participation, as binding on him [or her] and his [or her] personal representative and has effect as if he [or she] were not under the disability of infancy at the time of his [or her] participation; and
- (b) except where other provision is made by this Act, the civil act is binding and has effect as mentioned in paragraph (a) in favour of all persons.

...

## PART 2 - CAPACITY AT EIGHTEEN YEARS

### Civil acts generally

8 A person is not under the disability of infancy in relation to a civil act in which he [or she] participates when aged eighteen years or upwards and after the commencement of this Act.

### Full age etc generally

9(1) After the commencement of this Act:

- (a) for the purposes of any rule of law; and

- (b) except so far as the context otherwise requires, for the purposes of:
  - (i) any Act, whether passed before or after the commencement of this Act; and
  - (ii) any instrument made under an Act, whether the instrument is made before or after the commencement of this Act:

a person aged eighteen years or upwards on the commencement of this Act or who attains the age of eighteen years after the commencement of this Act:

- (c) is of full age and adult;
  - (d) is sui juris, subject however to the law relating to mental illness; and
  - (e) is not under any disability or incapacity of infancy.
- (2) Subsection (1) does not affect the construction of words which:
- (a) are contained in:
    - (i) any matter (whether in writing or not) constituting or evidencing a civil act in which any person participates before the commencement of this Act; or
    - (ii) the will of a person dying before the commencement of this Act; and
  - (b) refer to infancy or adulthood, to full age, to incapacity or capacity, or to disability or ability, or refer to a person being or not being sui juris, or make any similar reference:

except so far as the context otherwise requires.

- (3) Subsection (1) does not affect:
- (a) the construction of any reference to “the adult male basic wage”, the “adult female basic wage”, or any similar expression in any Act or in any instrument made under an Act;
  - (b) the construction of any Act, or of any instrument made under an Act, so far as the Act or instrument gives rise to any liability for fine or imprisonment or other punishment for an offence; or
  - (c) the power to make any order under Part 3 of the *Disability Services and Guardianship Act 1987* or the construction or operation of an order made under that Part.

...

### PART 3 - CAPACITY OF MINORS

#### Application

**16** This Part applies in relation to a civil act in which a minor participates after the commencement of this Act.

#### Preliminary

**17** Where a minor participates in a civil act, the civil act is not binding on him [or her] except as provided by this Act.

**Age of understanding**

**18** This Part does not make presumptively binding on a minor a civil act in which he [or she] participates, or appears to participate, while lacking, by reason of youth, the understanding necessary for his [or her] participation in the civil act.

**Beneficial civil act**

**19** Where a minor participates in a civil act and his [or her] participation is for his [or her] benefit at the time of his [or her] participation, the civil act is presumptively binding on him [or her].

**Disposition for consideration**

**20(1)** Where:

- (a) a minor makes a disposition of property for a consideration received or to be received by him [or her];
- (b) the consideration is not manifestly inadequate at the time of the disposition; and
- (c) he [or she] receives the whole or any part of the consideration:

the disposition is presumptively binding on him [or her].

**(2)** Where:

- (a) a disposition of property is made to a minor for a consideration given or to be given by him [or her]; and
- (b) the consideration is not manifestly excessive at the time of the disposition:

the disposition is presumptively binding on him [or her].

**(3)** Save to the extent to which, under Part 3 of the *Sale of Goods Act 1923* or otherwise, a promise may operate as a disposition of property, subsection (2) does not make presumptively binding on a minor a promise by him [or her] which is the whole or part of the consideration for a disposition of property to him [or her].

**(4)** Where the burden of, or arising under, a covenant or other promise runs with property so as to impose an obligation or restriction on a person to whom a disposition of the property is made in any manner or circumstances, subsection (2) does not make presumptively binding on a minor a disposition of that property to him [or her] in that manner or those circumstances.

**Gift**

**21** Where a minor makes a disposition of property wholly or partly as a gift, and the disposition is reasonable at the time when it is made, the disposition is presumptively binding on him [or her].

**Act pursuant to duty**

**22** Where a minor participates in a civil act pursuant to a contractual or other duty binding on him [or her], the civil act is presumptively binding on him [or her].

...

**Protection of strangers**

- 24** Where a minor participates in a civil act and a person who is not a party to the civil act:
- (a) acquires property affected by the civil act or any estate or interest in property so affected for valuable consideration; or
  - (b) acts, otherwise than as a volunteer and so as to alter his [or her] position, on the basis of the validity of the civil act:

in either case without notice that the minor participant is at the time of his [or her] participation in the civil act a minor, the civil act is, in favour of that person and in favour of any person claiming under that person, presumptively binding on the minor participant.

...

**Capacity by order of Supreme Court**

- 26(1)** The Supreme Court, on application by a minor, may, by order:
- (a) grant to the minor capacity to participate in any civil act or in any description of civil acts or in all civil acts; and
  - (b) rescind or vary an order under paragraph (a).
- (2)** The Court may make an order under subsection (1) on such terms and conditions as the Court thinks fit.
- (3)** The Court shall not make an order under this section unless it appears to the Court that the order is for the benefit of the minor.
- (4)** A civil act in which a minor participates is, if authorised by a grant of capacity under this section, presumptively binding on him [or her].
- (5)** An order of rescission or variation under paragraph (b) of subsection (1) does not affect the validity of a civil act in which the minor has participated before the making of the order of rescission or variation.

**Approval of contract or disposition**

- 27(1)** A contract made by a minor or a disposition of property made by or to a minor pursuant to an approval under this section is presumptively binding on him [or her].
- (2)** A court of petty sessions may, on application by a minor, by order approve a contract proposed to be made by a minor or a disposition of property proposed to be made by or to a minor.
- ...
- (4)** A court of petty sessions may make an order under this section on such terms and conditions as the court thinks fit.
- (5)** A court of petty sessions shall not make an order under this section unless it appears to the court that:
- (a) the minor would not undertake obligations under the proposed contract or dispose of property under the proposed disposition of property to the value of \$10 000 or upwards; and
  - (b) the order is for the benefit of the minor.

...

#### **Certified disposition by a minor**

**28(1)** Where a minor makes a disposition of property for consideration and a certificate in respect of the disposition is given in accordance with this section, the disposition is presumptively binding on him [or her].

**(2)** A certificate for the purposes of this section in respect of a disposition of property made by a minor for consideration must:

- (a) be given before, but not more than seven days before, the making of the disposition;
- (b) be given:
  - (i) by a solicitor instructed and employed independently of any other party to the disposition; or
  - (ii) by the Public Trustee; and
- (c) state that the person giving the certificate has satisfied himself [or herself] that:
  - (i) the minor understands the true purport and effect of the disposition;
  - (ii) the minor makes the disposition freely and voluntarily; and
  - (iii) the consideration is not manifestly inadequate.

#### **Certified disposition to a minor**

**29(1)** Where a disposition of property is made to a minor for consideration and a certificate in respect of the disposition is given in accordance with this section, the disposition is presumptively binding on him [or her].

...

#### **Affirmation**

**30(1)** Where a person participates in a civil act while he [or she] is a minor, the civil act may be affirmed:

- (a) while he [or she] remains a minor, on his [or her] behalf by order of a court having jurisdiction under this section;
- (b) after he [or she] attains the age of eighteen years, by him [or her]; or
- (c) after his [or her] death, by his [or her] personal representative.

**(2)** The court may affirm a civil act on behalf of a minor participant in the civil act under paragraph (a) of subsection (1) on application by the minor participant or by any other person interested in the civil act.

**(3)** Subject to section 36, the court shall not affirm a civil act on behalf of a minor participant in the civil act under paragraph (a) of subsection (1) unless it appears to the court that the affirmation is for the benefit of the minor participant.

**(4)** Where a civil act is affirmed pursuant to this section by or on behalf of a minor participant in the civil act, or by the personal representative of a deceased minor participant in the civil act, the civil act is presumptively binding on the minor participant.

...

**Repudiation by minor**

**31(1)** Where a minor has participated in a civil act, then, subject to sections 33 and 35 and subject to subsection (2), the minor participant may repudiate the civil act at any time during his [or her] minority or afterwards but before he [or she] attains the age of nineteen years.

**(2)** A repudiation of a civil act by a minor participant in the civil act does not have effect if it appears that, at the time of the repudiation, the civil act is for the benefit of the minor participant.

...

**Notice of repudiation**

**33(1)** Where a civil act is repudiated under section 31 or section 32:

- (a)** the repudiation does not affect any person unless notice in accordance with subsection (2) is served on that person or on a person under whom that person claims;
- (b)** the repudiation has effect against a person served with the notice and against a person claiming under the person served as if made on the date of service of the notice.

...

**Repudiation by court for minor**

**34(1)** Where a minor has participated in a civil act, then, subject to section 35 and subject to subsection (2), a court having jurisdiction under this section may, by order, repudiate the civil act on behalf of the minor participant at any time during his [or her] minority.

**(2)** The court shall not repudiate a civil act on behalf of a minor participant if it appears to the court that the civil act is for the benefit of the minor participant.

**(3)** Where the court repudiates a civil act on behalf of a minor participant, the court shall give such directions as it thinks fit for service of notice of the order of repudiation on persons interested in the civil act.

**Restriction on effect of repudiation**

**35.(1)** Where a civil act is presumptively binding on a minor participant in the civil act in favour of another party to the civil act or in favour of any other person, a repudiation of the civil act under any of sections 31, 32 and 34 by or on behalf of the minor participant, or, if the minor participant has died, by his [or her] personal representative, does not have effect as against that other party or person.

...

**Election by court**

**36** Where, on application to a court having jurisdiction under this section by a person interested in a civil act, it appears to the court that the civil act is not presumptively binding on a minor participant in the civil act in favour of the applicant, the court shall either affirm the civil act under section 30 or repudiate the civil act under section 34 on behalf of the minor participant.

**Adjustment on repudiation**

**37(1)** Where a civil act is repudiated under any of sections 31, 32 and 34, a court having jurisdiction under this section may, on the application of any person interested in the civil act, make orders:

- (a)** for the confirmation, wholly or in part, of the civil act or of anything done under the civil act;
- or

- (b) for the adjustment of rights arising out of the civil act or out of the repudiation or out of anything done under the civil act.

...

**(4)** Subject to subsection (3), and except so far as the court confirms the civil act or anything done under the civil act, the court shall make such orders as are authorised by this section and as the court thinks fit for the purpose of securing so far as practicable that:

- (a) each minor participant in the civil act makes just compensation for all property, services and other things derived by him [or her] by or under the civil act to the extent that the derivation of that property or of those services or things is for his [or her] benefit;
- (b) each other participant in the civil act makes just compensation for all property, services and other things derived by him [or her] by or under the civil act; and
- (c) subject to paragraphs (a) and (b), the parties to the civil act and those claiming under them are restored to their positions before the time of the civil act.

**(5)** Any court having jurisdiction under this section may, for the purposes of this section, make orders:

- (a) for the delivery of goods; and
- (b) for the payment of money.

...

**(7)** A court may make an order under this section on such terms and conditions as the court thinks fit.

...

#### **Civil act not repudiated**

**38** Where a person participates in a civil act while he [or she] is a minor and the civil act is not repudiated under any of sections 31, 32 and 34 by himself [or herself] or by his [or her] personal representative or by a court on his [or her] behalf within the times respectively fixed by those sections, the civil act is presumptively binding on the minor participant.

#### **Enforceability by minor participant**

**39** Subject to section 37, a court shall not give any judgment or make any order in favour of a minor participant in a civil act, or in favour of the personal representative of a deceased minor participant in a civil act, for the enforcement of the civil act, unless the civil act is presumptively binding on the minor participant in favour of the person against whom the judgment is given or order is made.

...

### **PART 5 - GENERAL**

#### **Agency**

**46(1)** After the commencement of this Act, a person under the age of twenty-one years:

- (a) may appoint an agent by power of attorney or otherwise; and
- (b) may, by an agent, participate in any civil act and otherwise do or suffer anything which a person aged twenty-one years or upwards may participate in or do or suffer by an agent.

(2) A civil act in which a minor participates by an agent after the commencement of this Act and anything which a minor otherwise does or suffers by an agent after the commencement of this Act has no greater validity or effect as against the minor than it would if participated in or done or suffered by the minor without an agent.

(3) After the commencement of this Act, a person may, by an agent under the age of twenty-one years, participate in any civil act and otherwise do or suffer anything which a person may participate in or do or suffer by an agent aged twenty-one years or upwards.

#### **Guarantee**

**47(1)** A guarantor of an obligation of a minor is bound by the guarantee to the extent to which he [or she] would be bound if the minor were not a minor.

(2) For the purposes of subsection (1) a minor has, under a civil act in which he [or she] participates, the obligation which he [or she] would have if he [or she] were not a minor at the time of his [or her] participation.

(3) This section applies to a guarantee given after the commencement of this Act.

#### **Liability for tort**

**48** Where a person under the age of twenty-one years is guilty of a tort, he [or she] is answerable for the tort whether or not:

- (a) the tort is connected with a contract; or
- (b) the cause of action for the tort is in substance a cause of action in contract.

...

#### **Property of minor**

**50(1)** Where a minor is beneficially entitled at law or in equity to property, the Supreme Court may, on such terms as the Court thinks fit, make orders authorising a person, either generally or in any particular instance:

- (a) to make any disposition of the property;
- (b) to receive the proceeds of disposition of the property;
- (c) to call for a disposition of the property to the person so authorised or as he [or she] directs;
- (d) to receive the income of the property;
- (e) to sue for and recover any chose in action comprised in the property;
- (f) to invest the property; or
- (g) to apply the capital or income of the property for the benefit of the minor.

(2) The Court shall not make an order under this section unless it appears to the Court that the order is for the benefit of the minor.

...



## APPENDIX D

### SOUTH AUSTRALIAN LEGISLATION

#### ***Minors Contracts (Miscellaneous Provisions) Act 1979 (SA)***

##### **Interpretation**

**3** In this Act, unless the contrary intention appears -

“minor”, in relation to a contract, includes a person who was, at the time of entering into the contract, a minor.

##### **Contract that is unenforceable by reason of minority remains unenforceable unless ratified in writing**

**4** Where a person has entered into a contract that is, by reason of his [or her] minority at the time of entering into the contract, unenforceable against him [or her], the contract shall remain unenforceable against him [or her] unless it is ratified by him [or her], in writing, on or after the day on which he [or she] attains his [or her] majority.

##### **Guarantees**

**5(1)** When a person (other than a minor) guarantees the performance by a minor of his [or her] obligations under a contract, the guarantee shall be enforceable against the guarantor to the same extent as if the minor had, before entering into the contract to which the guarantee relates, attained his [or her] majority.

**(2)** This section does not operate to render a guarantee enforceable if it would, apart from this section, be unenforceable otherwise than by reason of the minority of the person whose obligations are guaranteed.

##### **Approval of minor's contract by court**

**6(1)** A contract with a minor shall have effect as if the minor had, before entering into the contract, attained his [or her] majority if, before the contract was entered into by the minor, its terms were approved by a court.

**(2)** An application for the approval of a court in respect of the terms of a proposed contract may be made by -

- (a)** the minor, or his [or her] parent or guardian; or
- (b)** any other party to the proposed contract.

**(3)** In this section -

“court” means -

- (a)** the Supreme Court; or
- (b)** a local court of full jurisdiction.

**Restitution of property to minor****7(1)** Where -

- (a) a person has avoided a contract on the ground of his [or her] minority; and
- (b) before the avoidance of the contract, property passed thereunder to some other contracting party,

a court may, on an application made by or on behalf of the minor, order restitution of that property.

**(2)** An order under this section -

- (a) may be made on such terms and conditions as the court considers just; and
- (b) may be made notwithstanding that the minor has received some benefit under the contract, or that any other party to the contract has partly performed his [or her] obligations under the contract.

...

**Appointment of agent to act on behalf of minor****8(1)** A court may -

- (a) on the application of a minor; or
- (b) on the application of a parent or guardian of a minor,

appoint a person to transact any specified business, or business of a specified class, or to execute any documents, on behalf of the minor.

**(2)** Where a person appointed to transact business on behalf of a minor under this section incurs any liabilities in the course of so doing those liabilities are enforceable against the minor.

...

# APPENDIX E

## ENGLISH LEGISLATION

### ***The Infants Relief Act 1874 (UK)***<sup>279</sup>

#### **Contracts by infants, except for necessities, to be void**

**1** All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

#### **No action to be brought on ratification of infant's contract**

**2** No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

### ***Betting and Loans (Infants) Act 1892 (UK)***<sup>280</sup>

#### **Avoiding contract for payment of loan advanced during infancy**

**5** If any infant, who has contracted a loan which is void in law, agrees after he [or she] comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

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<sup>279</sup> Repealed by s 4(2) of the *Minors' Contracts Act 1987 (UK)* (which is reproduced below).

<sup>280</sup> Repealed by s 4(2) of the *Minors' Contracts Act 1987 (UK)* (which is reproduced below).

## **Minors' Contracts Act 1987 (UK)**

### **Disapplication of *Infants Relief Act 1874* etc**

**1** The following enactments shall not apply to any contract made by a minor after the commencement of this Act -

- (a) *The Infants Relief Act 1874* ...; and
- (b) section 5 of the *Betting and Loans (Infants) Act 1892* ... .

### **Guarantees**

**2** Where -

- (a) a guarantee is given in respect of an obligation of a party to a contract made after the commencement of this Act; and
- (b) the obligation is unenforceable against him [or her] (or he [or she] repudiates the contract) because he [or she] was a minor when the contract was made,

the guarantee shall not for that reason alone be unenforceable against the guarantor.

### **Restitution**

**3(1)** Where -

- (a) a person ("the plaintiff") has after the commencement of this Act entered into a contract with another ("the defendant"), and
- (b) the contract is unenforceable against the defendant (or he [or she] repudiates it) because he [or she] was a minor when the contract was made,

the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract, or any property representing it.

**(2)** Nothing in this section shall be taken to prejudice any other remedy available to the plaintiff.

### **Consequential amendments and repeals**

**4(1)** ...

**(2)** *The Infants Relief Act 1874* and the *Betting and Loans (Infants) Act 1892* are hereby repealed (in accordance with section 1 of this Act).

...

## APPENDIX F

### TERMS OF REFERENCE FOR THE NATIONAL INQUIRY INTO CHILDREN AND THE LEGAL PROCESS

I, MICHAEL HUGH LAVARCH, Attorney-General of Australia, in pursuance of section 6 of the *Law Reform Commission Act 1973* and subsection 11(1) of the *Human Rights and Equal Opportunity Commission Act 1986*, HEREBY REFER to the Law Reform Commission and Human Rights and Equal Opportunity Commission for inquiry and report, matters relating to children and young people and the legal process.

In particular the Commissions are to inquire into and report on:

- (i) legal advice and access for children and young people and their legal representation before courts and tribunals in the exercise of federal jurisdiction;
- (ii) the appropriateness of procedures for pre-trial investigation and taking of evidence from children and young people;
- (iii) the appropriateness of rules of evidence for, and procedures for taking evidence in courts and tribunals from children and young people;
- (iv) the question of the desirability of children giving evidence in family law and associated proceedings and the appropriate safeguards in such circumstances;
- (v) sentencing of children and young people for federal offences;
- (vi) the treatment of children and young people convicted of federal offences;
- (vii) advocacy of the interests of children and young people before courts and tribunals;
- (viii) the appropriateness and effectiveness of the legal process in protecting children and young people as consumers;
- (ix) the particular needs in these and related areas of children and young people for whom the Commonwealth has a special responsibility; and
- (x) any related matters of particular relevance to Australia's remove [sic] communities.

The Commissions may recommend legislative and non-legislative measures that should be taken to address any issues arising from their inquiry.

IN PERFORMING their functions in relation to the Reference, the Commissions shall:

- (i) have regard to the Commonwealth's special responsibilities for children arising under the Constitution and Australia's international human rights obligations, particularly under the Convention on the Rights of the Child;
- (ii) consult widely among the Australian community and relevant bodies including organisations with an interest in children and young people, community legal centres, legal aid commissions, consumer organisations, and courts and tribunals;
- (iii) consult relevant Federal, State and Territory government authorities;
- (iv) in recognition of work already undertaken, have regard to all relevant reports, including relevant

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ALRC reports, Family Law Council Reports and Reports of the Human Rights and Equal Opportunity Commission;

- (v) have regard to relevant law, practice and experience overseas.

THE COMMISSIONS ARE REQUIRED to report not later than 30 June 1997.

Dated 28th August 1995

MICHAEL LAVARCH  
ATTORNEY-GENERAL

## APPENDIX G

### COMPARATIVE REFORM PROPOSALS

	NSW <sup>1</sup>	SA <sup>2</sup>	WA <sup>3</sup>	Tas <sup>4</sup>	Eng <sup>5</sup>	Ire <sup>6</sup>	Ont <sup>7</sup>	BC <sup>8</sup>	Alta <sup>9</sup>
General enforceability	N	N	Y	N	N	N	N	N	N
Minor's benefit = enforceability	Y	NC	NC	NC	NC	NC	Y	NC	Y
The Infants Relief Act <sup>10</sup>	N/A	N/A	N/A	R	R	N*	N/A	R	R*
Lord Tenterden's Act <sup>11</sup>	R	NC	R	N/A	N/A	N/A	R	N/A	NC*
Goods Act <sup>12</sup>	R	NC	R	NC	NC	NC	R*	R	R
Coutts <sup>13</sup>	R	R	R*	R	R	R	R	R	R
Executory/ executed	B	NC	B	NC	NC	B	B	B	B
Court approval	Y	Y	N	N	N	Y	Y	Y	Y
Affirmation/ repudiation	D	NC	NC	NC	NC	NC	D	D	D
Reopen at minor's instance	Y	Y*	D	N	N	Y	Y	Y	Y
Restitution after repudiation	Y	Y	N	N	Y	Y	Y	Y	Y
Tort liability under contract	Y	NC	Y	NC	NC	N	Y	N	Y
Misrepresentation of age: effect	NC	NC	N	NC	NC	N	N*	N	N
Property/ attorney/ agency	D	NC	NC	NC	NC	D	D	D	D
Implementation	1970 <sup>14</sup>	1979 <sup>15</sup>	N	1988 <sup>16</sup>	1987 <sup>17</sup>	N	N	1985 <sup>18</sup>	N

B: both; D: detailed proposals; N: no; N/A: not applicable; NC: no change or no recommendation; R: repeal; Y: yes; \*: qualification

- 1 New South Wales Law Reform Commission, Report, *Infancy in relation to Contracts and Property* (LRC 6, August 1969)
- 2 Law Reform Committee of South Australia, Report, *Contractual Capacity of Infants* (R 41, December 1977)
- 3 The Law Reform Commission of Western Australia, Report, *Minors' Contracts* (Project No 25 Part II, May 1988)
- 4 Law Reform Commission of Tasmania, Report, *Contracts and the Disposition of Property by Minors* (R 48, July 1987)
- 5 The Law Commission, Report, *Law of Contract: Minors' Contracts* (R 134, June 1984)
- 6 Law Reform Commission of Ireland, Report, *Minors' Contracts* (LRC 15, August 1985)
- 7 Ontario Law Reform Commission, Report, *Amendment of the Law of Contract* (January 1987)
- 8 Law Reform Commission of British Columbia, Report, *Minors' Contracts* (LRC 26, February 1976)
- 9 Alberta Institute of Law Research and Reform, Report, *Minor's Contracts* (R 14, January 1975)
- 10 *The Infants Relief Act 1874* (UK) and *Betting and Loans (Infants) Act 1892* (UK) or their equivalents
- 11 Section 5 of the *Statute of Frauds Amendment Act 1828* (UK) or its equivalent

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- 12 Section 2 of the *Sale of Goods Act 1893* (UK) (see now s 3 of the *Sale of Goods Act 1979* (UK)) or its equivalent
  - 13 The rule in *Coutts & Co v Browne-Locky* [1947] KB 104 that a guarantee by an adult of an unenforceable minor's obligation is itself unenforceable
  - 14 *Minors (Property and Contracts) Act 1970* (NSW)
  - 15 *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA)
  - 16 *Minors Contracts Act 1988* (Tas)
  - 17 *Minors' Contracts Act 1987* (UK)
  - 18 *Law Reform Amendment Act 1985* (SBC 1985 c 10); see now *Infants Act* (RSBC 1979 c 196 Pt 2.1)



# APPENDIX H

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# APPENDIX I

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*Age of Majority Act 1974*  
*Anti-Discrimination Act 1991*  
*Associations Incorporation Act 1981*  
*Children's Services Act 1965*  
*Commonwealth Powers (Family Law - Children) Act 1990*  
*Consumer Credit Legislation Amendment Act 1996*  
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*Criminal Code*  
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*District Courts Act 1967*  
*Education (General Provisions) Act 1989*  
*Education (Student Work Experience) Act 1978*  
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*Fair Trading Act 1989*  
*Industrial Organisations Bill 1996*  
*Industrial Relations Act 1990*  
*Juvenile Justice Act 1992*  
*Land Title Act 1994*  
*Law Reform Act 1995*  
*Liquor Act 1992*  
*Magistrates Courts Act 1921*  
*Money Lenders Act 1916*  
*Property Law Act 1974*  
*Public Trustee Act 1978*  
*Residential Tenancies Act 1994*  
*Sale of Goods Act 1896*  
*Statute Law Revision Act (No 2) 1995*  
*Statute of Frauds Act 1972*  
*Statute of Frauds and Limitations Act 1867*  
*Supreme Court Act 1995*  
*Traffic Regulation 1962*  
*Vocational Education and Training (Industry Placement) Act 1992*  
*Vocational Education, Training and Employment Act 1991*  
*Vocational Education, Training and Employment Regulation 1991*  
*Workplace Health and Safety Act 1995*  
*Workplace Health and Safety Regulation 1995*  
*Workplace Relations Bill 1996*

#### Commonwealth (Cth)

*Commonwealth Electoral Act 1918*  
*Family Law Act 1975*  
*Life Insurance Act 1995*  
*Marriage Act 1961*  
*Sex Discrimination Amendment Act 1991*  
*Trade Practices Act 1974*

#### Australian Capital Territory (ACT)

*Mercantile Law Act 1962*

#### New South Wales (NSW)

*Minors (Property and Contracts) Act 1970*

#### South Australia (SA)

*Minors Contracts (Miscellaneous Provisions) Act 1979*

#### Tasmania (Tas)

*Infants' Relief Act 1875*  
*Minors Contracts Act 1988*

#### Victoria (Vic)

*Supreme Court Act 1986*

**CANADA****British Columbia (BC)**

*Infants Act (RSBC 1979 c 196)*  
*Law Reform Amendment Act 1985 (SBC*  
*1985 c 10)*

**NEW ZEALAND (NZ)**

*Age of Majority Act 1970*  
*Minors' Contracts Act 1969*

**ENGLAND**

*Betting and Loans (Infants) Act 1892*  
*Children and Young Persons Act 1933*  
*Employment of Women, Young Persons*  
*and Children Act 1920*  
*The Infants Relief Act 1874*  
*Minors' Contracts Act 1987*  
*Statute Law Revision Act 1875*  
*Statute of Frauds Amendment Act 1828*

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*United Nations Convention on the*  
*Rights of the Child*

# APPENDIX J

## TABLE OF CASES

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