Key Words

Contract law; legal theory; classical contract theory; reliance theory; law and economics; feminist legal theory; Property Agents and Motor Dealers Act 2000 (Qld); Retail Shop Leases Act 1994 (Qld).

Abstract

Chapter 11 of the Property Agents and Motor Dealers Act 2000 (Qld) and the Retail Shop Leases Act 1994 (Qld) both introduce procedural requirements to the process for creation of land contracts and were both introduced to address a perceived lack of conscience in each of the industries affected. These represent a recent broadening of the ambit of consumer protection legislation in Queensland which deviates from more traditional methods of statutory intervention into land contracts. This paper focuses on the extent to which the Acts effectively introducing a conscience element into certain land contracts, and the extent to which this alters classical contract law. The effectiveness of the approach is then tested against the critiques of two alternative theories of law – law and economics and feminist contract theory – to see whether the legislative approach answers the deficiencies in contract identified within the terms of each theory.
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The work contained in this thesis has not been previously submitted for a degree or diploma at any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

9 February 2007
1. Introduction

Contract law as taught and practised has been under attack from the parliament for well over 100 years. The reason behind this statutory incursion is usually the defence of the consumer who traditionally fared badly under the rigours of classical theory and the market. Common law contract has also had to contend with equity seeking to do good on a case by case basis applying its own brand of conscience to the weaker parties in marketplace negotiations.

As statutory intervention continues to erode common law contract principles and elements, a saturation point may be reached at which contract law will no longer exist as an independent branch of law but will consist only of remnant concepts embodied in statutes each of which applies only to a narrowly defined subject or person, or in respect of particular provisions.

To date the nature of erosion of the common law has generally been the imposition of a range of vitiating factors and implied terms into a validly formed contract\(^1\) between parties where one is identified as suffering a disadvantage. In the past ten years or so in Queensland however, Parliament has through two Acts in particular opened up the scope of consumer protection in previously open markets: the Property Agents and Motor Dealers Act 2000 (Qld) (‘PAMDA’) (specifically, chapter 11 dealing with real property contracts), and the Retail Shop Leases Act 1994 (Qld) (‘RSLA’). These Acts identify ‘consumers’ in the non-traditional ‘consumer’ marketplace of real property. Queensland Parliament has taken a different tack in seeking to protect these ‘consumers’. This initiative appears to adopt principles of conscience such as would be found in equitable notions of unconscionability: but rather than using the traditional framework of vitiating factors affecting a valid contract, it now seeks to regulate conscience in the market through the processes of contract formation.

\(^1\) It is noted however that the Trade Practices Act 1974 (Cth), s 51AB now prohibits unconscionable conduct relating to a supply or acquisition, or a possible supply or acquisition.
Because of the extension of consumer protection measures into real property markets ostensibly to promote conscience in dealings, for the purposes of this paper, their approach of altering the form of protection to pre-formation regulation, will be referred to as the ‘new scheme’.

While the relevant provisions will be examined in detail in chapters 2 and 3, the general features of the new scheme are that:

- the designated classes of contractors are seen by parliament as vulnerable to the mischief of a bad bargain where previously they were contractors within a largely unregulated market;

- it prescribes formalities to supplement the common law formation rules in land contracts, which must be undertaken before these classes of party will become irrevocably bound by these classes of contract along the lines of more traditional consumer protection markets;

- it requires a statutory warning or disclosure statement be given to the buyer/tenant; and

- the designated class may deny the bargain contractual force where these formalities are lacking.

As with more traditionally regarded consumer transactions, the new scheme pre-empts the opportunity for a vitiating factor to arise in the regulated land contracts. The new scheme, represented by these two Acts, alters the formation process by which a land contract derives its validity to favour a designated species of contractor – buyers of Queensland residential property in PAMDA, Queensland retail shop tenants in RSLA. PAMDA also importantly offers the buyer the right to lawfully terminate during a five day cooling-off period and alters the time at which the contract becomes binding on the parties.

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2 Such as door-to-door sales, regulated under the Fair Trading Act 1989 (Qld) Part 3, Div 4.
3 This paper will only deal with residential land sales regulated by PAMDA.
In contrast to the new scheme, *Svanosio v McNamara*\(^4\) illustrates traditional judicial treatment of contracts.

> Once a contract is made ie *the parties to all outward appearances have agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless it is set aside for failure of some condition on which the existence of the contract depends.* \(^5\) (emphasis added)

### 1.1. **Challenging Classical Theory**

Atiyah considers that in the early days of its development, the common law was the repository of principle, and statute a series of modifications and anomalous cases not based on any coherent social philosophy. In the development of contract law, statutory changes were gradually expelled from the emergent conceptual scheme of a general law of contract based on free market principles.\(^6\) Arguably this general law of contract remains embedded in our current practice, although in Australia it is indeed being progressively eroded by statute.

> The tide of codification continues to press heavily against the few remaining islands where the writ of common law still runs and there can be no doubt that in another generation or two the changeover from an almost pure case law system to an almost pure statute law system will have been completed.\(^7\)

Current legislative moves towards consumer protection may reflect a paternalism evident also in the early 19\(^{th}\) century, before the laissez-faire principles of Adam Smith had taken root. ‘Throughout the 18\(^{th}\) century, the law was perceived of as protective, regulative, paternalistic and above all a paramount expression of the moral sense of the community… Economic liberalism ultimately proved fatal to the principle of good faith.’\(^8\)

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\(^4\) (1956) 96 CLR 186.
\(^7\) Grant Gilmore, *The Death of Contract* (1974) 69. Gilmore has been criticised recently by Richard Austen-Baker, 'Gilmore and the Strange Case of the Failure of Contract to die after all, 2' (2002) 18 *Journal of Contract Law* 1. It can be argued however that the article focuses on peripheral issues rather than Gilmore’s central hypothesis.
\(^8\) Atiyah, above n6, 167.
Gilmore’s thesis was that contract will be reabsorbed into the mainstream of tort. He saw the decline and fall of freedom of contact as a reflection of the transition from 19th century individualism to the welfare state and beyond\(^9\) thus presumably seeing the rationale of the law turn full circle. While *Astley v Austrust Limited* confirmed that ‘conceptual and practical differences between the two causes of action remain of considerable importance’,\(^10\) Gilmore’s expanded comments still resonate in the Australian context:

> The most dramatic changes touching the significance of common law in modern life also came about, not through internal developments in common law, but through developments in public policy which systematically robbed contract law of its subject matter…removing from ‘contract’ transactions and situations formerly governed by it…\(^11\)

This statement forms the foundation of the inquiry in this paper. Classical contract law has indeed traditionally been eroded by statute where a superstructure is imposed on transactions otherwise regarded as contract. The new scheme however broadens this range of transactions where classical contract theory, tempered by principles of reliance and equity, has held sway. Indeed the nature of the regulated transactions is such that they fall outside the usual scope of consumer transactions. Colin Scott and Julia Black point out that

> [t]ransactions involving land are mentioned only incidentally. In this sense the scope of the book coincides with what is generally regarded as the thrust of consumer protection legislation; such legislation confines itself to transactions involving ‘goods’ and ‘services’.\(^12\)

This paper will investigate the fairness, effectiveness and efficiency of this new scheme within the framework of classical contract law. In doing so, it will examine the application of the law of contract in the context of the legislation to ascertain whether it does indeed remove the regulated real property transactions from ‘contract’, or instead, the legislative provisions broaden the common law conceptualisation of contract to strengthen principles such as conscience already finding their way into the common law framework.

\(^9\) Gilmore, above n7, 95.
\(^10\) *Astley v Austrust Limited* (1999) 197 CLR 1, 23.
\(^11\) Gilmore, above n7, 6.
\(^12\) Cranston’s *Consumers and the Law* (2000), 8.
1.2. *Scope*

In Part I this paper will:

1. establish the methods used by the *RSLA* and *PAMDA* to address the perceived consumer protection needs of the relevant classes of consumer, and identify how these differ from traditional methods of redress within these markets;

2. identify the impact of these provisions on classical contract theory as represented in common law contract in Queensland and issues which are likely to arise as a consequence; and

3. examine how the provisions interact with equitable consumer protection principles such as unconscionable conduct and elements of reliance.

The underlying assumption of this analysis is that classical contract theory supports the applied contract law framework in Australia.\(^{13}\) While there are many approaches which seek to explain the law of enforceable bargains, the structure and understanding of contract law by lawyers and jurists alike is a reflection of classical principles. In light of challenges to this traditional structure, the nature of modern contract law will be examined. This will identify any substantive variation to the classical concepts as practised.

In this context unconscionability and aspects of reliance theory will be examined to provide a deeper analysis of the effect of the new scheme. This is specifically relevant to this inquiry as the new scheme apparently seeks to override the court’s discretion in the application of the doctrine of unconscionability and the application of principles of reliance, finding obligation instead in the formal legislative requirements of the contract in question. This may narrow the scope of contract law in its broader sense. In contrast, the new scheme might well promote and extend the infusion of the *principle* of unconscionability into contractual relations, expanding our conceptualisation of contract.

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\(^{13}\) Brian Coote, 'In the Essence of Contract' (1988) 1 *Journal of Contract Law* 91, argues that there is no theoretical support for classical contract theory and asks how much present contract law is inherent or essential. This raises the issue of how relationships governed by the new legislative scheme would be classified.
1.2.1. The Legislation

There are many examples of legislative intrusion into common law contract principles. These include the *Sale of Goods Act 1896* (Qld) (‘SGA’), *Trade Practices Act 1974* (Cth) (‘TPA’) (and its derivatives eg *Fair Trading Act 1989* (Qld)), *Contracts Review Act 1980* (NSW) (‘CRA’), *Credit Act 1987* (Qld) and *Retirement Villages Act 1999* (Qld). The focus of all of these can broadly be stated as consumer protection: modifying the ‘worst’ aspects of a free market system to shield the weak from the excessive power of the strong. It is suggested that these Acts share the desire to introduce an element of conscience into bargains within their jurisdiction by recognising that it is unconscionable for those with market power take untrammelled advantage of those without market power.

The *SGA*, *TPA* and *CRA* illustrate a system of codification of common law principles and the introduction of broad (legislative) principles to a wide range of contracts. The *Credit Act 1987* (Qld) has had a huge impact on banking and finance law, but as this field has been recognised as a discrete area of law for a long time, this Act will not be covered here. In contrast, the *Retirement Villages Act 1999* (Qld) focuses on a previously integrated part of general contract law, which emerged out of the newly expanded market of retirement accommodation.

Like the *Credit Act 1987* (Qld) and the *Retirement Villages Act 1999* (Qld), *PAMDA* and *RSLA* do not seek to codify the common law\(^{14}\) and they purport to serve a consumer protection purpose. However they operate in a different environment again from these first two Acts. Banking and finance law already had its own purview – special rules have always applied in this field, with a consumer protection flavour. Likewise the relatively new market of retirement accommodation and new ideas of occupancy rights and responsibility dictated the development of rules specific to this area. Rather than building on an existing area of law or developing to deal with a new market, *PAMDA* and *RSLA* impose a new set of restrictions on existing markets – namely motor vehicle and residential land sales, and retail shop leases – which were previously only generally regulated. In the case of *PAMDA*, this paper will focus only on its residential land provisions because of the

particular shift in regulatory treatment of what was previously a largely unregulated market not particularly identified as a consumer market. These new restrictions affect a broad set of consumers (and business) to such an extent that their subject matter – residential land sales and retail shop leases – could be considered as excised from the general principles of contract and put in their own discrete field of law.

In addition, the *Credit Act 1987* (Qld) applies to ‘bank’ transactions where a bank can ‘take it or leave it’, and in the *Retirement Villages Act 1999* (Qld) the purchaser as a retiree or senior citizen fits seeking not just accommodation but often other services also, fits the more traditional profile of a consumer. The provisions in *PAMDA* relating to vehicle purchases apply to a motor dealer, not to a private seller. On the face of it, these circumstances represent an inherent imbalance of power. In contrast, in both the residential land sales provisions in *PAMDA* and in the *RSLA* the majority of transactions will involve ‘small players’ on both sides. This alters the scope of traditional consumer protection by significantly broadening the application of consumer protection principles into previously relatively unregulated markets without an obvious consumer involvement.

In summary, it is considered valid to analyse the legislative scheme offered by the residential land provisions of *PAMDA* and the *RSLA* as opposed to other consumer protection legislation, on the basis that:

- they impose restrictions on contracting in an existing market not traditionally the subject of legislative regulation; and
- the restrictions apply across the board, and not only to ‘big business’.

### 1.2.2. The Comparison

Commentators offer a vast array of theories and critiques of the philosophy and application of common law contract. This paper will investigate in Part II, how the new scheme measures up to critique of classical theory espoused by the law and economics school; and feminist legal theory. The vast array of critiques means that for purposes of brevity, only

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15 See eg *PAMDA* s298.
two will be used for illustration here. Hugh Collins points out that ‘legal regulation merely comprises one system applied in the space established by contractual practices’. These critiques represent views of the law founded outside that legal or contractual system.

In a free market economy it is easy to question how the imposition of barriers to a valid common law contract can be justified, and why parliament would introduce such wide-ranging regulation.

On the basis that contract law itself arose out of the economic liberalism of the industrial revolution in tandem with economic theory, there is strong justification for tracking the extent to which contract law (even specific principles) continues to adhere to economic principles and theory. Further, economic theory provides a justification of law based on its cost. Indeed each of the Acts under review cites economic reasons for introducing their measures and each of the regulated fields represents markets which are an identifiable economic indicator. Law and economics then represents a methodology implied within the legislation itself – an alternative system imposed on the space of contractual practices.

As will be identified, the harshness of strict adherence to the individualist free-market contract is mitigated by consumer protection exceptions at law and by statute. The essence of consumer protection is rectification of defects in the free market, whereby power can be misused to the detriment of a weaker party. One of those opposing principles is unconscionability which also informed the Queensland parliament’s approach to residential land sales and retail shop leases in Queensland. Broadly speaking, this relates to the lack of parity of bargain or process between parties to a contract and the fairness of how that lack of parity manifests. Where one party withholds information, or takes unfair advantage of the inferior bargaining position of the other, power is the underlying motif. There are

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18 See reference to Collins, above n16.
many theories which seek to expose the inherent inequities of our legal system as a whole. These tend to focus on imbalances of power.

Feminist legal theory is used here as an example of power-based analysis. Feminist theory looks at *male*-derived (contract) law and concludes that it supports a male hierarchy: law is ‘built around the form of transactions that predominate in the male-dominated market place’. It contends that ‘the doctrines that are regarded as necessary to assist the weak are subtly demeaned by the language as “exceptions”, as deviations from the normal rules of contract’. Therefore if the norm is male-dominated and masculine, the feminine is merely the exception.

What is particularly useful about a feminist analysis is the feminist critique of a legal standard itself as universal. To the extent that the new scheme apparently seeks to internalise conscience into the contracting process itself, the question is raised of whether the standard itself genuinely reflects a universal standard of fairness. The feminist tradition provides a framework to question equality and the notion of sameness and difference which lends itself to an investigation of these same issues in the context of the new scheme. This provides the framework for an analysis of the attempt of the new scheme to address the idea of unconscionability in a mainstream way.

It is acknowledged that there are many alternative frameworks of thought available through which to analyse the new scheme, however the two selected link directly into issues at the heart of the new scheme and consequently may enable the reader to identify how (or if) the scheme builds on the common law by answering the critiques and alternative conceptions of contract, or alternatively how it is symptomatic of the gradual decline of the ambit of common law contract: being slowly eroded by ad hoc legislative regulation.

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20 Finley, above n19, 898.

This analysis will examine the new scheme to see if it can be considered a realm separate from classical contract law (whether public policy is again ‘robbing contract law of its subject matter’). If it is separate from classical contract law then the next inquiry is how it interacts with traditional contract principles and remedies. Further, the scheme will be tested to see if it answers the criticisms of classical contract posed by two different schools of legal thought – this section will test whether the underlying philosophy of the new scheme can be identified with one or more of the theories examined. This type of analysis can be useful where government seeks to implement a new policy which differs from that currently upheld by the law. It can assist to clarify the grounds on which the law can indeed achieve the aims sought in the policy. This type of analysis is used by government, as seen in many explanatory memoranda issued pursuant to Queensland Government’s legislative standards: for example explanatory memoranda for both RSLA and PAMDA address economic criteria.

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22 Gilmore, above n11.
23 Atiyah, above n6, provides a clear insight into the evolution of contract law and demonstrates the impact of social values (as held by the ruling classes) on the common law as well as statute law.
24 See eg Explanatory Notes, Property Agents and Motor Dealers Bill 2000 (Qld), 4-5; Explanatory Notes, Retail Shop Leases Amendment Bill 2000 (Qld), 2.
Part I

This part will establish the framework of the consumer protection provisions of the *RSLA* and the *PAMDA* (which relate to residential land sales) so far as these impact on common law contract. The aim is to establish that the common rationale for each Act is an attempt to pre-empt unconscionable conduct through the introduction of procedural measures: that Parliament seeks to introduce conscience into contractual relations concerning certain land transactions.

The framework of the Acts in the new scheme will be contrasted with statutory regimes which have traditionally governed these species of contract (retail leasing and residential land sales). This aims to identify what the new scheme is likely to add to the existing framework of common law and statutory rights for contracting parties in these markets.

Finally, because the relevant provisions impact on the application of common law contract, the Acts will be examined in terms of contract law in its broadest sense to identify whether their measures are effective in introducing fairness to contractual relations. The court’s and Parliament’s approach to unconscionability will be contrasted with that in the Acts, and aspects of reliance which are applied in the context of common law contract will also be tested in light of the Acts’ provisions.
2. Retail Shop Leases Act 1994 (Qld)

With the introduction of amendments to the RSLA in 2000, it is arguable that parliament in Queensland ushered a new layer of restrictions into this species of contractual relationship further highlighting the identity of (small) retailers as the weak party in retail leasing transactions. The procedures required before a retail tenant was unconditionally bound by the terms of its contract had been refined, following the recommendations of the Policy Review Paper25 (‘paper’), which identified lease disputes as a major cost to small business. The paper supported strategies to reduce the time small business is in dispute, to promote efficiency and equity26 in the conduct of certain retail businesses.

This chapter will detail the consumer protection methodology of the RSLA focussing in particular on the 2000 refinements. It will identify the role of ‘conscience’ in determining the methodology, and examine where the new system deviates from earlier forms of statutory intervention and from classical contract methodology itself.

2.1. How the RSLA Scheme Works

RSLA uses a multifaceted scheme to protect the consumer – the retail shop tenant. There is a series of implied terms (suggesting parallels with SGA) and minimum standards for retail shop leases. There are protections for tenants wishing to renew leases, and guidelines for valuation of market rental.

The impact of the 2000 amendments is threefold. First, they expand the circumstances in which tenants are to be provided with a statement containing a summary of the essential terms (disclosure statement). Secondly, prospective tenants must obtain legal and financial advice. Thirdly, a tribunal can regulate unconscionable conduct in retail leases.

26 Use of ‘equity’ here is superimposed on the economic characteristics of the goals.
2.1.1. Disclosure Statement

Under s22, the lessor must give the prospective lessee of a retail shop a draft of the lease and a disclosure statement at least seven days before they enter into a lease. If the lessor fails to comply, the lessee may terminate within two months of entering into the lease, and recover compensation from the lessor for damages arising from the lessor’s failure.

The 2000 amendments placed a similar obligation on lessees in relation to their prospective assignees, and to landlords in relation to prospective assignees of a retail lease (ie the prospective assignee is entitled to a disclosure statement from both the landlord and the assignor).

This clearly adds to the elements required under contract law to establish an enforceable contract. Without disclosure in the prescribed form, in the prescribed timeframe, the contract is voidable. In addition to losing the bargain, the landlord is liable for damages. The combination of these two mechanisms amounts to a significant penalty for the landlord.

2.1.2. Legal and Financial Advice Certificate

Section 22D requires a prospective lessee or assignee who leases fewer than five retail shops in Australia, to provide the lessor with a legal and financial advice certificate before entering into the lease.

The sanction for this is unclear. Failure to give the certificate, or indeed the required notices to the assignee of a retail lease, creates a ‘retail tenancy dispute’ under section 22E. Within two months of entry into the lease, the aggrieved person may ask the tribunal to order that the document be given. The Act is silent as to consequences after the two month period.

In the absence of direct sanction, this provision of itself does not affect the bindingness of the transaction at common law. What it may do is call into question the quality of the parties’ bargaining power. In effectively requiring the tenant to provide evidence of advice, parliament is implying that without it, and independently of evidence of
unconscionable conduct by the landlord, the tenant has not been capable of entering the transaction as an informed party. A lack of informed consent may be regarded as no consent at all. This logic echoes that of Amadio\(^\text{27}\) where the plaintiff’s lack of independent advice was a factor relevant to determining the quality of the parties’ bargaining positions.

2.1.3. **Unconscionability**

Section 46A prohibits unconscionable conduct by the lessor and the lessee in connection with a retail shop lease. (Contrast the TPA, which focuses on corporations’ conduct, applying therefore to the supplier.) In determining whether there has been unconscionable conduct, under s46B the retail shop leases tribunal may have regard to: relative bargaining strength; whether conditions were reasonably necessary to protect legitimate interests; whether the party could understand documents; pressure and unfair tactics; availability of alternative leases; consistency of conduct with conduct in similar transactions with a similar party; failure to disclose intended conduct; willingness to negotiate; and good faith.

These **RSLA** requirements reflect those in s51AC of the **TPA**. Anne Finlay discusses the impact of the s51AC provisions and identifies that (in the case of the **TPA**) ‘Parliament has opened the way for Australian courts to disturb the allocation of risks’\(^\text{28}\). The onus then moves to the supplier ‘to ensure that any risks… are understood by the other side’\(^\text{29}\). In the **RSLA** context, the disclosure and advice provisions\(^\text{30}\) may provide evidence of the extent to which the s46B indicators of an unjust contract are satisfied: if conforming disclosure is made and advice sought, a tenant is unlikely to be successful in arguing that they could not understand the document.

Providing the mechanisms to pre-empt unconscionable conduct (disclosure statement, independent advice) must, by definition, minimise the scope for the application of the s46B

\(^{27}\) (1983) 151 CLR 447.


\(^{29}\) Ibid, 493.

\(^{30}\) **RSLA** ss22, 22D.
test for unconscionability.\textsuperscript{31} This is perhaps reflected in the narrow remedy available where unconscionable conduct is found – ie compensation.\textsuperscript{32} If a party were seeking to avoid the contract, then they would need to rely on the common law or equivalent provisions under \textit{TPA} or \textit{Fair Trading Act 1989} (Qld). In respect of common law remedies, this may again raise doubt about whether a party, having met the procedural requirements of the Act, would be successful in establishing the special disability required by the common law.\textsuperscript{33} If this is the case, it could be argued that the Act is successful in minimising recourse to the courts. Whether this framework therefore allows relief to genuinely aggrieved tenants is open to question. This calls into question the fairness and effectiveness of provisions ostensibly designed for consumer protection. The interaction of the Act with common law unconscionability will be discussed below.

While the unconscionability provisions mirror other protective devices\textsuperscript{34} they are explicitly provided for in this Act to bring them within the jurisdiction of the retail shop leases tribunal.\textsuperscript{35} This arm of the Act’s methodology creates a cost effective system for dispute resolution as an alternative to the courts.

\textbf{2.2. Legislating Conscience into Retail Lease Contracts}

The \textit{RSLA} may overtly appeal to conscience via sections 46A and 46B, but conscience arguably also implicitly draws together all its regulatory measures.

\textsuperscript{31} See Retail Shop Leases Amendment Bill 2000 (Qld) Explanatory Notes: ‘Increasing the level of pre-lease information that must be exchanged between parties to the lease will also serve to actively address the potential threat of action under the 'unconscionable provisions' … based on a lack of evidence of disclosure to a weaker party. This risk provides very clear reasons for those in a leasing relationship to disclose all relevant information that directly assists the other party's decision-making processes.’ 7-8; ‘A higher level of pre-lease disclosure will actively address the threat of action under the 'unconscionable conduct' provisions.’ 13.
\textsuperscript{32} \textit{RSLA} s83(3).
\textsuperscript{33} See eg \textit{Commercial Bank of Australia Ltd v Amadio} (1983) 151 CLR 447, 474-5 for a discussion of special disability in terms of common law unconscionability.
\textsuperscript{34} See eg \textit{TPA, Fair Trading Act 1989} (Qld).
\textsuperscript{35} While the Commonwealth provisions may be accessed by the retail industry in Queensland, seeking redress via the Federal Court is less accessible in terms of time and cost when compared with the Retail Shop Lease Tribunal processes.’ Retail Shop Leases Amendment Bill 2000 (Qld) Explanatory Notes, 13.
Legislating Conscience into Contract

The Act stands up for the ostensibly weaker party. Larger retail spaces and leases by a public corporation or its subsidiary are excluded from the Act, and tenants of five or more retail shops are not bound by s22D (legal and financial advice certificates). This supports the idea that tenants likely to be at a bargaining or information disadvantage are the target of the Act’s protection.

Through the disclosure provisions, the conduct of each party is intended to occur on a ‘level playing field’ of information so that the extent of disclosure or its purpose is no longer an issue of conscience. Lack of information is often a means by which a stronger party may take advantage of the weaker and parliament seeks to negate that possibility.

As well as disclosure, enforced help for the tenant (via legal and financial advice) is designed to minimise procedural unfairness in the Amadio mould. In common law cases arguing unconscionability, evidence of financial and legal advice and assistance before entering the contract would be significant in showing that an imbalance had been addressed.

In addition to procedural fairness, the requirement of external advice could be seen as moving towards achieving transactional fairness. Presumably a tenant with financial advice will not proceed with a transaction which represents a significant loss. Transactional fairness is achieved also through the minimum lease standards prescribed in the Act and impliedly through the unconscionability provisions which can consider the terms on which the tenant could get an alternative lease.

The purpose of the ‘evidence’ (the disclosure statement and the legal and financial advice certificates) is to modify the behaviour of both:

1. landlords, in accurately disclosing the essential terms of the contract; and

36 s5.
37 See above, n31.
38 See eg Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 477, where the Amadios ‘lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank.’
2. tenants, in taking the care to understand the legal and financial impact on their own situation, of the terms of the contract before becoming bound.

If it is unconscionable for the landlord to fail to disclose aspects of a deal, in requiring disclosure parliament is effectively legislating conscience into the process of contracting for retail shop leases in Queensland. This approach to conscience is supported through the device of listing relevant factors for considering unconscionability, including transactional issues.\(^{39}\) The implication is that conduct resulting in a gain or loss to a party outside what the market would ordinarily bear, may fall foul of good conscience in terms of the Act.\(^{40}\)

In addition the factors include procedural issues such as unfair tactics, consistency of conduct and good faith.\(^{41}\)

The \textit{RSLA} overtly seeks to regulate unconscionable conduct in the context of retail shop leases by adopting the traditional (\textit{TPA}) framework of identifying unconscionable conduct with reference to a ‘checklist’. However it takes the traditional framework further by requiring all those entering into the designated class of contract to produce evidence of a level playing field \textit{at the outset} of their relationship – even where this evidence may not be used explicitly for the purpose of addressing the issue of unconscionability.

\section*{2.3. Allocation of Risk and the \textit{RSLA}}

The \textit{RSLA} provisions appear to be aimed at addressing conduct (procedural fairness) and perhaps at moving towards transactional fairness also. Yet as Finlay pointed out in the context of \textit{TPA},\(^{42}\) \textit{RSLA} may also in fact reallocate risk.\(^{43}\)

Historically, small traders have taken all manner of risks – finding a market for the product; locating the business well; staff honesty; competition; acts of god. Some of these risks can be insured against, some cannot. The market will determine which business is successful –

\footnotesize{\textsuperscript{39} In s46A.\textsuperscript{40} \textit{RSLA} s46B (1)(b), (e).\textsuperscript{41} \textit{RSLA} s46B (1)(d), (f), (k).\textsuperscript{42} Finlay, above n28.\textsuperscript{43} See also eg S M Waddams, 'Unconscionable Contracts: Competing Perspectives' (1999) 62 \textit{Saskatchewan Law Review} 1, [15].}
at anticipating risks, hedging against them and ultimately in providing a product for which there is sufficient market to feed the business.

As the market for their retail product affects business, so will the leasing market for retail space. Sometimes the retail leasing market favours tenants, and tenants can negotiate with the upper hand. Sometimes the reverse occurs. Such is the nature of the market. There is no pre-determined bargaining position in this market.

It is consistently argued in the literature\(^ {44}\) that the purpose of the ameliorative aspects of contract theory applied by the courts ‘is not to disturb the allocation of tolerable risks’. The courts confirm that it is open to the parties to a contract to apportion the risks as between themselves.\(^ {45}\) Yet in retail shop leases it is not the parties but the RSLA itself which excludes unconscionable (or potentially unconscionable) contracts thereby shifting risks (and costs) between the parties. This scheme adjusts the risk for society by attempting to reduce bankruptcies and unemployment arising from landlord-tenant disputes in retail leasing, but in doing so it also adjusts the risks of the parties.

A tenant, who fails to apprise themselves of the terms of a long-term contract like a lease, is taking a risk. Most prudent business-people would consider it unacceptable to take this risk. In the absence of mitigating factors such as duress or undue influence or Amadio-style unconscionable conduct, it seems unlikely that the courts would protect a party from their own omission (\textit{caveat emptor}).

While it would seem contrary to common law contract for the court to re-assign a self-imposed (and unnecessary) risk to the other party to the contract, Parliament apparently considers that the tenant’s risk attendant on entering a lease ‘blind’ is unacceptable for broad economic reasons (if not for the tenant themselves) and consequently has imposed


\(^ {45}\) See eg \textit{Photo Production Ltd v Securicor Transport Ltd} [1980] AC 827 where (in the context of exclusion clauses) the court discussed apportionment of risk, and distinguished between risks which can be guarded against, and ‘misfortune risks’ ‘something which reasonable diligence of neither party to the contract can prevent’.
universal formalities designed to minimise this risk to the retailer and hence to the state economy.

The government has enacted legislation to remove from tenants a risk that a prudent tenant would not otherwise be expected to take. Consequently it now no longer matters that a retailer fails to become acquainted with the terms of their contract, as parliament has allocated the risk of doing so to the landlord who is now responsible for ensuring that they do. Further, the lawyer’s and accountant’s certificates introduce the element of self help to the extent that the tenant has to seek help themself, but even then relying on a third party to bear the risk in advising them.

Parliament has identified a lack of conscience in procedure and terms as the background to unacceptable costs to the economy in a real property non-traditional consumer leasing market. In dealing with this, through the introduction of measures to pre-empt unconscionable dealings, it has effectively altered the natural state of the market mechanisms it seeks to protect by reallocating risk within the traditional common law framework of contract. On first blush, these measures remove these contracts from the ambit of common law contract.
3. Property Agents and Motor Dealers Act 2000 (Qld)

The introduction of PAMDA in 2000 represents a new era of government regulation of private contracts concerning land dealings in Queensland, building on the earlier RSLA. Hansard reveals the common perceptions which led to the introduction of the Act as the means of reapportioning risk to those on whom parliament felt it should properly rest.

The ability of the existing Act [Auctioneers and Agents Act 1971 (Qld)] to deal with rapacious individuals exploiting ill-informed investors – marketeering – has been tested and found wanting...

The bill will introduce reforms that reclaim a proper balance between the interests and needs of traders operating in the marketplace and the consumers who deal with them...

In amendments introduced a year later to broaden the Act’s residential land sales consumer protection mechanisms, Hansard shows an emotive response by parliamentarians to a class difficult to define other than by the imprecise moniker ‘battlers’. According to the speeches, these people suffer at the hands of an innominate group – possibly real estate agents, possibly property developers, ‘marketeers’, lawyers.

In proposing this legislation, I sought three specific results: one, to rid Queensland’s property industry of crooks, shonks, con artists, rip-off merchants and those others who seek to hide behind a cloak of respectability while fleecing mum and dad investors; two, to protect Queenslanders and anyone else buying residential property in this state; and three, to provide a response which will help rebuild confidence in Queensland’s property market and ensure that people can buy property here in the knowledge that it is a good investment and that they will not be ripped off.

The remarks were bipartisan, in a debate that lasted some five hours.

…[O]ther than basically understanding that a marketeer was somebody who went out and profited like a leech off many other people in the community, I had little real idea of the actions of these people until I started to read about some particular instances. That people, who should have been in a position of trust and offering unbiased professional advice to decent investing Queenslanders and

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46 Queensland, Parliamentary Debates, 7 September 2000, 3103 (Hon JC Spence, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women’s Policy and Minister for Fair Trading).
48 Ibid, 2703 (Hon M Rose, Minister for Tourism and Racing, and Minister for Fair Trading).
Australians, have been unscrupulous has me shaking my head at their tactics… People are getting sucked in by high-pressure sales tactics.  

According to Mr Hopper MLA and the Hon M Rose MLA, the ethical operators in the industry ‘have nothing to fear’. 

The explanatory notes state the purpose of the Act in the general outline:

[t]o…introduce a new legislative scheme governing the functions of real estate agents, restricted letting agents…and property developers… The proposed regulatory framework seeks to achieve a balance between the interests of trading enterprises to freely operate in the marketplace and the needs of consumers for appropriate protection in their dealings with traders… (emphasis added). 

For residential property sales, there is to be a five day cooling-off period… (resulting) from an unsolicited approach to a buyer to attend a property information session…whose object is to sell residential property for purported investment advantages for the buyer. For sales of residential property not subject to a cooling-off period, the contract will…have a warning statement, as the first page… recommending (obtaining) advice of an independent lawyer before the contract is signed. Real estate practitioners and property developers will be subject to stringent disclosure obligations to enable potential buyers to be better informed before entering into binding sales contracts for residential property. 

It is observed that the language used vacillates between the language of contract law and the Queensland industry vernacular: the standard form contract is ‘the contract’ – whether a bargain has been concluded or not. This confused the matter of whether the law of contract applied, or if it was superseded. It is noted that the 2005 amendments to s366 refer to ‘proposed relevant contract’ indicating a refinement of terminology and presumably of concepts also. This is expanded below.

The Act’s original scheme offered two ‘mischiefs’ to be addressed:

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49 Ibid, 2672 (Mr Springborg).
50 Ibid, 2694, 2704.
51 Explanatory Notes, Property Agents and Motor Dealers Bill 2000 (Qld), 1, 3. Note this was subsequently amended so that now, under s 368, all residential land contracts (except those formed on sale by auction) are subject to a cooling-off period.
1. regulation of a profession (initially property agents, but subsequent to the 2001 amendments, also ‘marketeers’, solicitors, valuers and ‘anyone involved with the sale, promotion or marketing of property in Queensland’\textsuperscript{52}); and

2. protection of consumers from members of that regulated profession.

It can be seen then that the interests of ‘traders’ and consumers are intended to be balanced, but the question is: who is the ‘trader’? While a real estate agent is a trader in relation to real estate sales services they are not directly traders in land (ie they are not a property developer or land owner). To the extent that the \textit{PAMDA} regulates real estate agents in their dealings with buyers and sellers, these aims are met. However the Act also affects the parties to the sales contract itself neither of whom is the agent and in a significant proportion of cases, neither of whom will be a ‘trader’.

The Act originally sought to regulate real estate professions in Queensland. Sellers customarily contract with agents while buyers have a non-contractual relationship with the agent. The Act goes further than protecting these parties from the agent, and also protects the buyer from the seller: a range of regulatory provisions impact on this relationship in a potentially profound way. While mechanisms in the Act and the subordinate legislation (in codes of practice) regulate the behaviour of agents, the primary means of seeking to protect the buyer lies in legislative interference with the buyer/seller relationship, rather than the buyer/agent or seller/agent relationships.

Amendments to the original scheme expand the mischief to include that posed by ‘marketeers’. While the amendments show an overt economic rationale for the existence of the Act, Hansard and the Act itself show that the substance and operation of this chapter of the Act were founded on conscience.

\textsuperscript{52} Explanatory Notes, Property Agents and Motor Dealers Amendment Bill 2001 (Qld), 3.
[Marketeers] have adopted unconscionable practices which continue to result in massive consumer detriment and the erosion of public confidence in the benefits of investing in the Queensland property market…

The legislative response in the overall strategy is focussed on a broad regulatory response to the marketplace behaviour and conduct rather than further regulation of specific occupations in the property sales process \(^53\) (emphasis added).

These amendments clearly show the extension of the Act to attempt to deal with unconscionability by altering behaviour, and to establish a scheme whereby conscience is legislated into the contractual process through buyers taking responsibility, through levelling the information ‘playing field’ and through sellers being placed on the back foot in following a new ritual to achieve contractual relations. It also shows that the Act is now overtly intended to focus on the whole residential market, rather than targeting particular elements of it.

### 3.1. How the PAMDA Scheme Works

In the Act’s first couple of years of operation there were a number of amendments to the provisions regulating residential land contracts. For example, the initial provisions offered a cooling-off period only for ‘relevant contracts’ – being contracts entered into as a consequence of attending an unsolicited invitation to a property information session (howsoever called). However since the 2001 amendments, the cooling-off period has applied to all contracts for sale of residential property in Queensland (except auction contracts).

The principal provisions in the Act are:

1. Under s365(1), buyers and sellers under a relevant contract are bound by the contract when the buyer or the buyer's agent receives the warning statement and the relevant contract in the way prescribed by subsection (2) or (2A). The modes of delivery all require notice drawing the buyer’s attention to the warning statement.

\(^53\) Explanatory Notes, Property Agents and Motor Dealers Amendment Bill 2001 (Qld), 1, 2.
2. Sections 366, 366A and 366B require a contract to have attached as its first or top sheet, a warning statement in the approved form, or if faxed or emailed, that the warning statement form the second page of the transmission after the statement directing the buyer to the warning.

3. The seller or a person acting for a seller who prepares a contract for the sale of residential property in Queensland commits an offence if they send a contract that does not comply.

4. The warning statement is of no effect unless it is signed by the buyer (and where the proposed contract is handed to the buyer, the warning statement must be signed before the contract).

5. Under s367, if a warning statement requirement is not met or is of no effect, the buyer may terminate at any time before settlement by giving signed dated notice of termination.

6. Under s368, the buyer may terminate a relevant contract at any time before the cooling-off period ends by giving a signed notice to that effect. Penalty is payment of a small percentage of the deposit to the seller. Waiving or shortening the cooling-off period will only be valid by providing the seller with a lawyer’s certificate…

There are four ways in which these formalities have interfered with contract law:

1. The form of the contract – the contract must have as its top page a warning statement with prescribed information in a prescribed form, signed by the buyer.

2. The effect of a defective statement – the buyer may terminate at any time up to completion.

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54 Originally, before the contract was signed, the statement was to be signed and dated before a witness by the seller and the buyer. This was a significant drain on resources from a practical perspective.

55 Originally there was a conflict with the Body Corporate and Community Management Act 1997 (Qld) (‘BCCM’) requirement that contracts for sale of a community title lot must have as the top page a disclosure statement under that Act. This was resolved by amendments to the BCCM.
3. The point at which the parties are bound by the contract - parties are bound only when the buyer receives the warning statement and the contract.

4. The buyer’s right to withdraw from the contract during the cooling-off period without reason – even unreasonably – with only nominal payment to the seller.

3.1.1. Prescribed Form

The prescribed form is not a major intrusion into the parties’ ability to contract. However whether it is effective is another question: arguably it ignores the source of the mischief (being the unconscientious behaviour of marketeers in the Queensland property industry) by focussing on the parties in their relationships with each other and not the agent, and also by imposing sanction on the seller or its agent who drew the contract, for a breach of the section. It is questionable whether the form itself would alter marketplace behaviour ie whether buyers would seek independent valuation or legal advice before signing.

3.1.2. Right to Terminate

The buyer’s right to terminate at any time (under a ‘contract’ defective in form) places a heavy burden on an honest seller – in particular in a falling market.\textsuperscript{56} The Act is without regard for reliance interest, expectation or seller’s loss. In fact, it is the seller who is obliged to reimburse the buyer for their expenses during the contract period. It is arguable that this amounts to a penalty on the seller – and yet the seller’s only control over the process is to attach the warning statement and to refuse to contract if the buyer fails to sign it.

At common law, where a buyer terminates an otherwise valid contract before completion the seller has the right to compensation for the loss of the bargain or for expenses incurred up to that point (expenses arising out of their reliance on the buyer’s promise under the contract). Instead under \textit{PAMDA}, not only does the seller lose the bargain and any costs incurred, but must compensate the buyer for their own expenses – even if the termination is

\textsuperscript{56} The Queensland real property market has been fairly buoyant since the introduction of the Act, and interest rates low so the effect of the Act in a falling market has not yet been tested.
without cause. Under this legislation the seller now bears a greater risk where the buyer is indemified for the cost of their folly or indecision. This burden is all the greater for the seller’s inability to rectify a defect in the warning statement after the buyer has signed the contract (ie after the buyer has signed the offer to purchase on the form of contract). 

*PAMDA* has therefore allocated to the seller risks otherwise taken by a buyer of real property at common law.

This reallocation of risk illustrates how difficult it is to take a firm position on who controls a contract for the sale of land. To assume that buyers who have been wooed by unscrupulous marketeers looking for inordinately high secret commissions are in a weaker class than the sellers and their agents could be approaching accuracy. While the circumstances of entry into these contracts – hurried, instantaneous without research – would suggest that a prudent buyer would be foolish to fail to recognise the adverse circumstances and respond appropriately (ie obtain advice, or buy time to consider), the entire Queensland real property market is expressly targeted by *PAMDA*. Traditionally, ordinary people negotiating the sale and purchase of a house would bear risk according to a variety of factors – including personal circumstances, rising or falling market, available stock – and not because of their identity as seller or buyer alone. Now the *PAMDA* allocates risk according to the party’s role in the transaction.

**3.1.3. Point of being Bound**

In land contracts in Queensland, the court has recognised the

usual expectation of parties in negotiation for the sale of land is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. … real estate is ordinarily agreed to be sold by the execution by vendor and purchaser of a form of contract adopted by the Real Estate Institute of Queensland…

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This implies that a binding land contract (for sale) requires more than mere offer and acceptance – the parties expect their bargain to become binding on execution of the standard form of contract.

In Cannon Street Pty Ltd v Karedis, Muir J surveys judicial commentary on the issue of contract formation and becoming bound:

It is often difficult to fit a commercial arrangement into the common lawyer’s analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of ‘offer’, ‘acceptance’, ‘consideration’ and ‘intention to create a legal relationship’ which are the benchmarks of the contract of classical theory...

Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.58

But then Muir J said, citing Cozens-Hardy MR in Perry v Suffields: 59

if once a definite offer has been made and it has been accepted without qualifications, and it appears that the [exchange of] letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at.60

This supports the idea that in spite of its ‘deficiencies, the traditional offer and acceptance approach is routinely applied when the courts need to decide whether a contract has been formed’.61

60 Cannon Street Pty Ltd v Karedis [2004] QSC 104 (Unreported, Muir J, 30 April 2004) [114].
61 Paterson Robertson and Heffey Principles of Contract Law (2nd ed 2005), 50.
Under PAMDA however, communication of acceptance of an offer is not sufficient to bind the parties; nor is execution of the standard form of contract. Section 365 provides that the parties will only be bound when the buyer or buyer’s agent receives the warning statement and the contract in a way prescribed by the section. The onus is on the seller to prove when the parties are bound. This of course changes a fundamental element of common law contract, and raises a number of issues in relation to parties’ rights under the contract and practical issues in carrying out the terms of the contract.

Tight time constraints in Queensland conveyancing practice require the conveyancing process to begin as soon as possible after the contract is ‘entered into’ (as this was formerly understood). This can lead to practical problems under PAMDA – a delay in ‘becoming bound’ by the contract may reduce the buyer’s time to investigate the title before settlement. Additionally, the seller is the party empowered to render them bound (by delivery of the warning statement and contract) – another redistribution of the parties’ relative power, and one which does not necessarily afford any protection to the so-called consumer in this transaction.

It should be noted also that the 2005 amendments require the seller to direct the buyer’s attention to the warning statement when delivering the contract and statement to the buyer. The buyer must sign the warning statement before entering into the contract, must receive the contract with the warning statement as its top sheet (or in an electronic communication or fax where the sheet is sent before the contract) and must receive a statement or notice directing their attention (again) to the warning statement.

While the buyer may be disadvantaged by the seller controlling the time at which the parties are bound, the seller may also be disadvantaged, as the following scenario illustrates.

A buyer’s written offer had been accepted by the seller, by execution of the form of contract. The contract was dispatched to the buyer for the buyer to become ‘bound’ in terms of the PAMDA. The agent in the meantime notified the buyer of the acceptance. (Under common law contract, the

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62 PAMDA, s365(5).
parties would be bound from this point.) Before the buyer received the contract however, they got cold feet. They wished to escape the liability of the contract, but without losing any of the deposit for which they would be liable if terminating during the cooling-off period. They were able to withdraw their offer, on the basis that they were not yet bound by the contract.

The argument in favour of the common law contract rules is usually that they support security of contract: that they ‘fulfill the expectations of reasonable men’. The behaviour described, using as it does the PAMDA provisions, may in fact work against the market confidence so lamented in parliament during the Bill’s second reading. However, it does give a buyer, who is a consumer, the opportunity legitimately to escape a contractual obligation. The inconsistency lies in the talk in the Bill of supporting the market place, which appears to be a classical approach to contract, where in fact the impact of the PAMDA rules of being bound is in opposition to this.

This concern is highlighted following the interpretation of PAMDA in MNM Developments Pty Ltd v Gerrard where de Jersey CJ said that:

\[
\text{It would be an exaggeration to suggest that construction would frustrate commercial dealings. In the first place, the convenience of commercial dealings is implicitly only subsidiary. ... [I]t would mean the act of contracting must be done by the exchange of original documents...a course most contracting parties, even in this electronic age, would favour anyway, to ensure the security of their binding dealings.}\]

This judgment preceded amendments to the Act – which now specifically provides for creation of a contract by both fax and email, with detailed and specific provisions for ‘attachment’ of the warning statement in each circumstance. The Minister’s second reading speech simply mentions that:

\[
\text{[t]he amendments...will provide certainty for sellers of residential properties or their agents when transmitting precontractual (sic) documents by facsimile and other electronic means. At the same}\]

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65 Ibid, [20].
time, the amendments will preserve important consumer protection by ensuring that buyers’
attention is drawn to the warning statements and information sheets required to be included with the
contractual documents, which must be provided in a specific order.  

By this stage too the comments of Williams JA had been taken into account – namely that ‘[t]he provisions of the Act in question are badly drafted; the reference in s 366(1) should not be to a "contract" but to documents submitted to an intending purchaser’.  

The Minister refers to ‘pre-contractual’ documents, and the language of the statute now refers to ‘proposed relevant contract’ where previously it had referred to ‘relevant contract’.  The original language represented the vernacular and industry use of ‘contract’ (the standard form REIQ document). The comments of Williams JA highlighted the difficulties where the law is required to use imprecise terminology.

The implications of statutory intervention into common law contract are starting to become clear – some six years after the introduction of the Act. In spite of an expressed intention not to interfere with commerce, the court will read consumer legislation strictly in favour of the consumer, with commercial or market implications clearly to take a back seat.

3.1.4.  Cooling-off Period

It is fundamental to our free enterprise system that once parties agree on terms of their relationship, as embodied in the contract, they uphold their bargain. It is of course common to provide for parties to terminate the contract within its terms eg where conditions are not satisfied. However giving buyers the right to change their mind after becoming bound, and to terminate, is another matter. While intended to provide fairness for the buyer, the process raises the issues of autonomy of the buyer, certainty for the seller and the overall efficiency of the market as a consequence.

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68 Contrast, for example, the amended (by 2005, no 61) s366(1) ‘this section applies if a proposed relevant contract…’, with the earlier s366(1) ‘a relevant contract must have attached…’. 
It is the author’s experience conveyancing in metropolitan and regional Queensland over many years that interstate investors will often sign a contract for purchase with the expectation of being able to withdraw during a cooling-off period similar to that offered in their home state. Often the reason for wanting to withdraw is to substitute a related entity as purchaser after consultation with the buyer’s accountant. This has always had implications under the *Stamp Act 1894* (Qld)\(^6^9\) where rescission is conditional on replacement of the buyer. Under *Duties Act 2001* (Qld) s115(1)(d) there is no duty payable if the agreement is ended with the consent of the parties to it and there is no resale agreement.\(^7^0\) Now with the cooling-off provisions, these buyers can withdraw at will within the period, and a substituted entity can make a fresh offer simultaneously, without offending the *Duties Act 2001* (Qld).

Kronman however argues that a mandatory cooling-off period implies a ‘moral deficiency in those to whom it applies’. This therefore poses a challenge to the foundation of ‘liberal neutrality’ on which our laws are based.\(^7^1\) Impliedly, this questions the autonomy of a buyer subject to a cooling-off period.

Kronman considers cooling-off periods for marriage and divorce, and door-to-door sales. In these circumstances, where one’s guard is down and one ‘is likely to be moved by a powerful passion that can cloud his judgment and cause him to act in a way he will later regret’,\(^7^2\) the argument might be stronger for imposition of a cooling-off period. However ‘we quite properly refuse to recognize lack of judgment as a general defense (sic) against the claim that one has failed to meet his contractual obligations’.\(^7^3\)

While the purchase of a home might carry with it a degree of emotion putting the transaction on par with other major life events such as marriage and divorce, the transaction

\(^6^9\) Now *Duties Act 2001* (Qld).
\(^7^0\) See also *Duties Act 2001* (Qld) Revenue Ruling 14.2.
\(^7^2\) Kronman ibid, 796.
\(^7^3\) Ibid, 794.
is after all a commercial dealing traditionally regarded by the law in terms of contract. Kronman points out that there is no way of distinguishing transactions in which a party’s judgement is clouded and those in which it is not.\textsuperscript{74} This calls into question the justification of a cooling-off period on these grounds.

Based on these arguments, the blanket cooling-off period provided for in \textit{PAMDA} does not seem to be an effective way to compensate for parties’ poor judgement. Indeed this begs the question of how it might be justifiable to make assumptions about parties’ judgment in relation to residential land contracts in any event. Even if the rationale for the cooling-off period is an attempt to pre-empt unconscionable conduct by providing procedural fairness for the buyer, the presumption of a deficiency in the buyer remains, calling their judgment into question.

The existence of a cooling-off period provides additional problems, within the realm of the marketplace. It is difficult to see how a cooling-off period will achieve certainty of dealings otherwise sought by the law. On this rationale, sellers should be able to rely on buyers’ representation of themselves as bona fide purchasers prepared to undertake the obligations under the terms of the contract.

This is particularly so in Queensland where most conveyances settle within a month of entering into the contract. Buyers who have failed to make an application for finance within the first five business days of the contract (the cooling-off period) may find themselves unable to meet the usual 14 day finance deadline. If they do make the deadline, their bank may be unable to meet the 30 day settlement date. Therefore a prudent lawyer will advise their buyer client to apply immediately for finance in case they choose to go ahead with the contract, but that s368 will be available to them should they choose to rescind within the cooling-off period.

The effect of this is that conveyancing practice in Queensland will launch the buyer into the mechanics of carrying out the contract before the buyer is required finally to commit to the

\textsuperscript{74} Ibid, 796.
transaction. This seems to challenge the effectiveness of the cooling-off period as a time during which buyers can distance themselves from their initial decision.

A cooling-off period may be acceptable in terms of interference with parties’ autonomy and the contract as the expression of the parties’ will if the detriment to buyers required to proceed with an unwanted or unplanned purchase is seen as greater than that to a seller losing a sale. However the cooling-off period sits heavily with standard conveyancing practice in Queensland which has not taken it into account. The parties – principally the seller – now have no certainty for potentially one quarter of the total number of business days commonly provided for until settlement. The trade-off then is uncertainty for the parties for one quarter of the contract period to support buyers who may wish to end a contract they are unhappy with.

In terms of the PAMDA, the parties are by definition already bound while the cooling-off period is in operation (as the cooling-off period does not commence until the parties are bound). The parties are therefore already bound to perform the contract during the cooling-off period – including fulfilling their obligations to take reasonable steps to satisfy the contract’s conditions such as seeking approval for finance. In this respect the cooling-off period impacts on conveyancing practice possibly to the detriment of buyers who may see it as ‘free time’ within which to consider whether to proceed; but also of course to sellers whose contract may end at any time.

The issue however is whether the measure is effective in promoting the apparent aims of the legislation to promote fairness for buyers. Where a buyer may end the contract after seeking appropriate advice, there may be a genuine consumer protection benefit which forestalls any seller unconscionability. However there could instead be an unconscionable outcome for the seller (not a marketeer) at the hands of an unscrupulous buyer. In addition, the state of the market will determine which parties hold the negotiating power so that the cooling-off period will lose its potency in a seller’s market.
On this basis the measure is questionable in its ability to deliver an effective and fair outcome for buyers, and in altering the balance between parties may adversely affect consumer sellers.

3.2. ‘Legislating Conscience’ into Residential Land Contracts

Based on parliament’s discussion of the lack of conscience applied by those in the ‘industry’ and its attempts under the Act to protect the ‘innocent’ consumers from this lack of conscience, it is submitted that indeed the PAMDA attempts to legislate to compensate for the perceived imbalance between the parties with the ultimate aim of promoting conscience across the market for residential property sales. This is the basis underpinning the following analysis of the impact of these provisions in the Act – in particular, whether there has been a reallocation of the risk as between industry players and consumers in line with the goals of the legislation, or whether there is simply a reallocation of risk between the parties to the contract.

3.3. Reallocation of Risk under PAMDA

While it is easily apparent that there has been a reallocation of risk under the residential property sales provisions in the Act, on closer examination it is unclear to whom the risk will now pass. This is particularly so in relation to warning statements. The elements of risk encountered where a warning statement does *not* comply with the prescribed form are summarised in Table 1.

<table>
<thead>
<tr>
<th>Nature of risk</th>
<th>Party bearing risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>penalty (200 penalty points)</td>
<td>seller or person who prepared the contract</td>
</tr>
<tr>
<td>buyer may terminate</td>
<td>seller primarily, and agent (who stands to lose commission)</td>
</tr>
<tr>
<td>reimbursement of reasonable legal and other expenses incurred by the buyer</td>
<td>seller <em>and</em> the person responsible for preparing the contract*</td>
</tr>
<tr>
<td>after the buyer signed the contract</td>
<td></td>
</tr>
</tbody>
</table>
*Liability to reimburse is joint and several where there is more than one party liable to reimburse.

Because the liability to reimburse arises where the buyer terminates relying on the defective warning statement, it may arise at any time up to completion of the contract. When it does so, it arises in spite of any reliance interest of seller. This will be a contingent liability from the moment of contracting (on delivery of signed contract to the buyer).

The provisions impose a strict liability on the seller’s agent and the seller to take all steps to ensure compliance with the Act.

**Seller’s Risk**

Before the PAMDA, the primary risks for parties to contracts for sale of residential land in Queensland could be categorised as:

- risks contemplated by the contract, in consequence of which a sanction lay in compensation (eg the risk of the seller failing to give good title); and

- risks not contemplated by the contract, against which the buyer can protect itself through due diligence (eg paying above market value, structural defects of any building).

The latter type of risk may or may not arise out of unconscionable conduct of the seller. At common law where the risk became a reality, it would attract a response of caveat emptor.\(^{75}\)

Under PAMDA however, it is the seller who takes the risk that the buyer will exit the contract lawfully either:

- during the cooling-off period; or

\(^{75}\) But see below part 4.3.
• where the form of contract is unsound as a consequence of failure to attach the warning statement.

The seller’s risk that the buyer will terminate the contract and demand compensation for costs incurred is without the benefit of equitable review, assessment of the seller’s reliance interest or any concept of estoppel based on the buyer’s actions. The Act is clear in its wording. In addition, the seller (and the person preparing the contract) has committed an offence for failure to comply with the Act.

In summary, the seller and the person preparing the contract now face a risk not in existence under common law contract. This is more than a reallocation of risk; it is the generation of a new one. Importantly, it generates a new risk for sellers the majority of whom could be regarded as consumers themselves. This is particularly onerous where the seller is usually reliant on their agent for preparation of the paperwork. That parliament is prepared to place this onus on sellers themselves must demonstrate the importance placed on regulation of the industry.

In addition to new risks for sellers, looking below the bare words of the Act and identifying the context in which residential property transactions take place, it can be seen that the buyer too faces a new risk. Where a seller fails to deliver the signed contract and warning statement there appears to be no commenced contract in terms of PAMDA. It is possible that the seller could use this to their advantage to negotiate better terms elsewhere, having given a buyer the impression that a (common law) contract is on foot. A buyer in these circumstances could be justified in relying on the ‘contract’, but if the parties are not bound in terms of PAMDA, the question is whether the buyer will have any rights.

In just such a case, the court in Grieve v Enge76 ‘was inclined to think’ that ‘providing … that the parties are bound “for all purposes” at the time the buyer or their agent receives a signed copy of the contract s365(1) should not be understood as having the effect that prior

to that time the seller is not bound for any purposes.’ Cullinane J found that the legislation was not intended to ‘alter the common law position …so far as the vendor is concerned.’\textsuperscript{77}

With respect, this is not apparent from the plain words of s365(1). The consumer nature of the legislation however leaves courts in a position where they will find a construction supporting that – indeed Cullinane J emphasised that his view was ‘tentative’ and did not express any ‘concluded opinion’, but that ‘s365 must be read in its context’.\textsuperscript{78}

While this apparently leaves scope for the matter to be litigated further, the effect of this interpretation of the legislation is clear in the meantime: when the seller communicates acceptance, the seller becomes bound but the buyer does not. The buyer only becomes bound when the seller provides a copy of the contract and warning statement. If this decision is supported, then this places an additional burden on a seller. The lag between communication of acceptance and receipt of the contract gives a buyer more time to withdraw from the transaction, before even the cooling-off period commences.

The question also arises as to whether there is a contract in this ‘interregnum’. Where common law contract recognises a contract based on mutuality and that consideration is a \textit{quid pro quo}, the question arises as to the status of the seller as the only party bound. If the (bound) seller is seeking to rely on a contract before the buyer is bound, the seller is apparently left without remedy.

It is clear then that the markets for retail shop leases and residential land in Queensland have been singled out from the application of common law contract to the extent that they have been regulated under their respective Acts. The application of consumer protection provisions in the context of previously open and relatively unregulated markets changes the way in which contractual relationships are formed in these markets. To put in context the extent to which common law contract has been affected, the next chapter turns to a review of current application of contract law in Queensland.

\textsuperscript{77} Ibid, [41].
\textsuperscript{78} Ibid, [40].
4. Common Law Contract

Contract law provides a methodology to establish the enforceability of a promise. This chapter will identify that methodology as the foundation from which to assess the impact of the new scheme on the enforceability of promises involving relevant subject matter (ie residential land sales and retail shop leases in Queensland).

To analyse the effectiveness of the reviewed legislation, this chapter will review those aspects of common law contract which are challenged by its provisions including the broader context of common law contract incorporating the classical framework and *caveat emptor*. This will afford an insight into whether regulated contracts can still be considered part of contract, or whether they fall within the more traditional realms of consumer protection measures outside the contract framework.

4.1. Classical Contract Theory

Contract as Australian legal practitioners know it has developed over hundreds of years. It arose from the laissez-faire economics of the 18th century at a time when industrialisation and resultant wealth among a growing middle class led to increasingly complex transactions. Law and policy developed to cater for the new commercial environment. Mediaeval concepts of just price and fairness in bargains were rejected in favour of the paramountcy of individual responsibility and *caveat emptor*. Atiyah79 sums up the framework of contract law – a framework based on the ‘model of the market’.

1. Contracts consist of arms length dealings without fiduciary obligations to the other party.

2. Parties negotiate: neither owes a duty until a deal is struck.

3. Parties have no duty to volunteer information, or an entitlement to rely on the other.

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79 Atiyah, above n6, 402-3.
4. A deal is struck when parties agree or indicate agreement freely, without pressure, but where pressure is part of the larger marketplace environment.

5. Terms of a contract are up to the parties:
   a. they know their own minds, are the best judge of their own interests; and
   b. unfairness is irrelevant.

6. Bindingness is a pecuniary calculation: perform or pay damages.

Central to the development of contract law was the philosophy of freedom of contract: not just an economic imperative in the burgeoning marketplace, but a legal tenet upheld by the courts. This is illustrated in Atiyah’s market model above. Cases considering clogs on the equity of redemption, such as *Kreglinger v New Patagonia Meat & Cold Storage Company Ltd*80 and *Knightsbridge Estates Trust Ltd v Byrne and Others*,81 show the court’s determination to look at the terms of the parties’ bargain and to enforce that, over and above other considerations. The approach in these cases is reflected in that of *Svanosio v McNamara*.82

In discussing penalties and the application of doctrine of unconscionability, the court in *AMEV-UDC Finance Ltd v Austin* pointed out that ‘the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties’:83 the importance of freedom of contract continues to be recognised by Australian courts.

If Atiyah84 and other commentators such as Gilmore85 are to be believed, classical contract law still stands but as a ‘residuary body of rules of little application in practice’.86 This can be understood in the context of the development of the concept of unconscionability and

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80 [1914] AC 25.
81 [1938] 2 All ER 444.
82 (1956) 96 CLR 186.
83 (1986) 162 CLR 170, 194.
84 Atiyah, above n6.
85 Gilmore, above n7.
86 Atiyah, above n6, 687.
welfarist statutory intervention. Kessler and Fine\(^87\) and Bigwood\(^88\) however adopt a less radical view: freedom of contract at the core of classical theory has been challenged and its emphasis has simply shifted in response to the imperatives of justice, fair dealing and equity. Either way, it must be acknowledged that at least part of the challenge has come and continues to come from the legislature.

This shift in emphasis does point to inconsistencies. Fair dealing, unconscionability, reasonableness and good faith are grounded in an ideology which apparently conflicts with classical theory’s own principle of ‘freedom of contract’ and the law of the market.\(^89\) Yet it must be acknowledged that classical contract law rules are infused with countermeasures effectively to compensate for their inevitable harshness.\(^90\)

The RLSA and PAMDA support an ideology aligned with these countermeasures, in seeking to protect the unwitting party from a bad bargain. This is reminiscent of the approach of the 18\(^{th}\) century courts, albeit using a differently conceived framework wherein the bindingness of a bargain rests on the foundation of a conscientious transaction rather than the classical steps to formation. In this framework, the countermeasure becomes the measure of bindingness. In light of this inherent contradiction within traditionally conceived contract law and the increasing encroachment of statute (evidenced by the scope of the legislation under review), it is time to query what the future holds for contracts.

### 4.2. Elements of (Classical) Contract

The classical model of contract law has sought to promote certainty of dealings in the marketplace.\(^91\) The rules of engagement developed during the rise of market economics in the 19\(^{th}\) century are predicated on this principle – so while pre-contractual negotiations may

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\(^88\) Bigwood, above n44, [7].
\(^89\) Contra ibid ‘these values do not inevitably collide’.
\(^90\) See eg Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.
\(^91\) See eg Atiyah, above n6, 82.
give rise to obligations.\textsuperscript{92} Traditionally obligations will only arise upon formation of a contract.\textsuperscript{93}

Contract formation at law has been reduced to elements:

- offer
- Acceptance
- consideration
- intention to create legal relations

reaching agreement\textsuperscript{94}

is the agreement binding?\textsuperscript{95}

These elements continue to form the foundation of Australian contract law.\textsuperscript{96} In a recent Queensland example, after considering offer and acceptance and reviewing the cases, the court in \textit{Cannon Street}\textsuperscript{97} looked at whether consideration supported any alleged agreement. In spite of the difficulties, and the fallback position examining the whole transaction, it is the classical elements which ultimately determined the existence of a contract.

The classical approach was supported by McHugh JA in \textit{Integrated Computer Services}:

\textquote[McHugh JA]{'\textit{[t]he conduct of the parties … must be capable of proving all the essential elements of an express contract…'\textsuperscript{98}"

The upshot is first, that while courts might say that modern negotiations are too complex to fit within the artificial constructs of classical theory,\textsuperscript{99} the courts simultaneously use that construct to establish that there is a contract.\textsuperscript{100}

\textsuperscript{92} See below ch 7.
\textsuperscript{93} See eg Paterson Robertson and Heffey above n61, 7.
\textsuperscript{94} See eg \textit{Adams v Lindsell} (1818) 106 ER 250.
\textsuperscript{95} See eg \textit{Carlill v Carbolic Smoke Ball Co} [1892] 2 QB 484.
\textsuperscript{96} See eg the approach taken in Paterson Roberson and Heffey, above n61, 47; and see also discussion in cases such as \textit{Cannon Street Pty Ltd v Karedis} [2004] QSC 104 (Unreported, Muir J, 30 April 2004) (\textit{‘Cannon Street’}); \textit{Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd} (1988) 5 BPR 11,110; BC880115, 1 (\textit{‘Integrated Computer Services’}). See also \textit{Ermogenous v Greek Community} (2002) 209 CLR 95 for discussion on intention to be bound.
\textsuperscript{97} \textit{Cannon Street Pty Ltd v Karedis} [2004] QSC 104 (Unreported, Muir J, 30 April 2004)
\textsuperscript{98} \textit{Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd} (1988) 5 BPR 11,110; BC8801158 at 1, 17.
Secondly, while the courts profess to recognise that practical contract and modern commerce fail to reflect classical contract theory, Parliament has purported to use the classical construct of contract on which to impose its own rules.

In spite of the predominant classical view of contract, the new scheme alters the application of classical principles to the formation and enforcement of residential land contracts and retail shop leases. Offer and acceptance have been discussed above in the context of the PAMDA provisions on point of being bound\textsuperscript{101} as has the issue of becoming bound when a cooling-off period applies (regardless of offer and acceptance). Of course failure to comply with formalities required by each of the Acts will result in a voidable contract despite formation in accordance with common law, unless there are alternative common law means by which to seek enforcement.

The other important element identified in the new scheme is the allocation of obligation for providing information to buyers and tenants. Again, this changes the common law conception of the responsibility of the buyer to beware.

4.3. Caveat emptor

Running parallel to classical elements of contract and the principle of freedom of contract is the principle of \textit{caveat emptor}. This places the onus on the buyer to inquire into the subject matter of the contract and lays responsibility for disappointment in the outcome of the bargain at the foot of the buyer.

Over time however, the position of the seller was recognised as superior to that of the purchaser. As Griggs points out, post-World War II houses were produced in mass quantities and greater complexity so that buyers were often unable to closely inspect the

\textsuperscript{99} See eg \textsl{Cannon Street Pty Ltd v Karedis} [2004] QSC 104 (Unreported, Muir J, 30 April 2004) [109]; Bigwood, above n43, [9].

\textsuperscript{100} See eg discussion in Paterson, Robertson and Heffey above n61, 50.

\textsuperscript{101} See above, section 3.1.3.
real estate for defects prior to purchase. The parties were not negotiating on a level playing field.

Atiyah points out that the ‘old rule’ of *caveat emptor* has been eroded in the civil law and by statute. In Australian law the trend has been to entitle a consumer to rely on seller and manufacturer representations (actual or deemed). Under certain circumstances there may even be a positive obligation on a seller to disclose.

Compare for example the common law approach of 1906 and the statutory approach of 1992:

> [A]lthough a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet under the general rule of *caveat emptor*, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee…

In contrast, in the context of misleading or deceptive conduct under *TPA* s52, the court held in *Demagogue Pty Ltd v Ramensky* that where silence in the context of the situation allows the other party to believe a set of facts which are not true (ie when it amounts to a misrepresentation, or is misleading) then there is an obligation to speak.

While misleading and deceptive conduct raises a discrete range of issues, the point here is that measures are available outside the common law to ameliorate the effect of classical principles such as *caveat emptor*. In the case of s52 of the *TPA*, there is no positive obligation on a seller to disclose all, but there is an obligation to ensure that circumstances do not exist which may mislead the buyer. To this extent, the *TPA* approach represents a
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fundamental shift in the law and the imposition of statute into common law, but it does not remove *caveat emptor* altogether. Existing provisions such as s52 of the *TPA* cast a shadow over Atiyah’s market model of contract\(^\text{108}\) in that to comply with the *TPA* there may now be a duty to volunteer information where none existed before.\(^\text{109}\)

Legislative intervention into contract law is rigorously supported by government agencies such as the Australian Competition and Consumer Commission (ACCC) which devotes significant resources to enforce the provisions of the *TPA* relating to representations by suppliers about goods and services supplied. Its website\(^\text{110}\) offers guidelines for business on advertising and selling practices. It makes clear to the general public that what is unsaid is as important as what is said.

In the same vein, under s88B of the *Fair Trading Act 1989* (Qld) a person can be required to substantiate statements concerning the supply of goods or services where there is cause to believe them to be false or misleading.

In addition to existing statutory obligations on sellers/landlords to disclose, *PAMDA* and *RSLA* encourage buyers/tenants to investigate the subject matter of the contract. This is where the new scheme alters the landscape of protection for buyers of land and tenants. Where under *caveat emptor* the courts once would have assumed buyers/tenants would inquire (and would not compensate for failure to do so) now buyers are urged to inquire\(^\text{111}\) and retail shop tenants are required to obtain advice.\(^\text{112}\) Parliament makes no assumption of knowledge or inquiry and places no responsibility on the buyer/tenant but seeks only to

\(^{108}\) See above n79.


\(^{111}\) In the warning statement required under *PAMDA* s366D.

\(^{112}\) *RSLA* s22D.
promote buyer/tenant inquiry. Ultimately though, it also effectively provides compensation to a buyer/tenant where they fail to inquire.\textsuperscript{113}

The new scheme therefore differs from that of s52 of the \textit{TPA} in its effect on \textit{caveat emptor}: not only does it place a positive obligation on the seller/landlord to disclose information at the outset of the relationship, but it also encourages autonomy of buyers and tenants through investigation of the contract subject matter. Ultimately though the buyer/tenant may be protected from their own failure to inquire by the cooling-off period in \textit{PAMDA} and the procedural requirements for forms of disclosure and warnings.\textsuperscript{114}

This scheme seems to promote opposing policy objectives: encouraging changes in consumer behaviour by alerting consumers to undertake their own enquiries, yet strengthening the rules whereby consumers need take no responsibility for failure to enquire.

The shift in application of \textit{caveat emptor} has a consumer protection flavour – reflective perhaps of the move in social policy from individualism towards welfarism.\textsuperscript{115} This approach is reflected in the range of broad legislative measures which seek to protect consumers from the strict application of classical contract.

\section*{4.4. The Changing Face of Contract}

This chapter illustrates that the impact of the new scheme can be construed as being on contract law within the confines of contract law itself. The new scheme reflects an ethic of conscience found in countermeasures to classical rules, but applies these principles of consumer protection within the existing framework of contract, rather than external to it. To this extent, the bindingness of a bargain is found in the new scheme in the infusion of conscience into the classical rules of formation which are assumed by the legislation. The classical structure of formation is altered slightly by s365 of \textit{PAMDA} but this too recognises the place of the classical rules of formation in establishing bindingness.

\textsuperscript{113} eg cooling-off period; lack of formalities giving a right to rescind; no \textit{responsibility} on consumer to make inquiries; if landlord fails to get an advice certificate, there is no detriment to the tenant.
\textsuperscript{114} See \textit{RSLA} ss22(3), (4) and \textit{PAMDA} ss367, 368 respectively.
\textsuperscript{115} See above n9.
In this way, Atiyah’s model of the market\textsuperscript{116} is challenged by the new scheme, if not overturned completely. Contracts still consist of arms length dealings without fiduciary obligations, but in circumstances where disclosures and warnings provide parties with means to correct information imbalances before entering into the transaction. Parties continue to negotiate and neither owes a duty until a deal is struck – but s365 of \textit{PAMDA} and the compliance requirements of both Acts alter the concept of when a deal is recognised as being struck. This is a direct challenge to the rules of contract formation and the point of being bound.

In relation to obligations owed by the parties, in contrast to the common law, the \textit{RSLA} requires disclosure, and affords remedies to tenants who have suffered loss as a result of misrepresentation.\textsuperscript{117} \textit{PAMDA} gives the buyer notice to inquire into the price and terms, and the opportunity to withdraw under the cooling-off provisions.

The Acts continue to recognise that a deal is struck when parties agree or indicate agreement freely, without pressure, but also that the pressure that is part of the larger marketplace environment should be recognised by the parties in the warning and disclosure provisions. While terms of a contract are still up to the parties, buyers and tenants are put on notice to check the quality of those terms. Finally, bindingness remains a pecuniary calculation except where the foregoing principles have not been adhered to. Even in the case of cooling-off provisions, notional damages are paid by the buyer.

The Acts implement changes to the traditional conceptualisation of contract law in the marketplace. Whether these changes represent a shift in thinking in statutory modifications to contract law, the next chapter examines precursors to these statutory protections.

\textsuperscript{116} See above n79.
\textsuperscript{117} \textit{RSLA} s43(2).
5. Modifying Contract Theory: Statutory Intervention into Contract

While the classical framework represents continuity of liberal thought from the early thinkers to the present, in fact classical contract theory has been modified by statute and the courts since its inception. Parliaments and the courts identified early on that people needed protection from the extremes of the free-market environment. Where the freedom of parties to create private law as between themselves began as largely unregulated, limitations to that freedom soon emerged.¹¹⁸

While freedom of contract may be fundamental to the law of contract, it has been argued that deviation from that freedom will take the rules outside pure contract law.

Pure contract is blind to details of subject matter and person… In the law of contract, it does not matter whether the subject of the contract is a goat, a horse, a carload of lumber, a stock certificate or a share. As soon as it matters – eg if the sale is of heroin, or of votes for governor, …or labour for 25 cents per hour – we are in one sense no longer talking pure contract. In the law of contract it does not matter if either party is a woman, a man… a corporation, the government, or a church. Again, as soon as it does matter – if one party is a minor, or if the transaction is one in which a small auto company sells out to General Motors, or if a seller of legal services happens to be a corporation instead of a partnership or individual – we are no longer talking pure contract. When the relationship of parties to land is treated as creating distinctive legal issues, simply because land is involved, this is land law or property law, but not contract.¹¹⁹

This passage contends that regulation can result in excision of subject matter from contract law. This goes further than merely placing limitations within the free-market contract framework: it takes the law of particular bargains outside that of contract. Continual refinement of the rules applying to ever more specific fields must ultimately remove the role of broad contract law within that field. This highlights the question of whether the ‘new scheme’ does in fact remove these bargains outside contract law. If so, then the

¹¹⁸ See below section 5.1.
¹¹⁹ Atiyah, above n6, 405, quoting L Friedman, Contract Law in America, 20.
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intrusion into contract law matters not as the law can be compartmentalised for the relevant subject matter.

Building on this idea, while Atiyah and Gilmore in one sense state validly that freedom of contract is all but extinct it nonetheless remains the cornerstone of our system of private law-making (contract). The nature of the limitations imposed on contract-making within the system, reflect the underlying principle of freedom of contract. These limitations have not regulated the party with whom one can contract; nor have they interposed a barrier to free negotiation of the terms of a contract with another free agent. Even within Friedman’s example, while a contract with a minor may fall outside acceptable limits, this is because it is not free negotiation: the minor is simply (deemed) unable to make such a decision. The subject matter cited will render a contract unlawful – but has no bearing otherwise on the rules of formation and enforcement. Friedman’s limitations still fit within Atiyah’s model of the market-based structure of contract law120 either in promoting free will in bargaining, or because the subject matter is precluded altogether from any kind of enforceable contract.

Legislature and the courts have imposed limitations on freedom to have a contract enforced where subject matter is not precluded from being traded in the first place. Traditionally restrictions have applied at the tail end of a contract, once validly created, rather than applying at the outset. Limitations have often arisen out of the parties’ relative bargaining power – predicated a party’s knowledge of the subject matter or of the other party’s disadvantage, and the use of that knowledge.121 These limitations may over time adjust market behaviour (for fear of having a contract overturned) but of themselves do not interfere at the outset with the freedom of a party to undertake legal relations, nor to the formalities of bargaining itself or contract terms.

The new scheme itself seeks to quarantine specific subject matter from the usual rules of contract ‘touching the significance of common law’ and perhaps even ‘robbing contract

120 See above n79.
law of its subject matter’. But before turning to whether they are in fact excised from
contract law itself, the means of modifying classical elements will be considered – first by
statute and in the following chapter, by equity.

5.1.  Reining in the Free Market – Consumer Protection

It is clear that Parliament’s new scheme seeks to provide redress for a perceived imbalance
of market power – as courts and legislatures have done in the past – in contracts dealing
with particular subject matter. It follows all other ‘consumer protection’ laws which accept
that ‘consumers’ are those without power in the market and who are therefore deserving of
protection. ‘Consumer’ is defined differently depending on the legislation under which the
consumer stands to be protected. Mirroring those defined as consumers are those identified
by Parliament as having power: those regulated under various pieces of legislation
designed to protect consumers. In each case of consumer legislation, a ‘moral dimension’
can be observed. While this may fall short of the equitable doctrine of
unconscionability, the foundation for protecting the weaker party in a transaction is self-
evidently a moral one.

The sample in Table 2 highlights that Parliament has progressively narrowed the classes of
‘weak’ parties within frameworks defined by the subject matter of transactions. Limitations in contracts (not on contracts) – by implied terms (eg Sale of Goods Act 1896
(Qld)) and ultimately in the new scheme by matters of form – have progressively been
targeted more at defined subject matter within terms of reference dictated by the perceived
power balance.

While contract law has traditionally recognised limitations within its framework (eg lack of
capacity to contract) statutory limitations are starting to move outside that framework.
Friedman’s ‘subject matter and person’ are starting to matter in determining whether the

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122 See above n11.
123 See eg Kronman, above n71.
125 Friedman in Atiyah, see above n119.
classical rules apply at all, thereby on his argument removing these areas from contract and placing them within their own discrete field of law.

This chapter will identify three broad types of statutory intervention into contract, and the power relationships at the root of the intervention. In each case (except for SGA) the legislation is capable of application to land contracts. This analysis seeks to distinguish these traditional methodologies of statutory intervention into contract from that of the new scheme to ascertain whether the new scheme alone operates outside the framework of the classical conceptualisation of contract.

5.2. The Power Differential

While in statutes mentioned here there is the common factor of a disparity in market power, the question of power is not straightforward. In the case of a traditional consumer contract (of sale of goods) the powerful parties identified in the SGA, the TPA, the Fair Trading Act 1989 (Qld) and the CRA may all derive power simply by virtue of the market operation of that subject matter. The consumer may be powerless to effect changes to the terms of sale, or to purchase elsewhere.

In land sales and retail leasing on the other hand, the market will determine who holds the power. An offeror in a falling market will hold power – the offeree will have little choice but to accept (or risk having no contract). The opposite occurs in a rising market. This demonstrates that it can be simplistic to assume that any party will always have power. To that extent the way in which the legislature identifies the powerful party and then deals with the power differential will be crucial in determining the success of enforcing a ‘moral dimension’. In contrast, the common thread through the legislation discussed in this chapter, is that the weaker party, through market operation, can indeed be consistently identified as such.
Table 2: Consumer Protection Legislation and Corresponding Definition of Consumer

<table>
<thead>
<tr>
<th>Legislation</th>
<th>‘Weak’ party</th>
<th>‘Powerful’ Party</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Sale of Goods Act 1896</em> (Qld)</td>
<td>Buyers of goods</td>
<td>Sellers of goods</td>
</tr>
<tr>
<td><em>Trade Practices Act 1974</em> (Cth)</td>
<td>Those acquiring goods and services for personal use</td>
<td>Corporations (in trade and commerce)</td>
</tr>
<tr>
<td><em>Contracts Review Act 1980</em> (NSW)</td>
<td>Non-trade contractors</td>
<td>Unspecified</td>
</tr>
<tr>
<td><em>Retail Shop Leases Act 1984</em> (Qld)</td>
<td>Retail tenants (excluding public corporations)</td>
<td>Landlords leasing to a retail tenant</td>
</tr>
<tr>
<td></td>
<td>whose leased area is less than 1000 m²</td>
<td></td>
</tr>
<tr>
<td><em>Fair Trading Act 1989</em> (Qld)</td>
<td>Those acquiring goods and services for personal use</td>
<td>Suppliers/person in trade or commerce</td>
</tr>
<tr>
<td><em>Property Agents and Motor Dealers Act 2000</em> (Qld)</td>
<td>All buyers of residential land</td>
<td>All sellers of residential land</td>
</tr>
</tbody>
</table>

5.3. **Implied Terms**

Parliaments had introduced statutory measures to counter dealings offending the ‘moral dimension’ long before the *Sale of Goods Act 1896* (Qld) (‘SGA’) – for example, the *Passenger Act 1801* (Imp). In the *SGA*, Parliament sought to codify the common law rules governing implied terms in consumer contracts for the sale of goods. This was an early foray into the dissipation of the principle of *caveat emptor*. The market for consumer goods had been radically increased as a consequence of industrialisation. Consumers had

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126 See above, section 4.3.
begun dealing with intermediaries rather than the producer and were not in a strong position to make inquiries expected under *caveat emptor*. The haggling of the marketplace no longer could occur and consumers were at a disadvantage as to knowledge and therefore power. Terms as to quality and merchantability were therefore to be implied into contracts for sale of goods to restore balance to the relationship. The classical foundations of contract law had not anticipated the dislocation of consumer from supplier and the legislation addressed the new power differential by a reallocation of risk from the buyer to the seller.

The Act does not however interfere with the classical conception of contract, or its formation. Rather, the Act operates within the common law framework in the same way as the common law itself had (and does) imply terms.

The *Trade Practices Act 1974* (Cth) (‘TPA’) provides an example of the expansion of the *SGA* concept of statutory implied terms albeit applying to corporations supplying goods in trade or commerce. Part V Division 1A provides for corporate suppliers to bear the responsibility for product safety and information; and Division 2 contains the core of the *SGA* conditions and warranties in consumer transactions. These provisions reflect (corporate) suppliers’ position of superior knowledge about products, and the consequential power they hold in the marketplace. It can be conceived as offending morality if a corporate supplier were able to disclaim liability for faulty products where a consumer was powerless to inquire.

Senator Murphy when introducing the Trade Practices Bill 1974 (Cth), said:

> The existing law is founded on the principle of *caveat emptor*. That may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods on terms and conditions suitable to the vendor. The consumer needs protection by the law.\(^\text{127}\)

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\(^{127}\) Commonwealth, Parliamentary Debates, Senate, 2-3 April 1974, 1872 (Senator Lionel Murphy).
This highlights the reallocation of risk undertaken by the Parliament in these provisions. It also acknowledges the change in the relationships of the marketplace from that which led to the development of classical contract law to that now regulated under a scheme of implied terms. At the same time, these provisions are expected to operate within the framework of classical contract theory.

5.4. **Conduct Inside and Outside Contract**

Part V Division 1 of the *TPA* regulates the practices of corporations both within and outside the contract relationship. It contains a series of provisions regulating conduct considered to be unfair, in relation to the supply or possible supply of goods and services and to the sale of land and employment contracts. This differs from the *SGA* implied terms as:

- it covers representations *actually* made by the supplier where the *SGA* implies that representations have been made;

- it moves outside the contract itself by proscribing conduct also where it relates to *possible* supply of goods or services in a move away from classical theory which limited responsibility to conduct within the contractual relationship; and

- it expands the reach of the protective mechanisms beyond sale of goods.\(^\text{128}\)

The *TPA* goes further again, and in s52 prohibits misleading and deceptive conduct generally by corporations engaged in trade or commerce. This is not limited to any particular type of contract or negotiations and it moves further beyond the contractual relationship and classical contract vitiating factors.

Senator Murphy explained parliament’s rationale in expanding protective measures: ‘Clause 52 prohibits misleading and deceptive conduct and does so in general terms. It is important that there should be such a provision if the law is not to be continually one step behind businessmen who resort to smart practices.’\(^\text{129}\)

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\(^{128}\) *Trade Practices Act 1974* (Cth), ss 53A, 53B.

\(^{129}\) Commonwealth, Parliamentary Debates, Senate, 2-3 April 1974, 1877 (Senator Lionel Murphy).
Senator Murphy’s position reflects the common understanding of why consumer protection legislation exists. It highlights that parliament has sought to enforce the ‘moral dimension’ in legislating to redress a power imbalance in the market.

While these provisions extend the reach of protection beyond the classical contract the common law foundation remains and has not been altered by the TPA. Factors which may not have supported an action at common law will support relief under the TPA. For example, the Federal Court has confirmed that ‘[t]he generality of s52 does not support an implied limitation that would exclude from its operation conduct inducing an error of law’. However the additional vitiating factors under the TPA remain within the conceptual contractual framework of classical theory.

5.5. Unfairness and Review of Contracts

The Contracts Review Act 1980 (NSW) (‘CRA’) takes a different approach to dealing with a power imbalance in contract. Rather than following the SGA/TPA implied terms framework, it offers guidelines for the courts to determine whether a contract was unjust in the circumstances at the time of formation, and relief for parties to such an unjust contract. Relief includes varying, avoiding or enforcing all or part of the contract.

Since the introduction of the CRA (in 1992, with substantial amendments in 1998) the TPA has inserted its own unconscionability provisions, in Part IVA. These provisions however initially sought to apply common law unconscionability within the TPA framework. CRA differs in its approach.

Kirby P in West v AGC (Advances) Ltd offers an insight into the tenor of the CRA:

\[\text{The Act, although it operates in the domain of contract law, signals the end of much classical contract theory. ... Where such a radical disturbance of time-honoured concepts governing contractual relations between parties intrudes upon settled law, there is a natural disinclination to}\]

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130 Inn Leisure v D F McCloy (No 1) (1991) 28 FCR 151, 166.
131 Under s4(1) of the CRA, ‘unjust includes unconscionable, harsh or oppressive.
132 Trade Practices Act 1974 (Cth), s51AA(1) ‘A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories’ (emphasis added).
apply the statute as its language would suggest the Parliament to have envisaged. There is an equal inclination to by-pass the full consequences of such novel provisions by avoiding the application of the statute altogether and relying upon previously settled and more familiar avenues of redress. … Until the court implements the legislative intention by offering relief under that section, which has the purpose of avoiding as far as practicable the unjust consequence or result of the contract stigmatised as unjust, the legislation will continue to be ineffective and the purpose of the Parliament in enacting it will be frustrated.¹³³

His concerns are borne out by the majority judgement in that case. Where Kirby P had identified injustice and lack of conscience, McHugh JA (in the majority) saw none. The latter judgement reflected a classical laissez-faire approach of personal responsibility (caveat emptor) and indicated that the legislation was to be read purely in the context of classical contract theory. Kirby P had criticised the approach of Hodgson J in the court below for adopting the pre-existing law to provide relief. ‘The discretion is not to be limited in its exercise by reference to the relief available under pre-existing law … relief should be framed by the court freed from the preconceptions involved in earlier legal remedies for unconscionable contracts.’¹³⁴

However McHugh JA said that ‘…I do not see how [a] contract can be considered unjust simply because it was not in the interest of the claimant to make the contract or because she had no independent advice’. In fact he found that Mrs West did receive independent expert advice from her accountant son, and a barrister friend. Kirby P rejected that this advice was independent or appropriate. So while the CRA lists the fact of independent advice as a relevant consideration in assessing the justice or conscience of a contract, McHugh JA appears to reject the notion, yet he still addressed the issue in his reasons.

The contrast between the approach of the two judgements illustrates the challenge in offering a wholesale change to the foundation of contract law. The parliament’s intention to legislate conscience into contracts will not necessarily be enough to overturn centuries of classical theory.

¹³³ (1986) 5 NSWLR 610, 611-12.
¹³⁴ Ibid, 616.
The contrast continues to be seen in the application of the CRA. In *Baltic Shipping Co v Dillon*, Gleeson CJ said ‘[t]he general policy of the law is that people should honour their contracts. That policy forms part of our idea of what is just.’ As a reflection of classical theory, this seems to take an approach similar to the majority in *West*.

In *Permanent Trustee Co v Elkofairi* the court rejected the application of the CRA quoting Sully J:

> It would not accord… with the legislative will… to interpret and apply the provisions of the Act as to make any contract which falls within the theoretical ambit of the Act nothing more than a provisional engagement, the obligations and entitlements under which are entirely, or all but entirely, at large depending upon the view which happens to be taken by a particular Judge or Court in a particular case.

> [T]he present case is one involving a series of normal, commercial transactions between a Bank and a person wishing to borrow money from the Bank. In any such case the law has always imposed upon the Bank an obligation to be honest in its dealings with the intending borrower, and has always granted relief in a case of fraud or misrepresentation or other dishonest conduct on the part of the Bank. No doubt the Act may be understood as expanding the nature and the scope of circumstances in which the law will interfere with a contractual engagement that is on its face regular. But it does not follow, in my opinion, that in such a case the Bank is to be treated as though it were a charitable foundation, a social welfare agency, or a conduit for the provision of legal aid services. To hold otherwise would be, in practical terms, to destabilise normal commercial intercourse, a cardinal component of which is, in the nature of things, certainty as to entitlements and obligations.

This decision was reversed on appeal so that ultimately the contract was found to be in breach of the CRA but also unconscionable in the Amadio sense. The appeal court however

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136 *West v AGC (Advances) Ltd & Others* (1986) 5 NSWLR 610; cited with approval in *St George Bank Ltd v Trimarchi* [2003] NSWSC 151 (unreported Dunford J, 14 March 2003) and *Bakarich (As executor of the Estate of Bakarich (dec’d)) v Commonwealth Bank of Australia* [2004] NSWSC 283 (unreported, Nicholas J, 20 April 2004). The CRA provided relief in the former (where there was some evidence of fraud by forgery) but not in the latter.
138 *Westpac Banking Corporation v Gordon & Reilly* (Unreported, Supreme Court of NSW Common Law Division, Sully J, 1 April 1993).
139 *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 (unreported, Beazley, Santow JJA, Campbell AJA, 18 December 2002).
cited *West* with approval but distinguished the case on its facts. ‘It is not sufficient… for a claimant for relief under the [Contracts Review] Act merely to point to a loss or inopportune transaction’.\(^{140}\)

This trend indicates that the classical view prevails over legislative intrusion into contract law and that Kirby P’s (dissenting) view in *West* has not held sway. The courts appear to have been reluctant to use the *CRA* to provide a consumer-protection antidote to the rigours of classical contract: reluctant to move beyond the analysis of the trial judge Hodgson J,\(^{141}\) criticised by Kirby P.

The approach of the New South Wales Parliament as applied by the courts retains a closer relationship with the equitable doctrine of unconscionability than to that of the new scheme – despite the argument of Kirby P that it exists to expand on the doctrine. Accordingly, it presupposes that a contract has been formed in terms of the classical contract rules and adopts the common law framework of vitiating factors. This is to be contrasted with the pre-emptive scheme of *RSLA* and *PAMDA* both of which use a variety of devices to alter the circumstances in which a contract is formed and the behaviour of the parties in entering into their bargain.

### 5.6. **Contrasting Approaches**

The three different Acts cited illustrate a progression of approach. All seek to provide redress for those routinely disempowered in contractual (or other) relations, but do so by a variety of means: from implied terms, through proscription of misleading conduct, to unconscionability. The *TPA* provided an alternative to contract law whereby aggrieved consumers or those dealing with tradition corporations may seek redress regardless of contract law. However with respect to unconscionability, the *TPA* and the *CRA* (as applied) import the common law standards into statute. Again though, they both rely on an existing contract and work within common law contract rules.

\(^{140}\) Ibid, [78].

\(^{141}\) *AGC (Advances) Ltd v West* (1984) 5 NSWLR 590.
While Parliament and the courts are used to interpreting contracts and extra-contractual relationships subject to legislation in furtherance of a ‘moral dimension’, the new scheme places a new layer of regulation onto contract interpretation. This layer is that of conscience applied at the coalface of contract formation, where the new scheme seeks not to afford a review of the contract after the fact, but a better contract in the first place. The processes to achieve this lie not in application of measures that find parallels in common law (such as implied terms, misrepresentation or findings of Amadio unconscionability) but rather in information equality through disclosure, promotion of autonomy in bargaining through warnings and through the absolute right to withdraw during the cooling-off period.

As already implied though, amelioration of strict rules of contract law is not limited to legislative intervention. Since the 18th century, the courts have sought to give effect to the parties’ intentions where they would otherwise be defeated by the technical rules of classical law.142 It has been seen in this chapter that statute has followed equity in some cases, creating opportunity for remedy where parties have acted without conscience – albeit largely within the existing framework of contract law. The following sections examine further common law elements relevant to contract and how they interact with the new legislative provisions.

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142 See eg Atiyah, above n6, 111, 167.
6. Equity and Conscience

No examination of contract would be complete without including the principles of equity which effectively form an integral part of common law contract, and equitable remedies which offer relief within the classical contract methodology.

In the early part of this century, there was an overriding importance attached to the concept of freedom of contract and the need to hold parties to their bargains. These shouldn't be allowed to override competing claims based on longstanding heads of justice and equity.

According to Professor Paul Finn nearly 20 years ago, ‘the unconscionability principle (as distinct merely from the specific unconscionable dealings doctrine) is becoming as imperialistic in equity as the neighbourhood principle is in tort law’. There is no suggestion that this trend is abating. This chapter seeks briefly to chart the transformation of the equitable doctrine of unconscionability to the principle of unconscionability now widely found in common law. This aims to contextualise Parliament’s apparent appeal to conscience in *RSLA* and *PAMDA* within the broad principle of unconscionability. It will be argued that unconscionability can be conceptualised in terms of traditional libertarian principles of freedom of contract. If this is the case, can the new scheme be said to shift the conceptualisation of contract further towards a reliance on a general standard of conscience which operates within the framework of common law contract, or instead does the new scheme move these types of contract outside the common law framework altogether.

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6.1. **Unconscionability as a Concept**

Early cases on unconscionability focus on the nascent nature of contract law of the time. The affluent classes were those engaged in transactions that came before the courts, and real property and expectant interests were the focus. It might seem strange today to some that equity considered expectant heirs – educated but dissolute – and their contracts deserving of the court’s protection. But these cases formed the underlying principle, that ‘there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting where there is weakness on one side and advantage taken of that weakness’.\(^{147}\)

The leading modern case on unconscionability, *Amadio*,\(^ {148}\) was handed down in 1983; *Louth v Diprose*\(^ {149}\) followed in 1992 and *Garcia*\(^ {150}\) in 1998. These cases illustrate that justice and equity apparently continue to underscore the courts’ application of the law of contract, albeit in a different context to that of *Earl of Aylesford v Morris*.\(^ {151}\) As a doctrine however, each case confirms that the courts continue to apply the rules of contract to establish formation along classical lines, then examine whether there is a vitiating factor.

Anthony Duggan points out that

> Perhaps the most enduring characteristic of the High Court's approach over the years to private law adjudication has been its commitment to equity and the equitable notion of conscience ('unconscionability') as a basis for reforming the law and changing entitlements.\(^ {152}\)

The emergence of notions of good faith in statute and case law\(^ {153}\) confirm that this type of thinking (ie justice and equity) continues to influence the development of contract law.

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\(^{147}\) *Earl of Aylesford v Morris* [1871] A 67.
\(^{149}\) (1992) 175 CLR 621.
\(^{151}\) [1871] A 67.
This suggests that parliaments and the courts are increasingly sensitive to the possibilities of harsh outcomes arising from strict application of the laissez-faire contract rules. Their approach however has broadened from its foundation in the equitable doctrine. This is borne out of course by the rationale behind the enactment of the provisions under review in this paper.

### 6.2. The Meaning of ‘Unconscionability’

Traditionally, in terms of the doctrine of unconscionability,\(^1\) ‘unconscionability’ was a term of art which implied an immorality in the transaction.\(^2\) It related to a power imbalance,\(^3\) where the powerful party knew of a special disadvantage and took advantage of the weaker party regardless.

*Amadio* was the watershed case in Australia providing the definitive modern application of the principle. The case discussed the doctrine and the circumstances of its application sufficient to lay the foundation for certainty in this area of the law. Rather than provide a checklist of circumstances of disadvantage, the court saw unconscionability as an ‘underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created’. It was not enough for there to be simply a difference in the bargaining power of the parties – the ‘special’ disadvantage must be in the order of a

> disabling condition or circumstance…which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.\(^4\)

More recent Australian authorities provide a clear guide to the application of rules of unconscionability. In *Louth v Diprose*,\(^5\) the appellant induced the respondent to give her

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\(^1\) Given voice in cases such as *Earl of Aylesford v Morris* [1871] A 67; [LR] 8 Ch App 484.


\(^3\) Paul Finn ‘Unconscionable Conduct’ (1994) 8 Journal of Contract Law 37, 47.


\(^5\) (1992) 175 CLR 621.
money to purchase a house on the threat of self-harm. Brennan J discussed the elements of the dishonest conduct which smacked of fraud: a relationship placing the donor at a special disadvantage; the donee’s unconscientious exploitation of the disadvantage; and the consequent overbearing of the will of the donor who is unable to make a worthwhile judgement in his best interests. The respondent was in a position of emotional dependence on the appellant: she was in a position to influence his actions and decisions, resulting in the improvident transaction. In this case, the appellant deliberately used the infatuation and her own deceit to procure a benefit – this tipped the scales in favour of applying equity, which would not merely relieve the plaintiff of the consequences of their own foolishness.

Since *Amadio* and *Louth v Diprose*, the application of ‘unconscionability’ has broadened somewhat. The term appears to be restricted no longer in its application to the equitable doctrine of unconscionability in the *Amadio* mould. The broader use has perhaps been assisted by the 1992 amendments to the *Trade Practices Act 1974* (Cth) but it is applied even more broadly again than these provisions warrant.

Arguments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* sought to use ‘unconscionability’ as a bar to the appellant using a film which had been taken while trespassing. The Commonwealth, intervening, took the idea further:

> in determining whether the use of the information would be unconscionable, the court should take account of all the circumstances of the case, including the competing public interests in preserving the rule of law, protecting private property and in otherwise protecting the relevant information and the public interest in freedom of speech.

Nowhere in this submission is there mention of *Amadio*-style special disadvantage – the submissions sought to use the concept of ‘unconscionability’ in a broader sense than that traditionally used.

Ultimately these submissions were rejected. Gleeson CJ observed:

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159 See below.
160 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 211.
No doubt it is correct to say that, if equity will intervene to restrain publication of the film by the appellant, the ultimate ground will be that, in all the circumstances, it would be unconscionable of the appellant to publish. But that leaves the question of the principles according to which equity will reach that conclusion. 161

This was supported by Gummow and Hayne JJ who said that ‘…the notion of unconscionable behaviour does not operate wholly at large as Lenah would appear to have it’. 162 Though unconscionability was tested in a broader application in this case, the court rejected it as a primary source of rights in favour of its place merely as an element required for the application of the rules of equity.

This case illustrates how the concept of unconscionability (rather than the doctrine) could be expanded from its Amadio sense as an exception to contract, to a broader Gilmore-style duty couched in terms of conscience: an obligation which could underpin more discrete areas of law from contract to tort, to newer concepts such as privacy also argued in Lenah Game Meats.

It is this type of broad obligation to behave in a conscientious manner which forms the context of conscience relevant to the new scheme.

### 6.3. Common Law Introduction of Conscience into Contract

While consumer protection policies given voice through legislation such as TPA and RSLA specifically introduce conscience into commercial contracts, they apply a framework similar to that of equity: ascertaining the existence of a contract based on traditional contract law, then identifying whether the relevant vitiating factors apply. That is to say, they operate in tandem with the classical contract framework, but outside it. There is however a theoretical basis on which conscience could be seen to form an integral part of the classical framework rather than an exception. On this basis, the framework would see conscience as the standard for mutuality of the parties, contract terms related to the ancient concept of just price, and ultimately the imposition of matters of form to ensure substantive

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161 Ibid 227.
162 Ibid 245.
transactional conscionability. This framework distinguishes *Amadio* unconscionability (in equity) focussing as it does on conduct.

**Conscience as the Standard**

One of the challenges in applying conscience within the framework of classical contract law is the potential to alter the accepted wisdom of libertarian principles of freedom of contract and personal autonomy of contracting parties.

Bigwood has observed the historical importance of freedom of contract tempered by the application of justice and equity. 163 His idea of ‘conscience’ is one rooted in equity, which forms the standard for a consensus-building relationship. In this way equity provides a theoretical foundation for mutuality. Its purpose is not to disturb the allocation of tolerable risks, but rather to justify legitimate intrusions into freedom of contract (presumably via equitable notions of conscience) as institutional responses to imperfections which exist in markets. 164 In support (albeit in the US context), DiMatteo 165 quotes Professor Eisenberg: ‘a new paradigmatic principle – unconscionability – has emerged. This principle explains and justifies the limits that should be placed upon the bargain principle on the basis of the quality of a bargain’ (emphasis added) - without conscience, there is no freedom of contract. This conceptual framework helps refute Friedman’s analysis 166 which seems simply to excise from contract law any subject matter regulated externally in any way, and retains regulated contracts by accepting limitation on freedoms.

Likewise, Atiyah’s market model 167 can accommodate the limits on freedoms on the basis that without conscience there would be no free agreement (ie one without pressure). Atiyah discusses intervention in the contracting process in terms of ‘balance of convenience’. 168 In Atiyah’s terms then, can the provisions in the Acts which protect the

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163 Bigwood, above n44, [7].
164 Ibid [23].
166 See above, n119.
167 See above, n79.
168 Atiyah, above n6, 329.
quality of the parties’ bargain be justified on the basis that they enhance the framework of the market-based law. Alternatively, do they destroy that essential characteristic of the law of contract.

Broad notions of fairness and conscience form the background to the overall scheme adopted by both statutes\(^\text{169}\) although neither unconscionability nor unfairness is explicitly mentioned in \textit{PAMDA} itself. While \textit{RSLA} does provide specifically for unconscionability, its provisions relating to disclosure and advice imply an attempt at introducing conscience as the standard for mutuality in retail shop leases.

As unconscionability in \textit{PAMDA} is not defined, on DiMatteo’s argument this will impair the parties’ understanding of the purpose of the disclosure or warning provisions thereby limiting their effectiveness.\(^\text{170}\) If it were explicit that the formalities were to pre-empt a defined proscribed conduct, application of the Act would be seen as relevant thus enhancing its desired effect. While the strong language employed in the Parliament upon the introduction of \textit{PAMDA} suggests an underlying rationale of conscience in all aspects of the Act there is no apparent standard of conscience in the Act itself.

On the other hand, \textit{RSLA} s46A explicitly proscribes unconscionability – for both landlord and tenant. While s47B contains matters which may be taken into consideration in determining unconscionable conduct, it is left unsaid in the statute that unconscionability is relevant to the scheme of disclosure and provisions for lawful early termination of the lease. It could be said that attempts to alter unconscionable behaviour through a specific scheme of disclosure fails to satisfy DiMatteo’s requirement of transparency, but the context of the Act as a whole supports a standard of conscience in retail shop lease dealings. The unconscionability provisions however operate parallel to the equitable doctrine of unconscionability – whereby a contract is tested after the fact. While the Act implies conscience, whether it can be argued that it supports the concept of a standard of mutuality which would fit within common law contract principles is less certain.

\(^{169}\) See above n 47.
\(^{170}\) DiMatteo, above n165, 294.
In each case, as Griggs points out, values justifying consumer protection are not articulated. Coupled with piecemeal legal reform, ‘society can end up with a confused, convoluted and conceptually incoherent body of law’. While both Acts apparently attempt to address the conscience of contracting parties, *PAMDA* in particular fails to provide a context for the parties’ conscience to form the standard by which the legitimacy of their contracts is measured. The standardised response of *PAMDA* (and indeed of *RSLA* in its disclosure and advice provisions) to a host of covert assumptions reduces the potency of the provisions to provide an avenue for enforcing the conscionability the Acts apparently seek.

**Capacity**

Following this argument as to the legitimacy of introducing conscience as the standard, Waddams addresses the related issue that in applying this standard, those it seeks to protect are deprived of the power of contractual capacity. Additionally, the benefit of the law increases with the wealth of the weaker party which evidences an alteration in the risk (and therefore benefit) of the transaction. This changes our conceptualisation of the nature of the market and of the basis of freedom of contractual dealings.

If adjusting the market is consistent with the classical economics of Adam Smith and also with Friedman’s analysis of contract, the unconscionability of equity need not operate external to the law of contract. It could instead form part of the contractual framework. On this approach, removal of contractual capacity as described by Waddams may in fact fall within Bigwood and DiMatteo’s acceptable limits to absolute freedom. Unconscionability as a standard of contract law itself would therefore justify interference where freedom itself no longer exists and Atiyah’s market model of contract is undermined.

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172 See eg Marshall above n155 44.
173 Waddams, see above n43, [15].
174 Ibid 294 – but note Atiyah only considers classical economics to explain establishment of contract, not enforcement and intervention.
175 See above at n119.
176 See above at n173.
177 Bigwood, above n44; DiMatteo, above n165.
The uniform application of each Act to all tenants/buyers as the weaker party defines them as having only restricted capacity to contract – capacity which requires support in the form of disclosure/warning statements and a cooling-off period. Whether this truly empowers this class, or truly prevents unconscionable conduct, is open to question. Certainly these parties have a unilateral right to end the contract where the paperwork is not in order, and in the case of PAMDA, within the cooling-off period.

Waddams points out that the doctrine of unconscionability applied to individuals is not an appropriate way to assist a class of persons, and that this is the purview of the legislature. The legislation does address this critique of unconscionability to the extent that Parliament takes responsibility for assisting a class – but Parliament has failed to link adequately the express conduct to be averted and the regulated contracting process.

Hugh Collins takes Waddams’ point further, identifying that the general criticism of such regulation as that it ‘invariably harms those groups it is designed to protect’ through a backfiring of the market. His view though is that ‘a hybrid reasoning based on open-textured rules [such as unconscionability] still provides a superior regulatory strategy to formalism and the rigid rule of enforcement’. As discussed above though, the new scheme fails to represent such a hybrid reasoning, relying as it does on rigid enforcement.

Andrew Robertson on the other hand questions the role of voluntariness in contract. He looks at standard form contracts, objective interpretation of contracts by courts and incorporation of terms to conclude that ‘rather than looking to the voluntary assumption of obligation as a touchstone for the development of contract doctrine or the resolution of difficult issues, we need to embrace a more sophisticated conception of contract law’.

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178 Waddams, above n43, [15].
179 Collins above n16, 274.
180 Ibid.
182 Ibid, 217.
In contrast to Robertson’s argument that ‘contract scholarship must… take the standard form, rather than the negotiated transaction, as its central focus,’\textsuperscript{183} the context of this paper requires focus on the transaction to the extent that it is negotiated. Indeed the impact of standard form contracts and boilerplate clauses is outside the scope of this paper. Instead voluntariness is measured in terms of the tenant/buyer’s ability to enter into a contract at all, and to negotiate basic substantive terms such as price, inclusions, settlement date and conditions (building, pest inspection, finance) for land sales, and in respect of retail shop leases, terms such as rent, term, fitout costs, rent review and option.

This focus is justified in terms of the nature of the protective measures implemented by Parliament in the new scheme in which buyers/tenants are warned or required by the law to seek external validation of their decision,\textsuperscript{184} are given leave to end the contractual relationship,\textsuperscript{185} and are offered a wide range of factors (including for example good faith)\textsuperscript{186} giving rise to the possibility of relief outside the traditional equitable doctrine of unconscionability and perhaps outside common law contract. These provisions and the unconscionability provisions in the \textit{RSLA} all address negotiated terms and the negotiation process. Therefore if unconscionability is the mischief aimed at by Parliament in both Acts, then it is the parties’ voluntariness in the negotiating process to achieve just terms (outside the standard form contract terms) – their freedom of contract – that is under scrutiny.

Robertson’s argument is however relevant when he argues that ‘an obligation can only be regarded as voluntary if the obligation is meaningfully understood and the decision to adopt it is substantially unconstrained’.\textsuperscript{187} His analysis shows that ‘parties’ deficiencies of understanding and choice are substantial and widespread’.\textsuperscript{188} In particular, he cites wide evidence that parties fail to read their (standard form) contracts. On this basis, he contends

\begin{flushright}
\textsuperscript{183} Ibid, 187.
\textsuperscript{184} \textit{PAMDA} s366, \textit{RSLA} ss22-22D.
\textsuperscript{185} \textit{PAMDA} s368.
\textsuperscript{186} \textit{RSLA} ss46A, 46B.
\textsuperscript{187} Robertson above n181, 181.
\textsuperscript{188} Ibid.
\end{flushright}
that voluntariness is not a prerequisite to a binding contract, if courts will find parties bound regardless of their knowledge or understanding of the contract.

The imposition of disclosure statements, a measure supported by Griggs in relation to land sale contracts,\(^\text{189}\) and warning statements, can be looked at from two perspectives using Robertson’s argument. First, if contracting parties fail to read contracts in the first place, why would they read a disclosure or a warning statement? If this is the case, then disclosure and warnings make no difference to parties’ capacity. Alternatively, the offering of a disclosure or warning statement might provide the impetus for a party to inform themselves as to the terms of their contract, thus providing the element of voluntariness Robertson otherwise finds lacking.

The capacity of parties and their freedom to contract remains relevant however so long as the Acts use the blunt instrument of the universal disclosure/warning statement based on a presumption of disempowerment of a particular contracting party. This undermines the argument that conscience sets the standard as it applies only to one of the parties to the transaction. Therefore the issue becomes not whether the protected party has capacity, but whether the unprotected party retains their own freedom of contract.

Hansard makes it clear that Parliament identified purchasers as those who ‘require’ protection under \textit{PAMDA}.\(^\text{190}\) Accordingly a seller stands to lose a sale where their agent has failed to complete paperwork properly, even where the seller has derived no improper gain in terms of the doctrine or the principle of unconscionability. A seller may also be at the mercy of a buyer who refuses to comply with formalities. If the seller suffers financially as a result, there will be a redistribution of wealth with no regard to the conscience of the transaction, but with an overarching yet incorrect view as to the conscience of the seller class. The conscientious retail shop landlord may likewise be left to the mercy of a tenant under \textit{RSLA}.

\(^{189}\) Griggs above n102, [40].
\(^{190}\) See eg Queensland \textit{Parliamentary Debates}, 7 September 2000, 3103 (Hon JC Spence, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women’s Policy and Minister for Fair Trading).
It is recognised that many more retail shop leases than residential land sales will involve parties of uniformly disparate bargaining power. It is only a comparatively small proportion of residential land contracts\textsuperscript{191} where a marketeer (ostensibly the target of the legislation) is likely to be the seller, and where others stand to earn commissions at the expense of the buyer. On the other hand Queensland shopping centres were estimated to represent $9.6 billion of capital in 2001, and 53\% of all retail sales.\textsuperscript{192} The ‘majority’ of this capital investment was contributed to or owned by superannuation funds and listed property trusts\textsuperscript{193} – with ample finance and market power. Fifty-seven percent of specialty shops were owned by independent traders or small business franchises.\textsuperscript{194} Where the \textit{RSLA} causes a redistribution of wealth from a corporate landlord to a consumer tenant it can be argued that the consumer protection mechanism achieves its goal – but only where addressing a landlord’s unconscionability. Whether giving a retail tenant indiscriminate power to defer or delay negotiations or entry into a lease meets the goal of conscience in contract, is not so clear. Either way the indiscriminate presumption of disempowerment of a tenant fails to recognise the variation in relative power in the retail shop lease market.

The issue of power differentials in the application of principles of conscience affects the parties’ capacity to contract under the Acts in a further way. Firstly, landlords and sellers who are in fact the weaker party are denied full contractual capacity under the Acts where they prevent a bilateral right to enforce. The right to terminate during the cooling off period, or for non-compliance with a warning or disclosure statement may intervene in a contract which under the general law would have been valid and upheld even upon application of the doctrine of unconscionability. Parliament has determined that the defined parties and therefore society should benefit, but has failed to articulate the extent to which individuals or other classes do not. These others are denied consensus or full

\textsuperscript{191} Nationally, there were 49,406 financed existing dwellings in April 2005 but only 2,167 financed new dwellings in the same month - Australian Bureau of Statistics, ‘5609.0 Housing Finance, Australia’ (April 2005). This highlights the difference between the market in existing houses (less likely to be marketed by marketeers) and new ones (which are more likely).
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid.
capacity to contract, and by virtue of this the mutual nature of contract is diminished in spite of the arguments in favour of conscience as the standard for mutuality.

_Just Price_

The discussion so far suggests that setting a standard of mutuality is one conceptualisation of conscience as part of the framework of contract which does not necessarily support classical notions of freedom of contract and the parties’ capacity. An alternative conceptualisation is derived from the mediæval notion of a just price where a bargain would be fairly carried out without loss or gain to either side, and where justice was more important than freedom of choice.¹⁹⁵

Waddams’ distinction between unconscionable _conduct_ and unconscionable _transactions_ (as in _Earl of Aylesford v Morris_)¹⁹⁶ illustrates the difference between the process and the outcome – where just price is reflected in the outcome. DiMatteo also looks at the evolution of equitable principles from the theory of just price. Within classical contract law, the development of the doctrine of consideration formed an alternative to an examination of the terms of a transaction – it was a formality to satisfy the notion of fairness of exchange. The doctrine of unconscionability provided an excuse to examine the fairness of a contract (transactional unconscionability) outside the doctrine of consideration. On this view, the concept of just price continues to underpin contract law (in its broader sense).

As an alternative, but still grounded in just price, statutory forms provide a systematic method of preventing substantive unconscionability: but again, provided unconscionability or unfairness is adequately defined.¹⁹⁷ To justify market intervention, the adjustment process must be made according to transparent principles. There is more likely to be a successful intervention where market participants are aware of the nature of the unfairness to be sanctioned.

¹⁹⁵ See eg Atiyah, above n6, 61-2.
¹⁹⁶ Waddams, above n43, [3].
¹⁹⁷ DiMatteo, above n165, 294.
While the Acts may fail to provide a clear standard of conscionable behaviour by which parties’ transactions (and thereby their procedural fairness) can be measured, they do appear to reflect the thinking of a just price through the *RSLA* financial advice certificate and the *PAMDA* warning statement. In each case the tenant/buyer is required or encouraged to draw on third party expertise as to fair market price, rather than be part of the market themselves in determining what they are prepared to pay.

The measures fall short of meeting standards suggested by DiMatteo’s transparency and Griggs’ articulated values. On Waddams’ argument, they may do no more that simply reallocate risks. These critiques rest on the failure of each set of provisions to define the unfairness or unconscionability to be averted.

While the new scheme may not provide a comprehensive solution to questions of conscience in the contracts they regulate, they arguably do afford an example of the application of principles of conscience into contract by attempting to focus parties’ attention on adequacy of price and terms. The question remains however whether the measures of the new scheme can be conceptualised as part of the common law contract methodology through the more traditional idea of protecting freedom of parties to contract, but by applying a standard of conscience. This is because of the application of the measures to only one of the parties to the transaction, rather than a genuine attempt at determining mutuality.

### 6.4. Procedural Conscience

In addition to the impact on the parties’ transactional conscience and capacity already discussed, procedural conscience, the nature of conscience and contract law itself is subverted.

The first issue in procedural fairness is the provision of disclosure/warning material to create a ‘level playing field’. Both Acts take this approach, though the *RSLA* is a more refined approach, requiring the landlord to take responsibility for providing the tenant with

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198 Waddams, above n43, 3.
information. It is clear however, regardless of the lack of definition of unconscionability in either Act, that the Acts share a goal of achieving conscience in a procedural sense.

While a scheme to protect a class of consumer is most appropriately implemented by parliament,199 parliament through these Acts denies individuals the application of the rules of conscience to their circumstances. The benefits of this approach are therefore lost. In addition to the uniform presumption of parties’ disempowerment, the Acts200 remove discretion to identify the traditional elements of common law unconscionability which look to procedural fairness:

- conduct that is unconscionable;
- that there is a special disadvantage;
- that the disadvantage was exploited; and
- that it would be unconscionable to procure a benefit from the transaction.

6.5. Conscience applied in the New Scheme

Using this framework it can be seen that while conscience may be the underlying goal of the legislation, its expression is denied in any recognisable sense. This in itself alters the traditional understanding of ‘conscience’ or ‘unconscionability’ which further muddies the understanding of what the Acts are trying to achieve. It is likely that the goal of the legislation extends beyond traditional unconscionability, and certainly beyond procedural unconscionability. Replacing this explicit assessment of a party’s individual circumstances with regulated procedural fairness in contract formation, denies a mechanism to address genuine unfair dealing and waters down the effectiveness of the new scheme.

The most subtle of the impacts of the uniform approach to conscience is the subversion of the contract process itself. Those to be protected under the legislation only fall into their class by virtue of their (common law) legal relationship with the other party. At common law, a contract will exist before arguments of unconscionability arise to limit its validity.

199 Ibid.
200 Outside the specific unconscionability provisions in the RSLA.
The parties’ relationship will be relevant first because they have a contract. Having been established via their contract, their relationship is relevant subsequently in relation to bargaining power and other duties and obligations. For the purpose of the Acts however, the parties enter into a contract thus establishing their legal identities but unless the statutory formalities are *first* adhered to, the landlord/seller can then be denied their bargain.

While the infrastructure of common law contract is used to render the assistance deemed necessary by Parliament, ultimately the legislation disallows application of the common law rules. This blurs the lines between the broad underlying statutory conceptions of conscience and the framework for dealing with that; and the common law contract framework which is subject to the application of equity and the rules of unconscionability.

This chapter set out to establish whether these Acts can be seen as shifting our conceptualisation of contract towards a reliance on a general standard of conscience within the framework of common law contract. One Act mentions unconscionability expressly though not in terms of the adjustment of parties’ rights under contract, and the other fails to mention conscience. Each therefore fails to identify conscience as a standard by which to measure the appropriateness or validity of a regulated contract. However each can be seen to represent an attempt to address transactional conscience through promoting a just price and procedural conscience through information delivery. The price for that may be an abrogation of contractual capacity by those apparently disempowered and a subversion of the application of the traditional conception of common law conscience.

In the same way that this chapter examined the way in which the new scheme interacts with the equitable and broader notions of conscience, the next chapter will consider the attainment of the goal of conscience in terms of some reliance-based remedies available at common law.
7. Reliance and Conscience

The last chapter looked at the role of equity in shifting the focus in classical contract theory towards incorporation of equitable principles of conscience: while statute has broadened the scope for conscience as a consideration in contractual relations, moves are afoot in common law to incorporate these principles. In the case of the new scheme, it is possible to conceive of its range of measures moving beyond the equitable framework, to promote conscience within the framework of contract law itself and indeed in terms of classical contract concepts. The effectiveness of the measures in doing so however is open to question.

This chapter evaluates the new scheme’s interface with estoppel and part performance, in the context of reliance theory. Like some principles of equity examined above, reliance theory provides a rationale to soften the impact of classical theory through its alternative perspective on liability, or the foundation for enforceability of a promise. Without looking to the parties’ individual circumstances, reliance theory determines the underlying authority of the promise itself according to whether the promisee has relied on that promise: it focuses on the nature of the promise. This thinking moves outside the strict framework of classical contract theory, but represents a broader interpretation of ‘contract law’ in that it finds obligation based on a transaction which otherwise does not meet the criteria of a contract.

This is relevant to the new scheme because of the structure of its methodology in favouring the tenant/buyer. While the unconscionability provisions in the RSLA apply to each party, the disclosure statements in RSLA and the warning statement and cooling-off provisions in PAMDA benefit only the tenant/buyer. As is to be expected, these provisions ignore the status of the promise outside the formalities of contract formation: classical rules supplemented by the legislation. Yet if the legislation is aimed at the conscience of the transaction, is it justified in restricting its application to promises falling within the classical framework. The status of the parties’ bargaining power has already been
examined, with the conclusion that the extent of power in a transaction is more complex than identification based on a party’s role in a contract.

Additionally, the alteration by PAMDA of the point of being bound has potential to affect the buyer in terms of classical contract law, where if the principles of reliance are not allowed due to the Act’s framework, there is potential for detriment to a buyer where none existed prior to the Act.

The issue raised by reliance theory is that in these circumstances, where no contract exists by virtue of the lack of compliance in terms of the legislation (or because of termination during the cooling-off period under PAMDA) will a non-complying party still have a right to sue in equitable estoppel or based on part performance (ie outside the framework of contract) and indeed should such a party continue to have such a right. The answer to the first question will give a more complete picture of the extent to which the legislation narrows the range of remedies open to parties in a promissory relationship – or broadly conceived, under contract law.

Reliance theory ties together legal and policy aspects of contract law to create an alternative foundation for contractual enforcement: as does the new scheme. If the theory is accepted as providing a rationale for the enforceability of a promise, the statutes may accommodate application of reliance-based remedies in spite of their narrow formal requirements.

### 7.1. Promises, Promises

There are many theories about what gives a promise the protection of law. Reliance theory operates on the premise that an obligation should be enforced where the promisee has relied on a promise. Within the law of estoppel or the rules of part performance, it

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201 See above, chapters 2 and 3.
202 Discussed above in section 3.1.3.
embodies a methodology to protect the interests of the promisee – even where the formal elements of a contract may be lacking.

Fuller and Perdue’s 1936 articles\(^204\) are widely regarded as the reference point for reliance theory and their argument continues to be supported in a more modern context.\(^205\) Fuller and Perdue conclude that the (US) courts often use protection of the reliance interest as the foundation of their decisions (in contrast to textbook analyses) and that reliance on a promise should form a distinct promissory interest:\(^206\) reliance is and should form the measure of the bindingness of promises. In this way they start to tie together the policy application of the courts with the legal approach of the texts providing a normative foundation for enforcement of contracts.\(^207\)

While it is doubtful that reliance is an unsung normative force behind modern contract law,\(^208\) in Australia it is possible to identify that reliance has been incorporated into elements of the broader classical framework. It does not however usurp foundational classical concepts such as the doctrine of consideration and while allowing the reliance interest in damages the courts have not denied protection of the expectation interest.\(^209\) In contrast to the common law, the new scheme’s dependence on universally applied standards requiring adherence to form, as well as PAMDA’s cooling-off period, appear to deny altogether the application of such a normative end, ie protection of a reliance interest. This approach ignores the scope of common law remedies, based on reliance, which invoke conscience in assessing parties’ rights in a transaction.

Fuller and Perdue reject the validity of using the expectation interest to underpin enforceability of a promise because they argue that at the point of contracting the promisee


\(^{205}\) See eg Michael Spence, Protecting Reliance (1999).


\(^{207}\) The reliability of the system of commercial bargains is an example of a policy outcome rather than a legal one.


\(^{209}\) See eg Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, 80: ‘The award of damages for breach of contract protects a plaintiff’s expectation of receiving the defendant’s performance.’
has nothing: so where a court protects the expectation interest and grants the promisee the
benefit of the whole of a breached contract, the promisee will be in a better position than if
the contract had not occurred, rather than restored to the status quo. In contrast, the new
scheme seeks to protect a buyer/tenant from the detriment of a contract, rather than to
afford them the benefit of enforcement. The conceptualisation of reliance is therefore
skewed under the new scheme: the pre-reliance position of buyers/tenants is something to
be protected not through compensation for loss if the promise is not carried out, but
through the right to invalidate the contract in spite of their own promise to perform.

Commentators such as Benson however disagree that a promisee has nothing at the point of
contract (and therefore cannot lose anything from a breach). He looks at proprietary
entitlements and concludes that compensation for the value of the reliance interest
presupposes an entitlement to a pre-reliance position\(^\text{210}\) ie 'the placing of the onus of
proof on a defendant… amounts to erection of a presumption that a party would not enter
into a contract in which its costs were not recoverable.'\(^\text{211}\) This entitlement logically arises
at the point of contract, and theoretically categorises reliance as a species of expectation
interest. The centrality of expectation damages in spite of the acceptance of reliance
damages by Australian courts supports this analysis. This analysis however avoids
identifying why the promise should be enforced and therefore ignores the nature of the
promise.

While classical contract theory like Benson’s comments\(^\text{212}\) may offer little insight into the
nature of the promise, Fuller and Perdue’s argument (in parallel with Gilmore’s later
hypothesis) suggests that protection of a promise need see no legalistic boundary; a system
of rights and obligations can exist in an apparent amalgam of contract, tort and restitution.
If the reliance theory framework is applied to PAMDA and RSLA, it is inconsequential that
the transactions regulated by the Acts be conceptualised as part of contract law or a unique
case under statute: the promises would instead form part of this continuum of rights and
obligations regardless of their framework of enforcement. Reliance theory itself

\(^{210}\) Benson, above n203, 21.
\(^{211}\) Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, 87.
\(^{212}\) See above n210.
deconstructs contract into a broader law of obligations. This would minimise the impact of the new scheme’s alteration of classical contract rules on our conceptualisation of contract law. On the other hand, the Acts provide no support for promises which do not comply with the protective measures in the Acts. This is the normative element lacking in the statutes which has potential to sabotage the goal of the scheme to engender conscience into these transactions.

If a regulated transaction fails to be categorised as a contract because it does not satisfy the requirements of the relevant Act, then a seller/landlord or a buyer (where the point of being bound under *PAMDA* has not transpired) bona fide parties to the transaction who might otherwise have demonstrated an enforceable promise using reliance-based doctrines, will be left without recourse.

The normative aspects of reliance theory have not universally been accepted: for example Pratt asks *how to identify* what should be protected.\(^\text{213}\) He points out that the reliance theorists’ argument is circular: Fuller and Perdue talk in terms of ‘reasonable’ and ‘serious’ reliance.\(^\text{214}\) Pratt defines ‘reasonable’ reliance as reliance on a reasonable expectation of performance, then identifies the ‘basic problem for reliance theory’ that it would not ever be reasonable ‘to rely on a representation not thought to bind the representor’.\(^\text{215}\)

This question can be asked in the context of regulated transactions where under the new scheme it may not be reasonable for parties to expect to be bound until the requisite formalities have been undertaken. In residential land contracts pre-\textit{PAMDA}, buyers accustomed to dealing with interstate regimes which used exchange of contracts, or had a cooling-off period, might have been ignorant of the Queensland regime and not have expected to be immediately bound. On the other hand, those accustomed to the Queensland system may have expected immediately to be bound. The introduction of \textit{PAMDA} warning statements in particular and to a lesser extent the advice certificates under


\(^{215}\) Pratt, above n213, 189-90.
RSLA may indicate that at least some parties to contracts did not understand that they were bound by their promises.

This view is different from expecting the other party to be bound. Even if a buyer/tenant had an expectation that they could get out of the contract (somehow) they would normally expect that the seller/landlord would be bound and that the buyer/tenant could rely on the promises of the seller/landlord accordingly. Providing the buyer/tenant with information about the terms of the contract and their entitlements under the legislation, the new scheme brings home to contracting parties the bindingness of their promise and the expectation that what the other party is telling them will be binding. Alternatively if parties are not provided with the regulatory paperwork they will be none the wiser about any deferral of obligation and could be reasonably expected to consider themselves bound.

Reliance is the carrying into effect the parties’ bargain where the parties have been neither casual nor remiss in defining its terms ie the contract complies with classical elements but not with the formalities of the new scheme – but where the buyer/tenant determines according to the statute. On this basis, Fuller and Perdue’s analysis would argue that reliance on that bargain should be compensated, and in answer to Pratt’s argument, it will be reasonable to rely on the other party’s promise.

Reliance then is considered to be action undertaken in furtherance of a representation of a contract (if not a contract de jure then a promise considered to be binding on the representor) to the cost of the actor. This action, in the view of reliance theorists, is a valid basis for finding a ‘contract’ or at least an interest capable of protection. This of course conflicts with the very essence of the measures in the new scheme, requiring as they do strict adherence to form to secure mutual common law contractual rights. The first step then to inquire into the extent to which the new scheme alters application of reliance theory, is to see how this theory is embodied elsewhere in Australian law.
In modern Australian terms protection of the reliance interest falls within the purview of estoppel, illustrated by *Waltons Stores (Interstate) Ltd v Maher*[^216^] (‘Waltons Stores’), and also its relation, part performance.[^217^] Both doctrines seek to ameliorate the effects of the formalities of contract with reference to alternative methods of recognising the bindingness of a promise – based on reliance principles – but will they continue to be available to parties to regulated transactions?

### 7.2. Estoppel

While the early 1980’s in the US may have been the heyday of promissory estoppel preceding a decline,[^218^] the doctrine was at that stage taking form in Australia as a supplement to the strictures of classical contract – giving the courts a means to relieve plaintiffs from unconscionable conduct in the context of a promise which is not a contract[^219^] - relevantly in the case of the new scheme, in situations where the transaction fails to comply with statutory requirements.

Fuller and Perdue conclude that to find reliance-based obligation in a purported contract in breach of the *Statute of Frauds* will necessarily violate the terms of the statute and commentators also advocate using estoppel in cases of informality – where the reliance provides evidence of the bargain[^220^] and where it ‘makes enforcement appropriate’.[^221^] However they find a way to avoid the injustices of denied enforcement without overtly violating the policy of the statute. First they point out that part performance will ‘take the contract out of the Statute of Frauds’[^222^] and secondly they point to the related doctrine of estoppel.[^223^] This rationale could be applied to transactions under the new scheme: applying

[^216^](1988) 164 CLR 387.

[^217^] *Property Law Act 1974* (Qld) s6(d) recognises the validity of part performance – even in relation to *Statute of Frauds* provisions for the creation of interests in land.


[^219^] Ibid; JW Carter and DJ Harland, *Contract Law in Australia* (4th ed, 2002), 140 ‘[I]t is nevertheless clear that all the rules on consideration must be taken with a very large grain of estoppel flavoured salt.’


to contracts which fail to conform to the disclosure and warning statement requirements, or where a buyer relies on the cooling-off period to terminate, and where invoking the statute will lead to injustice or the unconscionability Parliament seeks to ameliorate.

The hypothesis is that the Statute of Frauds will bar protection of the expectation interest, but will not bar protection of the reliance interest. The authors debate whether this interest can be called ‘contractual’. This indicates that the debate has broadened from an attempt to define the nature of contract as reliance-based, to an analysis of what may constitute a contract. This is relevant to consideration of the effect of the new scheme. Indeed the discussion that follows in their paper identifies part performance, estoppel and restitution as other (juridical) means of protecting the reliance interest. The authors admit though that recovery in these circumstances is based on the expectation interest. The pattern seems to be: insufficient elements for a classical contract; an element of reliance determined according to judge-made principles; reliance seen as evidence of enforceable agreement; agreement enforced according to the promisee’s expectation. Fuller and Perdue would argue that this goes further than warranted under a normative reliance-based approach to promissory obligations and in fact puts reliance at the normative centre of contract law: reliance defines the promise itself as binding.

In seeking to determine the rights of the parties, classical contract analysis will also seek first to identify whether or not there is a contract. If there is no contract, then the promise will not be enforced. It is only through application of reliance-based rules (eg part performance, promissory estoppel) that there is a gradual creation of rights and therefore entitlement to remedies. Application of the remedies will be a contextual matter, not dependent simply on the rules of formation.

As an example of such a remedy, Waltons Stores determined that while reliance on a promise will not of itself create a liability, where a party creates or encourages in the other an assumption that a contract will come into existence or a promise will be performed and


\[225\] Benson, above n203, 6, citing Fuller: an ‘ascending scale of enforceability’.

to the knowledge of the first party the other party relied on that assumption and consequently suffered a detriment, the first party will be estopped from denying the promise.

The case looks at the enforceability of a promise which does not have the force of contract. It examines the question of form, insofar as it discusses the Statute of Frauds provision in New South Wales. There was no contract in writing and no written memorandum; nor was a note of a contract signed by Waltons. Under s54A, an action could not be brought where the underlying agreement was not in writing.

Brennan J resolved this in these terms:

If ... Waltons induced the Mahers to assume that a binding contract had come into existence, the assumed contract was a written contract...If the subject of the estoppel which binds Waltons is that a binding contract had come into existence, the estoppel extends to the existence not only of the facts which are essential to the existence of a binding contract but also to the existence of a contract which is binding in law. An estoppel by conduct may relate...not merely to facts but to the legal complexion of facts – ‘to the validity and subsistence of relations’...

The Statute of Frauds and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel...and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel. The action to enforce an equity created by estoppel is not brought ‘upon any contract’, for the equity arises out of the circumstances ... (emphasis added).

Subsequently in Powercell Pty Ltd v Cuzeno Pty Ltd the New South Wales Court of Appeal applied the reasoning of the court in Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA, requiring ‘something more’ than a mere promise to support an argument of estoppel where that would otherwise subvert the purpose of the Statute of Frauds. There would need to be a secondary assumption that the defendant would not rely on the Statute of Frauds or of course that it had been complied with. Giles JA in Powercell

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228 Ibid.
229 [2004] NSWCA 51 (Unreported, Meagher, Giles, Santow JJA, 12 March 2004), [63]-[71] (‘Powercell’).
230 [2003] 2 AC 541 (‘Actionstrength’).
acknowledged that an interest in land has arisen in the absence of a written record. He pointed out that in those cases, the ‘assumption induced by the defendant is taken to have encompassed enforceable rights which cannot be said of the mere assumption that a contract exists when the law of land requires a written record for enforceability’. The court therefore supported Waltons Stores without necessarily undermining the Statute of Frauds.

The court in Powercell also rejected Robertson’s argument that Actionstrength could be distinguished from Australian estoppel and therefore that no secondary assumption was required. While Robertson argues that estoppel provides an independent source of rights and therefore can be used to enforce a promise (where the elements of estoppel are present) Giles JA found that ‘it does not follow that where the source of the rights is contractual, the statutory imperative of s54A can be overcome by creation of an alternative source of rights’. The court has therefore effectively reigned in the application of estoppel.

Either way, the dilemma posed by Fuller and Perdue is resolved. Both Robertson and the court in Powercell identify the nature of the action to compensate the reliance. Either the remedy will be found in contract, or if there is no contractual basis for finding a remedy, the court may find an equitable remedy arising out of the circumstances without recourse to contract or tort.

Estoppel is not a method for enforcing non-contractual promises. As Brennan J was at great pains to emphasise in Waltons Stores, equitable intervention occurs only where a party tries to use their common law rights in a way that offends conscience of equity. In Waltons Stores for example, the inducing party’s failure to correct the relying party’s false

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231 Powercell Pty Ltd v Cuzeno Pty Ltd [2004] NSWCA 51 (Unreported, Meagher, Giles, Santow JJA, 12 March 2004), [76].
232 Ibid [75]-[77].
234 Powercell Pty Ltd v Cuzeno Pty Ltd [2004] NSWCA 51 (Unreported, Meagher, Giles, Santow JJA, 12 March 2004), [77].
expectation was against conscience. When the relevant elements of equitable estoppel are present, it ‘almost [wears] the appearance of contract,’ but ‘in compensating an injured promisee estoppel does not treat the promise as a contractual undertaking’. A promise from a buyer/tenant to a seller/landlord in a regulated transaction may therefore theoretically attract this remedy if detrimental reliance and unconscionability results – despite there being no enforceable contract. However the terms of the statute giving rights to the buyer/tenant will need to be dealt with (rights to terminate during the cooling-off period or to terminate where a formality is lacking). The question is whether equity will apply in the face of the statute.

Consider this example:

A owns the management rights in an apartment block used for holiday letting and long-term residential purposes. The rights include the freehold ownership of a unit for the manager’s residence. A negotiates with B for the sale of the management rights, subject to contemporaneous sale of the unit. Both A and B are substantial business-minded corporate entities. An otherwise unconditional standard land contract and management rights contract are entered into. The land contract complies in all respects with PAMDA. Circumstances change, and the buyer requests a different (but related) entity – C – be replaced as buyer. The original contract is ended by agreement, and a new management rights contract and standard land contract between A and C are executed. This latter land contract does not comply with PAMDA, in that the warning statement is not annexed.

The substituted buyer seeks to terminate the contract, and relies on its rights under s367 PAMDA.

The legislation is clear that C has a right to terminate but the question remains whether the court will override this clear intention and allow the contract to be enforced (assuming that specific performance is an appropriate remedy).

The analysis in Waltons Stores needs to be adapted to cover these circumstances. In that case, the court acknowledged that the contract was not enforceable at law, but that the

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237 Ibid, 424.
238 Pratt, above n213, 181.
239 PAMDA s368.
240 PAMDA s367; RSLA s22.
parties would be bound by the legal effect of what they had represented was the contract. Here, the contract was binding but was determinable at the buyer’s option. The analogy can be drawn where the buyer represents that there is a contract thus inducing the seller to act on that basis, but in fact the buyer then terminates.

The ‘innocent’ party in this case may rely on this representation unaware of the formal defect, or unaware of the potential for disclaimer by the buyer. Indeed the ‘innocent’ party may have been told by the buyer that it will disregard the defect and continue regardless.

In reliance on the representation, the seller loses the benefit of a binding contract. Damages could include holding costs, legal costs, loss of price (if subsequently sold for a lower price) but detriment in terms of estoppel may be more widely construed. In *Wright v Hamilton Island*, the court rejected the respondents’ argument that the appellant had not suffered detriment. In that case:

> the respondents… relocated themselves, or …refrained from going elsewhere, and set up businesses …in the expectation and on the assumption that the appellant would act as it represented it would...

Those …representations promised non-enforcement of the contractual rights upon which the appellant now relies.241

In our example, there are a couple of reliance scenarios to consider. First, ending the first contract is an act undertaken on reliance of the promise that the second contract would be binding. Secondly, if the seller had vacated the premises; made a new business investment or taken a job in anticipation of settlement this would be reliance on the promise that the second contract was binding. It is clear that whether these scenarios constitute detriment will depend on all the circumstances. For example if the market changed and the seller was unable to sell the property in spite of genuine efforts, they may well have suffered detriment to satisfy equitable estoppel. The buyer’s insistence on exercising strictly legal rights may in these circumstances be considered unconscionable.

In Knapp’s view, ‘the case seems an excellent one for binding the promisor as soon as any appreciable amount of performance, preparation for performance or other change of position has taken place in reliance on the newly modified agreement’. Knapp also discusses the promisor’s reliance on the rule of law to protect from liability on their promise. Although he does acknowledge it as an unequal comparison with the promisee’s reliance on the contract, it would still not fall within reliance theory as it is not reliance on parties’ representations but rather is reliance on an externality. It is the act of inducing a reliance based on the action and knowledge of the promisor which is the actionable reliance (in terms of Waltons Stores). Both parties will be relying on the rule of law: it is not reliance of itself.

In relation to a Statute of Frauds defence, Charlick v Foley Bros Limited held that:

Where a great mercantile firm in substance invites its customers to dispense with the formalities of written contracts, and to rely upon the business honesty and fidelity of the firm to the pledged word of its responsible agents, it is distinctly dishonourable to repudiate a transaction so entered into upon the ground that the customer was simple enough to place reliance on anything short of a written undertaking duly signed.

The plaintiffs did not succeed as the contract was held to be conditional, but the decision indicates how a court might approach an appeal to statute to overcome a contractual obligation.

In Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd the High Court upheld a contract for banking services entered into by an entity prohibited from engaging in banking services. The court considered the legality of a contract. In that case, the contract itself was not illegal, and the court looked to the policy of the statute to formulate its
approach. The statute, it found, was enacted not to protect members of the public, but to facilitate economic policy.\textsuperscript{246}

Like the banking contracts in \textit{Yango}, non-conforming contracts under \textit{PAMDA} and \textit{RSLA}, are not unlawful. There are penalties imposed for failure to annex a complying warning statement under \textit{PAMDA}, and a dispute will exist in terms of \textit{RSLA} if a disclosure statement is not provided but in each case the contract is simply voidable at the option of the buyer/tenant. However unlike \textit{Yango}, the purpose of the legislation is protection of the public – at least of buyer/tenants entering into the regulated transactions.

In 1990, the Full Court of the Queensland Supreme Court found that an estoppel could not be set up in a transaction void for illegality under the \textit{Land Sales Act}. In contrast to \textit{Yango} and the new scheme, the \textit{Land Sales Act} was clear that the instrument was void. Reviewing the authorities, the court based its decision on the premise that it was ‘unable to see how the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute’.\textsuperscript{247}

In \textit{Gold Coast Carlton Pty Ltd v Wilson},\textsuperscript{248} the Full Court discussed the right of an off-the-plan building unit purchaser to terminate where the vendor had failed to comply with the statutory disclosure requirements of \textit{s49 Building Units and Group Titles Act 1980} (Qld). Failure to disclose details of management contracts would result in penalties to the vendor, and a right in the purchaser to terminate the contract within 30 days of becoming aware of the breach. In this case the vendor disclosed that the management contract was in place on terms contained in a schedule. The schedule contained an agreement which failed to identify the manager or commencement date but was otherwise comprehensive in all terms.

The vendor claimed that it had entered into a verbal agreement with a manager, including an agreement to sell a unit in the complex – as the verbal agreement was unenforceable, it did not have to be disclosed.

\textsuperscript{246} Ibid, 422.
\textsuperscript{248} [1985] 1 Qd R 182.
At trial, and on appeal, the court considered that the vendor had breached the section in failing to provide details of the management agreement. On this appeal however, the appellant vendor also pleaded the new (retrospective) s49A of the Act, which deemed that the purchaser had known about s49 and its legal effect from the date of receiving the notice. On that basis, the purchaser had only 30 days from receiving the notice to terminate the contract, and was therefore out of time.

The appeal judgement does indicate how the courts will read legislation regarding disclosure statements. Williams J noted that the provisions relating to disclosure were penal (against the vendor); and that it was difficult to identify the mischief the section was to address (there was a range of information to be given, from substantive issues such as lot entitlements and bylaws, to the purchaser’s address). In his view then, construction of the provision would need to be lenient.

Andrews SPJ in awarding costs against the respondent made no order as to costs of the action below, but said:

[The respondents’] niggling defence seeking comfort in all kinds of petty technicalities evokes little sympathy but as the Act stood it provided for the giving of a notice of the administration agreement, which was not forthcoming, and in these circumstances I would not order costs against them.249

Technical defences attracting penalties will engender little sympathy with the court, but they will be enforced. The technical defence may have succeeded but for the retrospective amendment. This case spoke of reliance, but not of estoppel (and it is unlikely that an estoppel argument could have been raised).

In cases considering PAMDA or RSLA, the court may see reliance on the law (eg a lack of valid warning statement) as a ‘petty technicality’ where the parties have otherwise demonstrated the equality of their bargain. If there has been reliance, in terms of Charlick v Foley Brothers250 or where ‘to hold the contract unenforceable at the suit of the plaintiff’

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249 Gold Coast Carlton Pty Ltd v Wilson [1985] 1 Qd R 182, 190.
250 (1916) 21 CLR 249.
would be to provide a windfall gain to the defendants.\textsuperscript{251} Then the court may well deny the technicality. It should be noted that in \textit{Gold Coast Carlton v Wilson}\textsuperscript{252} the respondent purchaser relied on the representation and disclosure of the appellant vendor. As loath as the court was to entertain the petty technicalities, it could be argued that the court could not ignore this reliance and that this may have been definitive in the court’s reading of the provision. ‘They entered into the contract in reliance upon it (the representation as to management) as an inducing factor. It thus was material.’\textsuperscript{253}

A similar approach (though not in terms of estoppel) was taken in \textit{Devine Ltd v Timbs}\textsuperscript{254} where the court considered the correct form of the \textit{PAMDA} warning statement. The parties had entered into a put and call option, including execution of contracts for sale with the then current warning statement correctly signed and attached. These contracts were held in escrow pending exercise of the option. By the time the option was exercised, a different form of warning statement was in force. The buyer sought to terminate the contract, and relied on the defective warning statement.

The court found that the object of the Act was consumer protection, and that it had to construe the provisions to give effect to this. Accordingly, it could not sanction a situation where the buyer ‘was bound by a contract for some time without the benefit of a warning statement’.\textsuperscript{255} The respondent had become bound by the contract on the date of its signature, subject only to the exercise by the appellant of the put option. Therefore the relevant date for the signature on the form was when the ‘contract’ was signed by the respondent (the ‘contract’ being the document the buyer signs whereby the buyer becomes contractually bound).\textsuperscript{256}

This outcome seems a practical and just one without much in the way of theoretical analysis. It reflects \textit{Gold Coast Carlton} in that without expressly saying so the court seems reluctant to give favour to an argument technical in nature. This practical approach reveals

\begin{itemize}
\item \textsuperscript{251} \textit{Yango Pastoral Company Ltd v First Chicago Australia Ltd} (1978) 139 CLR 410, 428.
\item \textsuperscript{252} [1985] 1 Qd R 182.
\item \textsuperscript{253} Ibid, 184.
\item \textsuperscript{254} [2004] QSC 24 (Unreported, Helman J, 26 February 2004).
\item \textsuperscript{255} Ibid, [13].
\item \textsuperscript{256} Ibid, [14].
\end{itemize}
how the courts may approach the scenario above, in the absence of any compelling reason why it should approach it otherwise. If a theoretical basis were to be identified, it could be said that the courts recognise the impact of reliance on the ‘contract’ and the potential for an unconscionable outcome if that reliance is not protected.

This analysis can be extended by asking whether the seller of residential land (under PAMDA) can rely to their advantage on the new point of becoming bound by the contract: for example by leading a buyer to believe the contract has become binding (by communicating acceptance) without returning the executed contract (with complying warning statement). In these circumstances a seller (not ‘bound’ in terms of the Act) may attempt to gazump that buyer by treating with another in the wings, terminating the first ‘contract’ when the second is binding.

If a court were to consider this scenario, two things could happen.

First, the court could hold that the buyer had an equity in the land, based on the parties having signed the contract and the seller communicating acceptance – in spite of failure to provide a copy of the duly executed contract in terms of s365. If this amounted to a representation by the seller that a legal relationship existed\(^{257}\) (ie by communicating acceptance) it may be incumbent on the seller to perfect the contract in terms of the Act, by returning the signed agreement (and statement). As discussed in Waltons Stores\(^{258}\) and confirmed in Powercell\(^{259}\), the court will require ‘something more’ than mere reliance on a promise. In this scenario, the ‘something more’ would be a representation (through acceptance) that the seller has become bound albeit in a way that fails to comply with the Act. This analysis could support an argument that the seller is estopped from denying a contract, and protect the buyer’s reliance interest, where the elements of estoppel otherwise exist.\(^{260}\)

\(^{257}\) See eg the first requirement to establish equitable estoppel in Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 428.
\(^{258}\) Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.
\(^{259}\) Powercell Pty Ltd v Cuzeno Pty Ltd [2004] NSWCA 51 (Unreported, Meagher, Giles, Santow JJA, 12 March 2004).
\(^{260}\) See eg Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.
This would undermine the terms of the Act and its insistence on adherence to form but equity as practised by the courts would reclaim its place within contract law – even in respect of bargains outside classical contract law (as altered or removed therefrom by statute). While this may not be undesirable on this analysis (in that its aim after all would be to do justice) it would alter Parliament’s intention in changing the rights and responsibilities of the parties to the conveyancing transaction, taking them back to a pre-
PAMDA situation.

The new scheme has however explicitly rejected a case-by-case analysis and refers instead to a class of consumer. If equity were to co-exist with the legislation, it would not be clear at what stage parties were bound by the contract, or at what stage equity would protect them or cease to protect them (ie where the Act becomes paramount).

While the comments of de Jersey CJ in MNM Developments Pty Ltd v Gerrard indicate that the courts are reluctant to take a ‘liberal interpretation’ of legislation with a clear consumer protection aim, many of his comments talk about the context of s366. De Jersey CJ said that: ‘[w]hile a particular statutory construction may sometimes produce inconvenience, that does not justify departure from that construction if it is clear’. The implication is though, that the path may be open for the courts to find a way around a provision such as s365, where it serves a consumer protection goal.

This comes back to the inherent weakness of this legislation, namely that the consumer is the buyer rather than the seller. If a seller were to seek to use equity to enforce a contract where the buyer refused to entertain a warning statement (eg refused to sign it in accordance with section 366(4)), this would not be a consumer protection goal in terms of the Act but may be considered a consumer protection goal if the seller were a homeowner and the buyer a land developer. If the court did not see it as falling within the framework of the Act, equity would not be available to intervene. However if a broad approach were taken, and equity did intervene, the courts are left in a position of watering down the explicit terms of the Act.

\footnote{MNM Developments Pty Ltd v Gerrard [2005] QCA 230 (unreported de Jersey CJ, Williams JA, McMurdo J, 24 June 2005), [17].}
Alternatively, the court could hold that the Act is paramount, as it did in *MNM Developments P/L v Gerrard*\(^{262}\). Adopting the clear words of the Act and parliament’s stated aim to impact on *market* behaviour (not particular behaviour on a case-by-case basis) the court could rule that in spite of the seller’s communication of acceptance, the parties will not become bound, and therefore there is no contract until the seller provides the buyer with a copy of the signed contract annexed to the warning statement properly signed (ss 365(1) and 366(1)).

This approach closes the only chance the parties have of ensuring that they have a right to be heard in terms of their bargain, based on their behaviour in their relationship, rather than their actions, reliance, expectations and costs being ignored in favour of a broad brush whole-of-marketplace approach imposed by Parliament.

This approach would be preferred should any ‘acceptance’ of the offer fail to satisfy the requirement in estoppel for ‘something more’ than mere reliance.

### 7.3. Part Performance

If a promise were made, then according to Fuller and Perdue that promise *should* be enforced according to the reliance of a party on it: reliance on a promise justifies enforcement of the promise, regardless of the existence of a contract. In addition to estoppel, part performance is another example of reliance-based remedy.

In *Regent v Millett*, Gibbs J identified the foundation principle of part performance as:

> when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract … it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money.\(^{263}\)

Likewise in *Steadman v Steadman* the court found that while:

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\(^{262}\) Ibid.

\(^{263}\) *Regent v Millett* (1976) 133 CLR 679, 682, citing *Caton v. Caton* (1866) LR 1 Ch App 137, 148.
it is now very difficult to find from [the cases] any clear guidance of general application... it is not
difficult to see at least one principle behind them. If one party to an agreement stands by and lets the
other party incur expense or prejudice his position on the faith of the agreement being valid he will not
then be allowed to turn round and assert that the agreement is unenforceable.\textsuperscript{264}

These two Australian cases illustrate the place of reliance in part performance. Each case
refers to parties acting on the ‘faith of the agreement’: they have engaged in activity in
pursuance of and in terms of the bargain in reliance on what they understand to be a
contract. In terms of the discussion above,\textsuperscript{265} reliance is used here not to explain a contract
(because one did not exist) but to justify supporting a non-contractual relationship in terms
of contract law. The justification in these cases lies in the promisee’s reliance.

Likewise, these cases apparently overcome Pratt’s objection\textsuperscript{266} about subjectivity, in that in
each case there is an objective basis for the plaintiff to expect that there is a contract. In
part performance cases there is a set of circumstances which objectively establish the
foundation of a bilateral bargain (if not a contract at law). In addition, the courts will not
grant a remedy for a spurious or insubstantial act of reliance. In \textit{Carr v McDonald’s} for
example, the court would not accept as an act of part performance a ‘mutual release of
obligations involved in the agreed termination of a contract of service, terminable at short
notice’.\textsuperscript{267} Pratt’s view of reliance ignores that in the case of part performance, the
plaintiff must show that their acts of reliance are directly (unequivocally) referable to the
contract. This test was not satisfied in the purported contract for a particular franchise in
\textit{Carr v McDonald’s}.

The Federal Court in \textit{ANZ v Widin} provided an overview of the law. It confirmed that:

\begin{quote}
the performance which has to be shown must be performance of the person seeking to enforce the
contract... The converse of this proposition is: ‘...an act which, though in truth done in pursuance of a
\end{quote}

\textsuperscript{264} [1974] 2 All ER 977, 981. Cited with approval in \textit{Kelly v Clarke} [2001] NSWSC 1010 (unreported,
Hamilton J, 9 November 2001) but rejected as the Australian approach in \textit{Fletcher v Burns} (unreported
Supreme Court of New South Wales Court of Appeal Handley, Cole JJA and Dunford AJA, 19 March 1997),
\textit{Agius v Sage} [1999] VSC 100 (unreported Supreme Court of Victoria Commercial List Byrne J, 1 April
1999). It was treated neutrally in \textit{ANZ Banking Group Ltd v Widin} (1990) 102 ALR 289.
\textsuperscript{265} See above section 7.2.
\textsuperscript{266} Pratt, above n213, 185.
\textsuperscript{267} \textit{Carr v McDonald’s Australia Ltd} (1994) 63 FCR 358, 367.
contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to [be] the purchase money'. (citations omitted)\textsuperscript{268}

In terms of the new scheme, acts of a seller of residential land such as arranging a mortgage release and payout details for the nominated settlement date, permitting access to the buyer’s valuer, building and pest inspectors, instruction of a solicitor to undertake the conveyance, arrangement of removalists for the date of settlement will all point to carrying out the contract. If the warning statement is non-conforming, the buyer may still terminate at any time up to completion. The circumstances might well be differently construed however if the buyer partly performs the contract – seeks finance approval, engages a solicitor and building and pest inspector and affirms the contract on the finance date and building inspection date. In this case, can the seller rely on part performance to enforce the contract.

In Steadman the court found there was ‘an uneasy oscillation between regarding the doctrine as a principle vindicating conscientious dealing and as a rule of evidence’:\textsuperscript{269} This is reflected also in the comments of Brennan J in Waltons Stores.\textsuperscript{270} Overall these cases confirm that part performance is rooted in equity rather than found on the contract.\textsuperscript{271} This would put it beyond being a rule of evidence of the contract (the label often given to consideration). This supports the idea that part performance, as a species of reliance-based remedy available in Australian courts, should theoretically be available to relieve against inequities consequent on application of formal requirements other than the Statute of Frauds eg those of the new scheme.

While the new scheme regulates transactions outside ‘normal’ contract rules, it continues to refer to common law rules of formation supplemented by the statutory formalities to determine whether a contract is enforceable. However unlike the classical contract or the

\textsuperscript{268} ANZ Banking Group Ltd v Widin (1990) 102 ALR 289, 304.
\textsuperscript{269} Steadman v Steadman [1974] 2 All ER 977, 998.
\textsuperscript{270} Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 433.
\textsuperscript{271} See eg ‘the defendant is really ‘charged’ upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.’ Maddison v Alderson (1883) 8 App Cas 467, 475–6, cited in ANZ Banking Group Ltd v Widin (1990) 102 ALR 289, 301.
Statute of Frauds the warning and disclosure statements and advice certificates do not provide a universal validation of the bargain, but constitute an invalidating factor at buyer’s or tenant’s option. While Brennan J’s contention that the Statute of Frauds didn’t stop promissory estoppel went to proof of contract, the new scheme aims to promote a level playing field rather than to provide evidence of agreement and this provides a different emphasis for justification of the application of reliance-based remedies to regulated transactions.

7.4. Reliance-based Remedies and the New Scheme

It could be argued that strict application of PAMDA or RSLA would deny the principles of reliance theory represented in part performance or equitable estoppel by denying parties the opportunity for judicial review of the promise in terms of equitable principles. It does this by providing a self-help remedy (lawful termination) to the buyer/tenant (who avoids the contract without penalty) via the cooling-off provisions, and where there is a defect in form. It is a procedural matter not reliant on conscience; it is at the discretion of the buyer/tenant as opposed to the court, and it offers only one form of relief apparently exclusive of equitable remedies. Importantly, it also provides ostensible protection to one party in the regulated transactions: the party deemed to be the weaker, without looking at the origin or circumstances of a promise.

Where the buyer/tenant can avoid the contract, the detriment will lie only with the seller/landlord. There is no corresponding legislative right in favour of the seller/landlord. The status of a representation by a buyer/tenant is unclear: if the contract is voidable in any event, this may override any seller/landlord right to seek relief in respect of their detrimental reliance.

While contract law is infused with elements of reliance, it is more a tool than an overarching philosophy explaining the bindingness of a promise. It lacks the normative character ascribed to it by Fuller and Perdue. In particular in the new scheme, the

conceptualisation of the parties’ contract rests not on the mutually binding nature of the promise, but on the means for one party alone to end the contractual relationship based on predetermined transactional considerations. In spite of this, on close examination there may be room for the application of reliance-based remedies where the parties’ conduct would otherwise lead to an unconscionable result, and where there has been reliance by the seller/landlord on the buyer/tenant. This would consolidate the Acts’ focus on unconscionability and expand their operation within the sphere of contract law generally.

At this stage however the case law on the legislation (particularly on PAMDA) has focussed on the consumer protection nature of the legislation and has emphasised the strict interpretation of the provisions. Whether a change in market conditions will impact on the courts’ application of the legislation remains to be seen.
Part II

8. Criticisms of Classical Contract Theory

While classical contract theory continues to be applied as the law of contract in Australia, there are a number of schools of thought which challenge this foundation and some which seek an alternative path for contract law based on principles of one kind or another. This part of the paper will examine two of these – law and economics and feminist legal theory – to identify:

- how the school of thought seeks to challenge classical contract theory;
- whether conscience is considered important by that school in the scheme of contract law;
- whether the new scheme addresses the concerns of that school; and
- if it fails to address the concerns, how it does so and how a better outcome could be achieved.
9. Economic Analysis of Law

In Atiyah’s book, much attention is devoted to describing the development of contract law among the great thinkers of the enlightenment such as Hobbes, Hume, Locke, Smith, and John Stuart Mill. It is clear from his analysis that contract law grew out of the economic needs of society in the late 18th and early 19th centuries. It became inextricably linked with economic theory through these thinkers who trained in a multitude of disciplines including economics and law. Contract as we understand it in a theoretical sense, and such as is applied by the courts today, developed as part of a complete package of political economy mixing sociology, politics, law and economics.

There are many examples of the link between economics and contract law (and law in general). It is this link which is the focus for those belonging to the ‘law and economics’ school seeking specifically to analyse law in terms of economic theory. It should be noted that far from a fringe attempt to explain the law from a particular perspective, it is considered that economic analysis of law is an accepted discipline which is in fact part of the mainstream. For example, the foundation of the TPA is overtly economic, and taxation legislation is used as an economic tool.

It is not hard to identify a relationship between the ideal of laissez-faire economics and the notion of freedom of contract. Without an understanding of the discipline of economics, it is still possible to associate economic freedoms, freedom in and of the marketplace, with the liberty at law to engage in trade or commerce via a contractual relationship without government or other legal regulation. Indeed it is the invisible notion underpinning liberal western democracies that the market is free, and citizens have associated freedoms.

While there is discussion in the literature of whether the law and economics approach should be normative or positive, and how it fits in with legal doctrine, the application of economic theories to the legislation under review is considered to be valid on the basis of the underpinning philosophy of and justification for the legislation itself.

Atiyah, above, n6.
Under the *Legislative Standards Act 1992* (Qld) an explanatory note is to be issued with each new piece of legislation. The note must include a brief statement of the policy objectives of the bill and the reasons for them, and a brief statement of the way the policy objectives will be achieved by the bill and why this way of achieving the objectives is reasonable and appropriate. The explanatory notes for each Act reveal that parliamentary drafters address issues of economic efficiency.

The Explanatory Notes, Property Agents and Motor Dealers Bill 2000 (Qld) identify that the Bill seeks to achieve a ‘balance between the interests of trading enterprises to freely operate in the marketplace and the needs of consumers for appropriate protection in their dealings with traders’. In the Notes, mention is made of preventing the ‘unconscionable practices which continue to result in massive consumer detriment…’ This was expressed to ‘erode public confidence in the benefits of investing in the Queensland property market’.

The Bill was intended also to regulate the fidelity fund, commissions charged by agents and also to license operators in the industry. All of these contain an economic element. The Explanatory Notes also analyse the administrative cost to government, putting the introduction of the Bill in an economic context.

The 1999 review of the *Retail Shop Leases Act 1994* (Qld)\(^{274}\) identifies a number of economic issues which justify the proposed amendments to the Act\(^{275}\) – for example the impact of disputes on profits in retail industry, the impact of retail business on employment and the impact on growth (and therefore employment growth) of retail businesses involved in disputes. It also seeks to incorporate the National Competition Policy into the legislation – which policy arose out of and continues to reflect economic principles.

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\(^{274}\) Queensland Department of State Development, 6-7.

\(^{275}\) These amendments included the legal and financial advice certificates, additional disclosure requirements and unconscionability provisions.
This approach is reflected also in the 2004 Policy Review Paper,\textsuperscript{276} which cites in its opening paragraph that ‘there is no denying that Queensland’s retail sector is a vital part of our State’s economy’. Again, at page 4:

[...]his legislation contributes to the development and maintenance of an environment within which business can prosper. By improving the effectiveness and efficiency of the legislation and reducing both the number of disputes and the length of time required to resolve them, the overall business environment is improved.

The use of economics in these contexts is focussed on its positive analysis, rather than normative. It seeks to predict or describe the economic outcomes of the law, rather than prescribe or judge behaviour (in a normative sense). This predictive element is described by Trebilcock who points out that ‘it is difficult to imagine how governments can make sound policy or interest groups can advocate cogent policy positions without addressing the question of how people are likely to react to proposed changes in their environment, including changes in their legal environment’.\textsuperscript{277}

\textbf{9.1. Law in Economic Terms}

In the economic context, our legal system represents a framework of property rights. Stephen\textsuperscript{278} identifies property rights as specifying ‘norms of behaviour with respect to “things” that everyone must observe in interactions with others or bear the penalty for non-observance’. These norms, or laws, will determine economic outcomes and an economic analysis of those norms will reveal whether they can be applied to concentrate resources inefficiently, or efficiently.

Distribution of resources will be achieved efficiently when it is no longer possible to allocate the resources differently so that someone can be made better off and no one else worse off. This is Pareto optimality. The underlying assumption is that most people are

\textsuperscript{277} Michael Trebilcock, 'The Value and Limits of Law and Economics' in Megan Richardson and Gillian Hadfield (eds), \textit{The Second Wave of Law and Economics} (1999) 12.
\textsuperscript{278} Frank Stephen, \textit{The Economics of the Law} (1988) 11.
rational, and will before each transaction perform a cost-benefit analysis to determine whether it will improve their situation.

Where property rights are not well defined (property is inadequately protected and people have no compulsion to respect property of others) there will be little incentive to make the best (ie the most efficient) use of resources. For example if clean air and water are resources which are free and users have no cause to respect them, they will be squandered. Once they are attached to rights and those rights are protected, the commodity attracts an economic value and is used more efficiently. This affirms the centrality of law to economics.

Certainly the legislation under review deals specifically with property rights – retail leases and residential real property which in turn will determine economic outcomes. It governs the means by which parties acquire and dispose of rights to property. To assess whether these statutes reflect principles of law and economics, an assessment will first be made of the extent to which contract law itself, and the traditional exceptions to it, measure up to these principles.

9.2. Economic Analysis of Contract Law

Contract law and its underpinning idea of freedom of contract are however in themselves reflective of the laissez-faire system of free markets and to this extent at least economics infuses the law of contract. However while economics may provide a theoretical basis of analysis for parliament and academics, the courts do not confess to overtly applying the rules of economics. Sir Anthony Mason notes that ‘in formulating and applying principles, judges take account of many considerations such as precedent and history as well as morality, culpability, justice and fairness, and do not regard themselves as being at liberty to subordinate these considerations to the dictates of economic goals’. 279 He supports this position by observing that the ‘approach to judicial decision-making taken by Judge Posner has differed from that proposed by Professor Posner’. 280

280 Ibid 171.
Epstein has pointed out that while we know a lot about how the legal system works, it is difficult to use what we know. He advocates using ‘rules of thumb’ which while justifiable in economic terms, are also manageable in the legal setting. In his view, the common law of the 19th century was promulgated with a lot of common sense and the legal rules generated remain relevant in an economic setting. This implies that the rules applied by Mason CJ would inherently have an economic perspective.

As Trebilcock points out, Sir Anthony Mason’s viewpoint fails to acknowledge that economics is taken into account in many varied kinds of laws – that common law is not the only way in which law is made. Legislative standards indicate how parliaments use economic principles to make laws (see above). Therefore the courts will be upholding economic principles each time they interpret legislation subject to these standards.

In spite of this, Mason CJ has a point in that while the law of contract provides a central plank for the operation of the market thereby fulfilling a vital role in economics, it may not yet be jurisprudentially acceptable to apply overtly economic rules in the courts for those normative ends proposed by (Professor) Posner.

This section will examine elements of economic theory and identify how they take form within classical contract theory in a marriage of the two disciplines.

9.2.1. Pareto Optimality

Freedom of contract reflects the market-individualism function of the law of contract which facilitates competitive exchange. Competitive exchange will take place efficiently in the context of property-based rights where each party is better off, and no one is worse off (Pareto optimality). Laws satisfy the efficiency criterion where they enable a move towards the frontier of optimality. The imposition of laws though into the exchange

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282 Trebilcock, 'The Value and Limits of Law and Economics', above n277, 24.
mechanism inevitably brings a transaction cost, representing inefficiencies in terms of Pareto optimality though Calabresi categorises these ‘inefficiencies’ as true costs.

In an individual contract for purchase of a house, transaction costs lie mainly in information. A buyer needs to search for the right property to purchase. Negotiations involve the buyer gaining as much information about the property as they can, and ascertaining for themselves the true value of the property based on its attributes and their own feelings about it. During the conveyance, the buyer will collect a range of information from public agencies to investigate title.

The seller needs to get out into the market the information about their property – via an agent usually – involving commission and advertising fees and opportunity cost (lost opportunity for the duration the property is under negotiation or contract to a buyer).

In a conveyance, one party may be prepared to wear these costs for the benefit of liquidating or acquiring the asset. However the other party may consider that they will not benefit enough, in view of the costs, and in fact will be worse off by entering into the transaction.

If some of these costs could be reduced or removed, the parties would not feel their burden and would regard the transaction as a benefit. On Calabresi’s argument, by reducing or removing transaction costs, the parties would be encouraged to enter into contracts thus freeing up the market. This moves the frontier of optimality forward and increases the overall benefit to society. Increasing the number in the market who have benefited from a transaction where no one has suffered a cost would by definition make the market more efficient.

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285 Posner is an advocate of the normative standard of efficiency as the implicit goal of the common law. Many other commentators use economic analysis merely as a framework for deriving predictions about behaviour – see for example Stephen, above n278, 2.
This theoretical analysis is limiting though as it assumes transactions are only undertaken when someone is better off and no one worse off. The market is therefore already optimal. If the market is already at a Pareto optimal position, change that is made will benefit some and cause loss to others. If the new scheme were to advance the law and economics principles, this reality would need to be accounted for.

### 9.2.2. Kaldor-Hicks Criterion

The drawbacks of applying Pareto optimality are ameliorated by the Kaldor-Hicks criterion. This refines Pareto optimality, requiring a new law to be enacted if it would result in an overall gain (to society) even though there are some people who would be worse off. An example of this in practice is cited in the *Retail Shop Leases Act 1994 Review*. Assuming that it is inefficient to bargain to a conclusion on every contingency – the cost of everyone doing this would outweigh the cost of the few who suffer a loss from leaving some things to chance – the law should (Posner’s normative position) be prepared to fill in gaps in contracts where to do so would reduce transaction costs. While some may be worse off, the market overall would benefit. This overriding principle would provide a framework of default principles or presumptions to reduce transaction costs. Common law implied terms, standard form contracts and legislative implied terms (such as contained in the *SGA*) as well as industry-specific provisions reflecting standard industry practices are examples of tools to reduce transaction costs.

The benefits of standard form contracts lie primarily in reducing information costs. The parties can accept that their agreement will conform to a prescribed standard, and that only essential terms need be negotiated. There is a level of mutual understanding of the arrangement from the outset. A supplier who uses a standard and consistent form of warranty can ‘send signals to consumers about the quality and reliability of their products’. By providing a set of normal terms, parties have no need to need to negotiate

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286 See eg Calabresi, above n284.
287 1999, referring to the National Competition Policy requirements regarding competition.
288 Stephen, above n278, 180.
expressly thus the ‘complexity and cost’ of the transaction is reduced and its administration simplified. Applying the Kaldor-Hicks criterion, while some may be worse off under this system, overall costs are reduced. The law therefore brings the market closer to the optimality threshold.

9.2.3. Individual Cost and Marketplace Cost

Using the law to allocate resources efficiently involves imposing costs on the party most able to bear them. This idea has often been used in consumer protection legislation where a manufacturer or seller must give a warranty of quality as they are in the superior and cost-efficient position to control quality. This represents an individual cost to the manufacturer and a marketplace cost where the cost of compliance is passed on to consumers. However imposing a responsibility to ensure quality also assists the market in reducing transaction costs of arguing over faulty goods and encouraging confidence in people to transact – Pareto optimality.

Contrast the concept of *caveat emptor*, where a buyer is responsible for making enquiries relevant to the purchase. By bearing the individual cost of a failure to make enquiries, the buyer is saving the seller the cost of making good express or implied representations to every looker. If buyers learn from their failure to make the relevant enquiries, the market will benefit – but arguably only in respect of that buyer’s future transactions and so to a lesser extent than with the sellers’ warranty. This is not Pareto optimal and may not even be Kaldor-Hicks efficient.

Ultimately though marketplace cost will be reduced to the extent that contract law promotes certainty in the market. Through its rules, parties can ascertain the cost of a transaction in advance, and make rational decisions accordingly. If the law were to refuse to support private agreements, resources would be wasted in pursuing an agreed course of action which need not ultimately be upheld. This echoes the economic foundation of

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contract law as the norms everyone must observe or bear the penalty. As individuals are the best judge of their own best interests (in the free market) then it is appropriate to encourage agreements for mutual benefit – Pareto optimality – with the sanction of the public system. To the extent that some in the market might be worse off through the application of those rules, the threshold of efficiency is represented more by the Kaldor-Hicks criterion.

9.2.4. Optimal Breach

The application of contract rules to a party’s detriment is found in the rules of breach of contract. In contrast to the optimality of enforcing a contract, there is an (economic) argument in favour of ‘optimal breach’. Where the cost of performing a contract outweighs the cost of the breach, efficiency demands that the contract be allowed to fail. If the performing party is compensated to the extent of the expected profit, then both parties will be better off – the defaulting party has had to pay less than the cost of performing and the other party is no worse off than if the contract were performed.

The defaulting party is better off – not than their position at the point of entering into the contract, but from the point at which the contingency occurred. It is at the latter point that they reassess the mutuality of the benefit of the transaction, and determine an alternative course to approach Pareto optimality.

Allowing ‘efficient breach’ would minimise the transaction costs in circumstances where there is a risk of inefficiency (or a breach of Pareto optimality). As classical contract theory will usually insist on strict liability in terms of a contract, the scope for allowing efficient breach is minimal.

9.2.5. Unconscionability at Common Law

In the same way that rules of breach of contract are found to allow efficiency, so too can common law unconscionability be examined in economic terms by analysing whether the

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291 See above n278.
292 This reflects also one of the underlying assumptions of economic theory, namely that people make rational decisions in their own best interest. It is highly individualistic in tone.
cost of its application shifts the threshold of optimality. The difference is that unlike the rules of breach, unconscionability provides a remedy for a deviation from the acceptable process of the transaction (rather than its substance). It therefore serves a normative end.

Epstein\textsuperscript{293} argues that the cost of serving this end may well be too high. In the US context, he observes that to make the defence more accessible to defendants the rules of evidence have been modified. In his view, this approach will increase the number of valid contracts which are defeated undeservedly. The cost to the market of overturning valid contracts will be reflected in higher costs of bargaining in this market. Bargaining costs will increase where parties see a higher risk of having their bargains overturned and so need to introduce safeguards into their contracting processes. This is the converse of the security of enforceable bargains, referred to above.

A local example of this can be seen in third party guarantees of loan agreements. Since Amadio, banking practice has tightened enormously and it is standard practice (endorsed by the courts) for banks to require all guarantors to obtain independent legal advice in the form of a solicitor’s certificate. The certificates are usually required to be in the bank’s standard format. The Queensland Law Society recommends its own certificate, although banks will usually insist on their own form. The certificate must be given by an independent solicitor, so the guarantors (often directors of the borrower company) need to attend a solicitor other than the one acting for the company – whom they consider to be ‘their’ solicitor. The company’s solicitor cannot then absorb the cost of advising on the guarantee as part of the borrowing transaction, but separate fees will be charged by the other solicitor.

Additional costs are incurred by the advising solicitor who bears the risk of giving the advice. It is not a simple matter of witnessing a signature. The documentation and transaction must be explained, in terms of the certificate, to (often) unwilling parties – unwilling that is to be advised on the implications of a transaction which they see as fundamentally the same as the one “they” are entering for the company, and resentful of an additional cost. The banks consider themselves protected by having the solicitor certify to

the guarantors’ understanding of their liability under the securities. However ultimately it will be the solicitor’s insurer under their professional indemnity policy which bears the cost of a successful claim by the guarantor if the advice and certification process is not adequately followed by the solicitor.

The Queensland Law Society recommends charging a fee commensurate with the advice given – and suggests that a minimum of two hours is required to advise – and also that a separate file be opened and comprehensive notes taken.294 This drives up transaction costs for the borrower and guarantors and probably the banks to an extent, but quarantines banks from the costs of non-enforceable guarantees. The individual costs represent freedom of contract as they could not sensibly be borne by the bank. Alternatively, Adams argues that on a market-individualist approach, individual hardship (ie of unadvised guarantors) may be part of the ‘price of the common good in the form of an overall lowering of costs and therefore prices’295 – ie cases of unconscionable conduct would be preferable to the remedies which create the inevitable price rise.

To the extent that common law remedies represent consumer-welfarism, which presupposes that ‘consumer contracts are to be closely regulated’296 there are alternatives which achieve this end without raising transaction costs. Epstein297 suggests that legislation may be preferable to a complex common law system, and cites the cooling-off period for door to door sales298 as an example of a means to protect consumers traditionally disadvantaged in consumer contracts without attendant transaction costs.

Certainly low-cost legislative tools have been used for consumer protection in the local context. The *SGA* introduced mandated standard warranties and spelled out consumers’ rights in the sale and purchase of goods. The Act reduces transaction costs by reducing the cost to consumers of investigating the goods (shifting the burden of *caveat emptor*). The

295 Adams, above n283, 7.
296 Ibid, 3.
297 Epstein, 'Unconscionability a Critical Reappraisal', above n293, 305.
298 In a US context.
cost of this was to be borne instead by the seller/manufacturer, as the party most able to bear that cost. This is Kaldor-Hicks efficient.

The Commonwealth recognised the cost and complexity of bringing and enforcing claims of merchantability and unconscionable conduct by consumers and enacted the TPA, designed to provide a less expensive avenue to enforce these rights. The Act has also impliedly broadened the application of the doctrine of unconscionability. While reducing the enforcement cost for individuals the Act may instead have increased the cost to the market by increasing the number of claims brought. In the long term however the latter cost should be ameliorated through the ACCC’s education program and the educative effect of judgements in its favour. In theory, once corporations understand the risk of prosecution they can be expected to alter their behaviour in the market place. (So far in relation to unconscionability at least, ACCC test cases such as ACCC v Samton Holdings Pty Ltd\textsuperscript{299} and ACCC v Berbatis Holdings Pty Ltd\textsuperscript{300} have not managed to have the relevant provisions applied by the court. This may lead to a hiatus in the application of the provisions until their nature is properly understood by the market.)

Similarly, the CRA has sought to provide a framework for overturning contracts falling foul of its requirements. The cost saving here would be through enforcement – where, like the TPA, the court is given a statutory framework for overturning contracts rather than parties having to rely on a common law foundation. Where a party has borne the cost of having its contract overturned, other market operators would be encouraged to amend their own practices to avoid a similar fate. While transaction costs may be driven up, these would be borne by the parties most able to bear them, with consumers benefiting to the extent that their losses would be ameliorated.

On one hand therefore, law and economics can accept the imposition of consumer welfare regulations addressing unconscionability provided they do not create uncertainty or shift the threshold of optimality backwards. Adams though finds an economic rationale for denying tainted contracts, in that the presence of factors such as fraud, duress or incapacity

\textsuperscript{299} (2002) 117 FCR 301.

\textsuperscript{300} (2003) 214 CLR 51.
interfere with the proper functioning of the market. He expressly excludes inequality of bargaining power, although an absence of good faith in other circumstances would be accepted.\footnote{301} This argument would identify that the unconscionable behaviour is an inefficiency of itself and therefore steps to mitigate represent an improvement – a move towards optimality.

The alternative economic arguments to support exceptions to contract provide a basis from which to measure the new scheme to see if it moves the system towards or away from optimal use of resources.

\section{9.3. Economic Analysis of the New Scheme}

Classical common law does not require a court to enforce every contract before it – which would truly represent freedom of contract (on an individualist view). But common law will only interfere with this freedom if the reasons for doing so are proof of a defect in the formation process or incompetence of the party against whom the contract is to be enforced, or a substantive dimension which undercuts the private right of contract. Thus the court polices these problems and improves the administration of contract law.\footnote{302}

The new scheme however creates a new class of contract which while enforceable in all other respects may not be enforceable under the legislation due to a formal defect. It has been shown above that the legislation under review affects the common law rules of contract by imposing additional formal requirements on the open market contract process. Hansard and the explanatory notes inform us that there are classes of players in these markets which require the protection of parliament. Without questioning the plausibility of this underpinning notion, this section does question whether the legislation achieves this goal efficiently ie achieves:

\begin{itemize}
  \item Pareto efficiency, by making some better off without making someone else worse off; or
\end{itemize}

\footnote{301} Adams, above n283, 7. \footnote{302} Epstein, 'Unconscionability a Critical Reappraisal' above n293, 315.
- Kaldor-Hicks efficiency, by making society in general better off, even if someone is worse off.

The PAMDA procedures are frustrating to apply and represent a cost to buyers, sellers, solicitors and real estate agents. Admittedly some of the most frustrating and difficult components of the legislation have been modified since the Act first came into force. However there is still an identifiable additional cost to the parties in complying with the legislation.

9.3.1. Caveat emptor – Shifting the Burden

The principle of caveat emptor has at least been eroded in the new scheme. The principle requires active inquiry by the buyer and responsibility will rest with the buyer for consequences of failure to inquire. It is not a passive obligation. It reflects the ideal of freedom of contract and sanctity of contract, whereby each party as an independent economic agent bears the cost of their own part of the transaction.

a. PAMDA

Under the PAMDA the buyer is warned to consult with experts to ensure that the price is fair. This requires initiative by the buyer to make pertinent enquiries. During the cooling-off period the buyer may exit the contract. Inquiry would previously be made before the contract, or else the contract would be made subject to satisfactory inquiry. The cooling-off period removes the buyer’s responsibility to inquire on this basis and provides a means of exit from the contract regardless of genuine inquiry or concern.

This period of grace is granted at the expense of the seller – who during that time has no effectively enforceable contract – which allows the buyer to evade the active pre-contractual inquiries until after the cooling-off period expires. The cost to the buyer of terminating during the cooling-off period is a loss of 0.25% of the purchase price – the termination penalty.303 This will usually only be a nominal amount and experience shows that it is not sufficient to cover legal costs of the seller. In addition, once the seller

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303 This is implied in PAMDA s368. ‘Termination penalty’ is defined in s364.
becomes entitled to payment arising out of a contract for sale of their property, the agent similarly becomes entitled to a commission thus eroding the value to the seller.

While there is a cost to the seller, the buyer will benefit along the lines of efficient breach. If they wish not to proceed, rather than the cost of an action by the seller, they can bear the small cost of the termination penalty and exit.

_PAMDA_ has arguably shifted some cost of _caveat emptor_ from the buyer to the seller, in that the seller may now suffer the transaction costs less the termination penalty and their opportunity cost, where previously they would have been able to enforce the contract. Buyers no longer bear the cost of _caveat emptor_ during the cooling-off period: they may exit with only nominal cost.

While not Pareto optimal (it leaves some worse off) the cooling-off period reflects Kaldor-Hicks criterion: an overall gain to society, even though some may be worse off.

There is one class of buyer which was particularly disadvantaged before _PAMDA_: interstate investors from jurisdictions with a cooling-off period.\(^\text{304}\) There is some economic sense in standardising market conditions, where market differences eroded confidence and resulted in Pareto inefficient resource allocation (buyers were worse off – completing a contract they didn’t want and sellers were worse off faced with having to enforce the contract). Again, this supports the Kaldor-Hicks criterion.

While the cost of _caveat emptor_ may have shifted marginally under _PAMDA_, there is no change to the buyer’s responsibility for gathering information or making inquiries, and the principle will continue to apply outside the cooling-off period. In the Queensland Government report on _PAMDA_, the concept of seller’s disclosure is mooted for future consideration.\(^\text{305}\) This may significantly alter the costs and responsibilities of the parties.

\(^{304}\) Interstate investors were repeatedly cited in Parliament as suffering particularly from the pre- _PAMDA_ scheme. See Queensland, _Parliamentary Debates_, 13 September 2001, 2670-709 (various speakers).

b. **RSLA**

Under the *RSLA*, the tenant no longer has cause to make enquiries before entering into a lease. Information about the lease is provided by the landlord in accordance with the Act. Even the form in which the information is presented is prescribed. The tenant’s responsibility to inquire in terms of *caveat emptor* is severely undermined, and the bulk of the cost of this is passed to the landlord through increased legal costs, delay in having a binding lease and increased negotiation time.

The tenant too must bear a cost – that of obtaining independent financial and legal advice. However this is a cost which arguably should properly be borne by a tenant making judicious inquiries (and would be borne if the tenant took reasonable steps to avert the risk inherent in *caveat emptor*). In this respect, this Act differs from *PAMDA* where the cost to the buyer is only usually nominal. The tenant becomes liable for a significant cost to comply with the requirement of advice certificates. In one sense, *RSLA* is enforcing the principles of *caveat emptor* on the tenant – by requiring the tenant to make the relevant inquiries before becoming bound. This is arguably a more efficient allocation of resources than the fallout from a failed lease.

The costs associated with the loss of a contract for the sale of land in a ‘faultless’ situation ie exercise of rights to terminate within the cooling-off period, are probably only the seller’s foregone opportunities during the cooling-off period, legal fees and sometimes lost profit if the land is subsequently sold for less. On the other hand costs associated with a failure of a tenant to beware are much higher. Termination of a lease, being a long term contract, entails an empty shop for the land owner, costs of finding a replacement tenant and perhaps an adverse impact on the landlord’s ability to attract other tenants. The cost to the defaulting tenant is also high – liability for the rent for the balance of the term of the lease, loss of business and all the consequences that entails.
9.3.2. Transaction Costs

a. PAMDA

On its own economic analysis of the new scheme, the Parliament must have assumed that the seller in a contract for the sale of residential land has the capacity to bear the cost of compliance with the statute.

The seller’s cost lies in:

- gathering the forms and complying with them; and
- the possibility of loss of contract without fault.

As most sellers rely on agents to prepare contract documentation, it will be agents who bear the cost for preparing and presenting the various forms. As commission rates have remained static since the Act\(^\text{306}\) and the cost of preparation is not separately billed, agents will not be passing on this cost to sellers.

There is also an information cost for both seller and buyer. The parties are presented with a number of forms, all similar in their prescribed format, dealing with appointment of agent, acknowledgement of interests and warning statements. William Whitford points out that disclosure statements are ‘typically almost useless’ – even for an educated person\(^\text{307}\) The challenge as he sees it, is that drawing information to consumers’ attention is one thing, but having them use that information in their purchasing decisions is quite another.\(^\text{308}\)

While it is admirable in theory to warn buyers of risks inherent in purchasing real property, for those who take the warning literally unnecessary increased transaction costs can result. It is obvious that parliament had in mind self-funded retirees ‘hoodwinked’ by the marketeers in purchasing overvalued investment properties. This begs the question at what point a person is deemed capable of freely undertaking a real estate transaction. Advice to

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\(^{306}\) Commissions are set by the Property Agents and Motor Dealers Regulation 2001 (Qld) in Schedule 1, part 2, and remain the same as when the Regulation was passed.


\(^{308}\) See also Trebilcock and Dewees above n290, 116.
obtain a valuation can undermine the confidence they have in their ability to understand whether they have paid over value or not.

In a recent case handled by the author, first home buyers negotiated to purchase a home. The offer was made during the first week of the sellers’ contracted advertising period. Negotiations ensued for another 10 days, and a price was reached. When presented with the warning statement, the buyers opted to obtain a valuation. Entry into the contract hinged on the outcome of the valuation. The sellers had lost two weeks of their four week advertising contract and would be faced with further costs if the deal fell over and they had to recommence advertising. Ultimately the valuation came in at the last price offered by the buyers, so they entered into the contract – some three weeks after commencing negotiations.

Valuations traditionally represent a lower price than the market. Therefore in this case, the sellers lost the value of their advertising contract during the protracted negotiation period, may have lost an amount representing the difference between valuation and market. This is seen as a transaction cost as it arises out of the transaction rather than a true reflection of market forces. The buyers bore the cost of a valuation which ultimately was unnecessary. In practice, this situation is seen fairly frequently.

As valuations may reduce market prices and the market may have reduced confidence in transaction procedures, it could be said that the transaction costs of PAMDA are not economically efficient.

b. RSLA

Transaction costs of the RSLA are different. In seeking to prevent small business bankruptcies, the Act requires the landlord to give the tenant detailed information about the lease and for the tenant to obtain legal and financial advice before a valid contract is concluded. The landlord must provide the tenant with a copy of the draft lease and the disclosure statement at least seven days before the lease is to start.\(^\text{309}\)

While there is a compliance cost for the landlord in collating the lease information in the prescribed form, the tenant bears the cost of processing that information and in obtaining

\(^{\text{309}}\) s 22(1).
advice. Lawyers and accountants providing the advice certificates (and their insurers) also bear a cost in the contingent liability in having the tenant rely on the advice. While negligence in acting for a tenant would lead to loss in any event, the increased reliance by landlords on these certificates may increase the potential for liability by professionals.

The cost to the tenant however is one which arguably already should have existed, even if it was not actually borne by tenants in the past. If the retail shop lease is part of a larger business transaction, one might expect tenants to make full and proper enquiries about their legal and financial obligations before entering into the lease. This expectation is reflected in the fact that consumer protection is traditionally offered to consumers rather than to business people. Contrast the PAMDA provisions which assume that buyer enquiries are conducted after entry into a binding contract.

Therefore apart from the additional burden on landlords of the disclosure requirements, and the potential for increased contingent professional liability, this scheme appears not to impose any additional transaction cost. Arguably while not reaching Pareto efficiency, it is Kaldor-Hicks efficient.

### 9.3.3. Expectation Cost

In addition to the transaction cost associated with contract formation, there is the expectation cost where a buyer may withdraw from a ‘contract’ without penalty at any time up to completion, where the statutory formalities have not been strictly adhered to. The seller expects the transaction to provide a benefit and this expectation will be lost upon no-fault withdrawal by the buyer. Loss of this expectation represents a cost. While (for residential land sales) withdrawal within the cooling-off period entitles the seller to forfeit 0.25% of the purchase price (while perhaps impliedly as compensation, it is referred to in the Act as termination penalty) no such compensation exists where the buyer withdraws based on a defective form in either PAMDA or RSLA. Here, the seller bears the full cost of non-compliance with the legislation. Failure to comply penalises only that party.
The party bearing the cost of non-compliance is not necessarily the party targeted by the parliament in *PAMDA*. A reading of Hansard (and various media releases\(^{310}\)) shows after all that marketeers and ‘shonky’ real estate agents are the target and the reason for the warnings and disclosures and forms and supporting documents. And yet a cost to the agent will only arise when the seller (a contracting party) first suffers loss.

**9.3.4. Enforcement Costs**

The common law exception of unconscionability (or in fact any of the other common law exceptions to contract) involves a complex set of rules which is usually difficult (and costly) to enforce. This is particularly so in the case of unconscionable conduct in the *Amadio* sense, where that party is under a special disadvantage of some sort. In this respect, while the principle itself may be valuable, the rules themselves and the mode of using them could have minimal impact because of the prohibitive cost of enforcement.

While the *TPA* has dealt specifically with the cost of enforcement of rights under unconscionability, the new scheme has failed to include such a strategy as part of the method of shielding parties from unconscientious conduct. Both Acts establish a tribunal to deal with disputes, but in the case of the *PAMDA* the tribunal is limited to issues with licence-holders.

Thus a seller of residential land seeking to enforce a contract where adherence to formalities is in doubt will do so in the court system.

In the case of the *RSLA* the parties must first attend mediation followed by appearances before the Retail Shop Leases Tribunal if the matter has not been resolved. A matter before the Tribunal cannot be heard by a court while before the Tribunal. The jurisdiction of the Tribunal extends to issues of unconscionability\(^{311}\) and it may award compensation for unconscionability. Rights to appeal to the Supreme Court are constrained.\(^{312}\) However the

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\(^{310}\) See eg above fn 47; Merri Rose, 'New Legislation to Stop Marketeers in their Tracks' (Press Release, 10 September 2001); Merri Rose, 'Rose Invites PAMDA Review Input' (Press Release, 27 June 2002).

\(^{311}\) s46B.

\(^{312}\) s88.
Tribunal is required to operate with as little formality as possible, and parties have a limited right of representation.\textsuperscript{313}

Enforcement costs then for \textit{PAMDA} are no different from common law, but \textit{RSLA} alters the relative costs involved. While this apparently maintains or increases inefficiency, it is possible that the common law remedies under unconscionability may be limited or no longer available as a consequence of the processes of the new scheme. The legislation has intervened to emphasise the bargaining process, giving the buyer/tenant the opportunity for independent advice and to test the seller/landlord’s position. However there may remain circumstances where unconscionability is a genuine issue for the buyer/tenant in spite of the process undertaken in arriving at a contract.

If the new scheme alters market behaviour to pre-empt unconscionability, the number of cases brought should decrease. The cost of these cases however may increase as compliance with the formal procedural elements may provide ready evidence in favour of the seller/landlord. The market may be advantaged in regard to enforcement cost at the expense of the individual (who wears a higher cost).

The structure of the Acts ensures that enforcement seems akin to Kaldor-Hicks efficiency, rather than Pareto efficiency.

\textbf{9.3.5. The Normative Element}

Trebilcock\textsuperscript{314} points out that there can be a normative element to an ostensibly positivist economic model. Where economists talk only in terms of ‘rational utility-maximisers’, and analyse the law only in these terms, it is possible that market participants will come to see themselves in this light alone. This has the potential to alter behaviour in its own right: so that economic theory becomes not just a predictor of outcomes, but a determinant.

In the case of the new scheme where the parties are looked upon as rational actors in the defined property transactions, it is possible that they will become the roles prescribed for

\textsuperscript{313} ss72 and 71 respectively.

\textsuperscript{314} Trebilcock, 'The Value and Limits of Law and Economics' above n277, 17.
them by Parliament. The *RSLA* would cause retail tenants to act in the way a prudent business person looking after their own interests would have done. This will not result in a significant shift of the transaction cost, but should prevent economic loss resulting from business failure. In this respect, it could be said that this Act may have a normative effect, in promoting the rational tenant as a model of the rational economic actor.

In the case of the *PAMDA*, the legislation reflects an assumption that the buyers are the weaker parties in the market, and by implication advocates a slight shift in the transaction costs. The protection afforded by the Act may result in buyers taking advantage of the cooling-off provisions, and entering into contracts with abandon – surely an unintended normative consequence. In addition, the fraud-prevention measure of the warning statement could be used as an instrument of fraud by unscrupulous buyers who refuse the need for one, then seek to rely on its absence to end the contract.

### 9.3.6. Assumption of Rationality

In one last look at the new scheme through the lens of law and economics, the twin concepts of the rationality of economics and the law’s reasonable person\(^{315}\) are examined.

These concepts reflect the way in which law and economics complement each other. If, on an economic analysis of the law pre-*RSLA* and *PAMDA* parties were assumed to be rational, then there can be little need for the legislation in the form it is in, or perhaps at all. A rational house buyer will investigate, check the price and come to the market armed with information and advice sufficient to enter into a contract which maximises their satisfaction. Likewise a retail tenant will obtain comprehensive advice about the nature and effect of a significant and long term commitment.

It seems unlikely that a rational market player would put themselves in a position of entering into a significantly expensive transaction without sufficient information, where they can be taken advantage of by the other party. This is really all the legislation is doing – giving a second chance for these parties to obtain information before becoming bound.

\(^{315}\) Otherwise known as the reasonable man.
McGuinness\textsuperscript{316} cites the definition of negligence in *Blyth v Birmingham Waterworks Co* (1856) 11 Ec 781:

Negligence is the omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

This seems to describe a house buyer or retail tenant who fails to act to protect their own interests. Restricting free market mechanisms by interfering with contract process may attempt to remind these parties to undertake reasonable conduct, but it does so at a price.

Any costs of the process will not be reduced in the long term. If the market were left to adjust itself (ie exclude those who fail to take the precautions of a reasonable person, or a rational person) there would be short-term costs. However in theory, in the long term these would reduce as people became wise to their obligations to inform themselves before entering into such transactions.

It could be argued in support of statutory intervention, that these markets have been around long enough already yet have failed to adjust and consumers are still suffering loss. It is beyond the scope of this paper to analyse the intricacies of this market – suffice to say our increasingly affluent society, low unemployment and available credit have altered the number and background of people who now participate in these markets.

The legislation has been introduced with economic justification which fails to take this into account. The focus has been on the unconscionability of actions by marketeers of residential property and by retail landlords. There has been no consideration of the rationality or otherwise of parties’ behaviour, or any shift in the type of buyer/tenant entering the market.

In this way, a normative element is introduced to the scheme. Rightly or wrongly, people are seen as victims of an abuse of power, and they are to be afforded protection through the

formalities of the contract itself. This approach may undermine the purported economic benefits of the scheme.

In addition, where buyers can exit a contract within the cooling-off period without responsibility, the cost will fall onto the market in the frenzy associated with a boom, and on to the seller in the despair of a bust. Even if the statements are exaggerated or untrue, the message given to the general public is one of acceptance of this market behaviour, and that it results in successful transactions.

Whether or not resources are being efficiently allocated as a consequence of PAMDA and RSLA in these circumstances is questionable at best.

9.3.7. Costs of Termination

The rules of contract dictate that once entered into, a contract will be enforced by the courts. However economists argue that in circumstances where the cost of performance outweighs the cost of breach, it is more efficient to breach the contract than to proceed. While there is no breach involved in ending the contract during the cooling-off period, resources that the buyer would commit to the transaction would be diverted to a more efficient use in the same way they would be if a buyer had breached the contract. For this analogy to work, the assumption must be made that the seller suffers no loss or that the termination payment will be sufficient compensation for the termination.

The cooling-off period available to house buyers in the PAMDA opens a five day window to (virtually) obligation-free termination of the contract, where that buyer determines it would not be financially feasible to proceed. While this might allow efficient allocation of resources of contract for the buyer, it fails to take into account the cost to the seller of the termination, although as the window occurs immediately on formation the timeframe within which damage could occur is minimised. The termination penalty will provide some compensation for this damage. The downside of a universal procedure such as the cooling-off period is that the facts of the particular case cannot be judged and termination

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will occur at the whim of the buyer alone, without reference to the economic consequences to the seller.

The buyer’s right to terminate in the absence of the requisite formalities has little justification under the principle of efficient breach. This becomes more so the further through the contract the parties proceed – on the basis that reliance on a ‘binding’ contract will result in costs borne by both parties. The later the buyer chooses to terminate, the higher the cost. The only possible economic rationale for termination would be akin to the exception of unconscionability ie that there has been an illegitimate interference with market processes. It is hard to see how failure to provide a valid warning statement of itself can lead to that conclusion. On an economic analysis, the parties are assumed to be rational profit-maximisers. Lack of a warning statement will not detract from that.

Similarly the RSLA disclosure rules may facilitate efficient breach where there has been interference in market processes. If the rational profit-maximising tenant had read their lease or obtained legal assistance to do so, provision of a disclosure statement need have no effect. It could be argued that in using a prescribed form, the statement provides information about what is in the lease but also what is not. In this respect, it may supplement the tenant’s understanding of the terms of the lease relative to the market variations. If indeed this statement does ‘value add’ the information, it is very different from the PAMDA warning statement. In addition, the period within which the tenant may terminate is limited to 2 months from commencement. This no doubt reflects the long-term nature of the lease, as opposed to the short-term nature of the usual land contract. There will still have been reliance by the landlord though: a fitout perhaps, advertising and negotiation costs and of course lost rent.

This discussion assumes of course is that the buyer/tenant is in fact rational whereas consumers are really ‘boundedly rational’.318 This concept recognises that consumers (here, buyers/tenants) will not seek an optimal outcome but only one which is

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318 Scott and Black above n12, 34-5.
This concept itself calls into question the validity of the economic arguments which rely on assumptions. However it does assist in understanding the limitations of trying to justify the provisions on the basis of a purely economic argument.

Without anything further, it is hard to justify termination on grounds of efficient termination. It allows the buyer/tenant to be released from their obligations on any grounds – not just economic grounds. These buyers/tenants are in no different a position from a buyer/tenant who has received the statutory warning/disclosure and who seeks to terminate. Yet there is no application there of efficient breach principles – just strict enforcement. If it could be argued that any buyer/tenant should be able to be released so as to minimise cost, then the PAMDA cooling-off period seems the more efficient mechanism.

9.4. Conclusion

PAMDA and RSLA have been examined for economic efficiency in terms of meeting criteria in addressing the “exceptions” to contract law, transaction costs, enforcement costs, market behaviour and efficient breach.

In the case of transaction costs, market behaviour and enforcement costs it seems that PAMDA fails to satisfy notions of economic efficiency, but RSLA does. PAMDA may allow efficient breach through the cooling-off mechanism but if the buyer is better off through terminating then it cannot be done without the seller being worse off – except in a rising market where the seller will be able to secure a higher price. However that indicates that the buyer must by definition be economically worse off: having missed a bargain.

It is explicitly stated in the RSLA that small business bankruptcies and the cost to small business of retail lease disputes form the major reasons for the 2000 amendments. These are explicitly economic reasons, and the ability of this analysis to demonstrate a degree of efficiency in the allocation of the costs (and therefore resources) reflects that underpinning notion.

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319 Ibid.
The primary motivation of economics drove the *RSLA* amendments and it is a bonus that the parties’ bargaining positions are equalised to a large degree through the disclosure process. This sits well with the Act’s overall scheme: the amendments increasing the scope of the disclosure statements were accompanied by provisions protecting against unconscionable conduct. Together they remove the potential for economic inefficiency of subsequent action arising out of lack of information, or misuse of power.

*PAMDA* on the other hand is based on a rationale of conscience. It offended the collective conscience of Parliament that marketeers in Queensland were ‘fleecing’ ‘mum and dad investors’ in the Queensland residential property market, through their unconscionable pressure tactics. There was no mention of *caveat emptor* and inequalities of information. Parliament laid the blame for inflated prices at the feet of marketeers, and determined that the market would be redesigned to protect ‘innocent victims’. There is no responsibility to be undertaken by the buyer, although a valuation is recommended. The relationship between this information and the buyer’s position is not as strong as that in *RSLA* (ie between legal and financial advice and the tenant’s position).

*PAMDA* is not genuinely formulated in economic terms. Talk of the market, and ties to economic loss seem not to ground it in economic theory and arguably results in its inability to stand up to economic scrutiny.

The new legislative scheme per se could answer economic efficiency – for a low cost, self-help dispute resolution process. However transaction costs and opening for inefficient breach would need to be addressed to answer a law and economics view of contract.
10. A Feminist Contract Theory

So far this paper has presented classical contract ideas of the freedom, the right, of parties to enter contracts without interference – by other citizens or by the state. Classical theory assumes that parties are entitled to use their wiles and their particular knowledge to their own advantage in transacting. It assumes that it is right and good that rational market forces prevail, and that this is the natural order though equity will step in where a party seeks to act unfairly in a transaction: where a party becomes aware of a particular disadvantage of the other party and seeks to use that to their detriment.

Already this paper has tested the validity of contract law using an economic approach which highlights the parallel development of classical contract law and economic theory, and helps to explain the assumptions underlying contract law. The effectiveness of the new scheme can be measured in terms of economic legal theory – as an economic-oriented transaction.

A feminist approach to jurisprudence offers a perspective of the existing order in the law by unmasking the myth of law’s rationality and its neutrality to gender. While this type of approach takes a variety of forms and feminist scholars differ in their focus and viewpoints, feminist jurisprudence is generally concerned with redressing power imbalances inherent in the law. This general approach therefore provides a framework within which to analyse how the new scheme addresses the perceived power imbalance within its regulated contractual relationships. This chapter will use that framework to examine the gendered nature of contract and in particular, the relationship between the traditional (classical and now statutory) exception of unconscionable conduct and contract law in general; then the new scheme and classical contract law.

Women play a major part in the markets regulated by the new scheme. In 1997, women constituted 40% of those ‘employed’ in the small-business sector in Australia. Just under 50% of these were small-business owners, the balance being employees. Over half of women small-business owners had no education higher than secondary school. In 2004, around 70% of occupied private dwellings in Australia were either owned outright or were being purchased. Anecdotally, women are recognised by real estate agents as decision-makers in the purchase of residential property.

Women therefore have a vested interest in having their experience recognised by the legal system in the adjudication of their contracts (all contracts) in these areas. The assumption in classical contract theory is that subjects come to a level playing field to bargain to their own advantage. If however the law were predicated on a masculine construct, it could be inferred that women are strangers within it. The ‘woman question’ asks: how can this system better cater for the experiences of women as well as men. It serves no purpose for the legal system to apply an apparently objective and impartial standard if that standard in fact is partisan, rooted in a male identity favoured by the free market economy. Where the new scheme aims to afford equality to parties to the regulated transactions, Dianne Otto talks instead about the ‘capriciousness of equality as a legal standard’. In particular, her analysis looks into the failure of equity (in particular unconscionability) to take into account ‘structural social differences in power that may in a general way impinge on the transaction in question’.

This is a radically different approach from economic theory which like the law itself admits to no gender and focuses instead on financial cost in a supposedly free marketplace. The recurring assumption of *ceteris paribus* in classical economics precludes any examination of the impact of gender or of power (apart, that is, from the power of the market).

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324 Otto, above n21, 809.
325 Ibid.
The overview of three phases of feminism by Ngaire Naffine\textsuperscript{326} provides a useful starting point for this analysis. The first phase challenged the male monopoly on the law in the profession and the public sphere and the second challenged the deep-seated male orientation in law that infects all its practices. While both of these ideas will be relevant to the current inquiry, the third phase is seen to be overwhelmingly the appropriate context for examination of the new scheme. This third phase goes to the conceptual level of the law, ‘challenging the very concepts law invokes to defend itself as a just and fair institution’\textsuperscript{327}. Together, these three phases constitute the gendering strategy of the law.

Dale Spender\textsuperscript{328} argues that a ‘patriarchal society is based on the belief that the male is the superior sex and many of the social institutions… [are] then organised to reflect this belief’. This chapter will use this premise within the third phase of Ngaire Naffine and a narrower postmodern approach inspired by Mary Joe Frug\textsuperscript{329} to see if the new scheme can offer a deconstruction of the inherent gendered nature of contract law. This framework identifies:

- language of the law (a binary notation, inherently gendered);\textsuperscript{330}
- women as characters in the case law and the context of their life situation;
- the traditional structure of contract law (as principles and counter-principles); and
- the maleness of the law.

These issues are valid in the Australian context as most form part of the analysis of the gender of law in an ALRC Report.\textsuperscript{331} The Report identifies gender bias within the Australian experience, in both direct and indirect forms. It looks at how unquestioned assumptions can produce bias, and identifies ‘three contemporary approaches to equality and inequality in laws, policies and programs’:

\textsuperscript{327} Ibid, 2.
\textsuperscript{329} Frug above n320. The approach here will not adopt a postmodern deconstruction to the extent of denying the existence of woman or gender themselves.
• gender-neutral treatment;
• recognition that the experiences and requirements of women differ from those of men (differences approach); and
• identification of injustice arising out of the unequal distribution of power between women and men (subordination approach).

Thus while contract law may appear gender neutral, the gender-neutral approach challenges that assumption on the basis of historically disadvantageous treatment of women and male benchmarks for equality. The differences approach also identifies male benchmarks for equality though does not require women to be the same as men, rather identifying women’s differences from men as justifying different treatment. Feminist analysis of contract law using a subordination approach focuses not on differences but on power differentials and whether laws retain the dominance of men. These correspond to the respective foci of Ngaire Naffine’s first, second and third phases of feminism.

10.1. The Masculine Nature of the Law

If it is accepted that the law adopts the classical model which in turn reflects the needs and values of the western market economy, then it is not hard to argue the qualities of the primary participants in this system. A system rooted in an era dominated by the affluent, by those with a high standard of education, by competition between individuals for their own advancement, and on the whole by men, will inevitably reflect the values of those who developed it. Those who created and developed the law have enjoyed power in society. They have not had cause to enter into the context of others, and have accepted their own language as ‘natural, inevitable, complete, objective and neutral’. Even in the field of discrimination law, identification of discrimination is treatment of the ‘other’ in a way different from those who are dominant (ie men).

It is argued within this framework that the law is underpinned by concepts of rationality, consistency, adversarial contest, positivism and individualism. These traits are perceived

332 Finley, above n19, 892.
to be strong, masculine. ‘It may not have been deliberate design that (men) appropriated strength, reason, logic, objectivity etc for themselves and then proceeded to invest these characteristics with positive value.' This is the language of rational-economic contract law. The binary system of language is a recurrent theme through feminist and postmodern works.

In a satirical look at the common law notion of the reasonable man, A P Herbert’s fictitious *Fardell v Potts* highlights the impossibility and subjectivity of this construct. Its ‘judges’ in rejecting the application of the reasonable man standard to a woman (there is no such thing as a reasonable woman) bluntly bring home the gendered nature of this pillar of the common law and the preconceived notions which accompany it.

This reflects the additional gendered pillar of the law ie the male perspective forms the normative basis of the law: the reasonable man is in fact a man; the defence of self-defence applies a male standard (still relevant in spite of recent acceptance of the battered woman syndrome defence); and male workers form the standard against which women are to be measured in discrimination law. These standards are evidence that the law is informed by the experience of the men who created it and participated in it, and who wielded the power in society and its institutions to the exclusion of women.

In addition the law presents people as decontextualised beings robbed of personality and individuality. These people mirror what is dominant in the public sphere and the market – white, able-bodied, moneyed, rational, self-interested autonomous (men). The law reflects a world of dualisms: ‘reason/passion, rational/irrational, culture/nature, power/sensitivity, thought/feeling, soul/body, objective/subjective…(where) men associate

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333 Spender above n328, 101.
336 Finley, above n19, 893.
337 Naffine, above n326, 52.
themselves with the strong or positive side, and women with the weak or negative side’. 338 Dale Spender examines the connection between language and reality. The ‘reasonable man’ and the indicia of the free market reveal that those who invented these classifications were men. Her aim then, as a feminist, is to ‘dispense with these mutilating categories’ 339 to challenge the view of this language, these ideas, as impartial and objective’. 340

Presenting this gendered system and its decontextualised persons as impartial and objective is objectionable to feminists. While decontextualisation is regarded as the foundation of the law’s claim to speak with a ‘neutral, value-free and dispassionate voice’, for so long as this abstracted person does not represent the muted the foundation rests on a lie and the law cannot provide a sound basis for the equal and fair treatment of all. 341

The law goes further than this in defining issues and problems from the male perspective. Where a man is able to delineate his life in a work home dichotomy, and identify issues accordingly, a woman might see work and family as mutually defining. This is less obvious method by which the male hierarchy denies women’s experience in assigning a greater weight to elements of the human experience which they associate with themselves. 342

In this analysis, there is a risk of homogenising women and their experiences. There is also a risk of presenting women as unable to function in this system due to some inherent disability: whereas women suffer neither from an intellectual deficit nor from any fundamental defect which would necessarily preclude them from engaging in legal relationships in any field. What is sought is to ‘deconstruct the naturalistic, gender-blind discourse of law by constantly revealing the context in which it has been constituted…’ 343

339 Spender, above n328, 101.
340 Ibid 140.
341 Naffine, above n326, 49.
342 Finley above n19, 894.
343 Smart, above n334, 88.
To this extent, ‘gender remains a category that can help to analyse and improve our world’. 344

10.1.1. Language of the Law

Language is a primary means of imbuing the law with gender. It is now widely accepted in plain English legal drafting principles as well as in legislative and government drafting standards that authors are to avoid the convention of masculine pronouns including the feminine. 345 While it may be difficult for men to appreciate the unconscious undermining of confidence or the psychology of women by the continued use of male pronouns, this is widely recognised by feminist literature as creating, representing, promoting and perpetuating a masculine culture in the law, arising as it does out of the masculine culture of past times. 346 Masculine language was rationally interpreted to the detriment of women’s advancement in early cases by women seeking admission to universities and the professions. 347

Melvyn Bragg notes that language has been used as a conscious demarcation of social class. 348 Dale Spender also examines the development of the rules of grammar to promote masculine ideals. 349

10.1.2. Women as Characters in the Case Law

The traditional structure of understanding contracts reflected in the discussions in case law and the format of most contract texts is to identify that a contract exists (agreement, consideration, intention to create legal relations) then to identify exceptions to valid formation (including unconscionability). From there, remedies are determined.

346 Spender above n328, 147-62.
347 see eg extracts from Jex-Blake v Senatus of the University of Edinburgh (1893) 11 McPherson 784 and Re Edith Haynes (1904) 6 WALR; Re Kitson [1920] SASR 230; all in Jocelyn A Scutt, Women and the Law (1990) 5-10.
349 Spender above n328, 147-54.
Contract defined according to its requirement of intention to create legal relations includes commerce (the public sphere) and excludes issues affecting home and the family (the private). As the private has traditionally been considered the domain of women, women’s experience is systemically excluded from this field of law. Frances E Olsen\textsuperscript{350} points out that the (19\textsuperscript{th} century) family was ‘delegalised’ and while the courts would ‘blindly’ enforce contracts in the marketplace, they refused to enforce contracts between family members yet authoritatively defined family relationships. Contract law as we have seen is the law of the market, where the home is a haven from the market, and not a place for application of these rules.\textsuperscript{351} The law may recognise within the domestic sphere an intention to create legal relations but in a commercial context it will be presumed that the parties intend to create legal relations.\textsuperscript{352}

In addition to a lack of intention to create legal relations, where women’s domestic work is carried out in the course of a marriage for natural love and affection it fails to attract the status of consideration to support a contract. Equity however offers the remedy of constructive trust\textsuperscript{353} whereby a contribution by a partner (usually within a domestic situation) to the purchase, investment or maintenance of real property may be recognised by the court where that partner has no legal interest and where to deny them an interest would be unconscionable.

In \textit{Bryson v Bryant}\textsuperscript{354} Mr and Mrs Moate died within months of each other. Their home, registered in Mr Moate’s name, was left to Mr Moate’s estate. This was an action by Mrs Moate’s estate for a declaration of a constructive trust based on Mrs Moate’s financial and labour contribution to the house and the marriage. Kirby P (dissenting) used empowering language in his assessment of Mrs Moate’s contribution. He felt it not persuasive that Mrs Moate contributed financially and ‘by her own actions’ for natural love and affection. She was ‘no reclusive housewife but an active contributor to the relationship and its economic

\textsuperscript{350} Olsen, above n338, 1522.
\textsuperscript{351} Ibid, 1566.
\textsuperscript{352} Starke, Seddon and Ellinghaus, above n93, 171-5
\textsuperscript{353}Muschinski v Dodds\textsuperscript{355} (1985) 160 CLR 583; Baumgartner v Baumgartner [1985] 2 NSWLR 406.
\textsuperscript{354} (1992) 29 NSWLR 188.
success’. Kirby P speaks out against a ‘mostly male’ judiciary which tells women ‘condescendingly’ their lifetime of ‘women’s work’ must be regarded as ‘freely given labour’ only, or described as ‘natural love and affection’. He states that ‘judicial observations formulated to resolve disputes in purely commercial relationships’ should be applied to a domestic relationship. It appears that Kirby P is seeking to dismantle the public/private dichotomy in this (narrow) area of the law.

Sheller JA on the other hand, explains Mrs Moate’s conduct as arising from natural love and affection: there are reasons a woman enters into marriage other than for material gain. For the conduct to ‘qualify’ for an interest in the property, it must where the parties are married, be conduct ‘which…the woman would not be expected to embark upon unless she was to have such an interest’.

Sheller JA completes his stereotyping of gender roles by citing Green v Green:

Where an obligation on the part of a husband to house and provide for his wife is commonly regarded as an incident of the matrimonial relationship…the acceptance of an obligation by a husband to house his wife would not normally be regarded as an undertaking to give her a proprietary interest in the home in which they live…

In this case, the structure of contract law precluded a woman’s traditional experience in the domestic sphere. Mr and Mrs Moate were found not to have an intention to create legal relations, and there was no identifiable consideration to support a contract. Any remedy Mrs Moate seeks needs to fall outside contract law and within equity. Yet as this case shows, the very standard which precludes a remedy under contract can be used also within equity to deny a remedy. This case made it very clear also, citing Deane J in Muschinski v Dodds that a constructive trust does not ‘represent a medium for the indulgence of idiosyncratic notions of fairness and justice’.

355 Ibid, [199E].
356 Ibid, [204A].
358 Ibid, [220G].
360 Bryson v Bryant (1992) 29 NSWLR 188, [221E].
361 (1985) 160 CLR 583, 615.
Historically, women have been precluded by common law from being the subject of law. This has helped create a systemic gender bias of man as subject. Women’s inherent capacity to contract or indeed to own property (which formed the genesis of contract law) was curtailed for centuries under the common law until modified by the equitable doctrine of the separate estate, subsequently in Queensland further eroded by the *Married Women’s Property Act 1890* (Qld) and ultimately repealed altogether by the *Married Women (Restraint upon Anticipation) Act 1952* (Qld). In *Cheshire and Fifoot*, women’s capacity to contract continues to take the spot following lunatics and drunkards, although somewhat apologetically by the authors.

A subset of contract law in which capacity is relevant is in unconscionability and undue influence. In this area, women are represented – but as victims rather than as the subjects in commerce and industry. *Commercial Bank of Australia Ltd v Amadio* told the story of husband and wife who suffered as a consequence of their lack of comprehension of English. In *Yerkey v Jones*, the very principle applied is couched in terms of protection of married women who guarantee their husbands’ debts. Similarly the appellant in *Garcia v National Australia Bank Limited* sought to have this principle applied in her favour. The majority in that case challenged the traditional assumptions made about married women, and sought to define the principle in such a way as to get to the root of the equity, its meaning and its application.

This sample of women as subjects of contract who seek the protection of exceptions in the law of contract, highlights the systemically masculine structure of contract law itself. This structure relies on a male norm – identified in the ALRC Report – where all is compared to this male norm to establish its own identity. In this structure, woman is the other, a recurring theme in feminist writing. Otherness, coupled with the binary or dualistic

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362 Starke, Seddon and Ellinghaus, above n93, 563.
364 (1939) 63 CLR 649.
367 de Beauvoir above n334, 15.
nature of the language of law and analysis provides a framework for identifying contract law as falling within the systemically masculine law.

The new scheme circumvents the possibility for exclusionary rules by imposing a uniform procedure on all contracts. Under the new scheme, any party to a contract need have no recourse to exceptions to enforce a standard of fairness which is designed to form part of the contracting process itself. This is the first example of the possibility for the new scheme to impact on the gendered structure of the law. This applies also in the context of identifying that the exceptions to the norm (eg unconscionability) form part of that binary structure in another guise – that of principles and counter-principles.

10.1.3. Contract Law – Principles and Counter-Principles

As Clare Dalton identifies, principles of common law by which a contract is identified are opposed by counter-principles. Application of feminist reasoning premised on binary opposites recognises that counter-principles offer exceptions to the principles. In this sense they are the ‘other’.

As observed, establishment of the rules of contract law reflected establishment of the market economy, and the philosophy of economics and morals propounded by classical scholars. Public life of the 18th and 19th centuries (and much of the 20th century) belonged to men. The experiences of women were not relevant to the development of the economic and legal structure, and laws were developed in the image of the men who made them.

Accordingly, contracts are considered by the law to be negotiated by rational parties at arm’s length, free from emotional attachment or pressure and importantly, in an objective dispassionate and adversarial way:

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368 Ibid.
370 Spender above n328; Barnett above n330, 15.
• The doctrine of *caveat emptor* denies the obligation on a party with knowledge to share that with the other party: enforcing the personal responsibility so reflective of classical times. Strict liability for one’s contracts similarly reflected this idea.

• Consideration, as a cornerstone of establishing a valid contract, ignores the relationship of the parties and their reliance on each other. The fact of consideration evidences the existence of the contract.

• Enforcement of these contracts was undertaken in the context of the adversarial court system. This system is readily identified as foreign to and exclusive of women. Women see themselves as lacking credibility in the courtroom; often lack the financial resources to pursue a matter through the courts and are expected by judges and juries to behave in a particular (stereotypical) way.371

• Remedies in contract are determined by the outcome of the parties’ bargaining process. The court looks to what the parties can be seen to have done, rather than what they actually understood – eg a signature on a document is prima facie evidence that a party has read and understood its terms.

The foundations of this system are: adversarial, outcomes-based, rational, individualistic and autonomous. These traits are considered to be masculine – and therefore superior – in the linguistic tradition of binary opposites. The corresponding ‘feminine’ (and impliedly inferior) traits of nurturing, sharing, community, emotion, process-oriented, relationships-based are to be found in the counter-principles, the exceptions.

As has been discussed above though, notions of individualism in the market and freedom of contract have been eroded in recent times. Consumer protection legislation has flourished to compensate for inequalities in the marketplace – not all subjects are in fact equal, nor do they come together on the equal terms presupposed by the law. From a feminist perspective, this validates the question of whether it is meaningful or appropriate for the

371 Australian Law Reform Commission *Equality Before the Law: Justice for Women: Part II* above n331, [2.16]-[2.18].
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The law depends so heavily for its sense of impartial justice on the concept of the abstract individual where that individual is in fact not so abstract, but is a masculine construct.

The new scheme attempts to replace the common law assumed ‘level playing field’ which relies on these masculine assumptions about the parties to the transaction, with a genuine level playing field. There are no assumptions made about the capacity or experience of the subjects in these markets. The formality requirements act as a circuit breaker in the contracting process, putting the parties on notice about the nature and extent of their obligations. To that extent the parties are placed on an equal footing where neither has a real opportunity to use the system to their own advantage. A buyer/tenant must receive a warning statement, or disclosure statement. In the case of RSLA, each tenant is required to obtain legal and financial advice, and has time to consider the terms of the proposed lease. Under PAMDA, buyers are warned and advised to obtain legal and valuation advice before entering into the contract and all buyers are given a cooling-off period within which they may terminate.

These circuit breakers act as mediator bringing the parties to an even standard, rather than allowing the parties to engage in the pure rational profit-maximising behaviour of the marketplace. While the individual remains abstracted, there are no assumptions made about their characteristics.

Questions of abstraction are answered in the equitable doctrine of unconscionability which forms an exception within contract law. In an otherwise validly formed contract, this doctrine may be applied to provide relief to a contracting party in the interests of justice and equity. If contract law is the norm, this exception is the ‘other’. Where rules of contract can be considered to be of the masculine duality, the doctrine of unconscionability embodies principles which reflect the ‘feminine’ perspective. The doctrine will be applied to set aside a transaction.

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372 Naffine above n326, 53.
373 See above ch5.
374 Based on the idea of binary opposites.
whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.375

This looks at relationships rather than assuming that parties will operate as autonomous individual units. This relationship-based approach has potential to recognise the emotional and social impact on the parties of their course of dealings. It is not limited to a rational outcomes-based approach. The facts of the case are considered in identifying the relationship. This is an acknowledged subjective approach, rather than the neutral objectivity espoused by the law in general and contract law in particular. It is the subjective approach which softens the harsh impact of the unwavering apparent objectivity of the general principles.

The doctrine serves to protect those who are considered by the law unable to make a rational autonomous decision in relation to their contract as a consequence of their relationship with another contracting party. This perhaps can be related to the traditional view of women’s lack of capacity to contract in any circumstances.

It would be drawing a long bow however to say that the development of equitable principles and consumer protection legislation and principles in themselves offer a departure from the masculine norms of the legal system. They tinker with the edges of the system, but do not negate the overall impact of a system which denies the feminine condition and indeed the condition of men outside the standard masculine model (ie non-able bodied; non-English speaking; homosexual; poor; uneducated). They continue to be counter-principles and as such continue to uphold the gender-based foundation of the law of contract.

The idea of conscience could in fact be approached in an alternative way, as a prerequisite of a valid contract. This would be akin to good faith which is accepted in US law and which is now being discussed in the context of Australian law.376 Instead the current Australian approach to unconscionability sees it as an exception to the formation of a valid contract.

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376 See discussion in Elisabeth Peden, Good Faith in the Performance of Contracts (2003), [1.8].
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The norm with its exceptions reflects the binary and gendered nature of the law and social institutions generally.

In contrast the new scheme provides a systemic review of relationships interposing formal processes to regularise the undesirable behaviour formerly within the ambit of common law exceptions. While the subjective review of the parties’ own experience and relationship is missing in this scheme, the exceptional element of unconscionability is brought within the mainstream as a new norm. In fact it can be argued that pre-empting unconscionability deconstructs the ‘masculine’ side of the duality in contract and allows elements of the ‘other’ to be valued rather than overruled: consensus, relational thinking, responsibility, ethic of care, interconnection. These qualities are arguably allowed – not punished – by the new scheme. The new scheme does not leave the subjects to the vagaries of the marketplace and the dog-eat-dog world of commerce. It seeks to provide a process for parties to find their common ground, and to avoid the inequities inherent in an economic liberalist environment.

The final yet essential limb of the doctrine of unconscionability is that of abuse of power. This is also the third arm of gender bias identified in the ALRC Report, and the issue taken on by third-phase feminists. Recognising power issues within the context of contract law norms would provide an opening through which gender power issues could be explored – however as is noted in the case studies below, this will not necessarily occur. The power issues addressed in the new scheme however provide no forum at all for exploration of gender. This lack of consciousness raising might represent a missed opportunity to some feminists, however if the very structure of contract law itself has indeed altered to remove preconceptions of masculine behaviour and therefore bias, the loss may well be bearable.

10.2. Traditional Consumer Protection – Feminist Perspectives

As noted, the consumer protection regime commencing in common law rules, codified in the Sale of Goods Act 1896 (Qld) and later expanded by the Trade Practices Act 1974 (Cth), provides an alternative legal treatment for particular types of contracts. Consumer

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377 See eg Bartlett, above n344, 832; Finley above n19, 894; Cahn above n426, 1414.
protection, with its erosion of the hardline principle of *caveat emptor* can be considered to be a ‘soft’ area of law. Consumer protection does not reflect big business or commercial interests (public) but falls within the realm of private. While applied equally for the benefit of women and men, there may still be a hidden gendering in this exception to black letter contract and indeed there is evidence that women suffer particular discrimination in consumer transactions. To this extent, consumer protection is a gendered issue.

Consumer protection law reflects an underlying assumption that the consumer is unable to ascertain information about a product necessary to protect their own interests. The regulatory solution to the imbalance in knowledge and therefore power between a manufacturer and consumer was to allow assumptions about representations to be made under legislation whereby consumers would have security in relationships they forged with shopkeeper intermediaries.

Like unconscionability though, consumer protection rules are an exception to the general law. These rules are the ‘other’ in an area of law which is arguably gendered. On a feminist analysis, they reflect exclusion or differentiation afforded the feminine, within the masculine construct of the law.

The extent of the exceptions of traditional consumer protection such as warranties remains minor exception in the scheme of contract law. The ambit of these provisions cannot make headway into the gendered structure of contract. The *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1989* (Qld) create a broader range of options to impinge on the system. The Queensland Department of Fair Trading for example acknowledges that both retailers and consumers remain uncertain or unaware of the rules of exchange.

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(based on statutory warranties) and it, like the ACCC, has a mandate for public education which augments the tools available to promote a level playing field.

The extent of the application of the exception of unconscionability is likewise only limited. While unconscionable conduct may in fact occur frequently the wronged party will only appreciate their rights in a subset of those circumstances, and seek to enforce those rights in only a subset of those. A person to whom the doctrine of unconscionability will apply by definition suffers a ‘special disability’. The proportion of those wronged people who identify that they have been wronged and who pursue justice will be small indeed.\(^{382}\) The character of unconscionability as the ‘other’ is reinforced by the nature of it being an exception in the first place, but is more entrenched than the statutes which provide the assistance of a dedicated agency.

The nature of the processes available to consumers under ameliorative provisions is important in determining the extent to which they are effective in empowering the wronged party. For example part of the reason for the lack of application of unconscionability in the past can be attributed to the nature of the legal system itself. Adversarial, expensive, exclusive, high risk – the courts are a reflection of the marketplace whose dealings they arbitrate.\(^{383}\) The \textit{Trade Practices Act 1974} (Cth) and \textit{Fair Trading Act 1989} (Qld) have sought to address these issues by allowing better access to agencies to enforce the same or similar principles. Through administrative action taken by the ACCC (as in the cases of \textit{Berbatis Holdings}\(^{384}\) and \textit{Samton Holdings}\(^{385}\) for example) and by a variety of remedies alternative to those offered by the common law, the \textit{TPA} has to an extent liberated the principles from the constraints of traditional legal culture.

Like the \textit{TPA}, the new scheme follows the goal of improving access to justice, but broadens the means of achieving it. First it short-circuits the need for reliance on unconscionability

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\(^{383}\) See Atiyah’s ‘model of the market’ above n79.

\(^{384}\) \textit{Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd} (2003) 214 CLR 51 (‘\textit{Berbatis Holdings}’). See discussion below at section 10.3.1.

\(^{385}\) \textit{Australian Competition and Consumer Commission v Samton Holdings Pty Ltd} (2002) 117 FCR 301 (‘\textit{Samton Holdings}’). See discussion below at section 10.3.2.
or even norms of conscience or good faith, on the basis of its reinterpretation of the rules of contract and interposing formal requirements in contracts involving the subject matter of the legislation under review.

Secondly, it requires disclosure or warning which serves to highlight the seriousness of each party’s obligation to the other and removes the advantage of knowledge. Thirdly in the case of *PAMDA*, it offers a cooling-off period as a means of self-help should the contract terms not truly reflect that party’s perception of the bargain. These factors remove the bargaining process itself from the realms of the dispassionate arm’s-length rational profit-maximiser and grant buyers/tenants the opportunity to reflect and consider their bargain.

### 10.3. Feminist Case Analysis- Three Cases

While the new scheme provides a range of measures to empower consumers to handle their own contracting process, ultimately the common law structure of contract remains the foundation for these transactions. This law starts and ends in the courts which play an integral role in determining the tenor of the legal system itself. It is instructive therefore to apply feminist principles to the analysis of a small selection of cases discussed elsewhere in this paper to provoke an alternative view of the accepted method of deciding cases and to highlight otherwise hidden issues within contract law which reflect a gendered world view.

Katharine T Bartlett\(^{386}\) discusses the method she calls feminist practical reasoning, and asks the question:

> Do feminists reason contextually in order to avoid the application of rules – like the marital rape exemption – to which they substantively object? Or can the substantive consequences of feminist practical reasoning be justified as a proper means of moving from rules to results in specific cases?\(^{387}\)

It is submitted that in the commercial context examined below (in particular that of the first two cases) there is no such philosophical objection to the rules. But these cases therefore

\(^{386}\) Bartlett above n344.

\(^{387}\) Ibid, 862.
arguably better demonstrate the impact of feminist practical reasoning by selecting rules without an obvious gendered context. It is immaterial in this context whether the rules themselves are continued. It would not be a feminist imperative to see them overturned. However it is interesting to note the perspective with which they are applied by the judges, each of whom has failed to take into account the context of the women in each case, and in fact in many cases has failed to identify them as a party at all.

The purpose of this reasoning is to show that rather than the law presenting a value free zone, it is laden with values and assumptions which are not acknowledged. By forming the foundation of the decisions that are made, the bias is systemic and only by acknowledging this can the system become truly transparent and genuinely equitable. ‘By forcing articulation and understanding of those considerations, practical reasoning forces justification of results based upon what interests are actually at stake.’ \(^{388}\)

### 10.3.1. *ACCC v CG Berbatis Holdings*\(^{389}\) – Public vs Private

In *Berbatis Holdings* the primary characters were Mr and Mrs Roberts, who in their capacity as trustees of their family trust leased premises in a suburban shopping centre in which they operated a fish shop.

Centre management had required as a condition of their entering into a new lease (their existing lease due to expire and containing no options) that they release the landlord from its obligation to repay overpayment of outgoings. This condition was initially rejected by the Roberts, thus ending negotiations to sell the business. They were selling to be able to spend more time with their seriously ill daughter, and have more money to pay for her medical treatment.

Ultimately, negotiations to lease recommenced without the need for the release clause. Consequently, negotiations for sale also recommenced, and the purchaser started to take possession. At the last minute, the lease was produced for execution, containing the release

\(^{388}\) Ibid, 863.
clause. The Roberts felt they had no option but to sign, to avoid jeopardising the sale once again.

The question considered by the High Court was whether the position of the Roberts constituted a ‘special disadvantage’ in terms of unconscionability doctrine of the common law, to be applied in terms of the Trade Practices Act 1974 (Cth).

The majority held that there was no special disadvantage, with Kirby J dissenting. The traditional definition of ‘special disadvantage’ from Blomley v Ryan\(^\text{390}\) is quoted three times in the judgement. This includes ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’.\(^\text{391}\) The reiteration of ‘sex’ as a circumstance of disability or disadvantage unconsciously perpetuates the stereotype of women’s disability. It is impossible to think of a circumstance where maleness would be perceived of as a disability. The court has ample opportunity to address this issue, but in this case failed to do so. This issue is raised in cases such as European Asian of Australia Ltd v Kurland,\(^\text{392}\) where Rogers J said ‘I feel compelled to say that in the year 1985 it seems anachronistic to be told that being a female and a wife is, by itself, a sufficient qualification to enrol in the class of persons suffering a special disadvantage.’\(^\text{393}\)

In the most part of the judgement, the Roberts are referred to jointly. However there are a number of occasions where Mrs Roberts alone is referred to. These include (understandably) the circumstances where she entered into discussions with the centre manager. However it is not clear why evidence is led as to her business experience\(^\text{394}\) but not that of Mr Roberts. The decision also looked at the opportunity for Mrs Roberts (and not Mr Roberts, or the trustees) to be independently advised.\(^\text{395}\) The High Court cited

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390 (1956) 99 CLR 362.
391 Ibid [8], (Gleeson CJ); [68] (Kirby J); [182] (Callinan J).
392 (1985) 8 NSWLR 192.
393 Ibid, 200.
395 Ibid, [48].
French J\(^{396}\) (from the Federal Court trial) stating that ‘Mrs Roberts decided that she had little option but to sign the documents. Her lease was due to expire on 14 February 1997. There was no prospect of renewal and without that she would have no business to sell…’ (emphasis added).

There is no corresponding reference in the appeal judgement to Mr Roberts’ feelings or decisions or discussions, nor his execution of any documents. Yet the lease was apparently entered into by both Roberts, jointly, as trustees.

It is unclear why the court has chosen to differentiate between the Roberts in some instances and not in others, and why in particular only Mrs Roberts was singled out. It could be simply a matter of Mrs Roberts being the primary business operator of the two, and Mr Roberts the silent or minority partner. However if this is the case, this should be stated before the court differentiates between them. Otherwise, the question will indeed be asked as to what prompts the different emphasis in the judgement. It might be noted that while a story of Mrs Roberts is told here, her identity as a subject is limited to her public self – a rational autonomous individual. While that is one understanding of ‘equality’ treating women the same as men – it can mask the underlying masculine construct of the system that all subjects are to be presented according to that (masculine) norm.

While the majority rejected the special disadvantage, Kirby J considered that the Roberts’ daughter’s illness was ‘part of the circumstances that placed them in a serious “situational” disadvantage and inequality vis-à-vis the owners’\(^{397}\). Kirby J acknowledged that a family crisis places an extraordinary burden on people, and that in this case it did so in fact. An initial impression of this case would normally reflect a traditional interpretation: that while the burden was perhaps understandable it was outside the commercial setting and therefore not relevant. Kirby J’s comments\(^{398}\) would then be considered to appeal to the emotions, to conscience or compassion, rather than conform to his statement in *Austotel Pty Ltd v*...

\(^{396}\) Ibid, [28] (Gummow & Hayne JJ).
\(^{397}\) Ibid, [94].
\(^{398}\) Ibid, [112].
Franklins Selfserve Pty Ltd,\textsuperscript{399} namely that ‘[c]ourts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people’. A traditional analysis seems to assume that hard-headed business people behave in a rational way unburdened by family considerations or emotional constraints.

Yet approaching the case from a feminist viewpoint can take into account the public/private divide – where the public is the domain defined by men (who created it) and the private is the other. Kirby J’s own earlier statement focuses on the traditional subject acting within the public sphere. Why is it not relevant to take into account concern for one’s family as a vital and integral part of one’s business interests, in particular where those are a small family-operated business such as this one? It is the consistent devaluing of family or personal, private concerns and emotional reactions in the public sphere which has created the benchmark for ‘rational’ decision making applied by the law.

Naffine’s view of this public/private divide is that the professed concern (of the law) is with the interactions between individuals, functioning as individuals, within the public realm. It is the public activities and rights of people which are thought to require legal regulation and protection. What people do in their own homes is basically up to them.\textsuperscript{400}

The other side of this, illustrated by this decision, is that private concerns will not be recognised as bearing any relationship to public activities. The domestic realm, which would include care of the sick and care of children, does not fall within the public realm the subject of the law. Statute and common law have only recently attempted to make inroads into domestic violence and rape within marriage.\textsuperscript{401} This indicates the entrenched nature of the public/private divide, where questions of physical and psychological safety have remained so long outside the reach of the law. It is therefore not surprising that the public/private dichotomy is maintained elsewhere in the law.


\textsuperscript{400} Naffine above n326, 69.

\textsuperscript{401} See generally Barnett above n330, ch11; Graycar and Morgan above n401, 316-8.
Finley\(^\text{402}\) also identifies that legal language sets parameters within which speech in the legal world must occur. It demands universal principles including free choice, and that participants speak with dispassionate reason. This may be why it was relevant to cite Mrs Roberts’ business experience, her experience in the public world, but admits no evidence as to how her life and her husband’s life were affected by their daughter’s illness. This issue was surely central to identifying whether there was a special disadvantage in terms of the doctrine, but the law fails to provide a language which admits of it. This is further evidence of the dichotomy between ‘productive’ life and affective life: where the family is a separate sphere of activity and impliedly irrelevant to the market.\(^\text{403}\)

Issue is not taken here with the outcome of this case. However the majority judgement is considered suspect in failing to deal with the argument of the obvious emotional cost on the minds of the Roberts. It may well be that the court considers it appropriate only to consider the issues of the marketplace, and not personal issues in its application of the rules of unconscionability in the business world. However by failing to acknowledge the pain of the Roberts at all (even if this does not constitute a ‘special disadvantage’) the court impliedly devalues the private domain of the care of family members, and gives primacy to the domain of the public self, which has been argued is a masculine construct.

One final comment concerns the judgement of Callinan J, who concurred with the majority judgement of Gleeson CJ, Gummow and Hayne JJ. Callinan J identified that Mr and Mrs Roberts had a commercial choice.\(^\text{404}\) He took into account all the commercial realities except that which Kirby J had considered relevant, namely the representation by the centre manager that the release clause would not be relied on, and the eleventh hour insistence that it be included – when it was too late to consider alternatives. But this is precisely where the ‘personal’ (presumably as opposed to ‘commercial’) considerations came into play. The Roberts were unable to make a ‘commercial’ decision, as they were focussed on the imperative of their daughter’s situation. Time would not have created the pressure

\[^{402}\text{Finley above n19, 905.}\]
\[^{403}\text{See Olsen above n338, 1498.}\]
\[^{404}\text{Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51, [173].}\]
without the complication of personal circumstances. Kirby J pointed out that ‘equity will provide relief where even if the act of the weaker party is independent and voluntary, it is the result of the disadvantageous position in which he [sic] is placed and of the other party unconscientiously taking advantage of that position’.405 On this basis, their (personal) plight was relevant to their (business) position and should have been considered.

10.3.2. **ACCC v Samton Holdings**406 – Women’s Untold Stories

Like *Berbatis Holdings*, the company tenant in *Samton Holdings* took an assignment of a lease pursuant to the purchase of a business. In this case, the lease had only three months left before expiring, but did contain an option to renew. A director of the tenant purported to exercise the option, but failed to do so in time. The landlord and its directors conspired to derive a financial advantage from the imperative of the tenant to have a new lease, and entered into an arrangement whereby $60,000 would be paid over some years in consideration for the grant of a new lease. The arrangement was disguised in its form to avoid being contrary to legislative provisions prohibiting the demand of key money.

Here the gendered consideration of actions by the directors of the company tenant focused not on the woman, Mrs Ranaldi, but on her husband, Mr Ranaldi. He was described in paragraph 8 as ‘a person with proven business skills’. It appeared to be Mr Ranaldi who conducted negotiations, and Mr Ranaldi who exercised the option. In a series of actions and counter actions brought between various parties to the case, Mr Ranaldi (but not Mrs Ranaldi) was a subject.

There is in the case a consistent intermixing of the company tenant and the Ranaldis’ assets. The court found that in relation to potential losses, the company would after sale of the business, still have $100,000 of assets and Mr Ranaldi could resume his former occupation of trade in horses. There is no mention still of Mrs Ranaldi. The court goes on to state in paragraph 24 that Mr Ranaldi would have known what was in the best interest of himself and his wife. There is mention in paragraph 29 that ‘Mr Ranaldi was adjudged as

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405 Ibid, [80].
reasonably well-versed in commercial matters…The male respondents …were successful businessmen…” There is no mention of Mrs Ranaldi, nor of any of the 3 female respondents.

First, the lack of consistency in identifying the company as tenant, and in using the company and Mr Ranaldi or the Ranaldis interchangeably, arguably diminishes the impact of the judgement. The Ranaldis had mortgaged their home to secure the company’s borrowings. In this field, where statute (Trade Practices Act 1974 (Cth)) intersects with common law traditionally applied to individuals (the doctrine of unconscionable conduct) it is important to identify to whom and why the doctrine may or may not apply. The relationship between the parties, and their disability (can a company suffer a ‘special disability’?) will be important to the transition of the principles of unconscionability from the personal to business sphere.

Secondly, as in Berbatis Holdings (discussed above) the reader is left to ponder why one gender (in this case the men, in the other, the woman) is consistently referred to over the other. In this case, it appears that a stereotype of Mrs Ranaldi as wife: a passive director, with no paid occupation and whose assets are merged with those of Mr Ranaldi, operates to render her invisible to the reader. The decisions are made for her, and in her best interests, apparently by her husband. Mrs Ranaldi is arguably as important a player in the case as Mr Ranaldi, with as much to gain or lose, yet she has no identity in this case. By failing to cite the circumstances of Mrs Ranaldi, by failing to give voice to her story in the context of this litigation, the court is perpetuating the dominance in the law of male subjects and maintaining the invisibility of women. In this case, woman remain the ‘other’.

Were the court to tell this woman’s story, to identify her interest in the proceedings, the court could play a part in deconstruction of the dominance of male subjects in the legal system, and our culture generally. Readers of cases would start to hear the stories of women as well as of men and to identify this diversity as part of a new norm. As Bartlett points out, ‘much of the judicial reform that has been beneficial to women, has come about
through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women.407

10.3.3. Stern v McArthur408 - Dominance and Tunnel Vision409

Stern v McArthur provides another example of ‘gender neutral’ impartial reasoning (in the two dissenting opinions of Mason CJ and Brennan J) which arguably fails to take into account the experience of women, and which provides an example of the systemically masculine nature of the law.

It is clear from the opening paragraphs of the case that the respondents McArthur and the ‘other’ of the case title (namely Mrs Bates) had formerly been married but had divorced. The McArthurs, as they then were, had purchased land from the Sterns with vendor finance. They built a house and paid their instalments and the rates. In 1977, Mrs Bates (who occupied the property at that point, without Mr McArthur) became aware that Mr McArthur had ceased paying instalments some 12 months earlier. She took immediate steps to attempt to meet the arrears, but received incomplete and conflicting information from the Sterns and their solicitor about the amount due.

Subsequently, the Sterns demanded accelerated payment of arrears and the balance pursuant to their agreement and when Mrs Bates failed to pay they forfeited the property. They offered to account for the increase in value of the property as a consequence of the McArthurs’ improvements.

In this feminist interpretation of the case, it is recognised that some liberties will be taken in the extrapolation of facts from those stated in the report. It should be understood that this is done in the spirit of questioning what is unsaid in the report itself. It is considered to be a valid tool of feminist analysis to ‘ask the woman question’.410 This can form part of

407 Bartlett above n344, 863; also see Lisa Sarmas in Regina Graycar (ed), Dissenting Opinions: Feminist Explorations in Law and Society (1990), 76.
408 81 ALR 463.
409 Spender above n328 90.
410 Barnett, above n330, 19; Bartlett, above n344, 837.
consciousness raising – to ‘critique...law from the perspective of women’\(^{411}\) – or legal storytelling – ‘turning attention to how alternative stories can be told’\(^{412}\). This process can work to deconstruct the masculine structure of the law with the aim of weaving women and their experiences into the fabric of legal institutions.

The first ‘woman’ question arises as to the continuing financial relationship between Mrs Bates and Mr McArthur, after the end of their marriage. It could be interpreted that Mrs Bates was receiving some support from Mr McArthur in the form of contribution to the repayment of the loan for the property in dispute. The facts of their relationship are not otherwise raised in the judgement, even though they could be seen to be pivotal to the initial default which ultimately led to the attempted forfeiture of the land.

When demand for payment was made, Mrs Bates attempted to obtain finance from alternative sources. According to the judgement Mrs Bates did manage to obtain finance elsewhere, but Mr McArthur required the property to be sold. It was apparently not feasible for Mrs Bates to buy out Mr McArthur on her own account. The ‘woman question’ asks why Mrs Bates’ is unable to secure finance. Is she financially dependent on Mr McArthur? Does this arise out of systemic differences in the financial capacity of men and women?\(^{413}\) Why is she is inherently disadvantaged and powerless to act according to her own preferences in her own best interests? And ultimately, why has the court failed to take this into account?

Mr McArthur’s interest in the matter was dealt with peremptorily by Mason CJ: ‘there is no direct evidence that he was told by anyone before his one and only meeting with Mr Stern ...that the appellants were relying on their rights under cl 18(a)’\(^ {414}\). He did, according to Brennan J, attempt to deposit $2,500 to the vendors’ account in 1979, which amount was rejected. It was therefore incumbent on Mrs Bates to seek to protect her home.

\(^{412}\) Ibid 74.
\(^{414}\) *Stern v McArthur* 81 ALR 463, 465.
The judgement of Mason CJ and his application of the law is not necessarily questioned here. It is not the legal rules per se but the judge’s method of reasoning, the assumptions made and the facts and circumstances ignored, which bear scrutiny. It can be seen that his application of the rules giving relief against forfeiture fail to take account of Mrs Bates’ circumstances, and could therefore have an unjust effect simply because of circumstances consequent on her being a woman. It was not Mrs Bates’ responsibility (as between her and Mr McArthur) to make repayments. It was her former husband’s responsibility – apparently as part of a matrimonial settlement – on the basis that Mrs Bates continued to live there. The cessation of repayments without notice to Mrs Bates put her at risk of losing her home. Her inability to obtain a loan to remedy the default (assuming that is what happened) led to her inability to remedy the default by paying out the loan.

Insistence on an apparently neutral and value-free set of rules will in these circumstances penalise Mrs Bates because of her gender. This is because the norm pursuant to which the ‘neutrality’ of the rules is judged, is a masculine norm.

Brennan J’s comments of course reflect the common view of the common law:

“If unconscionability were regarded as synonymous with the judge’s sense of what is fair between the parties, the beneficial administration of the broad principles of equity would degenerate into an idiosyncratic intervention in conveyancing transactions.\(^\text{415}\)"

He then quotes Lord Radcliffe in *Bridge v Campbell Discount Co Ltd*:\(^\text{416}\) ““unconscionable” must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other...”\(^\text{417}\)

The ‘woman question’ asks here what a competent person is. Is that a person (a man) who can obtain finance on their own account; one who is not reliant on another for financial support to meet the mortgage repayments on their home? Alternatively principles of

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\(^\text{415}\) Ibid 479.
\(^\text{416}\) [1962] AC 600, 626.
\(^\text{417}\) *Stern v McArthur* 81 ALR 463, 479.
difference\textsuperscript{418} recognise that ‘talk of equality is in fact couched in comparative language of sameness/difference’.\textsuperscript{419} It looks for the norm against which legal subjects are measured. The law of contract deems woman a competent person by the law’s \emph{gendered} standard ie competent by male standards, without acknowledging her particular differences and thereby denying her the benefit of equity – designed to address inequities inherent in the common law.

This can be examined also by the principles of subordination analysis which look at ‘the reasons for a particular law or practice, including its historical origins and its current social and economic effects on women’\textsuperscript{420} If the (admittedly somewhat assumed) situation of Mrs Bates is regarded as the consequence of power imbalances inherent in society, of man’s historical domination over woman (to abuse the stereotypes – traditional child carer, low wage earner, dependent on ex-husband for alimony due to a complex interaction of low wages for women, lack of affordable child care, social security and tax rules) then the hidden bias of gender is also inbuilt into the law of contract as she is destined by the constructs of the legal system itself to fail the competent person test, and yet to fail also to fall within the equitable rules designed to compensate inequity. Identification not of Mrs Bates as the ‘other’, nor as a victim, but rather of the social context and conditions which place members of society in her position, is an important element of recognising any inherent bias. Merely recounting Mrs Bates’ circumstances and labelling them as ‘different’ from those of her ex-husband or of the respondents jointly as commercial subjects in a man’s world, has the potential to reinforce women’s identities as ‘other’ in a same/different axis. This in turn can reinforce male hierarchical norms when it is this which needs deconstruction in order to create an equal system, in tandem with construction of new norms.

\textsuperscript{418} See eg Jenny Morgan, ‘Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners’ in Margaret Thornton (ed), \textit{Public and Private: Feminist Legal Debates} (1985) 89, 89-90; Smart above n334, 82-5.
\textsuperscript{419} Finley above n19, 897-8.
\textsuperscript{420} Australian Law Reform Commission, \textit{Equality Before the Law: Justice for Women: Part II} above n331, [3.13]; for subordination as an alternative to difference, see also Morgan, above n418, 89.
Interestingly, this is a case which differs from *Berbatis Holdings* and *Samton Holdings* insofar as the judicial treatment of the parties is concerned. While evidence as to the actions of Mr McArthur and Mrs Bates has been included, and these parties treated separately to that extent, they did not necessarily have an equal interest in the outcome. In *Berbatis* and *Samton*, the courts referred to the husband and wife differently in the judgement, for no apparent reason – even though the parties stood to lose or gain equally.

In this case, Mrs Bates stood to lose her home as well as her interest in any paper profit in the property’s value, but Mr McArthur stood to lose only an interest in the paper profit in the property’s value. This would be complicated if pursuant to a Family Court settlement any increase in value had been accounted for in Mrs Bates’ favour – ie Mr McArthur may retain a liability to assist with mortgage repayments, but Mrs Bates was entitled to retain any profit in the value of the property.

However throughout the judgements, Mr McArthur and Mrs Bates were referred to jointly as the purchasers. It would have made some sense to identify their relationship and their separate interests in the proceedings, and to apply the relevant principles accordingly: where in the other two cases it made little sense to distinguish between the partners.

It might be noted that the judgements contain consistently gendered language: using he/him/his. As the decision was handed down in 1988, this is not surprising. Only since the early 1990’s has the law started to promote gender-neutral language. This is taking time to filter through all aspects of the law.\(^\text{421}\)

Deane and Dawson JJ identified the importance of the land being purchased ‘upon which (an ordinary couple) proposed to build their home’.\(^\text{422}\) While it is this notion which these judges considered essential to bring the relevant law into play (ie the subject matter of the contract as residential land was necessary to establish an equity in the property by drawing an analogy with an instalment contract) it is important that they managed to identify with the private sphere, the home. When the subject matter of the litigation is seen as

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\(^{422}\) *Stern v McArthur* 81 ALR 463, 489.
somebody’s home, the facts can be seen in a very different light, and the imperative for the application of the rules of equity becomes stronger. Note that Mason CJ stated that: ‘thereafter Mrs Bates lived in the house…’\textsuperscript{423} whereas Deane and Dawson JJ referred to ‘the second respondent [continuing] to occupy the house as her home’.\textsuperscript{424} Gaudron J too said: ‘[a] house had been erected on the land and had become the home of Mrs Bates’\textsuperscript{425} (emphasis added). She too acknowledged the importance of the private connection, and her judgement delivered the same outcome as that of Deane and Dawson JJ.

Naomi R Cahn points out that ‘the legal system values claims of individual rights and overlooks claims that are based on interconnection and responsibility’, and that a legal system based on the feminine value of connection might grant a higher status to shelter, rather than a (masculine) focus on rights\textsuperscript{426} – in this case, property rights arising out of a contract.

This analysis may be problematic for some feminists by focussing on Mrs Bates’ victimhood.\textsuperscript{427} The challenge for feminist authors is to reconcile taking into account the reality of women’s experiences with such an implication – victimhood after all can be seen as a reflection of the traditional male legal construct of women in the law.

It is submitted that Mrs Bates’ status as a victim in this case contributed to the efforts of the majority of judges to work the law in her favour. To the extent that the law recognises the instalment contract as worthy of protection as a special case in contract law, it is arguable that notions of the ‘battler’, the home owner, the private sphere, are already considered to indicate a power imbalance. Yet if this area is considered to be ‘feminine’ by the system, it again falls into the category of ‘other’ rather than within the general body of the

\textsuperscript{423} Ibid, 464.
\textsuperscript{424} Ibid, 490.
\textsuperscript{425} Ibid, 498.
\textsuperscript{427} See eg Graycar and Morgan, The Hidden Gender of Law; Adrian Howe, ‘Sweet Dreams: Deinstitutionalising Young Women’ in Regina Graycar (ed), Dissenting Opinions: Feminist Explorations in Law and Society (1990) 40, 51.
(masculine) construct of contract law. To that extent, the decision of the majority can be considered to be gendered.

It is observed that the judgement of Gaudron J is the only one to reveal the full names of the parties – giving them an identity.

10.4. Women and the Law – Consciousness and Inclusion

The cases analysed here illustrate the capacity for the courts to raise society’s consciousness of women and of an alternative norm through listening to and recounting the stories and the experiences of women along with those of men.

Although some of these women’s absent stories may have been provided at trial, it is the judgement of the higher courts which will be considered by lawyers and law students. In the interests of developing a truly value-neutral system representative of the breadth of citizens’ experience, it is therefore the duty of the highest court to contextualise women’s experiences: either to include these stories in judgements, or to identify what is lacking. This also provides instruction to lawyers representing future litigants, in what to present to the court.

By asking the ‘woman question’ the High Court could have acknowledged the importance of these women in the context of these cases, and normalised their experiences in the context of the law. It is not a defence that space or clarity of thought through brevity precludes the inclusion of this type of information. Judgements are growing longer, and often the minutiae of facts are presented by more than one judge.

Whether or not the lawyers for the parties in each case considered some of the questions asked here could in itself represent a bias in the legal system at its foundation point – ie at the point at which a person seeks legal advice. However it is worthy to consider whether lawyers themselves operate in a climate of hidden bias in which they seek out only the facts they see as relevant to providing the best possible case for their client, or simply being blind to any alternative interpretation. ‘Lawyers must be careful to respect their clients and
to ameliorate, or at least avoid aggravating, the pre-existing power structures in the attorney client relationship.\textsuperscript{428}

It should be stated also that the comments made here concerning male dominance are not intended to imply a conscious wrongdoing by the courts or the lawyers involved. Rather, it is the sublimation of the gender issues identified here that is evidence of the systemic bias in the law. Raising the consciousness of the courts themselves will arguably help in systematically addressing this bias. First, it would promote a transparency of reasoning and thus deconstruction of the foundational latent male norm.\textsuperscript{429} Secondly, Regina Graycar has observed the extent to which knowledge gained by a judge through his private life will become a public matter – through judicial notice.\textsuperscript{430} To the extent then that a judge’s private world incorporates and articulates women’s experiences, the more the legal system will become relevant for women.

This section has looked at how the legal system through its courts can better include women. Legislation is of course the other branch of law with potential to give women a voice in society and its institutions – to ‘challenge the very concepts law invokes to defend itself as a just and fair institution’.\textsuperscript{431} The question to be asked is whether the new scheme provides a better scheme than classical contract, which systemically incorporates the experiences of women as well as men.

### 10.4.1. Feminist Theory and PAMDA

PAMDA introduces changes to the classical contracting process – the mandatory warning statement, cooling-off period and point of being bound. Each of these elements challenges the common law contract constructs of rationality, consistency, adversarial contest, positivism and individualism discussed above.\textsuperscript{432} The cooling-off period in particular acknowledges an element of emotion in the contracting process and caters for the

\textsuperscript{428} Cahn, above n426, 1440.
\textsuperscript{429} Bartlett, above n344, 863.
\textsuperscript{431} Naffine, above n326, 2.
\textsuperscript{432} See above ch10.1.
consequences of an emotional decision, allowing a buyer to withdraw with only a notional penalty.

The warning statement too supports a buyer under pressure by providing a clear statement available to both parties about what a prudent buyer would do. It acknowledges the reality of the marketplace and its pressures and provides an objective and dispassionate voice in support of a buyer who might otherwise lack experience or bargaining power to insist on gaining a parity of information on the deal.

The alteration of the point of being bound also subtly shifts responsibility to the seller to clarify the terms of the relationship in terms of the written contract – while at the same time allowing time for the purchaser to reflect on the deal.

All these factors challenge the masculine construction of the contracting process and thereby arguable deconstruct the implied masculine nature of the institution of contract as one of detached, unemotional and rational decision-making.

While this structural element of classical theory may be addressed, there is still the binary nature of the law to be answered: which with its principles and counter-principles reflects the (masculine) self and the (feminine) other. Yet PAMDA challenges this also in addressing procedural unfairness in the contracting process to minimise the opportunity for unconscionability. This represents a new standard of conduct implicit in the contracting process, which avoids the masculine standard and feminine exception.

To the extent therefore that PAMDA creates a positive approach to equalising contracting parties’ bargaining position it removes the exceptional nature of more traditional consumer protection. In this respect, the Act answers the critique of feminism which objects to the dichotomy of self and other inherent in the law.

The irony in providing an inbuilt mechanism to pre-empt unconscionentious conduct is that the stories of the individual are subsumed within this process and the consciousness-raising approach of many feminists is thereby defeated. In this process neither women nor men become characters in the case law as one standard is universally applied and opportunity
for bringing individual circumstances before the courts are limited. This is particularly the case as the procedural tools relate specifically to a power imbalance in the buyer only. The seller, who may also be at a disadvantage in the inherently masculine marketplace, derives no support from the Act. The seller may be left with less recourse than under the common law equitable remedies which may be precluded now under the new scheme. Where the new scheme fails to acknowledge systemic bias to both contracting parties, it will only ever be able to partly satisfy a feminist critique.

In addition, while inequities arising from an unacknowledged gender bias in the institution of the market and the law of contract may be removed through the processes of the new scheme there is no acknowledgement that those inequities were gendered. This leaves the foundation of the law and other social institutions as they were, resting on an unacknowledged gendered basis.

The effect of this silence is compounded if under the Act issues of unconscionability come before the courts less frequently. It is possible that the courts will have fewer opportunities to rationalise these issues and to articulate women’s experiences in the realm of commerce, in particular as a seller of residential land. It means also that the traditional framework of principle and counter-principle will develop at common law in an increasingly narrow field of endeavour – which excludes the subject matter of the Act. The Act will remove women’s stories in this field from the courtroom altogether to the extent that the focus is on procedural matters rather than the relationships within a contract.

Finally, PAMDA offers potential to improve access to justice for women. The self-help nature of the Act’s pre-emptive process-driven provisions is beneficial for those for whom access to justice is limited.\(^433\) However this is only to the extent that the parties are able to protect their own rights leading up to a contract. Where a party is in breach of the contract, the Act fails to provide any greater access to justice than was the case pre-PAMDA. This approach only addresses gender inequalities in access to justice to a limited extent and would only partly satisfy a feminist critique.

10.4.2. Feminist Theory and RSLA

In the same way that PAMDA partly answers a feminist critique, so too does RSLA go only to a certain extent towards responding to gender inequality. First, the Act embraces unconscionability within its ambit and this could be construed as creating a new norm of behaviour. This breaks down the dichotomy of self and other and brings the former exception within the new norm.

Secondly, RSLA provides access to a tribunal to resolve disputes, including those involving unconscionability. The Act seeks to minimise the cost of and equalise the parties’ ability to resolve disputes. This is a significant advance for those traditionally suffering poor access to justice.

Thirdly, the Act’s disclosure statement and timeframes for disclosure also implicitly acknowledge the constraints of assumptions of rationality and dispassionate decision-making. They address any power imbalance in the negotiating process by providing a new and formalised negotiation and information gathering process. This new platform arguably removes the gendered genesis of market-based contract.

As with PAMDA, the lack of consciousness raising within the Act itself fails to articulate either women’s experience or the gendered nature of the law. Therefore while women may benefit from the Act’s measures the gendered nature of the system and of the change, is not acknowledged.

10.5. Conclusion

While the new scheme is not universal (applying as it does only to narrowly defined contractual fields) it does provide a systemic approach to address the gendered nature of the law. It raises the bar by taking an alternative approach to contract, by deconstructing the gendered foundation of contract law and rebuilding the basis on which a legal relationship is established. It removes the classical rationalist approach to defining a contractual relationship, introduces a scheme of disclosure, reasonable timeframes, information sharing and a permeating sense of conscience. The penalty for failure to
comply with the new scheme is a redistribution of power to the party identified as powerless under the classical system. While this is an inherent weakness in that only that party’s needs are addressed by the new scheme, it is the possibility of even this constrained systemic change that addresses a feminist critique.

The extent to which the lack of an overt acknowledgement of gender may detract from this achievement will depend on the perspective and priorities of any particular feminist jurisprudence. The practical importance of systemic change must however be acknowledged.
11. Conclusion

This paper seeks to determine the extent to which the new scheme impacts on classical contract theory. The answer must be that in the regulated fields, it has a significant impact. While PAMDA alters technical aspects of formation, the impact of the scheme overall has occurred not through a restructure of the elements of contract – these remain relevant, indeed vital – but primarily in the introduction of new elements which determine the validity and enforceability of a contract and therefore its bindingness on the parties.

The new formal requirements are designed to promote procedural fairness in negotiation and information gathering and in the case of RSLA, to provide a low-cost forum in which to resolve disputes. This scheme is identified here as introducing conscience into contract – each Act aims to bring closer the parties’ relative bargaining positions, mitigating against unconscionable conduct. The scheme is new in that it provides a platform for conscience to infuse the negotiations and therefore the contract, rather than taking a more traditional approach of applying rules of conscience after the contract has been classically formed. A seller/landlord failure to adhere to the formal requirements and thus lend conscience to their dealings may ultimately afford the buyer/tenant the power lawfully to withdraw from a classically valid contract at little or no cost.

Parliament has altered the foundation of contracting in these two traditionally laissez-faire markets through a focus on conscience. To the extent that the philosophy of the market has altered; that participants in these markets need to follow a unique process in reaching an enforceable agreement; and that they then remain subject to a regime of enforcement that differs from classical contract, it is valid to say that Parliament has removed these contracts from classical contract law. This recalls Gilmore’s statement ‘[t]he most dramatic changes touching the significance of common law… came about… through developments in public policy which systematically robbed contract law of its subject matter…’

434 Gilmore, above n7, 325.
As a system, the tools of the new scheme overturn not only classical contract theory but also challenge the relevance of reliance theory, as the focus is on contract formation and information-sharing mechanisms rather than on the nature of parties’ promises themselves and reliance thereon. This focus does however address some critiques of classical theory: PAMDA’s cooling-off period reflects principles of ‘efficient breach’ of law and economics; to the extent that the scheme deconstructs the traditional power base it may answer feminist critiques; and importantly the shift in the underlying focus of the market might represent a recognition of the value of communitarian values which infuses some feminist approaches.

The structure of the new scheme however is such that these effects are not guaranteed and in fact can be bypassed. This is seen particularly in relation to the party in each Act deemed to be the one with power in these transactions. In the same way that equity has recognised that the Statute of Frauds may itself be used as an instrument of fraud, so too might the party deemed powerless use the scheme to their advantage in the marketplace. Alternatively, in nominating a powerless party, the conceptualisation of the scheme (and of PAMDA in particular) fails to recognise the consumer identity of both parties. Additionally the scheme is rigidly conceived so that individual circumstances cannot be taken into account which might mitigate the damage to the notionally stronger party and allow scope for relief based on reliance. The rigidity of the scheme’s application is illustrated in the cases decided to date on PAMDA.\footnote{See eg above section 3.1.3.} While the consumer-protection nature of the scheme must axiomatically rest on a desire to equalise power, this aspect fails to answer the critique of gender power in feminist theory. To address underlying issues of power in the free market, the system itself needs to be overhauled and contract itself reconceptualised.

In spite of the courts’ current approach and their strict adherence to the formalities, it is possible that a change in the economic climate will alter the power relationships between parties to these transactions thus leading to a different approach. If this were the case, common law contract might seek to give back to contract Gilmore’s ‘transactions and situations formerly governed by it’ but which had been ‘systematically robbed’ from
contract. The government has shown already though, a propensity to amend *PAMDA* at least in response to criticisms arising from major decisions applying it. To the extent therefore that a court may alter the strict application of the Act, it is possible that Parliament will simply amend the Act to require strict compliance returning to the rigid application of the new scheme.

While it is concluded that the new scheme does seek to introduce conscience into contract, the potential for it to do this effectively has its limits. The *RSLA* offers the broader approach of the two Acts, consisting of a more homogeneous consumer group and the possibility for cost-effective review of contentious transactions. This might not provide a cure-all for the vexed issue of conscience in contract but it goes a fair way to addressing Parliament’s concerns. However the limitations of the *PAMDA* approach suggest that it creates a new set of inequities because the scheme itself fails to address the range of unconscionability issues in the market but where equitable ‘fine tuning’ of classical contract is unavailable to those within its system.

So long as government continues to create special rules for specific subject matter, practitioners will need to become more specialised and aware of the possibility for application of different rules dependent on subject matter of the contract. The market-based world of commerce whence contract law came will become increasingly fragmented. The ambitious breadth of subject matter removed by these Acts from the ambit of general contract mean that the idea of a uniform law of contract is no longer current. Ongoing discussion in Queensland about the possibility of unfair contracts legislation puts into question the long-term effect of rules compartmentalised into subject matter – in particular when seen in conjunction with a broader approach to unconscionable bargains.

The existing market-based scheme is not perfect and to achieve the freedom it seeks to embody will require adjustment. The critiques canvassed here all contribute to a greater understanding of the deficiencies of the current system and allow us to imagine a better

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436 Gilmore, above n7, 325.
one. But to fully achieve the impact of infusing conscience into market-based transactions and to answer the two critiques, the focus of reform must be on the big picture: planned reform of contract law itself or a re-conceptualisation of contract – perhaps into something like Gilmore’s more general law of obligations. Subject-based contract reform without a bigger policy objective cumulatively will only unleash the market’s greatest threat: a lack of freedom. This is the freedom which goes to the root of classical contract and of the critiques, and which reflects the application of conscience itself.

Without this broader policy approach, the panacea of equality within the market, level playing fields, equality of information and self-determination – ie freedom – will not be achieved. Where these goals are supported only by individual legislation based on subject matter, the resultant tools will instead create a Pandora’s Box of regulation still too technical for the lay person supported by specialist lawyers, tribunals and government enforcement agencies – a system which will indeed destroy the panacea.
12. Bibliography

Cases

Adams v Lindsell (1818) 1B&A 681; 106 ER 250.
Agius v Sage [1999] VSC 100 (unreported Supreme Court of Victoria Commercial List
Byrne J, 1 April 1999).
AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170.
ANZ Banking Group Ltd v Widin (1990) 102 ALR 289.
Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582.
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.
Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd
Australian Competition and Consumer Commission v Samton Holdings Pty Ltd (2002)
117 FCR 301.
Bakarich (As executor of the Estate of Bakarich (dec’d)) v Commonwealth Bank of
Blomley v Ryan (1956) 99 CLR 362.
Bridge v Campbell Discount Co Ltd [1962] AC 600.
Bryson v Bryant (1992) 29 NSWLR 188.
Cannon Street Pty Ltd and Ors v Karedis and Ors [2004]QSC 104 (Unreported, Muir J,
30 April 2004).
Carlill v Carbolic Smoke Ball Co [1892] 2 QB 484.
Carr v McDonald’s Australia Ltd (1994) 63 FCR 358.
Charlick v Foley Brothers Ltd (1916) 21 CLR 249.
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64.
Demagogue Pty Ltd v Ramensky (1992) 110 ALR 608.
Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 443 (Unreported, Beazley,
Santow JJA, Campbell AJA, 18 December 2002).
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523.
European Asian of Australia Ltd v Kurland (1985) 8 NSWLR 192.
Fletcher v Burns (unreported Supreme Court of New South Wales Court of Appeal
Handley, Cole JJA and Dunford AJA, 19 March 1997).
Legislating Conscience into Contract

G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631.
Gold Coast Carlton Pty Ltd v Wilson [1985] 1 Qd R 182.
Knightsbridge Estates Trust Ltd v Byrne [1938] 2 All ER 444.
Louth v Diprose (1992) 175 CLR 621.
Masters v Cameron (1954) 91 CLR 353.
McRae v Commonwealth Disposals Commission (1951) 84 CLR 377.
Muschinski v Dodds (1985) 160 CLR 583.
Permanent Trustee Co Ltd v Elkofair [2001]NSWSC 1113 (unreported, Beazley JA Santow JA Campbell AJA, 18 December 2002).
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827.
Regent v Millett (1976) 133 CLR 679.
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
Silovi Pty Ltd v Barbaro (1988) 13 NSWLR 466.
Steadman v Steadman [1974] 2 All ER 977.
Svanosio v McNamara (1956) 96 CLR 186.
W Scott Fell & Co Ltd v Lloyd (1906) 4 CLR 572.
Westpac Banking Corporation v Gordon & Reilly (Unreported, Supreme Court of NSW Common Law Division, Sully J, 1 April 1993).
Kathrine Scott Galloway

Yango Pastoral Company Pty Ltd v. First Chicago Australia Ltd (1978) 139 CLR 410.
Yerkey v Jones (1939) 63 CLR 649.

Legislative Materials

Credit Act 1987 (Qld).
Duties Act 2001 (Qld).
Duties Act 2001 (Qld) Revenue Ruling 14.2.
Explanatory Notes, Property Agents and Motor Dealers Amendment Bill 2001 (Qld).
Explanatory Notes, Property Agents and Motor Dealers Bill 2000 (Qld).
Explanatory Notes, Retail Shop Leases Amendment Bill 2000 (Qld).
Fair Trading Act 1989 (Qld).
Legislative Standards Act 1992 (Qld).
Property Agents & Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001 (Qld).
Property Agents and Motor Dealers Act 2000 (Qld).
Property Law Act 1974 (Qld).
Retail Shop Leases Act 1994 (Qld).
Retail Shop Leases Amendment Bill 2000 (Qld) Explanatory Notes.
Retirement Villages Act 1999 (Qld).

Articles and Books


Barker, Peter, 'Hot Property: E-deals drive Cairns Market', *Cairns Post* Saturday 8 February 2003, 1.


Finn, Paul 'Unconscionable Conduct' (1994) 8 Journal of Contract Law 37.

Foster, Allyson, 'Do Women Pay More?' (Consumer Law Centre Victoria, 1997).


Gilmore, Grant, The Death of Contract, Columbus, Ohio State University Press (1974).


Griggs, Lynden 'The Interrelationship of Consumer Values and Institutions to the
Griggs, Lynden 'The [ir]rational Consumer and why we need National Legislation
Governing Unfair Contract Terms' (2005) 13 Competition and Consumer Law
Journal 4.
Harland, David ‘Unconscionable and Unfair Contracts: An Australian Perspective’ in
Brownsword, Roger, Hird, Norma J and Howells, Geraint (eds) Good Faith in
Herbert, Alan Patrick, 'Fardell v Potts' in Uncommon law : being sixty-six misleading
cases revised and collected in one volume, London, Eyre Methuen (1969).
Hon Margaret Keech MP, 'Outcomes of the Review of the Property Agents and Motor
June 2005.
Howe, Adrian, 'Sweet Dreams: Deinstitutionalising Young Women' in Regina Graycar
(ed), Dissenting Opinions: Feminist Explorations in Law and Society, Sydney,
Jackson, Craig Leonard, 'Traditional contract Theory: Old and New Attacks and Old and
James, Nickolas J, 'A Brief History of Critique in Australian Legal Education' (2000)
Melbourne University Law Review 37.
Joint State and Territory Working Group for the Ministerial Council on Consumer
Kennedy, D. 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's
Kessler, Friedrich and Fine, Edith, 'Culpa in Contrahendo, Bargaining in Good Faith and
Kirwan, Lucy and Masters, Jeremy (eds), Australian Guide to Legal Citation, Melbourne,
Knoll, David D ‘Protection against Unconscionable Business Conduct – Some Possible
Applications for s51AC of the Trade Practices Act 1974’ (1999) 7 Competition &
Consumer Law Journal 54.
Marshall, Brenda 'Liability for Unconscionable and Misleading Conduct in Commercial
7 Bond Law Review 42
McGuinness, Kevin, 'Law & Economics - a Reply to Sir Anthony Mason CJ Australia'
Meehan, Michael and Tulloch, Graham, Grammar for Lawyers, Sydney, Butterworths
Kathrine Scott Galloway


Paterson, Jeannie Robertson, Andrew & Heffey, Peter Principles of Contract Law (2nd ed 2005).


Richardson, Megan and Hadfield, Gillian (eds), The Second Wave of Law & Economics, Leichhardt NSW, Federation Press (1999).


Legislating Conscience into Contract

Rose, Merri, 'New Legislation to Stop Marketeers in their Tracks' (Press Release, 10 September 2001).