ANALYSING CONSCIENCE AS THE MEDIATING CONCEPT BETWEEN THE FREE MARKET AND CONSUMER PROTECTION IN QUEENSLAND LAND TRANSACTIONS

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Abstract

In light of new amendments to the *Property Agents and Motor Dealers Act 2000* (Qld), this paper reviews the conceptual framework within which this Act delivers consumer protection within the free market. It compares the equivalent protection provisions of the *Retail Shop Leases Act 1994* (Qld) and assesses whether 'conscience' can provide a mediating factor between consumer protection and contract law, or whether these measures effectively remove these contracts from common law contract into their own discrete field. It concludes that implicit reliance on conscience without clearly articulating a standard of conscience leaves these contracts without a clear place within common law doctrine of unconscionability or an effective consumer protection foundation.

I Introduction

The Queensland residential property market has been regulated now for some 10 years, and the Queensland retail shop lease market for nearly 30. Enough time has now elapsed to assess whether the mechanisms of regulation of each of these otherwise free markets are capable of achieving consumer protection within the broader free market supported by contract law.

In this paper, the consumer protection provisions in the *Property Agents and Motor Dealers Act 2000* (Qld) ('*PAMDA*') dealing with residential real property sales and the *Retail Shop Leases Act 1994* (Qld) ('*RSLA*') (together, the 'Acts'), will serve to illustrate the intersection between

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what is referred to in this paper as 'statutory conscience', and the operation of free-market principles in the law of contract. It is taken as given that classical contract theory resting on the liberal philosophy of the free market continues to underpin the operation, application and development of contract law.[1]

This paper will argue that there is potential for the concept of conscience to mediate between the idea of consumer protection and the classical 'free market' contract. Without a means of reconciling the mechanisms of consumer protection provided by the Acts and principles of freedom and autonomy implicit in common law contract, it is possible that increasing statutory regulation of transactions in these markets will 'rob contract law of its subject matter … removing from "contract" transactions and situations formerly governed by it …'[2]

After providing an overview of the methodology of these provisions, this paper seeks briefly to chart the transformation of the equitable doctrine of unconscionability to the principle of unconscionability now widely found in common law and in legislation,[3] contextualising the Queensland Parliament's apparent appeal to conscience in these statutes.[4] Contract has traditionally used the principle of caveat emptor to indicate the individualist nature of the relationship between the parties, and it is this framework that influences our contemporary understanding of the nature of contract in the laissez-faire marketplace. Unconscionability, too, can be understood in terms of traditional libertarian principles of freedom of contract,[5] and this paper explores whether these legislative provisions, based on conscience, can be said to shift the underpinning conceptualisation of contract towards one that encompasses a general standard of conscience — an unconscionability principle — or whether instead they move these types of contract *outside* the common law

1 See, eg, Kate Galloway, 'Statutory Modification of Contract Law in Queensland: A New Equilibrium or Entrenching the Old Power Order?' (2008) 15 *JCU Law Review* 67.

2 Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974), 6.

3 See Joachim Dietrich, 'Giving Content to General Concepts' [2005] *Melbourne University Law Review* 6, where he points out that the term 'may indicate the broad moral principles or general ideas at work in the law, without avoiding more specific reasoning to justify decisions'.

4 See, eg, Galloway, 'Statutory Modification', above n 1, at footnotes 85–7.

5 See, eg, Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing the Basic Distinctions Part I' (2000) *Journal of Contract Law* 6.

contract framework altogether.

II Consumer Protection in Real Property Markets

Consumer protection is generally considered to relate to regulation of activities in the market for non-business goods and services. Though it may include acquisition of an interest in land,[6] Colin Scott and Julia Black have pointed out that

> [t]ransactions involving land are mentioned only incidentally. In this sense … the thrust of consumer protection legislation [is that] such legislation confines itself to transactions involving 'goods' and 'services'.[7]

Some real property transactions, notably residential tenancies and retirement homes, have, of course, long been regulated as consumer transactions[8] — in each case there is recognition of the subject matter of these transactions as personal, in that they relate to the home. In each case, there is an ostensibly powerful party (the retirement village operator and the landlord) and an ostensibly disempowered party (the retiree and the tenant) and the balance of power (or equality of bargaining position) is an obvious concern. The nature of the transaction (personal) and the potential for misuse of power, together result in a consumer transaction.

In contrast to the more traditional focus of consumer protection confined largely to goods and services, and in addition to residential tenancy regulation, Queensland has also for some time boasted a variety of statutory mechanisms to protect buyers of residential land in Queensland and tenants of Queensland retail shops. In general terms, these mechanisms alter the common law process of contract formation through requiring pre-contractual warning notices and disclosures.[9] The Acts have introduced restrictions on existing real property markets that had previously relied on the operation of common law contract.

Regulating broader real property transactions changes the consumer protection landscape in a couple of ways: first, by introducing markets

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6 See, eg, *Trade Practices Act 1974* (Cth), s 4B and *Australian Consumer Law*, s 2(3)(b); *Fair Trading Act 1989* (Qld), s 6.

7 C Scott and J Black, *Cranston's Consumers and the Law* (Cambridge University Press, 3rd ed, 2000), 8.

8 Protection for tenants in Queensland is now contained in the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); *Retirement Villages Act 1999* (Qld).

9 Scott and Black, above n7, 10.

for non-traditional consumer 'goods' (ie, real property); and secondly, by the suite of mechanisms of protection.

Warning and disclosure statements are of course familiar tools of consumer protection — including in real property transactions. They have been used in the case of transactions involving retirement villages[10] and in the purchase of off-the-plan community title.[11] Each of these markets can be identified as involving an identifiably 'consumer' party and the application of consumer protection within these real property markets is perhaps a logical extension of regulation of sale of goods and services. These mechanisms have not however usually been applied in the context of the open market in other real property, in which common law contract has retained its hold.

Consumer protection within real property markets generally is perhaps most familiar in terms of implied terms (such as those imposed by the *Trade Practices Act 1974* (Cth)[12]). Implied terms, some of which were codified or were based on the common law (and which will become part of the law in the form of guarantees of rights — see above), work alongside common law principles such as misrepresentation to protect people from bargains that in some way did not represent the will of the parties. These statutory inroads into contract law remain a reflection or an extension of mechanisms within the common law itself, and therefore fit within liberal classical contract concepts such as freedom of contract. They require the foundation of the market and existing legal principles to operate.[13] They do not alter the way we think about contract law. This kind of intrusion into real property contracts has generally enforced the existing paradigm of contract law, premised as it is on the existence of a contract according to classical common law principles.

Nicola Howell argues that consumer protection needs to be taken beyond the application of classical contract theory, represented by and representing the market, and into a new framework that represents instead the 'perspectives and realities of consumers'.[14] She suggests

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10 *Retirement Villages Act (1999) (*Qld).

11 *Body Corporate and Community Management Act (1997)* (Qld).

12 See, eg, s 69. Note the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) ('*ACL2*'), due to commence on 1 January 2011, replaces the scheme of implied terms with guarantees of consumer rights: see, eg, ss 51–59.

13 Galloway, 'Statutory Modification' above n 1.

14 Nicola Howell, 'Catching Up With Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts' (2006) 34 *Australian Business Law Review* 447, 463.

unfair terms legislation that would deal with both substantive and procedural injustice. She points out that provisions in Australia have not supported consumers as one might assume that they would.[15] Part of the reason for this is the overwhelming importance invested in freedom of contract and the inviolability of a bargain.

The recently enacted *Australian Consumer Law* (‘*ACL*’) unfair contract provisions seem to answer this criticism in the context of residential land sales.[16] Of note, the provisions identify a range of provisions as ‘unfair’, with a focus on parties’ relative power.[17] While the Commonwealth’s jurisdiction under the *ACL1* is limited to conduct of corporations,[18] the Fair Trading (Australian Consumer Law) Amendment Bill 2010 (Qld) provides no such limitation.[19] In terms of real property transactions, the State scheme therefore shifts the emphasis from the idea of a (powerful) corporate vendor against a (weaker) consumer purchaser and opens up the possibility of review of a contract based on the reality of a ‘significant imbalance in the parties’ rights and obligations’.[20]

Enactment of unfair contract legislation represents a move away from the notion of an inviolable bargain and transactions identifiable by subject matter, through its focus on actual imbalances of power. However, the approach of the *ACL1* differs from the methodology of the Acts in the explicit description of what is unfair, and the rationale for finding such terms void.[21]

A Challenging the Inviolable Bargain

In step with Howell’s thinking (and according implicitly with the approach of the *ACL1* unfair contracts provisions) under the Acts bargains are not inviolable. The *ACL1* focus, however, like that of the

15 Ibid.

16 Where those sales are ‘to an individual … [w]holly or predominantly for personal, domestic or household use …’ *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), s 2(3)(b) (‘*ACL1*’).

17 *ACL,* s 4.

18 *Trade Practices Act 1974* (Cth), s 130.

19 Section 16 will enact the *Australian Consumer Law* in Queensland, and s 4A identifies jurisdiction over individuals as well corporations.

20 *ACL1* s 3.

21 *ACL1*, s 3: a contract term is unfair if it would ‘cause a significant imbalance in the parties’ rights … it is not reasonably necessary … and it would cause detriment …’

Trade Practices Act implied terms,[22] is on *already formed* contracts. In contrast the Acts work outside the framework of classical contract law through altering the very foundation of the contract's existence. This is because the Acts' approach towards consumer protection[23] apparently rests upon promoting the application of conscience by landlords and sellers in the regulated transactions.[24]

Explanatory Notes to both the Bill introducing the relevant amendments to the *RSLA* and the *PAMDA* refer to the central idea of conscience:

> [i]ncreasing 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'...[25]

> [Marketeers] have adopted unconscionable practices which continue to result in massive consumer detriment. … The legislative response in the overall strategy is focussed on a broad regulatory response to the marketplace behaviour and conduct ...[26]

The *PAMDA* mechanisms involve annexation of a warning statement in the prescribed form to a 'proposed relevant contract' and a 'relevant contract'.[27] Failure to provide the warning in this way entitles the buyer to terminate the contract, without penalty, at any point up to completion,[28] and exposes the seller or their agent to a penalty.

In contrast to classical contract principles that require parties to carry out their bargain freely entered into, the buyer may end the contract, suffering only nominal penalty, at any time during a five day cooling-off period.[29] Additionally, in contradistinction to contract law requirements of offer and acceptance, until the recent amendments to the *PAMDA,* the

22 *Trade Practices Act 1974* (Cth), s 69, soon to be replaced by consumer guarantees under *ACL2*.

23 See reference in Property Agents and Motor Dealer and Other Legislation Amendment Bill 2010 (Qld) Explanatory Notes, pp 1, 3, 6; *PAMDA* s 363(b), (c).

24 See Galloway, 'Statutory Modification' above n 1, 85.

25 Retail Shop Leases Amendment Bill 2000 (Qld) Explanatory Notes, 7–8.

26 Property Agents and Motor Dealers Amendment Bill 2001 (Qld) Explanatory Notes, 1, 2.

27 *PAMDA,* ss 368A, 368C.

28 *PAMDA,* s 370(2). This must occur within 90 days of the day the buyer receives the copy of the contract (s 370(4)). As most residential contracts settle in a month, this limitation will only affect a minority of contracts.

29 *PAMDA,* s 370A(1).

contract did not become binding until the buyer received a copy of the contract signed by both buyer and seller.[30]

The *Property Agents and Motor Dealers and Other Legislation Amendment Act 2010* (Qld) has recognised the impact of these consumer protection mechanisms on the 'marketplace'. In seeking to 'restore certainty to the marketplace' it seeks to change the 'prescriptive nature' of these consumer protection mechanisms.[31]

- The requirements for 'attaching' a warning statement have been simplified through defining 'attached' to include methods for electronic and physical delivery (s 364).
- The commencement of the cooling-off period where a buyer signs after the seller, now occurs when the buyer has signed and communicated acceptance of the offer (s 369(2)).

  This will often occur where a counter-offer is made by the seller and it addresses the problem under the previous rules whereby common law contract rules of formation were abrogated by the Act.[32]
- Section 365 has been repealed. This provision changed common law contract by declaring the point of being bound occurred when the buyer or buyer's agent received the warning statement and the contract in a way prescribed by the section. This change restores common law rules of bindingness based on communication of acceptance of an offer.
- While the buyer may still terminate for failure to give a warning statement (s 370), the termination must happen within 90 days of receipt of a copy of the contract (s 370(4)). Providing a time limitation renders this protection more in line with the provisions in the *RSLA*.

Similarly, the *RSLA* permits the tenant to rescind their otherwise binding contract (lease) within six months of commencement of the lease, and to recover damages, if the landlord fails to disclose in terms

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[30] *PAMDA,* s 365 — repealed by *Property Agents and Motor Dealers and Other Legislation Amendment Act 2010* (Qld).

[31] Explanatory Memorandum, Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010, 2.

[32] See, eg, Kate Galloway, 'Legislating Conscience into Contract: How the Property Agents and Motor Dealers Act 2000 Affects our Understanding of Contract Law in Queensland Residential Land Sales' (December 2007–January 2008) 21 *Commercial Law Quarterly* 3.

of the Act.[33] The *RSLA* also requires the tenant to provide a legal and financial advice certificate.[34] While failure to comply will not challenge the inviolability of the bargain in terms of the Act, it may constitute a 'retail tenancy dispute',[35] wherein the parties may seek an order for the certificate to be furnished.

The implication in these provisions is that without warnings, disclosures and third party advice, the buyer (of residential land) and tenant (of a retail shop) are exposed to seller/landlord unconscionability that may provide grounds for ending the bargain. Presumably, in light of the explanatory memoranda, the assumption is that the statutory intervention will imbue the regulated transactions with conscience (thus removing this as a cause of action before the courts or tribunals involved).

In the case of the *RSLA*, which includes unconscionability as a basis of dispute before the Queensland Civil and Administrative Tribunal,[36] the mechanisms of disclosure and advice presumably provide the evidence of equitable information exchange. This potentially resolves allegations of unconscionability before they escalate to dispute.

Either way, in ensuring a standard of conscience through the prescribed contracting process, any power imbalance between the contracting parties is presumably corrected and the bargain is thus supported. The latest proposed amendments to *PAMDA* seem to recognise, however, that power has shifted too far — resulting in 'technical breaches' and an 'uncertain marketplace'.[37] This highlights that in both Acts, and in spite of proposed *PAMDA* amendments, the assumption of sites of power is somewhat problematic.

B Situating the Imbalance

The locus of the Acts' provisions in previously unregulated (or only generally regulated) and open real property markets, makes what the author considers to be fairly bold assumptions of the power relations between the parties. The Acts focus on empowerment of all buyers and tenants, at the expense of all sellers and landlords. In these markets, there is a blend of the personal (purchase of a home, or a lease of premises for a family-run business) with the commercial (investment

[33] *RSLA,* s 22.
[34] *RSLA,* s 22D.
[35] *RSLA,* s 22E.
[36] *RSLA,* ss 46B, 63, 97; and definition of 'retail tenancy dispute'.
[37] Explanatory Memorandum, Property Agents and Motor Dealers and Other Acts Amendment Bill 2010, 2.

property or retail leasing involving sophisticated business people). The state of market fluctuation in each case will often determine the power dynamic between the parties.

In the context of these regulated real property markets, previously within the purview of common law contract, the means of protection of a contracting party represents a shift. Previously, the law could protect a contracting party through statutory terms (such as misrepresentation, or false and misleading conduct[38]) or through (common law) equitable principles such as unconscionability, which examine the power dynamics in the individual case. In the case of the Acts, even considering the latest proposed *PAMDA* amendments, the inviolability of the conveyancing or leasing contract itself is put in question ostensibly to pre-empt the possibility of unconscionable conduct.

III Unconscionability: from Equity to Statute

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. 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'.[39]

The leading modern Australian case on unconscionability, *Commercial Bank of Australia Ltd v Amadio*,[40] illustrates 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.*[41] *Amadio* confirms that the courts continue to apply the rules of classical contract theory to establish formation of a contract, then examine whether conscience is a vitiating factor, according to equitable doctrine.

But, as Professor Finn has pointed out,[42] conscience is not anchored within doctrine alone and has developed into a principle underpinning equity generally. Anthony Duggan identifies that

[38] See, eg, *Trade Practices Act 1974* (Cth), s 52; soon to be replaced by *ACL2*, s 151.

[39] *Earl of Aylesford v Morris* [1871] A 67.

[40] (1983) 151 CLR 447.

[41] [1871] A 67.

[42] Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87.

> [p]erhaps 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.[43]

Law reform and changing entitlements based on conscience have not been the sole preserve of the courts of equity. The principle of conscience has moved beyond its roots. The emergence of notions of good faith in statute and case law,[44] for example, confirm that 'commitment to equity and equitable notions of conscience' is influencing the development of contract law outside its traditional sphere.

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 by the rationale behind the enactment of the provisions under review in this paper, but it remains unclear whether Parliament's approach will achieve the protections sought.

A The Meaning of 'Unconscionability'

Traditionally, in terms of the *doctrine* of unconscionability,[45] 'unconscionability' was a term of art which implied an immorality in the transaction.[46] It related to a power imbalance,[47] 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 sufficiently 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

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43 A J Duggan, 'The Profits of Conscience: Commercial Equity in the High Court of Australia' (2003) 24 *Australian Business Review* 30, [5].

44 See, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Trade Practices Act 1974* (Cth), s 51AC(4)(k).

45 Given voice in cases such as *Earl of Aylesford v Morris* [1871] A 67.

46 See, eg, Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7 *Bond Law Review* 42.

47 Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 47.

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.[48]

More recent Australian authorities provide a clear guide to the application of rules of unconscionability. In *Louth v Diprose*,[49] the appellant induced the respondent to give her 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 was found to have 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. Dal Pont, for example, argues that *Bridgewater v Leahy*[50] rather than focussing on parties' conduct, focuses on the quality of the outcome of the transaction.[51]

In *Bridgwater v Leahy*, an elderly man made an inter vivos transfer of family farming property to his nephew, who had worked the land with his uncle for many years. The uncle, before his death, made it clear to his solicitor why he was making the transfer on its favourable terms

48 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462.

49 (1992) 175 CLR 621.

50 (1998) 158 ALR 66.

51 G Dal Pont, 'The Varying Shades of "Unconscionable" Conduct — Same Term, Different Meaning' (2000) 19 *Australian Business Review* 135, 146.

— the nephew had 'stuck with him through thick and thin',[52] and he wanted to see the family farming business carry on under competent stewardship. There was no suggestion of the uncle's not being capable of making a decision such as this, or that the transaction did not reflect his wishes. However, the majority decision points out that it was the mere fact of the nephew's having the benefit of this transaction that imputed unconscionability. As Dal Pont points out, this differs from establishing *conduct* by the nephew that was unconscionable. It was more the unfairness of the outcome of the transaction from which unconscionability was implied.[53]

On this view, 'unconscionability' takes a broader meaning: it appears to be restricted no longer in its application to the equitable doctrine of unconscionable conduct in the *Amadio* mould. The broader use has perhaps been assisted by the 1992 and 1998 amendments to the *Trade Practices Act 1974* (Cth).[54] While s 51AA brings commercial dealings within the unwritten law of unconscionable conduct, s 51AC provides an expanded concept of unconscionability, 'with additional criteria for judicial reference'.[55] *Bridgewater v Leahy*[56], however, applies the concept even more broadly again than these provisions warrant — the judgement is not expressed in terms of the 'criteria for judicial reference' cited, for example, in s 51AC.

Further evidence for the potential of the broadening of unconscionability is provided within arguments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [57] which sought to use 'unconscionability' as a bar to the appellant using a film which had been taken while trespassing. In contrast to the traditional use of unconscionability, the 'transaction' involved in *Lenah* was not a contract. This renders the attempted use of the principle of unconscionability as a novel one and well outside the scope of an *Amadio* application. The Commonwealth, intervening, argued that:

> in determining whether the use of the information would be unconscionable, the court should take account of all the

52 *Bridgewater v Leahy* (1998) 194 CLR 457, 489.
53 Dal Pont, above n 51, 145–6.
54 See below; soon to become ss 21, 22 under *ACL2*.
55 Liam Brown, 'The Impact of Section 51AC of the *Trade Practices Act 1974* (Cth) on Commercial Certainty' [2004] *Melbourne University Law Review* 20.
56 (1998) 194 CLR 457.
57 (2001) 208 CLR 199.

> 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.[58]

Nowhere in this submission is there mention of *Amadio*-style special disadvantage — and nor could there be, in terms of the nature of the procurement of the information outside contractual relations. The submissions sought to use the concept of 'unconscionability' in a much broader sense than that traditionally used.

Ultimately these submissions were rejected. Gleeson CJ observed:

> 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.[59]

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.'[60] 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 focussing on the parties' conduct, to a broader duty of fairness and an assessment of the fairness of outcome of a bargain or fairness in dealings more generally: 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 not just to behave in a conscientious manner, but to achieve a fair outcome in dealings, which forms the context of conscience relevant to the Acts.

B Conscience in the Acts

The primary locus for the concept of conscience in the *PAMDA* provisions lies in the second reading debates. The Act represented a bid to 'rid

[58] Ibid 199, 211.
[59] Ibid 199, 227.
[60] Ibid 199, 245.

the Queensland real property industry' of 'crooks'.[61] In amendments debated in 2001, the Parliament sought to proscribe 'unconscionable practices' of marketeers.[62] While the Act itself fails to refer to conscience or unconscionable conduct, the genesis of the consumer protection provisions is clear:[63] an explicit reference to behaviour, but not within the original *Amadio*-type framework.

On this reading, the consumer protection mechanisms in the *PAMDA* can be understood in terms of conscience. The warning statement coupled with the cooling-off period, together provide a means by which to ensure procedural fairness and fairness of outcome. In alerting the buyer to the implications of the contract and the ability to withdraw with only nominal penalty, the warning statement allows the buyer breathing space before taking full contractual responsibility.

The warning statement allows also for information exchange through alerting the buyer to the importance of legal advice and valuation advice before becoming bound by the contract. This reflects a focus on transactional fairness — that the terms of the contract, including the price of the bargain, are fair to the buyer.

The fact that the contract can be terminated by the buyer in the absence of compliance with the warning statement provisions, challenges the inviolability of the bargain. This consumer protection mechanism reinforces that if conscience is not evidenced through process (and therefore the possibility of transactional fairness also), the bargain is not worthy of protection at law.

In contrast to the lack of express unconscionability provisions in the *PAMDA*, the *RSLA* expressly proscribes unconscionable conduct by both the landlord and the tenant.[64] In determining whether there has been unconscionable conduct under s 46B, the QCAT may have regard to a range of issues that reflect those in s 51AC of the *Trade Practices Act 1974* (Cth) and also the unfair contracts provisions in the *ACL1*.[65] The unconscionability provisions therefore mirror other protective

[61] Queensland, *Parliamentary Debates*, 13 September 2001, 2703 (Hon M Rose, Minister for Tourism and Racing, and Minister for Fair Trading).

[62] Explanatory Memorandum, Property Agents and Motor Dealers Amendment Bill 2001 (Qld), 1.

[63] See Galloway, 'Legislating Conscience into Contract' above n 32.

[64] *RSLA*, s 46A.

[65] For example, the relative strength of parties' bargaining position, undue influence, lease conditions that are not reasonably necessary.

devices[66] — however, they are explicitly provided for in the *RSLA* to bring them within the jurisdiction of the QCAT.[67] This arm of the Act's methodology creates a cost-effective system for dispute resolution as an alternative to the courts — another consumer protection feature of the Act.

While the *RSLA* may overtly appeal to conscience via sections 46A and 46B, conscience arguably also implicitly draws together all its regulatory measures. Like the *PAMDA*, the Act stands up for the ostensibly weaker party though not to the extent that they suffer from a 'special disadvantage'. Larger retail spaces and leases by a public corporation or its subsidiary are excluded from the Act,[68] and tenants of five or more retail shops are not bound by s 22D (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 — tenants of smaller retail spaces and tenants who have fewer than five retail shops.[69]

Again, as with the *PAMDA* warning statement, through the *RSLA* 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.[70]

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66 See, eg, *Trade Practices Act 1974* (Cth), *Fair Trading Act 1989* (Qld), *ACL.*

67 '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', Explanatory Memorandum, Retail Shop Leases Amendment Bill 2000 (Qld), 13. The Retail Shop Lease Tribunal function is now carried out by the QCAT.

68 Section 5.

69 Explanatory Memorandum, Retail Shop Leases Amendment Bill 2000 (Qld), 7.

70 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'.

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[71] and impliedly through the unconscionability provisions, which can consider the terms on which the tenant could get an alternative lease.

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.[72] 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.[73] In addition the factors include procedural issues such as unfair tactics, consistency of conduct and good faith.[74]

The *RSLA* overtly seeks to regulate unconscionable conduct in the context of retail shop leases by adopting the traditional (*Trade Practices Act*) framework of identifying unconscionable conduct with reference to a ‘checklist’.[75] However, both the *RSLA* and the *PAMDA* take this traditional framework further by requiring all those entering into the designated class of contract to produce evidence of a level playing field *at the outset* of their relationship — even where this evidence may not be used explicitly for the purpose of addressing the issue of unconscionability.

If it can be argued that the Acts, in attempting to introduce conscience into the regulated contracts, operate differently from the more traditional doctrine of unconscionability (and its statutory counterparts), then how can we conceptualise the role of conscience in these species of contract?

71 *RSLA,* Part 6.
72 *RSLA,* s 46A.
73 *RSLA,* s 46B(1)(b), (e).
74 *RSLA,* s 46B(1)(d), (f), (k).
75 See *RSLA,* s 46B.

IV Legislated Conscience — Exception or Standard?

While consumer protection is given voice through legislation such as *Trade Practices Act* and *RSLA* that specifically introduce conscience into contracts within a commercial context, they apply a framework similar to that of the common law: ascertaining the existence of a contract based on traditional contract law, then identifying whether the relevant vitiating factors apply. That is to say, equitable doctrine or its statutory equivalent — through vitiating factors such as unconscionability — operates 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 contract framework rather than an exception. On this basis, conscience can be understood as supporting the liberal notion of freedom of contract by setting the standard for mutuality of the parties — truly ensuring a free bargain. Additionally, freedom according to this standard of conscience may see mutuality reflected in 'just price' or fair terms, and ultimately through attention to the formation process and information equality (ie, substantive transactional conscionability), it may embody true individual autonomy. This type of framework distinguishes equitable *Amadio* unconscionability and its legislative counterparts as an exception, focussing only on conduct.

To the extent that these consumer protection mechanisms interfere with the application of general principles of common law (classical) contract, it could be argued that the Acts separate these species of transaction from general (classical) contract law and place them as an exception to general rules — just as unconscionability itself can be regarded as an exception to the norms of contract.[76] However, the underpinning principle of conscience in the Acts may also provide a means by which these mechanisms can be seen to embody classical contract norms of mutuality — it may offer a mediating concept between consumer protection and free market contract. This part of the paper canvasses these arguments and assesses whether the statutory provisions can be seen, through this mediating factor of conscience, to reinforce fundamental aspects of the market, or whether they simply make these types of contract an exception to classical contract law.

[76] See Gilmore, above n 2.

A Conscience as the Standard of Mutuality

As observed, 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. In doing so, it might be argued that the mechanisms of classical contract law are so altered that they cease to operate altogether and the arrangement falls outside contract law.

Bigwood provides a framework to draw these ideas together. He has observed the historical importance of freedom of contract tempered by the application of justice and equity.[77] 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.[78]

In support (albeit in the US context), DiMatteo[79] argues that '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 differs from that which might excise from contract law any subject matter regulated externally.[80] It would retain regulated contracts (such as consumer contracts) by accepting limitation on freedoms otherwise presumed in contract law.[81] Likewise, Atiyah argues that contract can accommodate these limits on freedoms, as without conscience there would be no free agreement (ie, one without pressure). [82]

These broad standards of conscience form the background to the overall

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77 Bigwood, above n 5, [7].

78 Ibid [23].

79 Larry DiMatteo 'Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law' (1999) 33 *New England Law Review* 265, 293.

80 See, eg, P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979), 405, quoting Friedman L, *Contract Law in America*, 20.

81 See, eg, Galloway, 'Statutory Modification', above n 1.

82 See Atiyah's market model in Atiyah, above n 80.

consumer protection methodology adopted by both statutes,[83] although neither unconscionability nor unfairness is explicitly mentioned in *PAMDA* itself. The assumption is that the Acts' consumer protection measures support the operation of the free market, and free market contract. The question remains, however, of the extent to which conscience provides a useful mediating concept between consumer protection and contract.

Unconscionability in *PAMDA* is not defined, thus compromising its consumer protection effectiveness. DiMatteo argues that this will impair the parties' understanding of the purpose of the disclosure or warning provisions.[84] If it were explicit that the formalities were to pre-empt a defined proscribed conduct, application of the Act would be seen by the consumer as relevant, thus enhancing its desired effect. Failure to make this explicit reduces the consumer protection effect.

Griggs too, argues in favour of conceptual clarity.[85] While the strong language employed in the Parliament upon the introduction of *PAMDA,* and government support for ongoing consumer protection provisions[86] suggest 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, s 46A *RSLA* explicitly proscribes unconscionability for both landlord and tenant. While s 46B 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 fail to satisfy DiMatteo's and Griggs' requirement of transparency, but the context of the Act as a whole supports a standard of conscience in retail shop lease dealings. Conscience in this sense does not mediate between contract and consumer protection, however, as the unconscionability provisions operate parallel to the equitable doctrine of unconscionability — whereby a contract is tested

[83] Queensland, *Parliamentary Debates,* 13 September 2001, 2670–709 (various speakers); Explanatory Memorandum, Property Agents and Motor Dealers Amendment Bill 2001 (Qld), 1, 2.

[84] DiMatteo, above n 79, 294.

[85] Lynden Griggs, 'The Interrelationship of Consumer Values and Institutions to the Vendor's Duty of Disclosure' (2005) 11 *Australian Property Law Journal* 19, [16].

[86] See Explanatory Memorandum, Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010 (Qld).

after the fact — rather than embodying a new standard by which to measure mutuality from the outset of the transaction.

While the measures taken in each Act are impliedly based on conscience, it is the lack of explicit definition of conscience that results in only limited support for a reframed standard of mutuality which would fit within common law contract principles. This undermines the potential of such provisions to provide effective consumer protection within the free market context.[87]

B Conscience as a Marker of Capacity

Related to mutuality in contract is the issue of capacity of the contracting parties. Waddams identifies that in applying the standard of conscience to determine mutuality, those the standard seeks to protect are deprived of the power of contractual capacity.[88] Additionally, the benefit of such a law increases with the wealth of the weaker party, evidencing an alteration in the risk (and therefore benefit) of the transaction. This may change the conceptualisation of the nature of the market and of the basis of freedom of contractual dealings.

If, however, adjusting the market can be read as consistent with the classical theory,[89] the unconscionability of equity need not operate externally 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[90] may fall within Bigwood and DiMatteo's[91] 'acceptable' limits to absolute freedom. Unconscionability as a standard of contract law itself would be justifiable where freedom would otherwise no longer exist and a 'market model' of contract is undermined.[92]

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

87 See also Griggs, above n 85; Galloway, 'Legislating Conscience into Contract', above n 32.
88 S M Waddams, 'Unconscionable Contracts: Competing Perspectives' (1999) *Saskatchewan Law Review* 1, [15].
89 See Atiyah, above n 80.
90 See Waddams, above n 88.
91 Bigwood, above n 5; DiMatteo, above n 79.
92 See Atiyah, above n 80.

class,[93] or truly prevents (equitable) 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 would prefer legislative intervention to the application of the doctrine of unconscionability, which he argues operates on an individual basis and is therefore not an appropriate way to assist a class of persons.[94] The legislation does address this critique of unconscionability to the extent that Parliament takes responsibility for assisting a class — but for all the prescription concerning the content of warning and disclosure statements,[95] Parliament has failed to inform buyers and tenants the express conduct to be averted.

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.[96] 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'.[97] *PAMDA* fails to represent such a hybrid reasoning, relying as it does on rigid enforcement through the blunt instrument of warning statements, against a pre-identified party (though softened somewhat by the proposed amendments). The *RSLA* unconscionability provisions might represent this hybrid approach, but the disclosure/advice statements do not.

Specifically though, it is worth exploring how the Acts, through a philosophy of conscience, can be seen to challenge the capacity of the parties to these transactions.

First, Hansard makes it clear that Parliament identified purchasers as those who 'require' protection under *PAMDA*.[98] 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. An otherwise fair

93 See, eg, Galloway, 'Statutory Modification', above n 1.

94 Waddams, above n 88, [15].

95 *PAMDA*, s 386; *Retail Shop Leases Regulation 2006* (Qld), Part 2.

96 Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999), 274.

97 Ibid.

98 See, eg, 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).

retail shop landlord may likewise be left to the mercy of a tenant under *RSLA*.

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[99] 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 per cent of all retail sales.[100] The 'majority' of this capital investment was contributed to or owned by superannuation funds and listed property trusts[101] — with ample finance and market power. Fifty-seven per cent of specialty shops were owned by independent traders or small business franchises.[102] Where the *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. It is not so clear whether giving a retail tenant indiscriminate power to defer or delay negotiations or entry into a lease improves the capacity of the parties according to a standard of conscience. Either way, the indiscriminate presumption of disempowerment of a tenant fails to recognise the variation in relative power in the retail shop lease market, thus debasing the capacity that the tenant may have according to market forces.

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. 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

[99] 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).

[100] Property Council of Australia, 'Shopping Centres in Queensland — the Facts' 2001.

[101] Ibid.

[102] Ibid.

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 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.

C Transactional Conscience

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.[103]

Waddams' distinction between unconscionable *conduct* and unconscionable *transactions* (as in *Earl of Aylesford v Morris*)[104] 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 and equitable estoppel both 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.[105] To justify intervention within an otherwise assumed free market, 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.

While the Acts may fail to provide a clear standard of conscionable

[103] See, eg, Atiyah, above n 80, 61–2.
[104] Waddams, above n 88, [3].
[105] DiMatteo, above n 79 294.

behaviour by which parties' transactions 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 than simply reallocate risks.[106] These critiques rest on the failure of each set of provisions to define the unfairness or unconscionability to be averted.

While the mechanisms in the Acts 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 in these Acts 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.

D 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 by the provisions in the Acts.

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 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,[107] Parliament through these Acts

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[106] Waddams, above n 88, [3].
[107] Waddams, above n 88, [3].

denies individuals the application of the rules of conscience to their circumstances. The benefits of this approach are therefore largely lost. In addition to the uniform presumption of parties' disempowerment, the Acts[108] 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. [109]

V Conclusion

It can be seen that while conscience may be the principle underlying these Acts, 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. However, 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 Acts — although leaving consumers with recourse under other consumer protection measures whether common law or statute.[110]

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. 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, a bargain is liable to termination unless the statutory formalities are *first* adhered to, rendering the bargaining process secondary to the statutory requirements.

While the infrastructure of common law contract is used to render the assistance deemed necessary by Parliament, ultimately the legislation potentially disallows application of the common law rules. This blurs the lines between the broad underlying statutory conceptions of conscience

[108] Outside the specific unconscionability provisions in the *RSLA*.
[109] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[110] Such as *Trade Practices Act 1974* (Cth), and more specifically, the *ACL1*.

and the framework for dealing with that, and the common law contract framework, which is subject to the application of equity and the doctrine of unconscionability.

This paper set out to establish whether these provisions under review 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: conscience as a mediating factor between consumer protection and common law contract. One Act (*RSLA*) mentions unconscionability expressly, though not in terms of the adjustment of parties' rights under contract, and the other (*PAMDA*) fails to mention conscience, though it is derived from a desire to achieve it. 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, challenging how we see the nature of contract law within the contemporary regulatory environment.

CASE NOTES