STATUTORY MODIFICATION OF CONTRACT LAW IN QUEENSLAND: A NEW EQUILIBRIUM OR ENTRENCHING THE OLD POWER ORDER?

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Abstract

In the past decade, Queensland has introduced legislative measures that fundamentally affect the application of contract law to residential land and retail shop lease contracts. This article examines whether the scheme of consumer protection under these Acts, consisting of warning statements, disclosure statements, advice certificates, and cooling off periods, addresses fundamental bargaining inequality through creation of a new order within these markets. It proposes that the framework of the Acts differs from the traditional principle/counter-principle dichotomy of classical contract law, whereby the norm of the contract is supported by exceptions that reinforce the same paradigm. In doing so, this paper critically examines the formalism and objectivism of classical contract theory using the framework of the critical legal studies movement (CLS) and seeks to assess whether the consumer protection regime under these Acts answers the CLS critique of common law contract.

I INTRODUCTION

The Critical Legal Studies movement (CLS) represents a broad school of thought which identifies the legal system as a bundle of contradictions, rather than as a coherent whole. Drahos and Parker for example, identify that 'liberalism has the problem that the market based on free willing choices has the ability to destroy itself by creating a few who can override

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the free wills of others'.[2] The contradictions represent unacknowledged imposition of liberal ideologies, supporting a particular social hierarchy in the liberal mould. Because the legal system is a cornerstone of the structure of society, a CLS analysis would posit that its very existence serves to reinforce and legitimise the existing power base. The law will therefore by definition contain the value judgements of those in power to the exclusion of those lower down the social/power scale.

Any value judgements contained in pronouncements of law are not visible within the classical construction of the law. The 'objective' formalism of classical jurisprudence results in a pronouncement of law bearing the 'mantle of objectivity and neutrality, [whose] resolution appears value free'.[3] In masking the moral and political choices made 'routinely' by legal actors, formalism provides few if any means, within established legal process, to challenge the inevitable moral and political construction of the 'institutions of social and political life'.[4]

In support of the classical concern of formalism is objectivism. Again, there is little room to challenge the social, political and moral order that dominates the law where the legal system itself rests on the objectivist belief that authoritative legal materials embody and sustain a defensible scheme of human association: an intelligible moral order.

In the classic contract case of *Trident v McNiece Bros*,[5] the dissenting judgement of Brennan J highlights the application of this formalist/objectivist philosophy in circumstances where the reasoning adopted is patently *not* axiomatic. After citing various authorities, Brennan J concluded that '[t]he doctrine of privity has long been settled and it was settled as a doctrine of general application'.[6] The rationale for this conclusion lies in Brennan J's focus on the importance of the doctrine of precedent.[7] The internal logic of the system allows the result to follow without question.

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2 Peter Drahos and Stephen Parker, 'Critical Contract Law in Australia' (1990-1) 3 *Journal of Contract Law* 30, 36.

3 R Graycar and J Morgan, *The Hidden Gender of Law* (1990), 56.

4 Karl E Klare, 'Critical Theory and Labor Relations Law' in David Kairys (ed) *The Politics of Law: A Progressive Critique* (1990), 61, 65.

5 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

6 Ibid 129.

7 Ibid 129-30.

In spite of this apparently rational deduction in support of privity, the majority in *Trident* differed in its reasoning, finding variously that: the doctrine of privity was unjust and so did not apply to contracts of insurance (Mason CJ, Wilson J); the promisor would be unjustly enriched if the promise was not fulfilled (Gaudron J); and that there was a trust relationship (Deane J). The diversity in views — even amongst the majority — demonstrates that formalism and objectivism must reflect subjective understandings of the construction of society. In contrast to the constrained thinking of Brennan J, the judgement of the majority in *Trident* displays the possibility of the law through the application of a more activist approach:[8] and it is the *possibility* that concerns CLS scholars.

A CLS approach will therefore aim to expose 'possibilities more truly expressing reality… by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview…'[9] Revealing the unacknowledged construction and maintenance of social order and hierarchy by legal actors and the legal system, many CLS scholars[10] work towards transformation of the existing legal structure as a tool of oppression, to liberate the powerless through a liberated legal system. Unger identifies this as the 'cumulative emancipation of personal relations from the constraints of some background plan of social division and hierarchy'.[11]

This paper will use Unger's CLS framework to examine classical contract law, and identify the way in which some recent Queensland legislative measures may make inroads into the monolith of classical contract theory in terms of CLS critique — focussing on individualism,

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8 Ibid.

9 Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' [2004] 7 *Macquarie Law Journal*, citing Alan Freeman 'Truth and Mystification in Legal Scholarship' (1981) 90 *Yale Law Journal* 1229, 1230-1.

10 See eg Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561; Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997; David Kairys (ed) *The Politics of Law: A Progressive Critique* (1990); an overview of CLS thought is provided in Damien Miller 'Knowing Your Rights: Implications for the Critical Legal Studies Critique of Rights for Indigenous Australians' [1999] 2 *Australian Journal of Human Rights*.

11 Unger, ibid, 598.

power, and the public-private divide. These legislative measures, contained in the *Property Agents and Motor Dealers Act 2000* (Qld) (‘*PAMDA*’) and the *Retail Shop Leases Act 1994* (Qld) (‘*RSLA*’), all apply to market transactions involving real property and so represent transactions that ostensibly embody the liberal ideal of individualist choice in the public sphere of the market. As will be seen however, parliament has identified an imbalance of power between the parties to these regulated transactions resulting in adverse social impacts amongst wronged purchasers of residential land and bankrupted retailers unable to maintain their lease obligations.[12] These observations perhaps illustrate a more critical examination of the underpinning assumptions of ‘free’ market transactions and so the resultant regulation may offer some *potential* to expose these assumptions and to liberate these market players from the boundaries of their relationships that are imposed by the law.

While statutory measures that impinge on common law contract will usually fall within the guise of consumer protection, and undoubtedly lend themselves to a Posnerian economic analysis, this paper focuses instead on the extent to which these Queensland provisions can be considered to impact upon the relative power of the parties to the regulated transactions outside a purely economic framework.

While Klare points out that the (CLS) ‘challenge is to develop a theoretical vantage to identify [a law] as consistent with a [liberal legal framework]’,[13] in this paper a CLS theoretical vantage will be used to examine whether a regulatory response in fact challenges the liberal legal framework assumed by CLS scholars. Accordingly, this paper will outline a theoretical framework broadly representative of the CLS movement before establishing the nature of the scheme of legislation under review and in particular the mischief identified by parliament that was to be cured by the legislation. It will then critique the regulatory scheme and assess the impact, if any, the scheme has on fundamental power relations between the liberal market’s players in terms of a CLS critique.

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[12] See *Retail Shop Leases Amendment Bill 2000* (Qld) Explanatory Notes; *Property Agents and Motor Dealers Amendment Bill 2001* (Qld) Explanatory Notes.

[13] Klare, above n 4, 64.

II A CLS Approach

CLS does not necessarily provide a uniform or unified approach to a deconstruction of power orders, but it does represent a variety of foci for critique of power orders as represented by law. Gordon acknowledges the diversity of backgrounds of 'this collection of people' who are involved with the CLS movement.[14] However he points out that in spite of this diversity and differences in method, 'there is an amazing amount of convergence'.[15] Similarly, Klare points out that critical legal theory can move beyond interpretive methods adopted by various interpretive disciplines, aspiring instead to understand 'how legal practices reinforce prevailing power relations and to develop theories of transformative practice…'[16] The CLS movement could be described as identifying the interaction of law in its classical sense with other social institutions as a limitation on true freedom of the citizen — hence the focus on transformative practice. In this paper, contract theory will be used as an expression of classicism, in light of the field of regulation (ie, contract) of the legislative provisions under examination.

A *CLS Meets Classical Theory*

Contemporary Australian contract law can easily be understood as developing out of the laissez-faire economics of the 18th and 19th centuries at a time when industrialisation and resultant wealth among a growing middle class led to increasingly complex transactions. Law and policy apparently developed to cater for the new commercial environment.

According to Unger however, 19th century jurists did not want to acknowledge what the market was. It followed that laws based on the foundation of something which was not understood led to ideology under the false guise of objectivism. On a critical interpretation, the development of the law of contracts could be seen to create a 'new ideological imagery that sought to give legitimacy to the new order',[17] whose apparent purpose masks presuppositions about society itself.

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14 Robert W Gordon, 'New Developments in Legal Theory' in David Kairys (ed) *The Politics of Law: A Progressive Critique* (1990) 413, 414.

15 Ibid.

16 Klare, above n 4, 69.

17 Jay M Feinman and Peter Gabel, 'Contract Law as Ideology' in David Kairys (ed) *The Politics of Law: A Progressive Critique* (1990) 373, 376.

These presuppositions are embodied within and upheld by the rules and processes of classical contract law. Indeed the fact that one might accept without questioning the commercial imperatives and context of the development of contract law principles itself supports the hegemony: the system seems 'at first glance …uncontroversial, neutral, acceptable'.[18] This, Gordon argues, is the most 'effective kind of domination' and as Feinman and Gabel also point out, the particular effectiveness of contract law in supporting the hegemony lies in the imagery it creates of the application of law representing what the people themselves have sought.[19]

Unger points out that contract law (indeed the legal system as a whole) is founded on private property rights as understood in the context of 19th century classicism.[20] In contrast to Unger's goal of development of an 'ideal community', CLS sees this system of rights as giving the individual holder effective immunity from societal responsibility — mutual responsibility. Law therefore supports a defective conceptualisation of the market through its support of the existing power base which provides individuals with immunity from responsibility to society through the concept of freedom of contract and the paradigm of the rational economic actor.

The philosophy of freedom of contract was not just an economic imperative in the burgeoning marketplace, but a legal tenet upheld by the courts[21] through application of formalism and objectivism in their reasoning. Cases considering clogs on the equity of redemption for example, such as *Kreglinger v New Patagonia Meat & Cold Storage Company Ltd*[22] and *Knightsbridge Estates Trust Ltd v Byrne*[23] show the court's determination to find what the parties intended, and to enforce that, over and above other considerations. The courts would 'ascertain… the real nature and substance of the transaction, and if it turned out to be

18 Gordon, above n 14, 418.

19 Feinman and Gabel, above n 17, 377.

20 Unger, above n 10, 599.

21 See references to freedom of contract in eg *Legione v Hateley* (1983) 152 CLR 406, 449; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170; *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 669.

22 [1914] AC 25.

23 [1938] 2 All ER 444.

in truth one of mortgage simply, to place it on that footing'.[24] The law can be seen to be objective and rational in ascertaining the substance of the transaction as an expression of the parties' wills — even to the extent of overriding harsh and unconscionable penalties that may appear on the face of the agreement. This approach, seeking to affirm objectively the will of parties to a contract, is reflected in Australian decisions such as *Svanosio v McNamara*,[25] concerning mistake in contract: 'once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good.'[26]

Principles such as caveat emptor support this structure in placing the onus on the buyer to inquire into the subject matter of the contract and laying responsibility for disappointment in the outcome of the bargain at the foot of the buyer. The principle presupposes the 'natural order' within the marketplace.

Feinman and Gabel describe freedom of contract as failing to 'take account of the practical limitations on market freedom and equality arising from class position or unequal distribution of wealth'.[27] This failure reveals the lack of objectivity and neutrality in the otherwise apparently unbiased concept and its supporting principles.

Admittedly, contemporary courts have found space within the law of contract to compensate for the 'practical limitations on market freedom'.[28] For example, 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'.[29] This statement, while affirming the importance of freedom of contract in the Australian context, also apparently illustrates the capacity

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24 *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25, 36.

25 (1956) 96 CLR 186.

26 Ibid 195, citing *Solle v Butcher* (1950) 1 K.B. 671; cited also in *Taylor v Johnson* (1983) 151 CLR 422.

27 Feinman and Gabel, above n 17, 377.

28 Ibid.

29 (1986) 162 CLR 170, 194.

of the law to provide counter measures. Cases such as *Amadio*,[30] *Louth v Diprose*[31] and *Garcia*[32] illustrate the preparedness of the courts to use counter-principles to overturn contracts representing power imbalances and which thus demonstrate a lack of 'true' freedom of the parties. Similarly, counter-principles exist to circumscribe freedom *to* contract, such as those prohibiting contracts for sex or murder, or proscribing certain contracts made by minors or those without capacity.

Contract law also fails to support contracts in non-commercial settings and requires an intention to create *legal* relations to support an enforceable contract — creating a barrier to exercise of freedom *to* contract. Unger draws a contrast between contract with its focus on self interest, and the gift which can have a community-preserving generosity (parent's gift to child) or community-destroying circumvention of the law (gift of married man to mistress).[33] Contract law excludes these latter transactions from its ambit.

In contrast, the law recognises the importance of personal interactions through the application of promissory estoppel and unjust enrichment. These counter-principles prevent privity applying to such an extent that the parties' interrelationships are not acknowledged. Counter-principles can therefore support the communal aspects of social life without impinging on the substantive source of obligations.

In spite of this, these examples illustrate the underlying tenet of Unger's thesis: that liberal society's institutions are set up as, and function to reinforce, a predetermined social hierarchy of defined roles for each individual in society. This challenges the 'neutral objectivity' of a principle such as freedom to contract. Gifts between parent and child, married man and mistress might differentiate between different models of human connection, but they in particular embody hierarchical preconceptions about the family, where the father/husband is the breadwinner of the family group. The fluidity of entitlements between family members, according to Unger, seems 'consistent with the maintenance and prosperity of the family only because there is an

30 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

31 (1992) 175 CLR 621.

32 *Garcia v National Australia Bank Limited* (1988) 194 CLR 395.

33 Unger, above n 10, 622.

authority at the head capable of giving direction to the team':[34] it is the recognised social hierarchy of patriarchal capitalism. Where unjust enrichment and promissory estoppel operate to enforce an obligation within the domestic sphere, they uphold the exclusion of these obligations from the central operation of contract law. Where they are recognised within the commercial realm, they uphold the economic order.

All these examples of counter-principles illustrate that contract is apparently the legal embodiment of (and support for) the free market. However, from a critical perspective, a market is really nothing more than the operation of inequality: contractual relations are nothing more than a manifestation of the power held by some over others. Acknowledgement of inequality of bargaining power within the law of contract therefore cannot go so far as to cancel every inequality of power or knowledge, for to do so will ultimately undermine a contract system.

> If everyone were quickly restored to a situation of equality within the market order, the method responsible for this restoration would be the true system of resource allocation. It would empty market transactions of much of their apparent significance.[35]

While the common law has provided compensating principles (eg unconscionability) apparently seeking to overcome the unfairness of formalism and alleged objectivity, such a principle requires the aggrieved party bear the onus of proving a vitiating factor either as plaintiff in an action to avoid a contract, or in defending an action seeking to enforce a contract against them. For example in unconscionability, the aggrieved party must show that they suffered a disability; that the stronger party knowingly took advantage of this.[36] Until that is shown classical presumptions will apply: the contract bearing the necessary hallmarks derived from a formalistic and objective examination, will be valid. The dominant paradigm is revealed and the weak are left on the margin. Therefore while it could be posited that such principles introduce an alternative to the dominance of liberal ideology, the reality for most aggrieved contracting parties is that the system which created the classical paradigm puts this aspect out of reach through doctrinal

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[34] Ibid 624.

[35] Ibid 626.

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

complexity and the high cost of access to justice. This maintains the integrity of classical contract theory and the liberal promise, and sustains its role as the perpetuator of unfairness masquerading as fairness.

In the context of the development of counter-principles such as unconscionability, it is easy to accept comments by Atiyah[37] and other commentators such as Gilmore[38] that classical contract law still stands but as a 'residuary body of rules of little application in practice'.[39] Kessler and Fine[40] and Bigwood,[41] however, adopt a less radical view: freedom of contract at the core of classical theory has been challenged, but its emphasis has simply shifted in response to the imperatives of justice, fair dealing and equity.

This latter approach echoes that of Feinman and Gabel who identify the development of a 'third stage transformation' of the economic and legal world (in the US context, but arguably also reflective of the Australian experience) encompassing a 'newly conceived notion of the general welfare'.[42] In contrast to Bigwood and Kessler and Fine, Feinman and Gabel focus on the extent to which these rules transform power and the social hierarchy. They conclude that the introduction of a 'newly conceived idea of general welfare'[43] is simply a concealment of 'what is really going on in the world'.[44] As with the development of classical contract, these 'new' ideas simply represent the use of the imagery of the law to legitimate the dominant ideology. This is achieved through the techniques of legal reasoning adopted by the Courts — formalism and objectivism — that come under sustained attack from CLS scholars

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37 P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

38 Grant Gilmore, *The Death of Contract* (1974).

39 Atiyah, above n 37, 687.

40 Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study' (1964) 77 *Harvard Law Review* 401, 443.

41 Bigwood, 'Conscience and the Liberal Conception of Contract: Observing the Basic Distinctions Part I' (2000) 16 *Journal of Contract Law Lexis* 6, [7].

42 Feinman and Gabel, above n 17, 381.

43 Ibid.

44 Ibid 382.

whose 'basic mission is to demolish the presumption and pretence of the legal process school'.[45]

Based on these arguments, the role of counter-principles is suspect. In fact, the 'greater role' of counter-principles is to reinforce the 'legitimating function of traditional doctrines'[46] and therefore the role of the market itself as embodying the dominant capitalist paradigm. Despite using the imagery of an 'ethic of cooperation and coordination'[47] between actors transacting in good faith, the law 'justifies the normal functioning of the system by resolving [conflicts] through an idealised way of thinking about it'.[48]

In challenging the existing classical structure, the CLS movement desires to generate an entirely new system of rights which overturns the inherited social hierarchy. Unger calls this a 'superliberalism' which:

> pushes liberal premises about state and society, about freedom from dependence and governance of social relations by the will to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place. [49]

Through superliberalism Unger proposes that social life resemble more closely what politics are already largely like in liberal democracies: a series of conflicts and deals among more or less transitory and fragmentary groups.[50] Overall, the movement looks to deconstruct society as a whole and to provide a paradoxical concrete yet plastic superstructure within which individuals are free to enter varieties of communal experience protected by legal rights. The dynamics of this superstructure will change as the needs of the citizens dictate.

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45 Elizabeth Mensch, 'The History of Mainstream Legal Thought' in David Kairys (ed) *The Politics of Law* (1990) 13, 33.

46 Feinman and Gabel, above n 17, 385.

47 Ibid 381.

48 Ibid 384.

49 Unger, above n 10, 603.

50 Ibid 602.

A CLS analysis of institutions and systems aims to underline a thesis that empowered democracy can be achieved via:

> cumulative emancipation of personal relations from the constraints of some background plan of social division and hierarchy, as the recombination of qualities and experiences associated with different social roles, and as the development of an ideal of community no longer reduced to merely the obsessional and stifling counter-image to the quality of practical social life. These need to be thought out in legal categories and protected by legal rights.[51]

CLS therefore presents a practical solution for a practical problem: how to exist within a continuous set of ideas, rather than within the framework of theory, exclusions, exceptions and repressions. Unger's system for example, focuses on transformation from the existing hierarchical system to a new fluid system.

Ultimately CLS aims to dismantle the contrasts between what a social world incorporates and what it excludes. The active power to remake and re-imagine the structure of social life should enter into the character of everyday existence.[52] The goal of CLS, in objecting to the inaccuracies and inconsistencies identified here, is to challenge the formalistic and apparently objective tools of the law, and to challenge their legitimacy based on principles of openness and accountability.

B *Anti-formalism*

Formalism is the application of 'impersonal purposes, policies, and principles as an indispensable component of legal reasoning'.[53] As an approach to making law, it purports to be a literal interpretation premised on apparently objective, or universal, understandings of the meaning of words.[54] In contrast, 'antiformalist critique aims to show

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51 Ibid 598.

52 Ibid.

53 See eg Unger, above n 10, 564; Drahos and Parker, above n 2; Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 968.

54 See eg the discussion above about *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

that the prevailing rules are not preordained by the nature of things, nor are particular case results required by legal logic.'[55]

In *ACCC v Berbatis Holdings*[56] the Roberts 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, lease negotiations recommenced without the need for the release clause. Consequently, negotiations for sale also recommenced, and the business purchaser started to take possession of the leased premises. At the last minute, the lease was produced for execution, containing the release 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 Roberts were in a position of 'special disadvantage' in terms of common law unconscionability applied in terms of the *Trade Practices Act 1974* (Cth) (*TPA*). This was rejected by the majority, applying the 'list' of special disadvantages spelled out in *Blomley v Ryan*,[57] which were held not to apply in this (business) context. Indeed, on a literal interpretation, the Roberts could not be said to be at a special disadvantage arising out of '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'.[58]

A formalist approach to legal reasoning in this case implies that hard-headed business people behave in a rational way unburdened by family considerations or emotional constraints, masking the actual disadvantage of the Roberts and the actual power wielded by the landlord in the context of their transaction. This process legitimates power hierarchies

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55 Klare, above n 4, 65.

56 (2003) 214 CLR 51 ('*Berbatis*').

57 (1956) 99 CLR 362.

58 As cited in *ACCC v Berbatis Holdings* (2003) 214 CLR 51, 63 (Gleeson CJ); 80-81 (Kirby J); 115 (Callinan J).

in that the law will uphold a transaction that ostensibly reflects the will of the parties.

Formalism is legitimised as an objective and rational scientific process in comments by Gleeson CJ in *Lenah Game Meats*, where he points out that it would be a 'misapprehension that the essential function of a court is to decide every case by a discretionary preference for one possible outcome over another'.[59] In other words, the court's role is the application of rational, deductive legal reasoning to derive a true and objective result. In contrast to this literal approach, Mason CJ and Wilson J comment that 'rules which generate uncertainty in their application to ordinary contracts commonly entered into by the citizen call for reconsideration'[60] — suggesting a purposive approach rather than a literal one. This contradiction supports the CLS rejection of claims that a literal interpretation of the rules will procure an objectively fair result.

Feinman[61] finds that in modern American law, critiques of classical law focus both on the reality of law as a form of social ordering; and the gap between law's vision of the world and the social reality of the operation of contract law. Yet according to Feinman adjustments to the classical system (in the form of modern law) remain focussed on individual autonomy and formal doctrine as rules. This is reflected in the majority decision in *Berbatis*.[62]

That the action in *Berbatis* was brought by the ACCC represents the possibility of the law in transforming power hierarchies. The availability of remedies for unconscionable conduct not just in common law but in statute law represents that the law embodies these principles as part of its corpus. However, as observed above, these are merely ideals that have not actually been achieved.[63] In a similar vein, Unger believes that the 'received ideas about the nature of rights and the sources of obligation cannot readily inform even the existing sorts of communal

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59 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 219.

60 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 119.

61 Jay M Feinman, 'Critical Approaches to Contract Law' (1983) 30 *UCLA Law Review* 829, 832.

62 *ACCC v Berbatis Holdings* (2003) 214 CLR 51.

63 Feinman and Gabel, above n 17, 384.

existence, much less the ones to which we aspire'.[64] Remedies for unconscionability for example, indicate that as discussed in *AMEV-UDC Insurance v Austin*[65] the law will find a balance between freedom of contract and protection of weak contracting parties. This statement legitimates the law's own claims to represent fairness. In contrast however, the majority decision in *Berbatis* highlights the law's failure to represent the lived communal existence of the Roberts and their disempowered status within the hierarchy. Therein lies the crux of the CLS critique of formalism.

C *Unresolved Inconsistencies*

As a concomitant to entrenching the existing power order, cases such as *Berbatis* provide an example of inherently unresolved inconsistencies of classicism that are identified in a CLS critique of formalism. These inconsistencies lie in the law's dichotomy of self and other, and public and private. *Berbatis* highlights the dominance in the law of self, or individualism, over other — the courts will apply the law in favour of a party fulfilling the norm of a rational business person furthering their own interests, but they do not identify with behaviours outside that liberal framework. It also exemplifies the differential between the public (business or economic activity, a valid subject of law) and the private (the sick child, family concerns, not relevant in a business context).

In privileging that which is public and individualistic, the law through the application of formalist technique sustains the power differentials constructed by the law and the institutions it supports — and CLS thinking identifies the contradiction and indeterminacy of classical (formalist) legal theory including individualism in that 'self and other can never be reconciled'.[66] The self/other dichotomy is axiomatic in the free market economy, where the nature of capitalism and free market is the denial of 'other' for the purpose of advancement of self through taking advantage of one's gifts and the inexperience of others to result in a bargain. It is not only immaterial that this is at the expense of 'other', it is *required*. A CLS analysis finds an inherent bias in the legal system whereby the interests of the elites (those with superior bargaining power) are advanced by the entrenched rules of the system

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64 Unger above n 10, 598.

65 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 194.

66 Drahos and Parker, above n 2, 35; see also Dalton, above n 10.

itself and by the privileging of the 'self'. The powerless too are to rely on self, but have none of the advantages rewarded by the system.

Kirby P observed that the actions of commercial people 'typically depend on self-interest and profit-making not conscience or fairness'.[67] He did add that protection from unconscionable conduct will be appropriate in particular circumstances, ie, there is a place for cooperation within the individualistic system, but this is an exceptional circumstance. In any event:

> courts should be wary lest they distort the relationships of substantial well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges. Such consciences, as the cases show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it.[68]

These comments are directed at a relationship — but one predicated on the selfishness of each party to it. Therein lies the contradiction. In addition, the context of this statement is specifically commercial thus illustrating the court's awareness of the inherent bias of its application of policy in favour of one group (consumers) but not as a matter of course in favour of another ('commercial' entities).

Kirby P's comment also illustrates Unger's critique of objectivism. While imposing an authoritative moral code to a set of (commercial) relationships, the statement reflects a failure to describe the extent of the relevant social interaction within the terms of the law.[69]

In these circumstances Unger may propose application of 'deviationist doctrine'. This would involve identifying the ideal to which the law aspires (a standard to determine conscience and consistently in all contractual relationships) thereby 'relativising the contrast between the current legal reasoning and [the] ideological controversy' of the ideal.[70]

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67 *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 586[B].

68 Ibid 586[C].

69 See also *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

70 Unger, above n 10, 603.

The ideological controversy here is that commercial participants in the market are expected to behave selfishly, but that transactions involving non-commercial participants attract a community-based category of rule. The two groups seem mutually exclusive. Recognising the ideal of conscientious behaviour by each party within all market-based relationships may enable changes within the context of existing doctrine. This removes the differentiation between public/private (commercial/non-commercial) as relevant, and allows the parties' lived realities to become relevant. Embedding the ideal (good conscience) allows an understanding of what the law is capable of *being*, helping the 'actual realisation of authentic values in a meaningful sense in every day life'.[71]

The underlying dichotomies of classical contract are represented also in terms of principles and counter-principles. The role of counter-principles to the principles of contract law has been interpreted so far as simply another means of supporting the dominant liberal-capitalist paradigm. In the Roberts' disempowerment in their transaction with their landlord, the *TPA* consumer protection provisions did not resolve their plight. However, these provisions imply that the law seeks to remedy inequalities of power in the marketplace through an examination of the contractual relationship. As an example of a more traditional framework of consumer protection, these provisions fit within the principle/counter-principle dichotomy.

III Statutory Consumer Protection

In this part, the discussion turns to the operation of statutory consumer protection as a means of supplementing the counter-principles of the common law. It examines the traditional methodology, before looking at some specific measures in Queensland over the past ten years. The question that will be asked is whether from a CLS perspective the contemporary Queensland measures empower the weak or merely reinforce the existing paradigm.

In the past decade or so the Queensland parliament has introduced mechanisms to protect buyers of residential land in Queensland and tenants of Queensland retail shops. These measures consist in general terms of warning and disclosures that alter the common law process of contract formation. This methodology imposes a new set of restrictions

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[71] Feinman and Gabel, above n 17, 384.

on existing property markets that were previously only generally regulated. To the extent that the measures share similar operation and goals, they are referred to in this paper as a 'scheme'.

A *Traditional Statutory Consumer Protection*

Statutory incursions into contract have traditionally shown themselves to follow the lead of the common law. The *Sale of Goods Act 1896* (Qld) (*SGA*) for example, sought to codify the common law protections for consumers of goods, as did the *TPA*.

Common law counter-principles relating to misrepresentation led the way for statutory provisions that have had the effect of eroding the principle of caveat emptor. In Australian law the trend has been to entitle a consumer to rely on seller and manufacturer representations (actual or deemed). Under s 52 of the *TPA* there is an obligation on the seller to ensure that circumstances do not exist which may mislead the buyer. Similarly, under s 88B 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. While not removing caveat emptor altogether, such provisions represent a fundamental shift in the law.

These statutes, in following the common law, steer the same path as classical contract theory, albeit apparently identifying a different framework of responsibility within the free market. However, they still require the foundation of the market and existing legal principles to operate. To this extent, they remain an expression of the formalism and objectivism inherent in the classical paradigm.

A similar approach has been taken in other jurisdictions within statutory schemes as an alternative to the common law. The *Contracts Review Act 1980* (NSW) (*CRA*) sought to provide a statutory direction to the court to apply the equitable principles of unconscionability. Kirby P argued (in dissent) in *West v AGC (Advances) Ltd*[72] that the court was not bound by the pre-existing common law in its application of the principles enumerated in the Act. In that case, and since,[73] the court

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[72] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 611-12.

[73] *West* was 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).

has affirmed the pre-existing common law in its application of this Act, exemplifying the dominance of the traditional structures of the law.

These legislative incursions into contract form counter-principles to the (classical) model, premised on the existence of a contract according to classical common law principles. They are applied via the formalistic and objectivist framework of the law.

B *The Scheme*

In contrast, the scheme of consumer protection measures introduced in Queensland over the past decade seeks to alter the rules of contract making itself. In each case, the parliament appears to have sought to circumvent unconscionability in contract through introduction of processes to level the playing field between the powerful and the powerless. Indeed the Explanatory Notes to the Bill introducing the relevant amendments to the *RSLA* tell us that:

> [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' … 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.[74]

And later, that '[a] higher level of pre-lease disclosure will actively address the threat of action under the "unconscionable conduct" provisions'.[75]

In a similar vein the Explanatory Notes to the relevant amendments to *PAMDA* reveal parliament's intention to level the playing field:

> [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

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The *CRA* provided relief in the former (where there was some evidence of fraud by forgery) but not in the latter.

74 Retail Shop Leases Amendment Bill 2000 (Qld) Explanatory Notes, 7-8.

75 Ibid 13.

> response to the marketplace behaviour and conduct rather than further regulation of specific occupations in the property sales process.[76]

To achieve the change in marketplace behaviour, the *PAMDA* provides that a contract for the sale of residential property in Queensland:

- must have annexed as its top page a warning statement in the prescribed form.[77] Without such a warning, the buyer may terminate the contract, without penalty, at any point up to completion.
- is not binding until the buyer receives a copy of the contract signed by both buyer and seller.[78] This subverts the classical rules of notification of acceptance as sufficient to create a binding contract.

The *PAMDA* also allows buyers a five day cooling-off period during which time they can end the contract with only a nominal payment to the seller.[79] This is predicated on the existence of a contract within the traditional framework and neither adds to nor challenges that aspect of the classical framework. It does however empower a buyer to escape the bindingness of a properly formed contract without looking to vitiating factors.

In terms similar to the *PAMDA*, the *RSLA* provides that landlord disclosure and tenant advice must precede a valid Queensland retail shop lease.[80] Upon failure to provide the requisite evidence of disclosure, the tenant may rescind the contract within two months of commencement of the lease, and recover damages. Like the cooling-off period of *PAMDA*, this innovation empowers a tenant to escape from an otherwise binding contract.

Failure to furnish an advice certificate does not affect the bindingness of the transaction, however, it may call into question the quality of the parties' bargaining power. In requiring the tenant to provide evidence

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

77 *PAMDA* ss 366, 366A, 366B.

78 *PAMDA* s 365.

79 *PAMDA* s 368.

80 *RSLA* s 22 (disclosure); s 22D (advice).

of advice, parliament implies that without it, and independently of evidence of unconscionable conduct by the landlord, the tenant has not entered the transaction as an informed party. This logic echoes that of *Amadio*[81] where the plaintiff's lack of independent advice was a factor relevant to determining the quality of the parties' bargaining positions, impacting on the court's preparedness to uphold the contract.

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. 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[82] and retail shop tenants are ostensibly required to obtain advice.[83] Parliament makes no assumption of information or inquiry and places no responsibility on the buyer/tenant, but seeks only to promote buyer/tenant inquiry. Ultimately though, it also effectively provides compensation to a buyer/tenant where they fail to inquire, through the mechanisms of cooling-off provisions, the lack of formalities required to rescind, and the lack of responsibility on the consumer actually to make inquiries. These aspects of the scheme shift the common law onus under caveat emptor from the weaker party to the party with power. They operate not simply as a means of actually delivering information to perfect the market, but provide mechanisms irrespective of information that empower the consumer to withdraw from what would otherwise be an enforceable contract.

The new scheme therefore differs from that of s 52 of the *TPA* in its effect on 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 the buyer/tenant may be protected from their own failure to inquire by the cooling-off period in *PAMDA* and the procedural requirements for forms of disclosure and warnings.[84]

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81 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

82 In the warning statement required under *PAMDA* s 366D.

83 *RSLA* s 22D — there is no penalty on the tenant who fails to provide advice.

84 See *RSLA* ss 22(3), (4) and *PAMDA* ss 367, 368 respectively.

It should be noted that the scheme focuses on empowerment of *all* buyers and tenants, at the expense of *all* sellers and landlords. Each Act represents the parliamentary assumption of a market hierarchy in favour of the latter, by the existing law. This too represents a change from the equitable exceptions (counter-principles) such as unconscionability, which look at the circumstances of the transaction and the parties' relationship to determine where the power lies. This facet of itself provides a re-thinking of the sites of power within the marketplace.

IV A CLS View of the Scheme

In terms of a CLS critique, it could be argued that the Queensland scheme has sought to fill the gap left by 'received ideas about the nature of rights',[85] to facilitate an aspired communal existence within identified markets.

It is acknowledged that a law and economics approach to the problem of power might seek to remedy the mischief of imperfect information by perfecting the access to and quality of information available to parties in the market place — and certainly this is one aspect of the scheme. However, apart from any arguments about efficiency or economic benefits of the legislation, the scheme is of interest to those seeking transformation in the law to the extent that it potentially represents an undoing of the norms of contract law through embedding notions of conscience where these existed previously only as exceptions — highlighting their limitations within the classical paradigm.

In seeking to facilitate a non-exploitative relationship between the 'underdog' and those apparently wielding power within the relationship, the scheme appears to have recognised the social nature of contract through, in the case of each Act, an explicit recognition of power and the role of conscience in market transactions. In the case of *PAMDA* for example, Hansard[86] shows an emotive response by parliamentarians to a class difficult to define other than by the imprecise moniker 'battlers'.

> 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

[85] Unger, above n 10, 598.

[86] Queensland, *Parliamentary Debates*, 13 September 2001, 2670-709 (various speakers).

> dad investors; two, to protect Queenslanders and anyone else buying residential property in this state…[87]

Likewise, the *RSLA* amendments specifically relate to the issue of *conscience* in following the recommendations of a Policy Review Paper,[88] which supported strategies to reduce the time small business is in dispute, to promote effi;ciency and equity in the conduct of certain retail businesses. It is noted that *equity* is superimposed upon the otherwise economic goals of the recommendations.

The provisions of each Act give power to one group at the expense of the other. In seeking to alter market behaviour, the scheme, in terms of CLS theory, has destabilised the relevant market. It has done this in two ways.

First, on a superficial level, the scheme offers information to the 'weaker' party. In the case of *PAMDA*, this is in the form of a warning statement, and in *RSLA*, a disclosure statement.

Secondly, and where the scheme is considered to deviate from existing counter-principles within classical contract, is the freedom of the nominated weaker party to withdraw from the transaction without penalty, or with nominal penalty only. [89] The scheme impacts fundamentally on our understanding of contract formation itself, and loosens the grip of suppositions about freedom of contract and freedom to contract in particular.

Unger identifies as inherently contradictory in contract law that:

1. obligation lies in the fully articulated act of will and unilateral imposition of a duty by the state, qualified by *ad hoc* counter-principles; and
2. the standard source of obligations consists in the only partially deliberate ties of mutual dependence, where counter-principles are generative norms of the entire body of law and doctrine.[90]

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87 Ibid 2703 (Hon M Rose, Minister for Tourism and Racing, and Minister for Fair Trading).

88 Queensland Department of State Development, '*Retail Shop Leases Act 1994* Review: Policy Review Paper' (September 1999).

89 *PAMDA* ss 365-8; *RSLA* ss 22, 22D-E, 46A-B, 83.

90 Ibid 569.

Classical contract sees obligations arise from the formalised bilateral executory contract which is a public ordering of the ostensibly private relationship for the enforcement and stability of the market, or from the state's unilateral imposition of a duty — inherently public.[91] In each case the counter-principles offered by the law purport to represent a private dimension but in fact represent a normative element derived from public expectations of society.

Dalton reaches the same conclusion, using slightly different terminology. She identifies the doctrines of duress and unconscionability as examples of the 'separation and conflation' of public and private — they are separated from general contract law as exceptions, but they in fact reflect widely held attitudes about which contracts are worthy of enforcement.[92]

Formerly, public intervention in private deal-making existed as a publicly generated counter-principle (eg, unconscionability) expressed ad hoc to deal with particularly private circumstances. The new form of public intervention avoids the private and ad hoc nature of the former exceptions, and draws the proscribed behaviour within the standard source of public obligations, both through attempts to perfect access to information, but in particular through the destabilising the original source of contractual obligation.

While the scheme's intervention in (ostensibly) private affairs is public (ie, imposed by the state) it conceals its public nature by imposing on the parties the onus to undertake a participatory (private) role in agreement-making processes. This is Dalton's 'separation'. Under the scheme, the onus is on the consumer (the powerless) to act on the warnings, to consider the terms of the contract and to assist themselves to be in a position to avoid unconscientious advantage being taken. To the extent that this is a state-imposed contracting process there is a conflation of the public generative norms with private activity. In one sense, this aspect of the scheme can be considered to reinforce the principle of caveat emptor through a 'constructively' better informed buyer. This is a relatively orthodox means of imposing state policy into an ostensibly 'private' sphere.

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91 Ibid 598.

92 Dalton, above n 10, 1011.

The scheme alters the status quo also in minimising the opportunity for application of common law unconscionability. The prima facie evidence of procedural fairness arising out of the conflation of state-imposed procedures and private activity minimises the need for ad hoc application of common law counter-principles. On balance, it is arguable that the legislative scheme draws together public and private, and minimises the exceptionality of undesirable conduct by those wielding market power.

The Queensland scheme has taken very specific subject areas and arguably through the altered statutory mechanisms for contract formation, has removed them from the broad umbrella of contract law. If still regarded as part of contract theory, they would become exceptions. On the other hand, the scheme could be something more than a superficial change to contract law, representing an incremental hierarchical change such as is advocated on a CLS approach. The test will be to identify the point at which the transactional distortion resulting from systemic inequality, justifies revising the very nature of contract itself. This is relevant regardless of whether the initial principle/counter-principle applies, or whether the extreme inequality scenario applies. A possible CLS solution to sustenance of the market and genuine freedom of contract depends on alteration of the institutional character of the market — systemic change — rather than the principle/counter-principle dichotomy.

The nature of the market regulation, outside the usual principle/counter-principle dichotomy may be described in terms of Unger's own analysis, whereby:

> some market regimes, taken in their actual political and social settings, may regularly generate or incorporate so much inequality that the minimum of correction needed to prevent them from degenerating into power orders amounts to more than the maximum correction compatible with the autonomy of decentralised market decisions. [93]

V Does the Queensland Scheme Answer a CLS Critique?

The scheme seeks to remove the unconscionability element from a contractual relationship by establishing a protocol between the parties

[93] Unger, above n 10, 627.

necessary for the formation of a contract. Neither Act asks questions about actual conduct. They seek not to identify the power dynamic that exists. They do not wish to examine 'special disadvantage', or whether unfair advantage has in fact been taken. Instead, the scheme presents as a one stop, self-help, pre-emptive blow to unconscientious conduct of all kinds. It apparently has many of the elements proclaimed by Unger to be desirable in deviationist doctrine.

We can accept Unger's proposition that legal rules and doctrines define the basic institutional arrangements of society. Further, even using a classical/formalist framework, rules must be 'interpreted and elaborated as a more or less coherent normative order'. The risk is identified by Unger however, of counter-principles representing 'a disconnected series of trophies with which different factions mark their victories in the effort to enlist governmental power in the service of private advantage'.[94] The scheme however may unify the rules by removing exceptions, thereby subverting the power base. Unger identified a number of ways in which this might occur.

First, the Queensland scheme enables contract formation (within its subject areas) to be represented by a single cohesive set of ideas. It eliminates the myriad exceptions to formation of contract — replacing them with a single concept whereby compliance with form will provide the buyer with every opportunity to make a considered decision, and will dispense with any suggestion of defect in consent. This system removes the 'ad hoc qualifications to the dominant principles', yet neither do counter-principles remain to be 'generative norms of the entire body of law and doctrine'.[95] All is embodied in the laws themselves.

Secondly, it rejects the existing institutional structure of society (being an institutionalised series of relationships between groups of people) by giving Parliament's 'battlers' control over contract formation where previously marketeers and landlords controlled process and outcome at the expense of those lower down in the social hierarchy.[96] Its method is to destabilise the power of some people (or the position they occupy) in the market to reduce others to passive acceptors of contract terms

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94 Ibid 582.

95 Ibid 569.

96 See *Retail Shop Leases Amendment Bill 2000* (Qld) Explanatory Notes; *Property Agents and Motor Dealers Amendment Bill 2001* (Qld) Explanatory Notes.

and consequences. This 'broadens the sense of collective possibility and makes more precise the ideal conceptions that ordinarily serve as the starting points of normative argument'.[97] If the market has not been precisely defined in the Queensland scheme (and where it therefore remains an indeterminate and abstract idea) there has at least been an attempt to identify it, in so much as parliament is seeking to change market behaviour into a form which will transform the relative power of those in that market.

The Queensland scheme 'reflects the reality of practical social experience'.[98] These modestly small areas of rights, newly defined in the legislation, operate transformatively to directly shape a set of personal relations. They 'alter these relations, collectively and deliberately, in ways that…encourage some partial change of the institutional order'.[99] By altering the balance of rights held in contract law — even in this 'detailed fragment' — it is possible to see the emergence of a new system of private rights from the familiar institution of contract law.

Thirdly, the scheme is not selective in that it applies universally regardless of special circumstances. It provides a guiding vision of how contract law will operate within its markets. This is a scheme that cannot be applied arbitrarily by the courts in the manner criticised by Unger, where it is 'always possible to find retrospectively more or less convincing ways to make a set of distinctions or failures to distinguish, look credible'.[100] Finlay also illustrated inconsistencies in application of these 'distinctions'. She cites for example, conduct about which small business complained which was harsh but legitimate, as opposed to unconscionable. [101]

Fourthly, the new scheme represents a solidarity constraint[102] whereby each party gives some force to the other party's interests, though perhaps less than to their own. Where there had been a disparity of power manifest in one party's greater vulnerability to harm (in the

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97 Unger, above n 10, 666.

98 Ibid 673.

99 Ibid.

100 Ibid 571.

101 Anne Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone Too Far?' (1999) 28 *Anglo-American Law Review* 470.

102 Unger, above n 10, 643.

present cases, this has been determined by parliament) the legislation forces one group to cede power to the other, regardless of the relative 'market ability' of the parties, and purely by force of the protocols of entry into contract. This reflects Unger's idea of a 'continuous shading of contract and community'[103] as opposed to a stark contrast between them. Counter-principles hint at this possibility without making it central. Underpinning notions of conscience within the scheme and the mechanisms to act on that provide the means to put this into practice.

Fifthly, even where contracting parties fail to appreciate it, in shifting the power and having each party give force to the interests of the other (even so far as requiring written acknowledgement of the position of the other party) the scheme highlights the existence of rights and obligations in the context of community; being a zone of heightened mutual vulnerability.[104] According to Unger, this gives a more satisfactory account of what attracts us to the communal ideal in the first place.[105]

Sixthly, the scheme encourages forms of human association that override and oppose an institutional or imaginative order that they have not yet managed to replace: the creation of counter images to the dominant models of social life.[106] This is manifested by the scheme's effect in empowering the underdog in a structure still bound by the constraints of classical theory, providing an alternative understanding of just how individuals may interact with the opportunity to have disadvantages minimised through full informed disclosure and therefore consent. Empowerment is derived through the means of purchasers/tenants withdrawing from contracts unilaterally or enforcing a right to information via statutory processes for information delivery through the threat of withdrawal.

The scheme delivers a 'looser and more contestable rationality requiring no mixture of bold theoretical claims or saving ad hoc adjustments'.[107] It stands alone. Either the prescribed form and process are adhered to, or they are not. It is a means to minimise the possibility of interference with

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103 Ibid 642.

104 Ibid 597.

105 Ibid 644.

106 Ibid 667.

107 Ibid 582.

the ability of a party to perfect their understanding prior to committing to a legal obligation.

Finally, the scheme allows 'multiple points of entry [into the] more or less authoritative resolution of problems that are currently defined as legal',[108] and which therefore fall within the purview of the legal profession's traditional monopoly over legal problems. Through this monopoly, the legal profession, steeped in classical doctrine, serves the existing power order. By providing a protocol for entry into legal obligations in order to pre-empt arguments on issues of unconscionability, the parties are given an opportunity to help themselves. The buyer or tenant may withdraw from the arrangement within the statutory time frame, if the protocols have not been complied with. In the case of *PAMDA*, the buyer even has the opportunity to exit with only nominal penalty for no reason at all within the first five days of the contract.

These options in themselves empower these groups of people to act on their own behalf where previously they had been ill equipped to further their own interests due to the complexity of the system of exceptions, and facilitate and encourage them to obtain and review information rather than passively rely on the power or benevolence of the other party.

VI Conclusion

The Queensland scheme embodied in the *PAMDA* and the *RSLA* through its straightforward application of procedural rules addresses many aspects of the CLS critique of contract law. It challenges the inherent structure of the market and levels the existing power differential. Importantly it reduces reliance on formalism and objectivism by creating a new cohesive standard for validity of contract, which removes counter-principles while embodying the public nature of desirable norms.

The primary downfall though is that the scheme's intervention may destroy the vitality of decentralised decision making by transforming the contractual regime into an alternative power order. The legislation grants buyers/tenants power which targets a group some of whom may have been disempowered but others who have not. The redistribution of power to those who are actually disempowered may not by itself destroy the vitality of decentralised decision-making, but the universal

[108] Ibid 668.

distribution of power to all buyers/tenants has gone beyond the application of common law counter-principles and contradicts the CLS objection to such power differentials. The Acts' redistribution in this sense may support formal equality, without necessarily addressing the substantive equality sought on a CLS analysis.

On balance however the scheme can be seen to represent a significant shift in underpinning classical concepts. It is possible that parties to these contracts may experience 'liberated exchange… free from the vitiating force of dominance'.[109] Perhaps the key is parliament's foray into the previously unexamined sense of possibility. This possibility empowers 'battlers' who have access to greater finances than in any other generation and who are now members of the market, and who were suffering from this 'vitiating force'. Using law to change the procedures and systems of a market thus shifting sites of power might allow a reimagination of social intercourse that falls outside the prevailing ideological system. In a modest way, and while not perfect, the new scheme illustrates how Unger's critique might be given form in creating a new equilibrium in place of an old power order.

[109] Ibid 673.