

# Foreword

*The Hon KE Lindgren AM QC*

I am honoured to have been asked to write the foreword to this work, not only because of its own merits, but also because it is dedicated to the memory of the late Professor David Harland, who was a co-author and friend of mine. David was a scholar of the highest order and the Australian leader in the field covered by this book.

True to the book's title, its chapters contain comparisons of the law and policy protective of consumers in Australia and New Zealand. There are also, however, numerous references to the positions in other countries; in particular, the United Kingdom, the United States of America, South Africa, the European Union and Japan. Accordingly, the work has a global frame of reference.

The book is divided into four parts: (1) 'General Themes'; (2) 'Unfair Practices and Defective Products'; (3) 'Consumer Credit and Investment'; and (4) 'Access to Remedies and Enforcement'.

In Chapter 1 (General Themes) Professors Malbon and Nottage disclaim any profession of the book to be comprehensive. Yet its scope is strikingly wide, as even a glance at the table of contents will show.

Chapter 2 addresses the endemic problem of defining the 'consumer' for whose protection the State is to legislate. The authors recommend what they describe as 'the obvious step' of treating all transactions as consumer oriented to begin with, but to allow well-resourced parties the right to opt out of the protective regime. This would avoid the definitional problem and the necessity for an aggrieved person to establish standing to sue. The suggestion is an interesting one which demands serious consideration, even though it would be thought radical and provocative in some quarters.

Chapter 3 compares approaches to consumer law reform in various countries, with particular emphasis on the European Union and New Zealand.

Chapter 4 examines guarantees (warranties) as to the quality of goods and services supplied to consumers. This chapter's reference point is Parts 3-2 and 5-4 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)), which are headed respectively 'Consumer transactions' and 'Remedies relating to guarantees'. Chapter 4 will be particularly useful to Australian lawyers who must now come to grips with a régime of statutory guarantees and associated statutory remedies in place of the previous implied contractual terms and their associated remedies for breach of contract. The chapter contains illuminating references to New Zealand, Saskatchewan and United Kingdom precursor Acts and to cases decided under them.

The Unfair Contract Terms provisions enacted in Part 2-3 of the *Australian Consumer Law* form the subject matter of Chapter 5, while 'Unconscionable

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Conduct in Consumer and Business Transactions' provides that of Chapter 6 – both Chapters being written by Associate Professors Nyuk Yin Nahan and Eileen Webb. The authors do not shrink from addressing issues associated with the breadth of the underlying concepts and the associated danger of idiosyncratic decision-making.

Chapter 7 poses the question, 'A General Prohibition of Unfair Commercial Practices?', and contrasts the EU model of a general prohibition with a model based on more specific (or rules-based) controls.

The final Chapter in Part 1, Chapter 8, returns to examine the subject of product safety, but from a regulatory (and strict liability) perspective rather than through the prism of statutory guarantees and associated statutory remedies enforceable by the consumer (the subject matter of Chapter 4).

Part 3 of the book takes us to the area of consumer credit. It addresses the *National Consumer Protection Act 2009* (Cth) and the *Credit Contracts and Consumer Finance Act 2003* (NZ) (Chapter 9); financial literacy, consumer banking and financial advice (Chapter 10); consumer vulnerability and disadvantage (Chapter 11); and 'Interest Rate Caps and Price Regulation in Consumer Credit' (Chapter 12).

'Access to Remedies and Enforcement' is the subject of Part 4. In Chapter 13 on 'Consumer Complaints', Justin Malbon mainly addresses industry-funded ombudsman schemes in Australia and New Zealand. In Chapter 14, Dr Paul O'Shea considers the challenge of overcoming inconsistencies in regulation and the exercise of administrative powers. Chapter 15 contains a discussion by Lynden Griggs of the recurrent problem posed by the phenomenon of commerce conducted by means of electronic communications.

This collection of 15 essays is, among other things, a treasure-house of references to research sources, including electronic research sources, which will be of benefit to practitioners, students, academics and policy-makers alike.

There can be no doubt that the book will prove to be an invaluable resource for all lawyers and legal firms whose practice, in whatever form, takes them into the area of consumer law and practice in Australia or New Zealand or in both countries. It draws attention to important recurrent themes, yet contains a wealth of supporting detail. In addition to recounting the past and describing the present, the work suggests directions for the future.

Although it is written mainly by academics and contains suggestions for law reform, the book is far from a 'for academics only' tome. It will be particularly helpful to Australian legal practitioners because of the recent legislative reforms in Australia which have foreign antecedents, especially the *Australian Consumer Law* and the *National Consumer Credit Protection Act 2009* (Cth) with its scheduled *National Credit Code*.

It is to be hoped that in due course the contributors and the publisher will provide a second edition, for which the assured success of this, the first, is certain to call.