

Acknowledgements

This book is aimed primarily at policy-makers, researchers, senior students and legal practitioners interested in locating recent consumer policy debates and major law reforms in Australia, as well as subsequent initiatives in New Zealand, in a broader comparative, theoretical and historical context. Like other major projects in this complex and evolving field, the book has drawn on the expertise and experience of many expert contributors, mostly from or associated with academia. We also thank Kevin Lindgren AM QC, a former professor of law and Judge of the Federal Court of Australia, for kindly contributing the foreword.

Many others have assisted in bringing this book project to fruition. We are very grateful to Diana Hu, Melanie Trezise and Kate Goldsworthy for research and editorial assistance, and for associated financial support from the law faculties of Monash University and the University of Sydney. We also thank The Federation Press for their proficient copy-editing and good-natured efficiency.

Chapter 2 draws partly on Griggs L, Freilich A and Webb E, 'Challenging the Notion of a Consumer: Time for Change' (2010) 19(1) *Competition and Consumer Law Journal* 52. Part II of Chapter 3 updates and expands on Tokeley K, 'Consumer Law and Policy Developments in New Zealand' (2012) 22 *Australian Product Liability Reporter* 302. Part III of Chapter 8 is based on Nottage L, 'Suppliers' Duties to Report Product-Related Accidents Under the New Australian Consumer Law: A Comparative Critique' (2011) 25(2) *Commercial Law Quarterly* 3. An excerpt from Chapter 8 also appears as Kellam J and Nottage L, 'Zwanzig Jahre verschuldensunabhängige Produkthaftung (Gefährdungshaftung) in Australien [Twenty Years of Strict Product Liability in Australia]' [2012] 6 *PHi - Haftpflicht international* 216-7.

This book is dedicated to the memory of the late Professor David Harland, former Challis Professor of Law at the University of Sydney and the 'godfather' of consumer law in Australia. He passed away unexpectedly in 2006, just before the start of the major reforms that are tracked and sometimes critiqued in this volume. We have all missed Professor Harland's expertise and wisdom, particularly regarding comparative dimensions to consumer law and policy, but his influence can be discerned directly and indirectly throughout this work.

Justin Malbon and Luke Nottage
September 2012

Notes on Contributors

Editors

Justin Malbon (LLB *Adel*, LLM *York, Can*, PhD *NSW*) specialises in consumer law and international trade law. He is a professor at Monash Law School and an Adjunct Research Fellow of the Australian Centre for Intellectual Property in Agriculture. Justin was a Visiting Scholar at the Law School and Visiting Fellow at Wolfson College at Cambridge University (2007), and a Visiting Fellow at the European University Institute in Italy (1998). He is also a former Dean of the Law School at Griffith University. Justin's publications include *Australian Export: A Guide to Law and Practice* (Cambridge University Press, 2006), *Interpreting and Implementing the TRIPS Agreement: Is it Fair?* (Elgar, 2008), *Understanding the Global TV Format* (Intellect, 2006), and *A Commentary on the TRIPS Agreement* (Elgar, forthcoming). Justin is a board member of the Queensland Competition Authority, and a panel member of both the Financial Ombudsman Service and the Superannuation Complaints Tribunal.

Luke Nottage (BCA, LLB, PhD *VUW*, LLM *Kyoto*) specialises in consumer product safety law, contract law, corporate governance and arbitration, with a particular interest in Japan and the Asia-Pacific. He is Associate Dean (International) and Professor of Comparative and Transnational Business Law at Sydney Law School, and Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS). Luke previously worked at Victoria University of Wellington and Kyushu University, and has held fellowships at other leading institutions in Japan and Australia as well as Germany, Italy and Canada. His publications include *Product Safety and Liability Law in Japan* (Routledge, 2004), seven other books, and over a hundred chapters and refereed or other articles. He has executive roles in the Australia-Japan Society (NSW), the Law Council of Australia, the Australian Centre for International Commercial Arbitration, and the Australasian Forum for International Arbitration. Luke also serves on the International Law Association (ILA) Committee on the International Protection of Consumers. He is a founding Director of Japanese Law Links Pty Ltd and has consulted for law firms world-wide, the European Commission, the OECD, the UNDP, and the Japanese government. Luke qualified as a lawyer in New Zealand in 1994 and in New South Wales in 2001.

Contributors

Aviva Freilich (BA, LL.M Hons *Syd*) is an Associate Professor at the Law School of the University of Western Australia (WA). She is part of the University's Consumer Research Unit and recently was awarded a grant to research security of tenure among WA seniors. Aviva's particular interest is the interface of contract and consumer law, and she teaches in both areas. She has published numerous refereed articles in these fields and co-authored *Consumer Protection Law* (Oxford University Press, 2008). She was commissioned by the WA Law Reform Commission to write a discussion paper on the implied terms in the *Sale of Goods Act* (WA) and was part of an audit of consumer law by the National Advisory Council of Consumer Affairs. Aviva was also consulted by the Small Business Development Corporation (WA) to review existing international practices regarding unconscionable conduct and renewal of licences in the franchising industry.

Lynden Griggs (LLB Hons, LL.M) is a Senior Lecturer in the Faculty of Law, University of Tasmania. He is currently Deputy Head, with research interests in consumer law, competition law, and land law. He has published extensively, recently completing two monographs for Kluwer in the areas of competition law, and economic and commercial operators. He has a particular interest in the interaction of land law and consumer law, as well as how consumer law will adapt to changing consumer behavior in respect of new technologies.

Nicola Howell (BSc Hons, LLB Hons *Melb*, LL.M *Griffith*) is a lecturer in law at Queensland University of Technology. She teaches contract law, commercial and consumer law, and insolvency law, and her research interests are in consumer policy, self-regulation, consumer credit law, and bankruptcy. She is a member of the executive committee of the Consumers' Federation of Australia, and was the consumer representative on the Banking Code's Code Compliance Monitoring Committee between 2009 and 2012. Prior to her appointment at QUT, Nicola was the inaugural Director of the Centre for Credit and Consumer Law, an academic centre based at Griffith University.

Jocelyn Kellam (BA *Melb*, LLB, PhD *Syd*, LL.M *Tübingen*) is a Partner at Clayton Utz in Sydney; and an Adjunct Professor at the University of Sydney Law School, co-teaching 'Consumer Contracts and Product Defects' (LL.M) with Luke Nottage. She is a commercial litigator with a particular interest in complex litigation, product liability and product regulation. Jocelyn has a significant litigation practice defending and settling product liability suits (including class actions) and regulatory prosecutions. She is also one of Australia's leading regulatory lawyers, particularly in the food and pharmaceutical areas. She has unique experience in relation to product recalls, having been centrally involved in some of Australia's largest recalls. Her publications include *The Contract-Tort Dichotomy and a Theoretical Framework*

for *Product Liability Law* (Nomos, 2000), *International Food Law* (Prospect Media, 2000) and *Product Liability in the Asia-Pacific* (Federation Press, 3rd edn, 2009); numerous book chapters and refereed articles; and many shorter papers on topical issues (<http://www.claytonutz.com/people/kellam_jocelyn/publications.page>).

The Hon Kevin Lindgren AM QC was a Judge of the Federal Court of Australia from July 1994 until he reached the mandatory retirement age in 2010. At the time of his appointment, he was practising as a Queen's Counsel at the Sydney Bar, mainly in the area of commercial law. After serving full-time articles of clerkship from 1957 to 1962, Kevin Lindgren practised as a solicitor from 1962 to 1969; was Lecturer, Senior Lecturer then Professor of Law at the University of Newcastle from 1969 to 1984; and practised at the Bar in Sydney from 1984 to 1994, being appointed Queen's Counsel in 1991. While he was a Judge, Dr Lindgren was also the President of the Copyright Tribunal of Australia from 2000 to 2007. After retiring from the Federal Court, Dr Lindgren was an Acting Judge of the Supreme Court of New South Wales and Acting Judge of Appeal of the New South Wales Court of Appeal for three months in 2010. Dr Lindgren is the author or co-author or the editor of several books and numerous journal articles and conference papers in the area of commercial law. He has continued to pursue writing activities, as well as undertaking arbitration and mediation work, in his 'retirement'. Dr Lindgren is an Honorary Life Member of the Copyright Society of Australia and of the New South Wales Bar Association, is President of the Australian Academy of Law, and was made a Member of the Order of Australia in January 2012 in recognition of his 'service to the judiciary and the administration of justice through the Federal Court of Australia and to legal education in the area of commercial law'.

Nyuk Yin Nahan, nee Chin (LLB *Malaya*, PhD *ANU*) began her academic career teaching consumer law. She was Associate Professor at the University of Western Australia when she left academia in the late 1990s, having taught in a range of commercial law units and served in various capacities at the University. She has published a book on exclusion clauses and papers on various subjects, including 'On the Nature of Undue Influence' with the late Professor Peter Birks. Nyuk taught casually at Monash University and briefly at the University of Melbourne in her 'retirement'. In 2011 she accepted a part-time appointment as Associate Professor at the University of Western Australia and now shares the teaching of Equity and Contract law.

Paul O'Shea (BA Hons LLB *UQ*, MSc *UO*, GDLP *QUT*, PhD *UQ*) lectures in commercial, consumer and financial services law at the TC Beirne School of Law at the University of Queensland. He founded its Clinical Legal Education program, with a Consumer Law Advice Clinic that has been awarded a ministerial prize for 'Excellence in Consumer Protection' and

the Vice-Chancellors Prize for Equity and Diversity. He co-authored *The Legal Environment of Business* (Thomson Law Book Co, 2006) and 'In Defense of Consumer Law' (in the *Sydney Law Review*). Paul was Chief Investigator for a project commissioned by the Ministerial Council for Consumer Affairs that included the largest and most comprehensive set of experiments into pre-contractual disclosure in consumer credit ever conducted in Australia. His PhD thesis is on 'Addressing Inequality in Consumer Transactions' and he is a panel member of the Financial Ombudsmans Service.

Jeannie Marie Paterson (BA LLB Hons ANU, PhD Monash) specialises in contract law, consumer law and consumer credit law. She is a Senior Lecturer at Melbourne Law School and also practises as a legal consultant. Jeannie's current research focuses on the protection of vulnerable and disadvantaged consumers. She has also written on unfair contract terms, consumer guarantees, unconscionable conduct and consumer protection online. Jeannie's recent publications include *Principles of Contract Law* (with Andrew Robertson and Arlen Duke, Thomson, 4th edn 2012), *Contract: Cases and Materials* (with Andrew Robertson and Arlen Duke, Thomson, 13th edn 2012) and *Unfair Contract Terms in Australia* (Thomson, 2012).

Gail Pearson (BA Hons UQ, LLB UNSW, PhD JNU) is Professor of Business Law at the University of Sydney. Recent books include Pearson and Batten, *Understanding Australian Consumer Credit Law* (2010); Pearson, Fisher, Peden and Tolhurst *Commercial Law Commentary and Materials* (2010); and Pearson, *Financial Services Law and Compliance in Australia* (2009). She was also one of the authors of Goldring et al, *Consumer Protection Law* (Federation Press, 5th edn 1998). Gail has been a Fellow at various US and Indian universities. Other activities have included membership of the New South Wales (NSW) Fair Trading Tribunal, the Advisory Committee to the NSW Minister for Fair Trading, and the ILA's Committee on the International Protection of Consumers (which recently drafted Resolution No 4/2012: the *Sofia Statement On The Development of International Principles On Consumer Protection*). Gail is also Vice President of the International Association of Consumer Law, and part of the Code Compliance Committee administering the Mutual Banking Code of Practice.

Christine Riefa (Maîtrise, DEA, PhD) is a Senior Lecturer at Brunel University (London) specialising in consumer and information technology law. She serves on the board of the International Association of Consumer Law and co-edits the *Journal of European Consumer and Market Law*. She was a Fulbright-EU scholar-in-residence at the Cleveland-Marshall College of Law in 2010, conducting research on the protection of consumers-gamers in virtual environments. Her previous research on online auctions will be published by Ashgate in 2013. Dr Riefa has also acted as a consultant for several private firms and policy-makers. She is working on a project funded

by the European Commission assessing the impact of Directive 2007/64/EC on payment services and of Regulation 924/2009 on cross-border payments. In 2010 she advised CARICOM (the Caribbean Community) on policy matters concerning the development of a legal framework to protect e-commerce consumers.

Kate Tokeley (LLB Hons, LLM *VUW*) specialises in consumer law and policy. She is a Senior Lecturer at the Law School at Victoria University of Wellington in New Zealand. Her interests lie in the areas of consumer law, legal paternalism, internet law, contract law and access to justice. Her work in the area of consumer law examines the various ways in which the law is justified in intervening in the market place to protect consumers. She has researched and published on topics such as online auctions, unfair terms, vendor bidding, class actions, tobacco regulation and the place of paternalism in consumer law. Kate is particularly interested in the limits and justifications for consumer law. She has written a textbook on *Consumer Law in New Zealand* (Butterworths, 2000) and published numerous articles in refereed journals and chapters in books, both in New Zealand and internationally. Kate is a member of the legal team working on the New Zealand Law Foundation's project on *Regulatory Reform in New Zealand*.

Eileen Webb (BA *Griffith*, LLB LLM *Qld UT*, DipEd *Qld*, PhD *WAust*) is an Associate Professor and a former Associate Dean of the Faculty of Law at the University of Western Australia. She is the Director of the Consumer Research Unit. Eileen's research is focused on consumer law and real property law. She is the author of many refereed articles and book chapters on these issues and has completed relevant consultancies for the ACCC, Small Business Development Corporation (WA) and the Department of Commerce (WA). Eileen is currently coordinating a joint research project involving the Council of the Ageing Western Australia (COTAWA) and the University of Western Australia considering the adequacy of current legislation in supporting seniors' on-going housing needs.

Therese Wilson (BA LLB Hons *UQ*, LLM *UQ*, PhD *Griffith*) is a Senior Lecturer in Law at Griffith University and teaches corporate law, banking and finance law and international commercial arbitration. She wrote her PhD thesis on 'Regulating to Facilitate Access to Safe and Affordable Credit for Low Income Australians'. Therese chairs the board of Foresters Community Finance Ltd and also serves on the board of its subsidiary company, Social Investment Australia Ltd. Therese coaches Griffith Law School's Vis International Commercial Arbitration moot team and also has expertise in the United Nations Convention on Contracts for International Sale of Goods, which she focuses on in her international commercial arbitration classes.

List of Abbreviations

Abbreviation	In Full
AAPT	<i>Director of Consumer Affairs v AAPT</i> [2006] VCAT 1493
<i>Abbey National</i>	<i>The Office of Fair Trading v Abbey National plc</i> [2008] EWHC 875 (Comm)
ACC	Accident Compensation Corporation
ACCC	Australian Competition and Consumer Commission
ACL	<i>Australian Consumer Law</i> (Schedule 2 of the CCA)
ACReN	Australian Consumer Research Network
ACT	Australian Capital Territory
ADIs	authorised deposit-taking institutions
ADR	alternative dispute resolution
<i>Amadio</i>	<i>Commonwealth Banking Corporation of Australia Ltd v Amadio</i>
APR	average percentage rate
APRA	Australian Prudential Regulatory Authority
<i>Ashbourne Management Service</i>	<i>Office of Fair Trading v Ashbourne Management Service Ltd</i> [2011] EWHC 1237 (Ch)
ASIC	Australian Securities and Investments Commission
<i>ASIC Act</i>	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
ATM	automated teller machines
B2B	business-to-business
B2C	business-to-consumer
<i>Banking Act</i>	<i>Banking Act 1959 (as amended)</i> (Cth)
<i>Berbatis</i>	<i>ACCC v CG Berbatis (Holdings) Pty Ltd</i>
<i>Big Kahuna</i>	<i>Big Kahuna Holdings Pty Ltd v Kitas</i>
<i>Blackloads</i>	<i>Director of Consumer Affairs Victoria v Backloads.com Pty Ltd</i> (Civil Claims) [2009] VCAT 754
<i>Blomley</i>	<i>Blomley v Ryan</i>
<i>Bridgewater</i>	<i>Bridgewater v Leahy</i>
CAA	Consumer Affairs Agency
CALC	Consumer Action Law Centre
CARICOM	Caribbean Community
<i>CBA v Munro</i>	<i>Commonwealth Bank of Australia v Munro</i>
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CCAAC	Commonwealth Consumer Affairs Advisory Council
CCCF	Credit Contracts and Consumer Finance
CCCFA	<i>Credit Contracts and Finance Act 2003</i> (NZ)

LIST OF ABBREVIATIONS

Abbreviation	In Full
CCCL	Centre for Credit and Consumer Law
CCP	Committee on Consumer Policy
CDEs	community development entities
CESL Regulation	Regulation on a Common European Sales Law
CGA	<i>Consumer Guarantees Act 1993 (NZ)</i>
CII	ARC Centre of Excellence for Creative Industries and Innovation
COAG	The Council of Australian Governments
<i>Consumer Credit Directive</i>	<i>Directive on Credit Agreements for Consumers</i>
Consumer Law Reform Bill	Consumer Law Reform Bill 2011 (NZ)
<i>Consumer Rights Directive</i>	<i>Directive on Consumer Rights</i>
<i>Contracts Review Act</i>	<i>Contracts Review Act 1980 NSW</i>
<i>Corporations Act</i>	<i>Corporations Act 2001 (Cth)</i>
COSL	Credit Ombudsman Service Limited
COTAWA	Council of the Ageing Western Australia
CPA	<i>Consumer Protection Act 2008 (South Africa)</i>
CPSC	Consumer Product Safety Commission
CPSL	Consumer Product Safety Law (No 31 of 1973)
CRA	Community Reinvestment Act 1977 (US)
<i>Dukemasters</i>	<i>ACCC v Dukemaster Pty Ltd</i>
EC	European Commission
e-commerce	electronic commerce
EFT	Electronic Funds Transfer
<i>Enhancements Bill</i>	<i>Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth)</i>
EU	European Union
Explanatory Memorandum	<i>A Guide to the Mandatory Reporting Law in Relation to Consumer Goods</i>
<i>Fair Trading Act</i>	<i>Fair Trading Act 1999 (Vic)</i>
<i>Financial Markets Authority Act</i>	<i>Financial Markets Authority Act 2011 (NZ)</i>
First ACL Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No 1) 2010 (Cth)
<i>First National Bank</i>	<i>Director General of Fair Trading v First National Bank [2002] 1 AC 481</i>
FOFA	Future of Financial Advice
FOS	Financial Ombudsman Service
FSR	financial services regulatory
FTA	<i>Fair Trading Act 1986 (NZ)</i>

LIST OF ABBREVIATIONS

Abbreviation	In Full
FTA	Free Trade Agreement
GFC	Global Financial Crisis
GovNet	ARC Governance Research Network
GPSD	<i>General Product Safety Directive</i>
GSP	general safety provision
IGA	Inter-Governmental Agreement
ILA	International Law Association
Issues Paper	<i>Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework</i>
<i>Jetstar Airways</i>	<i>Jetstar Airways Pty Ltd v Free</i> [2008] VSC 539
<i>Khoshaba</i>	<i>Perpetual Trustee Company Limited v Khoshaba</i>
<i>Louth</i>	<i>Louth v Diprose</i>
<i>Lux</i>	<i>ACCC v Lux Pty Ltd</i>
<i>Mango Media</i>	<i>Mango Media Pty Ltd v Comitogianni</i>
MCA	New Zealand's Ministry of Consumer Affairs
MCCA	Ministerial Council on Consumer Affairs
METI	Ministry of the Economy, Trade and Industry
<i>Muschinski</i>	<i>Muschinski v Dodds</i>
NCC	National Credit Code
NCCPA	<i>National Consumer Credit Protection Act 2009</i> (Cth)
NEIAT	National Education and Information Advisory Taskforce
NGOs	non-government organisations
NSW	New South Wales
<i>Oceana</i>	<i>ACCC v Oceana Commercial Pty Ltd</i>
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
original Enhancements Bill	<i>Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011</i> (Cth)
PC	Productivity Commission
PDS	Product Disclosure Statements
<i>PL Directive</i>	<i>Product Liability Directive</i>
<i>Radio Rentals</i>	<i>ACCC v Radio Rentals Ltd</i>
RegNet	Regulatory Institutions Network
Regulatory Guide	<i>Credit Licensing: Responsible Lending Conduct</i>
SCOCA	Standing Committee of Officials of Consumer Affairs
Second ACL Bill	<i>Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010</i> (Cth)
SSL	<i>Secure Sockets Lawyer</i>
<i>St Alban's City</i>	<i>St Albans City and District Council v International Computers Ltd</i> [1996] 4 All ER 481

LIST OF ABBREVIATIONS

Abbreviation	In Full
<i>TFEU</i>	<i>Treaty on the Functioning of the European Union</i>
the Network	Australian Consumer Research Network
<i>Tonto Home Loans</i>	<i>Tonto Home Loans Australia Pty Ltd v Tavares</i>
<i>TPA</i>	<i>Trade Practices Act 1974 (Cth)</i>
TPA Bill	<i>Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010</i>
<i>Trainstation Health</i>	<i>Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims) [2008] VCAT 2092</i>
<i>TLS</i>	<i>Transport Layer Security</i>
UCCU	Uniform Consumer Credit Code
UCCMC	Uniform Consumer Credit Management Committee
UCT	unfair contract terms
UK	United Kingdom
<i>Unfair Practices Directive</i>	<i>Unfair Commercial Practices Directive 2005 (EU)</i>
<i>Unfair Terms Act</i>	<i>Unfair Contract Terms Act 1977 (UK)</i>
<i>Unfair Terms Directive</i>	<i>Unfair Contract Terms Directive 1993 (EU)</i>
<i>Unfair Terms Regulations</i>	<i>Unfair Contract Terms Regulations 1999 (UK)</i>
<i>Upston</i>	<i>Permanent Custodians Limited v Carolyn Joy Upston</i>
US	United States
WA	Western Australia
<i>West</i>	<i>West v AGC (Advances) Ltd</i>
WTO	World Trade Organization