
Book review

Editor: Peter Lithgow

CONSUMER LAW & POLICY IN AUSTRALIA & NEW ZEALAND

Consumer Law & Policy in Australia & New Zealand by Justin Malbon and Luke Nottage (eds) (The Federation Press, Sydney, 2013)

INTRODUCTION

This is a very impressive work in terms of the breadth and depth of its scholarship. It fills a major gap in the academic literature on Consumer Protection Law in Australia and New Zealand in that it is the first comprehensive analysis of the 2010 *Australian Consumer Law* (ACL) reform package from a policy perspective. There are a number of doctrinal analyses of the ACL, but they pay scant attention to its policy underpinnings.

The 2010 reform package resulted in the adoption of the ACL as a single national law concerning consumer protection, fair trading and product liability.¹ For the first time, consumers have the same protections and expectations about business conduct wherever they live in Australia. The ACL is located in Sch 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). It brings together in one place the consumer protection provisions of the former *Trade Practices Act 1974* (Cth) (TPA). However, it did not simply re-cast the existing Federal law on consumer protection: it adopted reforms based on best practice in State and Territory consumer laws, and at a substantive level incorporated a new general protection in relation to unfair terms in standard form consumer contracts. In addition, it replaced the TPA implied conditions and warranties with consumer guarantees which are in the nature of statutory duties. Failure to comply with these consumer guarantees gives rise to statutory causes of action which can be enforced against either the supplier or the manufacturer at the consumer's option. The ACL is enforced by the Australian Competition and Consumer Commission (ACCC) and State and Territory regulators and contraventions give rise to criminal and civil liability.

The catalyst for the 2010 reforms was the 2008 report of the Productivity Commission (PC), *Review of Australia's Consumer Policy Framework*.² As part of its terms of reference, the PC was to report on "ways to improve the consumer policy framework so as to assist and empower consumers ... to meet current and future challenges".³ Recommendation 11.3 was that the Australian Government should take the lead role in providing funding to establish a National Consumer Policy Research Centre, to enable an expansion in policy-related consumer research.⁴ Unfortunately, the Australian Government failed to implement this recommendation and as a result research in this vitally important area is left largely to University academics and is performed, for the most part, on an ad hoc basis.

The authors who have contributed the chapters to this volume are mostly academics from universities in Australia and New Zealand who are experts associated with the Australasian Consumer Law Roundtable held annually in Australia and New Zealand since 2007. The consumer protection laws in Australia and New Zealand have much in common and have borrowed extensively from each other. One of the objectives of the *Closer Economic Relations Trade Agreement* entered into by Australia and New Zealand in 1984 is to encourage harmonisation of the business environment across both nations. Most recently, as part of the ACL reforms, Australia has adopted the consumer guarantees law contained in the *Consumer Guarantees Act 1993* (NZ) (CGA). The book is divided

¹ The first stage of the ACL reforms, the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), was passed on 17 March 2010. The second stage of the *Australian Consumer Law* (ACL) reforms, the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) was passed on 24 June 2010.

² Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report (2008).

³ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report (2008), Vol 1, vii.

⁴ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report (2008), Recommendation 11.3, Vol 1, xxvi.

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

PT 1: GENERAL THEMES

In Chapter 1 the editors explain that the aim of the work is “to locate Australia’s ACL reforms in a wider international, theoretical and consumer law context,”⁵ and “to contribute to our understanding of existing laws and policies in Australia, New Zealand and beyond, and proposes ways in which we can improve upon them”.⁶

Chapter 1 introduces key policy considerations, and outlines the key factors and political forces that may have influenced the ACL reforms. Surprisingly little is written about the politics of law reform in Australia. Those involved in the ACL reform process will attest to the difficulties associated with obtaining Commonwealth, State and Territory agreement on what protections should be included in the ACL and who should benefit from them.

Chapter 1 of the book contains a useful Appendix that summarises the proposals in the PC’s 2008 Report and the editors’ evaluation of the Australian Governments’ responses as of September 2012. The editors note that the procedures for pursuing small claims in courts and tribunals vary by jurisdiction and can be onerous for consumers. They rate the Australian Governments’ outcomes as “poor”. Also rated as “poor” are the resource constraints for legal aid and financial counselling which makes it harder to assist disadvantaged consumers. This theme will be considered further below.

In Chapter 2, Freilich and Griggs focus on the appropriate definition of what constitutes a “consumer”. Three different consumer-related concepts have been adopted in the ACL:

- “consumer” for the purposes of the consumer guarantees law;
- “consumer contracts” for the purposes of the unfair terms law; and
- “consumer goods” for the purposes of the product recall, safety standards, safety bans and safety warning notices law.

Freilich and Griggs argue that “the core statutory definition in the ACL should be eliminated entirely and all transactions should be treated as consumer transactions”.⁷

In Chapter 3, Nottage, Reifa and Tokeley undertake a comparative analysis of the consumer protection laws of the United States, Japan and New Zealand – three of Australia’s major trading partners. It outlines the *Consumer Law Reform Bill 2011* and other pending initiatives in New Zealand, notably a new responsible lending requirement, which show a partial influence from recent Australian statutory amendments.

PT 2: UNFAIR PRACTICES AND DEFECTIVE PRODUCTS

In Chapter 4, Paterson and Tokeley examine the mandatory quality standards imposed by the consumer guarantees in the ACL to ensure that goods and services meet the reasonable expectations of consumers.

In Chapter 5, Nathan and Webb comprehensively examine the unfair contract terms law and how it applies to standard form contracts with individual consumers. It concludes with a consideration of three issues that the authors predict will surface or re-surface in the future: first, attempts to circumvent the standard form contract through “charade negotiations”; secondly, the expansion of the unfair terms law beyond consumer transactions to embrace business transactions as well; and thirdly, the introduction of a possible “black list” of unfair terms, to supplement the existing “grey list”.

In Chapter 6, Paterson considers whether Australia and New Zealand require an additional catch-all prohibition of “unfair practices” to supplement the existing specific prohibitions. The *Unfair Commercial Practices Directive 2005* (EU) is considered as a possible model.

⁵ Malbon J and Nottage L (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, Sydney, 2013) p 5.

⁶ Malbon and Nottage, n 5, p 19.

⁷ Malbon and Nottage, n 5, p 51.

In Chapter 8, Nottage and Kellman consider the product liability and product safety provisions of the ACL, and they provide in-depth commentary and critical analysis of the ACL, s 131 reporting obligations that are triggered by product-related death, serious injury or illness.

PT 3: CONSUMER CREDIT AND INVESTMENT

In Chapter 9, Malbon considers the “responsible lending” requirements in Chapter 3 of *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) which is Australia’s response to the sub-prime crisis in the United States, and unjust terms in consumer credit transactions under the National Credit Code which appears in Sch 1 to the NCCPA.

In Chapter 10, Pearson examines recent reforms relating to financial literacy, consumer banking and financial advice. These reforms are Australia’s attempt to deal with the widespread problem that retail clients do not have sufficient knowledge to understand the complex fee structures behind financial products and services, and require personal financial advice from advice providers before acquiring financial products that meet their particular needs. The underlying objective of the reforms is to improve the quality of personal advice provided to retail consumer investors, thereby increasing consumer confidence, and facilitating greater access to financial advice.

In Chapter 11, Wilson considers the special problems faced by vulnerable and disadvantaged consumers in consumer credit markets.

Chapter 12 contains a critique by Howell of the interest rate caps and related controls under the NCCPA and the National Credit Code, which introduce bright-line price regulation for consumer credit contracts.

PT 4: ACCESS TO REMEDIES AND ENFORCEMENT

In Chapter 13, Malbon returns to the vexed question of access to justice in the context of consumer complaints. As Malbon observes, “Access to justice involves more than simply establishing courts and tribunals, particularly if the costs of engaging with the system are prohibitive”.⁸

For example, the consumer guarantees law under the ACL has now been in force for a little over two years. As one would expect there has not yet been time for any cases to find their way to the superior courts in Australia. Even in New Zealand where the NZ CGA has been in force for 20 years, there have only been a handful of cases heard in the superior courts. One obvious reason for this is that the amounts involved in most cases do not warrant the expense of litigating in the superior courts, and the vast majority of cases are dealt with in the Disputes Tribunals.⁹

In the period 2011-2012 there are no reported decisions in the Federal Magistrates Court based on a failure to comply with the guarantee of acceptable quality in relation to goods, and no cases based on a failure to comply with the guarantee of due care and skill in relation to services. The Consumer, Trader and Tenancy Tribunal of New South Wales (NSWCTTT) has jurisdiction to hear consumer claims in relation to the enforcement of consumer guarantees under the ACL (NSW), for less than the monetary limit of \$30,000 within the meaning of s 3 of the *Consumer Claims Act 1998* (NSW). In the same period there were 16 NSWCTTT decisions based on a failure to comply with the guarantee of acceptable quality in relation to goods, and three cases based on a failure to comply with the guarantee of due care and skill in relation to services. The Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction to hear minor civil disputes in relation to the enforcement of consumer guarantees under the ACL (Vic). Only two VCAT decisions were reported based on a failure to comply with the guarantee of acceptable quality in relation to goods, and three cases based on a failure to comply with the guarantee of due care and skill in relation to services. In Queensland, the Queensland Civil and Administrative Tribunal (QCAT) has jurisdiction to hear minor civil disputes in relation to the enforcement of consumer guarantees under the ACL (Qld). Only two QCAT cases were reported in 2011-2012 based on a failure to comply with the guarantee of due care and skill in relation to services, and none based on a failure to comply with the guarantee of acceptable quality in relation to goods.

⁸ Malbon and Nottage, n 5, p 358.

⁹ Tokeley K, *Consumer Law in New Zealand* (Butterworths, Wellington, 2000) at [2.2.4].

There are a number of possible explanations for the small number of Tribunal decisions in Australia over the period 2011-2012. One possible explanation is that there is still a widespread lack of awareness of consumer rights under the ACL consumer guarantee law.¹⁰ Another possible explanation is that there are unresolved access to justice issues that need to be addressed: we do not yet have a streamlined, cost-effective and efficient process for enforcing consumer rights in Australia. There is also evidence that the mandatory conciliation process that must be undertaken prior to a hearing in some Tribunals is not working well and may be deterring some consumers from pursuing their rights. The Consumer Law Action Centre has raised concerns over some years in relation to processes whereby mediation or settlement prior to hearing is encouraged (and in some cases forced) leading to poor outcomes for the individual consumer.¹¹

CONCLUSION

The book succeeds admirably in meeting its aims. It will be essential reading for anyone seeking to gain an understanding of how we arrived at where we are in relation to consumer protection law and policy in Australia and New Zealand, and the directions in which we should be heading. The book ends with a proposal to establish an Australian (or Australasian) Consumer Research Network, supported by many authors of the book as well as other experts.

On 15 November 2012, the Leader of the Opposition, Tony Abbott, announced that if elected the Coalition will conduct “a genuine root and branch review” of the CCA.¹²

If the Coalition is elected to office in September and keeps its promise to review the CCA, this book will provide much useful guidance on where further reform is needed. However, if Australia is to conduct the sort of evidence –based research into identifying and analysing consumer market problems that should precede the adoption of any new regulation, a much greater level of financial commitment is required from the Australian Government, and there is an urgent need to re-visit Recommendation 11.3 of the PC’s 2008 report, *Review of Australia’s Consumer Policy Framework*.

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¹⁰ Australian Government, *Australian Consumer Survey 2011* (June 2011). Available at: http://www.commerce.wa.gov.au/consumerprotection/PDF/Reports/Australian_Consumer_Survey_Report.pdf.

¹¹ See Noone MA, “ADR, Public Interest Law and Access to Justice: The Need for Vigilance” (2011) 37(1) *Monash University Law Review* 57.

¹² Tony Abbott, Leader of the Opposition, *Joint Press Release with Bruce Billson – Small Businesses to Grow under the Coalition* (Press Release, 15 November 2012) Available at <http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/8971/Joint-Press-Release-with-Bruce-Billson--Small-businesses-to-grow-under-the-Coalition.aspx>.