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30 August 2016

Productivity Commission
Canberra, ACT
By email

Submission to PC's study of 'Consumer Law Enforcement and Administration'

I have made numerous submissions into consumer (product safety) law, including many to the PC, since 2005 (see **Appendix A**).

I remain concerned about aspects of Enforcement and Administration, as set out in my 8 April 2016 Submission into the ACL Review (see **Appendix B**).

In further response to some of your Issues Paper topics:

1. Resourcing issues

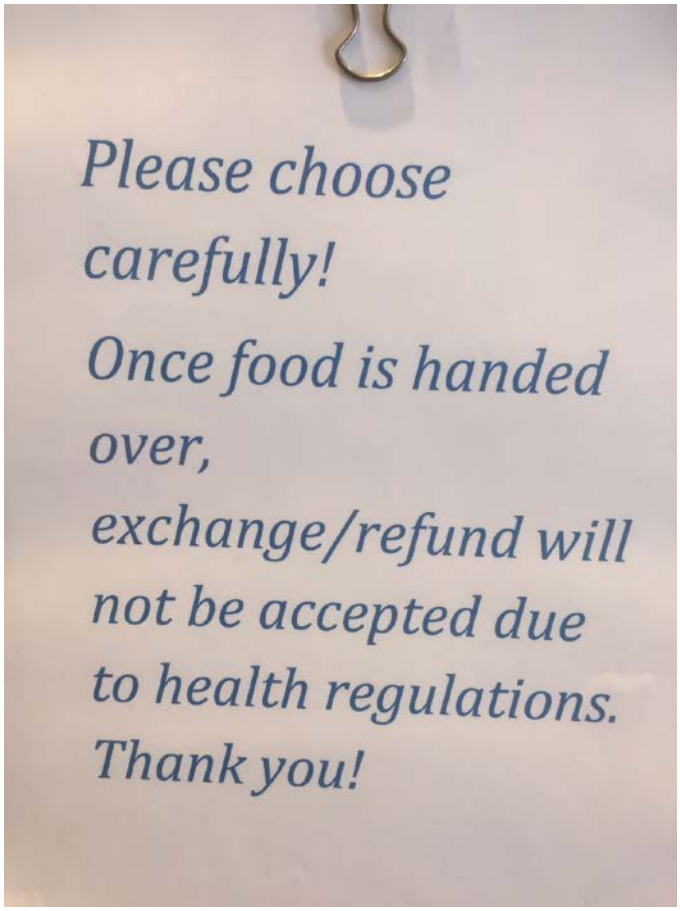
The ACL regulators focused initially on 'education'. The ACCC even announced unilaterally that they would not enforce a Regulation requiring notice of Consumer Guarantees to be added to 'extended' or voluntary supplier's warranties, for a year beyond the enacted implementation date. (Imagine if the police announced that it would not enforce new drink driving or other criminal laws for a year!) It is only in recent years, perhaps mindful of this five-yearly review, that the consumer regulators (especially ACCC) have commenced enforcement action. Without establishing credibility and experience for escalating enforcement action up the 'regulatory enforcement pyramid', we cannot expect regulators to obtain more 'cooperative' behaviour from suppliers. Yet this requires adequate resourcing.

This PC study should investigate levels of funding provided over time to consumer protection arms (as opposed to competition law arms) of the ACCC, and proportions directed to enforcement as opposed to 'education'. This should be cross-referenced the CALC's "regulator watch" report in 2013 that encountered inadequate and inconsistent reporting by consumer regulators, as well as several other serious problems.[1] It should take note of 'shadow shopping' and other studies by Choice, showing ongoing problems eg with consumer guarantees. Here is another graphic example of a (reported but still unpunished) contravention of the ACL by a local café near USydney's main campus:

[1] http://consumeraction.org.au/new-report-regulator-watch/

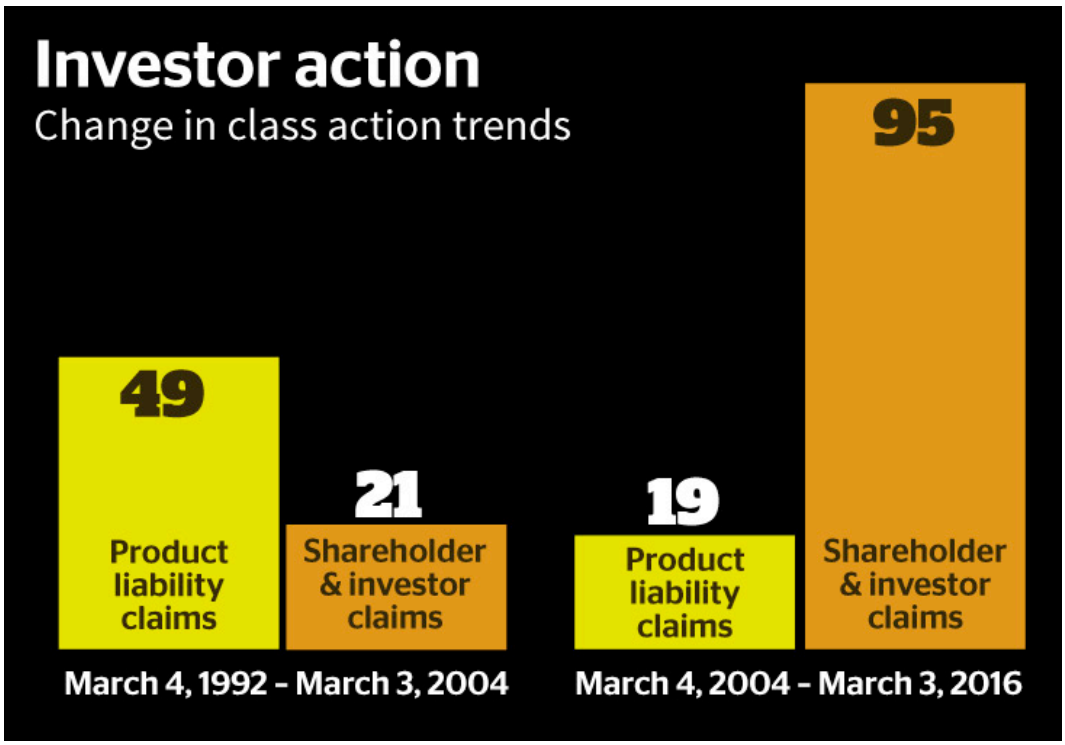
Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW 2000 Australia

ABN 15 211 513 464
CRICOS 00026A



The PC also needs to take into account that we can no longer rely on class actions as an (off-balance-sheet) mechanism for enforcing consumer law, especially in product safety matters – such cases hardly ever "pay", as this graph shows:[2]

[2] http://www.smh.com.au/business/consumer-affairs/after-the-high-court-threw-out-the-anz-bank-fee-case-are-class-actions-cactus-20160729-gqgcpm.html



2. Allocation of issues and responsibilities between regulators

The cooperation between the ACCC and state/territory regulators seems to be working quite well. But the PC should reconsider the decision to split off ASIC for financial products given the overlaps (eg linked credit supplier regulation) and widespread criticism of ASIC's enforcement record – combining it with ACCC might help ASIC lift its game.

The biggest problem however is the (lack of) coordination between the consumer regulators and the 'specialist' regulators. Consider the display notice above (relations with health regulators). Or (non-)recalls of Samsung washing machines and Infinity cabling (electrical product regulators). Or imported frozen berries (food regulators). Or (delayed) recalls of Volkswagen vehicles (long before the company's fraud about emissions, which has been punished far more harshly by some overseas regulators),[3] or of Honda vehicles with airbags that have caused fatal accidents in other countries (motor vehicles

[3] http://blogs.usyd.edu.au/japaneselaw/2013/08/taking_seriously_consumer_prod.html

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regulator).[4] The ACCC Chair keeps emphasising that it will defer to specialist regulators,[5] but they can be more easily subject to (often subtle) regulatory capture, so the ACCC should be resourced and otherwise encouraged to keep them honest.

3. Intelligence gathering and sharing

This is a major impediment to better inter-agency collaboration and enforcement. Unlike its major trading partners the ACL does not allow the ACCC and consumer regulators even to share information from suppliers' mandatory accident reports, without consent, to other specialist regulators – let alone counterparts abroad.

The scope of these reporting requirements is comparatively limited anyway, eg only rapid-onset health effects that require particular types of medical treatment.[6]

4. Other market developments

The growth of imports especially over the internet, which have generated major product safety problems, reinforce the need for Australia to also introduce a general safety provision (like the EU, Hong Kong, Malaysia, a variant in Singapore).

This can usefully complement product-specific standard setting powers, themselves under stress[7].

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[4] The lack of enforcement is evident also in the fact that makers and dealers refer to such recalls as "precautionary", on the basis that the parts have not (yet!) caused (documented!) injury or death in Australia. The PC should conduct research into the timing and extent of such recall progress in Australia compared to other major economies. I hypothesise that it has been much slower than the US (but where class actions are a much more real threat and therefore incentive to prioritise recall activity), Japan (but where brand reputation is more easily lost), but also European countries (with better public enforcement mechanisms). I have also been told recently about dealers saying that they will fast-track replacements of recalled / defective parts IF the customer also has a car service.

[5] https://www.accc.gov.au/speech/keynote-presentation-australasian-consumer-law-roundtable-2015

[6] Nottage, Luke R., Suppliers' Duties to Report Product-Related Accidents under the New 'Australian Consumer Law': A Comparative Critique (May 4, 2010). Commercial Law Quarterly, Vol. 25, No. 2, pp. 3-14, 2011; Sydney Law School Research Paper No. 10/41. Available at SSRN: http://ssrn.com/abstract=1600502

[7] See eg http://consumersfederation.org.au/standards-the-australian-consumer-law-goes-international/:
'The reactive system currently used to enforce Australia's mandatory standards is out of step with today's supply chain for consumer products. It has never been easy to prove a negative, i.e. that the product you just bought doesn't meet the mandatory standard, because of the highly technical nature of the standard's requirements. But it will be all the more so in future, when a regulated product sold here is made overseas to an overseas standard, and where we may not even have the

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Appendix A: Past submissions or consultancies reports on consumer law and enforcement

- Australian Attorney-General's Department, Private International Law consultation, at http://consult.govspace.gov.au/pil/, **21 November 2012**, with a version at http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_internationa.html
- Australian Attorney-General's Department, "Review of Australian Contract Law", **20 July 2012**, at http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx
- Productivity Commission, joint study Issues Paper, "Strengthening Economic Relations between Australia and New Zealand", Submission dated **22 June 2012**, at http://transtasman-review.pc.gov.au/all-submissions
- Australian Senate "Inquiry into Australia's trade and investment relationship with Japan", Submission dated **21 July 2011**, at http://www.aph.gov.au/house/committee/jfadt/japanandkoreatrade/index.htm
- ACCC, Draft *Mandatory Reporting Guide* (July 2010), **20 September 2010**
- Senate Economics Committee, "Trade Practices (Australian Consumer Law) Amendment Bill (No.2) 2010, Submission No 26 (and Evidence given on invitation, transcribed in Hansard), **April 2010,** at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_10/index.htm
- Treasury, "Regulatory Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime", Submission of **1 December 2009**; also at http://blogs.usyd.edu.au/japaneselaw/2009/12/comparing_product_safety_rereg.html
- CCAAC Review of Statutory Implied Conditions and Warranties, Submission of **4 August 2009**, at http://www.treasury.gov.au/contentitem.asp?ContentID=1614&NavID=
- Treasury, "National Consumer Credit Reform Package", Submission of **19 May 2009**; also at http://blogs.usyd.edu.au/japaneselaw/2009/05/responsible_consumer_lending_r.html
- Treasury, "An Australian Consumer Law", Submissions of 16 March 2009 and (with the Consumer Law Roundtable) **24 March 2009**, (via http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1484).
- National Report on Australia, to Kyoto Comparative Law Center, for Japanese Cabinet Office Project on Consumer ADR (English version completed April **2008**)

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expertise in Australia to test to that standard. In such a scenario, consumers need a guarantee of compliance *before* the product is sold on our market. A mandatory standard offers no protection whatsoever if it cannot be enforced.'

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- National Report on Australia, to Kyoto Comparative Law Center, for Japanese Cabinet Office Project on Representative Actions for Monetary Remedies (**2007**)
- National Report on New Zealand, to Kyoto Comparative Law Center, for OECD Project DTSI/CP(2006)8: see "The Report on OECD Member Countries' Approaches to Consumer Contracts" (**6 July 2007**, at http://www.oecd.org/dataoecd/11/28/38991787.pdf)
- National Report on Australia, to KU Leuven, for European Commission Project SANCO 2005/B/010 "An analysis and evaluation of alternative means of consumer redress other than individual redress through ordinary judicial proceedings" **(2006-7**, at http://ec.europa.eu/consumers/redress/reports_studies/inded_en.htm**)**
- Productivity Commission, "Inquiry into Australia's Consumer Policy Framework" Submission in **2007 (**available via www.pc.gov.au/inquiry/consumer)
- NSW Senate Inquiry into Unfair Terms in Consumer Contracts, Submission of **26 October 2006** (available via www.parliament.nsw.gov.au)
- Productivity Commission, "Standards and Accreditation", Submission of **18 April 2006** (at http://www.pc.gov.au/study/standards/)
- Productivity Commission, "Consumer Product Safety", Submissions of **11 July and 17 October 2005** (at http://www.pc.gov.au/study/productsafety/)

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Appendix B: Submission of 4 April 2016 to the ACL Review

This Submission highlights areas of the current ACL regime that are problematic or at least need serious consideration by policy-makers and legislators, across eight categories as follows [with cross-references to the relevant chapter/topic(s) in the government's Issues Paper[8]].

A. **Inconsistencies remaining in state and territory legislation**
[cf Issues Paper ch 1 / consumer policy in Australia]

The Inter-governmental Agreement of 2009 declared that the ACL would get rid of inconsistent legislation.[9] It seems subsequently to have been (re)interpreted as allowing states and territories to retain their regimes that maintain different and potentially higher levels of consumer protection. This differs from the tendency towards "maximal harmonisation" in the EU, in its active program of consumer protection law reform (outlined below in **Appendix B**).[10] The pros and cons of this situation need to be revisited. For example:

a. Just within New South Wales:
    i. protections under the Contracts Review Act 1980 overlap very considerably with the ACL unfair terms and unconscionable conduct (although eg the ACL scope might be expanded to cover contracts ruled "unjust", despite no ACL unconscionable conduct, as found in *Tonto Homes*);
    ii. Sale of Goods Act 1923 Pt 8 (mandatory warranties for consumer sales) is still in force, overlapping with ACL consumer guarantees;
    iii. legislation for motor vehicle dealers provides additional statutory warranties (although perhaps little known by consumers or advocates, which is surprising given recent empirical evidence of high levels of defects even in new cars).[11]
b. Nation-wide reforms on civil liability address the question of contributory fault by plaintiffs, in misleading conduct claims: it might be much simpler

[8] Available at http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/.
[9] https://www.coag.gov.au/node/211
[10] See also generally: Nottage, Luke R. and Riefa, Christine and Tokeley, Kate, Comparative Consumer Law Reform and Economic Integration (2013). Consumer Law and Policy in Australia and New Zealand, J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013; Sydney Law School Research Paper No. 15/77; Victoria University of Wellington Legal Research Paper No. 15/2016. Available at SSRN: http://ssrn.com/abstract=2662295
[11] https://www.choice.com.au/transport/cars/general/articles/lemon-cars-and-consumer-law

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to bring such provisions into ACL (then apply nation-wide) rather than leaving in the ACCA.

B. **Regulations under the ACL**
[cf Issues Paper ch 2 / legal framework]

These new powers have not yet been fully availed of, but could be, eg:

a. display notices (s66) requiring supplier to summarise key Consumer Guarantees at point of sale (not just when suppliers offer "extended" or other voluntary "warranties against defects") given considerable evidence of persistent non-compliance.[12]
b. Exclusion of guarantees in relation to certain supplies of gas, telecommunications or electricity (s66), but then (re)introduction of sector-specific regimes.[13]
c. Possible further examples of "possibly unfair" terms (s25(2)),[14] especially arbitration clauses.[15]

Conversely, the Regulation already issued pursuant to s103 is questionable, in requiring a notice alerting consumers that: *"Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods."* This assumes and implies that relief for a "minor defects" in violation of consumer guarantees, namely repair or replacement, allows these things. But if the supplier chooses to make a "replacement" at least for a defective newly purchased product, the ordinary meaning and sound policy considerations suggest that it should be a new (similarly unused) one, not say a "refurbished" one that may have been a "factory second" or indeed returned from another dissatisfied customer – and therefore probably more likely to fail even if "refurbished". A similar problem arises where the supplier chooses to

[12] See eg CLAC and Choice studies of online retailer terms, as well as half of major retailer salespeople still failing to understand the ACL: https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/consumer-law-shadow-shop-2015.
[13] Compare eg Corones, http://www.austlii.edu.au/au/journals/QUTLawJJI/2009/11.html, with http://www.industry.gov.au/Energy/EnergyMarkets/Pages/NationalEnergyCustomerFramework.aspx
[14] Even the 2013 ACCC Industry Review showed that unfair terms remained pervasive: https://www.accc.gov.au/publications/unfair-contract-terms
[15] Cf *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142, where an arbitration clause in a franchise agreement was upheld, thus preventing access to VCAT (treated as equivalent to a "court" under Commercial Arbitration Act). It is unclear whether such an arbitration clause would constitute a void unfair term for franchisees who will benefit from November 2016 from the extension of unfair contract terms protections under the ACL to certain small business contracts. Meanwhile and anyway, there is the risk that the *Subway* decision or reasoning might open the way to arbitration clauses being included into contracts with (individual) Australian consumers.

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repair defective goods – if new, why should they be able to use "refurbished parts"? Yet this sort of issue has arisen in small claim tribunal proceedings.

C. Omissions when ACL reform Bills finally enacted
[cf Issues Paper ch 2 / legal framework]

a. We should revisit the Treasury's original proposals, to consider: (i) not exempting eg architects from fitness for purpose guarantees, (ii) not including transactions under $40,000.[16]

   Anyway, that threshold should be reviewed. The government raised it to that amount in 1986, to account for inflation since 1974.[17] Taking into account subsequent price rises for a representative bundle of goods and serves, by 2015 the threshold should be around $100,000.[18] By keeping it instead at $40,000, the government in effect undermines the original policy objective of adopting a broad definition of consumer: it this deliberate (favouring the direction proposed by the Treasury during the ACL reform consultations), or justified?

b. As an indirect omission (not even signposted in the ACL itself!): insurance contracts. The EU, and now NZ, does not have such an exclusion. Australia's insurance industry seems to have a particularly powerful lobby, to successfully resist extension of the ACL unfair controls to their contracts. Yet problems with flood coverage/payouts, medical insurance (eg for heart conditions) and life insurance show that some extra discipline from the ACL should be beneficial.[19]

D. Other Omissions in the ACL compared to the original TPA
[cf Issues Paper ch 2 / legal framework]

a. It has never been explained why fitness for purpose pre-disclosed to manufacturer (eg by contacting head office), should not attract liability of the latter any more. This difference from the TPA crept in, seemingly unintentionally, when Australia substituted statutory warranties with NZ-Canadian-style consumer guarantees.

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[16] Cf Freilich and Griggs, ch2 in Consumer Law and Policy in Australia and New Zealand, J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013. The $4
[17] See http://www.austlii.edu.au/au/journals/AUBusLawyer/1986/12.pdf.
[18] Using http://www.rba.gov.au/calculator/annualDecimal.html.
[19] http://www.smh.com.au/business/banking-and-finance/hidden-nasties-in-life-insurance-policies-must-go-20160331-gnvqiz.html

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E. Questionable Late Additions to the ACL reform Bills
[cf Issues Paper ch 2; and ch 4 / emerging issues - … Empowering consumers through access to consumer data and disclosure requirements]

a. The s129A strict confidentiality duty on ACCC or consumer affairs regulators, receiving the product-related accident reports, means they can't even share important safety information with other Australian (eg health) regulators. Let alone counterpart consumer regulators in other countries (even close FTA partners like NZ). Let alone consumers (or even researchers seeking to gauge the effectiveness of Australia's belatedly introduced new regime).[20] The strict confidentiality requirement should be relaxed, as in other trading partners that have introduced such (actually broader) mandatory reporting requirements.

F. **New Issues for the ACL**, (more) apparent since (the lead up to) 2010:

a. **Consumer definitions**, which are many and complicated:[21]
[cf Issues Paper ch 1 / policy rationales; ch 2 / legal framework]
   i. They should be aligned at least for the contract-related provisions of the ACL: consumer guarantees versus unfair terms controls;
   ii. Why can't say public listed companies at least opt out, by agreement, of misleading conduct provisions for their dealings inter-se? In the EU and many other countries (eg Southeast Asia) the protection is for consumers (not competitors) against misleading conduct.
   iii. However, wider definitions may remain appropriate eg for consumer product safety powers under the ACL.

b. **Conflict of laws** provisions
[cf Issues Paper ch 2; ch3 / enforcement … international reach of the ACL; and ch 4 / emerging issues … online sales]

   i. The ACL s67(a) choice of law provision may too often lead to application of overseas supplier's law, if it has included an

[20] Nottage, Luke R., Suppliers' Duties to Report Product-Related Accidents under the New 'Australian Consumer Law': A Comparative Critique (May 4, 2010). Commercial Law Quarterly, Vol. 25, No. 2, pp. 3-14, 2011; Sydney Law School Research Paper No. 10/41. Available at SSRN: http://ssrn.com/abstract=1600502

[21] See chs 1 and 8 in J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013; and subsequently eg http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20130702.

express foreign (eg US) choice of law provision, even though less protective than ACL consumer guarantees law.[22] A recent judgment concludes that s67(b) can then prevail anyway, to allow application of the ACL guarantees,[23] but the reasoning is debatable as eg that would seem to make s67(a) redundant.

ii. Anyway, s67 only applies to the Division on consumer guarantees; not the unfair terms protections introduced in 2010 (and expanded to small businesses from November 2016, which often and increasing contract with overseas counterparties).

iii. Further uncertainty arises because there are no ACL provisions expressly dealing with parties' choice of forum clauses (eg providing for exclusive jurisdiction for foreign courts or arbitration).[24]

c. **Product safety regulation** (elaborated in **Appendix A** below): [cf Issues Paper ch 2 / legal framework]

i. There should be a statutory definition (not just ACCC Guidelines) of voluntary "recalls" (triggering notification duty to regulator): cf a Volkswagen controversy already in 2013.[25]

ii. Australia should add a disclosure obligation on suppliers for "near misses" and other serious health risks associated with their consumer products (so can we can better align and share info with overseas regulators, including the USA, EU, Canada and Japan).

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[22] http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_internationa.html.

[23] *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 (24 March 2016) at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0196. See also Winnie Ma, *"What's my choice - Deciphering the provisions on conflict of laws in the Trade Practices Act"* (2003) 11 Trade Practices Law Journal 149.

[24] Arguably, the approach to (foreign) choice of forum and/or law clauses should vary depending on different types of claims: misleading conduct, contracts between businesses as opposed to those purchasing for personal use: cf Nottage, Luke R. and Garnett, Richard, The Top Twenty Things to Change in or around Australia's International Arbitration Act (April 13, 2009). In L Nottage & R Garnett (eds), 'International Arbitration in Australia', Federation Press: Sydney, 2010; Sydney Law School Research Paper No. 09/19; U of Melbourne Legal Studies Research Paper No. 405. Available at SSRN: http://ssrn.com/abstract=1378722. See also Nottage, Luke R., The Government's Proposed 'Review of Australian Contract Law': A Preliminary Positive Response (July 18, 2012). Sydney Law School Research Paper No. 12/49. Available at SSRN: http://ssrn.com/abstract=2111826 (the AGD's project to consider reforming Australian contract law has also stalled).

[25] http://blogs.usyd.edu.au/japaneselaw/2013/08/taking_seriously_consumer_prod.html.

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iii. Given persistent and major product safety failures in recent years, the ACL should add a General Safety Provision, requiring all general consumer goods supplied in Australia to be reasonably safe, as eg in the EU or Malaysia.[26] This would be more efficient than the ACCC having to spend time and litigation expenses to get (only) part of the way towards that by the regulator seeking penalties etc for "misleading conduct" in continuing to display and sell products known to be causing injuries.[27]

d. **Consumer contracts**:[28]
[cf Issues Paper ch 2 / legal framework]

i. Australia should consider making the use of terms declared unfair be subject also to criminal sanctions (as under the recent NZ legislation).
ii. The ACL could add new provisions that (a) contractual reference to a (Banking) Code of Conduct intends incorporation by reference, (b) with certain provisions thereof intended as Conditions (triggering termination rights)[29]
iii. Extra provisions for specific classes of transactions could be introduced for vulnerable consumers (eg as defined by Regulations). For example, assuming that defined goods or services are NOT fit for purpose unless supplier proves otherwise (thus impose a "suitability" rule, as now with responsible lending for consumer credit).

e. Adding a general prohibition of **unfair commercial practices**:[30]
[cf Issues Paper ch 2 / legal framework]

i. As in the EU but also eg Singapore, this should be considered.

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[26] Nottage, Luke R. and Thanitcul, Sakda, Economic Integration and Consumer Protection in Southeast Asia: ASEAN Product Liability Law and Safety Regulation (December 13, 2015). ASEAN PRODUCT LIABILITY AND CONSUMER PRODUCT SAFETY LAW, Winyuchon Publication House, Thailand, 2016; Sydney Law School Research Paper No. 15/100. Available at SSRN: http://ssrn.com/abstract=2703130

[27] https://www.accc.gov.au/media-release/woolworths-misled-consumers-over-product-safety-hazards-%E2%80%93-ordered-to-pay-over-3-million-in-penalties

[28] See also Nottage (2012) op cit re AGD consultation on general contract law in Australia

[29] Nicola Howell (QUT) has been researching this problem.

[30] Paterson, ch8 in J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013

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f. Reassessing the "one law [sic], multi-regulator" model:
[cf Issues Paper ch3 / enforcement]

i. Recalling 2008 PC Report recommendations (also re harmonising consumer complaints / tribunals or courts, which has not happened); as well as
ii. CALC's 2013 report on disturbing differences in enforcement patterns across regulators.[31]
iii. The ACCC needs to (at least threaten to) use its back-up powers to regulate eg unsafe consumer products (eg foods, automobiles, electrical appliances) even if there exists a specialist regulator.

G. Further (independent, funded) research:
[cf Issues Paper ch 1 / policy]

a. The lack of research was emphasised in a 2009 Treasury consultation after the 2008 PC Report, but the government never even reported back publically on that consultation.[32]
b. PRAC within CAF doesn't seem to be enough, as there is a risk of at least perceived bias.
c. Why should the government only commit significant funding for research into consumer financial services (eg eg a UNSW-centred Centre),[33] but not general consumer law?

I am happy to elaborate on any of the above privately or at any public meetings held as part of the ACL Review consultation.

Yours sincerely

Luke Nottage

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[31] http://consumeraction.org.au/new-report-regulator-watch/calc-regulator-report-final-eversion/

[32] http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/037.htm&pageID=003&min=ceb&Year=&DocType=0. For an updated Submission from 16 academics of the (now defunct) Australian Consumer Research Network, urging greater government support for consumer law and policy research, see the Appendix in J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013.

[33] See http://www.law.unsw.edu.au/centre-international-finance-and-regulation.

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Appendix to Part F.c on **Product Safety Regulation:**

Consumer product safety can be enhanced primarily through: (a) market mechanisms (reputational effects, competition), (b) private law (contract law or consumer guarantees and product liability regimes) and (c) pre-market and post-market regulation by public authorities.

(a) Compared to many other (often developing) countries in the region, Australia benefits from extensive mainstream media reporting of product safety issues, and now lively coverage by social media – well exploited also by active consumer organisations (notably: Choice).[34] Yet major incidents over recent years suggest that **competitive and reputational incentives** to not put unsafe goods into circulation, and to respond quickly and effectively to reported accidents, are insufficient even for large companies (eg Samsung – washing machines). Difficulties are compounded where goods are imported, even in large volumes (eg Infinity cabling in homes), let alone in limited quantities by smaller suppliers (eg iPhone chargers). Product safety regimes overseas are improving, even eg in trading partners such as ASEAN states and China, but this is a slow process.[35]

(b) **Private law** can also indirectly encourage suppliers to give more priority to product safety. One incentive comes from mandatory statutory provisions in or around contracts with consumers. If direct sellers must provide redress but cannot pass on that liability exposure to upstream suppliers, which can still negotiate limited liability, then sellers should seek to source products from more reliable sources. However, there has been limited and conflicting case law on what amounts to a violation of the ACL's consumer guarantee of "acceptable quality", specifically now including product safety.[36] Curiously, it is also no longer possible for consumers to claim directly against manufacturers for (expressly or impliedly) pre-disclosed lack of fitness of purpose, as under the previous TPA – including case law which had allowed redress for lack of product safety. In addition, in cross-border contracting situations, questions remain unresolved

[34] https://www.choice.com.au/consumer-advocacy

[35] Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: http://ssrn.com/abstract=2562695

[36] "Remedies for Failure to Comply with the Consumer Guarantees Regime under the ACL: Problems of Uncertainty and Inconsistency", presented at the Australia-New Zealand Consumer Law Roundtable, 2 December 2014.

THE UNIVERSITY OF SYDNEY

concerning applicable law and forum,[37] including now the validity of clauses that may require (offshore) arbitration of consumer claims.[38]

Consumers can still bring claims concerning unsafe goods against manufacturers and other specified intermediaries under the ACL's strict product liability provisions, restating the TPA's provisions added in 1992 based on the 1985 European Directive. However, there remain very few reported judgments, and counsel and judges rarely refer to accumulated case law and authoritative commentaries under EU law.[39] Australia's broader "tort reforms" since 2002 have made lawsuits less attractive. Occasional claims for major personal injury from unsafe products (eg KFC chicken) have been vigorously defended by large corporate defendants.[40] For small-scale harm suffered by a large number of victims (eg imported Bonsoy milk imported), class actions are still possible. But they make take many years (especially if involving foreign goods or parties) with no guarantee of full success,[41] and they have become generally less attractive to law firms and any third-party litigation funders compared to class actions eg on behalf of shareholders or customers of financial institutions.[42] Australia still does not allow lawyers themselves to fund litigation, as in the US, although the Productivity Commission recently recommended this be reconsidered to expand access to justice.[43]

Another problem for Australia is that industry or statutory ombudsman schemes, providing more credible redress mechanisms for consumers than court proceedings, have not been extended from services to product markets. Small claims courts do not seem to attract product liability claims either. This also seems to be true in our major trading partners. However, Thailand enacted in 2008 a regime to facilitate consumer claims generally through regular courts,

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[37] http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_internationa.html. (The AGD's reform of private international law generally has stalled.)
[38] Cf eg http://www.allens.com.au/pubs/arb/cuarb15jul14.htm
[39] Nottage, Luke R. and Kellam, Jocelyn, Happy 15th Birthday, Part VA TPA! Australia's Product Liability Morass. ; Sydney Law School Research Paper No. 07/35. Available at SSRN: http://ssrn.com/abstract=988595; with updated information in Malbon and Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013).
[40] See eg http://www.smh.com.au/nsw/kfc-ordered-to-pay-8m-to-braindamaged-girl-20120427-1xpkc.html (subsequently appealed).
[41] http://www.smh.com.au/business/bonsoy-to-pay-soy-milk-victims-25m-in-record-class-action-20141124-11spe4.html
[42] The potential for product safety related class actions in Australia is now further restricted by the disastrous foray into the UK of one of the two major class action firms: http://www.smh.com.au/business/slater--gordon-shares-plunge-33pc-on-solvency-fears-20160301-gn7758.html
[43] http://www.pc.gov.au/inquiries/completed/access-justice/report

THE UNIVERSITY OF SYDNEY

which seems to have contributed to significant increases in filings under their strict liability law (and settlements, albeit few judgments). Aspects of this alternative need to be considered, as well as the scope for more representative actions to be brought by Australia's regulators regarding consumer guarantees and strict liability for unsafe goods. Procedural reforms appear to be more effective than substantive law changes for product liability, as many ASEAN states have now implemented strict liability regimes modelled on the EU Directive but more pro-plaintiff in various respects, yet there remains almost no reported case law across Southeast Asia (even eg in Malaysia, with an effective court system).[44]

(c) Limits to private law and market mechanisms mean that Australia must rely more extensively on **public regulation** in trying to secure product safety. There needs to more assessment of whether the ACL's nation-wide harmonisation in this field has been effective, or instead led to some undesirable "regulatory race to the bottom" – undermining the track record of some Australian states under the TPA in more actively intervening to set mandatory safety standards or ban unsafe products.

The regulatory framework for *pre-market* controls seems to be comparatively effective, in that the ACCC retains a back-up power to set mandatory minimum safety standards even for products that are primarily regulated by sector-specific regulators (eg foods), although typically the ACCC defers to their greater expertise. For example, in 2004 the ACCC banned small-size konjac jelly snacks that had caused deaths by choking overseas, thus effectively setting a minimum safety standard for a foodstuff (larger snacks can still be sold), whereas general consumer regulators overseas (eg ASEAN) often lack jurisdiction in such situations and therefore scope for formal engagement with other parts of their governments.[45] Nonetheless, such a lack of jurisdiction in many of Australia's trading partners in Asia (eg Thailand) makes it harder to share information and build up capacity among general consumer regulators.

Comparative analysis of pre-market regulation also identifies a significant gap under the ACL: no general safety provision, requiring all consumer goods to be reasonably safe. Following the 1992 European Directive, Malaysia introduced

[44] Nottage (2015), op cit; Nottage and Thanitcul (eds) *ASEAN Product Liability and Consumer Product Safety Law* (Winyuchon, Bangkok, forthcoming January 2016).
[45] Nottage, Luke, ASEAN Consumer Product Safety Law: National Laws and Free Trade Agreements, paper presented at the 2nd ASEAN Consumer Protection Conference, Bangkok, 14-15 December 2015, in Volume 2 at http://www.asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/consumer-protection/key-documents/; also via http://aadcp2.org/supporting-research-dialogue-on-consumer-protection/

THE UNIVERSITY OF SYDNEY

such a GSP in 1999, but in general terms and seemingly with little impact in practice. As an alternative approximation to a GSP, since 2011 Singapore generally requires all consumer goods to comply with ISO, EU or American standards (otherwise national or regional standards). Already there is some evidence of safety improvements eg for toys.[46] Another interesting development in ASEAN, which could be considered by Australia as an efficient standard-setting approach to a global product sector, is ASEAN's recent full implementation of a Cosmetics Directive that essentially adopts EU standards as well as substantive powers for regulators.[47]

As for *post-market* controls, the ACL regime moved towards global best practice by expanding mandatory reporting obligations imposed on suppliers. As well as requiring reports of voluntary recalls (also now mandated in New Zealand)[48] and making these more accessible online, the ACL now requires suppliers to report to the ACCC any known deaths or serious product-related accidents. However, compared to similar longstanding regimes in the US and the EU, and more recently Japan and Canada, this new obligation is quite narrow. Another problem is that at a late stage of the reforms, with little public debate and justification, the ACL legislation added a strict confidentiality obligation that prevents it sharing accident report information even with close FTA partner regulators (eg in New Zealand).[49] The US has confidentiality obligations too, but consumers and others can now be alerted to product hazards through the recent http://www.saferproducts.gov public website. Anyway, compared eg to the EU recently, there also seems to be very limited formal enforcement activity of the ACL's reporting obligations on suppliers. This ACL Review therefore needs to look closely at how the broader regimes operate overseas.

[46] http://mddb.apec.org/documents/2012/SCSC/WKSP1/12_scsc_wksp1_006.pdf
[47] http://blogs.usyd.edu.au/japaneselaw/2015/06/cosmetics_regulation.html
[48] Nottage, Luke R. and Riefa, Christine and Tokeley, Kate, Comparative Consumer Law Reform and Economic Integration (2013). Consumer Law and Policy in Australia and New Zealand, J. Malbon and L. Nottage, eds, Federation Press, Australia, 2013; Sydney Law School Research Paper No. 15/77. Available at SSRN: http://ssrn.com/abstract=2662295
[49] Nottage, Luke R., Suppliers' Duties to Report Product-Related Accidents under the New 'Australian Consumer Law': A Comparative Critique (May 4, 2010). Commercial Law Quarterly, Vol. 25, No. 2, pp. 3-14, 2011; Sydney Law School Research Paper No. 10/41. Available at SSRN: http://ssrn.com/abstract=1600502

THE UNIVERSITY OF SYDNEY

Appendix B: Book review forthcoming in the Competition and Consumer Law Journal

European Consumer Law

Norbert Reich, Hans-W. Micklitz, Peter Roth & Klaus Tonner

2nd ed 2014, Intersentia (Cambridge et al), xlvvii + 421pp

Reviewed by Prof Luke Nottage
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This reliable and comprehensive textbook on the many consumer law initiatives from the European Union (EU, and its predecessors) is a key resource for Australian policy-makers, academic researchers and even legal practitioners. It is particularly useful as Australia governments embark in 2016 on a five-yearly assessment of the achievements and possible future development of the Australian Consumer Law (ACL) regime implemented from 2011.

Like Australia, the EU began developing consumer law and policy from the 1970s, as outlined in **chapter 1** entitled "Economic Law, Consumer Interests, and EU Integration" (especially five stages set out in pp10-17). Initially, consumer protection in EU law had to be founded on completing the "internal market" for the free movement of goods, services, capital and labour – reminiscent of the primary impetus behind the ACL "re-harmonisation" nation-wide. However, subsequent treaties allowed the EU to intervene more directly to support consumer protection. There is also recently more awareness of the concept of the "vulnerable consumer" (due to their reasonably foreseeable "mental, physical or psychological infirmity, age or credulity": Recital 34 of the Consumer Rights Directive 2011/83/EU, not just the traditional "informed consumer" concept that still predominates in this area of EU law (pp 45-48).

Compared to Australia, where vulnerable consumers also now attract more attention from policy-makers but consumer law reforms have progressed somewhat in fits and starts, the EU legislature has accelerated initiatives particularly since the 1980s and now regularly reviews and proposes interventions across all areas. The greater impact of EU consumer law nowadays can also be seen in the trend towards interpreting old Directives (setting out provisions for the now 28 EU member states to implement into national law within a few years) and expressly stating in newer ones as "maximal" or "total" rather than "minimal" harmonisation instruments, meaning that member states cannot impose different national standards in their consumer protection laws. However, the tendency has been for such total harmonisation to be "targeted" at specific areas (pp 41-42), as some member states insist that they should be able to maintain and indeed perhaps experiment with higher levels of consumer protection in other non-targeted areas. This development

THE UNIVERSITY OF SYDNEY

is very interesting to compare with Australia's Inter-Governmental Agreement reached between the Commonwealth and the States in 2009. That seemed to envisage "total harmonisation" (on the ACL model), but it has left in place notably the *Contracts Review Act 1980* (NSW), overlapping with the ACL's provisions especially on unfair consumer contract terms and unconscionability.

Chapter 2 of this volume turns to "Unfair Commercial Practices and Misleading Advertising". A major emphasis is on the Unfair Commercial Practices Directive 2005/29/EC, a new-generation "total harmonisation" measure now implemented in member states. Unlike Australia's older prohibition on misleading conduct (influenced by US law), remedies are only available to consumers dealing in goods and services for personal use (not competitor firms), as indeed in most Asian jurisdictions. However, this EU Directive includes a more general prohibition on unfair commercial practices (pp 88-96), which some have suggested would be a useful addition to the ACL regime.

Chapter 3 outlines the EU's regulation of "Unfair Terms in Consumer Contracts", based on (minimal harmonisation) Directive 93/13/ECC, which provided the model for Victoria and then eventually the ACL. Belatedly, a growing body of case law is emerging from the European Court of Justice (ECJ), which Australians should therefore pay keen attention to:

> "Through their preparedness to make active use of the preliminary reference procedure [seeking interpretations of EU instruments from the ECJ], the national courts have awakened to the sleeping beauty that is the Unfair Terms Directive. … Most of the cases deal with financial matters in a broad sense. The sector-specific directives on consumer credit [detailed in **chapter 5** of this volume]… suffer from the fact they do not really tackle the really sensitive issues like consumer-debtor default, acceleration clauses, penalty payments and the like. In times of economic crisis, the broad scope of application of the Directive on unfair terms turns out to serve as a means of last resort". (p 164)

Chapter 4 deals with EU instruments on "Sale of Consumer Goods", for which the key "horizontal" (not issue- or sector-specific) instrument is Directive 1999/44/EC. Notably, Article 5(3) states that: "Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity" (such as second-hand goods: p 177). In 2012, Singapore adopted a similar provision (often referred to there as a "Lemon Law", although not limited to faulty automobiles) by amending the Consumer Protection (Fair Trading) Act.[50] The provision is also reflected in s 19(14) of the English Consumer Rights

[50] Nottage, Luke R. and Thanitcul, Sakda, Economic Integration and Consumer Protection in Southeast Asia: ASEAN Product Liability Law and Safety Regulation (December 13, 2015). ASEAN PRODUCT LIABILITY AND CONSUMER PRODUCT SAFETY LAW, Winyuchon Publication

Act 2015, but s 22(3) adds a clear-cut one-month "short-term right to reject" for consumers affected from goods that are basically "dead on delivery". This approach is worth considering to improve the provisions on reasonable durability under s 54 of the ACL.

The provision added to the 2015 Act in England is permitted because Directive 1999/44/EC remains a minimal harmonisation instrument. Originally, the European Commission (the executive branch of the EU) had proposed that a new instrument consolidate Directive 1999/44/EC with the Unfair Terms Directive and two others, under the total harmonisation principle. After pushback from some member states and negotiations with the European Parliament, only those other two (Directive 85/577/EEC on door-stop selling, and Directive 97/7/EC on distance selling) were so incorporated and updated in the Consumer Rights Directive 2011/83/EU, as detailed in **Chapter 9**.

Chapter 6 turns to "Liability for Defective Products and Services" on the part of manufacturers and certain others in the supply chain, typically outside contractual relationships with consumers. The centerpiece is the Product Liability Directive 85/374/EEC, compensating consumers on a strict liability basis for injuries and consequential property losses from goods containing a safety defect. Belatedly and quite surprisingly, the European Court of Justice agreed with the Commission's arguments that this was a total harmonisation measure, thus preventing for example France from extending similar liability to others in the supply chain (pp 267-8). However, the impact of the Directive on member states' national laws on product liability has been complex (pp 271-3). A close analysis of these developments is important given that Australia followed quite closely the 1985 Directive in 1992, largely retained in Part 3-5 of the ACL and generating a small but significant volume of case law.

Policy-makers should also consider this chapter's annexed proposal for a harmonisation instrument based on an extensive comparative study co-authored by Prof Micklitz on "Liability for the Safety of Services" for the European Commission in 2006. (In addition, the Consumer Protection Act 1992 of the Philippines extends strict liability with respect to unsafe services, as well as goods.) This chapter 6 would also have benefitted from an overview of the General Product Safety Directive 2001/95/EC, including a duty on suppliers to notify regulators about product-related accidents (adopted in narrower form by the ACL from 2011) and a general safety provision (adopted in Malaysia's Consumer Protection Act 1999 but not yet the ACL). Although this is public regulation rather than private law, it impacts significantly on consumer protection and potential product liability claims.

House, Thailand, 2016; Sydney Law School Research Paper No. 15/100. Available at SSRN: http://ssrn.com/abstract=2703130

THE UNIVERSITY OF SYDNEY

Chapter 7 covers the important contemporary issue of "Cross-border Consumer Protection". The EU benefits from early Rome Convention on choice of law for contracts (now Regulation 593/2008) plus Regulation 864/2007 on private international law arising out of non-contractual obligations, as well as the 1968 Brussels Convention (now Regulations 44/2001 and 1215/2012) on clarifying jurisdiction and cross-border enforcement of judgments. It reminds readers that the mostly case law based private international law regime in Australia is due for a revamp generally, and with respect to consumer law in particular, yet a reform initiative in 2012 from the federal Attorney-General's Department has gone nowhere.[51]

Chapter 8 deals with "Legal Protection of Individual and Collective Consumer Interests", another area needing attention in Australia as procedural mechanisms facilitating consumer access to justice were not systematically addressed in the ACL reforms. For collective redress, the EU provides for actions by certified consumer representatives under the Injunctions Directive 2009/22/EC (codifying 98/27/EC), but has not yet agreed on a binding instrument facilitating damages claims. By contrast, US-style (opt-out) class actions have developed in several Australian jurisdictions since 1992, and indeed were enacted in Thailand in 2015.

Especially for more isolated disputes, the Directive 2014/11/EU (to be implemented by 9 July 2015) aims to set uniform minimum standards for Consumer ADR, while the Online Disputes Regulation 524/2013 creates a single point of entry for e-commerce traders and consumers to resolve matters through ADR entities. There is a useful commentary on the enforceability of consumer arbitration clauses, in the light of this Directive and the earlier Unfair Terms Directive as well as US developments (pp 369-8). Privately-supplied mediation and arbitration services have not been widely used in consumer dispute resolution in Australia, perhaps because of the rapid growth in statutory and industry-based ombudsman schemes. However, questions the scope for development of consumer arbitration have arisen in the wake of *Subway Systems v Ireland* [2014] VSCA 142 (albeit in a franchise context, rather than a "consumer" context in the EU sense).

As this brief book review shows, EU consumer law is now pervasive, even if some topic areas have less legislation or only still minimal harmonisation measures, making it important also to consider national laws and practices within Europe. Many of the solutions are the result of careful policy analysis, legal drafting and political compromise. In themselves, as well as for their ongoing impact in other parts of the world such as Asia, they deserve to be closely analysed in Australia. This book, distilling insight from a much longer volume originally in German, offers a clear and authoritative survey of EU law developments.

[51] Cf eg http://blogs.usyd.edu.au/japaneselaw/2012/11/reforming_private_internationa.html