
Index

Acceptable quality

under Australian Consumer Law, 339-344
extended warranties and, 331-353
New Zealand Court decisions on, 341-344

Accounting standards

deductibility of interest and, 406-433

ACMA. *see* **Australian Communications and Media Authority Acquisitions.** *see* **Mergers/acquisitions**

Agency

vicarious liability vs, 67-84

Airlines decision

global cartels and FSI Act, 282-285

Amcor limited

Visy/Amcor cartel, 385-386

Animals

use of in the media, 200-204

Anonymity

in commercial litigation, 282-285

Anticompetitive behaviour. *see also* **Cartels; Competition**

attempt to prohibit information disclosure, 28-46
European perspective, 309-330
price signalling, 309-330
 Coalition Bill on, 309-312, 326, 329-330
 Government Bill on, 309-311, 326-330
prohibition against disclosure of pricing information, 40-43
“understandings” and “concerted practices”, 312-326

Antitrust damages

assessment of, 181-182

ASIC. *see* **Australian Securities and Investments Commission (ASIC)**

Australian Communications and Media Authority (ACMA)

use of animals in the media, 200-204

Australian Competition and Consumer Commission (ACCC). *see also* **Mergers/acquisitions**

cartels and consumer compensation, 177-190
consumer legislation and, 30-32, 34
coordinated effects decisions, 169-171
counterfactual analysis in merger cases, 451-456, 457-463
Immunity Policy regarding cartels, 385-405
new chairperson, 145

Australian Consumer Law (ACL)

acceptable quality under, 332, 339-344

Australian Consumer Law (ACL) – continued

consumer guarantees and extended warranties, 331-353
ordinary useful life of goods and, 331-353
refunds and returns under, 348-349

Australian Law Reform commission (ALRC)

For Your Information: Australian Privacy Law and Practice, government response to, 58-62

Australian Securities and Investments Commission (ASIC)

guidance on insolvency from, 100
new chairperson, 145
use of infringement notices by, 260-281

AXA APH

National Australia Bank proposed acquisition of, 169

“Balance of probabilities” test

counterfactual analysis in merger cases, 453-454, 457-463

Bankruptcy

payday lending and, 13

Banks. *see also* Payday lending

Competition and Consumer Amendment Bill (No 1) 2011 and, 30, 34, 37-38
responsible lending obligations, 464-471

BHP Billiton litigation

corporate group structures and, 86-93

Book reviews

Australian Cartel Regulation by Caron Beaton-Wells and Brent Fisse, 140-142

Borrowers

deductibility of interest, 406-433
payday lending. *see* **Payday lending**

Breach of contract

right to terminate for anticipatory breach, 362-366

Brokers

responsible lending obligations, 464-471

Building Energy Efficiency Disclosure Act (Cth)

legislative policy, 135

Buildings insurance. *see* Home insurance

Burden of proof

consumers and cartels, 180

Business records

electronically stored information, 191-199

Business regulation. *see* Regulation

Cadbury Schweppes action

private enforcement of cartel laws, 390-391

Caltex Australia Ltd

proposed acquisition of assets of Mobil Oil Australia, 170-171

Carbon pricing

legislative policy, 121-135

Carriers and carriage service providers. *see* **Telecommunications access regimes****Cartels**

Australian Cartel Regulation by Caron Beaton-Wells and Brent Fisse, 140-142

consumer compensation and, 177-190

damage and loss caused by, 178-185

deceit claims against, 186-187, 190

defined, 387

Foreign States Immunities Act and, 282-285

private enforcement of cartel laws, 385-405

Case studies

coordinated effects, 169-175

Cash loans. *see* **Payday lending****Circle on Cavill case**

domain name-trade mark conflicts, 47-48

Clean energy. *see* **Renewable energy targets****Client legal privilege**

electronically stored information and, 191-192, 196-198

Climate change legislative policy

ALP, 121-135

debate, 145

Greens, 130

independents, 131

Liberal/National Party Coalition., 121

renewable energy targets, 132-133

Collusion

potential for coordinated effects in mergers, 159-176

regulation of anticompetitive “understandings”, 309-330

Commercial litigation

anonymity in, 282-285

electronically stored information, 191-199

Commercial Radio Australia Codes of Practice and Guidelines

use of animals in the media, 200-204

Commercial transactions

exceptions to nemo dat rule, 209-226

Commonwealth Consumer Affairs Advisory Council (CCAAC) report

review of the Australian law of implied terms, 334-335

Companies. *see* **Corporate group structures**

Compensation

cartel laws, 177-190, 388-389, 393-394

Competition. *see also* **Anticompetitive behaviour; Cartels; Mergers/acquisitions**

attempt to prohibit information disclosure, 28-46

private disclosure of pricing information to a competitor, 34-40, 367-379

substantially lessening competition in a market, 40-43

Competition and Consumer Act 2010 (Cth)

cartels and consumer compensation, 177-190

concept of “understandings” in, 309-330

“eligible service” as “declared service” pursuant to, 301

Pt XIC, network access, 297-308

s 50, assessment of counterfactuals, 451-456, 457-463

Competition and Consumer Amendment Bill (No 1) 2011 (Cth)

attempt to prohibit information disclosure in, 28-46

discrimination against different sectors by, 32-34

per se liability, 32

potential use of continuous disclosure, 45

price signalling and, 65, 145

European perspective, 310-311, 326-329

s 44ZZU, V, 36

s 44ZZW, attempt to prohibit information disclosure in, 28-46

s 44ZZW(c), exclusion, 367-379

s 44ZZX prohibition, 36, 40-45

Compliance standards

“reasonably practicable” as compliance standard in OHS, 52-57

Computer forensics

metadata and, 192-193

“Concerted practices”

boundaries of, 317-318

European perspective, 312-326

price announcements, 321-324

proof of, 316-317

versus “understandings”, 325-326

Conglomerates. *see* **Corporate group structures**

Consumer Action Law Centre

report on payday lending, 22

Consumer Affairs Victoria

- review of credit laws, 23-24
- survey on payday lending, 7

Consumer credit

- payday lending. *see* **Payday lending**
- referral of regulatory powers to Commonwealth, 25
- responsible lending obligations under, 464-471

Consumer Credit (Queensland) Amendment Act 2001

- history of payday lending regulation, 20

Consumer guarantees

- enforcement of, 349-353
- extended warranties and, 331-353
- liability for breach of, 346
- new goods claims, 343-344
- policy context of, 332-333
- second-hand goods claims, 342-343

Consumer Law Centre Victoria Ltd

- research report on payday lending, 5

Consumers. *see also* **Consumer credit**

- FCA Act and, 182-184
- transfer of title by a non-owner, 209-226
- understanding of statutory rights, 333-334

Contents insurance. *see* **Home insurance****Continuous disclosure contraventions**

- continuous disclosure enforcement pyramid, 272-279
- strategic regulation theory, 272
- use of infringement notices by ASIC for, 260-281

Contractors

- employers' vicarious liability for, 67-84

Contracts

- good faith in contractual performance and enforcement, 227-244
- legislation on future matters and, 136-139
- right to terminate for anticipatory breach, 362-366

Contributory fault

- cartels and, 188

Controlled entities. *see* **Corporate group structures****Coordinated effects**

- case studies, 169-175
- new approach, 167-169
- past conduct, consideration of, 166-167, 173
- potential for in mergers, 159-176

Coordinated effects – *continued*

- Stigler's framework, 160-161
- structural factors, 161-162, 171-172
- traditional approach, 161-167

Corporate group structures

- corporate treasury companies, 86-93
- legal status of, 85-94

Corporations Act 2001 (Cth)

- insolvency of trustees and responsible entities, 95-110

Corporations and Markets Advisory Committee (CAMAC)

- liability of directors policy, 145-146

Council of Australian Governments (CoAG)

- liability of directors policy, 145-146

Counterfactual issues

- meaning of "likely", 457-459
- Metcash* case, 451-456, 457-463
- origin of word "counterfactual", 462-463
- standard of proof, 453-454, 457-463

Cover protection. *see* Insurance

Credit providers. *see also* Banks; Consumer credit; Payday lending

- alternatives to payday lending, 14-19

Creditors

- of trusts and responsible entities, 95-110

Cyclones. *see* Natural disasters

Damages

- assessment of, 180-185

Debt. *see* Banks; Consumer credit

Decision making

- ex-post assessments, 147-158

Deductibility of interest. *see* Interest

Defences

- avoiding time bar, 188-190
- no consumer contribution, 188
- non-availability of pass-on defence, 185-187

Deposit-taking institutions. *see* Banks

Directors

- liability of, 145-146
- of trusts and responsible entities, 95-110

Disclosure

- attempt to prohibit, 28-46
- continuous disclosure contraventions, 260-281
- prior disclosure in franchising agreements and, 246-259
- private disclosure of price-related information to a competitor, 34-40, 367-379
- prohibition against disclosure of pricing information to substantially lessen competition, 40-43
- responsible lending obligations under, 464-471

Discovery

- electronically stored information and, 191-199

Discrimination

- discrimination against different sectors in draft Bill, 32-34

Dispute resolution

- payday lending, 9-10

Documentation

- registering or recording disclosure documentation, 258-259

Domain name-trademark conflicts

- URLs vs domain names, 47-50

Duty of good faith. *see* Good faith**Earthquakes**

- insurance, 111-120

Economic characteristics

- discrimination against different sectors of the economy, 32-34
- supermarket industry, 148-153

Ectopia

- deductibility of interest and, 413-415

E-discovery. *see* Discovery**Electronically Stored Information (ESI)**

- commercial litigation and, 191-199
- paper documents vs, 192-196
- safeguards in dealing with, 196-198

Emissions control. *see* Climate change legislative policy; Renewable energy targets**Employers**

- vicarious liability for employees, 67-84

Energy efficiency

- legislative policy, 132-134

Enforcement

- consumer guarantees and extended warranties, 349-353
- continuous disclosure contraventions and, 272-281
- good faith in contractual performance and, 227-244

Index

Enforcement – continued

private. *see* **Private enforcement**

England. *see* **United Kingdom**

Environmental law. *see* **Carbon pricing; Climate change legislative policy**

Ethics

use of animals in the media, 200-204

Europe

regulation of anticompetitive 'understandings' and price signalling, 309-330

Ex-post assessments

ACCC decisions regarding supermarket industry, 157-158

Extended warranties

concerns raised by, 345-346

consumer guarantees and, 331-353

defined, 344

enforcement of, 349-353

as "incidental products", 344-345

information about at point-of-sale, 348-349

as insurance contracts, 345

liability for breach of consumer guarantees, 346

liability for false or misleading conduct, 346-349

potential liability under s 29(1)(n) of *ACL*, 332

prohibition against misrepresentations concerning the requirement to pay, 346-348

statutory protection and, 331-332

Facilitating practices

attempt to prohibit information disclosure, 28-46

efficacy of s 44ZZX prohibition and, 43

Factors Act exception

for sales by mercantile agents, 213-214

False or misleading conduct

extended warranties and, 346-349

Fault-based liability

vicarious liability vs, 67-84

Financial institutions. *see* **Banks**

Financial viability. *see* **Insolvency**

Financing

personal property, 210-213

responsible lending obligations, 464-471

Floods

definition, 118-119

insurance, 111-120

Foreign acquisitions

SGX/ASX acquisition/merger, 65

Foreign States Immunities Act 1985 (Cth)

commercial transaction exception, 288-289, 291-292

global cartels and, 282-285

separate entity doctrine, 288-291

Franchising

power and information imbalance in, 245-259

regulating relationships, 246-247

Future matters

Parliament's plenary power to legislate on, 136-139

Global.... see International...

Good faith

in contractual performance and enforcement, 227-244

Franchising Code of Conduct, 246

Goods and services

discrimination against different sectors, 32-34

Guarantees. see Consumer guarantees

Haig-Simons concept of income

deductibility of interest and, 410-415

Harm, theory of

coordinated effects and, 159-167

Harmonised laws

OHS, 434-450

current status and potential of, 443-445

evolution of, 435-442

questions regarding, 445-449

Home insurance

claims processing problems, 119-120

natural disasters, 111-120

standard cover, 112-113, 119

Immunity policy

regarding cartels, 400-405

Implied terms

consumer guarantees and, 332-334

good faith in contractual performance and enforcement, 233-243

Indemnity

trustee's indemnity against trust fund, 104-105

Information exchange. *see also* **Disclosure**

- “concerted practices”, 318-321
- price-related information aggregation provisions, 43

Information management systems

- privacy law reform, 58-62

Infringement notices

- company/industry factors, 267
- comparative utilisation of enforcement measures, 272-281
- context factors, 270-272
- penalty quantum factors, 267-268
- research into use by ASIC of, 265-281
- time to announcement factors, 269
- time to issuance factors, 268-269
- use of by ASIC for alleged continuous disclosure contraventions, 260-281

Insolvency

- administration regimes available, 97-98
- definition, 98-100
- sequence of investigation, 108-110
- of trustees, 95-110

Insurance

- employers’ vicarious liability and, 76-77
- home buildings and content. *see* **Home insurance**
- national insurance scheme, 111-120
- not-for-profits, 357-360
 - captive insurers, 357-358
 - group purchasing options, 359
 - mutual insurers, 358
 - piggy-backing, 359
 - risk accountability and, 354-361
 - risk financing pools or mutual funds, 358-359

Insurance Contracts Act 1984 (Cth)

- standard cover, 112-113

Intellectual property

- domain name-trademark conflicts, 47-50

Interest

- accounting treatment, 430-433
- characterisation of, 424-426
- conceptual framework and assessment process, 415-418
- deductibility of, 406-433
- economic aspects of, 409-410
- global and scheduler systems, 427-429
- Haig-Simons concept of income, 410-415
- interpretation issue, 426-430
- legal nature of, 421-426

payday lending and interest rates, 7-8, 20

International law

duty of good faith, 227-232

Foreign States Immunities Act and, 282-285

Internet. *see* **Websites**

Inventory financing

transfer of title by a non-owner, 209-226

Investment

telecommunications access regimes and, 298-300

Jarra Creek class action

private enforcement of cartel laws, 391

Land tax

statutory amendments to alter, 136-139

Law of torts. *see* **Torts**

Lawyers

as heads of regulatory agencies, 65

Legislation

climate change legislative policy, 121-135

State's powers to legislate on future matters, and contractual promises, 136-139

Lending. *see* **Banks; Payday lending**

Liability

limitation of trustee's personal liability, 107

limited liability for corporate group structures, 85-94

vicarious liability, 67-84

Link market services ltd

proposed acquisition of Newreg, 170

Liquidity

viability of trust funds, 104-105

Litigation. *see* **Commercial litigation**

Loans. *see* **Interest; Payday lending**

Loss distribution

employers' vicarious liability and insurance, 76-77

Managed investment schemes

insolvency of responsible entities, 95-110

Manufacturers. *see* **Consumer guarantees**

Index

Markets. *see also* **Competition**

potential for coordinated effects in mergers and, 159-176

Mavericks

potential for coordinated effects in mergers and, 159-176

Mcintyre Haig-Simons model

deductibility of interest and, 411-413

Media

use of animals in, 200-204

“Merchantable quality”

under *Trade Practices Act*, 335-338

Mergers/acquisitions

counterfactual analysis in, 451-456, 457-463

potential for coordinated effects, 159-176

SGX/ASX acquisition/merger, 65

supermarket industry, 147-158, 451-456, 457-463

Metadata

computer forensics and, 192-193

Metcash case

counterfactual issues, 451-456, 457-463

Microfinance programs

alternatives to payday lending, 15-19

low interest loan schemes (LILS), 16-19

no interest loan schemes (NILS), 15-16

Misrepresentation. *see also* **False or misleading conduct**

extended warranties and, 346-348

Mobil Oil Australia Pty Ltd

Caltex Australia proposed acquisition of assets of, 170-171

Money lent. *see* **Interest**

Mortgages

traditional personal property non-possessory financing, 210

Motor vehicle purchases

second-hand goods claims and, 342-343

transfer of title by a non-owner, 222-223

Mutual insurers

not-for-profit organisations, 358

National Australia Bank Ltd

proposed acquisition of AXA APH, 169

National Broadband Network (NBN)

telecommunications access regimes and, 297-298

National Consumer Credit Protection Act 2009 (Cth)

payday lending and, 25-27

responsible lending obligations under, 464-471

National Consumer Credit Protection Bill 2009 (Cth)

recommendations in, 24-25

National Greenhouse and Energy Reporting System (NGERS)

legislative policy, 134-135

Natural disasters

insurance, 111-120

Negligence

vicarious liability and, 67-84

NEIAT study

consumer understanding of statutory rights, 333-334

Nemo dat quod non habet rule

exceptions to, 209-226

Network access. *see* Telecommunications access regimes**New goods claims**

New Zealand Disputes Tribunal (NZDT) and, 343-344

New Zealand

CCAAC report and CGA model, 334-335

Court decisions on acceptable quality, 341-344

natural disaster insurance scheme, 115-116

new goods claims and, 343-344

Newreg Pty Ltd

Link Market Services proposed acquisition of, 170

Non-owners

transfer of title by, 209-226

Not-for-profit organisations

risk accountability and, 354-361

NZ International Accounting Standard (IAS) 32

operation of, 431-433

Occupational health and safety (OHS) laws

harmonised laws, 434-450

current status and potential of, 443-445

evolution of, 435-442

questions regarding, 445-449

“reasonably practicable” as compliance standard, 52-57

Open justice rule

anonymity in commercial litigation, 282-285

Opportunistic conduct

prior disclosure in franchising agreements and, 250-252

Ordinary useful life of goods. *see* Extended warranties

Organisational risk. *see* Risk management

Parliament

power of agreements to bind, 136-139

Pass-on defence

non-availability of, 185-187

Payday lending

alternatives to, 14-19

in Australia, 5-27

criticisms of, 7-10

deregulation of banks and, 11-12

dispute resolution, 26

extent of industry, 5-6

fees and charges, 6-8, 19

inequality of consumers and, 12-13

interest paid, 7-8, 20

online loans, 9

reasons for demand, 10-13

rolling over of loans, 8-9

Uniform Consumer Credit Code 1994 (Cth) and, 19-25

who uses it, 6-7

Personal information

privacy law reform, 58-62

Personal liability

limitation of trustee's personal liability, 107

Personal property

exceptions to nemo dat rule, 209-226

financing of, 210-213

***Personal Property Securities Act 2009* (Cth)**

approach to sale of secured goods, 220

classification of parties, 219-220

enforceability of a security interest, 218-219

exceptions to the nemo dat rule, 209-226

functional approach to security interests, 217-218

Pt 2.5 "taking free" rules, 221-225

transfer of title by a non-owner, 209-226

Pink Floyd v EMI Records

anonymity in commercial litigation, 282-285

Price signalling. *see also* **Anticompetitive behaviour; Disclosure**

- Amendment Bill to Parliament, 65, 145
- Attempt to prohibit information disclosure, 28-46
- Banking and petrol retail sectors, 34
- Coalition Bill on, 309-312, 326, 329-330
- Continuous disclosure contraventions, 260-281
- Dyestuffs* case, 321-322, 324
- European perspective, 309-330
- Government Bill on, 309-311, 326-330
- Per se prohibition against private disclosure of pricing information to a competitor, 34-40
- Private disclosure of price-related information to a competitor, 367-379
- Prohibition against disclosure of pricing information to substantially lessen competition, 40-43
- Wood Pulp II* case, 322-324

Prior disclosure

- in franchising, 246-259
- improving effectiveness of, 253-259
- registering or recording disclosure documentation, 258-259
- as a regulatory strategy, 247-250

Privacy Act 1988 (Cth)

- Exposure Draft of the new Australian Privacy Principles (APP), 58-62

Private enforcement

- of cartel laws, 385-405

Privilege. *see* **Client legal privilege****Productivity commission**

- CCAAC report, 334-335

Protected Cartel Information (PCI) scheme

- private enforcement of cartel laws and, 385-405

Public interest

- cartel laws, 386-392

Quality. *see* **Consumer guarantees; “Merchantable quality”****“Reasonably practicable” as compliance standard**

- OHS laws, 52-57

Records. *see* **Business records****Registered trade marks.** *see* **Trade marks****Regulation**

- franchising, 246-250
- harmonised OHS laws, 434-450
- legislative in form but executive in source, 33

Regulatory agencies

- appointment of heads of, 65

Renewable energy targets. *see* **Climate change legislative policy**

Repudiation

anticipatory breach of contract, 362-366

Responsible entities

insolvency of, 95-110

Restitution

claims against cartels, 186-187

legislation on future matters and, 136-139

Risk management. *see also* **Insurance**

not-for-profits, 356-357

risk financing pools, 358-359

Safe work australia

harmonised OHS laws, 449

Sale of Goods Acts

effect of *Personal Property Securities Act 2009* on, 224-226

exceptions to nemo dat rule, 213-217

“erchantable quality” and, 335-338

Second-hand goods claims

Motor Vehicle Disputes Tribunal and, 342-343

Security transactions

transfer of title by a non-owner, 209-226

Separate entity doctrine

corporate group structures and, 85-94

Short-term credit. *see* **Payday lending**

Solvency. *see* **Insolvency**

Spotless case

corporate group structures, 92

Standard of proof

counterfactual issues, 453-454, 457-463

damages analogy, 461

Standards. *see* **Compliance standards**

State’s power to legislate

future matters, on, 136-139

Statutory provisions

deductibility of interest, 427-430

implied terms regime. *see* **Implied terms**

Stigler's framework

coordinated effects analysis, 160-161

Stock exchanges

SGX/ASX acquisition/merger, 65

Strict liability. *see* **Vicarious liability**

Subsidiary companies. *see* **Corporate group structures**

Supermarket industry

ACCC decisions regarding, 147-158

economic characteristics of, 148-153

mergers/acquisitions, 147-158, 451-456, 457-463

United Kingdom, 156-157

"Taking free" rules

Personal Property Securities Act 2009 and, 221-225

Taxation

assessment function, 416-418

corporate group structures and, 86-93

deductibility of interest, 406-433

Telecommunications

use of animals in the media, 200-204

Telecommunications access regimes

dissatisfaction with negotiate-arbitrate model, 302-303

effectiveness of regulation, 297-308

"eligible service" as "declared service", 301

historic regulatory framework, 300-302

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth)

network access and, 297, 303-306

Tennis Warehouse case

domain name-trade mark conflicts, 47-51

Termination of contracts

for anticipatory breach of contract, 362-366

Theory of harm

coordinated effects and, 159-167

Third sector. *see* **Not-for-profit organisations**

Time bars

cartels and, 188-190

Title

title retention transactions in personal property financing, 210-213

transfer of by a non-owner, 209-226

Torts

fault-based liability, 67-84

Trade marks

domain name-trade mark conflicts, 47-50

Trade Practices Act

“merchantable quality” under, 335-338

Trading trusts

definition, 96

insolvency of trustees, 95-110

Transaction-based measurement

deductibility of interest, 406-433

Trustees

insolvency of, 95-110

limitation of personal liability, 107

“Understandings”. *see* Anticompetitive behaviour

Uniform Consumer Credit Code 1994 (Cth)

history of payday lending regulation, 19-25

United Kingdom

duty of good faith in, 231-232

supermarket industry, 156-157

United states

antitrust damages, 181-182

duty of good faith in, 228-229

natural disaster insurance scheme, 116-118

private enforcement of cartel laws, 392-393

Unjust enrichment

claims against cartels, 186-187, 190

Unsecured loans. *see* Payday lending

Useful life of goods. *see* Extended warranties

Utility companies

alternatives to payday lending, 15

Veil piercing

corporate group structures, 92-94

Vicarious liability

reasons it should be abandoned, 67-84

Victorian Consumer Action Law Centre

survey on payday lending, 7

Visy/Amcor cartel

cartel laws and, 385-386

Volunteers for not-for-profit organisations

piggy-backing on personal insurance, 359-360

Warranties. *see also* Extended warranties

express warranties, 332

statutory protection, 332

Websites

domain name-trade mark conflicts, 47-50

online payday lending, 9

Work Health and Safety Act (the model Act)

“reasonably practicable” as compliance standard in OHS, 52-57