Accessorial liability civil provisions under Trade Practices Act, 37-47 background to s 75B, 41-42 operation of s 75B, 38, 44-42 remnant operation of s 75B, 46-47 claims for damages, 37-38 criminal liability provisions, 37 difficulties in proving, 38, 44-45 knowledge of accessory, 37-3, 42-44 alternative interpretations as to content, 42-44 levels of knowledge, 44 other types of conduct, 41 possible relationships between parties, 39-41 party as "conduit" for information, 40-41 representations made indirectly, 39 representations made on behalf of corporations, 39 principal or accessory, 39-41 decision in Houghton v Arms, 45-46 Australian Communications Media and Authority (ACMA) children's television standards, review, 68 Australian Competition and Consumer **Commission (ACCC)** anti-cartel enforcement, 20-21, 28-29, 31-33, 35, 106-110, 285 collusion and "understandings", 20-21, 25-29, 62-63, 156, 320-321 privilege claim rejected in Amcor cases, 305-310 proposed legislative change, 34-36, 106-107 appointments to, 220-221, 303 dates for retiring members, 220 forthcoming appointments, 221 issues for making, 220 observations about appointments, 220-221 proposed small business deputy chairman, 303-304 authorisations and notifications powers, 48-50, 193-196 C7 litigation, 82, 84-90, 93-94, 100

clearance sales and duration representations, 247-248 mandatory codes of conduct, functions, 224 merger control regime, functions, 191-202 pecuniary penalties, time for commencement of proceedings, 204 possible reform of various powers, 222-225 representative actions under Trade Practices Act, 166, 189, 264-256 restrictive trade practices, 51-54 review of decisions by Australian Competition Tribunal, 311 sale of exclusive rights, approach to, 82, 93-94 statutory demands for information, 224 Australian Competition Tribunal central role in regulatory framework, 311 current matters before, 311, 313-317 decision in Re Application of Medicines Australia Inc, 48 aspects of, 49-50 implications, 50 ElectraNet decision, 312-313 jurisdiction, 311 legislative developments, 311 Dawson Review amendments, 312 national electricity law, 311-313 national gas law, 312 members, 311 Australian Law Reform Commission (ALRC) cartel conduct, penalties for, 107 class actions, recommendations for, 167-168, 176 estimate of cases, 170 Australian Securities and Investments **Commission (ASIC) Act** class actions brought under, 171-172 consumer provisions, 38 ethical business conduct, proposed changes to, 135 **Banking and Financial Services Ombudsman** activities as self-regulatory body, 67 website, 67

Banks accessorial liability, 38 penalty fees, 67 **Broadcasting industry** anti-competitive exclusive rights, in, 82-90 C7 litigation, 82, 84-90, 93-94, 100 background, 84-85 judge's findings, 88-90 key facts, 85-87 Seven's case, 87-88 wholesale sports channel market, 89-90 current affairs scoops and s 52 of Trade Practices Act, 216-219 exclusive content, demand for, 83-84 TCN Channel Nine v Ilvariy, 216-219 background, 216 defamation trial proceedings, 216 facts, 216 judgment of Court of Appeal, 216-219 principle of coherence, 218-219 trade or commerce, in, 217-218 **Cartel behaviour** background, 285-288 collusion and "understandings", 20-21, 25-29, 62-63, 156, 288-290, 320-321 consensual dealing and arrangements, 25-26 consideration, 29-32 Federal Court cases, 26-29, 291-292 High Court considerations in tax cases, 23 criminal penalties, 102, 106-115, 203, 222, 285 argument for, 108-112, 114-115 burden of proof, 110 collateral civil and criminal penalties, 107 deterrence, 108-110, 230 hard core conduct, 106-107, 110-14 moral opprobrium, 110-112 white-collar defendants, 112-114 damages, 285-287, 294-297 box case, 296-297 estimating, 295-296 implications, 297-298 defences, 286, 290

legal alternatives, 290-292 low profits, 293 market sharing, 289, 291-293 net benefits, 290 passing on, 293-294 financial fraud under Corporations Act, 110 nature of cartels, 286-288 successful cartel operation, 288-290 overseas jurisdictions, 23, 108-110, 286-287, 294-298 concerted action, 23-25 European Union Court of Justice, 23-25, 31 European Union, in, 23-25, 230-234, 236-237, 286 Germany leniency guidelines, 230, 234-237 legislation for, 108-110 New Zealand, 22-23, 31 United States, 21-22, 29-30, 287, 289, 291-296 penalties, 61, 64-65, 102-104, 112, 230 criminal sanctions, 106-114, 203, 222, 285 successful cartel operation, rules for, 288-290 Trade Practices Act, under, 102-115, 222, 285-287, 291-293, 295, 298 Visy case, 31-32, 61-65, 104-106, 109-110, 112-114, 286, 305 Amcor's application for immunity, 63, 305 annual price increase understandings, 62 compensation understandings, 63 corporate contravenor, 64-5, 113-114 customer price understandings, 63 decision, 61, 64-65 facts, 62, 105-106 individual contravenors, 65 investigations by ACCC, 104-105 over-arching understanding, 62 record penalties, 61, 64-65, 110, 204-205 Visy's admission of liability, 31-32, 64-65 **Case notes** ACCC v Baxter Healthcare, 51-54, 92-03, 97 ACCC v Leahy Petroleum Pty Ltd, 155-159, 209 ACCC v Visy, 61-65, 104-106, 286 Cadbury Schweppes v Amcor, 305-309

Cadbury Schweppes v Darrell Lea, 55-61, 276-284 Jarra Creek v Amcor, 309-310 TCN Channel Nine v Ilvariy, 216-219 **Civil penalties** cartel conduct, for, 61, 64-65, 102-104, 112, 230, 286, 305 competition law provisions, 203-215 European Union, fining policy in, 210-212 New Zealand, in, 209-210 United States, sentencing guidelines, 212-213 deterrence, 203, 207 Federal Court powers, 203 agreed facts and penalties, 206 determination of appropriate penalty, 205-209 gain from contravention, 208-209 negotiated settlements, where, 206 maximum penalties, 203-206, 213 determining, 207-209, 214 recent Australian judgments, 215 Pt IV of Trade Practices Act, under, 203-209, 213-215 quantum, 204-205 **Class actions** Australia, in, 165, 170-189, 249-275 background, 165-167 claim against each respondent, 176-177 number of actions, 171-172, 270-271 number of persons required, 175-176 opt out, 180-181, 258 respondent's communications with group members, 255-256 security for costs, 181-182 self selected groups, 179-180 small claimant classes vs large claimant classes, 178-179 strike-out applications under Federal Court Rules, 249-251 benefits and disadvantages, 167-170 costs orders, 262-264, 270 indemnity costs orders, 263-264 decisions, 172-174, 273-275 discretion to end class actions, 251-254, 258

elements for bringing proceedings, 174-189, 250 commonality, 185-189, 252-254, 270 connectivity, 183-185 numerosity, 175-176 Federal Court of Australia Act 1976 (FCA), under, 165-8, 170, 250-257, 272 background, 165-167 notice provisions, 254-256 Pt IVA judgments, 172-174, 250, 252, 270, 273-274 statutory framework, 174-186 joinder of persons, 177 litigation funding, 263, 268-270 no certification procedure, 175 personal injury, for, 188, 266 costs, 270 product liability, for see Product liability settlement, 256-262 advantages of, 256, 261 court approval generally, 258-259 court orders, 259, 262-264 factors relevant to approval of, 259-60 need for court approval, 257-258 past settlement schemes, 261-262 practical difficulties and other issues, 260-261 Trade Practices Act, under, 166, 189, 264-268, 271-272, 274-275 civil liability reforms, 266-268 class actions by ACCC under Pt IVA, 265-266 proportionate liability, 189 representative actions by ACCC, 166, 189, 264-266, 270 uplift fees, 257-8, 263, 268 Victorian Law Reform Commission (VLRC), recommendations, 167, 177, 272 **Codes of conduct** limitations of, 67 mandatory, proposed review, 224-225 Comparative price advertising Federal Court decision in ACCC v Prouds Jewellers, 320

Competition law

administration and national competition policy, 299-304 Birdsville amendments, 68, 222, 299-302 civil penalties under Pt IV of TPA, 203-215 concept of "take advantage" unchanged, 302 criticisms of proposed changes to ss 46 and 51AC, 229-304 European Union and Germany, in, 230-237, 286 intellectual property and competition policy reform, 116-117, 120-122 access regime, 129-130, 222 arguments and counterarguments, 126-129 case law, 122-126 IPCR Committee findings, 116-117, 129-130 intellectual property rights, 117-118, 122-130 competition policy, relationship with, 120-122 language of "rights", 118-119 market power, 122-130 misuse of markets power, proposed reform, 222, 301-302 passing off see Passing off **Competition Policy and Consumer Affairs** Minister and department for, 69 **Consumer concerns** bank penalty fees, 67 CHOICE campaigns for law reform, 66-68 allocation of responsibilities, 67-68 class action litigation, 165-170, 249-275 benefits and disadvantages, 167-170 number of actions, 171-172 product liability see Product liability clearance representations in ACCC v Terania case, 247-248 consumer transactions, 147-150 dual-priced tags, 247-248 editorial commentary, 5, 247-248 unduly long judgments, 81 experiences in consumer law and policy, 66-69 Fair Trading Acts, 6, 38, 46 incorporation of empirical research into consumer policy, 68 law and enforcement, 68-69

limitations of self-regulatory regimes, 67 manufacturers' obligations, 151-154 national consumer protection laws, 66 compensation, 223 gaps in, 66-67 possible reform, 225 online auctions, 147-150 Productivity Commission review, 66-68, 221, 287 selling on eBay, 147-150 Uniform Consumer Credit Code (UCCC), 67 **Consumer contracts** negotiation of, 66 unfair terms in, 66-67 proposed reform, 138-140, 223 **Council of Australian Governments (COAG)** National Reform Agenda, third-party access work, 226-229 Damages civil accessorial liability provisions, 37-47 civil liability reforms, 266 likely effects, 266-268 coat tails action, s 83 reform, 223 **Dawson Committee** recommendations, 103-104, 108, 110, 114, 191, 312 maximum civil penalties, 203-204 merger controls, 191, 195-196 report, 103, 106, 114, 203 submission by ACCC, 102, 108-110 **Defective goods** damages, 153 implied contractual terms, 152 indemnity under TPA, 153 manufacturer's warranties, 152-153 Elms v Ansell, 153-154 obligations of manufacturers, 151-154 Laws v GWS Machinery, decisions, 151-153 Skerbic v McCormack, 151 **Derivative Crown immunity** definition, 51 High Court decision in ACCC v Baxter Healthcare, 51-54, 92-93, 97

facts, 51 issues, 52 joint judgment, 52-54 judgment in dissent, 54 proceedings, 51-52 limitation of, 51, 54 Ethical business conduct case for s 51AC reform, 132, 135-141, 303 arguments for new legal framework, 138-140, 222-223 good faith, statutory duty of, 136-137 monetary cap, 136, 223, 303 statutory list of unconscionable conduct, 137-138 suggestions by small business, 222-223 unfair contract terms, 138-140 current amendments, 132-135 determination of unconscionable conduct, 132-135 increase in monetary cap, 134-135 replication of proposed changes in ASIC Act 2001, 135 unconscionability, 132-134, 222-223, 303 contractual right to vary for acquirers of goods or services, 132 definitions, 133-134, 136 **European Commission (EC)** cartel conduct powers, 23-25, 230-237, 286 elevator cartel penalties, 230 EU fining policy, 210 basic amount, 210-211 basic amount adjustments, 2112-12 EU leniency guidelines, 234-236 guidelines compared with German FCO, 236-237 immunity from fines, 231-233 marker system, 232 protection of leniency applications from access by third parties, 234 reduction of fines, 233 exclusive rights, approach to, 82, 94 new guidelines for setting fines, 203

powers for antitrust violations, 230 **European Union Court of Justice (ECJ)** ruling, 23-25, 31 **Exclusive rights** anti-competitive provisions, 82-95, 100-101 approach of ACCC, 82, 93-94 approach of European Commission, 82, 94 Australian cases, 90-93 Baxter Healthcare case, 51-54, 92-93, 97 C7 litigation, 82, 84-90, 93-94, 100 Melway street directories case, 91-92, 299 Stirling Harbour case, 91, 95, 99 guiding principles for acquisition, 95-101 competitive tender process, 96-97 likelihood of future competition for rights, 97-98 rights period not necessarily lengthy, 97 second best outcome, whether, 99 transaction, conditions for, 99-100 Fair Trading Acts (FTA) accessorial liability, 38, 45-46 misleading and deceptive conduct, regulation under, 6, 38 Franchise ACCC broad view, 319 decision in ACCC v Kyloe, 319-320 Franchise agreement High Court overturns decision in Ketchell, 318-319 meaning, 319 **Franchise Code** mandatory code, 224 operation of, 318-320 Genetically modified food products Russia, legislation and regulation in, 322-324 Germany Federal Cartel Office (FCO), 230 anti-cartel powers, 230, 234-237 antitrust violations, powers, 230 penalties for suppliers of liquefied gas, 230 new leniency guidelines from FCO, 234-236 EU guidelines, compared, 236-237

immunity from fines, 235 marker system, 236 protection of leniency applications from access by third parties, 236 reduction of fines, 236 Government application of TPA to commercial activities of, 222 "in the course of business", 222 Birdsville amendments, 68, 222, 299-301 proposals for new appointments to ACCC, 220-221 proposed review of TPA, 5, 132-140, 221-225 \$10 million threshold under s 51AC, 134-136, 223.303 unfair contract terms, proposed reform, 138-140, 223 **Horticultural Code** mandatory code, 224-225 **Hospital supples** decision in ACCC v Baxter Healthcare, 51-54, 92-93, 97 Indonesia competition law, in, 70-75 challenges, 70, 74-75 development, 70-71 KPPU role, 70, 72-74 operation, 74 Law No 5 of 1999, 71 criticism of, 71 enforcement and adjudication, 71-72 **Intellectual Property (IP)** competition policy and IP reforms, 116-117, 120-122 recommendations, 116-117, 129-130 intellectual property rights, 117-118, 122-130 relationship with competition policy, 120-122 language of "rights", 118-119 market power and IPRs, 122-130 access regime, 129-130 arguments and counterarguments, 126-129 Boral case, 122, 299, 303 Independent Ink case, 125-126 Power Generation case, 122-123 Queensland Wire case, 122

Stevens v Sony case, 123-124 real property and, 118-119 types of, 117-118 **Intellectual Property and Competition Review** (IPCR) Committee recommendations, 116-117, 129-130 Journalist prescribed information provider, under s 65A of TPA, 218 Lawyers "in trade or commerce" requirement, 6, 8, 15, 45, 46, 217 circumvention of, 15 conduct in the course of litigation, 11-13 High Court decision in Concrete Constructions (NSW) v Nelson, 8-9, 217 legal opinion and advice, judicial view on, 14-15 negotiation and compromise, 13-14 professional activates, 8-10 professional conduct, 10-11, 14 promotion of professional services, 15 summary of requirement, 15 legal professional privilege, 306 liability for misleading conduct see Misleading and deceptive conduct representative actions, where, 271-273 litigation funding, 263, 268-270 professional conduct rules, 255-256 uplift fees, 257-258, 263, 268 **Medicines** Australia Code of Conduct, 48-50 inappropriate hospitality, under, 48 public benefits test, 49 decision of Australian Competition Tribunal in Re Application of Medicines Australia Inc, 48-50 aspects of, 49-50 implications, 50 promotional activities of, 48 ACCC determination, 48 Mergers Australian control regime, significant changes, 191-202

ACCC functions, 191-202 clearance options, overview, 192-196 "courtesy" approach for uncontroversial merger, 193-194 existing ACCC informal clearance process, 192-196, 198 new merger authorisation procedure, 193-194, 196 policy aims of new merger clearance options, 194-196 possible implications of ACCC merger guidelines, 198-199, 202 practical impact for merger parties, 196-198 Public Competition Assessment, 200 role of ACCC Mergers Branch, 199 room for improvement, 200-202 Statements of Issue, 199-200 creeping acquisitions, 222 **Mining companies** BHP Billiton Iron Ore v National Competition Council, 142-146, 311 critical issue, 143 declaration of a "service", 314-315 facts, 142-143, 314-315 Full Federal Court decision, 144-145, 226-227, 314-315 High Court appeal, 142-143, 144-146, 226-227, 311, 313, 315-317 judgment in dissent, 145 reasoning at first instance, 144 future uncertainty, 145-146, 224 Hamersley case, 143-144, 146, 228 national access regime, 142, 224-229 production process exclusion, 145-146 Misleading and deceptive conduct accessorial liability see Accessorial liability conduct of legal professional, 6-7, 15-19 assessment of liability, 15 legal opinion and advice, 14-15, 16-19 useful judicial statements, 15-19 without prejudice communications, 19 corporation requirement, 7, 41 decision in ACCC v Terania, 247-248

decision in Houghton v Arms, 45-46 Fair Trading Acts, regulation under, 6, 38, 45-46 New Zealand, recent reforms concerning securities and takeovers, 238-242 passing off, where, 276, 279, 281-283 Mortgage brokers advice of, regulation, 67 licensing, 68 reverse mortgages, 67 National Access Regime background, 142, 226 BHP Billiton Iron Ore v National Competition Council, 142-146, 226-227, 311, 313-317 COAG's third party access role, 224-229 Fortesque Metals Group, Mt Newman Railway, 226-227, 313-314, 317 future uncertainty, 145-146, 224 Hamersley case, 143-144, 146, 227-228 Moomba to Adelaide Pipeline, 228-229 national electricity law, 311-313 National Gas Code coverage matters, 228 national gas law, 312-313 Tasmanian Rail Network, 227 The Pilbara Infrastructure (TPI) Goldsworthy Railway, 227 Hamersley Rail Network, 227-228 Robe River Railway, 228 **National Competition Council** access regime, role, 142, 224-229 declaration of services under Pt IIIA of TPA, 226 High Court appeal in BHP Billiton case, 142-146, 226-227, 311, 313, 315-317 New Zealand anti-trust and consumer protection reports, 190 competition law provisions, 209-210 misleading or deceptive conduct, recent reforms concerning securities and takeovers, 238-242 application of Fair Trading Act, 238-242 conduct relating to takeovers excluded from Fair Trading Act, 239 liability for misleading conduct prior, 238 liability under Securities Act, 239-240

liability under Securities Market Act, 240-241 Securities Legislation Bill, under, 238 Takeovers Act, under, 241-242 Takeovers Code, application of, 241-242 price fixing case, 22-23, 31 **Oil Code** mandatory code, 224 **Online auctions** consumer transactions, 147-150 **Passing off** Cadbury Schweppes v Darrell Lea, 55-61, 276-284 admissibility of disputed evidence, 56-59, 61, 279-282 Darrell Lea's use of colour purple, 58-60, 276, 284 expert evidence, 279-282 facts, 277 findings from first phase of trial, 277-278, 280-281 Full Court's decision, 60-61, 281-282 trade mark law, no infringement of, 272, 283-284 misleading conduct, issues regarding, 276, 279, 281-283 Privy Council's decision in Cadbury v Pub Squash case, 278 protecting brands, 282-283 Petrol pricing ACCC enforcement problems, 20-21, 27-29, 31-33, 35, 157-158 ACCC v Leahy Petroleum Pty Ltd, 155-159, 209 arrangement of understanding, 156 facts, 155-156 leniency arrangements, 158-159 problems with ACCC's case, 157-158 requirement of commitment, 156 take outs, 158-159 use of admissions, 158 Oil Code, 224 **Pharmaceutical Benefits Scheme (PBS)** actions of pharmaceutical companies, effect on, 67 **Predatory pricing** Birdsville amendments, 68, 222, 299-301

new test for, 68 Price fixing collusion and "understandings", 20-21, 25-29, 62-63, 156, 286, 290 methods, 288-90 paper product prices, 320-1 criminalisation of, argument for, 108-112, 114-115, 222 market sharing, 289, 291-293, 299-301 petrol pricing see Petrol pricing possible reform, 221-222 Visy case, 31-32, 61-65, 104-106, 109-110, 112-114, 204, 286, 305 white-collar defendants, attitudes to, 111-114 Privilege Cadbury Schweppes v Amcor, 305-309 ACCC intervention, 305, 307-308 implied undertaking, 307 legislative intervention, 307-308 support for loss of privilege by service, 308 maintenance of support for privilege notwithstanding service, 308-309 Jarra Creek v Amcor, 309-310 legal professional privilege, 305-306 public interest immunity, 305-307 **Product liability** class actions in Australia, 165, 170-189, 249-275 benefits and disadvantages, 167-170 empirical analysis, 170-174 representative actions by ACCC, 166, 189, 264-266, 270-271 settlement, 256-62 strike-out applications under Federal Court Rules, 249-251 discretion to end class actions, 251-254, 258 elements for bringing proceedings, 174-189, 250 commonality, 185-189, 252-254 connectivity, 183-185 numerosity, 175-176 empirical analysis, 170-174 Federal Court of Australia Act 1976, under, 165-168, 170-175, 250-257, 270, 272 background, 165-167

costs orders, 262-264 notice provisions, 254-256 Pt IVA judgments generally, 172-174, 250, 252, 270 statutory framework, 174-189 Trade Practices Act, under, 166, 189, 264-268, 271-272, 274-275 **Productivity Commission** inquiry/review, 66-68, 221, 225, 287, 297 part-time members, 221 retail tenancy issues, 225 Publication "prescribed", 218 Purple packaging Cadbury Schweppes v Darrell Lea, 55-61, 276-284 facts, 277 need for exclusivity, 58-59 trade mark law, 272, 283-284 Representative proceedings see Class actions **Restrictive trade practices** derivative Crown immunity, 51-54 limitation of, 54 High Court decision in ACCC v Baxter Healthcare, 51-54, 92-93, 97 facts, 51 issues, 52 joint judgment, 52-54 judgment in dissent, 54 proceedings, 51-52 **Reverse mortgages** risk and, 67 Russia food product registration, 323-324 post-registration monitoring, 323-324 food safety requirements, 322-323 genetically modified food products, 322-324 general overview, 322 regulation of genetic engineering, 322 labelling law amendments, 323 Self-regulatory regimes limitations of, 67

Small business collective bargaining, amendments to TPA, 223-234 Trade Practices Act 1974 (Cth) amendment considerations and proposals, 132-140, 221-225, 301-303 Birdsville amendments, 68, 222, 299-302 cartel behaviour, 102-115, 222, 285-287, 291-293, 295, 298 ACCC proposal for legislative change, 34-36 "understandings" under ss 45 and 45A, 20-21, 23, 25-34, 156, 222, 320-321 civil accessorial liability provisions, 37-47 civil liability reforms, 266 likely effects, 266-268 civil penalties, under, 203-209, 213-215 cartel conduct, for, 61, 64-65, 102-104, 112, 230 comparative price advertising, 320 and competition intellectual property see **Intellectual Property (IP)** competition law amendments, 66, 132-140, 221-224, 299-304 \$10 million threshold under s 51AC, 134-136, 223, 303 current affairs scoops, ss 52 and 65A, 216-219 enforcement, 68-69 Federal Magistrates Court, access in s 46 cases, 302-303 lawyers' liability under s 52, 6-19 "in trade or commerce" requirement, 6, 8-15, 45-46 "misleading and deceptive" requirement, 6-7, 15 - 19liability for defective goods see Product liability liability of accessory, civil provisions, 37-47 background to s 75B, 41-42 operation of s 75B, 38, 44-46 remnant operation of s 75B, 46-47 mandatory codes of conduct, proposed review, 224-225 proportionate liability under, 189 representative actions by ACCC under, 166, 189, 264-268, 271-272, 274-275

"take advantage", concept of, 302

unconscionable conduct see Ethical business conduct

unfair contract terms, proposed reform, 138-140, 223

Trade Practices Legislation Amendment Act (No 1) 2006 (Cth)

anti-competitive penalties, 104, 204

Trade Practices Legislation Amendment Act (No 1) 2007 (Cth)

Birdsville amendments, 68, 222, 299-301 advantages, 301

ethical business conduct, 132-135

Trade Practices Legislation Amendment Bill 2008 (Cth)

abuses of market power, 299-302

concept of substantial market power, 301-302
criticisms of proposed changes to ss 46 and 51AC, 301-304
Unconscionability see Ethical business conduct
Uniform Consumer Credit Code (UCCC)
credit providers, regulation of, 67
United States of America
cartel behaviour, 21-22, 29-30, 287, 289, 291-296
class action litigation, model in, 167, 170
price fixing regulation, 21-22, 29-30
Victorian Law Reform Commission (VLRC)
class action recommendations, 167, 177, 272
White-collar defendants
attitudes of society to, 111-114
government statements, 112-113