

CONSUMER LAW IN NEW ZEALAND (2ND EDITION)

BY KATE TOKELEY (EDITOR)
LEXISNEXIS NEW ZEALAND, 2014

MATTHEW BARBER*

The second edition of *Consumer Law in New Zealand*¹ is the work of eight academic authors, edited by Kate Tokeley, and follows some 14 years after the first edition,² which was written entirely by Tokeley. Between the two, LexisNexis published another consumer law textbook,³ but the more recent work draws more heavily from the earlier text, albeit substantially revised and rewritten. The authors of the second edition are highly-regarded and have considerable expertise in the areas of their contributions.

The size of the market for New Zealand legal textbooks dictates that many are written for use both in universities and in practice. Consumer protection law in New Zealand is largely a creature of statute and often involves bespoke dispute resolution mechanisms – consumer disputes are seldom heard in the High Court or above. This explains why, in addition to serving the academic market, *Consumer Law in New Zealand* is aimed at policy-makers and those who operate in and around the consumer-focused corners of the justice system.

Writing a New Zealand consumer law textbook involves grappling with two issues, one conceptual and the other practical. The first concerns the meaning of consumer law, which naturally has implications for the content of the book. The difficulty is whether to set out a comprehensive account of all the laws that govern consumer transactions or instead to focus on those laws that are aimed specifically at consumers. The first approach means including all the general rules of contract law that operate in the consumer sphere: offer and acceptance, mistake, misrepresentation, unconscionable bargains, the incorporation of terms et cetera.

The second approach means limiting focus to those provisions that protect consumers in special ways. Statutes that expressly single out consumers or consumer transactions, such as the Consumer Guarantees Act 1993, are obvious examples. More difficult, however, are statutory protections that do not define consumers, but operate in circumstances that usually involve or are likely to involve them. The problem with this approach is that it might exclude from consideration laws that are of great significance to consumer transactions on the basis that they also apply to purely commercial exchanges.

* Senior Lecturer, School of Law, University of Canterbury.

1 Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014).

2 Kate Tokeley *Consumer Law in New Zealand* (Butterworths, Wellington, 2000).

3 Bill Bevan, Bob Dugan and Virginia Grainer *Consumer Law* (LexisNexis, Wellington, 2009).

The prohibition on misleading and deceptive conduct in s 9 of the Fair Trading Act 1986 is one possible example of this – or at least it was prior to the 2013 reforms.

Consumer Law in New Zealand steers a middle course through this issue: it does not attempt a comprehensive account of the law governing consumer transactions and yet includes some content that might not otherwise be warranted. It has a heavy focus on misleading and deceptive conduct, for example, and has a chapter on financial products, an area that attracts business purchasers and where the express distinction between consumers and businesses seems not often to be drawn.

The practical issue with which the authors of a New Zealand consumer text must grapple is the dearth of litigation and thus of recorded judicial decisions. This, along with the newness of much of the legislation, particularly relating to the 2013 consumer law reforms, raises the possibility that, in some areas, the authors may be limited to summarising the apparent effect of statutory provisions. Although the textbook does wander into this territory, it does so only occasionally, and in areas where there are important statutory rules and no case law there would have been little choice. Judicious use has been made of overseas authorities where statutory provisions are sufficiently similar, and interesting and useful accounts of the developments and reforms are consistently present across the chapters.

The textbook is bookended by two general chapters: an introduction by Tokeley that offers a helpful account of the need for consumer protection; and an examination of the access to justice problems that consumers suffer, along with the mechanisms by which these can be alleviated, by Jessica Palmer. The remainder of the book sets out the protection measures that New Zealand consumers enjoy. These are either general, in that they apply largely to all consumer transactions, or related to particular transactions, industries or selling methods.

The two general protection chapters examine consumer information and unfair contract terms respectively. The chapter on consumer information is written by Debra Wilson, who also co-authors the New Zealand textbook on fair trading. The chapter covers the Fair Trading Act 1986 and then compares this with the remedies for misrepresentation contained in the Contractual Remedies Act 1979. The remainder examines rules around particular types of consumer information such as advertising or food labelling. In the second chapter, Alexandra Sims offers a detailed account of the unfair contract term regime that is now in operation. She draws heavily on Australian decisions in predicting how it will be applied and develop.

Four chapters are dedicated to particular types of transactions. The first of these concerns the supply of goods and services under the Consumer Guarantees Act 1993, although the definition of services, in particular, in that Act is so broad that this might be considered a general consumer statute. Tokeley provides a substantial explanation of the protection available when the goods or services supplied are defective. The second and third chapters

explore consumer credit agreements. The need for consumer protection in this area has long been recognised and its regulation can be complex, which helps to explain why the subject covers almost a quarter of the content of the book. Barry Allan discusses the general consequences of the Credit Contracts and Consumer Finance Act 2003 in the first of the chapters and lender responsibilities in the second – the latter including the responsible lender principles recently introduced. The fourth chapter here is, as mentioned earlier, on financial products, written by Gordon Walker and Alma Pekmezovic.

One chapter, written by Sims, is dedicated to industry-specific regulation, which includes such industries as telecommunication providers, motor vehicle dealers and retirement villages. Two short sections sit uneasily in it, on privacy and the Accident Compensation Corporation.⁴ Consumer rights in relation to their personal information are founded mainly in the Privacy Act 1993, and so are more general than the focus of the chapter. It seems that the lack of a general discussion of consumer privacy elsewhere in the textbook has forced Sims to express her account on general terms before recording some specific privacy codes that operate in particular industries.⁵ In times when this sort of information is becoming an increasingly tradable commodity, it may be that more of a general discussion of consumer privacy is warranted. Against this, however, is that the Act has no particular consumer focus and there is a lack of case law on this point. The operation of the ACC sits at the edge of consumer law: it provides cover for personal injury akin to a private insurer, but without any transactional basis for this relationship. For that reason, reviewing or appealing a decision of the corporation seems similar to doing the same in relation to decisions about social welfare or taxation.

The remaining two chapters relate to particular selling methods. The first is a catch-all chapter, written by Wilson, which includes door to door and other uninvited direct selling, unsolicited goods and services. The second, by Trish O'Sullivan, is on e-commerce. The latter area is becoming a more important part of consumer law: it is now estimated, for example, that 6.4 per cent of spending on retail sales in New Zealand is over the internet.⁶ A significant portion of these, 2.6 per cent of consumer sales overall, are made over the internet with overseas sellers.⁷ The consequences of the latter figure on effective consumer protection are considerable. The complexities caused by e-commerce are significant and, given the continuing growth of this medium, it may be that the next edition includes a more detailed analysis.

Overall, the second edition of *Consumer Law in New Zealand* gives an account of an important area of law that is consistently of a high standard, and is a welcome contribution to the subject.

4 At 5.6 and 5.7 respectively.

5 Privacy also features briefly in the chapter on e-commerce at 10.5.

6 "BNZ Online Retail Sales Report" (3 June 2014) at 2 <www.bnz.co.nz>.

7 At 2-3.