THE UNIVERSITY OF MELBOURNE

Melbourne Obligations Group
Melbourne Law School

Australia – New Zealand Consumer Law Roundtable

Wednesday 4 December 2019

Australia – New Zealand Consumer Law Roundtable

Wednesday 4 December 2019, 9.15am – 5.30pm

Room 223, Level 2, Melbourne Law School
185 Pelham Street, Carlton

Program in Brief

9:15 AM *Registration and Coffee*

9:30 AM **Welcome and opening by Simon Cohen, Deputy Secretary, Regulation**
Department of Justice, Community and Safety

10:00 AM **SESSION 1**

*Chaired by **Professor Gail Pearson,** University of Sydney Business School*

- **Dr Vivien Chen**, Monash Business School, Monash University
- **Ms Catherine Brown** and **Ms Nicola Howell**, QUT Law, Queensland University of Technology

11:00 AM *Morning Tea*

11:30 AM **SESSION 2**

*Chaired by **Professor Luke Nottage,** Faculty of Law, University of Sydney*

- **Ms Victoria Stace**, Faculty of Law, Victoria University of Wellington
- **Professor Elise Bant** and **Professor Jeannie Paterson**, Melbourne Law School, The University of Melbourne
- **Dr Sagi Peari**, UWA Law School, The University of Western Australia

1:00 PM *Lunch*

2:00 PM **SESSION 3**

Chaired by Professor Jeannie Paterson, Melbourne Law School and Co-Director of the Centre for AI and Digital Ethics, The University of Melbourne

- **Dr Kayleen Manwaring**, UNSW Business School, UNSW Sydney
- **Dr Damian Clifford**, ANU College of Law and Associate Research Fellow of the Information Law and Policy Centre at the Institute of Advanced Legal Studies (University of London)
- **Dr Andelka Phillips**, Te Piringa Faculty of Law, University of Waikato

3:30 PM *Afternoon Tea*

4:00 PM **SESSION 4**

*Chaired by **Dr Elizabeth Lanyon**, Company Secretary, The Good Shepherd Australia and New Zealand*

- **Associate Professor Samuel Becher**, School of Accounting and Commercial Law, Victoria Business School, Victoria University of Wellington
- **Professor Eileen Webb**, School of Law, University of South Australia
- **Dr Justin Malbon**, Griffith Law School, Griffith University
- **Dr Karen Fairweather**, Faculty of Law, The University of Auckland

5:30 PM **BOOK LAUNCH BY PROFESSOR GAIL PEARSON**
Nottage, Beaton-Wells, Malbon, Paterson
ASEAN Consumer Law Harmonisation and Cooperation (CUP, 2019)

6:30 PM **Roundtable Dinner** *(optional)*

Roundtable Program

9:15 AM **Registration and coffee**

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DR VIVIEN CHEN

Online payday lenders: Trusted friends or debt traps

The recent Senate inquiry into credit and hardship underscored the prevalence of predatory conduct in the payday lending industry. Concerns have arisen over aggressive marketing strategies that channel consumers towards high-cost payday loans, often exacerbating financial stress. Developments in digital technology raise further questions as to the adequacy of existing laws.

The article examines these concerns through an analysis of the marketing strategies of online payday lenders. It investigates the extent of compliance with rules that require lenders to display warnings on websites against the risk of harm from payday loans. The study finds that payday lenders commonly portray themselves as altruistic and responsible lenders who offer fast, convenient cash. Perceptions of payday lenders as trusted 'friends' are strengthened through use of social media and blogs that provide advice on living well on a budget. Marketing strategies and website layouts diminish the effect of mandatory warnings on the risk of harm.

The findings highlight the need for regulatory enforcement of laws aimed at safeguarding consumers against misleading and unconscionable conduct. Emerging challenges from the increasing digitalisation of payday lending and social media marketing raise the need for reforms to address gaps in the regulatory framework.

MS CATHERINE BROWN AND MS NICOLA HOWELL

Robo-debt 'consumers': Is Centrelink a model debt collector?

In recent years, there has been increasing criticism about Centrelink's beleaguered 'robo-debt' system. Commentators have questioned the legality of the debt, the lack of transparency around processes, and the inability of our current judicial and administrative review laws to deal with automated decision-making.

The incentive for automating decisions related to debt collection is clear. Under the Department's *Social Security Guide*, the recovery of debts must be pursued unless the debt is written off, not legally recoverable or it is not economical to pursue. Automated decision making that increases the cost efficiency of debt recovery is consistent with this mandate. Conversely, there is very little direct policy dictating the manner in which Centrelink should pursue the recovery of debts.

However, in the private sector, the ACCC and ASIC Debt Collection Guidelines require debt collectors and creditors to apply a "flexible, fair and realistic" approach to debt collection, and describes particular practices that are discouraged. This paper will therefore consider whether these standards should also be adopted by the Department, and more broadly, whether the Department should adopt a 'model debt collector' approach, including in relation to debt recovery activities that are subject to automated decision-making processes.

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MS VICTORIA STACE

Addressing irresponsible lending in the New Zealand consumer credit market

Will the Credit Contract and Consumer Finance Act (NZ) reform delivered what was promised? The Select Committee hearings have closed (August 2019) and the report of the Committee is expected in September. Some of the reforms are targeted at high cost lenders, where it appears there are the highest levels of irresponsible lending. Banks will be affected by the reforms aimed at reducing the ability to rely on information provided by the borrower, obligations on directors and senior managers, and further down the track, the prescription around what will be required to assess affordability (this will be contained in regulations expected to be released in December). Overall, the reforms proposed can be described minimal. Unless the current Bill is substantially amended following the Select Committee report, there is unlikely to be significant change in the levels of non-compliance with the current principles-based responsible lending obligations.

PROFESSOR ELISE BANT AND PROFESSOR JEANNIE PATERSON

Regulators, enforcement and lessons from the Banking Royal Commission

During the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission), the Australian Securities and Investments Commission (ASIC) came under fire for taking the lighter option of securing enforceable undertakings from businesses in breach of the law, rather than pursuing litigation. This paper considers broader lessons from the Banking Royal Commission for regulators in enforcement. Our research suggests at least four key takeaway points, relating to enforcement strategies, statutory complexity, the difficulties of litigation and clear reporting.

DR SAGI PEARI

Section 67: Conflict of laws, consumer protection and mandatory rules

The paper discusses some key aspects of section 67 of the Australian Consumer Law, its legislation history and the way the courts interpreted it in the *ACCC v Valve* decisions. It argues that following these decisions, Australian consumer law must provide clear criteria for the extra-territoriality determination in the near future. The law must provide a clear scope of situations, which shall trigger section's 67 application and those that will not. Taking into account contemporary cross-border commerce, international tourism and advancing technology, this definition must meet the demands of present-day reality.

Furthermore, it will be argued that by adopting the courts' interpretation of section 67, Australian jurisprudence has entered into unexplored territory of so-called "mandatory rules". While these rules are central to continental thought, they are less central in the United States, Canada and England. Under the courts' understanding of section 67 in *ACCC v Valve*, central provisions of Australian Consumer Law became mandatory rules. The paper discusses the historical origins of the mandatory rules, their developments and the criticism raised against them, from both consumer and business perspectives. These, I argue, need to be taken into consideration for future thinking and developing of the extra-territorial rules of Australian consumer law.

1:00 PM Lunch

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DR KAYLEEN MANWARING

(Mis)Informed consent: Privacy, unfair contracts and unconscionable conduct

Consumers are commonly faced with standard-form agreements in which they must consent to having their personal data collected, shared and used in order to access services such as websites and digital applications.

Currently, the collection, sharing and use of consumer data is regulated under the Commonwealth *Privacy Act* and *Australian Consumer Law* (ACL). The notion of 'consent' is prevalent across both legal frameworks. However, there is a critical difference in how consent is treated.

In most cases, the required 'consent' under the *Privacy Act* is not fully informed and is obtained through non-negotiable standard form agreements subject to unilateral variation and interpretation. In contrast, consumer protection laws may be more effective in protecting consumers against a lack of true informed consent. The ACL's unfair contract terms and unconscionable conduct regimes can be invoked to protect consumers and small businesses in relation to the misuse of consumer data.

This presentation will report on a work-in-progress: iappANZ has funded a report and two workshops (planned for Q1 2020) on informed consent in the context of consumer expectations of commercial dealings with data. The report is expected to recommend potential changes to legislation and practice associated with standard form agreements, and will focus on the use of standard-form agreements by major platform providers.

DR DAMIAN CLIFFORD

The unfair contract terms directive and pre-formulated declarations of data subject consent

The General Data Protection Regulation (GDPR) provides protections for so-called pre-formulated declarations of data subject consent. In Recital 42 of the Regulation reference is made to the Unfair Contract Terms Directive. This creates confusion regarding the overlaps between consent and contract as conditions for lawful processing of personal data in the GDPR and the protections afforded to standard form consumer contracts in the Directive. This presentation will describe the overlaps and analyse the conceptual challenges in the alignment of the respective consumer and data protection policy agendas in light of the recent changes to the EU consumer law acquis.

DR ANDELKA PHILLIPS

Buying your genetic self online – consumer contracts and personal genomics

We are living in the age of Big Data and a world of ever increasing surveillance, where a wide range of data about individuals are being collected, shared, and linked with other datasets by an increasingly diverse range of entities. The amount of tracking to which the ordinary individual citizen is now subject is largely unprecedented and not always well understood by that individual. New products and services that often rely on new and emerging technologies are constantly coming to market, normally with very limited oversight. We are seeing a wide range of new consumer focussed healthcare services, including many innovations in the Quantified Self movement and the Internet of Things. The personal genomics industry (aka direct-to-consumer genetic testing (DTC), or commercial genomics) is one such example.

The DTC industry has taken genetic tests out of the medical clinic and into people's homes, offering testing for a diverse range of purposes, including: health; ancestry; paternity and maternity; athletic ability; child talent; matchmaking; and infidelity. Such services are offered for sale typically through websites, where an individual can purchase a test and they will then be sent a sample collection kit. This kit normally requires the collection of a saliva sample or sometimes a cheek swab, which the individual collects and sends back to the company for processing. The company will then provide test results through a digital platform or email and may also provide other functions through their website, such as social networking. Social networking features of DTC companies often allow individuals to make connections with others. These often centre around connected people with others to whom they may be related. Companies are also often engaging in research utilising consumer data. Consequently, in the DTC context there is much scope for secondary use of data and also for data sharing with a wide range of entities.

Consumers encounter contracts and privacy policies on most websites they visit and very few consumers actually read these documents. This talk will provide an introduction to the world of personal genomics and the issues, which the industry raises for consumer protection law. This will include discussion of the industry's use of contracts to govern their relationships with consumers and argue that a number of terms commonly included in these documents could be challenged on the grounds of unfairness. This talk will draw upon the book *Buying Your Self on the Internet: Wrap Contracts and Personal Genomics*, which has just been published by Edinburgh University Press in July 2019 as the first volume in their Future Law series.

The book and related papers[1] are based on work, which began in 2011. This has involved the compilation of a database about the industry. This includes: information on the location of companies; the types of services they offered; screen shots, electronic contracts; and privacy policies, where these were publicly available. A version of the dataset has now been released and it is publicly available via Zenodo and my website.[2]

3:30 PM Afternoon Tea

[1] Andelka M. Phillips, 'Buying Your Genetic Self Online: Pitfalls and Potential Reforms in DNATesting' (May/June 2019) IEEE Security and Privacy 77-81 doi:10.1109/MSEC.2019.2904128; Andelka M. Phillips, 'Reading the Fine Print When Buying Your Genetic Self Online: Direct-to-Consumer Genetic Testing Terms and Conditions' (2017) New Genetics and Society 36(3) 273-295 http://dx.doi.org/10.1080/14636778.2017.1352468; Andelka M Phillips, 'Only a Click Away – DTC Genetics for Ancestry, Health, Love… and More: A View of the Business and Regulatory Landscape' (2016) 8 Applied & Translational Genomics 16-22 <https://doi.org/10.1016/j.atg.2016.01.001>; and Andelka M Phillips, 'Genomic Privacy and Direct-to-Consumer Genetics – Big Consumer Genetic Data – What's in that Contract?' (presented at GenoPri'15 (The 2nd Workshop on Genome Privacy and Security) published as part of IEEE Conference Proceedings 2015) <https://www.computer.org/csdl/proceedings/spw/2015/9933/00/9933a060.pdf>

[2] Please see Andelka M Phillips, 'Data on Direct-to-Consumer Genetic Testing and DNA testingcompanies' Version 1.3 (Open Access Dataset, Zenodo, February 2018) doi: 10.5281/zenodo.1175799 <https://zenodo.org/record/1183565#.WunK6y-ZNp8

4:00 PM Session 4

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ASSOCIATE PROFESSOR SAMUEL BECHER

Hungry for change: The law and policy of food health labeling

Modern unhealthy diets have been linked to a variety of negative health conditions, including diabetes, ischemic heart disease, stroke, cancer, and the obesity epidemic. Globally, an unhealthy diet is considered to be a factor in one-fifth of deaths. Alas, sixty percent of Australian and New Zealand adults are overweight or obese. This may lead to further negative externalities, imposing significant costs on public health systems.

In light of this reality, regulators around the world have been striving to create markets where consumers are more informed of their nutritional choices. Some regulators have implemented front-of-package labelling systems. Such labelling is designed to provide consumers with an explicit label that communicates the health-related value of foods. This, in turn, is assumed to simplify food choices for consumers and help them make healthier decisions.

Australia and New Zealand adopted the Health Star Rating (HSR) system in 2014. Five years on, the system is being reviewed. The presentation will: (1) introduce the law and policy landscape of food health labelling; (2) examine the problems with, and limitations of, the HSR system; (3) provide a comparative perspective by examining other key food health labelling methods; and (4) discuss legal and policy recommendations.

PROFESSOR EILEEN WEBB

The legal framework affecting restrictive practices in Australian residential aged care – a lack of fitness for purpose

The use of 'restrictive practices' in Australian residential aged care facilities is perplexing and controversial. Furthermore, such conduct is legally ambiguous.

This paper considers whether the ACL can be used to address unsatisfactory provision of aged care services, particularly in relation to 'restrictive practices.' In this context, restrictive practices refer to restraints used to address challenging behaviours exhibited by older people in residential care environments, particularly those experiencing dementia. Such procedures may involve physical, chemical (pharmaceutical), mechanical, or electronic restraints or utilise detention or seclusion. The commonality is that, for the period of the restraint, the older person is deprived of the basic legal and human rights of liberty and dignity. Indeed, the Australian Law Reform Commission has noted that the use of restraints in some circumstances could be regarded as elder abuse while the Aged Care Royal Commission has expressed significant concern regarding the (mis)use of restraints.

DR JUSTIN MALBON

Pre-disclosure for home insurance contracts

This presentation outlines the methodology and outcomes of a study of consumer behaviour when the purchasing home contents insurance (J Malbon and H Oppewal, (In)Effective Disclosure an Experimental Study of Consumers Purchasing Home Contents Insurance, September 2018, https://australiancentre.com.au/publication/ineffectivedisclosure/).

Insurers must provide pre-disclosure information to consumers proposing to take out home contents insurance, namely a product disclosure statement (PDS) and a two-page key fact sheet (KFS).

Empirical studies into the effectiveness of pre-disclosure information invariably assume that the clearer and more comprehensible the pre-disclosure information the more likely consumers will make rational choices. The study tested that assumption.

The study involved 406 participants in a laboratory setting mimicking real world online purchasing environments. Participants were variously invited to choose between two hypothetical insurance products, and in other settings three products. In various settings they could make their choices using a PDS only, a KFS only and a PDS and KFS. The hypothetical products offered were a good, an ok and a bad policy, so rational choice could be tested.

The presentation will outline the outcomes of the study, which adds to our understandings of the effectiveness or otherwise of pre-disclosure information and can inform future policymaking.

DR KAREN FAIRWEATHER

Unfair exception fees: where are we now?

This paper revisits the issue of unfair exception fees in consumer transaction and credit card accounts. It begins with a survey of the fee-charging practices of Australian banks from 2008 to the present. It re-examines the application of existing common law (and equitable) doctrines as well as statutory consumer protection provisions to such fees in the *Andrews-Paciocco* litigation. After turning to the regulation of exception fees in a number of other jurisdictions, it concludes by proposing a legislative solution in Australia.

5.30 PM Book Launch – Professor Gail Pearson

Nottage, Beaton-Wells, Malbon, Paterson

ASEAN Consumer Law Harmonisation and Cooperation

(CUP, 2019)

6.30 PM Dinner (optional – pay your own way)

Roundtable Chairs and Speakers

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Visitor WiFi

1. Ensure WiFi is enabled on your device
2. Select Visitor from available wireless networks
3. Launch a web browser and access any website (on some devices this is done automatically)
4. Your web browser will redirect to the Visitor login screen
5. Enter the Visitor username and password
6. Click Connect/Ok

Visitor Username: **lconsumerandcontracts**
Visitor Password: **@4Zqt&**

Eduroam

Instructions on how to connect your device to Eduroam at The University of Melbourne: **https://wireless.unimelb.edu.au/eduroam.html**

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