

CONTENTS

<i>Foreword by Lord Borrie of Abbots Morton QC</i>	v
<i>Sponsoring Organisations</i>	xv
<i>Editor's Preface</i>	xvii
<i>List of Contributors</i>	xix
<i>Table of Legislation</i>	xxiii
<i>Table of Cases</i>	xxxi

Introduction

Consumer Protection in Financial Services: Putting the Law in Context

Peter Cartwright

1. Introduction	3
2. Consumers, Investors and Citizens	4
3. The Law and Theory of Consumer Protection in Financial Services	7
4. Consumers and Information	10
5. Consumers and Non-market Goals	12
6. Consumer Law, Regulation and Enforcement	15
7. The Scope and Content of this Book	17

PART I THEMES AND TRENDS IN FINANCIAL SERVICES

Chapter One

The European Union, Financial Services, and the Consumer

Anna Mörner

1. Introduction	25
2. The Consumer in the European Union	26
2.1 The early years	26

Table of Contents

2.2	The New Approach	27
3.	Financial Services	30
3.1	Creating an internal market in financial services	31
3.1.1	Freedom to provide services across borders	31
3.1.2	Residual regulatory powers	32
3.1.3	The 'freedom to buy'	34
3.2	Measures specifically aimed at consumers	35
3.2.1	Cross-border credit transfers	35
3.2.2	Consumer credit	37
3.2.3	Distant selling	38
4.	Conclusion	39

Chapter Two

The Ombudsmen and Consumer Protection

Philip Morris and Gavin Little

1.	Background: the Proliferation of Ombudsmen and Problems Posed by Growth of the Ombudsman Technique	43
2.	The Banking Ombudsman Scheme	45
3.	The Building Societies Ombudsman Scheme	53
4.	The IMRO Investment Ombudsman Scheme	63
5.	Conclusions	69
6.	Addendum	70

PART II BANKING

Chapter Three

Bank Confidentiality and the Consumer in the United Kingdom

Andrew Campbell

1.	Introduction	77
2.	The Common Law Duty	80
3.	The Review Committee's Report and the Government's Response	81
4.	The Code of Practice	84
5.	The Four Qualifications to the Duty	87
5.1	'Under compulsion by law'	87
5.2	'Duty to the public to disclose'	90

5.3	'Where the interests of the bank require disclosure'	90
5.4	'Where the disclosure is made by the express or implied consent of the customer'	91
6.	What Information is Covered by the Duty of Confidentiality?	92
7.	Black Information	93
8.	Remedies for Breach of the Duty	94
9.	Conclusion	94

Chapter Four

Unilateral Variation in Banking Contracts: An 'Unfair Term'?

Eva Lomnicka

1.	Introduction	99
2.	Unilateral Variation in General	99
3.	The Unfair Terms in Consumer Contracts Regulations	107
3.1	Keeping outside the grey list	108
3.1.1	General	108
3.1.2	Schedule 3, paras 1(j) and (k)	110
3.1.3	'Valid reason'	112
3.1.4	'Specified in the contract'	113
3.2	The derogations	114
3.2.1	General	114
3.2.2	Schedule 3, para. 2(b): the first derogation	116
3.2.2.1	Scope	116
3.2.2.2	The proviso	118
3.2.3	Schedule 3, para. 2(b): the second derogation	120
4.	Present Practice	122

Chapter Five

Deposit Guarantees and the Individual Bank Customer

Peter Cartwright

1.	Introduction	125
2.	Deposit Guarantees: Definitions and Types of Scheme	125
3.	Deposit Guarantees and Consumer Protection	127
4.	Deposit Guarantees, Bank Safety and Moral Hazard	130
5.	Depositor Protection and Co-Insurance: The European Approach	133
6.	Deposit Guarantees and Informed Consumers	134

Table of Contents

7. The Future of Depositor Protection 135
8. Conclusions 136

PART III FINANCIAL SERVICES AND INVESTMENTS

Chapter Six

Financial Services Regulation: Can History Teach Us Anything?

Sharon Chin

1. Introduction 141
2. A Little History 142
 2.1 The corporatist system of regulation 142
 2.2 Reasons for the demise of the corporatist system 143
 2.3 The 'Big Bang' 144
 2.4 The Gower Committee 146
3. The Financial Services Act 1986 147
 3.1 The regulatory structure 147
 3.2 The scope of the Financial Services Act 1986 148
 3.3 Regulation of investment firms 149
 3.4 Problems with the Financial Services Act 1986 150
4. The Way Forward 153
 4.1 The Financial Services Authority: background and scope 153
 4.2 Policy considerations 156
5. Conclusion 159

Chapter Seven

Pensions and the Consumer: Lessons from Overseas

David O. Harris and Susan P. Jones

1. Introduction 163
2. Regulation 165
3. Distribution 168
4. Product Design 171
5. Redress 173
6. Disclosure 175
7. Public Education 177

Chapter Eight

Some Consumer Problems Relating to the Sale of Long-Term Insurance

Richard J. Bragg

1. The Scope of Insurance	185
2. The Consumer Problem	187
3. The Independent Financial Adviser and the Tied Agent	188
3.1 The Financial Services Act and regulation	188
3.2 The independent financial adviser	189
3.3 The tied agent	190
4. The Perceived Failure of IMRO and the Industry Response	191
5. How Can the Insurers Prevent Problems?	192
6. Sanctions	193
7. Conclusion	194

PART IV INSURANCE

Chapter Nine

Insurance Law Reform for the Benefit of the Consumer: Some Lessons from Australia

John Birds

1. Introduction	199
2. The Need for Law Reform	200
3. The Reform Process in Australia	202
4. Consumer Protection Provisions in the Australian Legislation	202
4.1 Intermediaries	203
4.2 Non-disclosure and misrepresentation	204
4.3 Utmost good faith	205
4.4 Formation issues	206
4.5 Prohibition of contract terms	206
4.6 General restriction on the insurer's right to avoid a claim	207
4.7 Standard cover	208
4.8 Protection in non-prescribed contracts	210
4.9 Other Australian reforms	210
5. Reactions to the Australian Legislation	211

Table of Contents

6. Self-regulation in Australia	213
7. Lessons from Australia	213

Chapter Ten

Consumer Protection in Insurance Contracts

Chris Willett and Norma Hird

1. Introduction	219
2. The Common Law	219
2.1 Risk and price terms, procedural terms and terms giving a discretion	219
2.2 Warranties	221
2.3 Rules	223
3. Legislative Approaches to Fairness	226
4. Self-regulation	229
4.1 The Statements of Practice	229
4.1.1 Warranties	229
4.1.2 Duty of disclosure	230
4.2 Insurance Ombudsman	231
5. The Way Forward	232

PART V CONSUMER CREDIT

Chapter Eleven

Seeking Social Justice for Poor Consumers in Credit Markets

Geraint Howells

1. Introduction	239
2. Low Income Consumers and Markets	239
3. The Particular Problems of the Credit Market for Low Income Consumers	240
4. Doorstep Moneylenders	242
5. High Interest Rates and Consumer Protection	244
6. Challenging Assumptions about the Existing Values of the Market	247
7. Justifications for Intervention	248
7.1 Competition	248

Table of Contents

7.2 Market re-organisation 249

7.3 Alternative institutions 251

8. Solutions 251

8.1 Competition 252

8.2 Prudent lender 255

8.3 Interest rate ceilings 258

8.4 Alternative institutions 260

8.4.1 Credit unions 262

8.4.2 Social fund 263

9. The Consumer Lawyer’s Task 263

Chapter Twelve

Racial and Gender Equality in Markets for Financial Services

Iain Ramsay and Toni Williams

1. Introduction 267

2. Freedom from Contract: Exclusion and Exploitation 270

3. Responses to Discrimination in Access to Credit and Capital:
Human Rights Law 271

4. Redlining 274

5. Community Reinvestment and Beyond 276

6. Conclusion 278

Index 281