## Contents

|       |      | the Third Edition   | V     |
|-------|------|---|-------|
|       |      | dgements  | vii   |
| Table |      |   | XV    |
| Table | of L | egislation  | xxiii |
| 1     | SE   | TTING THE CONTEXT   | 1     |
|       | 1.   | The development of consumer law and policy  | 1     |
|       | 2.   | Consumer law, neo-liberalism and the social market  | 7     |
|       | 3.   | Consumer influence in contemporary society: the politics of consumer  | 16.7  |
|       |      | protection  | 14    |
|       |      | 3.1 Explaining the existence of patterns of consumer regulation   | 15    |
|       | 4.   | Markets, consumption and ideology   | 24    |
|       | 5.   | The regional and global dimension   | 29    |
|       |      | 5.1 European consumer law and policy: establishing the ground   |       |
|       |      | rules of the internal market  | 29    |
|       |      | 5.2 Conceptions of the consumer in EU law   | 33    |
|       |      | 5.3 The competence of the EU in consumer policy   | 34    |
|       |      | 5.4 The move to maximal harmonisation; framework directives   | 36    |
|       | 6.   | The Secretarian Secretarian Control of the Secretarian Secretaria | 38    |
|       |      |   |       |
| 2     | RA   | TIONALES FOR CONSUMER LAW AND POLICY  | 41    |
|       | 1.10 | Neo-classical rationales: market failure  | 42    |
|       |      | 1.1 Assumptions of market failure analysis  | 47    |
|       | 2.   | Information failures in consumer markets  | 49    |
|       |      | 2.1 Market structure and information failures   | 54    |
|       | 3.   | The new policy paradigm: behavioural economics  | 56    |
|       |      | 3.1 Hyperbolic discounting  | 57    |
|       |      | 3.2 Over-optimism   | 58    |
|       |      | 3.3 Framing effects and status quo bias   | 58    |
|       |      | 3.4 Availability and anchoring  | 59    |
|       |      | 3.5 Information overload  | 59    |
|       |      | 3.6 Fairness  | 60    |
|       |      | 3.7 Emotions and the economy  | 60    |
|       |      | 3.8 Behavioural economics and regulators  | 61    |
|       |      | 3.9 Implications of behavioural economics for consumer law and policy   | 61    |
|       |      |   |       |

|   | 4.<br>5. | 1 0 0  | 67<br>70 |
|---|----------|--|----------|
|   | 5.       | 5.1 Assuring consumer access to markets at reasonable prices: social   | 70       |
|   |          |  | 73       |
|   |          |  | 77       |
|   |          | 5 11   | 79       |
|   | 6.       |  | 81       |
|   | 7.       |  | 82       |
|   |          | T service to the serv |          |
| 3 |          | AMEWORKS AND FORMS OF REGULATION OF  |          |
|   | CO       | NSUMER MARKETS   | 85       |
|   | 1.       | The new regulation   | 85       |
|   | 2.       | e  | 90       |
|   |          |  | 92       |
|   |          |  | 93       |
|   |          | 2.3 The consumer as a regulatory subject   | 95       |
|   |          | 2.4 Transnational consumer regulation  | 96       |
|   | 3.       | Techniques of regulation   | 98       |
|   |          | 3.1 Information remedies   | 98       |
|   |          | E .  | 03       |
|   |          | 5 61   | 03       |
|   |          |  | 04       |
|   |          |  | 05       |
|   |          |  | 05       |
|   | 4.       |  | 05       |
|   | 5.       |  | 05       |
|   |          | 5.1 The balance of public and private enforcement of consumer law 1  |          |
|   |          |  | 09       |
|   | 6.       | · ·  | 13       |
|   |          | 8 8  | 16       |
|   |          |  | 17       |
|   |          |  | 19       |
|   |          | 6.3 Enhancing reputational devices: trustmarks and reputation  | .19      |
|   |          | 8 1  | 22       |
|   |          |  | 24       |
|   |          | o. i omine dispute resolution  | 21       |
|   |          | E RECLU ATION OF RECEPTIVE AND INVENT  |          |
| 4 |          | E REGULATION OF DECEPTIVE AND UNFAIR   |          |
|   | CO       | MMERCIAL PRACTICES 11  | 27       |
|   | 1.       | Constituting the market 1  | 27       |
|   |          |  | 27       |
|   |          |  | 30       |
|   | 2.       |  | 36       |

|   |     | 2.1 Puffing and its limits  | 137 |
|---|-----|---|-----|
|   |     | 2.2 Theories of recovery for manufacturers' advertising claims                    | 139 |
|   | 3.  | Unfair Commercial Practices Regulation  | 151 |
|   |     | 3.1 Institutional framework of trade practices regulation                         | 154 |
|   | 4.  | A new start? The EU Unfair Commercial Practices Directive and                     |     |
|   |     | its implementation  | 156 |
|   |     | 4.1 The rationale for the UCPD  | 156 |
|   |     | 4.2 Maximal harmonisation and the UCPD  | 160 |
|   |     | 4.3 The scope of the Directive  | 163 |
|   |     | 4.4 The role of the general clause  | 164 |
|   | 5.  | Implementation: the CPUT Regulations 2008   | 165 |
|   |     | 5.1 Interpreting the regulations  | 166 |
|   |     | 5.2 The standard of protection: the average consumer and the                      |     |
|   |     | transactional decision test under the UCPD  | 166 |
|   | 6.  | Judicial interpretation of the average consumer test                              | 169 |
|   |     | 6.1 The vulnerable consumer   | 174 |
|   |     | 6.2 Material omissions  | 177 |
|   |     | 6.3 What is at stake in the average consumer test?                                |     |
|   |     | A comparative note  | 178 |
|   |     | 6.4 Disclaimers, 'car clocking' and the CPUT regulations                          | 181 |
|   | _   | 6.5 Material omissions and invitations to purchase                                | 183 |
|   | 7.  | Misleading pricing: the search for market fairness                                | 188 |
|   |     | 7.1 Why regulate misleading price claims?   | 188 |
|   | 0   | 7.2 The regulation of hi-lo pricing   | 191 |
|   | 8.  | Aggressive commercial practices   | 195 |
|   | 9.  | Prohibited practices: Schedule 1  | 198 |
|   | 10. | 'Cooling-off' periods in consumer transactions: a right to withdraw               | 100 |
|   |     | in consumer contracts?  | 199 |
|   |     | 10.1 Doorstep selling   | 200 |
|   |     | 10.2 Distance selling and cooling-off   | 206 |
|   |     | 10.3 Timeshares and cooling-off   | 208 |
|   |     | 10.4 Cooling-off periods and stimulating competitive markets: extended warranties | 208 |
|   |     | 10.5 Rethinking cooling-off periods: a right to withdraw?                         | 208 |
|   |     | 10.5 Retiniking cooling-on periods, a right to withdraw?                          | 209 |
|   |     |   |     |
| 5 | IM  | PLEMENTATION AND ENFORCEMENT OF UNFAIR  |     |
|   | CO  | MMERCIAL PRACTICES LAW  | 213 |
|   | 1.  | The structure of public enforcement of unfair commercial practices                |     |
|   | 1.  | The structure of public enforcement of unfair commercial practices law in the UK  | 214 |
|   | 2.  | Models of enforcement   | 214 |
|   | 3.  | Methods of public enforcement   | 220 |
|   | ٥.  | 3.1 The old workhorse: the regulatory offence                                     | 221 |
|   | 4.  | Administrative remedies   | 242 |
|   | 7.  | 4.1 Enforcement orders  | 242 |
|   |     | 4.2 Administrative penalties  | 252 |
|   |     | 1.2 Penantistative penantes   | 232 |

|   |     | 4.5 The emorceable undertaking                                      | 253 |
|---|-----|---|-----|
|   |     | 4.4 Adverse publicity: naming and shaming                           | 254 |
|   |     | 4.5 Public power to obtain compensation and redress                 | 255 |
|   |     | 4.6 Restorative justice orders                                      | 256 |
|   | 5.  | The balance of public and private enforcement of unfair trading law | 256 |
|   | 6.  | Class and public-interest actions                                   | 262 |
|   |     | 6.1 Canadian experience of consumer class actions                   | 271 |
|   | 7.  | The role of self-regulatory organisations in enforcing unfair       | 2/1 |
|   | , . | commercial practices law  | 274 |
|   |     | 7.1 Mandated self-regulation and co-regulation: the Advertising     | 212 |
|   |     |   | 27/ |
|   |     | Standards Authority   | 276 |
|   | 0   | 7.2 Codes of practice   | 288 |
|   | 8.  | Cross-border enforcement of unfair commercial practices law         | 292 |
| 6 | ST  | ANDARD FORM CONSUMER CONTRACTS AND THE                              |     |
|   |     | ARCH FOR FAIRNESS   | 297 |
|   | 1.  | Rationales for regulation   | 297 |
|   |     | 1.1 Inequality of bargaining power                                  | 297 |
|   |     | 1.2 Neo-classical economic analysis and standard-form contracts     | 300 |
|   |     | 1.3 Behavioural economics and standard-form contracts               | 302 |
|   |     | 1.4 Understanding the role of standard-form contracts in corporate  | 302 |
|   |     | relationships with consumers  | 303 |
|   | 2.  | Regulatory techniques   | 305 |
|   | ۷.  | 2.1 Judicial control  |     |
|   | 3.  |   | 305 |
|   | 3.  | The OFT: developing an approach to unfair contract terms regulation |     |
|   |     | negotiation, litigation and 'high-impact cases'                     | 317 |
|   |     | 3.1 Phase 1: change through negotiation                             | 320 |
|   |     | 3.2 Assessing the initial performance of the OFT                    | 326 |
|   | 4.  | A new approach? Greater use of test and high-impact cases           | 330 |
|   |     | 4.1 Threatening action: credit card penalty charges                 | 339 |
|   |     | 4.2 Bank charges  | 340 |
|   |     | 4.3 The OFT as bargaining agent for consumers                       | 357 |
| 7 | DE  | CHI ATION OF CONCLINED CREDIT MADVETS                               | 261 |
| 7 | KE  | GULATION OF CONSUMER CREDIT MARKETS                                 | 361 |
|   | 1.  | The role of consumer credit in the economy                          | 362 |
|   |     | 1.1 Consumer credit in the UK                                       | 364 |
|   |     | 1.2 Sub-prime and high-cost credit                                  | 367 |
|   |     | 1.3 Financial exclusion   | 373 |
|   | 2.  | The costs and benefits of consumer credit                           | 375 |
|   | 3.  | Rationales for regulation of consumer credit markets                | 376 |
|   | 4.  | The Consumer Credit Act 1974  | 380 |
|   |     | 4.1 Institutional structure of credit regulation                    | 382 |
|   | 5.  |   |     |
|   | ٥.  | Ex ante regulation: a safety model for credit regulation?           | 385 |
|   |     | 5.1 Ex ante regulation: the evolving experience of credit licensing | 386 |

xiii

|   |     | 5.2   | FSA approaches to regulation: the 'treating customers fairly'          | 202        |
|---|-----|-------|--|------------|
|   | 6.  | Emn   | initiative owering the demand side of the market? Information remedies | 393        |
|   | 0.  | 6.1   | Required disclosures: truth in lending                                 | 410        |
|   |     | 6.2   | Post-contractual information   | 410        |
|   |     | 6.3   | Formalities and the sanction of nullity: attacking agreements          | 416        |
|   |     | 0.5   | through heightened formalism   | 418        |
|   |     | 6.4   | Early settlement and promoting competition                             | 419        |
|   |     | 6.5   | Reducing creditor costs: credit information, credit scoring and        |            |
|   | 7   | ъ     | credit bureaux   | 420        |
|   | 7.  |       | onsibilising the consumer: financial literacy                          | 424        |
|   | 8.  | -     | onsible lending  | 426        |
|   | 9.  |       | llating contract terms and credit relationships: relational            |            |
|   |     |       | racting  | 432        |
|   | 10. | 9.1   | Controlling discretion and reacting to changed circumstance            | 432        |
|   | 10. |       | llation of the price of credit: usury                                  | 437        |
|   | 11. |       | Judicial control of credit terms: unfair credit relationships          | 440        |
|   | 11. |       | udsmen: The Financial Ombudsman Service                                | 448        |
|   | 12. |       | Ombudsmen, the rule of law and norm development                        | 454        |
|   | 12. |       | -indebtedness and regulation of credit default                         | 467        |
|   |     |       | Creditors' remedies and consumer protection The regulation of default  | 469        |
|   |     |       | Controls on repossession.  | 470        |
|   | 13. | Postr | ructuring and writing down consumer debts                              | 481        |
|   | 13. |       | Individual voluntary arrangements                                      | 490        |
|   |     |       | Administration orders  | 491        |
|   |     |       | Bankruptcy as a consumer remedy  | 492        |
|   |     |       | The role of bankruptcy in contemporary society                         | 493<br>495 |
|   | 14. |       | utional alternatives: expanding choice and access to                   | 493        |
|   | 17. |       | dable credit   | 498        |
|   |     |       | Credit unions  | 498        |
|   |     |       | The Social Fund  | 501        |
|   |     |       | Harnessing the resources of mainstream finance                         | 503        |
|   |     | 17.5  | Trainessing the resources of mainstream imance                         | 303        |
| 8 | QU. | ALIT  | TY REGULATION AND POST-PURCHASE QUALITY                                | 7          |
|   | PRO | OBLE  | EMS  | 505        |
|   | 1.  | Sourc | ces of quality problems: an economic perspective                       | 505        |
|   |     | 1.1   | The repeat-purchase mechanism, reputation and product quality          | 507        |
|   |     | 1.2   | Complaints, legal rights and problem solving                           | 508        |
|   | 2.  | Cons  | umer product warranties  | 512        |
|   | 3.  |       | te liability law   | 517        |
|   |     | 3.1   | Correspondence with description  | 519        |
|   |     | 3.2   | Satisfactory quality and fitness for particular purpose                | 521        |
|   |     | 3.3   | Judicial standards in relation to high-value consumer                  |            |
|   |     |       | products—automobiles and yachts  | 532        |
|   |     |       |  |            |

## CONTENTS

|        |       | 3.4 The structure of consumer remedies: designed for adjudication   |     |
|--------|-------|---|-----|
|        |       | or bargaining?  | 542 |
|        |       | 3.5 Rejection rights outside the Sale of Goods Act  | 547 |
|        |       | 3.6 Manufacturers' legal liability to consumers for economic loss   | 549 |
|        |       | 3.7 Reducing consumer costs in quality disputes? Lemon laws   | 553 |
|        | 4.    | Harnessing market gate-keepers for redress:   |     |
|        |       | connected-lenders' liability  | 553 |
|        | 5.    | The regulation of product market quality: the case of used cars   | 563 |
|        | 6.    | Services  | 566 |
|        |       | 6.1 Civil liability and service quality   | 567 |
|        |       | 6.2 Service performance and consumer bargaining power   | 571 |
|        |       | 6.3 Consumer damages  | 573 |
|        | 7.    | Car servicing   | 576 |
| 9      | PRO   | DDUCT SAFETY REGULATION   | 581 |
|        | 1.    | Rationales and objectives: defining an acceptable social risk   | 582 |
|        |       | 1.1 Identification of product risks   | 588 |
|        | 2.    | The development of consumer product safety regulation in the United   |     |
|        |       | Kingdom   | 588 |
|        |       | 2.1 Product safety standards  | 590 |
|        | 3.    | Consumer safety and transnational market governance within the EU 3.1 The EU 'new approach' to standards and consumer product | 593 |
|        |       | safety standardisation: free movement in a safe market  | 593 |
|        |       | 3.2 Representation of consumer interests on standardisation bodies  | 600 |
|        | 4.    | Post-marketing surveillance and the enforcement of product safety   |     |
|        |       | standards   | 605 |
|        | 5.    | Private liability law: product liability  | 609 |
|        |       | 5.1 Liability under the Consumer Protection Act 1987  | 610 |
| Refere | oncos |   | 627 |
| Index  | iices |   | 657 |
| LILICA |       |   | 001 |