



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BusLaw/LitLaw: GUIb1223854

16 December 2016

Australian Consumer Law Review
Consumer Affairs Australia and New Zealand ("CAANZ")
The Treasury
Langton Crescent
PARKES ACT 2600

Online: www.consumerlaw.gov.au

Dear Sir/Madam,

Australian Consumer Law Review – Interim Report

The Law Society of NSW welcomes the opportunity to comment on the Australian Consumer Law Review – Interim Report.

The Law Society's responses to the specific questions in the Interim Report are set out in the attached table.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, by email at liza.booth@lawsociety.com.au or phone (02) 9926 0202.

Yours faithfully,

Gary Ulman
President

ACL Interim Report Submission

Submission by the Law Society of NSW

Question	Submission
1.2 Scope and coverage of the ACL (pages 12-33)	
1.2.3 Fundraising activities and the ACL 1. Would further regulator guidance on the ACL's application to the activities of charities, not for profits and fundraisers help raise consumer awareness and provide greater clarity to the sector? <ul style="list-style-type: none">▪ If so, what should be included in this guidance?	Further regulator guidance on the ACL's application would assist consumers and provide greater clarity to this sector. Charities and not-for-profits are increasingly supplying goods and services to consumers. The Law Society submits that there should not be a distinction between charities and not-for-profits and other businesses when they are engaging in "trade or commerce". This is necessary to achieve the overarching objectives of the ACL, which emphasises confident consumers, effective competition and fair trading.

Question	Submission
<p>2. Are there currently any regulatory gaps with regard to consumer protection and fundraising activities? If so:</p> <ul style="list-style-type: none"> ▪ What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention? ▪ Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach? ▪ Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed? <p>3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?</p>	<p>The Law Society suggests that further investigation is warranted. This matter could be referred to the Australian Securities and Investments Commission ("ASIC") for further consideration into the potential for consolidation of regulation into primary fund-raising legislation, as distinct from the ACL and state and territory based legislation.</p> <p>Alternatively, the Law Society suggests that this issue could be referred to the Australian Charities and Not-for-Profits Commission. ASIC and ACL regulators could provide input on the issues identified.</p> <p>If regulation was consolidated into either primary fundraising legislation or the ACL, it may be necessary to repeal other existing state based legislation to avoid duplication.</p>
<p>1.2.4 Who is protected under the ACL?</p> <p>4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?</p>	<p>The Law Society considers that the threshold of \$40,000 should be increased to \$80,000 or \$100,000, noting that there has not been an increase since 1986. The new threshold amount should be indexed in line with the CPI.</p>
<p>5. What goods or services would be captured that are not already?</p> <p>1.2.5 Exemptions under the ACL</p>	<p>To provide one example, equipment installed in people's homes such as lifts, to assist the mobility of elderly or physically disabled consumers.</p>
<p>6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?</p>	<p>The Law Society is not aware of any other priority exemptions that need to be considered.</p>

Question	Submission
<p>1.2.6 Interaction between the ACL and ASIC Act</p>	
<p>7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?</p>	<p>The Law Society considers that the <i>Australian Securities and Investments Commission Act 2001</i> ("ASIC Act") should be amended to explicitly apply its consumer protections to financial products.</p> <p>The Law Society notes that the Commonwealth Government is considering this option in the media release of the Minister for Revenue Financial Services Media Release of 13 December 2016 calling for a review as a result of the Financial System Inquiry which includes granting "a product intervention power for ASIC, which would enable the regulator to intervene where a product is identified as creating a risk of significant consumer detriment."</p>
<p>8. What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?</p>	<p>The Law Society submits that financial products disclosures need to be written in plain English to make it clear what the products do and do not cover. However, this is likely to be addressed by ASIC in light of the current reviews of the financial services sector.</p>
<p>9. Are there any unintended consequences, risks or challenges in doing so?</p>	
<p>2.1 Consumer guarantees (pages 43-69)</p>	
<p>2.1.2 'Acceptable quality' for goods</p>	
<p>10. Could the issues about the durability of goods be addressed through further guidance and information?</p>	<p>The Law Society agrees that issues about the durability of goods should be addressed through further guidance and information; particularly enhanced disclosure on the expected lifetime of goods.</p>
<p>11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?</p>	<p>The Law Society submits that further guidance is required; particularly, with businesses, to confirm their responsibilities for responding to consumers' complaints in relation to the durability of goods and to assist with the returns process.</p> <p>There is an increasing fragmentation of supply chains for the</p>

Question	Submission
	<p>manufacture and distribution of goods. Suppliers of goods need to ensure that consumers are getting what they have paid for.</p> <p>The Law Society suggests that this principle is consistent with the supplier's obligations to engage in ethical sourcing and ensuring the integrity of their supply chains for human rights and other ethical purposes.</p> <p>As a matter of principle, any good which requires the consumer to pay a delivery fee should have a free returns policy as part of the rejection process.</p> <p>If this is not acceptable, then the test for "significant cost" should be linked to the price of the good.</p>
<p>12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?</p>	<p>The Law Society suggests that, in addition to the status quo and to ensure a high level of flexibility, the ACL adopt a provision that permits returns within 30 days after receipt of the good where it does not meet the contractual terms. This would be equivalent to s 22 of the <i>Consumer Rights Act 2015</i> (UK).</p>
<p>13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?</p>	<p>Both manufacturers and suppliers should clearly state what the design life or expected life of a good is; and disclose that information to consumers.</p> <p>The design life is one of the standard specifications in the manufacture of most products and this information should be made available to consumers.</p> <p>Some manufacturers use durability as a selling point, as it is sign of the quality of their product.</p>
<p>Non-disclosure agreements</p>	<p>The Law Society acknowledges the issues raised in the submissions made by consumer protection groups, noted in the Interim Report, on the use of non-disclosure agreements when consumers obtain a settlement or refund for the failure of a particular product.</p>

Question	Submission
	<p>It is a primary purpose of the ACL to provide protection to consumers, and one of the best ways for consumers to make an informed assessment is to obtain as much information as possible about the good or service as possible. The use of non-disclosure agreements distorts the information available and places the wider community at a greater disadvantage from being unable to make an informed assessment of particular goods or services.</p> <p>The Law Society agrees with the CHOICE recommendation¹ that the ACL regulators should ban non-disclosure agreements for settlements between consumers and traders where those terms offer no more than the existing ACL rights.</p>
<p>2.1.4 Lack of clarity about 'major failures' & 2.1.5 Industry-specific concerns</p> <p>14. Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?</p>	<p>The Law Society notes the recommendations of the Legal Aid Commissions of NSW and Queensland in the Interim Report and agrees with their recommendations for industry-specific laws for motor vehicles².</p> <p>This is appropriate given the time and cost to the consumer associated with having motor vehicles unavailable for extended periods of time.</p>
<p>15. What kinds of industry specific compliance and education activities should be prioritised in the context of finite resources?</p>	<p>The Law Society suggests that the ACL regulators continue with the level of guidance, including industry specific guidance, that it has adopted for other specific areas.</p> <p>In particular, the ACL regulators should use social media and online platforms as much as possible to educate and to disseminate information on repairs, replacement and refunds.</p>

¹ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Interim Report* 51.

² Ibid 48

Question	Submission
<p>16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:</p> <ul style="list-style-type: none"> ▪ What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non major failures' or type of safety defect that would trigger a 'major failure'? ▪ Are there any relevant exceptions or qualifications? 	<p>The Law Society supports Option 1 which will clarify the law on what can trigger a "major failure".³</p> <p>The Law Society also supports the recommendations of the Legal Aid Commissions of NSW and Queensland in the Interim Report in respect of a threshold test for major failures⁴. The Law Society submits that these principles should be adopted for "major failures" and apply across all industries.</p> <p>The Law Society also notes that it is highly unlikely that the courts will have an opportunity to develop case law to determine these definitions, as consumers are unlikely to bring proceedings, given the difficulties individuals and small businesses face in undertaking private legal actions.</p>
<p>17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?</p> <p>18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?</p>	<p>We cannot comment on these costs. We note, however, that businesses differ significantly and have different competitive and other cost pressures that will have different cost bases.</p> <p>In our members' experience, any additional costs borne by a business or industry are usually passed on to consumers either directly, via insurance or through government subsidy. However, this should not deter law makers from changing legislation to improve the quality of the goods, services and experiences that consumers receive by requiring businesses to change their business models to address the concerns and needs of consumers.</p>

³ Ibid 45

⁴ Ibid 58

Question	Submission
<p>2.1.6 Disclosure of rights under the ACL</p> <p>19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:</p> <ul style="list-style-type: none"> ▪ how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees? ▪ would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced? ▪ would it require any transitional arrangements and, if so, what are the preferred arrangements and why? 	<p>The Law Society submits that mandatory text for consumer guarantee rights is clear and has been consistently used since 1974. Changes to the mandatory text may result in a significant policy change and would require a major education campaign.</p>
<p>20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?</p>	<p>The Law Society submits that the mandatory text requirement should remain in use at the point of sale and in all the channels used by businesses to respond to consumers' queries.</p> <p>Businesses and the ACL regulators increasingly use social media and telecommunications platforms and technology to communicate with consumers. The Law Society recommends that an ongoing multi-channel approach be adopted in all communications with consumers.</p>
<p>21. Is there a need for greater regulation of extended warranties? If so:</p> <ul style="list-style-type: none"> ▪ is enhanced disclosure adequate or is more required? ▪ what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers? 	<p>The Law Society notes the problems associated with the "up-selling" of extended warranties, which may provide little, if any, benefits over and above the ACL consumer warranties.</p> <p>The practice of selling extended warranties appears analogous to the mis-selling of financial products in the financial services industry, which has recently received the attention of regulators in Australia and globally.</p> <p>The Law Society submits that the sale of extended warranties should be subject to provisions analogous to the extended warranty provisions in New Zealand, referred to at page 68 of the Interim Report. In addition, a cooling off period should apply.</p>

Question	Submission
<ul style="list-style-type: none"> ▪ what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)? 	<p>The Law Society is not able to comment on this issue.</p>
<p>22. What guidance and transition arrangements would businesses need?</p>	<p>The Law Society supports direct comparison between what is offered and the ACL provisions and a cooling off period under proposed Option 3.</p> <p>Businesses that are selling extended warranties should be able to remove them from the point of sale within a 30 day time period, unless these requirements are implemented.</p> <p>The Law Society recommends that the ACL regulators provide information to traders who sell these products on the existing ACL consumer warranties and encourage those businesses to disclose them at the point of sale.</p>
<p>23. Are there any unintended consequences, risks, or challenges that need to be considered?</p>	<p>The Law Society is not aware of any unintended consequences, risks or challenges.</p>
<p>24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?</p>	<p>The Law Society submits that in many cases it is not clear what benefit extended warranties provide to consumers and therefore what additional choice or flexibility they offer. The Law Society recommends that consideration be given to banning the sale of extended warranties, unless the disclosure requirements discussed above are implemented, together with a cooling off period.</p>

Question	Submission
2.2 Product safety (pages 70-104)	
2.2.3 General safety provision	
25. What are the key principles for an effective product safety regime?	<p>The Law Society refers to its previous submission on this issue, recommending that the ACL be amended to include a prohibition against unsafe goods equivalent to the European <i>General Product Safety Directive 2001/95/EC</i>.</p> <p>The Law Society agrees with the principles for an effective product safety regime set out in Table 3 on pages 80 and 81 of the Interim Report.</p>
26. Would a general safety provision in the ACL better meet those principles? Why, or why not?	<p>As the Law Society noted in its previous submission on this issue, the inclusion of a general safety obligation places the onus on to the supplier of goods to ensure that its products are safe. This is consistent with other underlying principles in the ACL, for example, not to engage in misleading and deceptive conduct. It also places the risk on the entities most able to bear it.</p>
27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime? <ul style="list-style-type: none"> ▪ What costs would it impose on business, for example, what processes or practices would need to be changed? ▪ What impacts would it have on safety outcomes for consumers? ▪ What, if any, transitional arrangements would be required for businesses? ▪ Are there any unintended consequences of a general safety provision? 	<p>The Law Society submits that many businesses are starting to comply with these principles already as a result of having to comply in other jurisdictions such as the European Economic Area and also as part of ethical sourcing and testing the integrity of their supply chains. Reputational damage is much harder for businesses to contain globally as a result of the widespread use of social media.</p> <p>The new product safety regulatory regime should be coupled with the removal of obligations for consumers to enter into non-disclosure agreements.</p>

Question	Submission
<p>28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?</p>	<p>The Law Society refers to its previous submission on this issue recommending that the ACL be amended to include a prohibition against unsafe goods equivalent to the European <i>General Product Safety Directive 2001/95/EC</i> and the UK product safety regime.</p>
<p>2.2.8 Performance-based approach to compliance with standards</p> <p>29. Should a 'performance based' approach to product safety standards be introduced?</p> <ul style="list-style-type: none"> ▪ What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance based' approach have for consumers? ▪ Are there any unintended consequences, and how could these be addressed? 	<p>The Law Society notes that it would be inconsistent with its other recommendations on changes to Australia's product safety regime to recommend a "performance based" approach to product safety standards. We therefore do not recommend that one be adopted.</p>
<p>30. How could the approach be designed? For example:</p> <ul style="list-style-type: none"> ▪ Are there any current domestic or overseas models, or features of models, that should be considered? ▪ How would it interact with other elements of the current regime, or with a general safety provision? ▪ What, if any, transitional arrangements would be required for businesses? 	<p>The Law Society does not support such an approach.</p>

Question	Submission
<p>2.2.10 Mandatory reporting requirements</p> <p>31. Should the mandatory reporting triggered be clarified? If so:</p> <ul style="list-style-type: none"> ▪ How should this be achieved? ▪ What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs? ▪ How would this affect the information that is available to regulators, and product safety outcomes for consumers? <p>32. Should the current timeframe for making a mandatory report be extended? If so:</p> <ul style="list-style-type: none"> ▪ What time period should apply? ▪ Should it be accompanied by other requirements, for example, immediate notification? ▪ What changes to businesses processes would be needed, and what would be the impact on compliance costs? ▪ What, if any, transitional arrangements would be needed? ▪ Are there any unintended consequences, and how could these be addressed? <p>2.2.12 Product bans and recalls</p> <p>33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:</p> <ul style="list-style-type: none"> ▪ How should a voluntary recall be defined? ▪ What factors or criteria should be included? 	<p>The Law Society submits that the CAANZ proposal to provide additional guidance on the meaning of 'serious injury or illness' and 'use or foreseeable misuse' should provide sufficient clarification on the mandatory reporting obligation⁵.</p> <p>The Law Society recommends that the ACL mandatory reporting timeframe and framework be amended to mirror the <i>Therapeutic Goods Act 1989</i> (Cth) mandatory reporting timeframe and framework.</p> <p>This would include increasing the mandatory reporting timeframe to 15 days with a requirement to immediately notify the ACL regulators on becoming aware of the mandatory reporting trigger.</p> <p>The changes to business processes should be minimal as businesses should have analogous obligations to report for their corporate governance purposes and to their insurers.</p> <p>The Law Society recommends that a statutory definition of voluntary recall be introduced as proposed in Option 3a on page 98 of the Interim Report.</p> <p>As to the other factors or criteria to be included, the communications strategy to be adopted by a business which has a product the subject of a recall, should mirror its "go to market" communication strategy for the product concerned; that is, the sale channels adopted by the supplier of</p>

⁵ Ibid 93.

Question	Submission
	<p>the product whether on-line, via social media, in-store or in traditional media. Where the product has been sold at a one-off event such as a fair, the communications strategy adopted should be the one used to advertise and promote the one-off event.</p>
<p>34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?</p>	<p>The Law Society suggests that the penalty for a failure to notify a recall should be increased. We refer to our comments later in this submission on the penalty thresholds that should be reviewed across the ACL.</p>
<p>35. Should current processes for implementing product bans and recalls be streamlined? If so:</p> <ul style="list-style-type: none"> ▪ How should they be streamlined? ▪ What would be the associated benefits and costs? ▪ Are there any unintended consequences, risks or challenges that need to be considered? 	<p>The Law Society recommends that the current processes for implementing product bans or recalls should be streamlined by using the MOU between regulators to nominate one regulator to take the lead on a particular product ban or recall. This regulator's actions would then apply across all jurisdictions in Australia.</p> <p>The associated benefits and costs would be clarity of the process and procedure and reduction in delay in having different or conflicting bans or recall processes apply in different jurisdictions in Australia.</p> <p>It would also provide protection to consumers who have not yet used the product and limit the extent to which suppliers could engage in forum shopping or dumping of products in jurisdictions not subject to the product ban or recall.</p>
<p>2.2.13 Public information about unsafe products</p>	
<p>36. Is there scope to improve the quality of information available to consumers on safety risks? If so:</p> <ul style="list-style-type: none"> ▪ What are the benefits of increased information, and what costs, risks or challenges need to be considered? ▪ What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised? ▪ How could this be achieved? For example, in what format should information be provided? 	<p>Yes, consumers are clearly interested in information about goods and services.</p> <p>Information and access to it is increasing via on-line forums such as websites (for example TripAdvisor), Facebook pages of both brands and groups (community, professional and special interest), Twitter and other forms of social media.</p> <p>The risks and challenges to be considered are the accuracy of the information and the remedies available to businesses if that information is</p>

Question	Submission
	<p>inaccurate.</p> <p>The most important information to consumers in a product safety context is if the product is not safe. This should be reported on an exception basis so that it is clear which products are unsafe and why.</p> <p>In terms of achieving the disclosure of information, the regulators could disclose the information on an “unsafe products” website by category and name or via an App. The content of the information does not need to be extensive, just the particulars of the product and that it is unsafe.</p>
<p>2.3 Unconscionable conduct and unfair trading (pages 105-116)</p>	
<p>2.3.2 Are the provisions working effectively?</p>	
<p>37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?</p>	<p>The Law Society refers to its previous submission on this issue and submits that the unconscionable conduct and unfair trading provisions are working effectively.</p> <p>Allowing the law on unconscionable conduct to develop is an appropriate and proportionate response to the issues raised, and to future issues that may arise.</p>
<p>38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?</p>	<p>The Law Society refers to its answer to question 37.</p>

Question	Submission
<p>2.3.3 Unconscionable conduct and publicly listed companies</p>	
<p>39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?</p>	<p>The Law Society considers that the exclusion should continue to apply. Given the Australian Securities Exchange ("ASX") continuous disclosure regime, ASX listed businesses should have corporate governance and other internal processes and procedures to protect themselves in a manner which is of a higher level of sophistication than consumers and small businesses.</p>
<p>40. Should the unconscionable conduct provisions be extended to publicly listed companies?</p> <ul style="list-style-type: none"> ▪ What are the benefits for publicly listed companies? ▪ What changes would other business need to make to their existing business practices and what are the associated costs? ▪ Should the protections be extended to all publicly listed companies, or are some exceptions appropriate? ▪ Are there any unintended consequences, and how could these be addressed? 	<p>The Law Society refers to its answer to question 39.</p>
<p>2.3.4 Unfair trading</p>	
<p>41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?</p>	<p>The Law Society refers to its previous submission on this issue and proposes that no further unfair trading prohibition needs to be introduced to the ACL.</p>
<p>42. Is there further evidence of a gap in the current law that justifies an economy wide approach?</p>	<p>The Law Society refers to its answer to question 41.</p>

Question	Submission
<p>2.4 Unfair contract terms (pages 117-132)</p>	
<p>2.4.2 Unfair terms in insurance contracts</p> <p>43. Should the ASIC Act's unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:</p> <ul style="list-style-type: none"> ▪ How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate? Would any changes to the definition of 'main subject matter' be required? Would the same types of terms be considered 'unfair'? ▪ What this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders? ▪ What would be the compliance costs of changing insurance contracts, and how would these affect consumers? ▪ What, if any, transitional arrangements would be required? ▪ Are there any unintended consequences, and how could these be addressed? 	<p>The Law Society notes that the insurance industry and insurance contracts with consumers are currently the subject of a number of public reviews and consultations. We submit that it would be premature for the ACL review to make recommendations on insurance contract terms in these circumstances.</p>
<p>2.4.6 Monetary penalties</p>	
<p>44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:</p>	<p>The Law Society considers that the use of terms previously declared 'unfair' by a court should be prohibited.</p>
<ul style="list-style-type: none"> ▪ What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly? 	<p>The Law Society suggests that a court ordered prohibition on "unfair" terms should be applied in accordance with the decision. That is, the court should determine, when making its decision, whether the unfair term is of a nature that should apply only to identical or similar standard form contracts, within a particular sector; or more broadly.</p>

Question	Submission
<ul style="list-style-type: none"> ▪ Would this increase the deterrent effect of the unfair contract terms provisions? 	<p>The Law Society submits that this would apply only to a limited extent given the very low number of consumer cases that appear before the courts.</p>
<ul style="list-style-type: none"> ▪ What penalties and remedies should apply? 	<p>The Law Society recommends that similar provisions and penalties and remedies to the <i>New Zealand Fair Trading Act 1986</i> be introduced.</p>
<ul style="list-style-type: none"> ▪ What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'? 	<p>The Law Society recommends that similar transitional provisions to the <i>New Zealand Fair Trading Act 1986</i> be introduced.</p>
<ul style="list-style-type: none"> ▪ Are there any unintended consequences, challenges or risks that need to be considered? 	<p>The Law Society submits that the threshold is still quite high given that a successful court action is still required to trigger the penalty being imposed.</p>
<p>2.4.7 Representative actions by regulators</p>	
<p>45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?</p>	<p>The Law Society generally supports the ACL regulators having a right to take a representative action on behalf of consumers. However, the ACL regulators should not be granted any additional powers to compel evidence from businesses.</p>
<p>46. Are there any unintended consequences, challenges or risks that need to be considered?</p>	<p>See the answer to question 45.</p>
<p>2.4.8 Legislative examples of unfair terms</p>	
<p>47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:</p> <ul style="list-style-type: none"> ▪ What examples should be added? ▪ Would this help address systemic issues or provide greater clarity for businesses and consumers? ▪ Are there any unintended consequences, risks or challenges that should be considered? 	<p>The Law Society recommends that this question be reviewed at a later point, to allow the extension of the unfair contract terms to business contracts to be assessed.</p>

Question	Submission
<p>2.5 Unsolicited consumer agreements (pages 133-152)</p>	
<p>2.5.4 Concerns about the level of regulation & 2.5.5 Concerns about vulnerable and disadvantaged consumers</p>	<p>The Law Society notes that CAANZ is unlikely to get stakeholder consensus on the regulation of unsolicited selling. The Law Society submits that the primary aim of the ACL is to protect consumers and that, therefore, the concerns of stakeholders representing consumers should be considered in the first instance.</p> <p>The Law Society notes CAANZ's reluctance to change the unsolicited selling provisions of the ACL due to a lack of evidence. The Law Society notes the support of the "Do not knock" campaign and also suggests that the ACL regulators conduct specific research on this area including:</p> <ul style="list-style-type: none"> ▪ a desktop analysis of the industry including actions taken in other jurisdictions on unsolicited selling (for example, the UK which has restricted door-to-door pressure selling by energy and utility companies); ▪ liaise with the Australian Communications and Media Authority to confirm how many people have registered for the "Do not call register", to stop spam text messages and email ▪ a further survey, such as the EY Sweeney one conducted for the purposes of the ACL review. <p>As a matter of principle, the Law Society submits that the onus should lie with the business to assess the ability of the consumer to make a decision to purchase their goods or services, based on the vulnerability of the consumer and any other disadvantage that they may have including age, disability, access to information and so on.</p>
<p>48. What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?</p>	<p>The Law Society supports the options set out at paragraphs numbered, 2, 3 and 4 on page 135 of the Interim Report.</p>
<p>49. Are there any unintended consequences, risks or challenges that should be considered?</p>	<p>The definitions of "high-risk transactions" and "low risk transaction" should also include a non-monetary materiality test of what is reasonable given the identity of the consumer. This is partly considered in the</p>

Question	Submission
<p>50. Should the cooling-off period be replaced with an opt in mechanism? If so:</p> <ul style="list-style-type: none"> ▪ How should it be designed? For example, should it apply to all unsolicited sales or only high risk sales? How should 'high risk' sales be defined? ▪ What would be an appropriate length of the opt in period? ▪ Should there be any exemptions? ▪ What is the likelihood that consumers would exercise an 'opt in' right? What impact would this have on sales across all sectors that engage in unsolicited selling, and what difference would this make to consumers? 	<p>proposal to remove the current restrictions on businesses seeking or accepting payment; as opposed to individual consumers.</p> <p>The Law Society suggests that, at a minimum and, subject to further monitoring and review by CAANZ, the cooling-off period should be replaced with a 30 day "opt-in" mechanism for all unsolicited sales.</p> <p>The Law Society submits that consumers who do want the good or service will opt-in in any event, irrespective of whether or not the sale is "high-risk" or "low-risk".</p> <p>The time period mirrors the proposed "30 day cooling-off" period for refunds and returns.</p> <p>The Law Society suggests that this would cause a dramatic reduction in sales generated by unsolicited selling. For example, MyHealth Record has had a very low take up (1% of the Australian population) using an opt-in approach.</p> <p>However, this is preferable, as the consumers who opt-in will really want the good or service being sold.</p>
<p>51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts? If so:</p> <ul style="list-style-type: none"> ▪ How should it be designed? For example, what rights should apply? How would 'enduring service contract' be defined? Are there any appropriate exemptions to consider? ▪ What should be the length, for example, of an extended cooling off period? When should a termination right cease to apply? ▪ What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected? 	<p>This would not be necessary under an "opt-in" regime as proposed above.</p>
<p>What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected?</p>	<p>The Law Society submits that a maximum 6 month transition period would be appropriate.</p> <p>In terms of transitional arrangements, the Law Society suggests that CAANZ review information available for consumer complaints for</p>

Question	Submission
<ul style="list-style-type: none"> ▪ Are there any unintended consequences, and how could these be addressed? 	<p>unsolicited sales and use that as the basis for educating those specific industries on the changes so that they can prepare their businesses accordingly.</p> <p>The Law Society understands that the majority of people employed in unsolicited sales businesses are casual employees and may also fall into the category of vulnerable consumers. The Law Society notes that this should not be a basis for restricting unsolicited selling.</p>
<p>52. Should an enhanced 'risk based' approach to unsolicited consumer agreement protections be adopted? If so:</p> <ul style="list-style-type: none"> ▪ How should it be designed? For example, what would differentiate low risk from high risk sales? What different set of rights and protections would apply? ▪ What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling? ▪ How would this affect outcomes for consumers? 	<p>The Law Society submits that the options proposed by CAANZ in paragraph number 4 on page 135 of the Interim Report are appropriate and that a further test of the vulnerability of the consumer, for example, minors, the elderly and people with disability, should be applied. The Law Society suggests that the \$500 threshold for "high-risk" transactions may be too high for certain categories of consumers. The onus of proof should lie with the person making the sale and not the consumer.</p>
<p>53. What are your views on the definitional and other issues raised above? For example:</p> <ul style="list-style-type: none"> ▪ Does the meaning of a business premise require further clarity so that the provisions operate as intended? 	<p>The Law Society submits that the meaning of "a business premise" is becoming less useful as a concept in an era where consumers purchase goods and services via a number of different channels, such as in-store, by telephone or on-line.</p> <p>The Law Society considers that the onus should lie with the supplier making the sale to assess the vulnerability of the consumer and respond accordingly. The ACL should provide higher levels of protection to vulnerable and disadvantaged groups.</p>
<ul style="list-style-type: none"> ▪ What are your views on documenting telephone sales? 	<p>The Law Society supports the documentation of telephone sales in the form of audio recordings, rather than transcripts. An audio recording will provide better evidence as to the likely level of understanding of the consumer on the call of the information provided and also whether the quality of the line has had or could be reasonably considered to have an adverse impact on the consumer's ability to assess the offer being made.</p>

Question	Submission
<ul style="list-style-type: none"> ▪ Should the exemption for emergency repairs be extended beyond a declared 'state of emergency' to other forms of emergency? If so, what circumstances should apply? 	<p>The Law Society supports clarifying the law in respect of emergency repairs⁶ so that a consumer who seeks a quote from a tradesperson for repairs or replacements in an emergency is not constrained from negotiating and accepting supply immediately and during the cooling off period.</p>
<p>54. Can these matters be addressed through further guidance or is legislative change warranted?</p>	<p>The Law Society considers that legislative change to restrict unsolicited sales in conjunction with further guidance is required.</p>
<p>3.1 Implementing the Australian Consumer Law and its objectives (pages 153-172)</p>	
<p>3.1.3 Barriers to accessing information</p>	
<p>55. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?</p>	
<p>56. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?</p>	
<p>57. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?</p>	<p>The Law Society has previously made a submission on the accessibility of the ACL and submitted, in that regard, that the ACL's location within Schedule 2 to the <i>Competition and Consumer Act 2010</i> (Cth) ("CCA") makes it slightly less accessible than if it were, for example, a separate statute of its own. The Law Society also submitted, however, that this issue needs to be balanced with consideration of the fact that the ACL is now well-established and is of a multi-jurisdictional nature, and as such, any change to the legislation's structure at this point in time may not be desirable. The Law Society maintains those views, but also notes that the views of other organisations on this topic were referred to in the Interim Report, two of which were to the effect that the ACL is a "minefield to navigate" and that the ACL's location (in Schedule 2 to the CCA) is a "barrier to access". These concerns as to the accessibility of the legislation appear to underpin question 56 in the Interim Report.</p> <p>In the context of question 56 and in light of the above, the Law Society submits that further consideration should be given to a standalone version of the ACL being produced – to the extent that it is feasible to do so without interrupting the operation of the multi-jurisdictional legislation</p>

⁶ Regulation 88 of the *Competition and Consumer Regulations 2010*.

Question	Submission
	<p>that is already in place. To the extent that it is not feasible to do so, the Law Society supports the expansion of ACL guidance material, such as the suggestions canvassed on page 161 of the Interim Report.</p> <p>The Law Society suggests that, in respect of businesses, CAANZ adopt the approach taken by the Office of the Australian Information Commissioner ("OAIC") in terms of issues, remedies and what the OAIC will do if there is a breach.</p>
<p>3.1.4 Access to remedies</p> <p>58. What are your views on an expanded 'follow on' provision, and the extent to which it would assist private litigants?</p> <p>59. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?</p> <p>60. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?</p>	<p>The Law Society suggests that a "follow-on" provision would assist not only private litigants but also the ACL regulators, courts and tribunals in terms of providing adequate redress to consumers.</p> <p>The Law Society notes that its recommendation to ban non-disclosure agreements would also assist in this regard.</p>
<p>3.1.6 Access to consumer transaction data</p> <p>61. What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?</p>	<p>The Law Society submits that, as a matter of principle, the dissemination of information for consumers via a variety of channels is appropriate.</p> <p>The ACL regulators should coordinate with the Digital Transformation Office, the Productivity Commission and the OAIC on future policy development and the most useful way to engage with stakeholders in respect of consumer transaction data.</p> <p>There are already too many independent reviews and calls for submissions on data and information that do not currently coordinate. An additional one by the ACL regulators would add to this confusion.</p>

Question	Submission
<p>62. Are there other ways that ACL regulators can support stakeholder engagement in policy development?</p>	<p>The Law Society submits that the proposals by the consumer stakeholder groups on increasing engagement with the ACL regulators on the identification of consumer issues is a good one. We recommend that CAANZ identify the best way for these groups to provide more iterative and regular information to the ACL regulators to assist to identify and address consumer issues as and when they arise.</p> <p>In respect of policy development, the Law Society submits that the existing forums and the ACL review itself have been appropriate mechanisms for consulting with stakeholders to develop policy.</p>
<p>63. Are there further ways for stakeholders to contribute and share their research and data with the wider community?</p>	<p>The Law Society submits that the proposals by the consumer stakeholder groups on increasing engagement with the ACL regulators and the more frequent publishing of data on consumer related issues are useful suggestions which allow for stakeholders to contribute and share their research and data with the wider community.</p>
<p>3.2 Penalties and remedies (pages 173-187)</p>	
<p>3.2.3 Maximum financial penalties</p>	
<p>64. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?</p> <ul style="list-style-type: none"> ▪ If so, what approach should be adopted? 	<p>The Law Society has previously submitted that an increase to the current maximum financial penalties under the ACL should be considered, noting that the maximum penalties have not been increased since the time the ACL was introduced in January 2011. The Law Society also suggested that consideration should be given to penalty units or some similar system being introduced to the ACL, as otherwise legislative amendment, which is cumbersome and expensive, is needed in order to adjust penalties under the ACL.</p>
<p>65. Are there alternative approaches to addressing the issues raised?</p> <p>66. Are there any unintended consequences, challenges or risks that should be considered?</p>	<p>The Interim Report raises for consideration whether the maximum financial penalties under the ACL should be aligned with the maximum penalties available under the competition provisions of the CCA, such that for companies the maximum penalties would be the greater of:</p>

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	<ul style="list-style-type: none"> ▪ \$10,000,000; or ▪ three times the value of the benefit the company received from the breach; or ▪ if the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months. <p>The Law Society considers that it is critical that the assessment of the appropriate size of maximum penalties should be addressed in a consistent and harmonious way across all legislation. Rather than looking at penalties for contravention of the competition provisions, which involve conduct of a different nature, and where the “benefit” received by the contravener may be easier to identify, a closer analogue to the ACL provisions may be the consumer law provisions under the ASIC Act. As noted in the Interim Report, the maximum penalties for breach of the consumer law provisions in the ASIC Act are expressed in penalty units, and currently equate to \$1.8 million for companies and \$360,000 for individuals (more than 50% higher than those available under the ACL).</p> <p>On 19 October 2016, the Federal Government announced the establishment of the ASIC Enforcement Review Taskforce. The terms of reference of that Taskforce, which will report to Government in 2017, include the adequacy of current penalties. The Law Society recommends that it would be prudent to await the results of that Taskforce’s review, before making any change to maximum penalties under the ACL, to help ensure that a unified approach is taken across consumer legislation.</p> <p>The Law Society also notes the observations in the Interim Report to the effect that there are significant administrative challenges in adopting penalty units in the ACL. While acknowledging there may be some practical difficulties to overcome, the Law Society believes that penalty units warrant further consideration, given the substantial efficiency benefits that would result from their introduction.</p>

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<p>3.2.5 Effectiveness of non-punitive orders</p> <p>67. Should traders be allowed or required to use third parties to give effect to a community service order? If so</p> <ul style="list-style-type: none"> ▪ How should this arrangement be designed? For example, under what circumstances would it apply? Which third parties should be allowed to give effect to a community service order? What requirements should be placed on them? ▪ What would be the benefits of such an arrangement for the party in breach, and for consumers? ▪ Are there any unintended consequences, challenges or risks that need to be considered? <p>68. Are there other types of non-punitive orders to which this could apply?</p>	<p>The Law Society previously expressed the view that it does not consider it necessary or desirable to make any amendments to the ACL to allow the Court to make orders that a business specifically engage a third party to carry out community service orders.</p> <p>The Law Society makes the following additional comments:</p> <p>a) Orders which require a contravening party to use or fund third parties to give effect to community service orders are already available under existing s 246(2)(a) of the ACL (previously s 86C of the <i>Trade Practices Act 1974</i> (Cth)). Such orders must bear a sufficiently close relationship to the contravening conduct.</p> <p>b) Concerns have been expressed previously by the courts in relation to the involvement of third parties in the context of the application of community service orders under s 86C of the <i>Trade Practices Act 1974</i> (Cth).</p> <p>For example, in <i>ACCC v Econovite Pty Ltd</i> [2003] FCA 964, Justice French (as he then was) refused to make an order, sought by the parties by consent, that the contravening party be ordered to produce 5,000 copies of a pamphlet on cattle nutrition drafted by an independent cattle nutrition expert. His Honour was concerned that this order required preparation of material “embodying what amounts to the opinions of third party experts for which [the respondent] cannot be held responsible?” [16]</p> <p>His Honour amended the proposed community service order to refer only to that conduct within the control, and therefore responsibility, of the respondent.</p> <p>The major consequence for the contravening party is that failure to comply may include prosecution for contempt. It is an interesting question also as to the liability of a third party who fails to comply with the order. For example, whether a third party would</p>

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	<p>be liable for aiding and abetting such a contempt.</p> <p>It follows that the present provisions set out in s 246 of the ACL are adequate to cover those circumstances where third parties may be used to give effect to a community service order.</p>
<p>4.1 Purchasing online (pages 188-202)</p>	
<p>4.1.5 Pricing and safety information</p>	
<p>69. Are current measures sufficient to ensure price transparency in online shopping?</p>	<p>The Law Society considers that the current measures are insufficient to ensure price transparency in online shopping.</p>
<p>70. Should measures to address pre-selected options during booking or payment processes be adopted? If so:</p> <ul style="list-style-type: none"> ▪ How should these be designed? For example, should pre-selected options be prohibited, or should any associated fees or charges be required to be included in the upfront price? ▪ Are the changes that would be required for websites and booking processes significant? What would be the costs of such changes? What transitional arrangements, if any, would be required? ▪ Are there any unintended consequences, and how could these be addressed? 	<p>The Law Society supports the proposed measures, mirroring those used in the European Union, to prohibit using pre-selected options during booking or payment processes that incur additional fees at the final booking or payment stage.</p> <p>As outlined in the Interim Report, this approach would assist consumers in being aware of the total price they would pay.</p>
<p>4.1.6 Application of the consumer guarantees in the online environment</p>	
<p>71. Should the sale by auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:</p> <ul style="list-style-type: none"> ▪ How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether? 	<p>The Law Society submits that the “auction exemption” should apply to consumers selling to each other in a similar manner to classified advertisements.</p> <p>However, a distinction should be made between the two categories of sellers.</p> <p>The Law Society submits that sales of services should always be subject</p>

Question	Submission
<ul style="list-style-type: none"> ▪ Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers? ▪ Are there any unintended consequences, and how could these be addressed? 	<p>to the consumer guarantees irrespective of the channel through which the sale is made.</p> <p>The Law Society notes that many online auction platforms have a system in place for identifying professional or business sellers and those who are individuals selling goods in a non-professional manner. It is the Law Society's view that any additional costs would not be significant nor impose an unfair burden on either the online auction platform providers or the businesses who list their products with them.</p> <p>The Law Society considers that information on the changes and transitional arrangements will need to be provided to minimise any unintended consequences.</p>
<p>Other Issues</p> <ol style="list-style-type: none"> 1. Amend the definition of 'unsolicited services' in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not yet provided 2. Amend the ACL to give private litigants standing to apply to the court for a director's disqualification order under section 248 of the ACL 3. Broaden the definition of pyramid schemes in section 45(1) of the ACL to include similar multi-level marketing schemes 4. Address inconsistency between state, territory and Commonwealth laws in defence of contributory fault for misleading or deceptive conduct claims 5. Amend inconsistency between section 68(3) of the ASIC Act, section 1349 of the Corporations Act 2001, and sections 224 and 248 of the ACL 	<p>The Law Society supports the proposed amendment.</p> <p>The Law Society supports the proposed amendment.</p> <p>The Law Society supports the proposed amendment.</p> <p>The Law Society supports the proposed amendment.</p> <p>The Law Society supports the proposed amendment.</p>

Question	Submission
<p>6. Clarify the consumer guarantees in relation to goods lost or damaged in transit</p>	<p>The Law Society considers that:</p> <ul style="list-style-type: none"> ▪ the consumer guarantees should be extended to the transit of goods to the consumer so that the consumer is not liable for goods lost or damaged in transit; and ▪ the seller and the shipping companies should bear the risk and not the consumer.
<p>7. Power to obtain information for product safety</p>	<p>The Law Society supports the proposed amendment.</p>
<p>8. Amend section 12DC of the ASIC Act to address inconsistencies with other consumer protection provisions in the ASIC Act</p>	<p>The Law Society supports the proposed amendment.</p>
<p>9. Amend section 13(1) of the ASIC Act to allow potential unfair contract terms to trigger ASIC's investigative powers</p>	<p>The Law Society supports the proposed amendment.</p>
<p>10. Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to exempt new agreements for the supplies of electricity or gas services.</p>	<p>The Law Society supports the proposed amendment.</p>