



THE LAW SOCIETY
OF NEW SOUTH WALES

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30 June 2016

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

By email: ACLReview@treasury.gov.au

Dear Sir/Madam,

Submission in response to the Australian Consumer Law Issues Paper

The Law Society of NSW welcomes the opportunity to comment on the Issues Paper on the Australian Consumer Law Review.

The Law Society's submission responds to the specific questions in the Issues Paper.

Australia's consumer policy framework objectives

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

The Law Society considers that the national consumer policy framework's overarching and operational objectives remain relevant, in a national context. However, due to the increase in consumers using e-commerce channels to acquire goods and services, consideration needs to be given as to how the Australian Consumer Law ("ACL") interacts with international consumer policy frameworks.

As a result of the increase in consumers using e-commerce channels to acquire goods and services, there needs to be greater coordination between the Australian Competition and Consumer Commission ("ACCC") and the Office of the Australian Information Commissioner ("OAIC") to ensure that consumers are aware of their rights under the Australian Privacy Principles ("APP") and to encourage business to comply with those obligations.

2. Are there any overseas consumer policy frameworks that provide a useful guide?

The Law Society does not consider structural change is necessary. It can be useful, however, to consider the experience in overseas jurisdictions in relation to proposals to improve effectiveness or to address a specific issue.

3. Are there any new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

The Consumer Affairs Victoria, Small Business Complaints guide that was developed with Monash University <https://www.consumer.vic.gov.au/businesses/fair-trading/complaint-handling> is a helpful way of engaging with business stakeholders.

Australian Consumer Law - the legal framework

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved? and

5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?

To empower and support consumers, the ACL should be easily accessible so consumers can inform themselves about their rights and protections.

As a national uniform law, the ACL is perhaps necessarily or unavoidably complex. It is located in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). This makes it slightly less accessible than if it were, for example, a separate statute of its own. Further thought could be given to whether the ACL may be more easily accessible to consumers as its own Act. However, given the established multi-jurisdictional nature of the ACL, such a change at this stage may not be desirable.

The Issues Paper also asks whether the structure of the ACL is easy to navigate, and expressions of the law clear, so that businesses and consumers can locate their rights and obligations with a reasonable degree of comfort and certainty, and understand the relationships between them.

The ACL has been drafted using “plain language” drafting. The language is straightforward and modern and made the law easier to understand. The language and expressions are generally clear. There are some exceptions, such as the expression “within the meaning of the unwritten law from time to time” used in the unconscionable conduct provision in section 20 of the ACL. However, legal practitioners would understand that such language is a necessary consequence of the common law system. No change to the structure or language of the ACL is recommended.

Consideration could be given to including provisions covering:

- e-commerce rights, obligations and remedies
- links to the APP and OAIC.

6. Are there overseas consumer protection laws that provide a useful model?

No change appears necessary.

7. Is the ACL’s treatment of ‘consumer’ appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

The ACL’s treatment of “consumer” is broadly appropriate. However, we note that some changes are necessary to reflect the changes in the way in which businesses are engaging with consumers. These changes include where those businesses are

located, i.e. increasingly overseas, even businesses which have their headquarters located in Australia, and the value given by businesses to consumer data.

The Law Society considers that the definition of “consumer” should be expanded to take account of the increase in e-commerce for the purchasing of goods and services, as well as the increase in the value of “big data” and “consumer data” for businesses, including via comparator websites. In the Law Society’s view, this is an example of where the ACCC needs to work closely with the OAIC to ensure that a consumer’s “data”, particularly “personal information” is better protected.

The Law Society supports the extension of consumer protections to small businesses. The number of freelancers, sole traders and small proprietary limited companies is increasing. This reflects the changing nature of how and where people work with an increase in part-time and casual work and self-employment. These businesses do not have the same level of sophistication as large corporations and should be afforded similar protections to non-business consumers. The OAIC applies a similar principle in requiring businesses that are larger and have higher turnover to have greater systems, processes and procedures in place to ensure compliance with the APP.

The Law Society supports the extension of the definition of “consumer” to charities and not-for-profits.

The Law Society submits that the \$40,000 threshold should be increased to \$80,000 or \$100,000. The original threshold of \$40,000 has been in place since 1986, without indexation. Increasing the threshold limit will provide a broader protection under the ACL for businesses acquiring goods or services.

General protections of the Australian Consumer Law

8. Are the ACL’s general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The Law Society considers that the ACL’s general protections are working effectively. Our committee members’ experience is that the general protections are well understood by both large businesses and small to medium enterprises. We do not believe that these general protections impose disproportionate or unnecessary costs on business.

The Law Society submits that the protections of the ACL recorded as principles are preferable to a checklist.

9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

The Law Society has not identified the need for any changes.

The Australian Consumer Law's specific protections

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The Law Society considers that most of the ACL's specific provisions are working effectively and do not impose disproportionate or unnecessary costs on businesses.

However, the Law Society submits that it is difficult for individual consumers to pursue the enforcement of the consumer guarantees contained in the ACL.

The Law Society also recommends that the ACL be amended to include a prohibition against unsafe goods equivalent to the European General Product Safety Directive 2001/95/EC. We submit that a prohibition on the supply of unsafe goods is consistent with other underlying principles of the ACL, for example, not to engage in misleading and deceptive conduct.

11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

As noted above, the Law Society recommends that the ACL be amended to include a prohibition against unsafe goods using the European General Product Safety Directive 2001/95/EC as a guide.

12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?

The Law Society submits that the consumer guarantees provide sufficient protection and that a separate "lemon law" is not required.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?

The Law Society recommends that the ACL adopt the model approach set out in the *Therapeutic Goods Act 1989* (Cth) for updating mandatory safety standards. This approach, as discussed in the Issues Paper, allows for the underlying referenced standard to automatically update when a change is made to the voluntary standard¹.

14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be made more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

We have insufficient information to take a view on this issue.

¹ See section 63(4)(b) of the *Therapeutic Goods Act 1989* (Cth)

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

The main difficulty with the introduction of a prohibition on certain commercial practices or business models is how to define such practices and models. The ACL already prohibits a particular type of business model, namely pyramid selling schemes, but it is difficult to identify other business models which should be subject to a blanket prohibition.

The Law Society submits that the ACL adequately covers unfair commercial practices and does not require amendment.

16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

The Law Society does not consider that a case has been made for the introduction of such a general prohibition.

In Australia, we already have the benefit of general prohibitions on misleading or deceptive conduct and unconscionable conduct. These statutory provisions have been interpreted widely by the courts and, in the event of contravention, flexible remedies are available for consumers.

In the Law Society's view, there is no persuasive evidence of a need for a new general prohibition. Certainly, to adopt the language of the Productivity Commission's 2008 report (referred to at page 35) we have not reached the point that there is "strong evidence" in its favour.

Moreover, the Law Society is concerned that the introduction of a legislative provision dealing with "unfair commercial practices" could create uncertainty for consumers, businesses, and their advisers. While the current provisions dealing with misleading or deceptive conduct and unconscionable conduct are wide in scope and require consideration of a range of facts and circumstances, advisers now have the benefit of a considerable body of case law to assist in advising clients as to whether conduct contravenes the law. A prohibition on "unfair commercial practices" will raise issues as to overlap with the existing provisions, what, if any, additional conduct it seeks to capture, and how a court will seek to determine what is "unfair".

17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

The Law Society submits that the current regime is appropriate and that no changes to the ACL's regulators powers need to be made.

Administering and enforcing the Australian Consumer Law

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

The Law Society believes that the ACL promotes a proportionate, risk-based approach to enforcement.

19. Are the remedy and offence provisions effective?

An issue that is raised in the Issues Paper (see, page 40) is whether the same penalties and remedies should be available in relation to both misleading or deceptive conduct, and false or misleading representations. The Paper notes that the financial penalties in Part 5-2 of the ACL are available for a breach of false or misleading representations but not for a breach of the prohibition against misleading or deceptive conduct.

In the view of the Law Society, it would be inappropriate for the financial penalties in Part 5-2 to be extended so as to be available for a breach of the general misleading or deceptive conduct provision.

Misleading or deceptive conduct is commonly alleged in Australian courts and it is, at least in some respects, relatively easy to establish. Relevantly:

- it is unnecessary to prove that the conduct in question actually deceived or misled anyone;²
- conduct is “likely” to mislead or deceive if, tested at the time the conduct occurred, there is a real or not remote chance or possibility of it being misleading or deceptive (regardless of whether it is more or less than 50%);³
- the question whether conduct is misleading is an objective question to be assessed in light of all of the relevant surrounding facts and circumstances, such that a person who has acted honestly and reasonably may nevertheless be liable;⁴
- intent is not relevant.⁵

The Issues Paper also raises the question of the appropriateness of the current civil penalties and remedies in the context of ‘phoenix’ companies (see pages 40-41).

The Law Society recognises the serious damage caused by ‘phoenix’ companies. It is important that regulation deters ‘phoenix’ conduct, and contains significant penalties for persons who engage in such conduct. However, the Law Society is not at present convinced that the ACL provisions are the appropriate vehicle to best achieve this outcome. Conduct of this kind is more efficiently and effectively dealt with under the *Corporations Act 2001* (Cth), for example through statutory provisions dealing with insolvency and directors’ duties.

Having regard to the manner in which the misleading or deceptive conduct provisions have been interpreted and applied by the courts, the provisions have the potential to capture a wide range of conduct in relation to which it would be inappropriate to apply pecuniary penalties.

² *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

³ *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82.

⁴ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1981) 149 CLR 191 at 197; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202; *Yorke v Lucas* (1985) 158 CLR 661 at 666; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [109].

⁵ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 223.

20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches? and

21. Is the current method for determining financial penalties appropriate?

The maximum financial penalties available under the ACL are currently \$1.1 million for corporations and \$220,000 for individuals (the Issues Paper notes that equivalent penalties under the *ASIC Act 2001* are \$1.8 million for corporations, and \$360,000 for individuals). As the Issues Paper states, these were set at the time the ACL was introduced (in January 2011) and have not been increased since that time. It is recommended that an increase to the penalties be considered given the passage of time since then and to ensure that the financial penalties under the ACL are adequate to deter future breaches.

The Issues Paper quotes from the judgment of Gordon J in *ACCC v Coles Supermarkets Australia Pty Limited* [2014] FCA 1405 where her Honour said (at [106]) "... the current maximum penalties are arguably inadequate for a corporation the size of Coles". Further, other legislation containing financial penalties, such as the *ASIC Act*, use "penalty units" which can be periodically updated and which will apply across the statute to which they relate. There is no mechanism for penalty increases in the ACL and this should be addressed in some way. Currently, legislative amendment is required to increase financial penalties under the ACL. This is cumbersome and expensive and consideration should be given to penalty units or some similar system being introduced into the ACL.

22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?

The ACL provides for a wide range of non-punitive orders designed to rectify the harm caused, or prevent further harm, rather than to punish a supplier.

The Issues Paper raises a question as to whether these non-punitive orders are adequate. In particular, it raises the issues of whether the court should have power to make community service orders in which a business is directed to engage a third party to give effect to that order, or European-style "skimming off" actions so that, for example, profits made from conduct contrary to the ACL be distributed for public purposes.

The court already has power to make community service orders, as is plain from the orders made in *ACCC v Titan Marketing Pty Limited* (2014) FCA 913.

The Law Society does not consider it necessary or desirable to allow the court to make orders that a business specifically engage a third party to carry out such orders. Once the order is made, of course, the business is obliged to comply with it as best it can. In certain circumstances, it may be necessary for that business to engage a third party to assist that process. No doubt this would form part of the basis of submissions by the business to the court on the question of penalty.

The proposal in the Issues Paper for "skimming off" remedies differs from our understanding of those actions in Germany. In Germany, skimming off actions for contraventions of the Unfair Competition and Restraints on Competition legislation allows consumer organisations to apply to the court for orders that the wrongdoer disgorge profits obtained from the contravening conduct. However, the profits are paid to the Federal Treasury. Given the costs of commencing these proceedings, these actions have apparently not proven very popular.

The Law Society does not support bringing in “skimming off” actions, such as exists in Germany, particularly in light of the availability of monetary penalties. Allowing “skimming off” actions, whereby profit is distributed for public purposes, is unnecessary given the ability for the Court to make community service orders. Furthermore, in Australia, representative proceedings can be engaged in by consumers who may then claim compensation for loss. This would appear to generally address that issue.

23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?

A fundamental guiding principle for any reform should be that each of the ACL regulators (the ACCC, ASIC and state/territory fair trading authorities) should be able to seek the same remedies and use the same enforcement tools.

24. Do you have views on any of the issues raised in section 3.2?

Another issue that is raised in the Issues Paper (see, eg, page 45) is whether all ACL regulators should be given powers to issue infringement notices.

The Law Society is opposed to any expanded use of the infringement notice regime in the ACL context. Instead, analysis should be undertaken of the current use of infringement notices by regulators and whether that level of use is too great, having regard to the relevant statutory context.

In the case of the infringement notice regime under the *Corporations Act 2001* (Cth), the regime was introduced on the presumption that it would deal with minor potential breaches of the legislation on a timely and efficient basis. Instead, the experience with ASIC’s use of infringement notices is that:

- ASIC has used the infringement notice regime in cases where it does not wish to risk time and money in the courts; and
- ASIC has, on average, taken almost 250 days from the time of an alleged contravention to the issuance of an infringement notice.⁶

As the Law Council of Australia submitted in 2007,⁷ infringement notices generally are only suitable for strict liability offences, and are inappropriate for offences that are serious and which require significant investigation by the regulator. Unfortunately, the concept of an infringement notice regime, which is used widely for parking offences and other similar minor regulatory breaches by state and territory governments, has been introduced into complex and significant areas of commercial law where it should have no role to play.

Infringement notices encourage targeted entities to seek to settle the matter, avoiding the time and expense of litigation. However, if the matter is sufficiently serious that the relevant regulator considers that enforcement action is required, and involves an important area of law, (such as the ACL), then it is in the public interest that appropriate court cases are brought and the relevant factual and legal issues determined.

⁶ Aakash Desai and Iam M Ramsay, “*The use of infringement notices by ASIC for alleged continuous disclosure contraventions: Trends and analysis*” (2011) 39 ABLR 260.

⁷ Law Council of Australia submission in response to the Treasury’s Discussion Paper on the Operation of the Infringement Notice Provisions of the Corporations Act.

3.3 Access to remedies and scope for private action

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

Consumers and businesses are often reluctant to bring claims under the ACL before the courts or tribunals. There are a variety of reasons for this. Some consumers are not in a position to identify that they have been subject to improper or illegal conduct and remain unaware of their legal rights.

Our experience is that consumers are particularly at risk of being unaware of their rights in relation to complex products such as insurance contracts, building and renovation contracts, superannuation, banking and financial investment products, mainly due an imbalance of information and a lack of understanding of complex legal information. In addition, some consumers have a limited understanding of their consumer guarantee rights; the obligations of corporations not to engage in misleading or deceptive conduct; or the obligations of businesses not to engage in restrictive practices when dealing with competitors or suppliers, amongst other things.

The Law Society considers there is scope to improve access to remedies by increasing consumer and business knowledge through education and the provision of accessible and targeted information by all ACL regulators.

In 2016, around four in ten consumer respondents (44%) and two thirds of business respondents (66%) were aware of dispute resolution services provided by consumer protection agencies. The Law Society therefore considers it important that consumers and businesses are firstly able to access relevant information about their rights and secondly, able to identify, or be directed to the relevant dispute resolution services and how to find a lawyer.

In relation to private action taken by a consumer or business in a tribunal or court, the onus is on them to show a breach of the ACL on the balance of probabilities.

Private action in a court or tribunal can be complex and costly and may not be practicable where disputes involve small sums. This is perhaps reflected in the 2016 survey in which only 28% of consumers reported they “definitely intend to take further action” in relation to unresolved disputes (of the resolved disputes, over 80% were resolved directly between the consumer and trader). The majority consumer respondents reported having “given up” trying to resolve their disputes, or the problem was going to “cost too much” to resolve.

The Law Society considers that legal costs can be a barrier to private action, particularly in circumstances where the disputes involve small sums and which do not justify the commencement of court or tribunal proceedings.

26. What low-cost actions could consumers and businesses more readily use to enforce their rights?

One of the primary sources of consumer complaint is the lack of communication or response to a query from a business.

The Law Society submits that businesses, regulators and Ombudsmen could use complaint handling mechanisms and guides such as the one recently issued by Consumer Affairs Victoria:

<https://www.consumer.vic.gov.au/businesses/fair-trading/complaint-handling>.

Another low cost option is the use of social media. Campaigns on Facebook and Twitter have had considerable success in encouraging businesses to respond to consumer complaints and to provide an appropriate remedy.

However, these actions are usually only available and successful where the business is a small one which is dependent on “word of mouth” or local reputation for success, large brand corporates or on-line economy providers, such as Airbnb, as set out in the examples given in the Issues Paper.

It is difficult for the Law Society to express an opinion on what low-cost actions consumers and businesses could more readily use in the absence of detailed empirical data on what remedies they are currently accessing.

As noted in the Issues Paper, Australia has a well-established dispute resolution framework and certain industries (e.g. telecommunications, energy, water, franchising, and airlines) have dedicated ombudsman schemes which help consumers and businesses to resolve their complaints.

Anecdotally, these ombudsman services provide a useful low-cost means of resolving those disputes which are captured under their respective jurisdictions, and typically involve mediation or other alternative dispute resolution procedure.

27. Are there any overseas initiatives that could be adopted in Australia?

In the UK, there has been the establishment of a retail ombudsman and a consumer ombudsman to help resolve consumer disputes, particularly those disputes which involve small sums and which do not justify the commencement of any court proceedings. This also acknowledges the limited resources of regulators, such as the ACCC, to resolve smaller disputes.

The Law Society supports the idea of an independent retailer or consumer ombudsman, in principle. However, there are a wide range of issues to be considered, including:

- the funding of the ombudsman – the UK consumer ombudsman and retail ombudsman are funded by subscriptions from participating businesses;
- the regulation and oversight of these ombudsmen;
- what determinations may be made;
- the enforceability of its determinations and, if so, whether those cases should be determined according to legal principles or a solution which is “fair and reasonable” to all parties; and
- the question of whether there is an appeal from the ombudsman’s determination and the right of consumers to reject the determination and pursue action in court must also be considered.

28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?

It is difficult for the Law Society to express an opinion on the experiences of consumers and businesses and dealing with ACL regulators, in any objective or empirical sense. Anecdotally, it is well known that the ACCC has limited resources and must confine its investigations necessarily to those areas which have the greatest impact.

The Issues Paper raises, for consideration, the question of whether the current scope of the “follow on” principles set out in Section 83 of the *Competition and Consumer Act 2010* be expanded. Presently, Section 83 is an evidentiary provision in which the findings of any fact by a court made in certain proceedings where the court has found a contravention to have occurred is prima facie evidence of that fact in later proceedings by any affected person applying for damages or compensation orders. The Harper Competition Policy Review recommended that Section 83 be extended to apply to admissions of fact. The Commonwealth Government has currently indicated it will support such an extension.

The Law Society supports this position on the basis that admissions of fact are generally made in circumstances where the admission is appropriate, and to avoid costs.

The Law Society also supports increasing the ability of the ACCC to educate consumers as to their consumer law rights, the legal system and how to find a lawyer.

Consumers’ primary avenue for enforcing their ACL rights is to request the relevant regulator to commence action on their behalf or by complaining to an Ombudsman if their dispute falls within the applicable terms of reference.

Please also refer to the Law Society’s submission in response to Question 10 and in particular, that the Law Society submits that the onus of proof in respect of a breach of a consumer guarantee should shift from the consumer to the supplier of the good or service. The Law Society submits that the powers of the regulators and Ombudsmen of the relevant jurisdictions should be extended to allow them to take representative action on behalf of consumers.”

29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

The Law Society submits that the ACCC could team better with the Department of Foreign Affairs & Trade, Austrade and other State based investment agencies to inform potential and current overseas businesses selling to Australian consumers on the ACL. The ACL could be used by those businesses as a sign of quality and understanding the Australian consumer and markets.

Further, where the Commonwealth has entered into international trade agreements, the ACCC on behalf of itself and the State based regulators, should liaise with their equivalents in treaty country member states to inform potential and current overseas businesses selling to Australian consumers about the ACL.

Emerging consumer policy issues

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

The Law Society submits that the definition of “unsolicited consumer agreements” in section 69 of Division 2 should be amended to include digital contact with consumers (that is, via Apps, online or email) that create an unsolicited sale. and current overseas businesses selling to Australian consumers on the ACL.

31. Does the distinction between ‘solicited’ and ‘unsolicited’ sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving ‘pressure selling’?

The Law Society submits that the ACL protections should apply to all sales involving ‘pressure selling’.

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, ‘pop-up’ stores?

The Law Society submits that these provisions require clarification to take into account the manner in which consumers are approached and how sales are made. This applies not just to “pop-up” shops but more specifically to e-commerce and other digital contact with consumers, that is, via Apps, online or email.

33. How could these issues be addressed?

The Law Society submits that the “cooling off” model in the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (UK) could be adopted in the ACL.

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?

The Law Society submits that optional fees and charges should be disclosed upfront to avoid misleading “teaser” sales. However, this should be a matter of enforcing the over-riding principles of “misleading and deceptive conduct”. The ACCC could include “teaser” prices to drive traffic as an example of “misleading and deceptive conduct” which would result in the same penalties being levied on businesses engaging in that conduct.

35. Are there any changes that could be made to the ACL to improve pricing transparency?

The Law Society submits that the ACCC could embark on a campaign with consumers and businesses to ensure that businesses are complying with the principles of the ACL in respect of price transparency.

The Law Society submits that the principles of the ACL are the most appropriate and it is not necessary to increase the level of complexity of the ACL with additional regulation.

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

The Law Society considers that the ACL adequately ensures that online sellers provide safety information about products and services at the point of sale. However, the ACCC could embark on a campaign with consumers and businesses to ensure that businesses are complying with the principles of the ACL in respect of safety information about products and services at the point of sale

37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

The Law Society considers that the ACL provisions adequately address issues regarding the transparency of comparator websites and online reviews.

However, the Law Society submits that greater transparency of the financial and any other interest of the comparator websites should be disclosed more prominently to allow consumers to make a more informed assessment of the goods and services compared on the site.

4.3 Emerging business models and the Australian Consumer Law

38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

The Law Society submits that the principles of the ACL apply equally to the "sharing" economy as to traditional forms for the sale of goods and services. The case study examples from the Issues Paper show that the ACCC is utilising the ACL and that no amendments are required.

The Law Society submits that the ACCC and the other regulators should continue to take the appropriate actions as demonstrated by the case study examples.

39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

The Law Society submits that greater clarity may be required in respect of the roles of the owner and operators of the platforms that are used in the "sharing" economy. The case study examples demonstrate that certain businesses have been prepared to modify their practices and clarify their roles and liability for the use of their platforms in a manner which makes it clear to consumers the extent to which they are responsible for people who use their platforms.

However, there should be greater emphasis of the obligation on those service providers to report to the relevant authorities illegal or criminal activity identified on their platforms.

4.4 Promoting competition through empowering consumers

40. Do consumers want greater access to their consumption and transactional data held by businesses

The Law Society submits that consumers do want greater access to their data, particularly as fewer paper based records are made available to consumers.

41. What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

The ACL needs to interact with or refer to the APP in respect of consumers' accessing their own data. If necessary, the ACL should contain a provision or note referencing the *Privacy Act 1998* (Cth) and the ACCC links with the OAIC. The Law Society submits that the ACL does not currently constrain efforts to facilitate access.

42. Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?

The Law Society submits that the consumer harm identified in the question should lead to greater interaction and collaboration with the OAIC about the APP. The ACL should only be reviewed and amended in respect of the provision of data, or the emergence of an 'infomediary' market, in consultation with the OAIC and the *Privacy Act 1998* (Cth).

43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

The Law Society submits that the disclosure requirements are effective and sufficient when read with the APP. Consumers would be further empowered if the ACL disclosures were read alongside the APP.

Interaction of the ACL with the *Retail Leases Act 1994* (NSW)

The Law Society is concerned about the interaction of the Part 2.3 Unfair contract terms of the ACL with the *Retail Leases Act 1994* (NSW). In particular, we are concerned with the proposed approach that we understand will be taken by the ACCC, that even if a clause reflects a provision in the *Retail Leases Act 1994* the clause may still be regarded as unfair under s 24 of the ACL. Apart from the uncertainty this approach will generate for both lessors and lessees, the Law Society suggests that it is difficult to reconcile with s 26(1) of the ACL. This section provides an express exemption for contract terms from being regarded as unfair where the term "is required, or expressly permitted", by a law of the Commonwealth, a State or a Territory."

The Law Society also understands that when the ACCC is considering a term of a retail lease against the limbs in s 24, (which provides examples of unfair terms), if any of those limbs are enlivened, the ACCC will presume a term is unfair. The onus will then be on the lessor to prove to the contrary.

In our view, consideration should be given to an exemption for retail leases from the ACL on the basis that the uncertainty that is likely to result is undesirable and that the *Retail Leases Act 1994* provides well understood protections for lessees. If granted, a uniform approach to an exemption for the various retail leases acts across State and Territory jurisdictions would also be appropriate. It would be problematic if the exemption was provided in some jurisdictions but not others.

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) 9266 0202.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Gary Ulman', followed by a period.

Gary Ulman
President