

Australian Consumer Law Review Interim Report

To
Electronic Lodgement
“Australian Consumer Law Review – Have Your Say”
www.consumerlaw.gov.au

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Introduction

The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

Australian Consumer Law Review – Interim Report

The Law Society notes that:

- the ACL Review is being conducted by Consumer Affairs Australia and New Zealand (CAANZ) in accordance with terms of reference agreed by the Legislative and Governance Forum on Consumer Affairs in June 2015.
- the review commenced on 31 March 2016 with the release of an Issues Paper for public consultation, with submissions sought by 27 May 2016.
- a wide range of stakeholders made submissions on the Issues Paper providing views on how Australia’s consumer policy framework is operating and what could be improved. This helped inform the drafting of the Interim Report which now seeks stakeholder views on issues and potential options for reform in a range of key areas including how the consumer policy framework could more effectively meet its objectives and address the risk of consumer and business detriment at an appropriate level of regulatory burden.
- CAANZ is proposing to prepare a Final Report to present to the Legislative and Governance Forum on Consumer Affairs by March 2017.

The Law Society is pleased to provide this Submission to Consumer Affairs Australia and New Zealand in response to the Australian Consumer Law Review – Interim Report noting that it does not intend to respond to all questions posed in the Interim Report.

1 SETTING THE CONTEXT

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?

If so, what should be included in this guidance?

2. Are there currently any regulatory gaps with regard to the conduct of fundraising? If so:
 - 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?
3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?
 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?
 5. What goods or services would be captured that are not already?
 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?
 7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?
 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?
 9. Are there any unintended consequences, risks or challenges in doing so?

2. THE LEGAL FRAMEWORK

10. Could the issues about the durability of goods be addressed through further guidance and information?

The Law Society considers it appropriate to retain the flexibility in determining the "reasonable durability" of a good so that it continues to be based on the specific facts of the case. Further the "significant" costs of returning goods may be an issue. It is unclear whether further legislative clarification or guidance is feasible and, therefore, the Society generally supports the retention of the status quo for acceptable quality.

11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance, for example, the cost of returning rejected goods and what may constitute a "significant" cost?
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 legislative clarification, or should the status quo remain to ensure a high level of flexibility?

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?
14. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, (see Option 1 page 62), in conjunction with industry specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?
15. What kinds of industry specific compliance and education activities should be prioritised in the context of finite resources?
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:
 - 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?
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?
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?

Questions 14 – 18

The Law Society considers that there is a need to balance the interests of consumers and traders.

It is noted that there appears to be a significant issue as to whether a series of non-major failures constitutes a major failure. The Society recommends that guidance would be helpful to confirm that a series of minor defects can constitute a major defect as well as ‘a cycle of failed repairs’. The Society would support further enquiry into whether refunds be allowed in cases where repairs and replacement are not appropriate remedies.

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:
 - 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?

Question 19

The Law Society considers the current disclosure rights are sufficient.

20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?
21. Is there a need for greater regulation of extended warranties? If so:
- 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?
 - What has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?

Question 21

The Law Society supports consumers having more information on the value of extended warranties whether this is undertaken by manufacturers or by consumer advocacy agencies or both is a matter of policy.

22. What guidance and transition arrangements would businesses need?
23. Are there any unintended consequences, risks or challenges that need to be considered?
24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?
25. What are the key principles for an effective product safety regime?
26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

Question 26

The Law Society supports a further review of the produce safety regime and general safety standard.

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- 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?
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?
29. Should a “performance-based approach to product safety standards be introduced?
- 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?
30. How could the approach be designed? For example:
- 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?
31. Should the mandatory reporting triggered be clarified? If so:
- 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?
32. Should the current timeframe for making a mandatory report be extended? If so:
- 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?
33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:
- How should a voluntary recall be defined?

- What factors or criteria should be included?
34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?
35. Should current processes for implementing product bans and recalls be streamlined? If so:
- 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?
36. Is there scope to improve the quality of information available to consumers on safety risks? If so:
- 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?
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?

Question 37

The Law Society considers the decisions of the Court as the appropriate vehicle for the development of this area of the law. Court decisions are appropriately adaptive and are made with reference to previous case law and the purpose and objects of the legislation.

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?

Question 38

The Law Society considers that any attempt to define or codify unconscionable conduct may unduly restrict the ambit of the prohibition and limit the flexibility of the Court to apply the prohibition to novel factual scenarios in way that is consistent with the objects and purposes of the legislation.

Alternatively any attempt to codify or define the prohibition by merely expressing the common law position would add little substantive reform to the pre-existing legislation and would thus be a futile exercise.

Further if raising awareness of the nature of the prohibition is what is desired then there are

other more appropriate ways, which do not require legislative amendment, of doing this including the publications issued by the regulator reporting on prosecutions .

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?
40. Should the unconscionable conduct provisions be extended to publicly listed companies?
- 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?
41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?
42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?
43. Should the ASIC Act's unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:
- 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"?
 - Would 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?

Question 43

The Law Society supports the following submission by reference to the legislation referred to within the following paragraphs.

1. *By s 12BF(1) of the Australian Securities and Investments Commission Act 2001 (Cth) ("ASIC Act"), a term of a consumer contract or small business contract is void if:*

- (a) *the term is unfair; and*
- (b) *the contract is a standard form contract; and*
- (c) *the contract is:*
 - (i) *a financial product; or*
 - (ii) *a contract for the supply, or possible supply, of services that are financial services.*

The Australian Consumer Law (“ACL”) contains similar unfair contract terms provisions: s 23.

2. *The ASIC Act and ACL unfair contract terms provisions do not apply to contracts governed by the Insurance Contracts Act 1984 (Cth): ICA, s 15.*
3. *Subject to s 9, the ICA governs “contracts of insurance ... the proper law of which is or would be the law of [an Australian] State or ... Territory ...”: s 8(1).*

Section 9 lists those insurance contracts not governed by the ICA, eg. reinsurance contracts, contracts to which the Marine Insurance Act 1909 (Cth) applies, health insurance, etc..

4. *The ASIC Act and ACL unfair contract terms provisions presently apply to insurance contracts not governed by the ICA? Should they apply to insurance contracts governed by the ICA?*

Generally speaking, consumer lobby groups argue they should; insurance industry bodies argue they shouldn't.

5. *Insurance contracts are not like general contracts in that they have an inbuilt ‘fairness’ mechanism – the duty of utmost good faith. Lord Mansfield introduced utmost good faith to insurance law 250 years ago in his seminal judgment in Carter v Boehm¹.*

Utmost good faith requires each party to an insurance contract to act towards each other openly, honestly and fairly in the lead up to the contract and in the performance of it.²

6. *The ICA came into force 30 years ago. Its object is described in its Long Title, which provides that the ICA was enacted to:*

... reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts operate fairly ...

7. *Utmost good faith is central to the ICA.*

By s 13(1), utmost good faith is an implied term of every insurance contract governed by the ICA. A failure to comply with the duty is a breach of the implied term and, since June 2013, a breach of the ICA: s 13(2).

By s 14(1) of the ICA, a party to an insurance contract cannot rely on a provision of it if to do so “would be to fail to act with the utmost good faith”.

8. *If an insurer breaches its duty of utmost good faith in the handling of a claim or potential claim or settlement of a claim, the Australian Securities and Investment Commission (ASIC)*

¹ (1766) 3 Burr 1905; 97 ER 1162.

² *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1, at [15] (Gleeson CJ and Crennan J).

can vary, suspend or cancel its AFSL licence or ban a person from providing financial services as if the breach was a failure by the insurer to comply with a financial services law: s 14A of the ICA.

Section 14A was introduced by the Insurance Contracts Amendment Act 2013 (Cth), amongst other things, to enable ASIC to address systemic breaches by an insurer of the duty of utmost good faith. It should be read in conjunction with s 55A of the ICA, which enables ASIC to bring or take over and continue a representative action on behalf of an insured against an insurer.

9. Sections 35, 37 and 54 of the ICA are also important controls on the enforceability and operation of insurance contract terms.

10. By s 35, an insurer must bring to the attention of an insured before a 'prescribed' insurance contract³ is entered into, those terms of the contract that differ from the standard terms of a 'prescribed' contract.

The standard terms of a 'prescribed' contract are set out in the Insurance Contracts Regulations 1985 (Cth), Part 5 – The Contract – Standard Cover.

11. By s 37, an insurer cannot rely on a provision in an insurance contract (not being a 'prescribed' contract) of a kind not usually included in insurance contracts that provide similar insurance cover unless the insurer gave written notice of the effect of the provision before the contract was entered into.

12. By s 54, an insurer cannot refuse to pay all or part of a claim in the circumstances described by s 54 "where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of" a post-contractual act or omission of the insured or of some other person.

By s 54, if an act or omission:

a) could reasonably be regarded as being capable of causing or contributing to an insured loss, it will fall into the category described by s 54(2) and the insurer can refuse to pay the claim, except to the extent that the insured proves that the act or omission did not cause or contribute to the loss: ss 54(3) and (4);

b) could not reasonably be regarded as being capable of causing or contributing to an insured loss, it will fall into the category described by s 54(1) and the insurer cannot refuse to pay the claim; it can only reduce its liability to pay the claim by the extent to which it has been prejudiced by the act or omission.

13. The presence of:

a) the Long Title to the ICA;

b) ss 13, 14, 35, 37 and 54 of the ICA;

c) Chapter 7 of the Corporations Act 2001 (Cth);

d) the external dispute resolution service available to insureds courtesy of the Financial Ombudsman Service;

e) the General Insurance Code of Practice 2014,

³ The prescribed contracts are: motor vehicle insurance, home buildings insurance, home contents insurance, sickness and accident insurance, consumer credit insurance and travel insurance.

suggest that extending the ASIC Act unfair contract terms provisions to insurance contracts governed by the ICA would add a layer of complexity to the sale, purchase and performance of insurance contracts governed by the ICA without any significant advantage to consumers.

Consideration should be given to whether the ACL and ASIC Act unfair contract terms provisions have been successfully applied to insurance contracts not governed by the ICA? If not, or if only rarely, why is it thought that extending those provisions to insurance contracts governed by the ICA would bring any discernible benefit to consumers? Particularly when the ICA already provides strong protection to consumers as described above.

If the ASIC Act unfair contract terms provisions are to be extended so that it applies to insurance contracts governed by the ICA, how should that be done?

14. *There are three options:*

- a) amend the ASIC Act and s 15 of the ICA so as to make it clear that the ASIC Act unfair contract terms provisions apply to insurance contracts governed by the ICA;*
- b) include the ASIC Act unfair contract terms provisions in the ICA; or*
- c) enhance the General Insurance Code of Practice 2014.*

If b) is chosen, preference should be given to applying them to one or other of two ranges of contracts already featured in the ICA: ‘eligible contracts’ – ss 21A and 21B; ‘prescribed contracts’ – Part V – The Contract, Divisions 1 and 1A. And perhaps broadening the scope of the particular range chosen.

15. *Section 54 of the ICA is an important feature of the ICA (see [12] above) and has regularly generated litigation over the 30 years the ICA has been in force, with the most recent High Court decision on the section published two years ago: *Matthew Maxwell v Highway Hauliers Pty Ltd*⁴ and the most recent appellate Court decision in November this year: *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd*.⁵*

Section 54 “does not operate to relieve the insured of restrictions or limitations that are inherent in that claim”.⁶ This notion contrasts with the notion of a term that “defines the main subject matter of the contract”: ASIC Act, s 12BI.

Applying the notion of a term that “defines the main subject matter of the contract” to insurance contracts governed by the ICA will inevitably give rise to debate and litigation concerned with how close that notion is to the s 54 notion of “restrictions or limitations that are inherent in [a] claim”.

44. Should the use of terms previously declared “unfair” by a court be prohibited? If so:

- 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?
- Would this increase the deterrent effect of the unfair contract terms provisions?

⁴ *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33; (2014) 252 CLR 590.

⁵ [2016] FCAFC 150.

⁶ [2016] FCAFC 150.

- What penalties and remedies should apply?
 - What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared “unfair”?
 - Are there any unintended consequences, challenges or risks that need to be considered?
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?
46. Are there any unintended consequences, challenges or risks that need to be considered?
47. Should the “grey list” of examples of unfair contract terms be expanded? If so:
- 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?
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?
49. Are there any unintended consequences, risks or challenges that should be considered?
50. Should the cooling-off period be replaced with an opt-in mechanism? If so:
- How should it be designed? For example, should it apply to all unsolicited sales on 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?
51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts? If so:
- 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?
 - Are there any unintended consequences, and how could these be addressed?
52. Should an enhanced “risk-based” approach to unsolicited consumer agreement protections be adopted? If so:
- 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?

Question 52

This is not a matter that the Law Society can comment on other than it should be the subject of further consideration having regard to appropriate risk matrix tools.

53. What are your views on the definitional and other issues raised above? For example:
- Does the meaning of a business premise require further clarity so that the provisions operate as intended?
 - What are your views on documenting telephone sales?
 - 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?

Question 53 *The Law Society submits that:*

the meaning of “unsolicited consumer agreement” requires further clarity as to whether it applies to an agreement made as a result of negotiation online (including social media) or through other means

- *the meaning of a “business premise” requires further clarity to ensure that it aligns with the relevant principle to capture transactions that occur at a place where consumers may not expect the supplier to transact with them;*
- *further clarity is required on how the monetary threshold is determined including how the value of an enduring service contract is determined, whether it includes any potential penalty for cancellation ; and*
- *the exemption for emergency repairs should not be extended beyond a declared ‘state*

of emergency' as the consumer who requires emergency repairs is often in a vulnerable situation.

54. Can these matters be addressed through further guidance or is legislative change warranted?

3. ADMINISTRATION AND ENFORCEMENT

The questions in this section have been addressed collectively where indicated.

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?

Question 55

The Law Society understands that consumers are increasingly utilising the internet for obtaining information on their rights and therefore supports greater access to the ACL being provided through this channel.

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?

Question 56

The Law Society understands that the current access to the ACL is not easy for non-lawyers as it is located in a schedule to the Act. The Society supports a mechanism that increases the visibility of the ACL including:

- *a standalone version of the ACL to improve access to it by consumers and business.*
- *A user-friendly format of the legislation with explanatory comments or guidelines for the application of provisions that are frequently accessed.*

57. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

Questions 57

The Law Society notes that one of the six operational objectives at page 153 is "providing information to improve consumer and business understanding of their rights and

responsibilities”.

The Law Society proposes that consideration be given to developing online interactive education/training or compliance tools for use by business and consumers

58. What are your views on an expanded “follow-on” provision, and the extent to which it would assist private litigants?

Question 58

The Law Society considers that while the “follow on” proposal might be a suitable means of reducing the time and cost in relation to actions where a civil remedy is sought provided it involves prima facie proof, and would not favour use of this device where the criminal standard for the onus of proof applies.

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?

Question 59

The Law Society considers that businesses might be less prepared to make admissions of fact if the “follow on” proposal is introduced but that this should not, be an obstacle to such introduction.

60. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

Question 60

The Law Society considers that one possibility is to have specific industries consider their members funding a complaints panel arrangement as has been done in the in the insurance industry (for complaints relating to the assessment of insurance claims by insurers).

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?
62. Are there other ways that ACL regulators can support stakeholder engagement in policy development?

63. Are there further ways for stakeholders to contribute and share their research and data with the wider community?
64. Are the current maximum financial penalties adequate to deter future breaches of ACL?
Would an increase be an appropriate response to the issues raised?
If so, what approach should be adopted?
65. Are there alternative approaches to addressing the issues raised?
66. Are there any unintended consequences, challenges or risks that should be considered?

Question 61 - 66

The Law Society supports the path of collaborating with stakeholders to collect consumer transaction data where –

- (a) the data is of value in efficiently addressing consumer needs;*
- (b) the data provides greater transparency which will lead to more effective competition.*

67. Should traders be allowed or required to use or fund third parties to give effect to a community service order? If so:
- 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?
68. Are there other types of non-punitive orders to which this could apply? Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

Question 67 & 68

In the circumstances outlined in this section the Law Society supports an independent party providing financial counselling to businesses or vulnerable consumers and that this is paid for by the offending party. Further it may be appropriate that the regulator engage the counselling service using funding it receives from the offending business.

4. EMERGING CONSUMER ISSUES THE LEGAL FRAMEWORK

69. Are current measures sufficient to ensure price transparency in online shopping?

70. Should measures to address pre-selected options during booking or payment processes be adopted? If so:

- 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?

Question 69 & 70

On the information set out in the Interim Report, the Law Society considers that the existing ACL measures are sufficient to ensure price transparency in online shopping.

Conceptually there does not appear to be a reason why the ACL should not be effective in this online environment.

However in light of the fact that the suppliers may be remote and there may be a need for legislation to prevent injustice in this area if suppliers take advantage of this environment, any adverse effect on consumers should be identified early through monitoring so that measures including legislative reform can be taken to minimise consumers being harmed.

71. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:

- How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?
- 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?

Question 71

The Law Society submits that there appears to be scope for further consideration as to whether the sale-by-auction exemption remains appropriate in the online space. A Greater understanding of this issue is required before finalising a view on this issue.



Elizabeth Needham
President