

Australian Consumer Law Review – Interim Report Consultation

Submission by Legal Aid Queensland



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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the “Australian Consumer Law Review – Interim Report Consultation.” LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to:

- mortgage stress
- housing repossession
- debt
- contracts
- loans (including small amount loans and car loans)
- telecommunications and unsolicited consumer agreements (including door to door selling).

This submission is informed by that knowledge and experience.

The issues paper presents a number of questions and issues for discussion. LAQ proposes to respond to the questions in the areas in which it has relevant expertise and then raise other issues that it believes are relevant to the consultation.

1.2 Scope and coverage of the ACL (pages 12-33)

1.2.4 Who is protected under the ACL?

Question 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?

As proposed in the Interim Report, LAQ supports an increase of the \$40,000 maximum threshold for consumer purchases in the ACL to \$100,000. LAQ also supports the linking of the threshold to the Consumer Price Index (CPI) to allow adjustment to the threshold for inflation on an annual basis.

In LAQ’s submission the proposed increase in the threshold and its linking to CPI would assist to restore the original level of protections for consumers that was contemplated by the legislation when it was first enacted.

Question 5. What goods or services would be captured that are not already?

In LAQ’s experience, an increase in the threshold is likely to capture a range of goods and services purchased by farmers for the day to day operation of their agricultural businesses. In LAQ’s submission transactions involving farmers should be subject to the protections of the ACL because many farmers are small business operators who would benefit from the added protection provided by the ACL. However, the definition of consumer in section 3 of the ACL would need to be amended to cover goods and services purchased by small business including farmers and rural small business.

1.2.5 Exemptions under the ACL

Question 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?

LAQ supports reviewing the current exemption in the *Insurance Contracts Act 1984* that excludes the operation of unfair contracts terms protections for consumers from applying to standard form insurance contracts.

In LAQ’s experience, there is nothing special or different about insurance contracts that mean these contracts should not be subject to the same prohibition on unfair contract terms that all other types of standard form contracts entered into between consumers and businesses must comply with.

1.2.6 Interaction between the ACL and ASIC Act

Question 7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?

Question 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?

Question 9. Are there any unintended consequences, risks or challenges in doing so?

LAQ supports the amendment of the ASIC Act to explicitly extend the application of its consumer protections to financial products. While LAQ acknowledges the current definition of “financial services” in the ASIC is broad, in LAQ’s experience there is some uncertainty among consumers and their representatives about whether all protections in the ASIC Act apply to conduct relating to financial products.

In LAQ's view, this amendment would provide clarity and certainty to consumers and businesses and ensure the consistency of the ASIC Act consumer protections across financial services and products.

LAQ is unable to comment on any compliance obligations this amendment may impose on businesses but notes it is likely existing compliance regimes would already address the *Australian Securities and Investments Commission Act 2001* obligations that a business has concerning financial services and most financial products. As a result, any compliance impact on businesses are likely to be minimal while the benefits in terms of clarity and certainty for businesses and consumers are significant.

LAQ is not aware of any unintended consequences that the proposed change may raise which outweighs the benefits afforded to vulnerable consumers.

2.1 Consumer guarantees (pages 43-69)

2.1.2 'Acceptable quality' for goods

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

LAQ strongly supports the existing consumer guarantees for acceptable quality and fitness for purpose and the protections that they provide to consumers. LAQ acknowledges the need for some flexibility in the definition of consumer guarantees to allow them to respond to new products and evolving technologies.

LAQ supports the idea that some of the issues around durability can be addressed through further information and guidance by the regulator. Information and guidance should identify common groups of products and provide both consumers and businesses with details of what constitutes acceptable durability and shelf life of a product.

In LAQ's submission the durability and lifespan of a product should also be viewed as an opportunity for business. Providing information about the durability and the product's lifespan to consumers will allow consumers to have more confidence when purchasing goods about the quality of the good that is being purchased. It will also provide guidance to the consumer when something goes wrong with a product about whether that product has performed acceptably. Consumers are likely to support products that can be demonstrated to provide long lasting good value for money. A durable and long lasting product can be a point of differentiation for businesses.

Question 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?

LAQ is aware of no other major issues of uncertainty raised by consumers. In LAQ's experience the biggest issues faced by vulnerable consumers are:

- (a) The uncertainty faced by consumers concerning what is meant by a good or service being of acceptable quality or fit for purpose in their individual circumstances; and
- (b) The cost of enforcing consumer guarantees in a court or tribunal. More specific guidance may alleviate some of the current need for costly expert evidence on these issues.

Question 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?

LAQ refers to its answer to Question 10.

Question 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?

In LAQ's submission, any further guidance on durability that is provided has to be specific to individual industries, types of products and what constitutes reasonable wear and tear. This will allow individual differences between goods and industries to be recognised and the consumer to be able to make an informed decision when purchasing a product.

In LAQ's experience consumers respond favourably to products that are long lasting and of good quality. Businesses that are able to provide consumers with durability information which demonstrates that they have a quality product of a reasonable price are likely to attract more consumers to purchase their products.

2.1.4 Lack of clarity about 'major failures' & 2.1.5 Industry-specific concerns

Question 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?

LAQ agrees that the proposal in the interim report to clarify the law on what is a major failure of a product may address the more obvious cases where a good has failed to be of acceptable quality.

However, in LAQ's submission, the proposal does not address the central issues that a majority of consumers face in seeking remedies under a consumer guarantee. These are:

- (a) The evidentiary burden of showing a good is not of acceptable quality or not fit for purpose; and
- (b) The time and monetary cost of bringing a court or tribunal case to enforce their rights.

LAQ maintains its submission that a lemon law should be introduced as part of the ACL as it will provide clarity to consumers and industry concerning when goods are of acceptable quality and consequently reduce the cost and evidentiary burden of proving that a good is or is not of acceptable quality in a Court or Tribunal.

Question 15. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?

In LAQ's submission, any industry specific compliance mechanisms should be implemented to strengthen the existing ACL consumer guarantees through the introduction of lemon laws.

The most appropriate compliance mechanism would include recording all complaints on a central database and, similar to the NSW Office of Fair Trading, publishing an annual list of the companies that the most complaints have been received about for alleged breach of a consumer guarantee.

Question 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?

LAQ refers to the circumstances set out on page 58 of the Interim Report as good examples of when repair and replacement may not be considered an appropriate remedy.

In LAQ's submission it is appropriate to define major failure, and the number of non-major failures that equate to a major failure, to provide clarity to consumers and business and reduce the current cost and evidentiary burdens faced by vulnerable consumers in exercising their rights in a court or tribunal. LAQ reiterates its earlier submissions in answer to questions 14 and 15 that there should be a Lemon Law included in the ACL.

Question 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?

LAQ is unaware of any additional costs associated with businesses providing refunds in these circumstances. In LAQ's submission, if a faulty product is provided by a business, any costs associated with remedying that should be borne by the business.

Question 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?

LAQ is not aware of any unintended consequences, risks or challenges that need to be considered. Again, in LAQ's submission, if a faulty product is provided by a business, any costs associated with remedying that should be borne by the business.

2.1.6 Disclosure of rights under the ACL

Question 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?

LAQ supports maintaining the current requirements for mandatory notices for warranties against defects. It is important that consumers are informed of their legal rights and that the industry is reminded of their legal responsibilities. In LAQ's experience the provision of a mandatory notice achieves both of these objectives.

LAQ supports a plain language review of the mandatory notice to ensure the notice is expressed in a way that is the easiest for consumers to understand. In LAQ's submission any costs associated with the amending of the current mandatory notice requirement have already been incurred by business when the requirement first introduced.

Question 20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

In LAQ's submission, the mandatory notice is the most effective way to notify consumers of their rights and it is important that obligations to notify consumers of these rights are maintained.

Question 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)?**

In LAQ's submission greater regulation of extended warranties is required.

In LAQ's experience there are a number of problems with extended warranties:

- (a) They provide little or no value to vulnerable consumers above the protection offered by mandatory warranties and consumer guarantees.
- (b) They are upsold to consumers as part of a package deal without an adequate explanation of the product or alleged value that it provides to consumers. The effect of an upsold product is that it inflates the original price.
- (c) In some cases consumers are unaware that they have been sold the product.
- (d) Sales people selling extended warranties demonstrate a lack of understanding of the protections offered by the ACL and extended warranties.
- (e) Extended warranties are often offered at the last minute in the sales process when all the consumer wants to do is complete the sale and leave the store. This timing predisposes the consumer to accepting the product.

The effect of these problems causes significant harm to vulnerable consumers who pay for a product that provides limited value for the expense incurred.

In LAQ's submission the appropriate solution to addressing the problems created by extended warranties is twofold:

- (1) require businesses to provide to consumers with a fact sheet on extended warranties at point of sale; and
- (2) introduction of a cooling-off period for extended warranties.

The introduction of a fact sheet on extended warranties at the point of sale is not enough on its own because it is not practical to expect the consumer to read and analyse a fact sheet at the point of sale and before making a decision to purchase the product.

The combination of these two initiatives will provide vulnerable consumers with:

- (i) more information about extended warranties that will allow vulnerable consumers to make a more informed decision about whether the product is of any value to them; and
- (ii) the ability to take information about the product and make a considered choice about whether to proceed with the product away from the pressure of the sales environment.

Question 22. What guidance and transition arrangements would businesses need?

Question 23. Are there any unintended consequences, risks, or challenges that need to be considered?

In LAQ's experience point of sale staff have little or no understanding of extended warranties and its interaction with the ACL. As a consequence, the biggest challenge for businesses would be to provide appropriate training for staff so that a consumer's ACL rights and the information available on a fact sheet are properly explained. It would be appropriate that guidance be provided by regulators on the extent and type of training to be provided to frontline staff.

Question 24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?

LAQ refers to its answer to Question 21.

2.3 Unconscionable Conduct and Unfair Trading

2.3.2 Are the provisions working effectively?

Question 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?

LAQ recognises that the law on unconscionable conduct has created a "broad and principles based" definition that is developed through Court precedent. The "principles based approach" is designed to give Courts flexibility to assess whether conduct is unconscionable on a case by case basis.

However, court decisions based on unconscionable conduct have not been as effective in changing industry wide practices. In contrast in the area of regulated credit, proscriptive requirements in relation to the obligation on lenders to lend responsibly (contained in the *National Consumer Credit Protection Act 2009*) and guidance from ASIC in relation to those obligations has been far more effective in driving industry to assess affordability for individual consumers than a right by an individual to reopen the contract as unjust.

In LAQ's submission, because the cost of taking legal action for consumers is so prohibitive, matters that end up in court, that are seeking clarification or further development of the law in relation to unconscionable conduct, are likely to be those cases that have little in common with the issues faced by average consumers or the products and services typically purchased by those consumers. A combination of allowing courts to further develop the law in this area and some legislative proscription together with effective industry guidelines would ensure that flexibility is not lost and the ACL remains responsive to future challenges.

Question 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?

In LAQ's submission the consequence of maintaining the status quo and not codifying existing unconscionable conduct principles is that it reduces the certainty for businesses and vulnerable consumers concerning whether the conduct is unconscionable.

2.3.4 Unfair trading

Question 41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?

Question 42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?

LAQ supports the introduction of a new general ACL provision that prohibits unfair trading or unfair conduct.

In LAQ's experience there are business products and practices which take advantage of a vulnerable consumer's lack of knowledge, awareness or alternatives to the products and services being offered. These categories of business practices are set out on pages 113-114 of the ACL Interim Report.

These business practices cause significant consumer detriment and regularly lead to poor consumer outcomes. However, this conduct does not often meet the very high standard required to prove unconscionable conduct, which leaves vulnerable consumers without a remedy against unfair conduct.

In LAQ's submission because the existing unconscionable conduct provisions do not provide adequate protection or remedy for vulnerable consumers in the case of unfair conduct, a new unfair trading provision should be introduced into the ACL.

2.4 Unfair contract terms (pages 117-132)

2.4.2 Unfair terms in insurance contracts

Question 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'?
- 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?

The introduction of unfair contract terms provisions for standard form consumer contracts have provided significant benefits and protections to vulnerable consumers when they are contracting with businesses.

However, in LAQ's submission the clear omission from the ACL unfair contracts terms coverage is the exemption provided to standard form insurance contracts by the *Insurance Contracts Act 1984*.

LAQ has observed no substantive difference between standard form insurance contracts and standard form consumer contracts that justifies standard form insurance contracts not being regulated by the unfair contracts terms protections of the ACL.

The protections offered to consumers by the *Insurance Contracts Act 1984* do not provide the

same level of protection as the provisions for unfair contract terms in the ACL. As a result, there is no basis for exempting standard form insurance contracts from the ACL.

In LAQ's submission, making standard form insurance contracts subject to the ACL unfair contract term provisions is likely to see changes to insurance contracts offered to consumers and will eliminate unfair contract terms such as the ones outlined on page 122 of the Interim Report.

LAQ acknowledges that there is likely to be compliance costs to business in ensuring that standard form insurance contracts comply with the ACL unfair contracts terms provisions. However, these costs are likely to be similar to those experienced by other industries which are required to comply and are not onerous and have not prevented the majority of businesses from complying with the ACL unfair contract terms provisions.

2.4.6 Monetary penalties

Question 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?
- 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?**

LAQ supports the use of terms, previously declared unfair by a Court, being prohibited in future contracts. The prohibition should apply to similar terms in standard form contracts within a particular sector.

In LAQ's submission the deterrent effect of the unfair contract terms provisions would be further enhanced by the introduction of penalties that apply when a term is declared unfair by the Court.

Currently, the only consequence to a term being declared unfair is the contract term is declared void. In LAQ's experience, in a majority of cases, the contract continues on. The effect of this is that the consequence for a business from a finding of an unfair term is minimal and does not create enough of an incentive for businesses to ensure that their contracts do not contain unfair terms. It also adds a barrier to consumers taking the matter to a Court or Tribunal because the remedies available after a term in a contract is found unfair are very narrow.

LAQ recognises that the introduction of penalties for unfair contract terms and a ban on the use of declared unfair terms will require regulators to develop a mechanism to ensure that consumers and businesses are informed of prohibited unfair terms.

In LAQ's submission, the most appropriate way of achieving this would be:

- (a) the creation of a register of declared unfair terms; and
- (b) the inclusion of a list of declared unfair terms in a bi-monthly newsletter sent to businesses and published on the ACCC's website.

LAQ is not aware of any unintended consequences, risks or challenges that should be considered that would outweigh the benefits to be afforded to vulnerable consumers.

2.4.7 Representative actions by regulators

Question 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?

LAQ supports regulators being allowed to take representative actions on behalf of multiple affected consumers because it provides meaningful access to justice for vulnerable consumers, who are otherwise unable to afford to enforce their rights in a Court or Tribunal.

In LAQ's submission, this power would be even more effective if:

- (a) there was a breach or penalty associated with the declaration of an unfair term¹; and
- (b) regulators were granted the power to compel evidence from businesses to allow them to investigate whether a term is unfair. These investigative powers should be broad to ensure that matters are fully investigated and assessed as to the appropriate:
 - (i) enforcement and compliance response regarding the business; and
 - (ii) compensation and redress for consumers where the circumstances require it.

In LAQ's submission, this expansion of the regulator's enforcement powers will also provide access to justice to vulnerable consumers who currently struggle to enforce their rights under the unfair contract terms provisions.

Question 46. Are there any unintended consequences, challenges or risks that need to be considered?

LAQ is not aware of any unintended consequences, challenges or risks that need to be considered as part of this submission that would outweigh the benefits to be afforded to vulnerable consumers.

2.4.8 Legislative examples of unfair terms

Question 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?

LAQ supports the expansion of the grey list of legislative examples of terms that might be considered unfair.

In LAQ's submission the following examples are terms that should be added to the grey list:

- (a) terms that allow new or increased charges that were not originally in the contract;
- (b) terms that automatically renew the contract unless the business is notified by the consumer that they want the contract to end;

¹ See LAQ's answer to Question 44.

- (c) terms that impose large cancellation fees for a termination or breach of a contract that are disproportionate to the actual loss suffered by the business; and
- (d) terms that make the contract “the entire contract between the parties” and exclude verbal representations made by the seller.

In LAQ’s experience terms similar to each of these terms have caused consumers significant detriment. They are also terms that are unnecessary to protect the legitimate interests of a business. As a consequence, it is in the interests of vulnerable consumers that each of these terms is added to the grey list of examples of terms that may be unfair in the ACL.

LAQ is not aware of any unintended consequences, risks or challenges that should be considered that would outweigh the benefits to be afforded to vulnerable consumers.

2.5 Unsolicited consumer agreements (pages 133-152)

2.5.4 Concerns about the level of regulation & 2.5.5 Concerns about vulnerable and disadvantaged consumers

Question 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?

In LAQ’s experience, the current unsolicited consumer agreement provisions have provided significant benefits to vulnerable and disadvantaged consumers² who are most likely to encounter the high pressure sales tactics and information asymmetry that is characteristic of unsolicited selling.

In LAQ’s submission it is very important that the existing 10 business day cooling off period for unsolicited sales be maintained as in LAQ’s experience this period allows consumers in vulnerable circumstances to properly consider whether they should proceed with a contract and if they decide that they shouldn’t proceed, exercise their rights to withdraw from the contract.

Equally important, is the protection offered to vulnerable consumers by s.82(3) of the ACL. This provision allows the cooling off period to be extended to 3 or 6 months in circumstances where a business has failed to comply with its obligations to properly inform a consumer of the existence of and rights under the cooling off period. This ability to extend the cooling off period is particularly important to protecting the rights of vulnerable consumers because some businesses routinely misinform consumers of their cooling off period rights which can mean a consumer does not become aware of those rights until after the 10 business day cooling off period has expired.

In addition, in LAQ’s submission it is very important that the restrictions on the payment for and supply of goods and services during the 10 business day cooling off period remain as they currently provide vulnerable and disadvantaged consumers with the ability to consider their purchase away from the high pressure sales tactics of unsolicited sellers.

LAQ supports a continuation of the 10 business day cooling off period for unsolicited sales and the extended cooling off period that applies to contracts when businesses fail to properly inform consumers of their cooling off period rights under a contract.

² LAQ agrees with the list of vulnerable consumers set out on page 142 of the ACL Review Interim Report.

Question 49. Are there any unintended consequences, risks or challenges that should be considered?

LAQ is not aware of any unintended consequences, risks or challenges that should be considered that would outweigh the benefits to be afforded to vulnerable consumers.

Question 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 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?

LAQ refers to its answer to Question 48 and to its support for a continuation of the existing cooling off period arrangements.

LAQ is concerned that the introduction of an opt-in mechanism may reduce the rights available to vulnerable consumers under the ACL because it is difficult to frame an opt-in mechanism that provides similar protections to the existing extended cooling off period available to consumers when a business does not correctly explain a consumer's rights.³

LAQ submits that for an opt-in mechanism for unsolicited sales to be considered and provide effective protection for consumers it should have the following characteristics:

- (a) Would apply to all unsolicited sales and not just "high risk" sales or sales that pose the greatest consumer detriment. In LAQ's submission, it is low value sales that often cause the most consumer detriment to vulnerable and disadvantaged consumers because they have the least capacity to absorb the loss of even a small amount of money. As a result, it would be very difficult to define "high risk" sales in a way that allowed practical application and also ensured that vulnerable and disadvantaged consumers remain adequately protected.
- (b) A consumer would be required to wait 7 days before they can opt-in to a contract. The introduction of an opt-in period of 1 business day would provide no meaningful protection for vulnerable consumers because it would provide no time for a consumer to take a contract that they have signed and properly assess its value away from the high pressure sales tactics that characterise unsolicited selling.
- (c) Immediate supply of goods and/or immediate payment would be prohibited. In LAQ's experience consumers are less likely to exercise their legal rights to withdraw from a contract where they have already been supplied with the goods which are the subject of the contract and/or where payment has been made.
- (d) Would include protections for consumers that are similar to the protections set out in s.82(3) of the ACL. The protections in s.82 of the ACL extend the cooling off period for unsolicited consumer agreements to 3 or 6 months when a business does not meet its obligations to explain the cooling off period to the consumer. Similar protections should apply to an opt-in

³ See section 82(3) of the Australian Consumer Law.

mechanism for unsolicited consumer agreements so that if a business fails to properly explain a consumer's rights and the consumer has raised the failure to comply with the legislation, the supplier should be required to take court action and prove the agreement is not an unsolicited consumer agreement.

Question 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 these affect outcomes for consumers?

LAQ does not support the adoption of an enhanced risk based approach to unsolicited consumer agreements.

In LAQ's submission attempting to distinguish between "high risk" and "low risk" transactions in order to enhance protections for "high risk" transactions (such as goods and services over \$500) while reducing protections for "low risk" transactions (less than \$500) will adversely impact on the most vulnerable and disadvantaged consumers who are disproportionately affected by low value transactions.

The reason for this is that all transactions, regardless of their value, are "high risk" transactions for vulnerable consumers on low income because they cannot afford to have anything go wrong with any transaction without it affecting their ability to maintain household expenses to pay the necessities that they need to live.

As a result, in LAQ's submission the same protections should apply to all unsolicited sales irrespective of their value because:

- (a) There is no one definition for "high" or "low" risk that will adequately protect vulnerable consumers.
- (b) Consistent application of the law to all unsolicited sales is important to ensure the same conduct is regulated by the same protections.
- (c) Consistent application of the law to all unsolicited sales is important as it will ensure certainty and avoid confusion for business and consumers.
- (d) Permitting payment and supply of goods in the cooling off period for low value transactions is likely to ensure that most vulnerable consumers will not exercise any cooling off period rights that they currently possess. Allowing supply/payment will dilute the unsolicited sales protections which are designed to provide vulnerable and disadvantaged consumers with the ability to consider whether to proceed with a transaction away from the high pressure sales tactics of an unsolicited salesperson.

LAQ is not aware of any benefits a change to the existing laws would bring that would enhance the existing benefits currently afforded to vulnerable consumers.

Question 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?

Business or trade premises

In LAQ's submission businesses operating pop up stalls or kiosks in shopping centres should be included in the definition of unsolicited consumer agreements.

In LAQ's experience high pressure sales from temporary or pop up stalls or market kiosks in shopping centres have caused consumers significant harm. Typically, these transactions involve:

- (a) A temporary or pop up stall being set up in the common area of a shopping centre.
- (b) The salesperson approaching the consumer without invitation in the common area of the shopping centre away from the stall.
- (c) The consumer being offered a free product or deal that encourages them to attend the pop up stall with the salesperson.
- (d) The consumer signing up to a product or service before leaving the pop up stall or at some point in the future when they return to collect the good or access the service. For example, an offer of a discounted photo and photo shoot, which is provided at the time they attend the pop up stall. Then when they attend to view the photos, high pressure sales are applied to encourage the purchase of expensive additional products.

In LAQ's submission transactions that occur in this context are unsolicited sales and consumers should receive the same protections as if the transactions occurred in an unsolicited door to door or phone context. This interpretation is consistent with the original intent of these provisions, that they apply broadly and to a wide range of locations and industries.

Documenting telephone sales

LAQ supports the proposal that the whole of an unsolicited phone call should be recorded. In LAQ's experience, many consumers who enter unsolicited agreements over the phone allege that one of the reasons they agreed to the contract was because of representations made by the telemarketer about the product on the phone that were ultimately misleading.

The absence of any requirement to record these calls makes it very difficult for consumers to prove they were misled or for businesses to prove that their employees acted appropriately on the phone.

Introducing a requirement that all unsolicited phone calls be recorded will provide an indisputable record of what was said about a product and provide certainty for both business and consumers about the nature of the contract that has been entered into. In LAQ's experience, having a record of the phone call resolves any disputes that might arise very quickly because of the contemporaneous evidence it represents.

LAQ points out that the practice of insurance companies in recording their phone calls saw a number of insurance disputes following the 2011 Qld Floods resolve almost immediately because of the call record of a conversation that could be provided in the event of a dispute.

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

In LAQ's submission, it is appropriate that these matters be addressed through legislative change so that both business and consumers have certainty of the law.

3.1 Implementing the Australian Consumer Law and its objectives (pages 153-172)

3.1.3 Barriers to accessing information

Question 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?

LAQ agrees that the ACL regulators are effective in the use of their current resources by targeting priority areas that have been identified as having the potential to cause the most harm.

In LAQ's submission the most effective enhancement to the existing communication channels would be to develop in consultation with consumer groups a self-help guide that includes:

- Specific guidance about consumer rights under the ACL.
- A suite of template letters that could be used by consumers in exercising their ACL rights.
- A guide to running ACL claims in Courts and Tribunals.

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

In LAQ's experience it is unlikely that consumers will use a stand-alone version of the ACL. LAQ refers to its answer to Question 55 and the need for self-help resources to assist vulnerable consumers to understand and access their ACL rights.

3.1.4 Access to remedies

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

LAQ supports the expansion of the follow-on provisions in the ACL similar to the Commonwealth Government's expansion of s.83 of the *Competition and Consumer Act 2011* (CCA). This expansion will allow consumers to rely on admissions of fact in earlier proceedings and should reduce some of the costs currently experienced by consumers in accessing their ACL rights in a Court or tribunal.

Question 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?

Expanding the follow-on provisions may affect the extent to which businesses are prepared to make admissions of fact. However, in LAQ's submission this risk is very similar to the risk that arises as a result of the expansion of s.83 of the CCA which is already proposed by the government.

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

LAQ refers to its earlier submission in response to the ACL issues paper that sets out the

importance of the establishment of a retail ombudsman to allow a low cost or cost free means for vulnerable and disadvantaged consumers to access and enforce their ACL rights.

3.1.6 Access to consumer transaction data

Question 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?

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

In LAQ's submission it is important that the ACL regulators continue to engage with consumer groups and their representatives about current issues faced by vulnerable and disadvantaged consumers and their needs in addressing the issues affecting them. LAQ supports the Consumer Regulators Forum model established in Queensland, which meets 3-4 times a year, as a good model for continuing the engagement between regulators and consumers.

3.2 Penalties and remedies (pages 173-187)

3.2.3 Maximum financial penalties

Question 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?

If so, what approach should be adopted?

In LAQ's submission the current maximum financial penalties do not adequately deter future breaches of the ACL. LAQ supports Option 1 in the Interim Report which would see a significant increase in the maximum penalties available.

This increase in penalties would:

- provide an effective deterrent and encourage greater compliance by business with the ACL;
- provide a boarder range of monetary penalties; and
- encourage consumers to make and pursue complaints about breaches of the ACL.

Question 65. Are there alternative approaches to addressing the issues raised?

Question 66. Are there any unintended consequences, challenges or risks that should be considered?

LAQ is not aware of any viable alternate approaches or any unintended consequences that should be considered.

3.2.5 Effectiveness of non-punitive orders

Question 67. Should traders be allowed or required to use 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?

Question 68. Are there other types of non-punitive orders to which this could apply?

LAQ supports the continued use by the Courts of non-punitive orders on a business found to be in breach of the ACL as an effective way of addressing problems that are caused by conduct that breaches the ACL.

LAQ supports the proposal that businesses be required to fund third parties to give effect to a community service order. The most appropriate circumstances where this would apply is where a business has caused financial loss to a vulnerable consumer and one of the remedies is the delivery of specialist services such as financial counselling to the consumer. In these circumstances it would not be appropriate for the business to undertake the non-punitive order themselves.

This approach would benefit consumers as it would ensure that they are assisted by an independent service staffed by people qualified to provide the assistance. However, a non-punitive order of this type should also be combined with another order such as the implementation of an internal compliance and education program within the business in order to ensure the culture and business practices of the business are improved.