

Submission

*Australian Consumer Law Review Issues
Paper*

*Consumer Affairs Australia and New Zealand
The Treasury*

*A Submission of the
Queensland Law Society*

26 May 2016

No.	Question	QLS Submission
CONSUMER POLICY IN AUSTRALIA		
Australia's consumer policy framework objectives (1.3)		
1	Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?	<p>The Society believes the current framework's objectives remain relevant and should be maintained.</p> <p>The national consumer policy framework is an important part of the consumer protection laws in Australia. The objectives of this policy seek to strike a balance between:</p> <ul style="list-style-type: none"> • consumer protections and redress; • consumer empowerment through meaningful participation in the market; • allowing legitimate business to successfully operate in the market; and • allowing new technology to be used to create new business opportunities and new products for consumers.
2	Are there any overseas consumer policy frameworks that provide a useful guide?	Please refer to the Society's response to question 1.
3	Are there 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?	In the Society's view, the current overarching and operational objectives, and the principle-based approach in which they are implemented, strike an appropriate balance between the rights and protections of consumers, small businesses and large businesses.
AUSTRALIAN CONSUMER LAW — THE LEGAL FRAMEWORK		
Structure and clarity of the Australian Consumer Law (2.1) Structure and clarity of the ACL (2.1.1)		

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Meaning of 'consumer' (2.1.2)		
4	Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?	The Society believes the ACL is expressed in reasonably clear language, and has an appropriate structure.
5	Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?	Although there are aspects of the law that may be viewed by some stakeholders as less clear than they could be, or not as simple as they could be, the Society's view is that the level of complexity in the ACL is appropriate. The need for legal certainty, as well as the deliberate differentiation in the application and/or consequences of particular provisions in defined circumstances, will unavoidably lead to some provisions being drafted in terms that may appear to be technical or complicated.
6	Are there overseas consumer protection laws that provide a useful model?	<p>The Society does not recommend the incorporation of additional overseas consumer protection laws into the ACL model at this time.</p> <p>The Society believes that the ACL as it stands provides a workable and appropriate regime of consumer protection laws. The Society is also conscious that the ACL already incorporates consumer protection concepts that originated overseas (such as the unfair terms regimes, which were enacted in the UK prior to their enactment in Australia).</p>
7	Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?	<p>The Society submits that the current threshold is appropriate, and should remain.</p> <p>The Society is unaware of any issue or circumstance in which the existing threshold applies to exclude a matter that ought to be subject to the ACL, and the Society believes that the \$40,000 threshold should only be modified if a specific need to include an additional issue or circumstances within the ACL can be demonstrated.</p>

No.	Question	QLS Submission
General protections of the Australian Consumer Law (2.2)		
Misleading or deceptive conduct (2.2.1)		
Unconscionable conduct (2.2.2)		
Unfair contract terms (2.2.3)		
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?	<p>The Society believes the general protections of the ACL are working effectively. Although there is always the opportunity to reflect and, where appropriate, improve the existing legislation in order to respond to emerging markets and consumer practices which may not be covered to the desired extent under the existing ACL, the Society is unable to identify any particular areas of concern at this time.</p> <p>An express object of the ACL is to enhance the welfare of Australians through consumer protection. To that end, the Society believes this is best achieved through principle-based legislation that applies across the economy. With respect to whether the general protections address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on business:</p> <ul style="list-style-type: none"> • The Society is unaware of any statistics which support the view there is a decline in the number of new businesses being commenced as a result of the impact of the general protections available in the ACL. The object of these protections is to enhance the welfare of Australians. These protections appropriately reflect Australian values of fairness, honesty, trust and confidence. • The Society is unaware of any existing concerns that the ACL imposes disproportionate or unnecessary costs on businesses.
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?	<p>The Society believes the protections provided by the general protections in the ACL are appropriate and effective, including by providing an effective deterrent to contraventions of the ACL.</p> <p>However, the Society believes that the maximum penalties for certain specific protections may need to be increased to ensure they are effective in all circumstances to deter future breaches in the ACL. This is particularly relevant in cases of more serious misconduct by large corporations, as discussed in the Society's submission in response to questions 19 and 20 below.</p>

No.	Question	QLS Submission
The Australian Consumer Law's specific protections (2.3)		
False or misleading representations (2.3.1)		
Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)		
Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)		
Unsolicited selling agreements (2.3.5)		
Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)		
Product safety (2.3.7)		
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 Society submits that the ACL's specific protections are working proportionately and effectively. The Society is not aware of any general need to change the specific protections at this time.
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?	<p>As well as providing useful clarification to general protections in the ACL, the specific protections in the ACL provide a useful way to define particular forms of misconduct, and (where appropriate) provide enhanced penalties in relation to that misconduct, without derogating from the necessary flexibility that the ACL provides in relation to the general protections.</p> <p>As regards the charity and non-for-profit sector, the Society suggests that it may be appropriate to review the ACL (including the specific protections regarding unsolicited sales agreements, unsolicited supplies, and harassment and coercion) to ascertain whether it already does (or could, with minor changes) effectively regulate fundraising activities in this sector. Given the existing inconsistencies amongst the States and Territories regarding the regulation of the not-for-profit sector, the Society believes it would be efficient and in the public interest to standardise this regulation nationally. One option to achieve this standardisation is under the auspices of the ACL, as most fundraising activities involve dealings with consumers.</p>
12	Does the ACL need a 'lemon' laws provision and, if so, what should it cover?	The Society believes the ACL should maintain its principle-based approach to consumer laws, and apply them consistently across the economy. Accordingly, the Society submits that if any additional protection against the purchase of 'lemons' is proposed to be introduced, those protections should

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		<p>apply broadly rather than to specific industries (e.g. motor vehicles).</p> <p>Given the importance (and challenges) of educating consumers and businesses regarding the ACL, the Society submits that any 'lemon laws' should be introduced as an augmentation to existing ACL provisions, rather than as an entirely new regime within the ACL.</p> <p>The Society suggests that one option to introduce 'lemons laws' would be to augment the existing consumer guarantees regime, to provide that in certain circumstances a series of 'minor' failures (e.g. a certain number of minor failures within a defined period) would be deemed to constitute a 'major' failure. The result of this addition would be that the consumer could choose between the existing remedies of repair, refund or replacement.</p> <p>The Society submits that a modest change of this sort will provide useful and appropriate protection to consumers, whilst minimising the nature and extent of any changes to the ACL (including compliance costs for businesses).</p>
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?	<p>The Society submits the current product safety framework should be maintained.</p> <p>The product safety provisions in the ACL provide appropriate protection and flexibility in their current form, and are capable of being successfully applied to emerging product safety issues.</p>
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?	No comment.

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Other issues (2.4)		
Addressing 'unfair' commercial practices (2.4.1)		
Interaction between the ACL and ASIC Act (2.4.2)		
15	Should the ACL prohibit certain commercial practices or business models that are considered unfair?	The Society submits that there is no current need to introduce a general prohibition against unfair practices.
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?	For consideration to be given to the introduction of an unfair practices prohibition in the ACL, the Society believes that a problem should be identified that cannot be addressed by the existing protections set out in the ACL, and that problem itself must be capable of being clearly defined. The Society is not aware of any existing problem regarding commercial practices or business models that are considered unfair which are unable to be addressed by the ACL as it currently stands.
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?	<p>The Society submits that no change to the definition of 'financial service' is needed.</p> <p>Although the Society believes that the split of enforcement responsibility between the ACCC and ASIC regarding consumer matters does create unnecessary complexity and inefficiency in the enforcement of the consumer laws, the Society understands that this issue is beyond the scope of the current ACL review.</p> <p>The Society has not encountered any additional complexity arising from the current definition of financial service in the ASIC Act. The Society believes it is generally clear what types of services fall within the consumer laws in the ASIC Act, as opposed to the ACL.</p>
ADMINISTERING AND ENFORCING THE AUSTRALIAN CONSUMER LAW		
Proportionate, risk-based enforcement (3.1)		

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18	Does the ACL promote a proportionate, risk-based approach to enforcement?	<p>The Society submits that the ACL promotes a ‘proportionate, risk based approach’ to enforcement. In doing so, the Society believes that the ACL concentrates the resources of regulators on priority areas which have been identified as having the potential to cause significant consumer harm.</p> <p>Finally, as discussed above in relation to question 17, although the Society believes that the split of enforcement responsibility between the ACCC and ASIC regarding consumer matters does create unnecessary complexity and inefficiency in the enforcement of the consumer laws, the Society understands that this issue is beyond the scope of the current ACL review.</p>
<p>Effectiveness of remedy and offence provisions (3.2)</p> <p>Distinction between civil and criminal penalties (3.2.1)</p> <p>Types of ACL penalties and remedies (3.2.2)</p> <p>Deterrent effect of financial penalties (3.2.3)</p> <p>Setting and updating maximum financial penalties (3.2.4)</p> <p>Role of non-punitive orders (3.2.5)</p> <p>Jurisdictional differences in the enforcement ‘toolkit’ (3.2.6)</p>		
19	Are the remedy and offence provisions effective?	<p>The Society submits that the financial and non-financial penalties that may be ordered by a Court are generally adequate to deter future breaches.</p>
20	Are the current maximum financial penalties available under the ACL adequate to deter future breaches?	<p>However, the Society submits that the maximum penalties for certain specific protections may need to be increased to ensure they are effective in all circumstances to deter future breaches in the ACL, particularly in cases of more serious misconduct by large corporations.</p> <p>The Society believes that the maximum penalty of \$1.1 million for unconscionable conduct is insufficient to deter large corporations from engaging in repeated, systematic, or egregious instances of unconscionable conduct. The size of this maximum penalty may, in circumstances involving serious or repeated breaches by large corporations, prevent a Court from imposing a penalty that is better aligned with the benefits the company may have received from its misconduct.</p> <p>If it is viewed as appropriate to increase the maximum financial penalty for unconscionable conduct, the Society submits that it should be increased to a larger specific dollar figure, rather than using a</p>

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		<p>cascading formulation that includes elements of the contravener's Australian turnover, e.g. as is currently used for unlawful cartel conduct. The Society believes that a cascading formulation of this sort is only appropriate for the most serious types of competition law breaches such as unlawful cartel conduct.</p>
21	<p>Is the current method for determining financial penalties appropriate?</p>	<p>The Society submits the broad discretion given to Courts to determine appropriate penalties for breaches of ACL is appropriate. The Society is conscious, however, that there appears to be a growing trend towards regulators and alleged contraveners being unable to reach common ground regarding the appropriate penalties to apply to contraventions held by a Court to have occurred.</p> <p>If this is a trend and it continues, the Society believes that it will lead to an inefficient expenditure of regulator resources. Although the Society is conscious that this issue may be beyond the scope of this review, identifying mechanisms to encourage agreed outcomes should increase the efficiency of regulators and therefore the effectiveness of the ACL.</p>
22	<p>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?</p>	<p>The Society submits that the existing non-punitive orders available under ACL are sufficient.</p> <p>The existing non-punitive orders provide discretion to Courts to impose orders to better deter future contraventions, as well as to potentially rectify the harm caused by a breach of the ACL. The Society believes that these non-punitive orders have been (and are being) successfully and appropriately utilised by the Courts to enforce the ACL.</p>
23	<p>What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?</p>	<p>Please refer to the Society's response to question 21.</p>
24	<p>Do you have views on any of the issues raised in section 3.2?</p>	<p>No comment.</p>

No.	Question	QLS Submission
Access to remedies and scope for private action (3.3)		
Effective dispute resolution (3.3.1)		
Scope for private action (3.3.2)		
Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)		
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?	<p>The Society believes that private litigation is an effective regulatory tool in consumer and competition law and delivers real outcomes that are in the wider public interest, and that access by small and medium sized enterprises (SME) and consumers to the Court system enhances competition, efficiency, market participation and is in the public interest.</p> <p>However, the Society believes barriers exist for individual consumers and SMEs who wish to enforce their rights under the ACL. The principal barrier facing Australian consumers in seeking remedies under the ACL is the cost associated with the enforcement of private rights and of seeking access to justice. Other barriers which exist under the ACL include:</p> <ul style="list-style-type: none"> • the possibility of adverse costs orders which deter consumers and small business from pursuing their rights under the ACL; and • the significant power and resource imbalance in situations where SMEs/consumers seek redress from 'deep pocket' corporate defendants. <p>More can be done in relation to litigation funding, class actions and funded private actions to enhance access to the Court system. Barriers exist, for example, for those who:</p> <ul style="list-style-type: none"> • have strong prospects of success, which are unable to secure representation because the quantum of loss is too small to result in a victory that is anything more than Pyrrhic; and • seek a non-financial outcome, for which law firms may have no appetite for commercial reasons, either on a deferred fee arrangement or on a no win-no fee basis (due to the likely absence or uncertainty of funds to meet the firm's fees and disbursements).
26	What low-cost actions could consumers and businesses more readily use to enforce their rights?	The Society submits that potential solutions to reduce barriers to private enforcement of ACL rights may include:

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27	Are there any overseas initiatives that could be adopted in Australia?	<ul style="list-style-type: none"> • protective costs orders as a shield from adverse costs orders; • the introduction of a “Justice fund” based upon the Hong Kong Model; • common fund costs orders; and/or • the ability for lawyers to charge contingency fees. <p>The Society believes that protective costs orders, common fund costs orders and contingency fees may provide a means by which consumers and businesses would have greater access to the Australian courts to seek enforcement of their private rights under the ACL.</p> <p><u>Public interest and protective costs orders</u></p> <p>Protective costs orders have previously been made in some public interest cases. Accordingly, the issues for further consideration include:</p> <ul style="list-style-type: none"> • When are protective costs orders justified (eg in environmental law)? • Should protective costs orders extend to consumer/competition law? Is this already happening overseas? • Labor proposal: Small business litigants encouraged to go to ombudsman to ascertain whether their case has merit. Then to apply for a ‘no adverse costs order’ from a court. The court to ascertain merit of case. If the case has merit, any liability for the defendant’s legal fees could be waived. <p><u>Consumer funds</u></p> <p>In addition, the Hong Kong Justice fund provides an example of an overseas initiative that could address current concerns in respect to access to justice.</p> <p>The Hong Kong Justice Fund involved the establishment of a trust fund for the purpose of enabling consumers to access legal remedies. The fund was to be available in those cases with an identified significant public interest or injustice. Further, aggrieved persons must have exhausted all other means of resolving the dispute prior to seeking to access the fund. While moneys issued by the trust fund are intended to be recovered from any proceeds of funded proceedings, there is not any further amounts payable by the users of the fund. This is a significant development in this space, which enables a much greater proportion of any recovery to benefit the persons who satisfied the criteria to access the fund.</p> <p>In Australia, a Victorian Law Reform Commission recommendation resulted in the establishment of the Law Institute of Victoria’s Justice Fund. The fund was Intended to be self-funded and provide financial assistance to parties with meritorious civil claims, an indemnity in respect of any adverse</p>

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costs order, and meet the requirements of any order made by a Court in respect of security of costs. In return for providing financial support, the proposed fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases, not unlike a commercial litigation funder. One difficulty with this model is that the proposed 'commission' levels appear to be uncommercial.

Emerging solutions for consumer access to justice

Funding schemes are likely to be of significant assistance in achieving consumer protection outcomes. It has been recognized overseas that the development of funding models is necessary to provide effective consumer access to justice. Some emerging funding trends which have been identified include:

- third-party funders in Australia and some EU countries. Independent (non-lawyer) third party funding, which commenced in Australia, is now being embraced by some overseas jurisdictions;
- Legal Aid and legal expense funds used as solutions for individual claims; and
- Contingency fees, third-party funding, and collective redress funds are specifically funding options for the application of collective actions.

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?

The Society acknowledges the limitations regulators face due to finite funding and increasingly broad responsibilities, and understands the broader utility in regulators selecting claims based on public interest considerations. However, the Society submits there are some areas in which regulators could play a greater role that may significantly improve consumer welfare.

Particular areas where consumers may benefit from greater regulatory attention include:

- Situations where consumers may have a sound claim but are unable to secure funding (including in relation to potential consumer class actions). Smaller consumer claims are particularly problematic, as the limited quantum of loss often means the costs of a class action is unviable.
- Situations where a regulator elects to assist a subgroup of persons who have means of bringing an action privately, while overlooking other groups for whom without the assistance of the regulator an action will never be brought. The Society suggests that in circumstances where regulators selectively assist particular sub-groups of consumers should attract greater scrutiny to assess whether they should be candidates for a regulator's power to bring representative proceedings.

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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 Society is satisfied that the ACL is as effective as is reasonably possible for this purpose. Australian consumers are able to bring actions against overseas traders using the ACL, although there are often difficulties of seeking to enforce Australian judgements against entities without assets in Australia.
EMERGING CONSUMER POLICY ISSUES		
Selling away from business premises (4.1)		
30	Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?	<p>The Society submits that the unsolicited sales provisions of the ACL have been effective in addressing the consumer harm from unsolicited sales, and recommends that they be maintained.</p> <p>The Society believes that these provisions have been particularly successful in protecting consumers in vulnerable circumstances who are more likely to be approached by unsolicited salespeople in the home, by phone or in the local shopping centre.</p> <p>Examples of successes include:</p> <ul style="list-style-type: none"> • the enforcement of the law on unsolicited agreements (door to door sales) including the ‘Do Not Knock Sticker’; and • Wujal Wujal becoming the country’s 1st Do Not Knock town.
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’?	<p>The Society believes that extending some of the unsolicited sales protections to solicited sales would be a significant change to the ACL that is likely to lead to high compliance costs for business (with a flow-on cost to the broader economy).</p> <p>As discussed above, one of the most important considerations in dealing with unsolicited sales is to protect consumers in vulnerable circumstances who are most susceptible to consumer harm from pressure selling tactics. The Society believes that current unsolicited sales protections, in combination with other elements of the ACL, address this issue appropriately.</p> <p>The Society believes that the same harm that occurs in the context of unsolicited sales can also occur when consumers in vulnerable circumstances are purchasing goods in circumstances where the consumer has made the first approach to the seller (e.g. similar high pressure sales tactics can</p>

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		<p>be used in this scenario).</p> <p>However, given the significant nature of any change to apply protections to these situations, the difficulty of defined the circumstances in which greater protections should apply, as well as the potential need to introduce laws that apply to a narrow part of the economy (rather than having economy-wide consumer laws, which the Society believes is preferable), the Society does not recommend any change to the ACL in this respect at this time. The Society suggests that further consideration should be given to the situation(s) in which greater protections may be appropriate, as well as the appropriate protections to apply in those situations (which may not be best incorporated into the existing unsolicited sales regime).</p>
32	Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?	The Society submits that the requirement that a sale occur 'in a place other than the business or trade premises of the supplier' (as used in section 69(1)(b)(i)) should be amended to explicitly include situations where consumer agreements are entered into after a consumer is first approached by a dealer in the common area of the shopping centre (even if only a very short distance from the business or trade premises of that dealer, which may be a temporary kiosk) and is enticed back to the business or trade premises of the dealer where an agreement is then made.
33	How could these issues be addressed?	The Society is also conscious of other protections in the ACL, and notes that these could also be used to contribute to the protection of vulnerable consumers in these scenarios. In particular, the Society is conscious that section 50, which prohibits undue harassment in coercion, could be expanded to include situations where physical obstruction, or undue persistence or enticement, to make sales to consumers from a temporary kiosk in a shopping centre.
Online shopping (4.2)		
Price transparency (4.2.1)		
Transparent safety information for products sold online (4.2.2)		
Comparator (comparison shopping) website (4.2.3)		
Online reviews and testimonials (4.2.4)		
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	There are different views within the Society regarding whether optional fees and charges should be required by law to be disclosed upfront to consumers in all circumstances.

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	disclosed upfront?	<p>The Society acknowledges that providing consumers with early and full information about price is an important part in consumers participating in the economy and ensuring fairness and accessibility. Consumers may differentiate not only between products, but also between different levels of optional features and costs on a product.</p> <p>However, the Society is also conscious of:</p> <ul style="list-style-type: none"> the compliance costs to business (with flow-on costs to the broader economy) that would be caused by a requirement that optional fees and charges be disclosed upfront to consumers in all circumstances; and the practical difficulties that would be associated with a requirement of this sort (for example regarding product or services for which there are a multiplicity of optional or contingent fees or charges, depending on the choices made by the consumer or the way in which the consumer uses the good or service), which in some situations may have the unintended consequence that the transparency of pricing is actually reduced (e.g. if the volume of upfront disclosure required to be given means that consumers do not read, and/or do not understand, the disclosure).
35	Are there any changes that could be made to the ACL to improve pricing transparency?	<p>There are different views within the Society regarding whether there are changes that could be made to improve pricing transparency.</p> <p>One change to the ACL suggested by some members of the Society that could improve price transparency is the introduction of a 'key price screen' to all online sales. Similar to the Key Mortgage Fact Sheet that was introduced as part of the National Consumer Credit Reforms, the key price screen could be made a mandatory first screen in any on-line sales process, and could include:</p> <ul style="list-style-type: none"> the total minimum price payable; all optional fees that could be charged as part of the product being purchased listed individually; and all optional charges that could be charged as part of the product being purchased, listed individually. <p>However, other members of the Society are conscious of issues including:</p> <ul style="list-style-type: none"> the risk that a change of this sort may reduce price transparency in situations where there are a multiplicity of optional or contingent fees or charges, depending on the choices made by the consumer or the way in which the consumer uses the good or service;

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		<ul style="list-style-type: none"> the potential chilling impact on innovation (both in terms of new goods or services, as well as pricing and services for goods or services) that this change may have; the compliance costs to business, including small business, that this change would cause (with flow-on costs to the broader economy); and the technological difficulties that implementing a change of this sort across the multiplicity of platforms and technologies used by consumers to shop online would involve.
36	Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?	No comment.
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?	<p>There are different views within the Society regarding whether changes should be made to the ACL regarding the adequacy of comparator websites and online reviews.</p> <p>The Society recognises that there is likely to be a lack of understanding among consumers about how some comparator websites operate and how they are remunerated. In particular:</p> <ul style="list-style-type: none"> consumers may understand that that the sole purpose of the website is to act for the benefit of the consumer; consumers may believe that a comparator website looks at all products available in a market instead of just some products; consumers may believe that comparator websites are independent and that there is no commercial relationship between service providers and the comparator website; and/or consumers may be uncertain as to what products are being compared, and how the comparison has been conducted (e.g. they may assume like for like comparisons are occurring when this may not always be the case). <p>The Society is also conscious of the ACCC Guide issued in August 2015 that suggests key principles with which comparator websites should comply, being that they should:</p> <ul style="list-style-type: none"> facilitate honest like for like comparisons; be transparent about commercial relationships; and

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- clearly disclose who and what is being compared.

As this only a guide, the Society is conscious that there is no significant consequence to a comparator website if it does not comply with these principles.

Some members of the Society believe that the principles outlined above from the ACCC's Guide should be incorporated in the ACL, on the basis that they are important to ensuring fair and functioning markets in which consumers can fully participate, as they allow consumers to make good decisions about what is available in the market.

However, other members of the Society do not share the view that these principles should be enshrined in the ACL, on the basis that:

- the prohibition on false or misleading conduct provides a clear and easily enforceable regime that includes provisions that already specifically address comparative advertising;
- the enhanced penalties that apply to false or misleading conduct (including the possibility of criminal prosecution) are adequate to enable regulators to enforce this regime, and enable Courts to deter future instances of misleading comparative advertising;
- the existing provision that reverses the onus of proof in relation to testimonials (whether they made communicated online or otherwise) provides another useful enhancement for the benefit of both regulators and acquirers (including consumers) in relation to false or misleading testimonials;
- the application of the false or misleading conduct regime to representations made to non-consumers means that the change discussed above may take effect more broadly than just in relation to comparative advertising or testimonials directed to consumers, and this may not be necessary or appropriate with respect to representations to non-consumers;
- the compliance costs to business, including small business, that this change would cause (with flow-on costs to the broader economy); and
- the potential chilling impact on innovation (both in terms of advertising for goods or services, as well as potentially the introduction of new goods and services in some markets) that this change may have.

Finally, the Society notes the success of the national project led by OFT NSW in 2013 regarding online reviews. The Society believes that taking enforcement action regarding false and misleading on-line reviews is important, as they may distort the appearance of the market to consumers.

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Emerging business models and the Australian Consumer Law (4.3)		
38	Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?	<p>The Society submits that the ACL generally provides consumers with adequate protections in relation to the 'sharing' economy.</p> <p>The Society believes that the ACL should apply consistently across the economy, and that changes should only be made to the ACL where a clear gap in existing provisions is identified. Accordingly, if additional consumer protections for emerging business models are proposed to be introduced, those protections should apply broadly and be incorporated within the broader framework of the ACL.</p>
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?	<p>The Society believes the ACL provides adequate clarity and certainty to consumers in respect to the types of transactions are covered by the ACL in a 'sharing' economy.</p> <p>The Society notes that the existing framework of consumer law can be applied to many emerging transaction types seen in the 'sharing' economy.</p> <p>A practical issue that could be addressed is to require provision of information that accurately identifies the seller. The Society believes this is a particular issue in online transactions, where sellers may not provide accurate identifying information to purchasers, or may not provide a lasting mode through which they may be contacted. Requiring this information to be provided should allow prospective purchasers to shop online with certainty as to the supplier from whom they are purchasing, which should enhance their ability to make complaints or take further action in the event of a breach of the ACL.</p>
Promoting competition through empowering consumers (4.4)		
40	Do consumers want greater access to their consumption and transactional data held by businesses?	No comment.
41	What is the role of the ACL and the regulators in supporting consumers' access to data? Is there	No comment.

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	anything in the ACL that would 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?	No comment.
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?	No comment.