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Senate Standing Committees on Economics
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Dear Committee Secretary

Australian Securities and Investments Commission – inquiry into investigation and enforcement conduct

Thank you for the opportunity to provide this submission to the Senate Economics Committee's inquiry into the capacity and capability of the Australian Securities and Investments Commission (ASIC) to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct.

This is a joint submission by Consumer Action Law Centre, CHOICE, Consumer Credit Legal Service (WA) Inc, Indigenous Consumer Assistance Network, Financial Counselling Australia, Financial Rights Legal Centre and Super Consumers Australia. Information about our organisations is available at **Appendix B**.

Effective enforcement action is a critical task of consumer protection regulators and essential to a well-functioning consumer market. In recent years, ASIC has completed a significant amount of meaningful enforcement work that has been targeted at unethical, unprofessional and/or unlawful businesses causing harm to consumers. Their interventions have improved consumer outcomes in financial services, provided valuable guidance to industry on the laws that apply to their businesses, and led to a more competitive marketplace.

ASIC's use of the various forms of enforcement powers in their toolkit is generally appropriate for the circumstances. We encourage ASIC to continue to use the variety of powers at their disposal and take a campaign approach toward compliance and enforcement. In particular, we encourage ASIC to continue to expand its thematic and detailed reviews of the industries it regulates, particularly higher risk areas.

To empower ASIC to deliver more effective outcomes from its investigations and compliance work, we recommend that Government:

- amend ASIC’s legislative objectives to specifically reference its role in promoting fair treatment for consumers experiencing vulnerability
- increase ASIC’s funding, particularly to allow it to do more ongoing data collection and analysis
- develop a mechanism by which ASIC and Treasury can proactively identify and respond to any problematic conduct that falls on the edge of ASIC’s regulatory perimeter
- introduce an unfair trading prohibition and give ASIC the power to enforce this provision in relation to financial services
- introduce a super-complaints power similar to the one in the UK
- align penalties in relevant ASIC legislation to those in the Australian Consumer Law (ACL).

We also note that ASIC already has significant reporting obligations to Parliament. While accountability is important, increasing layers of oversight across multiple committees does not seem to add a lot of value. It also detracts from ASIC’s core functions as it requires significant resourcing internally. If any increased accountability were to be recommended, it should only relate to publishing better information for the general public.

A summary of recommendations is available at **Appendix A**.

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ASIC's enforcement work

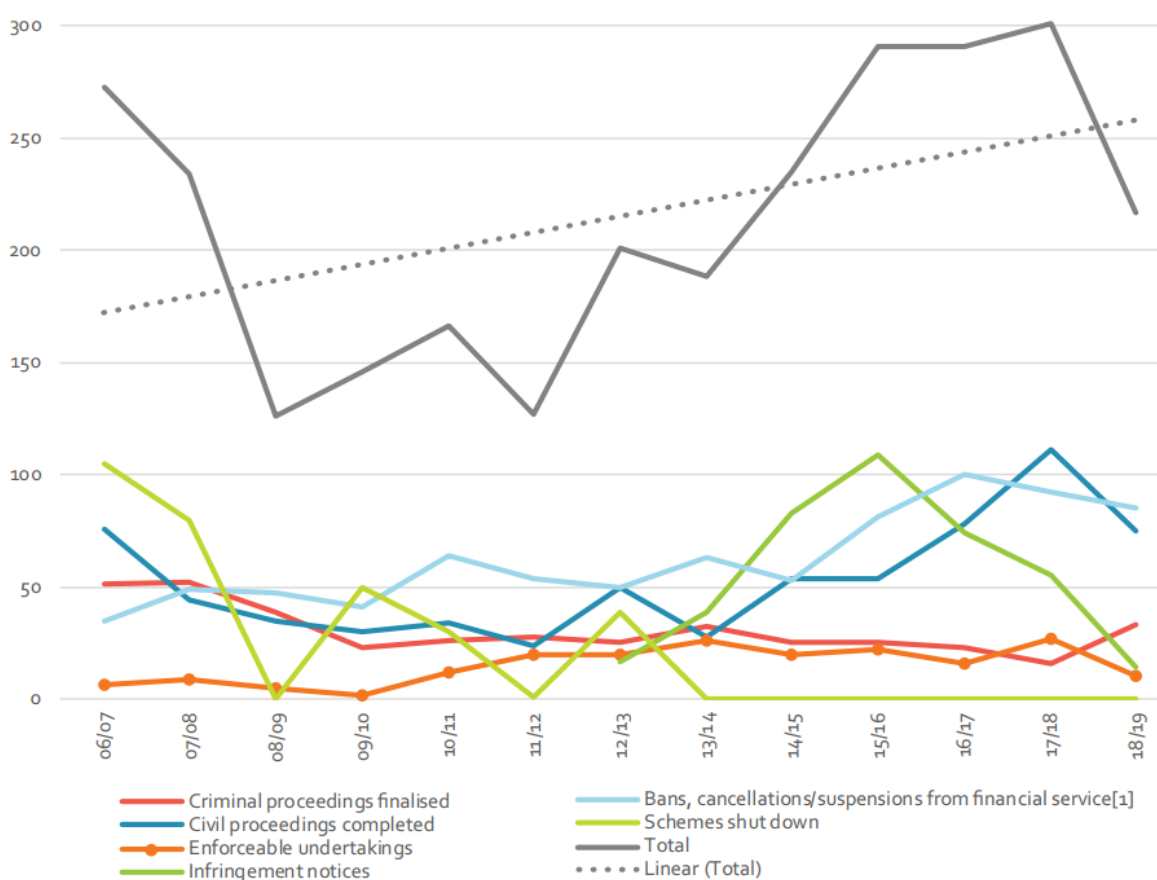
Effective enforcement action is a critical task of consumer protection regulators and essential to a well-functioning consumer market.

This was an important finding from the Financial Services Royal Commission which stated that “the Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account”.¹

ASIC is a very important regulator in the lives of Australians, particularly people experiencing vulnerability and disadvantage. This is because its role is in key essential service markets, like consumer credit, insurance and banking. Fair and affordable provision of these services to all is necessary to allow reasonable participation in society.

In Consumer Action's 2020 report, *Regulator Watch: the enforcement performance of Australia's consumer protection regulators*, we rated ASIC highly. This was because for the period the report covered, there was an upward trend in enforcement activity (see graph below).² The report commented as follows: “More recent years demonstrate a willingness to issue civil proceedings against major entities, in contrast to earlier years where negotiated outcomes with large entities was favoured”. The report also rated regulators for reporting of compliance and enforcement actions, and ASIC achieved the highest possible score, noting that “ASIC's public reports demonstrate an increasing commitment to enforcement activity and improvements in the accessibility of its data”.

Graph: Enforcement activity ASIC – 2006 – 2019



¹ Financial Services Royal Commission, Final Report, February 2019, Page 3-4

² Consumer Action Law Centre, *Regulator Watch*, 2nd ed, 2020, page 52-53 https://consumeraction.org.au/wp-content/uploads/2020/03/RegulatorWatch_Report_Compressed.pdf

In the period since the report, it appears that ASIC has increased its enforcement work, particularly in relation to civil penalty proceedings.³

| | FY 2020-21 | FY 2021-22 |
|-------------------------------|------------|------------|
| Criminal litigation completed | 29 | 37 |
| Civil litigation completed | 46 | 61 |
| Bannings, suspensions etc | 193 | 180 |
| Infringement notices | 3 | 3 |
| Enforceable undertakings | 3 | 1 |

Consumer groups support ASIC using a range of enforcement tools, including a combination of litigation and enforceable undertakings. It is sometimes the best outcome for consumers for ASIC to reach a settlement with a firm where this means consumers will be compensated more rapidly than might happen if a matter went to court. Litigation is however necessary, to test out the meaning of the law and to demonstrate publicly that there are consequences for bad conduct.

We also support the judicious use of a broader range of enforcement tools, including some that facilitate earlier intervention to prevent harm and warn other consumers about risks than is possible through litigation. These include warnings, infringement notices and stop orders under the design and distribution obligation provisions. We note that there are encouraging signs that ASIC is making greater use of this broader range of tools, as highlighted by some of the examples below.

We have particularly welcomed ASIC's recent focus on enforcement action in relation to egregious business practices that affect the most vulnerable, many of which have resulted from complaints by consumer organisations. The following are some of the important and effective enforcement actions in 2022:

- Rent4Keeps and Layaway Depot⁴—an innovative legal action arguing that certain contracts that have been styled as 'consumer leases' are in reality 'credit contracts'. The allegation is that the arrangements have been deliberately structured to avoid important consumer protections, such as the 48 per cent cap on interest and fees. This is a business model that many consumer organisations, including Consumer Action, have complained about. This matter is listed for hearing in May 2023.
- Sunshine Loans⁵—ASIC alleges this payday lender charged fees to consumers where they attempted to amend the payment schedule, which was unlawful. High charges by payday lenders is another key area of complaint by consumer organisations. This matter is listed for hearing in July 2023.
- Proceedings in relation to the former Aboriginal Community Benefits Fund(ACBF)/Youpla Group⁶—this was a notorious firm that targeted Aboriginal and Torres Strait Islander peoples with poor-value funeral plans. ASIC has listened to feedback from the community and prioritised enforcement proceedings against this entity, including former directors and office holders. First Nations advocates have called for enforcement action to ensure accountability and deterrence.

³ ASIC Annual report 2021-22, https://download.asic.gov.au/media/10dgoaqv/asic-annual-report-2021-22_full.pdf

⁴ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-090mr-asic-sues-rent4keeps-and-layaway-depot-for-alleged-breaches-of-credit-act/>

⁵ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-132mr-asic-sues-sunshine-loans-for-charging-prohibited-fees/>

⁶ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-372mr-asic-seeks-to-preserve-property-of-former-youpla-group-director/>

- Defending High Court special leave by Cigno⁷—ASIC has used a range of enforcement tools against this high-cost lender which designed its products to avoid credit laws. ASIC took action that Cigno and related entities were operating unlicensed, and successfully defended an appeal in the High Court.
- OnePath Life for failures in income protection claims handling⁸—this matter concerns a customer who had disclosed prior mental health issues before purchasing insurance, but the insurer still claimed the customer had acted fraudulently by failing to disclose certain hospitalisation for mental health issues. The claim was that the insurer failed to act with utmost good faith during claims handling, which is a requirement to treat people fairly and transparently.
- American Express Australia (**Amex**) for breach of design and distribution obligations⁹—this case involves allegations that Amex was aware that credit cards sold in-store were not suitable to their target market, because there were high cancellation rates and Amex knew that some consumers were confused about whether they had applied for a loyalty card or a credit card. The in-store sale of credit cards has been an area of concern for consumer organisations over many years.
- Timeshare company Ultiqa not acting in best interests¹⁰—this matter concerned the high-pressure sales tactics adopted by the timeshare provider to sign people up to a high-cost and complicated scheme, often using related finance. Timeshare has been a consistent area of concern to consumer organisations. This action sent an important signal to the timeshare industry that inappropriate sales tactics will not be tolerated.
- Latitude and Harvey Norman for interest free advertising¹¹—in this case, ASIC alleges that advertisements promoting 'no deposit', 'interest free' payment methods were misleading because they did not disclose that consumers could only use the interest free payment method if they applied for and used a particular credit card, and also because they failed to adequately disclose establishment fees and monthly account service fees. The advertising and promotion of credit has also been a concern to consumer organisations.
- ClearLoans for financial hardship misconduct¹² – this matter concerned a number of forms of harmful conduct by ClearLoans when dealing with borrowers in financial hardship, such as failing to adequately handle hardship requests or giving borrowers sufficient time to correct defaults, attempting to rely on guarantors for payments without considering hardship requests, among other forms of harmful conduct. A number of our organisations saw ClearLoans' conduct cause substantial harm to our clients. The Federal Court issued over \$6 million in penalties, in recognition of the substantial harm that misconduct in responding to financial hardship can cause people experiencing vulnerability.
- A&M Group Pty Ltd, which trades as Debt Negotiators¹³— a penalty of \$650,000 was imposed after the Federal Court found that the entity engaged in misleading or deceptive conduct and in undue harassment or coercion against debtors who had missed payments under their debt agreements. Debt

⁷ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-360mr-asic-successful-in-high-court-against-bhf-solutions-and-cigno/>

⁸ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-344mr-asic-commences-proceedings-against-onepath-life-alleging-utmost-good-faith-breach/>

⁹ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-338mr-asic-takes-civil-penalty-action-against-american-express-australia-in-first-court-case-alleging-breaches-of-design-and-distribution-obligations/>

¹⁰ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-277mr-timeshare-company-ultiqa-penalised-900-000-by-federal-court/>

¹¹ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-270mr-asic-sues-latitude-finance-australia-and-harvey-norman-holdings-for-allegedly-misleading-interest-free-advertising/>

¹² See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-037mr-clearloans-penalised-6-million-for-financial-hardship-misconduct-and-other-credit-act-breaches-during-covid-19/>

¹³ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-373mr-court-finds-a-m-group-liable-for-misleading-or-deceptive-conduct-and-undue-harassment-or-coercion-imposes-650-000-penalty/>

Negotiators had sent text messages that debtors could be charged with fraud or imprisoned if they failed to make payments, and that legal action or a garnishee order could be obtained.

- Action against a ‘influencer’ who the Federal Court found had been carrying on a financial service business without a licence.¹⁴ This is an example of conduct at the perimeter of ASIC’s regulatory remit that, left unchecked, risks the proliferation of unqualified, unregulated financial advice on mainstream social media. Action like this is also essential to protect the underlying licensing regime and help determine the regulatory perimeter. This action has raised public awareness about the absence of oversight of influencers, and has prompted others to seek registration, who would then require them to meet relevant standards.
- Multiple infringement notices issued for greenwashing.¹⁵ Misleading and unethical marketing has been a concern of consumer organisations for years in regard to a range of financial products. It is essential to motivate companies to ensure any claims about ethics are legitimate, rather than a misleading attempt to cash in on the climate (or any other) emergency. Unfortunately, this kind of action is required if consumers are to be able to put any faith in any claims by financial product issuers about the ethics of their product.
- Consumer groups strongly support ASIC’s recent use of design and distribution obligations (DDO) stop orders to quickly address consumers being targeted by inappropriate financial products. ASIC has issued 22 design and distribution obligations (DDO) stop orders, across a wide range of products, including managed investment schemes, crypto funds and credit products.¹⁶

The role of strategic litigation in testing the limits

While ASIC’s enforcement record can have a strong impact on the marketplace, we should not always expect regulators to win cases. An important role of regulators is to test the limits of the law, and that will necessarily involve losing some cases. We have welcomed ASIC taking on hard cases and appealing them if they lose.

Unlicensed lending against Cigno and BHF Solutions

ASIC’s claim of unlicensed lending against Cigno and related entity BHF Solutions was initially dismissed by the Federal Court, with it finding that fees charged not by the lender (BHF) but rather by the related agent entity (Cigno) were not “for providing credit” pursuant to the National Credit Code.¹⁷ ASIC appealed this decision to the Full Federal Court, successfully arguing that the very high fees charged under Cigno’s composite service agreement was “for providing credit”, noting that the legislation must be looked at in a way which ‘looks to the substance of the credit arrangements rather than their contractual form’.¹⁸ The credit laws are a technical area of law, and it is important that the regulator use its power to promote the law’s purpose of consumer protection.

Conflicted remuneration laws - CBA and Colonial First State Investments Ltd

Another recent appeal by ASIC related to the Federal Court’s decision that Commonwealth Bank of Australia (CBA) and Colonial First State Investments Ltd did not breach conflicted remuneration laws when they reached an agreement to distribute Colonial’s super product through CBA’s branch network.¹⁹ This was a case study from the Financial Services Royal Commission, which identified concerns about revenue received by CBA for selling

¹⁴ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-371mr-federal-court-makes-findings-against-social-media-influencer-tyson-scholz/>

¹⁵ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-336mr-asic-issues-infringement-notices-against-investment-manager-for-greenwashing/>; <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-379mr-asic-issues-infringement-notice-against-superannuation-trustee-for-greenwashing/>

¹⁶ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-026mr-asic-to-expand-enforcement-focus-areas-in-the-coming-year/>

¹⁷ *ASIC v BHF Solutions Pty Ltd* [2021] FCA 684.

¹⁸ *ASIC v BHF Solutions Pty Ltd* [2022] FCAFC 108.

¹⁹ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-293mr-asic-appeals-commonwealth-bank-and-colonial-first-state-conflicted-remuneration-decision/>

the product influencing which product branch staff were trained and told to recommend.²⁰ An appeal in this matter is important because the decision, if let stand, may limit the operation of the conflicted remuneration provisions.

RECOMMENDATION 1. ASIC should continue to prioritise and increase enforcement action through the courts, and appeal matters where they are unsuccessful.

Increasing thematic compliance reviews to identify best practice

Beyond enforcement, we consider that ASIC's thematic reviews and reports to examine problems in markets are very important in securing compliance and promoting good industry practice. For example, ASIC recently examined the compliance of small amount credit contract providers with the requirement to provide target market determinations pursuant to design and distribution obligations. This compliance exercise resulted in significant improvement in target market determinations issued, which should result in fewer inappropriate sales of a high risk product.²¹ Other reports have included industry reviews of the 'buy now pay later' industry and credit cards.²² These reports identify good practice and where improvements are required, can influence market conduct. Ideally, this prevents the need for enforcement action, by sending clear signals about where the regulator considers that conduct needs to improve and providing industry with an opportunity to respond.

As an example, ASIC's 2018 reports into the credit market, among other things, compared the extent to which each provider's product had features which could lead to consumer harm, such as whether the provider notified consumers before an interest free balance transfer period was about to finish. Amex was the only provider which had made no commitment to put in place restrictions on customers exceeding their limits. Soon after the release of the report, Amex did change its product.

These types of ASIC reports also provide an objective source of data on how financial products are being distributed and their impact on consumers, which is a valuable resource for policy makers considering reforms. ASIC's successive shadow shopping exercises in the financial advice industry through the 1990s and early years of this century, for example, provided an objective fact base on the quality of advice that was being provided to consumers, which was particularly valuable when Parliament was called upon to consider the Future of Financial Advice reforms.

While we have not undertaken a detailed assessment, it appears that ASIC has reduced its thematic compliance reviews in recent years, at least with respect to the publishing of reports about them. This is an important aspect of ASIC's regulatory toolkit, particularly given it can use its information-gathering powers to collate industry data. We encourage ASIC to focus again on these thematic reviews.

Consumer Action's *Regulator Watch* report series called for a "campaign approach" to enforcement.²³ A campaign approach involves regulators taking a range of complementary actions, including strategic enforcement, to address a specific issue as regulators need to be able to prevent consumer harm, not just deal with misconduct as it occurs.

Campaigns can be proactive—tackling emerging market problems, or reactive—addressing research or significant consumer complaints and systemic issues. The objectives of a campaign approach are to highlight specific problems, educate the market and change behaviour, ideally before the poor behaviours become entrenched or caused widespread consumer harm.

²⁰ Vol 2, page 98

²¹ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-352mr-asic-intervention-improves-small-amount-lenders-target-market-determinations/>

²² See <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-672-buy-now-pay-later-an-industry-update/>; <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-604-credit-card-lending-in-australia-an-update/>

²³ <https://consumeraction.org.au/report-regulator-watch/>

A coordinated campaign approach has the potential to have a significant impact on markets. Such an approach can use information, communications, surveillance, investigations and enforcement action to improve market outcomes. As noted above, this can also improve the efficiency of regulation by providing industry with opportunities to improve practice before ASIC needs to consider taking formal enforcement action. When done regularly, it can also generate a standard operating rhythm that allows efficiencies and savings to be found.

In this regard, it is promising that ASIC has for the first time published its Enforcement Priorities in late 2022.²⁴ The Enforcement Priorities contain a clear purpose, to: 'communicate our intent to industry and our stakeholders, and give a clear indication of where we will direct our resources and expertise.' To deliver on these priorities, we encourage the regulator to adopt a campaign approach, which might include public communications about its concerns and expectations, producing information for the marketplace about good practice and compliance, raising issues directly with firms and sectors, undertaking investigations and thematic reviews, as well as taking enforcement actions.

RECOMMENDATION 2. ASIC should continue and increase its thematic reviews of market sectors and practices and make use of its information gathering powers to identify good practice as well as areas of concern.

RECOMMENDATION 3. ASIC should build on its enforcement priorities and adopt a campaign approach to each of its enforcement priorities.

Focusing on vulnerable consumers

Many of ASIC's enforcement actions identified above involve market conduct that impacts consumers experiencing vulnerability. It is very important that ASIC prioritises its efforts to support vulnerable and disadvantaged consumers. We welcomed ASIC's announcement in November 2022 that, "misconduct involving a high risk of significant consumer harm particularly conduct targeting financially vulnerable consumers" is an "enduring" enforcement priority".²⁵

ASIC's legislative objectives include promoting "confident and informed decision making" by consumers and investors.²⁶ "Confident and informed participation" is an outdated understanding of consumer protection. The complexity of financial products and markets means that many members of the community, especially people experiencing vulnerability, will likely be unable to be confident and informed market participants. It places the onus on individuals to be informed, rather than promoting good outcomes for people.

To meet this objective, ASIC needs to recognise that there are many consumers experiencing vulnerability who may be less able to protect or represent their interests, engage effectively, and/or more likely to suffer detriment. Barriers to confident and informed decision making may include event-based circumstances (e.g. job loss, family breakdown, bereavement) as well as systemic factors (e.g., employment insecurity, lack of digital literacy) or market-based factors (e.g., information is too complex or potentially misleading).

ASIC Deputy Chair Sarah Court has noted the importance of vulnerability when speaking about ASIC's current enforcement priorities, stating in relation to enforcement in the credit area that "our job is to protect and disrupt activity targeting vulnerable consumers".²⁷

ASIC's ability to address consumer vulnerability should be reflected in its legislative objectives. Without an objective relating to consumer vulnerability, we consider that the regulator and the regulatory regime will be unable to make effective decisions regarding regulatory priorities, scope and exclusions. This is because decision-

²⁴ See: <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>

²⁵ See: <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>

²⁶ ASIC Act, section 1(b); Corporations Act, section 760A(a).

²⁷ <https://asic.gov.au/about-asic/news-centre/speeches/asic-s-annual-forum-2022-enforcement-priorities-and-the-regulatory-toolkit/>

making will place too much emphasis on other objectives like efficiency or assume that all people can easily engage with market information and processes. The temptation will be to take a narrow cost-benefit approach, rather than consider the impact of action on particular cohorts, such as people experiencing vulnerability. Focusing on economic cost-benefit analysis at the macro level can mask the negative experiences of people experiencing vulnerability.²⁸ Regulatory decision-making must recognise that public benefits are achieved when *all* consumers are protected and empowered, not just those that are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them.

Furthermore, regulators and industry sectors in Australia and the UK are increasingly adopting vulnerability objectives or strategies. This includes the Essential Services Commission,²⁹ the Australian Energy Regulator³⁰ and the Australian Financial Security Authority³¹ in Australia, as well as the Financial Conduct Authority (FCA)³² and the Competition and Markets Authority in the UK.³³ Given the extent to which ASIC focuses on outcomes for vulnerable consumers, it would be appropriate for it to also develop its own vulnerability strategy.

The FCA's guidance for firms on the fair treatment of vulnerable consumers aims to drive improvements in the way that firms treat vulnerable consumers. The FCA states "[f]irms should understand what harms their customers are likely to be vulnerable to and ensure that customers in vulnerable circumstances can receive the same fair treatment and outcomes as other customers. This needs to happen through the whole customer journey from product design through to customer engagement and communications."³⁴ We consider ASIC's approach to protecting consumers experiencing vulnerability would be enhanced by developing similar guidance.

ASIC's statutory objective should also be expanded to focus on improving the long-term economic wellbeing of consumers. Consumer groups encourage the Committee to consider aligning the legislative objectives of ASIC with the objects of the *Competition and Consumer Act 2010* and *Telecommunications Act 1997*, which guide the work of the Australian Competition and Consumer Commission (ACCC) and Australian Communications and Media Authority (ACMA):

*"The object of this Act is to **enhance the welfare of Australians** through the promotion of competition and fair trading and provision for consumer protection."*³⁵

"to provide a regulatory framework that promotes:

*(a) the **long-term interests of end-users** of carriage services."*³⁶

This would ensure that ASIC's enforcement approach is focused on improving the long-term welfare of consumers, especially those experiencing vulnerability.

RECOMMENDATION 4. The Government should amend ASIC's legislative objectives to reference its role in promoting fair treatment for consumers experiencing vulnerability, and enhancing the long-term economic welfare of consumers. Whether this occurs or not, ASIC should also develop its own vulnerability strategy.

²⁸ See for example, Consumer Action's analysis of the public benefit assessment under the Competition & Consumer Act: <https://consumeraction.org.au/report-our-response-to-the-new-energy-tech-consumer-code/>

²⁹ ESC, Regulating with consumer vulnerability in mind, <https://www.esc.vic.gov.au/other-work/regulating-consumer-vulnerability-mind>.

³⁰ AER, Towards energy equity, a strategy for an inclusive energy market: <https://www.aer.gov.au/retail-markets/guidelines-reviews/towards-energy-equity-a-strategy-for-an-inclusive-energy-market>

³¹ AFSA, AFSA Vulnerability Framework 2022-25, <https://www.afsa.gov.au/about-us/corporate-information/key-documents/vulnerability-framework>

³² FCA UK, Guidance for firms on the fair treatment of vulnerable customers, <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>

³³ CMA UK, Consumer vulnerability: challenges and potential solutions, <https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions/consumer-vulnerability-challenges-and-potential-solutions>

³⁴ See: <https://www.fca.org.uk/news/press-releases/fca-launches-guidance-firms-fair-treatment-vulnerable-customers>

³⁵ *Competition and Consumer Act 2010* (Cth), s2

³⁶ *Telecommunications Act 1997* (Cth) s3

RECOMMENDATION 5. ASIC should publish guidance for firms on the fair treatment of vulnerable consumers.

ASIC's Indigenous Outreach Program and Engagement

An example of the important positive impact that comes from specific consideration of people who can experience vulnerable circumstances can be seen via the enforcement work involving ASIC's Indigenous Outreach Program (IOP). The IOP works to identify issues with financial services that impact First Nations communities, and ensures that when ASIC engages with First Nations communities, it does so with appropriate cultural sensitivity.

The IOP has developed good relationships with community sector organisations that directly work in First Nations communities, including organisations like the Indigenous Consumer Assistance Network and financial counsellors, as well as First Nations-led programs such as Mob Strong Debt Help at Financial Rights Legal Centre. This has allowed the team to understand the issues impacting communities and identify where enforcement activity can address exploitative business models and reduce harm. These activities have led to enforcement that specifically target conduct impacting First Nations communities that we believe wouldn't have happened without the involvement of the IOP. Examples include:

- Litigation in relation to the use of a "book up" system in APY Lands, that was harming community and amounted to unlicensed credit activity. While ASIC was unsuccessful in proving that the conduct also met the very high bar of unconscionability, it shone a clear light on the problems with this model³⁷
- Court action against Channic Pty Ltd and Cash Brokers Pty Ltd, which involved a highly harmful and unlawful loan system operating out of a car dealership in Cairns that was causing harm to consumers from the First Nations community of Yarrabah.³⁸

It is an ongoing reality that the work of regulators and government do not often deliver meaningful and identifiable benefits upon the lives of First Nations communities. While the work of ASIC's IOP does not necessarily address the underlying systemic disadvantage experienced by First Nations people (particularly those in remote communities), it is a way that helps identify and put a stop to specific instances of harm by unethical financial services providers. The IOP is a valuable element of ASIC's regulatory work and will be even more important given the welcome announcement by ASIC of misconduct impacting First Nations peoples as an enduring enforcement priority. We urge the Committee to recommend that the Government look for ways to expand or support the continued operation of the IOP.

More broadly, we also acknowledge the recent development of ASIC's Indigenous Financial Services Framework, which is a very positive step as it will guide how ASIC interacts with First Nations people.³⁹ We hope this will help ensure the impact upon First Nations people is a relevant consideration for all of ASIC's enforcement work.

RECOMMENDATION 6. The Government should provide additional specific funding for ASIC to expand its Indigenous Outreach Program, including to specifically support enforcement work where appropriate.

Accountability to government, business and the community

A key issue being considered by this inquiry is whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement.

³⁷ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-136mr-high-court-dismisses-asic-appeal-in-apy-lands-book-up-case/>

³⁸ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-108mr-queensland-car-yard-lender-ordered-to-pay-over-1-2-million-after-breaching-consumer-credit-laws/>

³⁹ <https://asic.gov.au/about-asic/what-we-do/how-we-operate/stakeholder-liaison/asic-s-indigenous-outreach-program/asic-s-indigenous-financial-services-framework/>

There are a range of accountability mechanisms that ASIC must comply with which assess whether ASIC is meeting its statutory obligations and community expectations. We note that in addition to inquiries such as the current one, ASIC is accountable to the Australian Parliament through the:

- Parliamentary Joint Committee on Corporations and Financial Services;
- Senate Standing Committee on Economics; and
- House of Representatives Economics Committee.

ASIC also responds to Statements of Expectations issued by the Government, and is also regularly reviewed by the Financial Regulatory Assessment Authority (FRAA), which is tasked with assessing and reporting on the effectiveness of both ASIC and the Australian Prudential Regulatory Authority.

Consumer representatives consider regulators should be accountable to the public for who they stand to serve. We are concerned however that existing accountability measures focus too much on the interests of industry rather than the interests of consumers. For example, the members of FRAA primarily have industry experience and connections, and there is not representation from those with consumer or community interests or experience.

While accountability is important, and we strongly support the role that parliamentary committees and authorities play in keeping our institutions accountable to the public they serve, increasing layers of oversight across multiple committees and the FRAA seems to detract from ASIC's core functions as we have observed that it requires ASIC to allocate significant resourcing internally to report to these committees.

We also consider that key elements of accountability to consumers and the public include transparency and effective consultation.

Statement of expectations

The Statement of Expectations is an important mechanism through which the Government articulates its vision for the regulator. The last Statement of Expectations for ASIC was issued in August 2021 by the former government in a very different economic environment.⁴⁰ It contains no recognition of ASIC's consumer protection role and makes only passing reference to enforcement. The Committee could recommend a new statement of expectations that better reflects the community's expectations of ASIC as a consumer protection regulator in financial services.

A new Statement of Expectations should ask ASIC to:

- draw upon a broad range of regulatory and enforcement tools to encourage compliance with the laws that ASIC administers
- use investigatory and research functions to publish evidence on emerging harms and compliance with existing laws
- seek an appropriate balance in enforcement outcomes between achieving timely compensation for consumers and appropriate penalties for breaches of the law
- provide advice to government on weaknesses in the legislative framework and enforcement tools available to ASIC in responding to risk of harm.

RECOMMENDATION 7. The Government should issue a new Statement of Expectations to ASIC that emphasises its role in enforcement of consumer protection laws and contribution to policy debates.

⁴⁰ <https://asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/statements-of-expectations-and-intent/>

Review of the Consumer Consultative Panel

ASIC has effective consumer consultation mechanisms, including through its Consumer Consultative Panel (CCP), and through close relationships with consumer groups. The CCP could be improved however by giving greater standing and resources to the CCP. An alternative model that could be considered is the Financial Services Consumer Panel (FSCP) in the UK which is hosted by the UK's FCA. The FSCP is an independent statutory body set up to represent the interests of consumers in the development of policy for the regulation of financial services. The FSCP panel members are selected through a competitive recruitment process, paid fees and supported by a small secretariat. The Panel Chair meets regularly with the FCA Chairman and Chief Executive, has a research budget and produces annual reports. The FSCP describes its role as bringing a 'consumer perspective to aid effective regulation', supporting or challenging the FCA where required.

The role of ASIC in complaints handling

An effective corporate regulator is critical to Australia's consumer protection framework. Some of the criticism that ASIC faces focuses on its failure to respond to particular complaints. When considering this criticism it is very important to note that ASIC has not been empowered by the Parliament to be a dispute resolution or complaints handling body. It is not resourced and does not have the mandate to resolve every dispute or take action against every complainant in relation to consumer loss. Instead, ASIC needs to use its judgment, in this context, to consider individual complaints and strategically take enforcement action against firms causing significant harm.

One of the most significant advances in consumer protection in the past 25 years has been the establishment of mandatory external dispute resolution schemes in many industry sectors, including the Australian Financial Complaints Authority (AFCA). AFCA was established by the previous Federal Government to resolve individual consumer complaints in the financial sector. Since being established in 2018, AFCA has provided access to justice for thousands of people who would have otherwise been unable to resolve disputes if they had to rely on existing courts and tribunals, which are expensive, slow, and largely inaccessible without legal representation.

Consumer groups recognise there can be an "expectation gap" about ASIC's role in dispute resolution and enforcement. There is a misunderstanding by some in the community about what they believe ASIC can do in relation to individual complaints, compared with ASIC's statutory powers. This expectation gap was examined by the Senate Economics References Committee in its 2014 inquiry into ASIC's performance.⁴¹ The Committee concluded that:

*"ASIC will never be able to do everything the community may expect of it. In some respects, nor should it. It would be unrealistic to expect that ASIC could be funded at a level where all breaches or allegations of misconduct were pursued."*⁴²

Consumer groups endorse the Commonwealth Ombudsman's submission to the 2014 inquiry which suggested ASIC can improve its communication with consumers to mitigate this expectation gap. The Ombudsman said that ASIC could improve its communications by:

- providing a better explanation of its role at the beginning of the reporting process, to set realistic expectations for the reporter;
- providing a more detailed explanation of its reasons for a decision not to investigate, clarifying why ASIC considers an investigation of the misconduct included in the report would not serve a broader public purpose; and
- providing better information about what regulatory action it has already taken.⁴³

⁴¹Senate Economics References Committee, 2014, The performance of the Australian Securities and Investments Commission

⁴²Senate Economics References Committee, 2014, The performance of the Australian Securities and Investments Commission, Final Report, p.xviii

⁴³Commonwealth Ombudsman, 2013, Submission to the Senate Economics References Committee: Inquiry into the Performance of the Australian Securities and Investments Commission, https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Submissions

We acknowledge that ASIC has improved its engagement with consumers and has opportunities to continue improving to manage this expectation gap.

We also recognise that ASIC may lack the data capability to be adequately analysing complaints and reports of misconduct in order to identify patterns that may indicate the need for enforcement action against a particular individual, firm or industry sector. That is one of the reasons for our recommendation below for greater resources for data analysis.

Publication of reports of misconduct

ASIC could also improve transparency by publishing all reports of misconduct and how they are responded to. The Consumer Financial Protection Bureau's Consumer Complaint Database provides a good model. In addition to publishing individual complaints, ASIC could regularly publish data on key trends in complaints. Publishing complaints would not only provide a level of public accountability about the regulator's response to consumer concerns, but would also assist consumers make decisions about particular financial service providers and provide incentives for such providers to respond more effectively to the needs of consumers. The Federal Government would have to provide additional funding to ASIC to undertake this work.

Improving misconduct reporting pathways

ASIC could also improve accountability by making it easier to report misconduct. ASIC's website does not make this easy, in fact it's very challenging to determine how to make a complaint. ASIC's public facing website, MoneySmart, does include a page "how to complain".⁴⁴ On this page, it states "if you believe there has been misconduct about a company, its directors or officers, you can lodge a complaint with ASIC". This links to a page on the ASIC main website which provides various information and videos about resolving complaints of different types.⁴⁵ This page does not, however, provide any link or guidance about how to report suspected misconduct about a business to ASIC. There is a separate page entitled "Report misconduct to ASIC", which links to a portal to make a complaint.⁴⁶ However, despite seemingly below the former page in the navigation architecture outlined at the top of the page, it does not seem to be linked from that page. We could only find this page through an organic search for "report misconduct to ASIC". Many people will never work out how to make a complaint or will give up.

Once you find the regulatory portal, it requires substantial information. One example is that it asks "how much money did you lose". It can be difficult to determine this in relation to some types of misconduct (e.g. misleading conduct) such that the question acts as a barrier to completing the form. While there does need to be a level of detail provided so that ASIC can effectively triage many complaints, the form could be reconsidered so that it is easy to use and to remove unnecessary barriers.

In making these points, we recognise that reports of misconduct are not the only source of market intelligence that ASIC uses to inform its compliance and enforcement activities. For example, it receives reports of systemic issues and possible contraventions from the Australian Financial Complaints Authority and engages regularly with stakeholders through the general Consultative Panel and Consumer Consultative Panel.⁴⁷

RECOMMENDATION 8. Enhanced accountability for ASIC should focus on accountability to consumers through consultation and transparency, including replicating the approach of the Consumer Finance Protection Bureau in the US with its Complaint Database.

RECOMMENDATION 9. ASIC needs to improve its "report misconduct" function so that it is much simpler to lodge and complete reports.

⁴⁴ <https://moneysmart.gov.au/how-to-complain>

⁴⁵ <https://asic.gov.au/about-asic/contact-us/complaints-about-companies-organisations-or-people/>

⁴⁶ <https://asic.gov.au/about-asic/contact-us/complaints-about-companies-organisations-or-people/report-misconduct-to-asic/>

⁴⁷ See ASIC Regulatory Guide 267, Oversight of Australian Financial Complaints Authority.

Compensation and enforcement

This inquiry's terms of reference includes: 'the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action'. We consider that effective dispute resolution and compensation schemes are complementary and support the work of a regulator to ensure compliance with the law.

The regulatory architecture for financial services and consumer credit provides that firms themselves are primarily responsible for dispute resolution, and there are internal dispute resolution requirements they must meet. If these systems do not resolve disputes, then a complaint may be made to the external dispute resolution service, AFCA. As stated above, in addition to its role in resolving individual complaints, AFCA is required to refer systemic issues and serious misconduct to regulators, including ASIC.

Where there are systemic issues, AFCA will raise the matter with the firm and it can provide remediation. AFCA will also refer the matter to the regulator, which will determine whether further compliance and enforcement action is necessary. In addition, ASIC can and should consider remediation as part of its surveillance, noting that remediation is underpinned by the general obligation on licensees to do all things necessary to ensure its regulated activities are provided efficiently, honestly and fairly. Complying with this obligation includes licensees taking responsibility for the consequences of their misconduct or other failures, and remediating consumers who have suffered loss as a result.

ASIC has published a comprehensive regulatory guide on consumer remediation. It sets out the regulator's expectations of licensees in relation to remediation, including how this can be done efficiently, honestly and fairly.⁴⁸ Consumer advocates have endorsed this guidance, noting that scheme design should err on the side of the people impacted, so that compensation covers the true losses caused by the company's relevant conduct. This includes consideration of how people experiencing vulnerability may have been impacted, as well as indirect losses and non-financial losses that may have resulted from the conduct.⁴⁹

Reforms to improve ASIC's enforcement powers

People need to be protected from unfair trading practices

Consumer groups support a clear and distinct prohibition on unfair trade practices in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*. Unfair trading laws operate effectively in the United States, European Union, United Kingdom and Singapore. Currently, consumers do not have clear consumer protections from unfair trading practices. This is a missing link in Australia's consumer financial protection regime. An unfair trading prohibition will enhance the enforcement capability of ASIC.

The courts have taken a narrow and restrictive definition of unconscionable conduct, which has weakened consumer protection in Australia. This is evidenced in the *ASIC v Kobelt* case, when the High Court ruled 4-3 that the conduct of a retailer in the Anangu Pitjantjatjara Yankunytjatjara lands did not constitute unconscionable conduct.⁵⁰ In this case, the retailer operated a store which sold goods, including second hand cars on credit. The retailer required his customers, the Anangu people, to provide him with their debit cards, PINs and details of their income, which he used to withdraw all, or nearly all, of the customer's money from their bank account on the day they received it. This case highlights that the bar for unconscionability has been set at too high a level, leaving a gap in Australia's consumer protection laws.

⁴⁸ <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rq-277-consumer-remediation/>

⁴⁹ See <https://consumeraction.org.au/people-should-get-their-money-back-quicker-and-more-easily-following-new-asic-guidance-says-consumer-advocates/>

⁵⁰ *ASIC v Kobelt* [2019] HCA 18

Australian financial and credit licensees are also subject to a general obligation to act, “efficiently, honestly, and fairly”.⁵¹ However, the Australian Law Reform Commission (ALRC) has found that there has been conflicted case law on the general obligations. In its interim report into Financial Services Legislation, the ALRC found:

“The sweeping scope and indeterminate nature of the ‘efficiently, honestly and fairly’ obligation, the prescriptive compliance obligations currently imposed, the proliferation of overlapping prohibitory provisions, and drafting which promotes a ‘tick a box’ approach, all give rise to unnecessary complexity in this area of law and detract from meaningful compliance.”⁵²

A clear and simple unfair trading practices prohibition will enhance the enforcement capability of ASIC. Consumer groups welcomed the commitment in September 2022 by Commonwealth, State, and Territory consumer affairs ministers to consult on proposed reforms to address unfair trade practices.⁵³ This will help better protect consumers from financial harm.

RECOMMENDATION 10. The Federal Government should legislate an unfair trading prohibition in the ASIC Act.

ASIC should be granted a legislated directions power

The Federal Government should legislate for ASIC to have the power to give directions to financial services and credit licensees. A directions power is a missing link in ASIC’s existing regulatory toolkit and would help ASIC more effectively address or prevent emerging risks to consumers.

The directions power was a key recommendation of the ASIC Enforcement Review and the Banking Royal Commission.⁵⁴ The Enforcement Review found:

“a directions power could enable ASIC to direct the licensee to take urgent action that may be necessary to protect clients’ interests...Such a power will provide ASIC with an efficient mechanism to require a licensee to put in place or modify internal systems or restrict activities in appropriate ways to prevent detriment to consumers.”⁵⁵

In February 2020, the then Federal Government released draft legislation to provide ASIC with a directions power.⁵⁶ Consumer groups strongly supported the passage of this legislation. However, the bill failed to be introduced in the previous Parliament. The Bill stated ASIC may make a direction if there is “reason to suspect that a financial services licensee has engaged, or is engaging, in conduct that constitutes a contravention of a financial services law.”⁵⁷ The bill had a non-exhaustive list of directions that ASIC could make. This includes directing a financial services licensee to not accept new clients or not transfer a specified asset to another person, or to compel a licensee to undertake a review of their conduct. Importantly, a directions power would allow ASIC to compel financial services or credit licensees to establish a remediation scheme. This is critical where consumer redress in the courts is unlikely, such as recent litigation against Cigno. In this case, thousands of low income and vulnerable consumers have been harmed by the conduct of this company, but will not receive redress. Instead, Cigno is left to profit from its illegal behaviour. A directions power would be a valuable tool which would help ASIC become a more proactive and responsive regulator.

⁵¹Section 912A(1)(a) *Corporations Act 2001 (Cth)*

⁵²Australian Law Reform Commission, 2021, Financial Services Legislation, Interim Report A, Report 137, November, p.499-500

⁵³ SA Attorney-General’s Department, Consumer Affairs Ministers meet in Adelaide, 2022, <https://www.agd.sa.gov.au/about-us/news/consumer-affairs-ministers-meet-in-adelaide>

⁵⁴ ASIC Enforcement Review Taskforce, 2017, Recommendations 46-50 <https://treasury.gov.au/sites/default/files/2019-03/ASIC-Enforcement-Review-Report.pdf>

⁵⁵ ASIC Enforcement Review Taskforce, 2017, p.103, <https://treasury.gov.au/sites/default/files/2019-03/ASIC-Enforcement-Review-Report.pdf>

⁵⁶ Financial Sector Reform (Hayne Royal 4 Commission Response—Stronger 5 Regulators (2020 Measures)) Bill 2020: 6 FSRC rec 7.2 (ASIC directions)

⁵⁷ Financial Sector Reform (Hayne Royal 4 Commission Response—Stronger 5 Regulators (2020 Measures)) Bill 2020: 6 FSRC rec 7.2 (ASIC directions), 5918

There are provisions in the ASIC Act that already recognise remediation payments should be prioritised over penalties when addressing misconduct (and particularly if company liquidity is a concern – such as was evidence with the collapse of ACBF/Youpla),⁵⁸ but the absence of a power to direct remediation currently restricts the ability of ASIC to pursue this agenda.

RECOMMENDATION 11. The Federal Government should legislate a broad directions power for ASIC including a power to direct a licensee or issuer of a financial product or financial service under the ASIC Act to establish a remediation program in appropriate circumstances.

Empower ASIC with a super-complaints function

Consumer groups can play a crucial role bringing to the attention of regulators emerging and systemic harms affecting consumers. Our casework experience and engagement with the community allows us to observe emerging harms in the system.

The Federal Government has committed to establishing a super-complaints function.⁵⁹ This would allow designated bodies to make complaints to regulators about systemic consumer harms. Regulators would be required to respond within a certain period of time with a proposed cause of action. The course of action could include enforcement action, launching a market study, working with industry to improve their practices, referral to another regulator, or making a finding (and providing reasons) that no further action is warranted.

Super-complaints have been effectively operating in the United Kingdom for two decades and have improved outcomes for UK consumers. The UK model provides a useful foundation for the design of an Australian super-complaints function. It has the following design features and principles:

- The UK Secretary of State designates the relevant organisations that may lodge a super-complaint. The Minister, “may designate a body only if it appears to him to represent the interests of consumers of any description”.⁶⁰ Designated organisations are Citizens Advice, Which?, The Consumer Council for Northern Ireland, CCWater, CAMRA, and the Federation of Small Businesses.
- Super-complaints are required to address “any feature, or combination of features, of a market in the United Kingdom for goods or services that, is or appears to be, significantly harming the interests of consumers.”⁶¹
- Regulators in the UK have 90 days to publish a public response to the super-complaint.

Consumer groups support the Federal Government legislating a super-complaints function for consumer protection regulators, including ASIC and the ACCC. Regulators should also be adequately resourced to address super-complaints in a timely manner.

RECOMMENDATION 12. The Federal Government should legislate a super-complaints function for ASIC.

Limited enforcement options at regulatory perimeter

A challenge ASIC faces is that it has fewer enforcement powers when dealing with avoidant business models on the regulatory perimeter. The most obvious example of this is where entities engage in conduct that requires a licence (eg credit or financial services licence) but simply don’t have one. In these cases, most of the time the only option ASIC has is to take court action against the unlicensed entity, and these cases are often complex. This is a problem and barrier to effective compliance work because court action is extremely resource intensive compared with infringement notices and other powers. Conversely, the blatant disregard for the law by these entities means

⁵⁸ See for example ASIC Act, s 12GCA.

⁵⁹ The Hon Dr Andrew Leigh MP, 2022, Keynote address to the Australian Repair Summit 2022, Canberra, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/speeches/keynote-address-australian-repair-summit-2022-canberra>

⁶⁰ UK Enterprise Act 2002, section 11(6) <https://www.legislation.gov.uk/ukpga/2002/40/section/11>

⁶¹ UK Enterprise Act 2002, section 11 <https://www.legislation.gov.uk/ukpga/2002/40/section/11>

they often cause the most harm to consumers, and external dispute resolution is often unavailable because membership of AFCA is only required of licence holders.

A notorious example involves the regulation of funeral insurance whereby ACBF/Youpla was able to describe its product as a 'funeral expenses' policy to evade licensing.⁶² This was only addressed after it was considered by the Financial Services Royal Commission.⁶³

The long history of ASIC's compliance work directed at Cigno (some of which is described above) is another example of this issue. Cigno arranges small, short term loans with lending partners but charges confusing and obscenely high fees for its services. Our casework indicates that Cigno has been the most harmful operator in the credit market for the last four years. The litigation described above has taken nearly two and a half years to finalise. In this time, ASIC has also issued two product intervention orders primarily directed at Cigno and its lending partners. Cigno has continued to trade through this whole period, having now adopted a third contract structure to allegedly avoid credit regulation. To borrowers, these models all appear identical and they continue to charge fees that are pushing people into severe financial hardship.

We understand ASIC is exploring further options to address Cigno's latest model. However, this will likely require further court action or at least another product intervention order, which also involves a resource heavy process, leaving a real risk this extremely harmful lending model will continue for a few more years at least.

We recommend a mechanism to continuously review and update the regulatory perimeter and consider whether the core definitions in legislation are covering activity that the community would expect. In the United Kingdom, the Financial Conduct Authority regularly publishes its "perimeter report".⁶⁴ This report identifies business activity and potential consumer detriment that might be occurring that is not covered by the regulatory remit of the FCA or is only partially covered. We recommend that the Australian regulatory framework adopt a mechanism such as this to regularly review and make recommendations for regulatory change to ensure that activity that should be regulated, is.

RECOMMENDATION 13. The Government should introduce a mechanism such as the UK FCA 'Perimeter Report' to help ASIC work with Treasury to identify any problematic activity that falls outside of regulated definitions, and introduce solutions.

Resources required to support data collection and analysis

One alternative power sometimes available to ASIC for dealing with companies at the regulatory perimeter is to use the product intervention power (PIP). The PIP allows ASIC to proactively ban conduct, products, product features or similar that are, or are likely to cause, consumers significant detriment. Some uses of the PIP to date have resulted in extremely meaningful interventions in markets. However, for ASIC to responsibly use the PIP, it understandably needs data to justify the intervention. In practice, this has meant that the issuing of a product intervention order has often taken longer than was envisaged by the law makers when it was legislated.

Challenges with data collection are consistent issues for ASIC when exercising other powers as well. As noted above, there has also been a decrease in ASIC's broad thematic inquiries in recent years. From our perspective, this appears to be a capacity issue, directly related to funding and costs. While ASIC has reasonably broad data collection powers, data collection and analysis are time consuming, and based on our understanding, ASIC's budget leaves limited ability for specific data collection and analysis.

Increased funding for ASIC earmarked for data collection and analysis would allow ASIC to have more consistent and complete knowledge of market conduct, and would increase its ability to respond quickly to instances of

⁶² FSRC, Interim report, Volume 2, p443.

⁶³ *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*

⁶⁴ See: <https://www.fca.org.uk/publications/annual-reports/annual-report-regulatory-perimeter-2020-21>

consumer harm. It would also provide the Government with valuable additional resources to help make informed decisions on how to improve regulation of the sector. A clear example of this can be seen with buy now pay later (BNPL) – another product that is higher risk because it is designed to avoid credit law regulation. Treasury has recently consulted on possible options for the future regulation of this product. ASIC has produced two valuable reports on BNPL, but the analysis takes time. At present, there is no Government published data on BNPL relating to its use from 2020 onwards. Some of the data requested of consumer groups on BNPL suggested that independent oversight of the sector was significantly limited. In reality, the casework of consumer groups will only ever reflect a small portion of the community in need.

As noted above, an appropriate level of resourcing for data analysis would also allow ASIC to make the best use of the large number of complaints and reports of misconduct that it receives. It would also help them better analyse breach reporting data that is received under the reportable situations regime. The information ASIC has released about this data to date has provided valuable insights,⁶⁵ and being adequately resourced to analyse trends would allow ASIC to deliver more meaningful outcomes from this regime.

A regulator needs to be able to be well informed about its regulatory remit. There is a need for greater resourcing for ASIC to monitor the wide sector it is responsible for. Providing ASIC with sufficient resourcing to continuously undertake meaningful data collection and analysis of the financial sector would permit the Government to legislate faster, from a more informed perspective.

RECOMMENDATION 14. Increase ASIC's funding for ongoing data collection and analysis, to ensure that ASIC and the Government are better placed to respond to issues that arise in the marketplace.

Penalties for financial misconduct need to be increased

Consumer groups support financial services firms being subject to stronger penalties for breaches of consumer protection provisions in the ASIC Act. This increase should mirror recently increased penalties in the Australian Consumer Law (ACL). The level of penalties must be set at a level which deters non-compliance and is seen as more than the cost of doing business.

Consumer protection provisions which prohibit unconscionable conduct, misleading and deceptive conduct, and unfair contract terms are mirrored in the ACL and ASIC Act. There can often be a lack of clarity about whether the conduct of a company is captured by the ACL or the ASIC Act. Recent examples include conduct by crypto asset operators and landlord insurers engaging with tenants.

In November 2022, the Federal Parliament introduced significantly stronger penalties for breaches for key consumer protection and competition provisions in the Australian Consumer Law.⁶⁶ This has now resulted in an imbalance of penalties for the same breaches of the law across the two pieces of legislation:

⁶⁵ See: <https://download.asic.gov.au/media/nhenjz1a/rep740-published-27-october-2022.pdf>

⁶⁶ Treasury Laws Amendment (More Competition, Better Prices) Bill 2022

| | Breaches of key consumer protection provisions of the Australian Consumer Law | Breaches of key consumer protection provisions of the ASIC Act |
|---|---|--|
| Maximum civil penalty an offending business | <p>The greater of:</p> <ul style="list-style-type: none"> • \$50 million; • three times the value of the benefit; or • 30% of the adjusted turnover during the breach. | <p>The greater of:</p> <ul style="list-style-type: none"> • \$13.75 million (50,000 penalty units); • three times the benefit obtained and detriment avoided, or • 10% of annual turnover, capped at 2.5 million penalty units (currently \$555 million). |
| Maximum civil penalty an offending individual | \$2.5 million | \$500,000 |

Under the current penalties regime, a major bank is subject to a significantly lower fine than a major retailer for a breach of the same consumer protection provision. Stronger penalties, properly enforced, will send a clear message to financial services firms that misconduct will not be tolerated, and has to be more than the cost of doing business.

In the ALRC's Interim Report B on its review into the simplification of financial services legislation, it was proposed that offence and penalty provisions in corporations and financial services legislation be consolidated into a smaller number of provisions covering the same conduct, due to their limited use in court enforcement. We urge caution with this recommendation, particularly in ensuring that any consolidation does not result in gaps. Much of ASIC's compliance action occurs outside court action, including in informal engagement with businesses. We would expect ASIC to be using many of the existing provisions in its engagement with businesses, whether or not they are formally used in prosecutions.

RECOMMENDATION 15. The Federal Government should increase the penalties for breaches of consumer protection provisions of the ASIC Act. This should mirror the newly legislated penalty regime in the Australian Consumer Law.

Further information

Please contact Policy Officer [REDACTED] at Consumer Action Law Centre on [REDACTED] or at [REDACTED] if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE
CHOICE
CONSUMER CREDIT LEGAL SERVICE (WA) INC.
FINANCIAL COUNSELLING AUSTRALIA
INDIGENOUS CONSUMER ASSISTANCE NETWORK
FINANCIAL RIGHTS LEGAL CENTRE
SUPER CONSUMERS AUSTRALIA

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. ASIC should continue to prioritise and increase enforcement action through the courts, and appeal matters where they are unsuccessful.

RECOMMENDATION 2. ASIC should continue and increase its thematic reviews of market sectors and practices and make use of its information gathering powers to identify good practice as well as areas of concern.

RECOMMENDATION 3. ASIC should build on its enforcement priorities and adopt a campaign approach to each of its enforcement priorities.

RECOMMENDATION 4. The Government should amend ASIC's legislative objectives to reference its role in promoting fair treatment for consumers experiencing vulnerability, and enhancing the long-term economic welfare of consumers. Whether this occurs or not, ASIC should also develop its own vulnerability strategy.

RECOMMENDATION 5. ASIC should publish guidance for firms on the fair treatment of vulnerable consumers.

RECOMMENDATION 6. The Government should provide additional specific funding for ASIC to expand its Indigenous Outreach Program, including to specifically support enforcement work where appropriate.

RECOMMENDATION 7. The Government should issue a new Statement of Expectations to ASIC that emphasises its role in enforcement of consumer protection laws and contribution to policy debates.

RECOMMENDATION 8. Enhanced accountability for ASIC should focus on accountability to consumers through consultation and transparency, including replicating the approach of the Consumer Finance Protection Bureau in the US with its Complaint Database.

RECOMMENDATION 9. ASIC needs to improve its "report misconduct" function so that it is much simpler to lodge and complete reports.

RECOMMENDATION 10. The Federal Government should legislate an unfair trading prohibition in the ASIC Act.

RECOMMENDATION 11. The Federal Government should legislate a broad directions power for ASIC including a power to direct a licensee or issuer of a financial product or financial service under the ASIC Act to establish a remediation program in appropriate circumstances.

RECOMMENDATION 12. The Federal Government should legislate a super-complaints function for ASIC.

RECOMMENDATION 13. The Government should introduce a mechanism such as the UK FCA 'Perimeter Report' to help ASIC work with Treasury to identify any problematic activity that falls outside of regulated definitions, and introduce solutions.

RECOMMENDATION 14. Increase ASIC's funding for ongoing data collection and analysis, to ensure that ASIC and the Government are better placed to respond to issues that arise in the marketplace.

RECOMMENDATION 15. The Federal Government should increase the penalties for breaches of consumer protection provisions of the ASIC Act. This should mirror the newly legislated penalty regime in the Australian Consumer Law.

APPENDIX B – ABOUT OUR ORGANISATIONS

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

CHOICE

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

Financial Counselling Australia

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. Financial counsellors work in community organisations and provide advice and support to people experiencing financial hardship.

Consumer Credit Legal Service (WA) Inc.

CCLSWA champions the financial rights of Western Australians on credit, debt and consumer law issues.

- We ensure people in Western Australia are treated fairly in the financial marketplace by providing free, confidential legal advice through our Telephone Advice Line.
- We provide legal representation to people experiencing vulnerability and disadvantage so that they can access justice.
- Our community legal education programs empower West Australians experiencing vulnerability and disadvantage to understand their rights and avoid financial pitfalls.
- We help other service providers, including financial counsellors and community support workers, to understand and support their clients' financial rights.
- We are a voice for change so that financial systems and consumer laws are improved for all.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy, and financial counselling services to Aboriginal and Torres Strait Islander consumers across North and Far North Queensland, with a vision of "Empowering Indigenous Consumers".

Indigenous peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace in remote and regional communities create conditions in which consumer and financial exploitation occur. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples.

Super Consumers Australia

Super Consumers Australia is the people's advocate in the superannuation sector. Super Consumers Australia advances and protects the interests of people on low and middle incomes in Australia's superannuation system. It was founded in 2013 and received funding for the first time in 2018.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights is an operator of the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

