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By email: FSRCconsultations@treasury.gov.au

The Manager
Consumer and Corporations Policy Division
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Langton Crescent
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Dear Madam/Sir

Exposure Draft Implementation of ASIC Enforcement Review Taskforce – Directions Power

Thank you for the opportunity to provide comment on the Exposure Draft of the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2020 Measures)) Bill 2020: FSRC rec 7.2 (ASIC directions)* (the **Bill**). This submission has been drafted by Consumer Action Law Centre, with contributions and endorsement from the following organisations:

- CHOICE
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Rights Legal Centre

Information about the contributors to this submission is available at **Appendix A**.

Consumer representatives strongly support the recommendation made by the 2017 ASIC Enforcement Review Taskforce (the **Taskforce**) that ASIC be provided with a power to direct financial services and credit licensees in order to address or prevent risks to consumers. An effective Directions Power would overcome some of the shortcomings of enforceable undertakings (**EUs**).

As noted by both the Taskforce¹ and the Final Report of the Financial Services Royal Commission (**FSRC**),² an EU generally require acknowledgment by the licensee of ASIC's concerns about a breach of the law. The FSRC noted

¹ ASIC Enforcement Taskforce, *Final Report*, December 2017, page 10, available at: <https://treasury.gov.au/sites/default/files/2019-03/ASIC-Enforcement-Review-Report.pdf>.

² Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, February 2019, page 440-441, available at: <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

'when an entity fails to acknowledge that it has done wrong the risk is that it considers the promises made in the EU as no more than the cost of doing business or the cost of placating the regulator'. In contrast, the ASIC will be able to become a more proactive and effective regulator should it have a directions power, particularly in the area of facilitating consumer redress.

Trigger for the Directions Power

Consumer representatives strongly support the proposed trigger for a direction that ASIC must have a 'reason to suspect' that a licensee has, is or will engage in contravening conduct (proposed subsection 918(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and proposed subsection 78B(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**)).

This is the language used in section 13 of the *Australian Securities and Investments Act 2001* (Cth) (**ASIC Act**) to trigger general powers of investigation. 'Reason to suspect' has been interpreted by the Courts to mean more than mere suspicion but less than prima facie evidence,³ and can be established if the ASIC delegate holds the suspicion and has reasonable grounds for doing so.⁴ As noted in the explanatory memorandum, this is an objective test based on the facts and circumstances of each case.

We consider that this trigger should allow proactive use of the Directions Power by ASIC.

However, consumer representatives have concerns about one limitation in the trigger for the Directions Power that could restrain ASIC's use of the power in relation to future conduct by a licensee. Proposed subsection 78B(1)(b) of the *Corporations Act* and proposed subsection 918(1)(b) of the *Credit Act*⁵ state that ASIC must have reason to suspect a licensee *will* engage in contravening conduct. We would suggest that it will often be difficult for ASIC to come to that position of certainty as to future conduct. It would be more appropriate if ASIC could use the power where it has a reason to suspect a licensee 'will or is likely to' engage in contravening conduct.

The use of 'likely to' is common in legislative drafting for consumer protection, for example, the prohibition on conduct that is misleading or deceptive, or is likely to mislead or deceive.⁶ Consumer representatives consider that the same formulation should be used for the Directions Power.

RECOMMENDATION 1. That ASIC have the power to make a Directions Power if it has reason to suspect at licensee will or is likely to engage in contravening conduct.

Interim directions

Consumer representatives strongly support the ability of ASIC to issue interim directions to enable proactive and quick action (proposed subsections 918F of the *Corporations Act* and section 78H of the *Credit Act*).

The Bill proposes that ASIC may give an interim direction if ASIC considers that a delay in giving a direction would be prejudicial to the public interest. The term 'public interest' should enable consideration of any consumer detriment associated with a delay in issuing a direction.

Types of directions, including remediation and redress programs

Consumer representatives support the ability of ASIC to issue a range of directions, with the types of directions listed in the Bill being non-exhaustive (proposed subsection 918(5) of the *Corporations Act* and proposed subsection 78B of the *Credit Act*).

³ *Queensland Bacon Pty Ltd v Rees* (1996) 115 CLR 266.

⁴ *National Companies and Securities Commission v Sim (No 2)* 1986 11 ACLR 171.

⁵ We repeat these comments in relation to proposed subsection 918F(1)(b) of the *Corporations Act* and proposed subsection 78BH(1)(b) of the *Credit Act* insofar as those provisions relate to the trigger for interim directions.

⁶ *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA.

In particular, we strongly support the provisions relating to directions to establish a remediation program to compensate people who have suffered loss or damage as a result of contravening conduct. Consumer representatives expect that these provisions will enable much more proactive action by the regulator, including the setting of expectations and outcomes, in relation to the design and implementation of remediation schemes. We have been concerned about the limitations imposed on ASIC by the existing regime which relies on the use of EUs.

Where remediation programs are the result of a negotiated outcome, ASIC may be limited by the strength of its negotiating position (for example, by the evidence available to support the alleged wrongdoing and customer loss). This may mean that there are limitations in the scope of remediation because there must be agreement by the wrongdoer.

Below are some concerns from otherwise welcome and important remediation programs that have not been able to provide adequate or complete solutions to redressing customer loss:

- Motor Finance Wizard:⁷ contracts where consumers managed to make repayments for the initial 12 months are excluded from remediation, even though some of these contracts may have caused substantial hardship.
- BMW Finance:⁸ consumers have complained of delays in the administration of the program, including a 12-month delay in one complex case; low refund offers in the face of high loans and ongoing financial hardship; and, in one case, a consumer was bankrupted as a result of the unaffordable loan, so the cash refund failed to put them back in the position they would have been, but for the misconduct.
- Radio Rentals:⁹ Although the firm admitted contraventions of the responsible lending laws in respect of 278,683 consumer lease contracts entered into between 1 January 2012 and 1 May 2015, only customers who defaulted on making a payment in the first 12 months or defaulted on 3 or more occasions during a term of a contract are eligible for redress. Many Radio Rentals customers pay using Centrepay (a service to pay bills from Centrelink payments), so Radio Rentals payments were given priority over essential expenses. This may mean that the impact of the wrongdoing – such as the inability to put food on the table – is not fully captured by default rates.
- Cash Converters:¹⁰ redress in respect of systemic contraventions of responsible lending laws was limited to those that had taken out loans in-store, rather than online.¹¹
- Nimble:¹² redress in respect of systemic contraventions of responsible lending laws was limited to customers showing evidence of hardship after a loan was issued based on hardship indicators such as entering a debt agreement under Part IX of the *Bankruptcy Act 1966*.

⁷ ASIC, *Enforceable Undertaking – Affordable Car Loan Pty Ltd & ors*, May 2017, available at: <http://download.asic.gov.au/media/4266959/029490310.pdf>.

⁸ ASIC, *16-417MR ASIC action sees BMW Finance pay \$77m in Australia's largest consumer credit remediation program*, 6 December 2016, available at: <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-417mr-asic-action-sees-bmw-finance-pay-77-million-in-australias-largest-consumer-credit-remediation-program/>.

⁹ ASIC, *18-017MR ASIC acts against Thorn's Radio Rentals and secures multi million customer refunds for poor appliance rental outcomes*, 23 January 2018, <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-017mr-asic-acts-against-thorns-radio-rentals-and-secures-multi-million-customer-refunds-for-poor-appliance-rental-outcomes/>.

¹⁰ ASIC, *16-380MR Cash Converters to pay over \$12m following ASIC probe* (9 November 2016), available at: <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-380mr-cash-converters-to-pay-over-12m-following-asic-probe/>.

¹¹ ABC, *Cash Converters loans: Corporate watchdog ASIC's investigation into payday lender 'half-baked'* (28 February 2018): <http://www.abc.net.au/news/2017-02-28/asic-investigation-into-cash-converters-inadequate/8309870>.

¹² ASIC, *16-089MR Payday lender Nimble to refund \$1.5 million following ASIC probe* (23 March 2016), available at: <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-089mr-payday-lender-nimble-to-refund-15-million-following-asic-probe/>.

ASIC's add-on insurance remediation schemes, which commenced in August 2017, are another very welcome development but not an entire solution to redress.¹³ The refunds agreed to by insurers cover only certain classes of consumers who were patently mis-sold add-on insurance, and some may only be eligible for partial refunds. There will be people who are not eligible for refunds under the ASIC remediation schemes, but who may nonetheless legally be eligible for full refunds, because the sale of insurance involved unconscionable conduct or misleading and deceptive conduct. These arrangements are negotiated outcomes only, not enforceable undertakings, which may limit the public accountability of the insurers in question.

Consumer representatives expect that the proposed Directions Power, including the provisions which allow ASIC to specify elements of a remediation program in detail if necessary, will assist overcome some of the shortcoming listed above. In particular, we strongly support proposed subsections 918(6) of the Corporations Act and 78B(6) of the ASIC Act which allow ASIC to specify features of a program at a broad or detailed level, including features assessing the extent of the loss or damage suffered as a result of the remediation, how people will be notified about the program, the ability for people to receive compensation without making claims and any other feature ASIC considers appropriate.

We note paragraph 1.24 of the Explanatory Memorandum to the Bill which states that 'the directions power allows ASIC to direct a licensee to set up a compensation program, but it does not allow ASIC to direct a licensee to compensate a client or class/group of clients – only a court would be able to order that payment(s) be made and the amount of any such payment'. While we understand this limitation, there is a community expectation that people who have suffered loss or damage are actually remediated in a way that is efficient, quick and fair, without need for lengthy and costly court proceedings. This aligns with recommendation 23 of the Australian Law Reform Commission's (ALRC) 2019 *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*.¹⁴

RECOMMENDATION 2. That ASIC be provided broad discretion to determine to the elements of a direction about a compensation scheme, as proposed by subsections 918(6) of the Corporations Act and subsection 78B(6) of the Credit Act.

Cy près powers

Consumer representatives consider that the Bill should be amended to specifically empower ASIC to make *cy près* directions.

Cy près (a legal doctrine meaning 'as near as possible') can be employed to indirectly effect restitution to affected consumers who have suffered loss or damage and are unable to be directly contacted. In such cases, damages payable by a culpable trader can be held in trust and used to fund work which aims to benefit the class that has suffered, as a whole. This can be particularly beneficial where there are many consumers who have been illegally required to pay very small amounts—*cy près* can be adopted to prevent a wrongdoer profiting from errors or illegal conduct.

The ALRC, in recommending improvements to redress powers for regulators of consumer products and services, made specific mention of *cy près* powers. It states '[w]here affected consumers cannot be located, the damages that otherwise would have been paid should be donated to charity, particularly those organisations that support consumers to access regulatory redress schemes'.¹⁵ We strongly urge the Bill to be amended to clarify that such a power can form part of a remediation program ordered by ASIC.

¹³ See para 2.43 of Part 1 of our submission to the Financial Services Royal Commission: <https://consumeraction.org.au/wp-content/uploads/2018/01/180122-Consumer-Action-Sub-to-Royal-Commission-Part-1-FINAL-redacted-180323-UN.pdf>.

¹⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report*, December 2018, available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf

¹⁵ *Ibid*, page 250.

RECOMMENDATION 3. That the Bill be amended to specifically provide ASIC the power, in making a direction about a compensation scheme, to include *cy près* directions.

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

Please contact Director Policy & Campaigns **Katherine Temple** at **Consumer Action Law Centre** on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO
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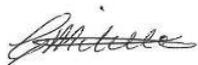
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APPENDIX A – CONTRIBUTORS

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, campaigns, outreach, community engagement and more. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities. In the 2018/2019 financial year, we represented over 100 clients in their disputes, and participated in over 40 law reform activities.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

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 operates 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.

APPENDIX B - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. That ASIC have the power to make a Directions Power if it has reason to suspect at licensee will or is likely to engage in contravening conduct.

RECOMMENDATION 2. That ASIC be provided broad discretion to determine to the elements of a direction about a compensation scheme, as proposed by subsections 918(6) of the Corporations Act and subsection 78B(6) of the Credit Act.

RECOMMENDATION 3. That the Bill be amended to specifically provide ASIC the power, in making a direction about a compensation scheme, to include *cy près* directions.