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Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Committee members

### **The performance of the Australian Securities and Investments Commission**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to contribute to the Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission (**ASIC**).

Briefly:

- we consider that an effective regulator is essential for a well functioning consumer protection system. However, a proper consideration of ASIC's effectiveness as a regulator needs to not only consider the performance of ASIC but also whether this broader system is working;
- we are generally very impressed with ASIC's performance as a regulator of the areas of consumer law that we relevant to our work;
- however, we do have concerns with the time it can take for ASIC to respond to systemic issues we have raised with it;
- this submission suggests the committee consider whether:
  - ASIC has the necessary level of resources to do the enforcement work that is expected of them;
  - ASIC should be resourced more through a 'user pays' model rather than relying only on consolidated revenue;
  - ASIC should do more to inform complaints and the public about the conduct of its investigations;
  - shifting the focus of financial services regulation from disclosure to the substantive conduct of business could reduce the drain on ASIC's enforcement resources;
  - enhancing ASIC's powers could allow it to respond more quickly and effectively to market misconduct;
  - the introduction of a last chance compensation scheme would improve consumer protection and reduce demand on ASIC enforcement resources;
  - ASIC could do more to prioritise the needs of vulnerable and disadvantaged consumers; and

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- enhancing the responsibilities of the ASIC CAP to more closely resemble the Financial Services Consumer Panel (which is hosted by the UK's Financial Conduct Authority) might improve ASIC's consumer protection outcomes.

Our comments are detailed more fully below.

## **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Action has a strong interest in the effectiveness of consumer regulators, and we regularly pass on consumer complaints to regulators for investigation. In March 2013, we published a comprehensive report reviewing the enforcement performance of Australia's consumer protection regulators, titled *Regulator Watch*. This report included analysis of ASIC's consumer protection responsibilities across financial services and consumer credit. A copy of that report is attached to this submission.

## **ASIC's Role and Performance**

### ASIC and consumer policy

As Australia's corporate, markets, and financial services regulator, ASIC has a very broad role. Our interactions and experience with ASIC relate to its role as the consumer protection regulator for financial services and consumer credit. We encourage the committee to consider ASIC's performance in light of its overall role in the consumer protection system and to have regard particularly to the National Consumer Policy Objective. That objective, agreed to by the (then) Ministerial Council for Consumer Affairs in 2008, is:

To improve consumer well being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.<sup>1</sup>

This is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;

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<sup>1</sup> Ministerial Council On Consumer Affairs, Joint Communiqué, Meeting of Friday 15 August 2008.

- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

#### ASIC's role in the consumer protection system

Effective regulators are essential for a well functioning consumer protection system, and their enforcement role is perhaps most critical. Consumers can, at least in principle, use the legal system to enforce their rights against businesses that have breached consumer protection laws. However the financial and other barriers to consumers doing so in practice are significant. Individual consumers often lack the resources or capability to take action, meaning that misconduct can go un-remedied. While consumer legal services, such as Consumer Action Law Centre, provide resources to assist with individual enforcement against businesses, demand for such services outstrips supply.

Non-compliance with consumer laws may also contribute to anti-competitive outcomes—some businesses may comply with the law, but others will not in the knowledge that the risk of being found in breach is low. Robust enforcement by consumer regulators can protect individual consumers as well as to contribute to fairness within markets.

Further, consumer protection law often needs to be tested before the courts to determine its meaning and extent. This is a key role for consumer regulators. Sometimes law reform is argued for in circumstances where the existing law has not been fully tested. The majority of individual complaints against businesses are settled without any legal finding being made and thus do not have any wider impact on market misconduct. For laws to be fully tested, consumer regulators need to take enforcement action, including in matters where the outcome may not be certain.

We acknowledge that responsibilities of regulators beyond enforcement are also critical, such as trader and consumer education as well as standard-setting. However, we believe attention should be particularly applied to regulators' enforcement role because it is a key function of a regulator's toolkit and also because regulators can face disincentives to use it as much as is needed. For example, enforcement activities can be more expensive, more time and resource intensive, and regulators can face the risk of public criticism should enforcement activities not be successful before the courts.

In our view, the enforcement activities of a regulator should particularly respond to systemic problems and the most serious misconduct.

- *Systemic Problems*

A systemic issue by definition affects a number of consumers. As noted above, while services like ours can assist individual members of that group through legal and financial counselling casework, this is at best a partial solution. We could not possibly assist every consumer who comes to us for assistance and indeed most consumers (particularly the most vulnerable) will not even seek help.<sup>2</sup>

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<sup>2</sup> For example, In 2006, Consumer Affairs Victoria (CAV) reported that approximately four per cent of revealed consumer detriment in Victoria is reported to it and smaller percentages are reported to other agencies, such as ombudsman. Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, October 2006.

Even if every consumer with a problem received assistance with their dispute, this would still not provide a systemic solution. These disputes are usually settled between the parties (often with a confidentiality requirement) and a trader engaging in systemic misconduct will not necessarily be under any pressure to reform their approach to prevent the problem happening again.

Again, a service like ours can try to apply pressure on a problem trader through the media or (where poor conduct extends across an industry) by lobbying for law reform. But a regulator with appropriate powers to investigate and sanction breaches of the law has far more influence over business and is better placed to respond to systemic problems.

- *Serious misconduct*

Similarly, our service can assist individual clients who have suffered loss because of serious misconduct, but we cannot seek penalties that are commensurate to the level of misconduct and send a message to the broader industry that similar conduct will not be tolerated in future.

However, ASIC (and any other consumer protection regulator) will not be capable of doing their job unless the rest of the consumer protection system is working. This broader system includes:

- a regulatory framework that encourages competitive and fair trader conduct, and discourages poor conduct;
- education and resources which enable consumers to make informed choices, further encouraging competition; and
- fair and accessible dispute resolution processes which allow consumers to solve their own problems.

The first two elements above help prevent problems occurring, and the third create options to resolve problems that do arise. Together all three ensure markets operate fairly and competitively and reduce the need for involvement of the regulators.

A proper consideration of ASIC's ability to regulate markets in its jurisdiction needs to not only consider the performance of ASIC itself but also whether this broader system is working.

### ASIC's performance

We are generally very impressed with ASIC's performance as a regulator of the areas of consumer law that we relevant to our work.

Our *Regulator Watch* report found that ASIC:

- has a steady record of enforcing the consumer law;<sup>3</sup>
- is a clear leader among other regulators in clarity and comprehensiveness of how they report enforcement activity;<sup>4</sup>
- communicates well with the public through the media and through its excellent MoneySmart website which provides accessible guidance and tools for consumers<sup>5</sup>; and

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<sup>3</sup> G. Renouf, T Balgi & Consumer Action law Centre (March 2013), *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, page 87.

<sup>4</sup> *Regulator Watch*, page 13.

<sup>5</sup> *Regulator Watch*, page 147.

- (along with the ACCC) should be seen as a model for State and Territory regulators looking to improve their performance.<sup>6</sup>

While we have some concerns with ASIC's ability to respond in a timely way to matters referred to it (discussed below), we are overall pleased with ASIC's collaboration with consumer advocates, particularly through the Consumer Advocacy Panel (**CAP**). The CAP provides a direct line of communication between consumer advocates and senior ASIC officials including the Deputy Chairman Peter Kell and frequently the Chairman, Greg Medcraft.

The recent introduction of a CAP "matters register" will enable progress of matters referred to ASIC from CAP members to be tracked at each meeting. This initiative was adopted as a response to a recommendation in our *Regulator Watch* report for regulators to set up improved systems to regularly and routinely report to consumer organisations on progress and outcomes of complaints made by or through those organisations. We would encourage ASIC to consider further the ways in which it can keep complainants as well as the broader public informed of the progress of investigations without impinging upon the levels of confidentiality required to progress investigations. We understand ASIC must comply with confidentiality provisions pursuant to section 127 of the *Australian Securities & Investments Commissions Act 2001* (Cth), which are stricter in comparison to other consumer regulators like the Australian Competition and Consumer Commission. While confidential investigations are necessary for procedural fairness, confidentiality must be balanced with the public interest resulting from the public and consumers being confident that the regulator is responsive to complaints.

ASIC also provides funding for research projects on topics of concern to CAP members. In our experience the discussions at CAP meetings are informative, frank and useful, which compares very favourably with the common experience of meeting with government or industry representatives who can be unwilling to respond openly to questions or concerns.

In addition to the CAP we also have regular meetings with senior staff in ASIC's Melbourne office to track the progress of matters referred to ASIC and sharing information.

### **Timeliness**

While ASIC broadly performs well, we do have concerns with the time it takes for ASIC to respond to systemic issues we have raised with it.

One example concerned the debt collection firm ACM. Consumer Action handled a very large number of serious complaints about ACM and was referring complaints to ASIC from 2008 requesting that they intervene. We continued to refer complaints to ASIC and, growing increasingly frustrated with the lack of response we took the unusual step of criticising ASIC in a 2010 media release.<sup>7</sup> ASIC did ultimately commence proceedings against ACM in May 2011 and secured an excellent outcome in the Federal Court in October 2012. However, a great deal of consumer detriment may have been avoided had ASIC responded more quickly—it is notable

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<sup>6</sup> Page 156.

<sup>7</sup> 'Debt collector complaints too small-fry for consumer watchdog ASIC'. Accessed 15 October 2013 from <http://consumeraction.org.au/media-release-debt-collector-complaints-too-small-fry-for-consumer-watchdog-asic/>

that the 2011 proceedings concerned conduct by November 2008 and June 2010, and that the court outcome was not achieved until 2012, some four years after the issue was initially identified.<sup>8</sup>

More recently we have raised concerns with what in our view are systemic failures by the payday lending industry to meet responsible lending obligations under the *National Consumer Credit Protection Act 2009*. These obligations applied to the payday lending industry from 1 July 2010, yet enforcement action only commenced this year (noting that ASIC did previously undertake some monitoring of the sector, including publishing a public report). We welcome the action that ASIC is currently taking action against a number of payday lenders,<sup>9</sup> but again we feel this response has been a very long time coming, particularly considering that it was widely accepted that the industry was engaging in systemic and widespread breaches of responsible lending obligations.

We accept that good investigation and enforcement processes take time. We also accept that ASIC may not agree that conduct we bring to its attention is in fact a breach of the law, or is serious enough to divert enforcement resources. However, where ASIC does agree that a problem deserves an enforcement response, there needs to be a balance between taking the time to be sure of its position and responding quickly enough to prevent further harm.

Taking a timely and responsive approach is particularly important in emerging or rapidly changing markets, or those that are first subject to regulatory oversight (such as payday lending). In such markets, businesses will be experimenting with new business models and marketing strategies in an uncertain regulatory environment. The regulator could sit on its hands and see what happens or it could play a role in shaping the market by sending early messages that particular types of conduct will not be tolerated. In our view, the latter approach is not only likely to be more effective at reducing the likelihood of consumer detriment but is likely to be an efficient use of resources. If poor conduct or a culture of non-compliance is able to develop in the market, the regulator is likely to be required to expend greater resources 'fixing up the mess'. Where a regulator fails to set the tone for a market, industry players are able to make arguments based on sunk costs,<sup>10</sup> consumer familiarity with harmful practices and/or 'they got away with it, so how can you challenge me'.

## Responses

### Resourcing

We do not have a view on whether the delays discussed above are caused by a lack of resources or an inefficient use of existing resources. However, it will always be the case that ASIC's performance will be limited by its resources. ***The committee should consider what ASIC's core investigation and enforcement work is, what level of resources are required to complete that work and whether ASIC has those resources.***

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<sup>8</sup> '11-107AD ASIC alleges debt collection group engaged in misleading and harassing behaviour', ASIC Media Release, 26 May 2011.

<sup>9</sup> For example, ASIC's action against The Cash Store (see ASIC Media Release 13-257 from 11 September 2013) and Fast Action Finance (Media Release 13-205 from 7 August 2013)

<sup>10</sup> Other things being equal, industry will often incur higher costs in changing a particular product design or distribution model where it has been in place for longer.

We encourage the committee to consider whether ASIC should receive greater funding from the businesses it regulates—more of a 'user pays' model. We note that UK's new Financial Conduct Authority is funded entirely from the financial services firms it regulates.<sup>11</sup> Such an approach might reduce ASIC's reliance on consolidated revenue and provide more flexibility for the regulator to increase or decrease its resourcing depending on the scope of its required activities.

#### A regulatory framework focused on conduct rather than disclosure

As we have argued above, the adequacy of the broader regulatory framework for credit and financial services will affect ASIC's performance as a regulator in this area. A framework which encourages competitive and fair conduct by industry will create fewer problems and so demand less of the regulator. In our view, the current disclosure-based regulatory approach fails to address many of the consumer problems in credit and financial services and so may be adding to ASIC's workload.

Two broad forces seem to drive disclosure-based responses to consumer protection problems. The first is a number of assumptions attributed to classical economic and classical contract theory which together promote the view that consumers necessarily act rationally, are free to negotiate terms and, assuming they are well informed about the nature and terms of a product, they will only make a purchase if it is in their best interests to do so. This line of reasoning is troubled by a number of considerations:

- more disclosure is often a bad thing: for example, few consumers ever read any of the numerous PDS' they will receive in their lifetime and it is more or less expected that consumers will sign standard form contracts without really reading them (consider, for example, insisting on reading a rental car contract at an airport counter and taking the time to ask questions about things you don't understand while a queue of other customers grows behind you);
- credit and financial products are extremely complex and non-experts will frequently misunderstand even the most important elements: take for example the widespread surprise and anger among insurance policy-holders affected by the 2011 Queensland floods when informed that their policies covered 'storm' but not 'flood' damage;
- people do not necessarily choose between products 'rationally', they make quick decisions using mental shortcuts when dealing with unfamiliar topics or when limited by time; and
- people typically have trouble calculating costs and risks, especially when the cost or risk is temporally remote.

These factors affect all consumers, but even more difficulties affect disadvantaged or vulnerable consumers. For example, those who speak English as a second language may be unable to understand contract terms.

The second broad driver is political expediency and cost. A Government responding to a consumer protection issue will likely have a number of options: doing nothing (unlikely if there is already popular support for action); interventionist options which force businesses to change their practices (likely to be fiercely opposed by industry); or half measures such as improving

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<sup>11</sup> Financial Conduct Authority, 'How we are funded', available at: <http://www.fca.org.uk/about/how-we-are-funded>

disclosure or 'consumer education'. The attraction of the disclosure / education option is that it appears relatively cheap and encounters less resistance. The limitation of this model is that in many cases it may in fact be the costliest option because it adds extra costs (the disclosure requirements) but fails to solve the problem.

We stress that improving disclosure can be a solution to a consumer problem where that problem is caused purely by insufficient information reaching the consumer. For example, one of our concerns with consumer leases (especially 'rent to buy' arrangements) is that consumers are not aware of the cost of these contracts because businesses are permitted to give what we would argue are misleading impressions about cost in their advertisements. Better disclosure requirements could solve that problem (though not other problems with the same product). However, no amount of disclosure could solve the problems caused by payday lending, which are driven by poverty and a predatory business model.

In recent years we have seen the beginnings of a move away from a disclosure focus. For example, recent reforms to the obligations of payday lenders and financial advisers were based in the acknowledgement that the desired consumer protection outcomes were best achieved by focusing on unfair practices themselves rather than disclosure. Further, since 2011 ASIC has had power in relation to unfair terms in consumer contracts—these powers can enable the regulator to seek changes to terms in consumer contracts that are not commercially necessary. Introduction of key facts sheets in credit and insurance have also been driven by recognition that brief, targeted disclosure is more effective than complete disclosure.

Re-aligning credit and financial services regulation away from a disclosure focus is a huge project but it must be undertaken if we want that regulation to be effective. ***We invite the committee to consider whether ASIC's limited resources are being drained by market problems that could be avoided by shifting the focus of financial services law to focus less on disclosure and more on substantive conduct of business.***

#### Focusing ASIC's powers

Further to the point above, ***we suggest the committee consider whether enhancing ASIC's powers could allow it to respond more quickly and effectively to market misconduct.*** In particular, the committee should consider powers available to the new UK Financial Conduct Authority to suspend or ban potentially harmful products.

While the Financial Conduct Authority's powers are new, they propose a model to allow a financial services regulator to respond quickly to problematic conduct before extensive harm can occur. Indeed, a media report from March this year suggested that the new powers were driven by dissatisfaction with the time it took its predecessor Financial Services Authority to investigate and respond to problems in the Payment Protection Insurance industry.<sup>12</sup> The new powers are designed to allow the regulator to suspend a product for up to one year while it investigates.<sup>13</sup>

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<sup>12</sup> 'Financial Conduct Authority may ban harmful products', *The Guardian* (UK), 26 March 2013. Accessed 16 October 2013 from <http://www.theguardian.com/business/2013/mar/25/fca-ban-financial-products>.

<sup>13</sup> 'The Financial Conduct Authority: what it does and who is charge', *The Telegraph* (UK), 8 November 2011. Accessed 16 October 2013 from <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8874588/The-Financial-Conduct-Authority-what-it-does-and-who-is-charge.html>



While the focus of ASIC's powers are on regulating the conduct of licensees, the Financial Conduct Authority is empowered to regulate financial and credit product themselves. In our view this approach gives a regulator more power to respond quickly to emerging problems before widespread consumer detriment occurs.

#### Effective dispute resolution and compensation arrangements

Fewer demands will be made of ASIC's resources where consumers have effective, fair and accessible options to resolve dispute with business themselves.

#### *External Dispute Resolution*

At present, credit and financial service providers are required to be a member of an ASIC approved External Dispute Resolution (EDR) service. While the EDR system can be improved (indeed, EDR schemes are subject to regular independent review processes which identify improvements), it is in our opinion one of the most important parts of the consumer protection system and has contributed to efficient and fair redress for many thousands (if not, millions) of consumers who would not have been able to resolve disputes through courts or tribunals.

A key function of EDR schemes is the identification, resolution and reporting of systemic issues and serious misconduct. In the financial services industry, EDR schemes must report systemic issues and serious misconduct to ASIC and they also report publicly on these matters. For example, the Financial Ombudsman Service provides a quarterly update on systemic issues reported to ASIC in its public bulletin, The Circular. EDR schemes, largely due to their focus on resolving disputes, do not name businesses, nor is there any obligation on ASIC to respond to reports from EDR schemes. ***We recommend the Committee consider whether more confidence may be engendered in the effectiveness of ASIC if it was required to report publicly on what action it has taken, if any, in relation to issues reported to it by an EDR scheme.***

#### *Last Chance Compensation Scheme*

One option for improving consumer protection in consumer credit and financial services would be the introduction of a 'last chance compensation scheme'. The purpose of this kind of compensation scheme would be to compensate consumers for losses suffered due to the actions of financial advisers or service providers in situations where compensation could not be recovered from the business themselves, for example due to insolvency.

Consumer advocates have recommended the introduction of such a scheme in financial services for some time<sup>14</sup> and was considered in depth (though rejected) by Richard St John in his 2010 *Review of Compensation Arrangements for Consumers of Financial Services*. We continue to support the introduction of such a scheme and in our view it could apply equally to credit and consumer lease providers where there are insufficient compensation arrangements. We note for example that credit providers and lessors are not required to hold professional indemnity insurance (brokers are, by comparison) and this could create problems for consumers seeking compensation from a credit provider or lessor who then goes into administration.<sup>15</sup>

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<sup>14</sup> See for example Choice's page 'Consumer compensation scheme for financial services ': <http://www.choice.com.au/consumer-action/past-campaigns/finance/consumer-compensation-scheme-for-financial-services.aspx>

<sup>15</sup> ASIC, Regulatory Guide 210—Compensation and insurance arrangements for credit licensees, March 2010: [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg210.pdf/\\$file/rg210.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg210.pdf/$file/rg210.pdf)

***The committee should consider whether the introduction of a last chance compensation scheme would improve consumer protection and reduce demand on ASIC enforcement resources.***

#### Prioritising the needs of vulnerable and disadvantaged consumers

Meeting the needs of vulnerable and disadvantaged consumers is included as an operational objective of Australia's consumer policy framework, noted above. Vulnerable and disadvantaged consumers are less likely to be able to use dispute-resolution or the courts to protect their own interests, and they often rely on regulators to protect them from market misconduct. We encourage ASIC to consider further what ways it can prioritise and meet the needs of vulnerable and disadvantaged consumers, particularly in consumer credit markets where the risk of exploitation is significant.

Vulnerable and disadvantaged consumers raise particular challenges for consumer protection enforcement activity. They are often less willing to complain, more easily intimidated, less likely to have retained documentary records and less likely to perform well as witnesses in court proceedings where (among other things) they can be readily confused under skilled cross examination. Often vulnerable consumers will be a member of a class of consumers who have suffered a loss, and it is obviously asking a lot of a vulnerable individual to participate in lengthy and complicated court enforcement processes when there may be limited benefit to them individually.

We think regulators, including ASIC, could do more to prioritise the interests of vulnerable and disadvantaged consumers. Our report, *Regulator Watch*, noted that the enforcement policies of regulators did not grapple with the reluctance of litigators to build cases relying on the evidence of vulnerable individuals.<sup>16</sup> That report recommended that governments, regulators and consumer organisations work with courts and policy makers to ensure that the interests of vulnerable and disadvantaged consumers benefit from consumer protection enforcement.

#### 'Campaign approach' to enforcement

Once it is accepted that a regulator cannot respond to all misconduct that comes to its attention (or even all serious or systemic matters) it is necessary to create some kind of guidelines about which issues it will respond to and which it will not.

A useful way to do this is to adopt a 'campaign approach'—that is, undertake a coherent and planned series of actions which are together designed to achieve an overall aim and objectives. This approach recognises the limitations facing regulators in relation to access to resources, particularly in response to potentially prolific breaches of consumer protection law. It also looks at an issue more holistically, including business and consumer educational initiatives combined with targeted enforcement

An example of this approach which we discussed in *Regulator Watch* is the ACCC's response to the widespread use of untested and possibly misleading 'green claims' and in relation to door-to-door selling. The ACCC's approach included:

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<sup>16</sup> *Regulator Watch*, page 117.

- public statements about its concerns;
- producing guides for business and consumers;
- raising issues with possibly non-compliant businesses;
- undertaking investigations into apparent non-compliance;
- obtaining enforcement outcomes in response to some claims including administrative undertakings court enforceable undertakings and court declarations that claims were misleading.<sup>17</sup>

The first stage to this kind of approach is a public statement that the regulator intends to focus its resources on particular areas. This serves a number of purposes, including putting relevant businesses on notice that their practice may be under greater scrutiny (and so encouraging them to improve their practice) and making consumers and the media more aware of problems in certain markets. Most importantly, it creates guidelines for distributing enforcement resources between competing demands. It becomes both a public commitment to investigate problems in stated priority areas as well as a license of sorts to decline to investigate problems in other areas given limited resources.

The ACCC publicly declares a list of priority areas each financial year, and the speech by ACCC Chairman Rod Sims in February 2013 seemed to have the desired effect of putting business and the public on notice that the ACCC saw problems in particular industries. For example, both Fairfax<sup>18</sup> and News Corporation<sup>19</sup> published stories on the same day as Sims' speech mentioning the priorities, focusing on food labeling 'credence claims' and fake online testimonials. In addition, a google search for 'ACCC priorities 2013' returns a number of articles by law firms pitched at making business clients in ACCC priority areas aware that they may soon come under additional scrutiny.<sup>20</sup> While ASIC has listed strategic goals and it has improved transparency about its approach to enforcement<sup>21</sup>, it does not to our knowledge specify priority areas for enforcement. We suggest ASIC consider taking a similar approach to ACCC on this front.

#### Bringing greater capacity to the Consumer Advisory Panel

While we believe the ASIC Consumer Advisory Panel (discussed above) brings a number of advantages, an enhanced consumer advisory role may bring further benefits to the regulator, its work, and the confidence of the public in its performance. Ensuring consumer interests and priorities are considered closely by senior decision-makers within ASIC will mean it is more likely that decisions are made and priorities are set that accord with consumer need. We note that other sectoral regulators that have a consumer focus have instituted ways in which consumer interests are considered by regulatory decision makers. For example, the Australian Energy

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<sup>17</sup> *Regulator Watch*, Box 1, pp 50-53.

<sup>18</sup> See 'Food Labelling a Priority for ACCC in 2013'. Accessed 16 October 2013 from <http://news.smh.com.au/breaking-news-national/food-labelling-a-priority-for-accs-in-2013-20130221-2etx0.html>

<sup>19</sup> See 'Free range claims under ACCC scrutiny'. Accessed 16 October 2013 from <http://www.news.com.au/money/cost-of-living/free-range-claims-under-accs-scrutiny/story-fnagkbpv-1226582201798>.

<sup>20</sup> See for example Sara Dennis (14 March 2013) 'Seven Main Priorities on ACCC's Agenda for 2013- does your business operate in a target area?'. Accessed 16 October 2013 from [http://www.claytonutz.com.au/publications/edition/14\\_march\\_2013/20130314/seven\\_main\\_priorities\\_on\\_accs\\_agenda\\_for\\_2013-does\\_your\\_business\\_operate\\_in\\_a\\_target\\_area.page](http://www.claytonutz.com.au/publications/edition/14_march_2013/20130314/seven_main_priorities_on_accs_agenda_for_2013-does_your_business_operate_in_a_target_area.page)

<sup>21</sup> ASIC, Information Sheet 151: ASIC's Approach to Enforcement, available at: <http://asic.gov.au/asic/asic.nsf/byheadline/Information+Sheets+Content+Page?openDocument#151>.

Regulator has established a Consumer Challenge Panel which provides that regulator with consumer perspectives as part of its technical and complex regulatory processes.

A possible model is the Financial Services Consumer Panel (FSCP) which is hosted by the UK's Financial Conduct Authority (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 and acting 'as an independent counter balance' to parallel boards which represent the interests of industry.<sup>22</sup>

The committee should consider whether enhancing the responsibilities of the ASIC CAP to more closely resemble the FSCP might improve ASIC's consumer protection outcomes.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

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<sup>22</sup> See FSCP website at <http://www.fs-cp.org.uk> and Annual Report, 12/13, available at <http://www.fs-cp.org.uk/publications/pdf/FSCPAR%202012-13.pdf>;