



Consumer Credit  
Legal Centre NSW

October 2013

## Submission in relation to the performance review of the Australian Securities and Investments Commission

by the

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc (“CCLC”) is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for 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. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC’s work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on the performance of the Australian Securities and Investments Commission (“ASIC”).

### **Summary of Submissions**

- ASIC has been a very effective regulator in the consumer credit space. It has been very active in the first few years of taking over this role from the State governments in 2010 and has taken some well target activities to address areas of likely consumer detriment.
- ASIC cannot take action in every single case of consumer loss.
- ASIC could do more to keep the market aware of its focus and compliance activities. Industry players need to be reassured that wayward competitors are under scrutiny where appropriate so that competitive pressures do not place downward pressure on compliance standards.

- ASIC needs to respond to consumer complaints in a timely fashion and, where timeliness is not practical, keep consumers (and their advocates) informed in some appropriate way.
- ASIC needs some better regulatory tools so that it can react in a timely and effective manner to prevent consumer detriment.
- We encourage ASIC to continue to conduct and foster research, gather evidence from complaints and surveillance activity, and work with consumer advocates and industry to develop creative solutions to problems and inform government about regulatory gaps or weaknesses in their enforcement capacity.

## General Comments

The Consumer Credit Legal Centre (CCLC) would like to first submit that we are generally very pleased with the overall performance of ASIC as the key financial services regulator and especially in its relatively new role as the consumer credit regulator.

We have an open and constructive working relationship with ASIC through our participation on the Consumer Advisory Panel, our regular complaints to ASIC about financial services providers, consultation with ASIC staff in relation to statutory interpretation and regulatory guidance and our collaboration with ASIC on community sector training and outreach activities.

## ASIC's Credit Jurisdiction is relatively new

The majority of CCLC's contact with ASIC is in their capacity as the national consumer credit regulator. The CCLC notes that ASIC's performance as the *consumer credit regulator* is relatively new, because its jurisdiction under the new *National Consumer Credit Protection Act 2009* ("NCCP Act"), only came into effect in stages over 2010 -2012. This area was formerly the subject of State regulation, although national uniform template legislation had been in place since 1996. Nevertheless, ASIC has already laid the basis of a solid regulator presence in this area.

ASIC managed the registration and licensing process, which was a considerable undertaking, without major incident, with key industry stakeholders reporting a fairly smooth transition. Since that time ASIC has issued Regulatory Guidance in relation to a number of issues to encourage and support industry compliance<sup>1</sup>. The development of these guides involved

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<sup>1</sup> RG 201 Unsolicited credit cards and debit cards; RG 202 Credit registration and transition; RG 203 Do I need a credit licence? RG 204 Applying for and varying a credit licence; RG 205 Credit licensing: General conduct obligations; RG 206 Credit licensing: Competence and training; RG 207 Credit licensing: Financial requirements; RG 208 How ASIC charges fees for credit relief applications; RG 209 Credit licensing: Responsible lending conduct; RG 210 Compensation and insurance arrangements for credit licensees; RG 218 Licensing: Administrative action against persons engaging in credit activities; RG 220 Early termination fees for residential loans: Unconscionable fees and unfair contract terms; RG 234 Advertising financial products and advice services (including credit): Good practice guidance; RG 234 Advertising financial products and advice services (including credit): Good practice guidance.

considerable consultation with industry and consumer representatives and several have been updated to reflect new issues, further amendment of the law or regulations, or to provide further clarification as issues arise. In our view, the Regulatory Guides are very comprehensive and accessible documents that provide meaningful guidance.

The CCLC contributed comments on the original draft of *RG 209 Credit licensing: Responsible lending conduct* and uses it extensively in advising clients, conducting negotiations on behalf of consumers with lenders and other market participants and making submissions in the course of assisting clients with complaints to external dispute resolutions schemes. In an area of new and largely untested law this form of guidance is crucial.

In addition to this ASIC has undertaken a number of research and surveillance activities which have also served the due purpose of gathering intelligence and supporting industry compliance, including:

- *Report 216 Response to submissions on CP 135 Mortgage exit fees: Unconscionable fees and unfair contract terms* (November 2010)
- *Report 262 Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' home loans* (November 2011)
- *Report 264 Review of micro lenders' responsible lending conduct and disclosure obligations* (November 2011)
- *Report 330 Review of licensed credit assistance providers' monitoring and supervision of credit representatives* (March 2013)
- *Report 358 Review of credit assistance providers' responsible lending conduct relating to debt consolidation* (July 2013)

These reports reveal a pro-active approach to the credit jurisdiction – striking a balance between assisting industry to comply with the new obligations at the same time as gathering intelligence for potential enforcement activity in the future where appropriate. They also reveal a desirable level of targeting *hot spots* where consumer detriment has been rife in the past, such as debt consolidation, low doc loans, and small amount credit (such as pay day lending). While consumer advocates (including the CCLC) are at times critical of the supportive approach taken by ASIC to this transition process (we would like to see more enforcement), we recognise the important long term benefits of this work. We also note that ASIC has taken some important enforcement action in this area which is detailed below.

## **Consumer education**

ASIC has taken a pro-active role in consumer education from the commencement of its new jurisdiction. The CCLC co-operated with ASIC to deliver a full day training session on the new laws to financial counsellors and community lawyers in Canberra, Sydney (on two occasions) and in Hobart. Similar events were held all around the country with different community or legal aid organisations working in partnership with ASIC in every State and Territory.

ASIC also released its new look consumer website, Money Smart, in 2011. While we often provide constructive feedback about various details of this site, overall it is a very comprehensive and useful resource for consumers – especially the numerous calculators

and other practical information available to assist people consider their financial options. We note that Money Smart won Best Service Delivery website at the 2012 *Excellence in eGovernment Awards*.

ASIC continues to have a strong presence in the consumer education space and recently released *Report 374 Shaping a National Financial Literacy Strategy for 2014–17: Consultation feedback report* (October 2013).

### **ASIC's Consumer Advisory Panel**

The CCLC is currently a member of ASIC's Consumer Advisory Panel ("CAP"). The CCLC also liaises with ASIC staff between meetings and has a constructive relationship. CAP has commissioned some of the key research undertaken by ASIC over the years – particularly as it relates to vulnerable consumers.

The interaction with staff at CAP is constructive and informative. We contend that CAP should be further improved by:

- Introducing more focus on outcomes, but a recent decision to track issues raised at CAP more effectively may assist in this regard.
- Better integration and consideration of CAP issues throughout ASIC
- Introducing a similar model to that in the UK being the Financial Services Consumer Panel.

### **ASIC's older jurisdiction under the ASIC Act**

ASIC has had some interest in consumer credit and related markets since 2001 because of its jurisdiction under Part 2 of the *ASIC Act* in relation to misleading representations (s12BB), unconscionable conduct (s12CA), misleading and deceptive conduct (s12DA) and debtor harassment (section 12DJ) in relation to financial services, including credit. In that context it conducted or commissioned a number of research and/or surveillance exercises which shaped the development of industry best practice and law reform policy in the areas of consumer lending and debt collection. This work also provided ASIC with a good foundation on which to base its current work as national credit regulator. It was not, however, the regulator with responsibility for credit law during this period.

In 2003 ASIC released *Report 19: A report to ASIC on the finance and mortgage broking industry*, written by the CCLC with funding from ASIC's Consumer Advisory Panel. Finance and mortgage brokers were poorly regulated, or not regulated at all, in many states of Australia, and this report detailed the extensive harm to consumers, and in some cases losses to lenders, that resulted from this regulatory gap. The report received considerable attention in the media, from industry and from law makers at the State and Federal level. It is credited by many as starting the process of reform which resulted in draft State legislation (the *Finance Broking Bill 2007*), which was never enacted, but was instead subsumed into the national reform process which produced the *NCCP Act* in force today. Further exploration of problems in this area occurred in ASIC's *Report 119: Protecting wealth in the family home: An examination of refinancing in response to mortgage stress*, which focused specifically on predatory lending and equity stripping practices. CCLC raised the issues in this report with ASIC and provided clients for the research.

Related to this was the issue of mortgage exit fees. While many fairly mainstream loans were subject to mortgage exit fees of several hundred dollars, in the non-bank sector these sometimes amounted to thousands of dollars.<sup>2</sup> Among clients of CCLC (both casework and advice callers) reports of \$3,000-\$5,000 dollars were common, many fees were higher, and the worst reported to CCLC was \$29,000 (based on a percentage of the amount borrowed). Consumers often reported being trapped in high interest loans, because they could not borrow enough to cover the exit fee upon refinancing. This left some borrowers in the position where they had to sell their homes even though they could have afforded a more competitive loan with lower repayments.

In 2008 ASIC conducted a review of mortgage entry and exit fees at the request of the then Treasurer Wayne Swan. The results of that review, published in *Report 125: Review of mortgage entry and exit fees* (April 2008) were a useful contribution to the debate. In 2009 the CCLC represented a client in the Consumer Trader and Tenancy Tribunal. The decision in that matter is *Broadfoot v RHG Mortgage Corporation Limited (Commercial)* [2009] NSWCTTT 447 (14 August 2009). The CTTT decision found that the fee charged was not a genuine pre-estimate of RHG's loss in the early termination (refinance) of the mortgage. This decision was appealed in the District Court by RHG but then the matter was settled before the matter was heard. In 2012 ASIC issued regulatory guidance in the form of *RG 220 Early termination fees for residential loans* and conducted compliance activity resulting in substantial refunds to consumers.<sup>3</sup> Ultimately mortgage exit fees were prohibited by regulation but ASIC guidance in relation to break fees remains relevant.

In September 2005 ASIC released *Report 55: Collecting statute-barred debts*. This was at a time when complaints about debt collection companies who bought large tranches of debt at cut prices and engaged in dubious collection practices were perhaps at their height. With no customer relationship to preserve and no brand to protect in order to attract further customers, debt collectors acted with little restraint. Also, having purchased large numbers of debts with inadequate documentation, they often pursued the wrong debtors, failed to listen to alleged debtor's legitimate arguments about liability or the amount owing, black-mailed people with threatened credit report listings (regardless of their legal entitlement to list) and often pursued debts which would no longer be enforceable at law. The ASIC report (which was instigated following a decision of the Victorian Supreme Court *Collection*

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<sup>2</sup> Mortgage exit fees are not the same as break fees. Mortgage exit fees were formerly applied to many variable rate mortgages. They were often applied if the loan was refinanced or paid out within the first 1-5 years, but sometimes longer. In some cases a new period in which the fee was payable commenced every time the debtor changed the amount or conditions of the loan. These are now prohibited by law. Break fees apply where a fixed rate loan is broken within the fixed rate period and represent the damages to the lender for the loss of interest over the remaining period that the fixed rate would have applied if rates have gone down and the funds can no longer be lent at the same rate. These fees continue to apply.

<sup>3</sup> 12-169MR RHG customers refunded over \$3.3 million, *Thursday 19 July 2012*, "Over 6,400 consumers will be refunded more than \$3.3 million by RHG Mortgage Corporation Ltd (RHG), formerly known as RAMS Mortgage Corporation Ltd, following ASIC concerns about discharge and early termination fees charged on home loans terminated since 1 July 2010. RHG has also agreed to reduce its discharge fees on existing loans and to the staggered removal of early termination fees for thousands of customers going forward."Media release viewed at [www.asic.gov.au](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-169MR+RHG+customers+refunded+over+$3.3+million?openDocument)

*House Ltd v Taylor* [2004] VSC 49 in relation to unconscionable conduct in the context of collecting statute barred debt) was important in highlighting existing industry practice and fostering improvement. This was followed by the release of the joint ACCC/ASIC *Debt collection guideline: for collectors and creditors*.

In 2009 with many households affected by the *Global Financial Crisis* ASIC, jointly with Consumer Affairs Victoria, released *Report 152 Helping home borrowers in financial hardship* which again assisted in identifying and promoting best practice, played a role in controlling the potential long term financial harm that flowed from the prevailing economic conditions, and has enduring relevance for any home loan customer dealing with financial hardship (as a result of unemployment, family breakdown, sickness or disability for example).

ASIC also released two reports in the reverse mortgage, equity release space (*Report 59 Equity release products report*, and *Report 109 'All we have is this house' Report on consumer experiences with reverse mortgages*) which were timely and influenced industry self-regulation and ultimately the specific provisions of the NCCP in relation to reverse mortgages.

## **ASIC's Credit Enforcement Activity**

### General

Since taking primary responsibility for credit regulation in Australia in July 2010, ASIC has undertaken considerable enforcement activity in the area of credit regulation. The former laws of NSW (prior to the enactment of the NCCP Act) involved a negative licensing system. This meant that to prohibit a person from being lawfully active in the provision of credit or finance broking the government had to take action in the Supreme Court. The result of this was that very few players were ever banned, despite poor conduct being rife. Since the introduction of the Australian Credit Licence system, ASIC bans brokers (usually for fraudulent conduct and/or providing misleading information in loan application documents) on a regular basis.<sup>4</sup> Lenders are also not immune, with several directors or lending business also being banned on a permanent or temporary basis.<sup>5</sup> This means that, while there are no doubt offenders who have so far escaped detection, there is a nonetheless a clear message that poor conduct can and does lead to consequences.

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<sup>4</sup> Recent examples include 13-265MR South Australian mortgage broker charged with providing false or misleading information, *Friday 27 September 2013*; 13-200MR Former mortgage broker pleads guilty to submitting false documents to lenders, *Friday 2 August 2013*; 13-179MR ASIC permanently bans mortgage broker, *Wednesday 17 July 2013*; 13-170MR ASIC bans Perth finance broker for falsifying documents, *Thursday 11 July 2013*; 13-113MR ASIC permanently bans motor vehicle finance and insurance broker, *Wednesday 22 May 2013*; 13-080MR ASIC bans Sydney mortgage broker and cancels his Australian credit licence, *Tuesday 16 April 2013*

<sup>5</sup> 270MR ASIC accepts enforceable undertaking from Queensland credit provider, *Wednesday 9 October 2013*, "ASIC has accepted an enforceable undertaking (EU) from Mr Brett Morgan, 43, a director of Rent the Roo South Brisbane Pty Ltd, trading as Home Zone Rentals. ASIC was concerned that Home Zone Rentals was providing household items under a 'rent to buy' arrangement, although neither Home Zone Rentals, nor its directors were at any time licensed to engage in credit activity." 12-127MR ASIC bans Victorian pay day lender, *Thursday 14 June 2012* "ASIC has banned Victor Manatakis, of Doncaster, Victoria, from engaging in credit activities for five years after an ASIC investigation found his payday lending business was an unlicensed credit provider."

## Unconscionable conduct, and misleading and deceptive conduct under the ASIC Act

As stated above, ASIC has had an ongoing jurisdiction under the ASIC Act in relation to misleading and deceptive conduct and unconscionable conduct, dating to before the commencement of the credit regulation.

### **Case Study**

The CCLC had raised concerns about Australian Lending Centre, Sydney Lending Centre and the proprietor of these organisations, Chris Riotto, a number of times over the last decade. We had received many calls from affected borrowers over the years and had acted successfully in a number of matters. We raised our concerns with NSW Fair Trading and the Finance Broking Association (of which Chris Riotto was the NSW President at one stage) without any action being taken.

We also lodged complaints with ASIC in relation to 3 clients – an elderly man whose loan who obtained a loan he could not afford secured over his home, a single mother who had pulled out in time but had been threatened with considerable fees for not proceeding with a potentially disastrous loan, and chronically depressed woman from a non-English speaking background, whose home was also at risk as a result of a loan for \$3,500. The CCLC had already settled the individual matters of these clients to their satisfaction but we had grave concerns for other clients and the ongoing risk posed by the business practices engaged in by the entities involved.

ASIC investigated and took action on behalf of five clients of The Australian Lending Centre, Sydney Lending Centre, and AMR Investments, as well as against their owner Christopher John Riotto, including the three CCLC clients. The action was brought under sections 12CA and 12CB (relating to unconscionable conduct), and sections 12DA and 12DB (misleading and deceptive conduct) of the ASIC Act. The case, run by ASIC on behalf of these five clients, was decided in the Federal Court of Australia in February 2012.

The court found that AMR Investments, Australian Lending Centre and Sydney Lending Centre had engaged in misleading and deceptive conduct, and unconscionable conduct, by:

- Having clients signing broking contracts for business loans, when they specifically knew the loans were for personal use. The practical effect of this was to remove important consumer protections afforded personal loans under the Uniform Consumer Credit Code.
- In one specific case, broking a secured loan, with the security being the client's house, when it was clearly evident that client would not be able to service the loan in any way.
- In another specific case, exploiting the clearly evident disability of the client, so that a loan could be brokered at a rate of 5% per month (60% p.a.). The loan was secured over the client's only asset.

The Federal Court ordered that Sydney Lending Centre and Australian Lending Centre pay ASIC's costs. They were also ordered to pay compensation to one of the parties ASIC was bringing the action on behalf of. Sydney Lending Centre has not applied for a new credit license. Australian Lending Centre has the following conditions/enforceable undertakings being imposed on its credit license. These include:

- The appointment of an independent compliance specialist to review the conduct of Australian Lending Centre's business, including its client files. The independent compliance specialist must also regularly report to ASIC the findings of any reviews conducted.
- The appointment of a 'responsible manager' who must have the necessary knowledge and expertise to operate a credit license.

The CCLC was very pleased with the outcome of the Court case but disappointed with decision to allow Australian Lending Centre to retain its Australian Credit License. We recognise that ASIC needs to provide due process to industry participants and balance competing factors in the licensing decisions. Since the imposition of these conditions on Australian Lending Centre, our Centre has not yet received any complaints against Australian Lending Centre, but we will be alert for any further evidence of poor conduct.

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### Consumer leases

Consumer leases have long been used to circumnavigate more stringent laws applying to loans rather than leases, and have been a means by which the poorest and most vulnerable in society pay significantly more for consumer goods than the remainder of the population. In some cases consumers have paid for their goods over and over. They were also hit with exploitative penalties when they couldn't afford the contract and tried to hand the goods back. Under the Uniform Consumer Credit Code leases were treated differently to loans, with minimal disclosure applying, no interest rate caps in the States in which interest rates caps applied, and a general lower standard of obligations. As is often the case, this lower level of obligation resulted in the restructuring of contracts to reduce compliance costs and allow higher charges with lower levels of obligation to the consumer.<sup>6</sup> For example, when the law changed to specifically outlaw inflating the cash price of goods in order to conceal the cost of what was essentially a credit transaction (but claimed to be interest free), the most notorious user of this business model simply changed to offering consumer leases involving similar costs and problems.

The new national laws have carried over some of these problems<sup>7</sup>, but a combination of general licensing obligations, responsible lending obligations (which do apply to leases), and unfair terms legislation, has given ASIC some tools with which to address problems in the industry. ASIC has taken action in relation to a number of entities offering consumer leases on particularly unsavoury terms, especially to economically disadvantaged consumers. Early in 2013 ASIC cancelled the credit license of Mobile Rentals, a Victorian operator offering

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<sup>6</sup> The problems with leases were detailed in *A loan in lease clothing: Problems identified with instalment based rent/purchase contracts*, The Micah Law Centre, 2007, available at <http://consumeraction.org.au/wp-content/uploads/2012/07/A-Loan-in-Lease-Clothing-report-Micah-Law-Centre.pdf>

<sup>7</sup> Recent amendments have added some additional obligations onto lessors – Consumer Credit Legislation Amendment (Enhancements) Act 2012.



consumer leases, and banned its director for engaging in credit activities for five years for blatant disregard of the responsible lending laws. More recently ASIC took further action against its franchisees when a surveillance exercise revealed similar poor practices to the franchisor continuing among the franchisee business despite the earlier enforcement action. “The franchisees’ directors have been excluded from the industry by entering into written undertakings with ASIC stating they will not engage in credit activities for three-and-a-half years. Consumers have also been released from their obligations under the contracts and now own the goods.”<sup>8</sup> Other rental companies that have been the subject of enforcement action include Zaaam Rentals, Ray Rentals and Mr Rental.<sup>9</sup> Consumer advocates applaud this crackdown in this area.

### Misleading and deceptive advertising

As noted above, ASIC has issued detailed guidance in relation to advertising and has taken enforcement/compliance action on numerous occasions including (but not limited to):

- Home lending (misrepresentations about interest rate);<sup>10</sup>
- Credit cards<sup>11</sup>
- Payday lending (misrepresenting continuing credit as short term);<sup>12</sup>
- Motor vehicle finance (guaranteeing credit would be given in all cases when responsible lending requires that this will not be the case).<sup>13</sup>

Other action has related specifically to misleading and deceptive conduct in relation to credit limit increase offers on credit card accounts.

### Credit Limit Increase Offers

Since 1 July 2012 financial institutions have been prohibited by the NCCP Act from sending written unsolicited credit limit increase offers to customers unless the customer has specifically opted in to receiving such offers.

Consumer advocates and financial counsellors have assisted consumers for a decade who have found themselves in hot water as a result of accepting unsolicited credit limit increases. These offers were often presented as something the consumer had earned or at least deserved for their great payment history (when in fact they may have been carrying a high interest debt for some time and be particularly at risk of default as a result) and have often been couched in terms which urged the consumer to accept the credit as a risk management strategy (“extra credit just in case”) rather than the additional risk the debt itself can become. Unfortunately similar manipulative marketing strategies have now been

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<sup>8</sup> 13-245MR ASIC removes Mobile Rentals’ franchisees from industry, 3 September 2013.

<sup>9</sup> 13-207MR ASIC hits Ray Rentals with a four year credit ban, 24 April 2012; 13-021MR ASIC takes action against Zaaam rentals, cancelling its licence and banning its directors, Monday 11 February 2013; 13-022MR ASIC accepts enforceable undertaking from Mr Rental, Tuesday 12 February 2013

<sup>10</sup> 13-218MR CUA honours discounts on home loans after misleading ad campaign, 19 August 2013; 12-03MR CBA to change Wealth Package loan comparison rates, Thursday 12 January 2012; 12-73AD HSBC to change home loan advertising, Wednesday 18 April 2012;

<sup>11</sup> 12-110MR Bankwest amends credit card advertising following ASIC action, Monday 4 June 2012

<sup>12</sup> 13-112MR ASIC concerns sees payday lender change advertising, Thursday 23 May 2013,

<sup>13</sup> 12-136MR ASIC takes action on car finance advertising, Monday 25 June 2012

employed to induce consumers to provide the requisite consent to receive credit limit increase offers.

The intention of the law was clearly to allow consumers to shield themselves from tempting offers of additional credit they might find difficult to repay. The law clearly says that consumers can *opt in or out at any time*. Further, customers *can still apply for additional credit* at any time, it is only the lender who cannot offer such an increase without a prior application or consent. Despite this a number of lenders have been caught out by ASIC misrepresenting the situation to consumers in order to induce them to provide the necessary consent:

- In March 2012 ASIC accepted an enforceable undertaking from the Commonwealth Bank in relation to a message sent to its internet banking customer which gave the misleading impression that they would miss out on the opportunity to consent to additional credit limit increases if they did not sign up now and they could not access additional credit in future if they did not consent.<sup>14</sup>
- In April 2012 Westpac changed its messaging on this subject as a result of ASIC's concerns that it was giving customers the misleading impression that they could not access additional credit without giving consent to receiving unsolicited credit limit increases, and that they needed to act fast or they might miss out.<sup>15</sup>
- GE Money were the most recent to be caught out with ASIC commencing legal action against them in October 2013. ASIC alleges that GE represented to customers that they had to give GE Money consent to send them unsolicited credit limit increase offers before it would activate their credit card or give them a credit limit increase.<sup>16</sup>

ASIC's vigilance in the area is absolutely crucial and we support its continuance. Further law reform may also be necessary as banks have now taken to making offers verbally over the phone and in branches to get around the law.

### Pay day lending

Pay day lending is a source of considerable problems for low income and/or vulnerable consumers. In the experience of the CCLC, borrowers can rarely (if ever) afford the amounts borrowed, let alone the expensive cost of credit, and are often plunged into a cycle of endless debt, borrowing or refinancing multiple times from the one lender and/or from multiple lenders simultaneously. These lenders have been subject to responsible lending obligations since July 2010 and additional obligations have been introduced to protect pay day lending (and other small amount credit customers) in March and July 2013.

The importance of ASIC taking action in this area cannot be overstated. The clients of these services are among the most vulnerable in Australia. After extensive consideration the current regulatory settings were set as striking a balance between consumer protection and access to credit. It is extremely important that the laws are now enforced so that they

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<sup>14</sup> 12-40MR ASIC accepts enforceable undertaking from Commonwealth Bank, *Wednesday 7 March 2012*

<sup>15</sup> 12-79MR Westpac withdraws unsolicited credit card limit increase invitation in response to ASIC's concerns, *Tuesday 24 April 2012*

<sup>16</sup> 13-280MR ASIC takes civil action against GE Money, *17 October 2013*

operate as intended. Organisations like the CCLC can assist individuals to enforce their rights, but those individuals represent a drop in the ocean compared to the broader clientele of pay day lenders. Further, the amounts involved in such cases are often so small that individual matters are settled regularly without having any impact on systemic behaviour.

ASIC has so far commenced legal action in a handful of cases (under the 2010 laws as opposed to the recent amendments):

- In June 2012 ASIC banned a Victorian pay day lender for undertaking credit activities without an Australian Credit License;<sup>17</sup>
- In August 2013 ASIC commenced action against Fast Access Finance who lent money to consumers in breach of the Queensland interest rate cap laws under the guise of trading in diamonds. The lender was also seeking to avoid the obligations under the NCCP Act, including to be licensed and comply with responsible lending laws.<sup>18</sup> The company was previously the subject of an adverse tribunal decision in Queensland that was upheld on appeal.
- In September 2013, ASIC commenced legal proceedings against the pay day lending business The Cash Store for breaches of the responsible lending obligations and engaging in unconscionable conduct. *“ASIC claims that TCS and AFA have provided unaffordable loans to a large number of their customers who were on low incomes or in receipt of Centrelink benefits. In addition, ASIC claims that TCS has acted unconscionably and unfairly in selling insurance in relation to these loans to these customers when it was unlikely that they could ever make a claim on that insurance.”*<sup>19</sup>
- In October 2013, ASIC sent a letter to PR Finance expressing concerns that AMX did not comply with the NCCP Act in granting its loans.<sup>20</sup>

The CCLC welcomes the above announcements, especially the two recent actions which go directly to exposing lenders who are attempting to avoid the application of the credit law. Pay day lenders and other small amount financiers have a long history of avoidance practices in NSW and we were dismayed to see these practices continue under the new national regime. It has been very frustrating to report these matters to ASIC and see no publicly visible action. We note that the first public statements in this regard have come at the time of commencing legal action. Clearly considerable work needs to be done gathering evidence and building a case to get to this point. In the meantime, industry players are watching and getting a clear message that avoiding and/or failing to comply with the credit laws is a viable option.

There are other entities and other models of avoidance currently in use. We are aware that not only the CCLC, but also other agencies, have reported these to ASIC. We hope to see additional action in this area in the near future but we suggest that ASIC should be able to give clearer public messages about the lawfulness, or likely lawfulness of avoidance conduct

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<sup>17</sup> 12-127MR ASIC bans Victorian pay day lender, 14 June 2012

<sup>18</sup> 13-205MR ASIC commences legal action against Fast Access Finance, Wednesday 7 August 2013

<sup>19</sup> 13-257MR ASIC takes civil action against The Cash Store, Wednesday 11 September 2013

<sup>20</sup> See Market Update by KeyBridge at <http://www.asx.com.au/asxpdf/20131003/pdf/42jt3k2yyv2mx4.pdf>

at an earlier stage than the issuing of proceedings. Without this, entities engaging in blatant law evasion appear to go unrebuked, leading other industry players who are competing with the offending entities to question why they are complying.

There is also much to be done in this area in relation to responsible lending as in our experience pay day lenders are either not applying the new responsible lending laws at all, or applying them inadequately. We note that the Cash Store action includes allegations of non-compliance with responsible lending laws. This is a good start. It is our understanding that further compliance and surveillance work in this area is planned for the near future and should be a priority.

### Debt collection

In early 2008, the CCLC wrote to a major bank complaining about the activities of a debt collector to whom they were assigning to large number of consumer debts. Such action was not taken lightly but in response to an alarmingly large collection of consumer complaints identified by our advice line staff commencing in 2004 and continuing unabated. In response we received a letter from a major law firm acting on behalf of the debt collector and accusing us of tortious interference in their commercial relationship with the bank. We subsequently became aware that the Consumer Action Law Centre in Melbourne had made a similar approach and received the same response. At the same time we were referring individual complaints to ASIC, as were many other legal centre and financial counsellors.

In 2011 ASIC commenced proceedings in the Federal Court against ACM Group Limited (the subject of our numerous complaints) for debtor harassment. In October 2012 the Federal Court found ACM Group Ltd “*had harassed and coerced debtors and engaged in 'widespread' and 'systemic' misleading and deceptive conduct when recovering money.*” The Court based its findings on extensive evidence from, among other things, phone recordings and internal procedural instructions. In one particular case the Court found the operator to be ‘*rude, condescending and vicious*’.<sup>21</sup> This was an excellent outcome but many consumer representatives were frustrated by the long period between complaints made and the outcome achieved.

### Other

ASIC has also conducted other compliance activities in the credit sphere resulting in positive results for consumers:

- Refunds to thousands of consumers of inappropriately financed tyre and rim insurance premiums<sup>22</sup>
- Changes to charging of default interest on credit cards.<sup>23</sup>

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<sup>21</sup> 12-261MR Federal Court finds debt collection group misled and harassed debtors, *Wednesday 31 October 2012*

<sup>22</sup> 13-231MR ASIC review prompts car financiers to refund more than \$15 million, *Wednesday 28 August 2013*, 12-134MR More than \$1 million to be refunded to BMW finance customers, *Wednesday 20 June 2012*

<sup>23</sup> 12-31MR American Express agrees to change credit card interest rate policy for defaulting cardholders, *Friday 24 February 2012*

### Room for improvement

CCLC does believe that ASIC can and should undertake more enforcement activity. We refer to the Regulator Watch report prepared by the Consumer Action Law Centre<sup>24</sup> which clearly shows that enforcement activity from ASIC has decreased in recent years.

We also strongly recommend that ASIC consider adopting a “*campaign approach*” to enforcement like that used by the ACCC. In this approach, the regulator takes a multi-pronged approach to the issue by issuing media releases about concerns, guides about best practice conduct, investigations, negotiations with affected businesses and enforcement. We are aware that ASIC conducts all of these activities but suggest they could do more to coordinate them in a strategic and publicly overt manner to maximise the combined effect.

## **Responsible lending**

Consumer advocates have been concerned about irresponsible lending practices for over a decade. Free availability of credit in the early 2000s created an alarmingly increasing debt to income ratio, which coupled with ample anecdotal evidence of consumers struggling with impossible levels of debt, led to calls by consumer advocates and financial counsellors for greater regulation of the consumer credit market.

Lending without proper inquiry into ability to pay was particularly rife in the personal loan market in the late nineties and early 2000s, particularly in the form of unsolicited credit card limit increases. The early 2000s also saw the rise of “non-conforming lending” in the home loan market – Australia’s answer to sub-prime lending. In particular, it saw the rise “low” and “no doc” loans<sup>25</sup>. While some lenders specifically targeted and priced their products for marginal borrowers, the trend soon spread into the mainstream, with most mainstream lenders including the major banks offering low doc products. This trend was exacerbated by the growth in the use of mortgage brokers. Brokers carried none of the default risk worn by lenders and had a strong financial incentive (in the form of commissions) to get as many and as big a loans as possible accepted by the financial institutions and other lenders. The presence of the 3<sup>rd</sup> party in the transaction also allowed the lender (keen to grab or retain market share) to distance themselves from the transaction and to either genuinely miss, or effectively *turn a blind eye*, to irregularities in loan applications.

The sub-prime crisis in the US, and the ensuing global financial crisis, brought home that there was a bigger price to pay for uncontrolled lending than the impact on the immediate parties to the transaction and gave momentum to the case for reform. It was at about this time that the well advanced process being undertaken by the State governments to regulate brokers was rolled into a major effort by Commonwealth legislators to address systemic problems in lending via major national law reform in the area of consumer credit.

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<sup>24</sup> *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators* by G Renouf, T Balgi and Consumer Action Law Centre (March 2013)

<sup>25</sup> Low doc loans are where very little information is obtained on ability to repay. No doc loans are where there is no information obtained on ability to repay. Both loans rely on the value of the asset only.

In 2009 the *NCCP Act* was enacted, coming into effect in stages over the subsequent couple of years. This legislation includes several measures which go directly to the heart of the problems described above in relation to responsible lending and are completely new (and in some aspects unique in the world):

- Licensing of lenders AND importantly, brokers and intermediaries (including the ability to remove or place conditions on a license)
- General conduct obligations
- Specific responsible lending obligations

ASIC has already considerable action in this area as noted above (*RG 209 Credit licensing: Responsible lending conduct*, and four of the five reports noted on pages 12 and 13 above). In addition to this ASIC has taken enforcement action against a handful of brokers, lenders and lessors under consumer leases.<sup>26</sup>

It will take some time before we see if these systemic problems in lending have been resolved by the new law, and by ASIC's broadened enforcement powers. The initial impression of the CCLC is that industry (with some notable exceptions including pay day lenders as noted above) is largely compliant with the new laws in so far as the responsible lending obligations are concerned. However we note that the law is relatively new and compliance likely to be in its *honeymoon phase*. ASIC will need to be vigilant to ensure that standards do not begin to slide as lenders become more complacent about the new regime and memories of the GFC begin to fade.

### **Allegations that ASIC has not responded appropriately to complaints in relation to fraudulent lending practices**

We note that a considerable number of submissions by individuals to this enquiry refer to events that reflect the systemic failures of responsible lending referred to above. Many of these submissions refer to conduct which occurred some time ago, prior to the introduction of the new laws in many cases.

Prior to the introduction of the responsible lending laws, borrowers could plead unjust contracts under the *Uniform Consumer Credit Code* (State based law), common law and unconscionability and misleading and deceptive conduct (ASIC Act) in some circumstances. This meant that regulation was split between the State and Federal Governments which led to enforcement being very problematic. The primary responsibility for the regulation of credit (credit providers and brokers), however, clearly rested with the State and Territory Governments and a referral of power to the Commonwealth was required for it to enact the *NCCP Act* in 2009.

The remedy at law under the law prior to 2010 was invariably a reduction in the interest and charges applicable, not a release from the entire loan. In particular, the borrower must

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<sup>26</sup> 13-228MR ASIC commences legal action against Cairns-based lender and broker, *Monday 26 August 2013*; 13-106MR ASIC cancels Money Choices licence and bans its director Matthew George *15 May 2013*; 13-257MR ASIC takes civil action against The Cash Store, *Wednesday 11 September 2013*

usually repay the benefit received under the loan even if the loan is unjust.<sup>27</sup> This means that in many cases (depending on the amount borrowed) where these laws have been successfully argued people have been required to sell their home or other property in order to repay the principal amount borrowed.<sup>28</sup>

We are aware from calls to our Centre that many consumers are being given advice by a consumer support group, Banking & Finance Consumer Support Association, that would appear to be not well founded in law. While some of these borrowers have definitely been adversely affected by poor lending practices, the remedies available at law at the time, and even now, are not as extensive as some borrowers have been led to believe. Many borrowers are being advised to stop making payments on their loans altogether and are risking the repossession of their properties as a result (in addition to possibly being liable for further interest, charges and enforcement expenses).

The *NCCP Act* has introduced new remedies in the form of compensation. These laws only apply to loans made on or after 1 July 2010 or 1 January 2011, depending on the entity involved. These laws are untested in the courts but it is highly likely that similar legal principles will apply in so far as people will be compensated for demonstrated losses only. They will not be able to unjustly enrich themselves (get a free house) and any compensation payable may be reduced if the Court determines that the consumer contributed to their own loss (by, for example, providing false and misleading details themselves or signing blank forms).

Some consumers submitting to this Inquiry may be out of time in relation to some of their claims (that is barred by the limitations acts applying in their jurisdiction). We have also spoken to borrowers who have acquired the impression that they do not have to substantiate their actual financial circumstances at the time of the alleged offending conduct in order to make a claim – the mere fact that lenders and/or brokers may have been guilty of poor conduct, they believe, should entitle them to an automatic remedy. Again, this ignores basic legal principles which require evidence of a person's financial position before and after the events in question in order to establish the amount of any compensation or remedy. Indeed in most cases this information is also needed to *establish any entitlement to a remedy*. This can lead borrowers to be difficult to advise because they will not provide sufficient instructions.

Expecting ASIC to investigate and take action in relation to problems which occurred prior to their jurisdiction in credit commencing is unreasonable. As shown by the Australian Lending Centre case study above, prosecuting a case in relation to the conduct of an individual entity under the ASIC Act (without the credit laws) is a resource intensive exercise and will not necessarily result in the players being banned from the industry now. It will certainly not turn back time, nor enable consumers to keep assets they could not afford in the first place, or to retain assets used for security when the funds have been expended for the consumer's benefit. Expending resources investigating conduct that has already been identified as a problem and has been the subject of major law reform is also clearly of

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<sup>27</sup> *Permanent Mortgages Pty Ltd v Michael Robert Cook and Karen Cook* [2006] NSWSC 1104 (24 October 2006). Some cases pleaded other causes of action such as misleading and deceptive conduct (by the broker) or the NSW Contracts Review Act – the result was nonetheless the same.

<sup>28</sup> There are exceptions to this where a third party has received the benefit of a loan or where the amount advanced is small enough for the consumer to be able to pay off the principal loan without selling an asset.

limited value. Where conduct has been particularly heinous, ASIC may choose to take action with a view to preventing further harm by excluding particular players from the market, but this will necessarily be a strategic decision. As noted above<sup>29</sup>, ASIC has already taken action in a many cases involving fraud and dishonest conduct and we anticipate they will continue to do this.

It should also be noted prior to the transfer of regulation to the Commonwealth, ASIC intervened under s1330 Corporations Act 2001 (Cth) in its role in upholding the public interest in the proper functioning of the Australian financial system in matters such as *Permanent Trustee Company Limited v Gillian O'Donnell Permanent Trustee Company Limited v Di Benedetto Tonto Home Loans Australia Pty Ltd v Tavares [2009] NSWSC 902 (4 September 2009)*. This decision has been significant in developing the law in relation to the relationship of intermediaries, and State laws including the Contracts Review Act.

Those consumers who are not out of time, have the option of taking private legal action (we appreciate this is not always a realistic option), or in some cases applying to the free external dispute resolution schemes which are available (the Financial Ombudsman Service and the Credit Ombudsman Service). For some people getting a favourable outcome will require abandoning the unrealistic expectations some of the borrowers have developed.

Some of these cases do highlight gaps in the credit law reform program to date, specifically credit extended to small business, farming, and some aspects of investment are not covered by the new credit regime. Some reforms in these areas were mooted by the former Federal Government but were not pursued as a result of industry resistance and a concern about reducing access to credit for business and investment. A role for ASIC in the future could be to investigate to what extent this remains a problem in the market and the extent of the consumer detriment which results.

In summary, we contend that prior to ASIC taking over the regulation of credit it was limited in the regulatory action it could take in relation to systemic misconduct in lending. This has left many affected consumers in the very frustrating situation where the State based regulators responsible for credit are not taking action on pre 2010 lending due to the transfer of power to the Commonwealth. This is a difficult regulatory situation but it cannot and does not make ASIC responsible for regulation prior to law reform.

### **Not ASIC's role to respond to everything:**

The CCLC submits that the role of a large national regulator is to respond to systemic and serious breaches of law within the industry that it regulates. ASIC cannot be expected to resolve each individual consumer dispute, nor would it be in the public interest. ASIC should carefully consider how to respond to all potential breaches of the law, but should not necessarily undertake a formal investigation of every individual complaint that comes to its attention.

Currently, ASIC considers a range of factors when deciding whether to investigate and possibly take enforcement action including strategic significance, the benefits to pursuing enforcement, and any alternatives to a formal investigation. Like any government agency

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<sup>29</sup> See earlier sections of this submission detailing ASIC's enforcement and other action in relation to fraud, misleading and deceptive conduct and a range of other misconduct.



ASIC has finite resources, and it should be strategic in using those resources appropriately, and in ways that will benefit the most Australians.

There are several alternatives for consumers that have a dispute with a financial services provider than hoping for a formal investigation from ASIC. Australia currently has a robust and effective external dispute resolution regime, as well as numerous free financial counselling and legal assistance organisations for low income consumers who have a genuine dispute in the financial services sector. Many of these services are accessible to all Australians through the national 1800 007 007 number.

We do encourage ASIC to take as strategic approach as possible to addressing problems within its resource constraints. Sometimes a timely public announcement or compliance campaign may be warranted, even though enforcement action in relation to particular transactions or events that have already occurred is not considered an appropriate use of resources.

## **Insurance**

The CCLC operates a national insurance service for consumers (the Insurance Law Service), including a national legal advice line, consumer education, limited legal assistance and representation and advocacy in relation to potential law reform, public policy development and improving industry practice. We assist customers affected by natural disasters such as bushfire and flood, in addition to numerous other run of the mill insurance problems such as excess disputes, arguments in relation to pre-existing conditions and other policy exclusions, and ensuring consumers are treated fairly when there are allegations of fraud.

ASIC has done some interesting work in this area including in relation to consumer credit insurance, claims handling and dispute resolution, telephone sales and funeral insurance. Again we think there more ASIC could do, but they are somewhat limited in taking strategic action by a lack of consumer protection law. While the Insurance Contracts Act provides some protection, it largely envisages individual rather than systemic action, and to date insurance contracts have been excluded from the Unfair Contracts regime applying throughout Australia in relation to other retail products and services.

## **External Dispute Resolution**

Effective and accessible dispute resolution is a key part of any successful consumer protection framework. This is the part of the system which provides redress for individuals where appropriate, freeing up the regulator to pursue serious transgressions and system-wide issues. Another important role played by ASIC is the approval and oversight of the external dispute resolutions schemes which perform this role in credit and financial services.

All holders of both Australian Credit Licenses and Financial Services Licenses are required to be members of approved external dispute resolutions schemes (“EDR schemes”) as a condition of holding their license. Funded by their industry members, but governed by independent boards, these schemes provide a free, independent dispute resolution service to complainants and play a vital role in providing realistic access to legal remedies for consumers and driving improvement in complaint resolution and best practice in industry.

ASIC has issued (and updated from time to time) regulatory guidance in relation to both what is required of the EDR schemes themselves to seek and retain approval, and the internal dispute resolution standards and procedures required of the licensees (and their various representatives). ASIC has also conducted consultation in relation to its regulatory guidance generally and in relation to specific issues such as the new terms of reference of the newly amalgamated Financial Ombudsman Service in 2009<sup>30</sup>, the review of the EDR schemes relatively recent jurisdiction in matters where legal proceedings have already commenced,<sup>31</sup> and, in relation to the latter, a further review in relation to setting an upper limit on the value of small business loan facilities that can be the subject of the post legal proceedings jurisdiction.<sup>32</sup>

The CCLC is largely satisfied with ASIC's oversight in this area. In fact, we are of the view that EDR has been one of the greatest success stories of consumer protection in Australia, with thousands of consumers able to access redress. It has also been a great driver of best practice in service delivery and complaints resolution in credit and financial services. ASIC's role has been consultative and practical – their decision not to interfere with the post statement of claim jurisdiction of EDR but to exclude some high value small business complaints was a sensible response to stakeholder concerns.

### **Terms of Reference**

*(a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations;*

### **Investment & Small Business lending:**

There still must be improvements in the regulation of investment and small business lending. There are inherent risks in investment lending for consumers and in recent years these risks have been exaggerated by misconduct in the provision of investment products and services in contravention of licensing and disclosure obligations. During Phase 2 of the National Credit reforms the Government expressed that it was particularly concerned with situations where consumers fail to appreciate risk associated with borrowing to invest.

Specifically, the Treasury has said: “The current legislative framework does not adequately address this misconduct. Enforcement activity by ASIC is ineffective due to a combination of regulatory and enforcement gaps, the prohibitive cost and inefficiency of enforcement action and the unlikelihood of targeted enforcement action by ASIC resulting in behavioural change in the industry as a whole. There are also substantial barriers to recovering compensable losses, both in actions taken by ASIC and by consumers in their own right.” – From Treasury RIS on Investment Lending Regulation

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<sup>30</sup>Report 182 Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference Dec 2009

<sup>31</sup> Report 308 Response to submissions on CP 172 Review of EDR jurisdiction (debt recovery legal proceedings) (October 2012)

<sup>32</sup> Report 348 Response to submissions on CP 190 Small business lending complaints: Update to RG 139 (June 2013)

“Once misconduct induced losses have been incurred, it can be difficult and expensive for ASIC to prosecute and recover losses for consumers. ASIC can only take action on behalf of consumers where it is in the public interest to do so (with regard to the cost of taking action), which often means that action will only be taken where there is large scale detriment. This means that individual investors may not obtain recourse through action by ASIC, and, further, that where they do, it may not be in a timely manner.”

We believe the investment lending has been instrumental in facilitating some spectacular investment failures with catastrophic results for many consumers, including self-funded retirees who have lost their homes and their life savings. We commended the Government for attempting to strike the right balance between avoiding stifling funding for investment through excessive regulation and providing a level of protection for investment borrowers in those circumstances which have posed the greatest risks in the past, but unfortunately the proposed legislation was never passed.

As noted above, ASIC could play a role in identifying the extent to which problems in this area persist, in order to inform any future reform program.

### **Financial Difficulty Predator Businesses**

In recent years, consumer advocates have noticed the dramatic increase of businesses that consumer advocates describe as predatory quasi-financial services. These businesses have found profitable means to exploit Australians going through financial difficulty by offering services that at best include outcomes that could have been achieved for free from an ombudsman or financial counsellor, and at worst actively cause additional hardship and consumer detriment. Some of these businesses fall into a nebulous unregulated space making the harm they cause very difficult for consumer advocates to combat. Others may be regulated, but only in a limited fashion or there is a lack of clarity about whether they are regulated:

The types of businesses include (attached includes more information about these):

- Budgeting services
- Credit repair services
- Bankruptcy services
- Debt agreement brokers/introducers (who are not regulated by the Australian Financial Security Authority)
- Debt negotiation (outside personal insolvency)

Consumer detriment is primarily financial, but can also be non-financial. In financial terms, these businesses invariably charge significant fees when free options to assist struggling debtors may be available (i.e. financial counselling). Non-financial detriment can arise if services do not meet consumer needs (increased financial stress alone can lead to health problems, mental illness and relationship breakdown). In some cases the financial detriment is severe:

- consumers are subject to legal proceedings because they have paid a 3<sup>rd</sup> party instead of their creditors and/or they have been advised to stop paying for the purposes of creating greater leverage in negotiations;
- consumers have their credit report impaired as a result of advice to stop paying;
- consumers are placed in Debt Agreements under the Bankruptcy Act when this is not in their interests;
- consumers are made bankrupt; and
- consumers are prevented from going bankrupt when this is their most appropriate option.<sup>33</sup>

The CCLC submits that ASIC's ability to take action in relation to these entities is very limited. Some of these businesses have an Australian Credit Licence, but the services offered may not necessarily be regulated by consumer credit or financial services legislation (i.e. debt agreement brokers, credit repair services). Although the fees that these businesses charge may be very high and disproportionate to the service provided, this may not itself be unlawful, even though consumers suffer great detriment.

Even if ASIC takes action to remove an entity's credit license, it does not have the authority to prevent the entity from engaging in its core activities. CCLC is currently acting in two matters where the other party's credit license has been removed since December 2012 and its principal banned for 3 years. Despite this, there does not appear to be any recourse as the activity undertaken does not appear to satisfy the definition of credit activity under the NCCP Act.

In many cases these activities are also causing losses to industry. Credit repair agencies place considerable pressure on lenders to remove credit listings in circumstances which are inappropriate and would potentially impair the credibility and usefulness of the credit reporting system. In the case of budgeting services and debt negotiation services, another creditor is added into a situation where often the fundamental problem of the consumer is that they don't have enough money to pay their existing creditors – this simply siphons off money that might otherwise have been applied to their original debts. ASIC recently convened a Roundtable of consumer and credit industry representatives to promote discussion of the problems being experienced from both perspectives and to encourage solution focussed thinking. ASIC has also been examining the limits of its powers in this area.

We support ASIC in this activity and argue that it has a valuable role to play in fostering innovative solutions where possible and also informing the government of the limits of its powers and the problems it cannot resolve as a result of those limitations. In particular, this is another example where ASIC's regulatory powers are limited and urgent considerations need to be given to ensure that ASIC has adequate regulatory powers to protect consumers using these services.

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<sup>33</sup> Some consumers have reported being told they cannot go bankrupt until they have made payments over a set period to the service provider

## **Shifting the focus from disclosure to conduct and products**

We strongly support the submissions made by the Consumer Action Law Centre in its submission on the need for the regulatory framework to be more focussed on conduct than disclosure and to give broader scope for dealing with products which may be inherently misleading, unfair in effect, or unfit for the purposes for which they are intended.<sup>34</sup> As an organisation advising and acting for consumers we are continually frustrated by running cases where we are arguing technical breaches of law or misleading and deceptive conduct, when the core problem is really one of unfair conduct or exploitative product design.

*(b) the accountability framework to which ASIC is subject, and whether this needs to be strengthened;*

The CCLC can only comment on ASIC's role in relation to credit and to a lesser extent in relation to insurance. Accountability is important and should be strengthened where possible. We refer to the recommendations in Regulator Watch by the Consumer Action Law Centre

*(c) the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies;*

No comment

*(d) ASIC's complaints management policies and practices;*

## **Timeliness, feedback and communication**

Many complaints take a very long time for ASIC to act on. Even where consumer advocates are pleased with the ultimate outcome, the void that exists between complaint(s) and outcome is disconcerting and best and downright infuriating where consumer harm is accumulating and industry practice becoming entrenched.

As noted above, better regulatory tools may be necessary in some cases to allow timely action, or prioritisation of resources in others. Where there is no other option than to take considerable time to build a case then we submit that ASIC should take other measures within the bounds of its confidentiality obligations such as letting consumer advocates know whether particular issues are being progressed or have simply been filed for future reference, and why. This would enable consumer advocates to know how to direct their energy - such as gathering more evidence to provide to ASIC if the problem is considered worthy of more attention, seeking particular evidence considered important by ASIC, lobbying for law reform (where ASIC does not consider the conduct breaches any current law), or simply redirecting their energy to other issues. Better feedback about enforcement encourages people to make more complaints, and to make better quality complaints, which will only improve ASIC's performance in the longer term.

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<sup>34</sup> Consumer Action Law Centre submission on *The performance of ASIC* pages 7 and 8

We have raised these issues with ASIC through the CAP process and hope to see improvements in this area in the near future.

We note ASIC's public announcement in August 2012 in relation to targeting unlicensed credit activities and support this type of announcement and focussed campaign.<sup>35</sup>

*(e) the protections afforded by ASIC to corporate and private whistleblowers; and*

We have no expertise or experience in this area.

*(f) any related matters.*

### **Criticism of ASIC when matters are not successful in Court**

We note that ASIC has been criticised at times for taking unsuccessful court action. Such criticism may be warranted if such cases are poorly chosen or incompetently prosecuted, but to suggest that a regulator should never lose in Court would be to ensure that the law is never fully tested. Legal action, successful or not, defines the boundaries of acceptable behaviour and sends clear messages to the market place. It may also highlight the need for reform, or alternatively, show that the current law is adequate to address an area of growing concern. Keeping in mind the resource intensive nature of court action, regulators should sometimes be prepared to take calculated risks to determine the extent of the law and to refine its interpretation.

Thank you again for the opportunity to comment on the performance of the Australian Securities and Investments Commission. If you have any questions or concerns regarding this submission please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.

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<sup>35</sup> 12-205MR ASIC campaign on unlicensed credit providers, *Monday 27 August 2012*