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Australian Law Reform Commission
GPO Box 3708
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Dear Commissioners

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on *Discussion Paper 85—Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (June 2018).

About Consumer Action

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

Executive Summary

This Inquiry is an important opportunity to enhance access to justice in Australia. Class actions are an essential part of the consumer redress framework. Class actions provide an important means for people to band together to pursue justice when companies engage in widespread violations of the law. For this reason, we strongly support a facilitative regime for class actions. Such a regime should avoid counterproductive barriers that stop people from being able to exercise their rights.

We **enclose** our submission to the Victorian Law Reform Commission's 2017 *Inquiry into Litigation Funding and Group Proceedings* (**VLRC Submission**), which provides comment on issues relevant to the current inquiry. The enclosed submission makes the following recommendations:

- the restriction on lawyers charging contingency fees should be removed;
- robust court oversight is important to protect litigants at certain process steps (for example, processes to 'close' the class) as well as settlement and distribution, but there should not be upfront barriers to initiating class actions such as class certification;
- litigation funding plays an important role in supporting class actions, but measures should be adopted to manage conflicts of interest and encourage funders to adopt common fund class action models; and
- the Commission should support a judicial power to allow a court to order *cy près* or public interest distributions of unclaimed damages in class actions.

Our submission to this Inquiry focuses on design principles for a proposed federal collective redress mechanism (Proposal 8-1).

We are broadly supportive of fast, low-cost and, accessible dispute resolution. The design of any such scheme must build upon lessons from existing regulator remediation schemes, particularly in financial services.

Many people are falling through the cracks of the existing redress mechanisms, particularly those with disputes about faulty cars, shonky retirement housing operators and legacy debts from the VET FEE-HELP scandal.

Importantly, any federal collective redress mechanism must complement, and not undermine, the role of class actions. A thriving class actions sector is likely a necessary precondition for the scheme's success. Without the threat of a class action, many firms would be unlikely to provide voluntary redress.

Similarly, in looking to adopt the UK approach to voluntary collective redress, the size and prevalence of civil penalties would need to be increased. The reduction of a civil penalty will only operate as an effective incentive to provide voluntary redress if there are strong and empowered regulators in all sectors that are willing to actively challenge corporate wrongdoing.

We expand on principles for design of a scheme below, drawing on lessons from existing regulator remediation programs and external dispute resolution (EDR) schemes. These include:

- Adopt the principles in the Australian Securities & Investments (**ASIC**) Regulatory Guide 256 on advice client review and remediation (**ASIC RG256**);
- Provide full redress to consumers;
- Ensure a wide scope;
- Proactively locate all affected consumers;
- Include *cy près* powers to benefit the class as a whole where consumers cannot be located;
- Ensure timely remediation;

- Stop time running on limitation of actions periods; and
- EDR schemes should administer voluntary redress schemes where appropriate.

Consideration must also be given to the scheme's interaction with:

- existing redress mechanisms;
- ASIC's proposed power to direct a firm to remediate customers; and
- Government wrongdoing or circumstances where the Government is a necessary party to remediation, such as with the VET FEE-HELP scandal.

Proposal 8-1: The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.

Question 8-1: What principles should guide the design of a federal collective redress scheme?

Consumer Action supports the consideration of a federal collective redress scheme. We support fast, low-cost, effective and accessible schemes that facilitate access to justice. However, the success of any new scheme in improving justice outcomes will depend on its design.

Importantly, a federal collective redress mechanism must complement, and not undermine, class actions in Australia.

Below we identify some gaps in, and lessons from, two existing mechanisms for collective redress that should also be considered in evaluating the need for, and design of, a new federal collective redress scheme:

- systemic issues investigations by external dispute resolution (**EDR**) schemes; and
- regulator remediation program, particularly in financial services.

Systemic issue investigations by EDR schemes

EDR schemes in many industries play a role in obtaining redress for groups of consumers where they investigate a systemic issue, recommend remedial action and monitor implementation.

The power to provide collective redress through systemic issues investigation varies between EDR schemes, depending on the powers set out in the scheme's terms of reference (or rules) and its willingness to prioritise this work. After criticism that its work in this area was inadequate, the Telecommunications Industry Ombudsman has recently made promising moves to strengthen its systemic issues function.

However, systemic issues powers are not always sufficient to facilitate redress for corporate wrongdoing. There are three key reasons for this.

First, not all sectors of the Australian economy are covered by an industry-based EDR scheme. Unlike the UK, there is no retail ombudsman service in Australia.[1] This means products and services fall between the gaps of existing industry EDR schemes for financial services, energy and water utilities, and telecommunications.

A key gap in the work of Consumer Action relates to disputes about motor vehicles, which accounted for 20 per cent of calls to Consumer Action's legal advice line in 2016-17. For many Australians, especially those living in rural and remote areas, a safe and reliable car is essential to fully participate in family life and employment. Disputes with car retailers and manufacturers about defects can be very difficult for consumers to navigate through a tribunal or court, and usually require expert evidence, which (at a cost of up to $2000) is beyond the means of many of our clients. As the ACCC New Car Retailing Final Report found, the current dispute resolution options 'do not effectively enable consumers to obtain the remedies they are entitled to under the consumer guarantees.'[2] The availability of class actions has been vital to allow consumers to obtain redress for manufacturing defects.

Retirement housing is another area in which the absence of an industry EDR scheme prevent accessible justice for residents of retirement villages.[3]

Second, industry EDR schemes can be limited by their jurisdiction, leaving people without access to EDR. For example, one of AFCA's predecessor schemes, the Financial Ombudsman Service (**FOS**), has limited jurisdiction over the level of fees or charges,[4] whereas there may be a legally arguable remedy available through the courts. Further, some products can be structured so that the relevant industry ombudsman service does not have jurisdiction. We also refer to our comments on "dealer-issued" warranties in our enclosed VRLC Submission at page 3, which fall outside FOS's jurisdiction because they do not relate to the provision of financial services by a FOS

[1] For information on a proposal to establish a Retail Ombudsman in Australia, see: Consumer Action Law Centre, *Submission to The Treasury on priorities for the 2017-18 Federal Budget* , 19 January 2017, available at: http://consumeraction.org.au/wp-content/uploads/2017/01/20170119-Budget-Submission-201718.pdf.
[2] ACCC, *New Car Retailing Industry: A market study by the ACCC* (December 2017) 76, available at: https://www.accc.gov.au/system/files/New%20car%20retailing%20industry%20final%20report_0.pdf.
[3] Consumer Action, Submission to Parliamentary Inquiry into the Retirement Housing Sector, 20 June 2016, available at: https://consumeraction.org.au/wp-content/uploads/2016/07/Joint-Letter-Parl-Inquiry-2016-FINAL.pdf; Consumer Action, *Media release: Twelve months on, and still no Ombudsman for older Victorians*, 7 March 2018, available at: https://policy.consumeraction.org.au/2018/03/07/twelve-months-on-and-still-no-ombudsman-for-older-victorians/.
[4] Financial Ombudsman Service, Terms of Reference, Clause 5.1(b).

member. Gaps also exist in relation to (often predatory) new products and services, such as in the debt management and FinTech sectors.[5]

Even where an EDR scheme has jurisdiction, if the company that engaged in wrongdoing is not a member of the scheme, generally EDR will not be able to provide redress to individuals or to groups through systemic issues work. This can occur where the firm has become insolvent, or lost its licence due to its misconduct, and therefore no longer has to maintain membership of the EDR scheme.[6] Our views on the undeniable need for a compensation scheme of last resort in the financial system are set out in a series of submissions to the recent Ramsay EDR Review.[7] In many cases, professional indemnity insurance also will not assist consumers to obtain redress.

Third, EDR schemes generally require consumers to self-advocate. While the ability to resolve a single dispute without the need for costly lawyers or legal proceedings is generally a strength of EDR schemes, some people are unlikely to engage without proactive outreach and support. Many consumers affected by predatory conduct have difficulty advocating for themselves due to vulnerability and/or disadvantage, for example, low literacy levels, financial stress, and no access to free legal advice. Class actions can play a role to ensure such people are afforded a remedy. Any new collective redress mechanism should have accessible processes, engage in outreach to marginalised communities, and provide support to vulnerable people throughout the application process.

Regulator remediation schemes

There has been an increasing focus on consumer remediation by ASIC in its enforcement work. For example, in the 2015-16 financial year, ASIC secured over $200 million in compensation and remediation for consumers and investors across the areas it regulates.[8]

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[5] Consumer Action Law Centre et al, *Joint consumer submission to Treasury consultation on Establishment of the Australian Financial Complaints Authority*, 29 November 2017, 19-22, available at: https://policy.consumeraction.org.au/2017/11/29/joint-submission-establishment-of-the-australian-financial-complaints-authority/. In fact, there has been a policy decision to reduce barriers to entry for businesses that claim to be 'fintechs', which has drawn criticism from consumer advocates: https://www.smh.com.au/business/banking-and-finance/consumer-groups-extremely-concerned-over-fintech-sandbox-20171113-gzk0x0.html.

[6] Consumer Action Law Centre et al, *Joint submission to Review of the financial system external dispute resolution framework – Supplementary Issues Paper*, 4 July 2017, 14, available at: https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/07/Joint-consumer-submission-EDR-Review-Supplementary-Issues-Paper-2.pdf.

[7] Ibid.

[8] ASIC, *Submission to Senate Inquiry into Consumer Protection in the Banking, Insurance and Financial Services Sector* (March 2017), p 71, available at: http://download.asic.gov.au/media/4536718/asic-submission-consumer-protection-in-the-banking-insurance-and-financial-services-sector-march-2017.pdf.

This has been a very welcome development and has contributed to increased redress for consumers. This focus on remediation also aligns with the policy underlying provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) which, for example, require courts to give preference to making an order for consumer compensation if a wrongdoer has insufficient financial resources to pay a pecuniary penalty (or fine) and compensation.[9]

Much of this remediation has been through enforceable undertakings or through negotiation, in lieu of other enforcement proceedings such as criminal action or seeking a civil penalty. While ASIC also has powers to begin representative action to recover damages for people who have suffered loss, given ASIC has been largely able to obtain consumer compensation through negotiated mechanisms, this power is rarely used. ASIC states it will use enforceable undertakings if 'it provides a more effective regulatory outcome than non-negotiated, administrative or civil sanctions'.[10]

Remediation programs have been effective in delivering compensation to consumers. However, there are a number of limitations in this framework, which may be instructive in designing a federal collective redress mechanism.

First, while ASIC has released helpful guidance on its expectations of remediation programs, this helpful guidance is limited to financial advice licensees.[11] ASIC states that the principles in the guide are applicable to review and remediation that is not related to personal financial advice, which would include lending and other areas within ASIC's regulatory remit.

Second, given remediation programs are a negotiated outcome, ASIC may be limited by the strength of its negotiating position (for example, by the evidence available to support the alleged wrongdoing and customer loss). This may mean that there are limitations in the scope of remediation because there must be agreement by the wrongdoer. This is likely to be a limitation in adopting the UK model of voluntary collective redress.

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

- Motor Finance Wizard:[12] contracts where consumers managed to make repayments for the initial 12 months are excluded from remediation, even though some of these contracts may have caused substantial hardship.

[9] Section 12GCA, ASIC Act; section 181, NCPP Act.
[10] ASIC, *RG100 Enforceable undertakings* (February 2015), para 100.16, available at: http://download.asic.gov.au/media/2976014/rg100-published-19-february-2015.pdf.
[11] ASIC, *RG256 Client review and remediation conducted by advice licensees* (September 2016) (**ASIC RG256**), available at: http://www.asic.gov.au/media/4009895/rg256-published-15-september-2016.pdf.
[12] ASIC, *Enforceable Undertaking – Affordable Car Loan Pty Ltd & ors*, May 2017, available at: http://download.asic.gov.au/media/4266959/029490310.pdf.

- BMW Finance:[13] consumers have complained of delays in the administration of the program, including a 12-month delay in one complex case; low refund offers in the face of high loans and ongoing financial hardship; and, in one case, a consumer was bankrupted as a result of the unaffordable loan, so the cash refund failed to put them back in the position they would have been, but for the misconduct.
- Radio Rentals:[14] Although the firm admitted contraventions of the responsible lending laws in respect of 278,683 consumer lease contracts entered into between 1 January 2012 and 1 May 2015, only customers who defaulted on making a payment in the first 12 months or defaulted on 3 or more occasions during a term of a contract are eligible for redress. Many Radio Rentals customers pay using Centrepay (a service to pay bills from Centrelink payments), so Radio Rentals payments were given priority over essential expenses. This may mean that the impact of the wrongdoing – such as the inability to put food on the table – is not fully captured by default rates.
- Cash Converters:[15] redress in respect of systemic contraventions of responsible lending laws was limited to those that had taken out loans in-store, rather than online.[16]
- Nimble:[17] redress in respect of systemic contraventions of responsible lending laws was limited to customers showing evidence of hardship after a loan was issued based on hardship indicators such as entering a debt agreement under Part IX of the Bankruptcy Act 1966.

ASIC's add-on insurance remediation schemes, which commenced in August 2017, are another very welcome development but not an entire solution to redress.[18] The refunds agreed to by insurers cover only certain classes of consumers who were patently mis-sold add-on insurance, and some may only be eligible for partial refunds. There will be people who are not eligible for refunds under the ASIC remediation schemes, but who may nonetheless legally be eligible for full refunds, because

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

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

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

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

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

[18] See para 2.43 of Part 1 of our submission to this Royal Commission.

the sale of insurance involved unconscionable conduct or misleading and deceptive conduct. These arrangements are negotiated outcomes only, not enforceable undertakings, which may limit the public accountability of the insurers in question.

Regulator remediation programs can be very effective in changing conduct through, for example, the appointment of independent compliance experts and other mechanisms. They have also facilitated redress for many thousands of consumers who would otherwise face significant hurdles in obtaining compensation. However, due to limitations described above, they are unable to offer comprehensive consumer redress.

In 2017, the ASIC Enforcement Taskforce published a consultation paper noting this issue and stated that difficulties can arise where a wrongdoer has made appropriate amendments to its systems and processes to address how a breach occurred but has not established a remediation program.[19] While this is not stated in ASIC's Enforcement Policy, it may be that in such circumstances ASIC is less willing to take punitive court action and thus its negotiating position is weakened.

The ASIC Enforcement Taskforce proposed an enhanced directions power for the regulator which would allow it to direct a financial services or credit licensee to, inter alia, establish a program to assess claims for restitution and compensation to customers.[20] The Federal Government has accepted this recommendation, which would be a welcome enhancement to strengthen the ability of ASIC to seek remediation while still being able to take enforcement action.

Consideration should be given to how a federal collective redress scheme would interact with an enhanced directions power for ASIC.

While ASIC and the Australian Competition and Consumer Commission (**ACCC**) are increasingly taking action to obtain compensation on behalf of groups of consumers, this is by no means widespread among regulators. Many sector-specific regulators do not have powers to obtain compensation for affected consumers, but rather have powers to obtain administrative, civil and sometimes criminal sanctions against wrongdoers. Even where regulators do have powers to obtain compensation, for example state-based consumer affairs or fair-trading regulators, these powers are rarely exercised. This may be due to lack of resourcing for these regulators. Public regulators are limited by their resources and recognise that class actions complement the role of the regulator.[21]

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[19] Treasury, *ASIC Enforcement Review Taskforce: ASIC's Directions Powers* (November 2017), available at: https://treasury.gov.au/consultation/c2017-t234325/.

[20] Ibid, Position 1.

[21] Michael Legg, 'ASIC's nod to class actions', *The Australian,* 12 April 2017, available at: http://www.theaustralian.com.au/business/opinion/asics-nod-to-class-actions-may-backfire/news-story/4b2ee2aa619539bea0cae5ee33eb5e42?nk=b2fc18a05bb5f56c95c8ee2d93985659-1506557590.

In light of limitations of the existing mechanisms, we consider there is merit in considering a federal collective redress mechanism, subject to the design principles outlined below.

Design principles

1. Adopt the principles in ASIC RG256

We support the principles outlined in ASIC *Regulatory Guide 256: Client review and remediation conducted by advice licensees*, which may be instructive for the Commission. It includes issues such as the scope of a program, timeframe, the adequacy of resources to manage remediation, the involvement of an independent person/expert, effective communication with consumers, and external review. This guidance is very helpful to stakeholders about considerations and expectations for remediation programs. Our submission in response to ASIC's consultation on its draft regulatory guidance on remediation sets out our views on these principles.[22]

Although a detailed comparison of the UK and Australian regimes is beyond the scope of this submission, we note that RG256 appears to be more detailed and prescriptive as to the design and process of remediation that the guidance on approval of voluntary redress schemes issued by the Competition and Markets Authority[23] and the Financial Conduct Authority.[24]

2. Provide full redress to consumers

The most important design feature is that the scheme provides consumers with full redress—remedies should be equal to (or at least, very similar to) consumers' entitlements at law.

The aim of ASIC review and remediation schemes is 'generally to place the affected clients in the position they would have been in if the misconduct or other compliance failure had not occurred.'[25] We strongly support this principle. In practice, however, some of the ASIC remediation schemes that have not achieved full redress, as discussed above.

While a voluntary redress scheme may be cheaper than class actions, it must still provide fair and full redress. We agree with Michael Legg that:

[22] Consumer Action Law Centre, Submission to ASIC on CP247: Client review and remediation programs and update to record-keeping requirements, 17 April 2016, available at: https://policy.consumeraction.org.au/2016/04/19/cp247-client-review-remediation-programs-update-record-keeping-requirements/.
[23] Competition and Markets Authority, *CMA40: Approval of voluntary redress schemes for infringements of competition law*, 14 August 2015.
[24] Financial Conduct Authority, *FG16/3: Voluntary redress schemes under the Competition Act 1998 (Cth)* (March 2016).
[25] ASIC RG256.19 and 256.128.

> The least cost option will be less attractive if it fails to fairly and equitably compensate consumers. Care needs to be taken that resolution schemes, especially those designed by corporations, are not tilted in the stronger parties' favour or lack transparency.[26]

3. Ensure a wide scope

Where there is widespread misconduct by a firm, the scope of conduct and consumers eligible for redress should be as wide as possible to enable access to justice for all and an efficient resolution of all claims.

Consumer Action was concerned that ASIC's Cash Converters remediation program for responsible lending breaches only applied to online payday loans and not to loans taken out in-store.[27] In our view, the decision to limit redress to online loans meant that many people affected by the wrongdoing—among them some of the most vulnerable members of our community—missed out on compensation.[28]

One of the concerns with a narrow scope is that it may 'gut' the potential class for any class action. That is, if a voluntary redress scheme cherry picks the easy or most egregious cases, there may be fewer affected consumers left to join a viable class action.[29]

Other issues as to scope:

- The scope of eligibility and compensation should be reviewed throughout the process when new information or material comes to light.
- We agree with ASIC RG265 that the scope of review should be a minimum of 7 years prior or as far back as the firm has records.

4. Proactively locate all affected consumers

The framework must give the firm strong incentives (and consequences for failing) to identify and locate all consumers affected by the misconduct or wrongdoing. There must be an obligation on the firm to proactively contact and engage consumers—opt-in simply won't work, particularly for those consumers experiencing vulnerability or disadvantage.

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[26] Michael Legg, *Many wrongs can make a right: how mass redress schemes can replace court action* (The Conversation, 24 November 2017) available at: http://theconversation.com/many-wrongs-can-make-a-right-how-mass-redress-schemes-can-replace-court-action-51118.

[27] ASIC, *16-380MR Cash Converters to pay over $12M following ASIC probe*, Media release, 9 November 2016, available at: https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-380mr-cash-converters-to-pay-over-12m-following-asic-probe/.

[28] ABC, *Cash Converters loans: Corporate watchdog ASIC's investigation into payday lender 'half-baked' (*27 February 2017), available at: http://www.abc.net.au/news/2017-02-28/asic-investigation-into-cash-converters-inadequate/8309870.

[29] We understand that the first group action brought under the UK's recent collective action reforms was undermined and not viable in part due to voluntary redress provided to the majority of affected consumers.

Where possible, consideration should be given to making compensation 'automatic'. That is, where the trader can identify the amount of redress and has the customer's contact details, then the customer should immediately receive the funds rather than be required to step through hoops.

In the context of class actions, there is a strong motive to identify as many class members as possible to ensure the viability of the class action. Plaintiff firms are adept at, and prioritise, the identification of all potential class members. In the case of a voluntary redress scheme, the same motive will likely not apply to the firm that has engaged in wrongdoing. Spending time and money to find remote or disadvantaged consumers will add to the costs of the scheme and the amount of compensation.

The problematic approach of the Commonwealth Bank of Australia (**CBA**) to remediating consumers that were mis-sold consumer credit insurance (**CCI**) is instructive. In our view, CBA was too slow to identify the initial 64,000 unemployed customers who were mis-sold CCI and remediate them. Further, CBA's response, once it identified these customers, was inadequate because:

- CBA made an informal 'good governance notification' to ASIC in relation to only 27,800 customers, rather than a significant breach notification in relation to the full number of customers;[30]
- In 2015, CBA initially only intended to compensate unemployed customers who had active Credit Card Plus insurance policies. It failed to take any steps to address consumer detriment in relation to the sale of a similar Loan Protection Insurance product until ASIC made it aware of a consumer complaint in 2016. CBA did not take action in relation to lapsed CCI policies; and
- Other than students, unemployed customers will be required to proactively respond to CBA in order to receive compensation. Vulnerable and disadvantaged customers are less likely to actively contact CBA and secure the refunds to which they are entitled. The people most likely to miss out on remediation include culturally and linguistically diverse people, people with low literacy and people who are not easily contactable (for example, due to housing insecurity or not owning a telephone).

It is unclear how CBA identified unemployed customers, given that they did not record this information at the point of sale. There also appears to be a gap in CBA's remediation program in respect of customers who were ineligible to claim for other reasons, for example, due to that fact that their work was casual or they were self-employed.[31]

[30] See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**), Consumer Lending Hearings, Transcript of Proceedings (Day 6, 19 March 2018), 516–8, available at: https://financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/transcript-19-march-2018.pdf.

[31] See Witness Statement of Clive Richard Van Horen (CCP & LPP) to the Banking Royal Commission, Exhibit #1.95, CBA.9006.0001.0001, p 4–6, 14–16.

Beyond CBA, it is likely that there are large groups of people, including customers of other banks, who were mis-sold CCI but are yet to be identified and refunded.

The ongoing problems with cleaning up the VET FEE-HELP scandal is another example of the need to proactively find those affected and ensure timely redress. For a long time, the countless students and job-seekers affected by this scandal had no access to external dispute resolution. Government reforms in response to this scandal included the establishment of the VET Student Loans Ombudsman on 1 July 2017, which has proved extremely popular, receiving 2,917 complaints in the first three months of operation.[32]

While the establishment of the ombudsman was a great reform, many Australians who were misled or deceived into taking on huge VET FEE-HELP debts are still carrying those legacy debts and bearing the cost of this systemic failure. The Australian National Audit Office found that:

> As at 30 June 2016, the Australian Government Actuary estimated that $1.2 billion in loans issued inappropriately by VFH providers in 2014 and 2015 would not be recovered. The Actuary also estimated that a further $1 billion in VFH Loans would not be repaid, largely relating to loan recipients not expected to meet the income repayment threshold for new debts raised in 2015-16.[33]

Education brokers and VET providers were driven by sales and commissions, not by education and employment outcomes. These unscrupulous providers targeted people desperate to find a job, people with disabilities, or low literacy, disadvantaged Aboriginal communities, and newly arrived communities. Given the repayment thresholds for these debts, many people are unaware that a VET FEE-HELP debt is quietly sitting on their tax file. This is likely to change given the repayment thresholds have recently been reduced significantly.

5. Include cy près powers

Where affected consumers cannot be located, the firm should not obtain a windfall from its misconduct. Instead, funds should be used to benefit the class of affected people as a whole through public interest distributions of unclaimed damages.

Please refer to our comments on 'Compensation outcomes' and the doctrine of *cy prés* in our **enclosed** VLRC Submission at page 7.

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[32] Commonwealth Ombudsman: VET Student Loans, *Quarterly Update 1 July 2017 – 20 September 2017*, http://www.ombudsman.gov.au/__data/assets/pdf_file/0021/78411/VET-Student-Loans-Ombudsman-quarterly-update-Website-publication.pdf.

[33] Australian National Audit Office, *Administration of the VET FEE-HELP scheme*, 20 December 2016, available at: https://www.anao.gov.au/work/performance-audit/administration-vet-fee-help-scheme.

6. Ensure timely remediation

Consideration should be given to incentivising timely remediation. There are countless examples of redress occurring far too late. This can have larger impact on people experiencing hardship, illness, or approaching retirement.

The CBA consumer credit insurance remediation program was announced in August 2017. However, in our view CBA knew, or should have known, that it was at risk of mis-selling CCI well before this date. The same is true of other banks and insurers embroiled in CCI mis-selling scandals. Since the late 1980s, a series of reports,[34] regulatory actions and litigation have put CBA and other financial services entities on notice that the sale of CCI is inherently risky. At least since 2011, CBA should have been aware of the Payment Protection Insurance scandal in the United Kingdom,[35] and of the conclusions and recommendations of ASIC's damning report on CCI in 2011.[36]

7. Stop time running on limitation of actions periods

There are often delays in establishing voluntary redress schemes, so in many cases consumers may be facing the expiration of 6-year limitation of actions periods when they apply to the scheme. Limitation of actions periods should stop running while an application is on foot with any collective redress mechanism. This could be achieved by amendment limitation of actions acts, or requiring the firm to waive the right to rely on the expiration of the limitation period in any defence to a subsequent proceeding.

Without this, consumers will face two undesirable outcomes: pursuing separate litigation in a court or tribunal to preserve their legal rights, thus removing the benefit of a fast, low-cost, non-court voluntary redress scheme and creating duplication rather than efficiencies; or let the limitation period expire and potentially end up with no redress if their application doesn't fit the eligibility criteria.

Our legal practice has had a case where an important limitation of action period was due to expire during the 60 days that the remediation scheme stated it would take to make a decision on the application for redress. There is ambiguity in the eligibility criteria for remediation, so the outcome is uncertain. As a result, our client had to file separate proceedings in a civil tribunal to preserve their rights in the event that the remediation application is unsuccessful.

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[34] This includes the 1987 Australian Financial Counselling and Credit Reform Association report, *Need or greed: a report on consumer credit insurance*, and the 1991 report from Redfern Legal Centre*, 31 cents in the dollar: a report on consumer credit insurance from the consumer perspective.*

[35] Financial Conduct Authority, *History of payment protection insurance regulation*, available at: https://www.fca.org.uk/publication/documents/history-ppi-regulation.pdf.

[36] ASIC, *Report 256: Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions* (October 2011), available at: https://download.asic.gov.au/media/1343720/rep256-issued-19-October-2011.pdf.

8. EDR schemes should administer redress schemes where appropriate

Consumer Action has previously proposed that ASIC remediation schemes be operated and administered by the Australian Financial Complaints Authority. This would create costs efficiencies have many benefits for consumers as EDR schemes are familiar with dealing with individual claimants and have accessible processes. An EDR scheme will often be familiar with the subject matter of the remediation from individual complaints or its own systemic issues investigation.

In the context of a federal collective redress, however, this will pose some challenges as not all consumer-facing industries have an available EDR scheme, as discussed above. Notable gaps include for disputes about general consumer or retail providers, car dealers and manufacturers, and retirement housing providers.

We recommend that, where a suitable EDR scheme exists, consideration be given to that scheme operating the voluntary redress scheme.

9. Increase size and prevalence of civil penalties in all sectors

We note that the primary incentive in the UK framework for voluntary redress is a 20 per cent reduction on the civil penalty. We support the reduction in civil penalties for firms that establish a voluntary redress scheme, on the condition that the scheme provides full redress to affected consumers.

However, for a reduction in the civil penalty to operate as an incentive in the Australian context, the amount and frequency of civil penalties must rise. Civil penalties under the *Australian Consumer Law* have been too low for too long, making it the 'poor cousin' of competition law.[37]

Similarly, Consumer Action has argued strongly that civil penalties for breaches of the National Energy Laws must be increased and aligned with penalties under the Australian Consumer Law.[38] The failure of energy retailers to comply with their customer hardship policies has resulted in recent enforcement action by the Australian Energy Regulator[39] and breaches should also be subject to higher penalty amounts to prevent consumer harm. The penalty currently charged for this infringement is miniscule when compared to the revenue of energy retailers. Many customers may

[37] At the time of writing, a bill was before Parliament to increase the civil penalties under the Australian Consumer Law: see *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018*.
[38] Consumer Action Law Centre, Submission to the Standing Committee of Officials on the *Australian Energy Regulator (**AER**) Powers and Civil Penalty Regime Consultation Paper*, 28 June 2018, https://policy.consumeraction.org.au/2018/07/03/aer-powers-civil-penalty-regime-consultation-paper/.
[39] AER, *Infringement notices issued to Origin Energy for alleged failure to offer hardship assistance and wrongful disconnection (*2017) available at: https://www.aer.gov.au/retail-markets/compliance/enforcement-matters/infringement-notices-issued-to-origin-energy-for-alleged-failure-to-offer-hardship-assistance-and-wrongful-disconnection

have been denied hardship assistance to maintain access to their essential service, owing to the inadequacy of the penalty.

In addition to high penalties, there must be a realistic threat that litigation or collective redress will be pursued against the firm in the absence of a voluntary mechanism. This requires strong and empowered regulators that are willing to bring legal proceedings, and a facilitative class actions regime. Better still would be an enhanced power for all regulators to direct a firm to remediate affected consumers, as proposed for ASIC.

Government wrongdoing

The VET FEE-HELP debacle reveals the overlay between corporate and governmental wrongdoing. Firms were only able to exploit the scheme because of poor design, and the Government is the only party able to cancel a debt. In many cases, the Government and regulators will be unable to recover the misappropriated funds because firm is now insolvent. Acquire Learning, an education broker that exploited VET FEE-Help, is now in administration and reportedly owes creditors $92 million.[40] The Centrelink robo-debt scandal is another example of the need to provide collective redress to consumers affected by Governmental wrongdoing.[41] Consideration should be given to how a collective redress mechanism would apply to Government action.

Further consultation

Given the complexities in designing a new scheme, we recommend further consultation be undertaken on this issue. We recommend that a scheme should only be established after a detailed proposal and further consultation on how the scheme would work, what industries it would cover, and how it would interact with existing mechanisms and settings.

[40] AFR, *High-flying Acquire Learning made millions but directors under investigation*, 25 September 2017, https://www.afr.com/news/policy/education/highflying-acquire-learning-made-millions-but-directors-under-investigation-20170925-gyo5lm; The Age, *Acquire Learning faces $4.5 million in penalti*es, 30 May 2017, available at: https://www.theage.com.au/national/victoria/acquire-learning-faces-45-million-in-penalties-20170530-gwg2zx.html.

[41] In January 2017, it was estimated that 170,000 debt notices had been issued with thousands of Australians incorrectly told they owe money: Henry Belot, ABC News, *Centrelink's controversial data matching program to target pensioners and disabled, Labor calls for suspension*, 2017, available at: http://www.abc.net.au/news/2017-01-17/labor-calls-for-suspension-of-centrelink-debt-recovery-program/8187934.

Contact details

Please contact Senior Policy Officer Cat Newton on with any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE

Gerard Brody
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