

16 July 2018

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION
AND FINANCIAL SERVICES INDUSTRY**

Submission on Round 4 Hearings

**Issues affecting Australians who live in remote and regional
communities, which relate to interactions between Aboriginal
and Torres Strait Islander people and financial services entities**

Introduction

1. Consumer Action works to advance fairness in consumer markets, particularly for disadvantaged and vulnerable people, through financial counselling, legal advice and representation, policy work and campaigns and training and outreach. We provide financial counselling and legal advice and education to more than 15,000 people each year, including on issues facing consumers in regional and remote areas. Our lawyers have long-standing experience on responsible lending, insurance and general consumer issues and provide representation to people in disputes with financial service providers and insurers, including at internal and external dispute resolution services.
2. Over the past three years, we have provided extended advice and legal representation to 25 people on issues relating to funeral insurance. Often this is expensive funeral insurance which is unaffordable and unsuitable, with people at risk of losing all money they have paid upon cancellation of the policy. As part of this work, we have represented clients who have disputes with the Aboriginal Community Benefit Fund (**ACBF**).
3. Our work on funeral insurance is part of our specialist insurance law practice. Generally, this work includes assisting people who have been denied insurance cover, who have bought unsuitable insurance or who have claims disputes with insurers. We most commonly assist with car insurance, mis-sold add-on insurance, home insurance and funeral insurance.
4. Consumer Action has also provided outreach and training to community lawyers and financial counsellors across regional Victoria on funeral insurance. Following such outreach at a regional Aboriginal Community Controlled Organisation in early 2016, we were referred a number of



people who had questions about ACBF. As part of this ongoing work, our Koori¹ Engagement Manager has engaged with Aboriginal² communities and organisations that support them on the issue of funeral insurance to identify community concerns and issues.

5. Our engagement work with the Aboriginal communities in Victoria more broadly includes working together with the Victorian Aboriginal Legal Service³ to improve referral pathways for Aboriginal communities and facilitating an action group, made up of community and government agencies working with Aboriginal communities. The group meets regularly to promote a co-ordinated approach to addressing civil legal needs for the Victorian Aboriginal community.³ We have also recently launched our Koori Help Line for Aboriginal communities in Victoria.⁴
6. Consumer Action has provided legal advice and representation and support to Tracey Walsh, an Aboriginal and Torres Strait Islander woman living in Victoria, who gave evidence during the Round 4 hearings of her experiences dealing with ACBF.
7. Consumer Action acknowledges that the experiences of Aboriginal communities with financial service providers are as diverse as the communities themselves. It is therefore critical to the success of any community engagement on law and policy reform, that it be tailored to reflect the specific needs of each community by working together with those communities in a meaningful and respectful way.

General questions relating to ACBF and Select AFSL case studies

Is the current regulatory framework in respect of funeral expenses products adequate? In particular, should the framework be amended so that funeral expenses products are not excluded from the definition of financial product by virtue of section 765A(1)(y) of the Corporations Act and regulation 7.1.07D of the Corporations Regulations 2001?

8. We submit that the current regulatory framework in respect of funeral expenses products is inadequate, especially as compared to other funeral insurance policies.
9. Funeral insurance policies that provide for funeral expenses only are regulated by the Australian Securities and Investments Commission (**ASIC**) under the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) but are not covered by the financial services licensing and conduct regime of the *Corporations Act 2001* (Cth)

¹ The term 'Koori' refers to the Victorian Aboriginal communities.

² In this submission, the terms 'Aboriginal' and 'Indigenous' refer to Aboriginal and Torres Strait Islander peoples.

³ The civil law needs of Aboriginal Victorians are well-documented, including most recently by the Australian Indigenous Legal Needs Project in association with Larissa Behrendt and the Jumbunna Indigenous House of Learning in *The Civil and Family Law Needs of Indigenous People in Victoria* (James Cook University, 2013).

⁴ For further information about the Koori Help Line, see paragraph 79 of this submission.



(Corporations Act). We note that Regulation 7.1.07D confirms that funeral expenses policies are not financial products. Section 11(3)(e)(ii) of the *Life Insurance Act 1995* (Cth) (**LIA**) confirms that these policies are not regulated as life insurance. Such policies are also not regulated as insurance policies, noting that the *Insurance Contracts Act 1984* (Cth) (**ICA**) does not apply.⁵

10. Other funeral insurance policies are regulated by the Corporations Act, which provides greater protections for consumers. This creates a regulatory gap and provides an incentive for companies like ACBF to engage in regulatory arbitrage.
11. The Explanatory Memorandum for the Regulations⁶ includes the following commentary about the exemption:

Funeral benefits are excluded from the operation of the Act under section 765A(1). The definition of funeral benefit in section 761 of the Act is based on the definition used in section 11(3)(e) Life Insurance Act 1995 (LIA). However, the Act did not include the second limb of the LIA definition, which related to the payment of money for the purpose of a funeral.

This regulation extends the exemption from the Act to cover this second limb—the payment of money solely for the purpose of financing a person's funeral. The rationale for relief is that a funeral expense policy, where provided for the sole purpose of paying in the future for a funeral, does not warrant regulation by the licensing and disclosure provisions of the Corporations Act.

12. We submit that the evidence adduced in relation to ACBF's misconduct over the course of the hearing indicates that a funeral expenses policy now warrants regulation, at the very least by the current provisions of the Corporations Act, ICA and the LIA.
13. Examples of consumer protections not currently available for funeral expenses policies include (but are not limited to):
 - a. General obligations of a financial services licensee under section 912A of the Corporations Act, including requirements to:
 - i. to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
 - ii. maintain competence to provide financial services;
 - iii. ensure representatives are adequately trained; and
 - iv. have a compliant dispute resolution system.

⁵ See *Insurance Contracts Act 1984* (Cth) s 8.

⁶ Explanatory Statement, *Corporations Amendment Regulations 2003* (Cth) 1
<<https://www.legislation.gov.au/Details/F2003B00040/Explanatory%20Statement/Text>>.



- b. Requirement to comply with financial advice obligations under Ch 7 of the Corporations Act;
 - c. Requirement to comply with the hawking provisions under section 992A of the Corporations Act;
 - d. Requirement to act with utmost good faith under section 13 of the ICA;
 - e. Requirement to act with utmost good faith in reliance on insurance policy provisions under section 14 of the ICA;
 - f. The powers of ASIC to intervene where there has been a failure to comply with the duty of utmost good faith under section 14A of the ICA;
 - g. Consumer protections relating to misrepresentation and non-disclosure under Part IV of the ICA, noting that ACBF has commenced declining claims for non-disclosure this year;⁷
 - h. The ability of a payee/beneficiary to recover directly against the life insurer under section 48A;
 - i. Protection afforded by section 54 of the ICA in respect of claims; and
 - j. Disclosure requirements under the Corporations Act and the ICA.
14. Whereas the capital requirements under the LIA do not apply to ACBF, there is very little certainty about whether ACBF will have the financial capacity to meet its requirements under its funeral policies into the future, including to maintain premium payments to the offshore life insurer, or compensate consumers for misconduct.⁸ Given this, and the risk of significant loss to customers, we consider it open to the Commission to recommend that ASIC seek freezing orders against ACBF in the course of any investigations into ACBF's conduct. See paragraphs 42 to 44 on *Other matters: Freezing orders* below for discussion.
15. Further, should the proposed Product Design and Distribution Obligations only apply to products requiring a Product Disclosure Statement (**PDS**) under the Corporations Act, which was proposed by exposure draft legislation,⁹ those obligations would not apply to funeral expenses policies sold by ACBF. Consumer groups have recommended that these obligations apply to financial products as defined in the ASIC Act to ensure broad and consistent coverage.¹⁰

⁷ ACBF has declined four claims due to non-disclosure of cancer: Witness Statement of Mr Bryn Jones, ACBF.0008.0001.0204, 21.3(b), 22.1.

⁸ For more information on the need for a last resort compensation scheme, see paragraphs 90-96 of this submission.

⁹ Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Cth).

¹⁰ Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Submission on Design and Distribution Obligations and Product Intervention Powers* (13 February 2018) <<https://policy.consumeraction.org.au/2018/02/13/submission-design-and-distribution-obligations-and-product-intervention-powers/>>.



Should section 12BAA subparagraph (8) subparagraph (o) of the ASIC Act be amended to put beyond doubt that funeral expenses policies are not excluded from the definition of financial product, as applicable to part 2 Division 2 of that Act?

16. We recognise that clarity across financial products and services regulation is important. However, we are not aware of any confusion that has arisen as a result of section 12BAA(8)(o) in relation to ACBF. In our view, it is clear that ACBF's funeral expenses policies fall within section 12BAA(8)(o) of the ASIC Act. We respectfully submit that it would be useful for the Commission to make a finding on this. In the event that the Commission determines that this is in fact unclear, we acknowledge that a legislative amendment would therefore be necessary to ensure clarity.

Is the current regulatory framework sufficient to minimise the risk of funeral insurance providers using inappropriate sales practices to sell their products to vulnerable people, including Aboriginal and Torres Strait Islander people living regionally or remotely?

17. We submit that the evidence adduced in relation to the sale of funeral insurance indicates that the current regulatory framework is insufficient to prevent inappropriate sales of funeral insurance policies to vulnerable people, including Aboriginal people living regionally and remotely.

18. We submit that it is appropriate for the Commission to recommend a specific prohibition of false or misleading statements about association with a particular community to prevent the use of words such as 'Aboriginal' being used to give the misleading impression they are Aboriginal-run or have ties to the community, like in ACBF's case. We submit also that the misconduct and resulting consumer harm also warrants the introduction of a complete ban on unsolicited sales. We have provided further detailed comments below.

Prohibition of representations made about associations with Aboriginal communities

19. We consider that ACBF wrongly represents that it uniquely provides a product and service tailored to meeting the needs of Aboriginal communities and that its policies are 'for the benefit of' Aboriginal people¹¹.

20. We refer to evidence adduced before the Commission relating to statements on ACBF's website and in other advertising and promotional materials about how ACBF's policy is particularly beneficial to members of Aboriginal communities. For example, ACBF's website www.aboriginalfuneralplan.com.au displays a description of ACBF as Australia's only funeral

¹¹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3789.



insurance plan dedicated to the Aboriginal community alongside photographs of Aboriginal people,¹² and the following statement:¹³

Aboriginal Community Funeral Plan provides a product and service tailored to meet the needs of Australia's Aboriginal and Torres Strait Islander people.

21. Ms Tracey Walsh gave evidence about how in 2005, she signed up to the ACBF funeral insurance policy at her place of work, the Rumbalara Aboriginal Co-Operative. Ms Walsh stated that the use of the word 'Aboriginal' and the images on the product materials, including the rainbow serpent and the image of the family, led her to believe that ACBF was an Aboriginal organisation.¹⁴ Ms Walsh stated that she also believed that the salesperson was Aboriginal. Ms Walsh gave evidence to the Commission that it was important to her to sign up with an Aboriginal organisation because she liked to support other Aboriginal organisations and that she feels more comfortable dealing with other Aboriginal people.¹⁵
22. The evidence adduced before the Commission demonstrates that ACBF's funeral expenses policies are particularly inappropriate for the needs of the target customer base as compared to other funeral insurance policies on the market for a number of reasons. First, ACBF's health categorisation could result in Aboriginal customers paying more than they would if they had obtained funeral insurance from another provider.¹⁶ Second, ACBF policies did not pay out for suicide until recently,¹⁷ despite the higher rates of suicide in Aboriginal communities.¹⁸ Third, ACBF has cancelled 22,623 policies purchased since 2004.¹⁹ Mr Jones gave evidence that 6,000 of those policies were cancelled following ACBF's removal from Centrepay, when customers were unable to be contacted.²⁰ These customers have received no benefit from the product and have lost potentially thousands, even tens of thousands, of dollars. Fourth, the average amount insured for ACBF customers as at 30 June 2013 was the lowest of all funeral insurers ASIC surveyed at \$6,639, with the industry average being \$8,859. Fifth, ACBF's claims payout ratio of

¹² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3704.

¹³ *Ibid* 3705; ACBF Website Screenshot, Exhibit 4.149, (RCD.0006.0007.00050).

¹⁴ Witness Statement of Ms Tracey Walsh, WIT.0001.0072.0001, [6]-[9]; *Transcript of Proceedings Day 36*, (2018), 3765-3766, 3781.

¹⁵ Witness Statement of Ms Tracey Walsh, WIT.0001.0072.0001, [9]; Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3766.

¹⁶ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3844.

¹⁷ Witness Statement of Mr Bryn Jones, WIT.0001.0054.0001, [21.3].

¹⁸ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3862.

¹⁹ Witness Statement of Mr Bryn Jones, WIT.0001.0054.0011, 16.

²⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4132.

only 13.9% was the lowest percentage of all insurers ASIC surveyed.²¹ And sixth, ACBF currently has 16,190 policies where customers potentially will pay more than the benefit amount and 754 policies where customers have already paid more than the benefit amount.²² We note that the cultural audit completed by MuraConnect indicated that ACBF staff were unable to communicate effectively and sensitively with Aboriginal people due to their lack of understanding of Aboriginal culture and history, providing further evidence of the unsuitability of ACBF's product and engagement with Aboriginal people.²³

23. We consider that it is open to the Commission to find that ACBF has breached sections 12DA and 12DB(e) of the ASIC Act, by making statements about its dedication to and association with the Aboriginal community. ACBF has been marketing its product in the same way for a number of years. We note, for example, that Ms Walsh took out the policy in 2005 and submit that she was influenced by the advertising, as described above at paragraph 21. We refer also to advertising in 2012 and 2013,²⁴ and more recent promotional material, in which ACBF provides: *Over 20 years working in the Aboriginal community.*²⁵
24. We submit that it is appropriate for the Commission to recommend extending the provisions of the ASIC Act and of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**Australian Consumer Law**) to prohibit false and misleading representations about any association with a particular community, including false and misleading use of words such as 'Aboriginal' and 'Torres Strait Islander'.

Unsolicited sales ban

25. We note that ACBF is not bound by the prohibition on hawking in section 992A of the Corporations Act. As above, we consider ACBF should be required to comply with this legislation. However, we submit also that further reforms are needed to adequately protect consumers from inappropriate unsolicited sales.
26. We refer to the unsolicited calls made to Ms Kathy Marika, a Yolgnu woman from the Northern Territory who currently lives in New South Wales. The evidence of unfair sales tactics employed against Ms Marika were disturbing, including refusing to take 'no' for an answer and selling her

²¹ Australian Securities and Investment Commission, *Analysis of the Funeral Insurance Sector in Australia* (April 2014), ASIC.0025.0003.1757.

²² Witness Statement of Mr Bryn Jones, WIT.0001.0054.0001, [15.1]-[15.2].

²³ MURACONNECT, *Cultural Audit Report – Aboriginal Community Benefit Fund* (2018) ACBF.0003.0001.0114.

²⁴ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3825-3827.

²⁵ *Ibid* 3827.

funeral insurance even when she disclosed she already had funeral insurance.²⁶ We note that, unlike ACBF, Select AFSL (**Select**) is required to comply with section 992A.

27. Rowena Orr QC submitted that it is open to the Commission to find a relatively minor breach of section 992A was committed by Select, namely, providing an oral PDS without consent.²⁷ Even if Select had sought consent to provide the PDS orally, we submit that this would not have prevented the inappropriate sale or the financial harm that resulted from the unsolicited call.
28. We submit that the evidence adduced in relation to the sale of funeral insurance products indicates that the current regulatory regime is insufficient and a ban on unsolicited sales more generally is required. This requires consideration of circumstances where companies like ACBF sponsor Aboriginal community events and have stalls in public areas, as it is important these informal approaches are also captured by the consumer protections.²⁸
29. Consumer Action is aware of significant harm resulting from unsolicited sales in other markets, including the sale of vocational education courses, retail energy contracts, mattresses and solar panels. We submit that the Commission should recommend amendments to both the ASIC Act and the *Competition and Consumer Act 2010 (Cth)* to ban unsolicited sales entirely. We have written at length about the harm resulting from unsolicited sales in our submissions to the Australian Consumer Law Review,²⁹ and in our report *Knock It Off! Door-to-door sales and consumer harm in Victoria*.³⁰

Is the current regulatory framework sufficient to minimise the risk of sales of unsuitable funeral products to these people, including to avoid the risk of individuals having multiple forms of funeral insurance, and to address the sales of funeral insurance policies to children and young people?

²⁶ SAF.0001.0001.0070; SAF.0001.0001.0082; Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018); Witness Statement of Ms Kathy Balngayngu Marika, WIT.0001.0060.0001.

²⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4141.

²⁸ See Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (Cth) which will clarify the operation of the Australian Consumer Law unsolicited services provisions and unsolicited consumer agreements in a public place.

²⁹ Consumer Action Law Centre, *Submission to the Australian Consumer Law Review* (30 May 2016)

<<https://consumeraction.org.au/wp-content/uploads/2016/05/Consumer-Action-ACL-Review-Submission-FINAL.pdf>>; Consumer Action Law Centre, *Submission to the Australian Consumer Law Review* (9 December 2016)

<<https://consumeraction.org.au/wp-content/uploads/2016/12/ACL-Review-CALC-Response-to-Interim-Report-FINAL.pdf>>; Consumer Action Law Centre, WEstjustice, National Association of Community Legal Centres and Federation of Community Legal Centres (Victoria) Inc, *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework – Consultation RIS* (23 April 2018)

<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180423-ACL_Super-RIS-submission-FINAL.pdf>.

³⁰ Consumer Action Law Centre, *Knock It Off! Door-to-door sales and consumer harm in Victoria* (November 2017)

<<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>>.



30. We submit that the current regulatory regime is insufficient to minimise the risk of sales of unsuitable funeral insurance policies to vulnerable consumers. Ms Marika was sold funeral insurance when she already had a funeral insurance policy,³¹ and Ms Walsh had already paid \$3,000 more than her benefit at the age of 53 years.³² We note also that ACBF actively sold funeral insurance to children and young people,³³ and as at 2014, approximately two thirds of its customers were aged below thirty years of age and approximately one third below the age of fifteen.³⁴ Current consumer protections have failed to prevent these inappropriate sales.
31. We submit that it is open to the Commission to recommend reform, and that a suitability test apply to insurance products such as funeral insurance.³⁵ Relevant considerations for funeral insurance must include a minimum age, a cap on premiums at the value of the total benefit, and an affordability assessment.
32. We submit that it is also open to the Commission to recommend Government funding and support for community-led education on funeral products to minimise the risk of inappropriate sales of funeral insurance to Aboriginal communities. Whereas we recognise there is a need for funeral plans and products in communities, we also recommend funding and support for the development of safe, suitable and culturally appropriate community-led funeral products and services. We note that this ought to be done in partnership with Aboriginal Community Controlled Organisations. We suggest that community consultation adopt Aboriginal methodologies to gather information (including yarning circles, informal questions, and transparent and plain language) and that time be taken to ensure consultation is meaningful and respectful, noting that in some communities it is taboo to talk about Sorry Business.
33. We consider changes are also needed to the approach taken by external dispute resolution bodies in relation to the inappropriate sale of funeral insurance. We refer to a recent Financial Ombudsman Service (**FOS**) Determination.³⁶ The applicant in that case argued, among other things, that he was misled about the true nature of the plan as he believed it was akin to a savings plan and the financial services provider was a not-for-profit organisation established to assist Aboriginal community members in saving for their funerals. While acknowledging that the applicant had low levels of literacy and had finished school at year seven, FOS found in favour

³¹ Witness Statement of Ms Kathy Balngayngu Marika, WIT.0001.0060.0001, [8].

³² Witness Statement of Ms Tracey Walsh, WIT.0001.0072.0001, [30].

³³ Witness Statement of Mr Bryn Jones, WIT.0001.0054.0011, 3809.

³⁴ Australian Securities and Investment Commission, *Analysis of the Funeral Insurance Sector in Australia*, ASIC.0025.0003.1757, 8.

³⁵ For more detail, see: Gail Pearson, 'There are a few gaping holes in the proposals to beef up ASIC', *The Conversation* (online), 16 December 2016 <<http://theconversation.com/there-are-a-few-gaping-holes-in-the-proposals-to-beef-up-asic-70408>>; Consumer Action Law Centre et al, *Design and Distribution Obligations and Product Intervention Power – Proposals Paper* (15 March 2017) <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/03/FINAL-Joint-Consumer-Submission-DADOs-and-PIPs-15032017.pdf>>.

³⁶ Financial Ombudsman Service (FOS) Determination 412384 <<https://www.fos.org.au/resolving-disputes/decisions/>>.



of the financial services provider and concluded that the applicant was not misled because he had received the plan documents and, even if he was, his reliance was not reasonable because it took him two years to approach a financial counsellor for assistance in understanding the plan documents. We submit that it does not appear that FOS considered what was 'fair in all the circumstances' in coming to this decision.³⁷

34. We consider it is also open to the Commission to recommend changes to ensure better and more effective consideration of issues of fairness to supplement the existing jurisprudence.
35. This is particularly important where people lodge complaints about policy cancellations because they were unable to continue to afford the premiums and/or where they have paid more than the benefit amount.

Does the current regulatory framework deal adequately with the potential for people with funeral insurance policies to pay more in premiums than may ever be paid out? And should the current regulatory framework be modified to include protections for holders of funeral insurance in relation to the cancellation of their policies for non-payment of premiums?

36. We submit that the current regulatory framework does not deal adequately with the potential for people with funeral insurance policies to pay more in premiums than may ever pay out.
37. We consider that it is appropriate for the Commission to recommend that premium caps are introduced to avoid overpayment, which could form part of the suitability assessment described above at paragraph 31. We otherwise refer to and repeat submissions made in relation to the previous questions at paragraphs 30 through to 35.

Additional question from Commissioner Hayne: There is also a general question about whether estimates of total cost should be given. ASIC recommended that. It may be time to get some submissions about whether that's right or wrong

38. We agree that ASIC's recommendation to provide customers with an estimate of the total cost could be useful for a number of customers. If consumers are to make a choice in their own best interests, they need to be able to easily compare the various options available, such as insurance in comparison with funeral bonds or pre-paid funerals, which commonly have set costs.
39. However, we note that there are limitations of disclosure in providing effective consumer protection. We refer to the Financial System Inquiry final report, which notes that disclosure in relation to financial products can be ineffective for a number of reasons, including consumer

³⁷ Financial Ombudsman Service, *Terms of Reference*, section 8.2



disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy.³⁸

40. For example, most consumers only spend six seconds reading the terms and conditions for online software packages, such as entertainment packages or smart phone apps.³⁹ People's behavioural biases, including reliance on short-cuts and heuristics to process information, makes disclosure alone insufficient. Essentially, when 'the decision environment is complex relative to their mental and computational capabilities', consumers base decisions on approximate measures, because to sort through all the information and make an informed decision is not deemed worth the effort.⁴⁰

41. We consider that to provide meaningful consumer protection, this would need to form part of a suite of reforms, as described above.

Other matters: Freezing orders & ACBF

42. We refer to the recommended findings made by Ms Orr QC on breaches by ACBF of the ASIC Act,⁴¹ and our additional submissions to the Commission in relation to the case study of Tracey Walsh and ACBF.⁴²

43. In these circumstances, we submit that it is appropriate for the Commission to recommend that in the course of ASIC investigating these potential breaches, it consider seeking freezing orders against ACBF and its directors under section 12GN of the ASIC Act and/or section 23 of the Federal Court of Australia Act 1976 (Cth).⁴³ We so submit for reasons including the following:

- a. the numerous findings of breaches against ACBF available to the Commission including those relating to breaches of directors' duties under the Corporations Act;
- b. the potential resulting liability of ACBF to pay money by way of penalty, compensation, refund or otherwise;

³⁸ The Treasury, *Financial System Inquiry – Final Report*, November 2014
<http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf>.

³⁹ Jeff Sauro, Do Users Read License Agreements? (11 January 2011) Measuring U, <<https://measuringu.com/eula/>>.

⁴⁰ Dr Patrick Xavier, Submission 'Behavioural Economics and Customer Complaints in Communication Markets' to Australian Communications and Media Authority, *Reconnecting the Customer*, May 2011.

⁴¹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4133-4134

⁴² Consumer Action Law Centre, Case study: Tracey Walsh and Aboriginal Community Benefit Fund – Submission to Royal Commission, 2-14 <<https://policy.consumeraction.org.au/2018/07/16/case-study-tracey-walsh-and-aboriginal-community-benefit-fund-submission-to-royal-commission/>>.

⁴³ Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd [2016] FCA 976.



- c. the unfair, dishonest, exploitative nature of the conduct forming the basis of the breaches;
- d. the systemic nature of the conduct, especially as referred to in Consumer Action's submissions relating to directors' duties;⁴⁴
- e. the specific vulnerabilities of the customers affected by this conduct;
- f. the volume of customers reliant on the solvency of ACBF to pay funeral benefits;
- g. the evidence available suggesting that the directors, including founder Ron Pattenden, have been and/or continue to be knowingly concerned in ACBF's systemic misconduct;
- h. the danger or real risk that assets could be dissipated so as to frustrate the court's processes and enforcement of orders against ACBF, noting that underlying life insurer Crown Insurance Ltd, and one of its directors, Ron Pattenden, are based overseas.

44. Taking into account the serious potential harm to ACBF's substantial and vulnerable customer base and the risk that ASIC will be unable to enforce orders made against ACBF, we submit that it is in the interests of justice for the Commission to recommend that ASIC consider applying for a freezing order to prevent assets being lost irretrievably.

Questions relating to the ANZ basic bank account case study

Do banks take sufficient steps to promote the availability of fee-free accounts to eligible customers?

45. The Australian Banking Association's (**ABA**) Affordable Banking website lists 11 banks, including the major four banks, which offer a transaction account that is fee-free to eligible customers. These accounts are known as a basic bank account. As noted by the Code of Banking Practice Review (**the Code Review**) Final Report, the Affordable Banking website is 'tangible evidence that the ABA and its member banks understand that the banking sector has a societal (if not legal) obligation to provide access to a basic account, whatever a person's financial situation.'⁴⁵
46. However, evidence adduced before the Commission indicates that at least some banks are not taking sufficient steps to promote the availability of fee-free accounts to eligible customers, including Aboriginal customers. Further, Ms Thy Do's evidence suggested that ANZ may have

⁴⁴ Consumer Action Law Centre, Case study: Tracey Walsh and Aboriginal Community Benefit Fund – Submission to Royal Commission, 10-14 <<https://policy.consumeraction.org.au/2018/07/16/case-study-tracey-walsh-and-aboriginal-community-benefit-fund-submission-to-royal-commission/>>.

⁴⁵ Phil Khoury, Independent Review Code of Banking Practice, 31 January 2017, Chapter 18.3 <<http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>>.



actively put barriers in place to her client opening a basic bank account and opened a different account that was inappropriate. This was despite multiple inquiries indicating Ms Do's client would be eligible for a basic bank account.⁴⁶

47. As outlined in the witness statement of Ms Lynda Edwards from Financial Counselling Australia:

*Unfortunately, there are still many people living in regional and remote communities who are eligible for basic bank accounts, but instead have accounts which charge fees.*⁴⁷

48. Ms Edwards went on in her statement to explain that bank fees and charges are one of the reasons that Aboriginal people have accounts that end up in overdraft. These fees can include account keeping fees, direct debit dishonour fees and unauthorised overdraft fees,⁴⁸ and can add up to significant amounts, particularly for a person on a low income.

49. For example, Mr Anthony Tapsall gave evidence that once an ANZ account with an informal overdraft becomes overdrawn by \$50 or more a fee of \$6 a day is applied for a maximum of 10 business days per month plus interest.⁴⁹ Interest is charged at the ANZ retail index rate plus 8.5 per cent (which at the time of the witness statement amounted to 17.2 per cent per annum).⁵⁰ Ms Sian Lewis from Commonwealth Bank also gave evidence of an Aboriginal customer being charged \$730.80 plus debit interest in fees and charges between July 2013 and January 2018.⁵¹ The fees and charges were associated with Automated Funds Transfer (**AFT**) payments for a NAB loan account that was closed in July 2013.⁵² The fees charged to the customer included AFT fees, rejection fees, overdrawn account fees, and scheduled payment dishonour fees.⁵³

50. The lack of awareness about basic bank accounts was raised by consumer advocates during the Code Review in 2016, noting that 'despite the efforts of the ABA and individual banks, many eligible consumers have no idea about the existence of basic bank accounts.'⁵⁴ The Banking Code

⁴⁶ Ms Do, Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4146.

⁴⁷ Witness Statement of Ms Lynda Edwards, Exhibit 4.140, (WIT.0001.0067.0001), [64].

⁴⁸ Witness Statement of Ms Lynda Edwards, Exhibit 4.140, (WIT.0001.0067.0001) [54].

⁴⁹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4148 to 4149.

⁵⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4148 to 4149.

⁵¹ Witness Statement of Ms Sian Lewis, CBA.9000.0078.0001, [140].

⁵² Exhibit 4.220.30 (CBA.0517.0130.1000) <<https://financialservices.royalcommission.gov.au/public-hearings/Documents/exhibits-2018/6-july/EXHIBIT-4.220.30.pdf>>.

⁵³ Witness Statement of Ms Sian Lewis, CBA.9000.0078.0001, [140].

⁵⁴ Joint Consumer Representative Submission to the Australian Bankers' Association Inc., *Independent Review of the Code of Banking Practice 2016*, September 2016, 29 <http://consumersfederation.org.au/wp-content/uploads/2016/09/160916_ABACodeReview_Submission_FINAL.pdf>; See also, Reconciliation Australia, *Banking in the Future: National Indigenous Money Management Agenda*, November 2007, 34, 'relatively few NIMMA [National Indigenous Money Management Agenda] community consultation participants are aware of the basic bank accounts... In addition, some participants who were aware financial institutions offered a basic bank account or a low fee



Compliance Monitoring Committee (**CCMC**) also found in July 2017 that ‘banks could do more to promote their basic bank accounts’. The CCMC reviewed major banks’ websites, conducting keyword searches for ‘basic bank account’ and ‘Indigenous’. Neither of these searches produced results showing the bank’s basic account offering.⁵⁵

51. In order to raise awareness and increase access to basic bank accounts, the joint consumer submission to the Code Review recommended that:

‘It should be incumbent on banks to enquire as to a customer’s financial circumstances when opening a new account and to offer a ‘basic bank account’ if the customer is eligible. Even more importantly, as customer’s circumstances change throughout their lives, banks should put in place systems and procedures to identify where a customer’s account is clearly no longer suitable and offer that customer a more appropriate option.’⁵⁶

52. We consider that banks can easily identify customers eligible for basic bank accounts through account indicators. For example: receipt of a government benefit or pension into the account; exceeding a threshold for inward payment dishonours; failed scheduled payments or account overdrafts which are incurring fees; or, the bank being aware of relevant circumstances as a result of hardship assistance being requested or offered on a credit facility. We note evidence of Mr Tapsell of ANZ, admitting the bank had knowledge of a Centrelink pension being received into an account which had incurred multiple overdrawn fees.⁵⁷

53. Similarly, where banks service regions with high proportions of Aboriginal customers from regional and remote areas, including in the Northern Territory and other parts of Australia, they should proactively assess the whether customers in that area are eligible for and in receipt of basic bank accounts. This could be done, for example, through cross-referencing data about Centrelink benefits or pensions. Where it is identified that there are customers who are not accessing beneficial accounts, the banks should take proactive steps to ensure access. Evidence adduced before the Commission suggests that at least one bank has taken this approach and considered how to migrate relevant customers to basic fee-free accounts.⁵⁸

transaction account have limited branch access thus rely on alternative access points, such as a third party ATM, limiting the benefit of these accounts.’ <http://www.fnf.org.au/uploads/6/3/1/1/6311851/banking_for_the_future.pdf>.

⁵⁵ Reconciliation Australia, *Banking in the Future: National Indigenous Money Management Agenda*, November 2007, 10, <<https://www.fos.org.au/custom/files/docs/ccmc-special-report-access-to-banking-services-by-indigenous-customers.pdf>>.

⁵⁶ Joint Consumer Representative Submission to the Australian Bankers’ Association Inc., *Independent Review of the Code of Banking Practice 2016*, September 2016, 30<http://consumersfederation.org.au/wp-content/uploads/2016/09/160916_ABACodeReview_Submission_FINAL.pdf>.

⁵⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4075 – 4078.

⁵⁸ Exhibit 4.159 (CBA0001.0390.0012) <<https://financialservices.royalcommission.gov.au/public-hearings/Documents/exhibits-2018/4-july/EXHIBIT-4.159.pdf>>.



54. The Code Review Final Report agreed with these concerns in part, stating that ‘ideally signatory banks would have systems and processes whereby they could scan for customers who are likely to be eligible for basic bank account, and proactively offer that option.’⁵⁹ We note, however, that the Code Review Final Report did not make a recommendation to this effect.
55. In response to the Code Review, the ABA released a revised Draft Banking Code of Practice,⁶⁰ which is currently awaiting approval from ASIC. While committing to raising the awareness of basic accounts and training staff, the banking industry did not commit to proactively identifying eligible customers and offering them a basic bank account. We consider this a missed opportunity for banks to meet community standards and expectations in relation to account suitability. We therefore submit that it is open to the Commission to find that banks must offer basic bank accounts to all eligible customers and create accounts as requested in a timely manner.
56. We also consider that the banking industry should be required to report publicly on the number of basic bank accounts each institution has on offer, and on the number of customers eligible for basic bank accounts. Public reporting can provide incentives to banks to ensure those eligible for basic accounts are not inappropriately missing out and/or the inordinate and costly delays in the creation of the accounts.

In what circumstances, if any, is it appropriate for a bank to challenge directly or indirectly a customer’s expressed wish to have a basic account?

57. There are very few circumstances where it would be appropriate for a bank to challenge directly or indirectly a customer’s expressed wish to have a basic account.
58. The only circumstances so recommended in the Code Review Final Report is where opening the account would be unlawful (for example, under anti-money laundering laws) or where the consumer’s conduct amounts to an offence under legislation (for example, threatening behaviour). This is consistent with the approach in the United Kingdom.⁶¹ However, while the

⁵⁹ Phil Khoury, Independent Review Code of Banking Practice, 31 January 2017, 172 <<http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>>.

⁶⁰ Australian Banking Association, Code of Practice, Chapter 16 and clause 166 ABA (2013), *Code of Banking Practice*, chapter 16, clause 166 <https://www.ausbanking.org.au/images/uploads/New_Draft_Code.pdf>.

⁶¹ Phil Khoury, Independent Review Code of Banking Practice, 31 January 2017, 170 <<http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>>.



ABA said that it supported this recommendation 'in part' in response to the Code Review,⁶² the obligation to open a basic account was not included in the Draft Code.⁶³

59. The limited exceptions outlined in the Code Review Final Report recognise that 'in today's society, a bank account is a fundamental necessity.'⁶⁴ In our view, banking is now considered an essential service and should be treated as such. Further, the potentially disastrous financial impact of banking fees and charges, particularly for low income people, mean that access to and awareness of basic bank accounts is enormously important.

Are banks' identification requirements appropriate for Aboriginal and Torres Strait Islander customers? If so, are those identification requirements sufficiently understood and implemented by staff on the ground?

60. As outlined in Ms Edwards' witness statement, AUSTRAC has developed more flexible identification approaches for Aboriginal people. This guidance was issued in 2016.⁶⁵ The guidance permitted reporting entities, such as banks, to verify identity using alternative means such as a photographic reference or referee statement.⁶⁶

61. Despite AUSTRAC's guidance, we consider that banks could do more to adopt appropriate processes that help Aboriginal people to overcome the issues they face in proving their identity.⁶⁷ Ms Do's evidence about the difficulties her client faced in verifying her identity when opening an account with ANZ was just one example of this.⁶⁸ Mr Nathan Boyle from ASIC also gave evidence to the Commission that 'it is not presently clear to ASIC the extent to which [the AUSTRAC guidance] has been taken up in practice. A common issue remains that banks may be

⁶² Australian Bankers' Association Inc., Response by Australian Bankers' Association to Review Final Recommendations, 27

<<https://www.ausbanking.org.au/images/uploads/ArticleDocuments/113/Banking%20Industry%20response%20to%20Khoury%20Review.pdf>>.

⁶³ Australian Banking Association, Code of Practice <https://www.ausbanking.org.au/images/uploads/New_Draft_Code.pdf>.

⁶⁴ Phil Khoury, Independent Review Code of Banking Practice, 31 January 2017, 169 <<http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>>.

⁶⁵ Australian Transaction Reports and Analysis Centre, *Aboriginal and/or Torres Strait Islander People* (last updated May 2018) <<http://www.austrac.gov.au/aboriginal-and-or-torres-strait-islander-people>>.

⁶⁶ Banking Code Compliance Monitoring Committee, Own Motion Inquiry: Breach Reporting, June 2018, 11 <<http://www.ccmc.org.au/cms/wp-content/uploads/2018/06/CCMC-Inquiry-Report-Breach-Reporting-June-2018.pdf>> ; Edwards witness statement para 52 Witness Statement of Ms Lynda Edwards, Exhibit 4.140, [52].

⁶⁷ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [54].

⁶⁸ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4144-4145.



unable to consistently identify Indigenous people in remote areas and apply policies accordingly.⁶⁹

62. Some banks appear to have made more progress than others in implementing AUSTRAC's guidance. In particular, we note Ms Lewis' evidence that CBA uses an identification process aligned with the AUSTRAC guideline, and has a specialised and tailored identification process for Indigenous customers in remote communities via the Indigenous Customer Assistance Line (ICAL).⁷⁰ Nevertheless, Ms Lewis acknowledged that there are still areas for improvement as set out in the EY Report,⁷¹ which CBA is 'currently further investigating'.⁷²
63. As outlined in the Commission's background paper, one of the causes of financial exclusion for Aboriginal people is a lack of identification documents.⁷³ Reconciliation Australia's Banking for the Future background paper also noted 'in remote areas the time taken and cost of travelling to a financial institution to provide proof of identity documents can be a barrier to opening an account'.⁷⁴ The background paper also highlighted that lack of awareness can contribute to confusion about identification and verification requirements.⁷⁵
64. Given the barriers to banking services faced by Aboriginal people, particularly in regional and remote areas, it is important that banks develop flexible identification processes for community members who do not have standard identity documents. Banks should also ensure staff are trained on the AUSTRAC guidance, with additional training and monitoring in branches that are more likely to provide banking services to Aboriginal people and Aboriginal people in regional and remote areas. We have provided additional comments relating to staff training in the paragraphs below.

Do financial services entities have in place appropriate policies and procedures to assist Aboriginal and Torres Strait Islander people to overcome obstacles associated with geographical remoteness, to address the cultural barriers to engagement that some of these people face, to address the linguistic barriers to engagement that some of these people face, and to address the obstacles posed by the financial literacy levels of some of these people?

⁶⁹ Witness Statement of Mr Nathan Boyle, ASIC.0800.00007.0001, [82].

⁷⁰ Witness Statement of Ms Sian Lewis, CBA.9000.0078.00001, [48], [61].

⁷¹ Exhibit SL-21, (CBA.0001.0333.2033).

⁷² Witness Statement of Ms Sian Lewis, CBA.9000.0078.0001, [77].

⁷³ Department of Prime Minister & Cabinet, *Aboriginal and Torres Strait Islander Consumers' Interactions with Financial Services*, Background paper for the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 3 <<https://financialservices.royalcommission.gov.au/publications/Documents/ATSI-background-paper-21.pdf>>.

⁷⁴ Reconciliation Australia, *Banking in the Future: National Indigenous Money Management Agenda*, November 2007, 32 <http://www.fnf.org.au/uploads/6/3/1/1/6311851/banking_for_the_future.pdf>.

⁷⁵ Ibid.



65. As noted at paragraph 7, the Aboriginal community is as diverse as the broader Australian population. Not all Aboriginal people experience the barriers set out above. However, Aboriginal people remain overrepresented in groups with the lowest financial literacy and are among the most financially excluded in the country, indicating that further work needs to be done in this area.⁷⁶
66. It is critical for policymakers to engage with Aboriginal communities and community organisations to identify issues relating to banking services. These engagements should be led by community and in partnership with community organisations. As outlined at paragraph 32, it is imperative that culturally appropriate methodologies are used to gather information. Time should also be taken to ensure that any consultation is meaningful and respectful.
67. Evidence provided during the hearings suggested that financial services entities need to implement more appropriate policies and procedures to assist Aboriginal people to engage with banking services. The evidence provided by Ms Do and Mr Tapsall suggested that ANZ in particular has further work to do in this area.⁷⁷
68. Ms Edwards also gave evidence about the following challenges that some Aboriginal people continue to experience when dealing with banks:⁷⁸
- Difficulties visiting a bank branch without support;
 - Lack of understanding of bank statements, meaning disengagement from the banking system;
 - Not feeling comfortable speaking with call centre staff, and lack of staff understanding about the distance to the local bank branch; and
 - Staff not understanding the cultural obligations of Aboriginal people.
69. Our casework and Koori engagement work has also identified the need for more appropriate policies and procedures to assist Aboriginal communities in relation to financial services in Victoria.
70. We acknowledge that there have been some positive initiatives and commitments made by the banks, as outlined in Ms Edwards and Mr Boyle's evidence.⁷⁹ In addition, all four major banks

⁷⁶ Witness Statement of Mr Nathan Boyle, ASIC.0800.00007.0001, [25]-[26].

⁷⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018).

⁷⁸ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [72]-[73]; Witness Statement of Ms Sian Lewis, CBA.9000.0078.0001; Witness Statement of Mr Anthony Tapsall, ANZ.999.012.0030.

⁷⁹ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [59], [63], [71]; Witness Statement of Mr Nathan Boyle, ASIC.0800.00007.0001, [76], [101].



have developed Reconciliation Action Plans, the ABA has released an Indigenous Statement of Commitment and the Code of Banking Practice has obligations to assist members of remote Indigenous communities.⁸⁰ However, there still appears to be a disconnect between head office promises and implementation at the local branch or call centre level. ASIC chairman James Shipton echoed these sentiments recently, stating that:

*The Royal Commission heard the vast majority of city-based financial companies had no understanding of how their policies played out in regional communities... I want to encourage financial firms, especially their senior leaders, to actively engage in closing the financial inclusion gap in remote and indigenous communities. And by that I mean coming to remote areas, meeting local people, listening to the issues they face and understanding the barriers they encounter.*⁸¹

71. The need to develop tailored and local responses was also reflected in the CCMC's report Access to Banking Services by Indigenous Customers, which said that 'one size does not fit all' and noted the different approaches by banks 'reflects the diversity of both Indigenous communities as well as the challenges difference communities and service providers face.'⁸²

And, if appropriate policies and procedures are not in place, what changes should be made to those policies and procedures to deal with those matters?

72. Solutions to the issues faced by Aboriginal people should be developed in partnership with local communities, and in recognition of the diversity of and within these communities. It is important that bank executives and policymakers visit these communities, as suggested by Mr Shipton, to understand the particular issues they face.

73. Part of a shift to local engagement should include recognition that Aboriginal people are far more likely to experience digital exclusion than the broader Australian population. The National Aboriginal and Torres Strait Islander Social Survey shows that while 85.7% of Aboriginal people living in urban and regional areas have accessed the internet in the last 12 months, only 53.1% of those living in remote and very remote areas have done so.⁸³ As banks continue their rapid shift towards digital banking, the reality is that those facing digital exclusion are now more likely

⁸⁰ Banking Code Compliance Monitoring Committee, Special Report: Access to Banking Services by Indigenous Customers, July 2017 <<http://www.ccmc.org.au/2017/07/26/ccmc-special-report-access-to-banking-services-by-indigenous-customers/>>.

⁸¹ 'ASIC demands banks, insurers treat Aborigines fairly', *The Australian* (online), 9 July 2018 <<https://www.theaustralian.com.au/business/banking-royal-commission/asic-demands-banks-insurers-treat-aborigines-fairly/news-story/d7c98349e3fa292ad4a42e4e37f980fa>>.

⁸² Banking Code Compliance Monitoring Committee, Special Report: Access to Banking Services by Indigenous Customers, July 2017, 5 <<http://www.ccmc.org.au/2017/07/26/ccmc-special-report-access-to-banking-services-by-indigenous-customers/>>.

⁸³ Prof. Julian Thomas, et. al., Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017, 2017, 16 <<https://digitalinclusionindex.org.au/wp-content/uploads/2016/08/Australian-Digital-Inclusion-Index-2017.pdf>>.



to also experience financial exclusion. The substantial reduction in local bank branches by the major banks,⁸⁴ particularly in rural and regional areas,⁸⁴ makes the local engagement suggested above a much more difficult task.

74. Some steps that banks can take to provide more culturally appropriate and sensitive banking services were identified by Ms Edwards, who made a number of relevant recommendations in her statement.⁸⁵ The CCMC's report *Access to Banking Services by Indigenous Customers* also provided several examples of best practice in relation to financial inclusion, financial literacy and cultural awareness.⁸⁶ Reconciliation Australia also suggested a number of options for improving financial literacy and access to financial products and services for Indigenous people in its 2007 report *Banking for the Future*.⁸⁷ ASIC's Indigenous Outreach Program⁸⁸ has also done significant work in this area.⁸⁸

75. Based on our casework and engagement work, we consider the following initiatives as particularly important:

- Hiring more Aboriginal staff in banks, ensuring those workplaces are culturally safe and supportive of Aboriginal staff and ensuring retention policies are active documents;
- Requiring all client-facing staff to complete localised cultural awareness and cultural safety training. It is recommended that branches engage with local Elders to facilitate this training;
- In places where language is a barrier, additional effort should be taken to ensure interpreters are available and resources are translated into local languages;
- Facilitate provision of a financial counsellor or a support person for people with low literacy during branch visits;
- Consider 'off road banking', which would involve banks visiting remote communities each month that do not have access to a branch. It should also include financial counsellors who have strong ties to the community and interpreters where needed; and

⁸⁴ Parliamentary Joint Committee on Corporations and Financial Services, Chapter 2- Bank Branch Closures in Rural, Regional and Remote Australia
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2002-04/banking/report/c02>.

⁸⁵ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [73].

⁸⁶ Banking Code Compliance Monitoring Committee, Special Report: Access to Banking Services by Indigenous Customers, July 2017 <<http://www.ccmc.org.au/2017/07/26/ccmc-special-report-access-to-banking-services-by-indigenous-customers/>>.

⁸⁷ Reconciliation Australia, *Banking in the Future: National Indigenous Money Management Agenda*, November 2007, 32 <http://www.fnf.org.au/uploads/6/3/1/1/6311851/banking_for_the_future.pdf>.

⁸⁸ Witness Statement of Mr Nathan Boyle, ASIC.0800.00007.0001.



- Introducing a dedicated assistance line for Aboriginal people. Ensuring that call centre staff understand the issues within the Aboriginal population and the complexities of community engagement and have the flexibility to respond to each caller's individual circumstances with quality solutions.

76. We have provided further comments in relation to telephone services below.

Should more banks have a telephone service staffed by employees with specific training in assisting indigenous consumers?

77. We consider that more banks should have a dedicated telephone assistance line for Aboriginal people that is staffed by employees with specific training in assisting and supporting Aboriginal customers.

78. The CBA's ICAL service receives a significant number of calls, which indicates that there is demand for dedicated assistance lines for Aboriginal people. In the last twelve months (ending May 2018), ICAL received over 174,000 calls from its customers; ICAL receives more than 3,000 calls a week from retail customers in over 90 remote communities.⁸⁹ We note Ms Edwards' evidence that the CBA's ICAL assistance line has been 'a good initiative that has been helpful' but that it could be improved by 'making the number more prominent on the website and extending its opening hours so that WA customers can get better access.'⁹⁰

79. At Consumer Action, we acknowledge the importance of our services being tailored to the needs of the Victorian Aboriginal community.⁹¹ Accordingly, we recently launched the Koori Help Line which is a dedicated telephone assistance service for Koori communities and workers.⁹² It is the first of its kind in Victoria, established to improve access to and provision of our services and to ensure the community receives appropriate advice and support on key consumer issues. Lawyers staffing the Koori Help Line undertake specific training on engaging with Aboriginal clients to provide culturally appropriate services and respond to the individual needs of clients.

Questions relating to the ANZ overdraft case study

Is it lawful for informal overdrafts to be offered on an opt-in rather than an opt-out basis to recipients of government benefits in circumstances where the costs of utilising the informal

⁸⁹ Witness Statement of Ms Sian Lewis, CBA.9000.0078.0001, [34]-[35].

⁹⁰ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [71].

⁹¹ Consumer Action Law Centre, Strategic Plan, 2017 <<https://consumeraction.org.au/wp-content/uploads/2017/09/Consumer-Action-Strategic-Plan-2017-Web-Version-small.pdf>>.

⁹² <<https://kooihelp.consumeraction.org.au/>>.



overdrafts are high and where informal overdrafts may not be adequately notified to customers? Is that lawful and is it appropriate?

80. The initial question is the legal basis for what is sometimes referred to as an 'informal' overdraft. This usually refers to the situation where a customer of a bank conducts a transaction under which the balance of the account is exceeded, resulting in it being overdrawn. Banks will sometimes honour the transaction without having reached formal agreement with the customer—usually based around its own 'settings' for risk for the customer. An example would be drawing a cheque or making an electronic transfer for \$3,000 on an account with a balance of \$2,000. Rather than bouncing the withdrawal, the bank accepts the transaction and the account is overdrawn.
81. The accepted legal characterisation of the transaction is that the cheque or transfer request represents a request by the customer for an overdraft to the relevant amount which the bank may accept or reject.⁹³ The principle is expressed to apply to current accounts, which is generally viewed as one on which the customer makes deposits and draws cheques or conducts electronic transfers and withdrawals.⁹⁴ Such informal overdrafts are repayable on demand and operate on the banks usual terms.
82. This means that for most bank accounts, there will be an informal overdraft facility, unless the customer opts out. This means providing an instruction to their bank to not approve any such 'request'.
83. Due to the informal nature of the transaction it is not considered possible to provide the required disclosure for a credit contract. The result is what is now section 6(1) of the National Credit Code—the short-term credit exemption. This exemption provides that the informal arrangement could go for two months but by the end of that period it must be repaid or a formal credit contract, with the required disclosures, entered into to replace it.
84. The problem remains that at the point of granting the informal overdraft, there is no assessment of suitability. Given the significant debt that can be incurred, and associated fees and charges, this presents a serious risk of harm to consumers. As outlined in Mr Boyle's and Ms Edwards' evidence before the Commission, some people struggle to understand the concept of an overdraft and can suffer significant financial hardship in attempting to clear the debt.⁹⁵ While it appears that informal overdrafts are technically legal, we submit that they are not appropriate and do they meet community standards and expectations.

⁹³ *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226.

⁹⁴ Gregory Weaver and Charles Craigie, *The Law Relating to Banker and Customer*, (Sydney Law Book Co. 1975) 3.10.

⁹⁵ Statement of Mr Philip Bowden WIT.0001.0076.0001; Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001.



Should any other aspect of the current regulatory regime in respect of informal overdrafts be reformed to minimise the risk of consumer detriment?

85. In our view, overdrafts should only be provided once a suitability assessment is completed in accordance with the requirements of the *National Consumer Credit Protection Act 2009* (Cth) and ASIC's Regulatory Guide 209. Further, an overdraft should only be offered in response to a proactive request by the consumer and subsequent assessment as 'suitable'. We reiterate our submissions during the consumer lending hearings regarding lack of appropriate suitability assessments for overdraft facilities, and the dangers of 'pre-approved' credit offers.⁹⁶

And do ADIs presently have adequate policies in place for the implementation of the code of operation?

86. The Code of Operation, published by the Department of Human Services and the Department of Veterans Affairs, sets out how much a financial services provider can recover from a customer if their account is overdrawn.⁹⁷ Under the Code of Operation, people reliant on Centrelink should be able to retain 90 per cent of their payment for living expenses, with only 10 per cent payable towards the debt. The aim of the Code of Operations is to ensure that recipients of income support payments have sufficient income to maintain adequate living standards.

87. Signatories to the Code of Operation are the ABA, the Australian Finance Conference and the Customer Owned Banking Association (**COBA**). While the Code of Operation is described as a non-legally binding statement of best practice, banks that have signed the 2013 ABA Code of Banking Practice commit to complying with the applicable requirements of the Code of Operation.⁹⁸ Further, the Code of Banking Practice is incorporated into the contract with the customer, so it is a contractual commitment.⁹⁹ The Customer Owned Banking Code of Practice, published by COBA, includes a similar commitment.¹⁰⁰

88. Ms Edwards gave evidence that the Code of Operation is not being applied in a systemic way by the banks.¹⁰¹ We also note Counsel Assisting Mark Costello's suggestion that compliance with the Code of Operation is a 'difficult' and 'complicated' arrangement for banks to put in place

⁹⁶ Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Submission on Round 1 Hearings – Consumer Lending* (3 April 2018), [7]

<<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180403-Submission-on-Consumer-Lending-FINAL-1.pdf>>.

⁹⁷ <https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/code-operation>

⁹⁸ ABA (2013), *Code of Banking Practice*, clause 19.1.

⁹⁹ ABA (2013), *Code of Banking Practice*, clause 12.3. See also *National Australia Bank v Rice* [2015] VSC 10; *Commonwealth of Australia v Doggett* [2015] VSCA 351; *Commonwealth of Australia v Wood* [2016] VSC 264

¹⁰⁰ COBA (2018), *Customer Owned Banking Code of Practice*, clause 26.5.

¹⁰¹ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [29].



while offering informal overdraft facilities.¹⁰² Mr Costello also suggested during questioning about compliance with the Code of Operation that it ‘would just be easier if people were in an account like an Access Basic account that did not have an informal overdraft attached to it’.¹⁰³ This is because in practice the bank may need to set up two accounts to comply—one to pay down the overdraft, and the other as an account with the remaining 90 per cent of the welfare payment. We are not aware of banks adopting this process for accounts with informal overdraft facilities attached.

89. We therefore do not consider that ADIs have adequate policies in place for the implementation of the Code of Operation, particularly while banks continue to offer informal overdraft facilities. Where banks do not have such policies, they risk breaching the Code of Practice and their contract with their customer. We submit that it is open to the Commission to find that the terms of the Code of Banking Practice form part of the loan contract by reason of the bank’s adoption of the Code alone.¹⁰⁴ We further submit that it is therefore open to the Commission to specifically find that signatories to the Code of Banking Practice are contractually bound to comply with the Code of Operation.¹⁰⁵
90. Given this, we consider it is open to the Commission to recommend a program of remediation across all banks regarding the Code of Operation. This should involve identifying all instances of where banks have recovered more than 10 per cent of a fortnightly benefit for the repayment of debt in breach of the Code of Operation, and offering compensation for any loss or hardship incurred. This should be conducted proactively in accordance with the principles outlined in ASIC’s Regulatory Guide 256 on client review and remediation.

Other issues

Payday lending and consumer leases

91. While we acknowledge that consumer leases and small amount credit contracts (known as payday loans) do not fall within the terms of reference of the Commission, we wish to highlight

¹⁰² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4089.

¹⁰³ *Ibid.*

¹⁰⁴ *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351 [104] McLeish JA (with whom Whelan JA and Garde JA agreed); *National Australia Bank v Rose* [2016] VSCA 169 [40] Warren CJ and McLeish JA.

Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Submission on Round 1 Hearings – Consumer Lending* (3 April 2018), [9.1]-[9.8]

<<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180403-Submission-on-Consumer-Lending-FINAL-1.pdf>>.

¹⁰⁵ Pursuant to clause 19.1 of the Code of Banking Practice.



the negative impact these high-cost products have on Aboriginal people. Ms Orr QC noted in her opening address that the Commission has been told about problems with a range of consumer credit products including payday loans and consumer leases, 'particularly those taken out to obtain essential household items, such as furniture and white goods'.¹⁰⁶

92. Mr Boyle gave evidence to the Commission that ASIC saw Aboriginal consumers being 'specifically targeted' by payday lenders and consumer lease providers, which ASIC did not see regularly in other areas.¹⁰⁷ ASIC receives a 'significant amount of reports of misconduct in relation to both consumer lease providers and small amount credit contract providers' and sees behaviours that are 'less than ethical'.¹⁰⁸ This included reports of trusted and respected Elders being provided with incentives to introduce the company to other members of their communities.¹⁰⁹
93. Ms Edwards also provided evidence that payday loans and consumer leases cause 'enormous harm' to Aboriginal people.¹¹⁰ Ms Edwards described these lending practices as 'predatory', 'unfair' and expensive, and also highlighted problems with continued access to Centrepay by consumer lease providers.¹¹¹
94. We have written at length about the consumer harm being caused across Australia by consumer leases and payday loans. Most recently, we contributed extensively to the Small Amount Credit Contract Review (**SACC Review**), which included consideration of consumer leases.¹¹² We have also raised concerns about consumer lease providers' ability to gain priority access to welfare payments via the Centrepay system, and recommended this access be removed.¹¹³

¹⁰⁶ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 35* (2018), 3695.

¹⁰⁷ Witness Statement of Mr Nathan Boyle, ASIC.0800.00007.0001, [60].

¹⁰⁸ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3746-37.

¹⁰⁹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3747.

¹¹⁰ Witness Statement of Ms Lynda Edwards, WIT.0001.0067.0001, [48].

¹¹¹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 3746.

¹¹² Consumer Action Law Centre, *Submission: Review of the Small Amount Credit Contract Laws* (15 October 2015)

<<https://consumeraction.org.au/review-of-the-small-amount-credit-contract-laws-submission/>>;

<https://policy.consumeraction.org.au/2016/01/22/submission-sacc-review-interim-report/>

<https://consumeraction.org.au/review-small-amount-credit-contract-laws-final-report/>

<https://policy.consumeraction.org.au/2017/11/06/submission-small-amount-credit-contract-and-consumer-lease-reforms/>

¹¹³ Ibid; Consumer Action Law Centre, *Submission- Independent Review of the Centrepay System*, 28 February 2013

<<https://www.humanservices.gov.au/sites/default/files/documents/submission-17-consumer-action-law-centre.pdf>>;

Consumer Action Law Centre, *Submission - Review of Centrepay Policy and Terms*, 21 March 2017.



95. The Government accepted the majority of recommendations of the SACC Review in November 2016.¹¹⁴ These recommendations included:

- retaining the existing price caps on SACCs;
- extending the SACC protected earnings amount requirement to all consumers and lowering it to 10 per cent of the consumer's net income;
- introducing a cap on total payments on a consumer lease equal to the base price of the good plus 4 per cent of that price per month; and
- introducing a protected earnings amount requirement for consumer lease providers of 10 per cent of net income for all consumers, equivalent but separate to the requirement for SACCs.

96. Exposure draft legislation to implement these recommendations was released for consultation in October 2017.¹¹⁵ Consumer groups were and continue to be strongly supportive of the legislation and recommendations made by the SACC Review Panel.¹¹⁶ However, legislation has still not been introduced to Parliament. Recent research by Digital Finance Analytics found that since the Government released the SACC Review report in April 2016, three million additional payday loans, worth an estimated \$1.85 billion, have been taken out by about 1.6 million households, generating a tidy profit of about \$250 million in net profit for lenders. Around one fifth of them (about 332,000 households), were new payday borrowers.¹¹⁷

97. We are continuing to urge the Government to enact the legislation as soon as possible.

Last resort compensation scheme

98. The recent cancellation of Dover Financial Advisers' financial services licence¹¹⁸ following the Round 2 hearings on financial advice has highlighted the continued need for a last resort compensation scheme.

99. A series of financial scandals have left many Australians out of pocket and in some cases, resulted in the loss of the family home or a secure retirement. Scandals have not just occurred

¹¹⁴The Hon Kelly O'Dwyer MP, 'Government response to the final report of the review of the small amount credit contract laws' (Media Release, 28 November 2016) <<http://kmo.ministers.treasury.gov.au/media-release/105-2016/>>.

¹¹⁵ National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018 (Cth) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6057>.

¹¹⁶ <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/171103-FINAL-submission-exposure-draft-SACC-legislation.pdf>>.

¹¹⁷Consumer Action Law Centre, *Are We There Yet? The Mysterious Case of the Vanishing SACC Bill* (19 June 2018) <<https://policy.consumeraction.org.au/2018/06/19/are-we-there-yet-the-mysterious-case-of-the-vanishing-sacc-bill>>.

¹¹⁸ Australian Securities and Investments Commission, 'Dover Financial Advisers' financial services licence to be cancelled' (Media Release, 18-195MR, 29 June 2018) <<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-195mr-dover-financial-advisers-financial-services-licence-to-be-cancelled/>>.



in relation to financial advice; many people have suffered uncompensated loss from the mis-selling of complicated investment products, collapse of managed investment schemes and predatory conduct by credit providers. When the loss goes uncompensated, the impact on individuals and families can be severe, with flow-on costs for the community, Government and trust in the financial system.

100. We recommend that a compensation scheme of last resort be established to prevent the well-documented harm caused by uncompensated losses, and to rebuild trust and confidence in Australia's financial system. It is the missing piece of our financial services regulatory architecture.

101. To build trust and confidence in the financial system, the compensation scheme must be broad in its scope and apply to all:

- financial service providers, including credit licensees and operators of managed investment schemes; and
- unpaid external dispute resolution determinations, and orders of courts and tribunals.

102. All legacy unpaid determinations of the FOS and Credit and Investments Ombudsman must be paid, either as part of a last resort compensation scheme or a separate one-off levy on industry.

103. Redress for past disputes is complex but achievable. Ideally, a last resort compensation scheme would be retrospective in application. However, if any scheme established applied to prospective claims only, then we would support a separate past disputes forum that:

- is funded by industry with a contribution by Government;
- is open for applications for a period of at least two years;
- considers disputes from at least the last 10 years to capture the harm suffered by victims of financial misconduct who could not recover from firms that collapsed during the Global Financial Crisis and other financial scandals; and
- in the event that the forum is not able to fully compensate all people affected, applies a rationing approach on the basis of financial hardship to ensure compensation for those who need it most.

104. For more information, we refer to our recent joint submission to the Review of the Financial System External Dispute Resolution and Complaints Framework (**Ramsay Review**)



Supplementary Issues Paper on last resort compensation and redress for past disputes with these recommendations.¹¹⁹

¹¹⁹ Consumer Action Law Centre, EDR Review Supplementary Issues Paper – Last resort compensation for victims of financial misconduct (4 July 2017) < <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/07/Joint-consumer-submission-EDR-Review-Supplementary-Issues-Paper-2.pdf>>.

