



ROYAL COMMISSION INTO MISCONDUCT IN THE

Banking, Superannuation and Financial Services industry

ROUND 7 – POLICY QUESTIONS ARISING FROM THE FIRST SIX ROUNDS

About Financial Counselling

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial counsellors need an in-depth knowledge of credit law, bankruptcy law, debt collection law and practices, industry hardship processes and government concession frameworks, as well as counselling skills.

Financial counselling agencies are exempt from holding either a Credit Licence or an Australian Financial Services Licence as long as they meet certain criteria, including that their services are free and staff are adequately trained.

There are approximately 800 financial counsellors in Australia, and we estimate this translates into around 500 full time positions.

People can access financial counselling through either face-to-face services or by ringing the phone financial counselling service, the National Debt Helpline on 1800 007 007. We estimate that face to face financial counsellors assist around 125,000 people each year. In 2017, the National Debt Helpline received almost 170,00 calls an increase of 12% on the previous year.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. FCA's member groups are the State and Territory financial counselling associations. FCA provides a voice for the financial counselling profession, provides training, support and resources for financial counsellors and advocates for a fairer marketplace for the clients of financial counsellors.

About this Submission

The observations in this submission are based on the knowledge and casework experience of financial counsellors. FCA obtains this in a number of ways including: case studies provided to us by financial counsellors that we use to inform submissions; direct contact from financial counsellors to alert us to problems they are seeing; through our involvement as the coordinating body for the National Debt Helpline (the phone financial counselling service); and through the FCA Representative Council, part of our governance structure, which comprises representatives from each State and Territory financial counselling association.

The submission responds to these chapters in the interim report:

- chapter 2 – consumer lending
- chapter 4 – small and medium enterprises (briefly only)
- chapter 7 – remote communities
- chapter 8 – regulation and the regulators

We do not answer all of the questions posed in these chapters and focus on some issues more than others.

The final section of this submission covers other policy issues.

We also provided separate submissions on superannuation (round 5 of the hearings) mainly in relation to Aboriginal and Torres Strait Islander people living in regional and remote communities, and on gambling.

Lenders outside the terms of reference

The Royal Commission has identified widespread and systemic problems in the banking industry. Financial counsellors are particularly concerned about irresponsible consumer lending, an issue from the round one hearings, as this is a common factor in their casework.

We want to place on the record that problems with irresponsible lending are endemic and occur far more widely than within the banking sector. There are serious problems with irresponsible lending by payday lenders, rent-to-buy companies and non-bank lenders. There are also issues with inappropriate debt collection activity and inappropriate behaviour and financial arrangements in the debt management industry (debt agreement administrators, credit repair agencies, budgeting services and so on).

What these businesses have in common is that they predominantly target people on very low incomes or those who are vulnerable in some way, for example, because of low financial literacy or mental illness. The impact of poor practices, such as irresponsible lending, is severe. Regulatory reform however is extremely slow, for example, laws to curb predatory payday lending and consumer leases, have been years in the making, but are still not before Parliament.

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1

Consumer lending

INTRODUCTION

Overview

1. Irresponsible lending is the issue that worries financial counsellors most and is a constant theme in financial counselling casework. This section sets out our thinking about this issue and responds in a broad way, to a number of questions posed in chapter 2 of the interim report. Other specific questions in chapter 2 are dealt with in the next section.
2. The summary of our argument, and the structure of this section, is this:
 - a. we need responsible lending laws to stop both predatory lending and lending that traps people with debt they can't afford to repay without hardship;
 - b. there has been widespread non-compliance with the existing responsible lending laws;
 - c. the reasons for non-compliance include market structures, difficulties with, or lack of, enforcement and a lack of clarity about the law and how to apply it;
 - d. the solution is to make the laws clearer as well as move to an outcomes focus;
 - e. we need to worry about, and clean up, the current irresponsible lending hangover.

Why we need responsible lending laws

3. It is worthwhile considering why we need responsible lending laws as this is important for policy development. We can see three main reasons.
4. First, it stops predatory lending. Predatory lenders come in a variety of forms. One common, profitable version is to target borrowers in mortgage distress while there is still some equity left in the property. The lender promises to "save" the borrower. What they do in fact is charge an exorbitant amount to set up a new loan, charge an equally exorbitant interest rate to ensure the borrower defaults and then call in the property, so they can strip any equity left. One of the positive outcomes of the existing law is that it has had an impact on this type of lending and it is now rare.
5. Second, when it comes to borrowing money, the interests of lenders and

borrowers are only partially aligned. Lenders go to considerable trouble to avoid bad debts. However, as the Royal Commission has highlighted, there is still significant profit in pushing borrowers to the edge — not so far that a person defaults, but to the extent they have as much debt as possible. Of course this can be a fine line and the cost of doing business is that some people will actually default.

6. Third, and related to the point above, when people have too much debt it causes financial hardship. One of the saddest things emerging from the Royal Commission was how the impact of poor lending or hardship practices on people's lives was just not considered: people were just numbers. Struggling with bills and debts puts enormous stress on people and can have detrimental impacts on a person's mental or physical health, children and relationships.
7. It is also worth noting that while too much credit can be bad for individuals, it can also be bad for the economy. There are many examples. One is that it is very likely that house prices in Australia have been inflated by easy access to credit. Another is that small businesses given credit, on the basis of asset-backed guarantees, may make lenders less likely to assess the underlying viability of the business, but more likely to provide the maximum loan. Finally, there are macroeconomic repercussions of widespread lending to people who cannot realistically repay: the Global Financial Crisis was driven by the securitisation of poor quality loans.
8. Responsible lending laws do not obviate the need for personal responsibility, or as some people describe it "responsible borrowing". We are not arguing this is a one-way street. But as an example, people underestimating their expenditure when applying for a loan, doesn't make them dishonest. The truth is that many people do not track their expenditure in minute detail and have very little idea how much money they are spending on various aspects of their lives (although this will soon become simpler as budgeting apps and tracking tools become more common). Most of us instead rely on the bank to tell us how much we can afford to borrow. Financial literacy can only do so much of the heavy lifting.

There has been widespread non-compliance with responsible lending laws

9. Chapter 2 of volume 1 in the interim report describes a number of examples where banks have breached the responsible lending laws. Sometimes these relate to specific instances, albeit affecting many people, such as for ANZ and CBA in their provision of personal overdrafts.¹ In other instances, the breaches goes to the very heart of bank lending practices, with banks systematically using expenditure benchmarks that were too low, not verifying a loan applicant's expenditure or not enquiring about their requirements and objectives as required by the law.

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1 Interim Report, Volume 1, p 48.

Why has there been non-compliance?

10. It helps in framing solutions, to ask first why there has been such widespread non-compliance. There are a couple of factors at play:
 - a. reverse competition — if one market participant introduces a profitable practice encouraging over indebtedness, then other lenders inevitably follow. An example of this race to the bottom is banks assessing credit card limits on whether or not a customer could afford the minimum payment of 2% or 2.5% each month. This is patently ridiculous;
 - b. financial markets and products can be complex and managing money is not as simple as it sounds. People are not very good judges of their future behaviour (the bank thinks I can afford it, I will definitely save more etc);
 - c. lack of strong enforcement by ASIC - but see next and our comments about the regulators in part 4.
11. The most important reason however is the laws themselves.
 - a. The Commission's interim report is very clear about what the laws require and comes to the conclusion that banks did not comply with them (and we agree).
 - b. But the banks interpreted the laws in a different way, albeit in a way that worked to their advantage (to maximise the amount of money they lent and to automate decision processes as much as possible).
12. One of the problems is that there was, and continues to be, room for debate about what actual steps the laws require. Some of this plays out in the questions posed by the Commission around issues such as the use of benchmarks.
13. ASIC Regulatory Guide 209 has been both a help and a hindrance. In an attempt to allow flexibility, the guide introduces the concept of scalability. But that has meant banks could read down what was required by the laws or at least argue about what was required with the regulator.
14. The only court case of which we were aware in relation to responsible lending concerned payday lender, The Cash Store.² This is a scathing judgement of quite egregious lending practices. This should have served to put the banks on notice that some of their lending assessment practices needed to tighten, but the problem again is one of degree.

What are the solutions?

15. In response to the Royal Commission, banks are now adjusting their lending assessment processes to ask more questions and verify expenditure more closely. The issue is whether further regulation is required. And if there was no further regulation, in a few years, would the same bad practices creep

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ASIC v The Cash Store (in liquidation) [2014] FCA 926.

back in?

16. Our conclusion is that law reform is needed, so that responsible lending laws are put beyond doubt. A first step would be to clarify the detail in RG 209 and importantly, move it from guidance to statute. We also need to remove the concept of “substantial hardship” which is far too low as a mechanism for assessing affordability.
17. We also support the call by our colleagues in the Consumer Action Law Centre, that the penalty for breaching the responsible lending laws would be that the lender forfeits the loan principle. Their submission provides more detail.
18. The broader, fundamental and far reaching reform, would be to start framing more of our laws in terms of outcomes. There is more information about this regulatory approach in part 4 of this submission.
19. In relation to responsible lending, an outcomes or performance-based approach places the onus on lenders to look at the results of their actions. Most current regulation instead focuses on inputs such as conduct requirements. For example, lenders would need to provide evidence that their lending decisions actually resulted in affordable payment arrangements for their customers and that loans were consistent with a person’s requirements and objectives.

How do we clean up the current problems resulting from irresponsible lending?

20. This leaves us then with the serious problems arising from past poor lending practices. There are current and increasing problems in particular with:
 - a. the number of interest only home mortgages maturing now and in the next few years;³
 - b. the large numbers of people with problem credit card debt (1.9 million);⁴ and
 - c. the increasing numbers of people retiring with large debts.⁵
21. For a start, people need to get advice and assistance if they are affected by irresponsible lending. Financial counsellors have an important role to play here (see part 6 of this submission also). We are very worried that too many people will miss out on assistance and could end up in the debt collection

3 See ASIC Media Release dated 11 October 2017 at <http://asic.gov.au/about-asic/mediacentre/find-a-media-release/2017-releases/17-341mr-asic-update-on-interest-only-home-loans/>. Also see ASIC Report 445: Review of Interest Only Home Loans at <http://download.asic.gov.au/media/3329474/rep445-published-20-august-2015.pdf>.

4 ASIC, Report 580, Credit card lending in Australia.

5 “Rapid rise in retirees with mortgage debt”, The Age, 21/10/18. “In 2002, only 4 per cent of homeowners aged over 65 carried mortgage debt, figures from the Australian Bureau of Statistics show. By 2015, the latest figure available, that had grown to 12 per cent.” This data is reflected in financial counselling casework. The Salvation Army Moneycare financial counselling service says that over one in four people accessing their service is now over 55.

system.

22. Lenders need to:
 - a. actively review past responsible lending decisions every time people present in financial hardship and have a process in place to remedy this;
 - b. offer more flexible and workable solutions to people affected by irresponsible lending, for example, long-term payment arrangements or debt write-offs.
23. If there are concerns about people being trapped in loans and being unable to refinance, these could be addressed by targeted regulation that confirmed a loan was not unsuitable if the refinance resulted in the borrower being in a better situation, for example, if repayments were lower. This will need clear guidance from the regulator.

RESPONSE TO QUESTIONS POSED (AND NOT COVERED ABOVE)

24. The remarks above address a number of the questions in chapter 2 of the interim report, as well as section 8.13 in chapter 10. This section responds to some, not all, of the remaining questions in chapter 2.

Duties owed by an intermediary

What duties does an intermediary owe to a borrower?

What duties should an intermediary owe to a borrower?

25. There are two options that would help overcome what are inherent conflicts of interest in mortgage broking.
 - a. The first option would be to require that brokers act in the best interests of their clients. This would have some impact, although we note a best interests duty has not adequately fixed the problems in financial advice.
 - b. The second option would be to make intermediaries, such as brokers, the agents of the lender. At the moment, the intermediary is the agent of the borrower. This means that misleading, unconscionable or unfair conduct does not legally involve the lender. The borrower can only take legal action against the intermediary for the misconduct and seek compensation. A borrower could actually lose their home to repossession while pursuing a mortgage broker for misconduct. The borrower is far better off dealing directly with the lender so if any misconduct occurs, the lender is directly liable and the remedy would involve the loan. Lenders would have strong incentives to adequately supervise brokers/intermediaries.
26. Intermediaries should owe the borrower the following duties:
 - a. to be free from conflicts of interest, including not accepting any commissions from the lender that may lead to a conflict of interest;

- b. that the loan is not unsuitable which should include gathering detailed information about requirements and objectives and the borrower's financial position and tailoring the loan to those needs;

Systems to prevent breaches of responsible lending obligations

How can entities' systems be improved to detect and prevent breaches of responsible lending obligations by intermediaries?

27. Credit providers should not be relying on the assessments of an intermediary. Responsible lending obligations should require credit providers to review and check financial details themselves.

Introducer programs

Are 'introducer' programs compatible with responsible lending obligations?

28. Introducer programs are not compatible with responsible lending. Introducers often only act as a referral and should not be involved in any responsible lending assessments.

Disclosure by brokers re obligations to lender and borrower

What should be disclosed to borrowers about an intermediary's obligations to the lender and to the borrower?

29. Borrowers already receive a Credit Guide for loans under the National Credit Act. This does not give any information about the intermediary's obligations to the lender and to the borrower. Further disclosure is unlikely to work to address the borrower's lack of information or understanding of these obligations. The borrower already receives a large pile of documents when getting a loan that they are unlikely to read.

Disclosure by brokers re remuneration

What should be disclosed to borrowers about an intermediary's remuneration?

30. Borrowers should receive full details of the remuneration of an intermediary including any up front commission, trailing commissions, penalties for early repayments, gifts and other incentives.

Responsible lending and a borrower's expenses

What steps, consistent with responsible lending obligations, should a lender take to verify a borrower's expenses?

Do the processes used by lenders, at the time of the hearings, to verify borrowers' expenses meet the requirements of the NCCP Act? Do the processes now used meet those requirements?

31. The processes used by lenders to assess expenses were not rigorous enough and did not meet the requirements of the NCCP Act. Without more information, it is difficult to know if current processes now meet them.

- 32.** We note that with the advent of open banking, it should be much easier in the future for lenders and borrowers to get actual data about expenditure. This will help lenders in fulfilling their responsible lending obligations.
- 33.** What would also help people looking to borrow, that is not readily available now, is information about:
- a. their expenditure tracked to a reasonable benchmark — are they spending more or less than others in comparable situations, for example, on say food, electricity or entertainment? Lenders do this now using HEM but do not share this data with their customers;
 - b. guidelines about what is a reasonable amount to borrow and to repay. There used to be rules of thumb in relation to home lending for example, that now seem to have been thrown out the window. One rule was to borrow a maximum of three times annual income and for repayments to be around 25% of net income. No one seems to know what “reasonable” looks like any more. From a financial literacy point of view, this makes it harder for individuals to understand the “system”. Instead we increasingly rely on what the banks say we can borrow and therefore assume we can afford. But as we have seen, the incentive for the bank is to avoid borrower default, not to worry too much about affordability.
- 34.** ASIC Regulatory Guide 209 is not specific enough about what steps need to be taken for responsible lending. In summary, it is having enough information to really know the customer. The steps include:
- a. asking how many bank accounts for savings/transactions the borrower has as well as credit cards;
 - b. obtaining copies of three months of bank account statements for each account;
 - c. asking the borrower about their expenditure including, debt repayments, utilities, rent, shopping, car costs, education and so on
 - d. comparing and inquiring about the stated expenses versus actual expenses on the bank account statements;
 - e. checking a credit report;
 - f. stress testing against a benchmark to ensure the expenses are not artificially low; and
 - g. sharing this information with the customer, so that they can also understand their financial position.

Use of the Household Expenditure Measure

Should the HEM continue to be used as a benchmark for borrowers’ living expenses?

- 35.** It is perfectly reasonable to use a benchmark. The key is that the benchmark

itself is a reasonable one. What the Royal Commission unearthed was that lenders were using a HEM benchmark that was too low. We understand that the HEM can be lower than the Henderson Poverty Index for some profiles.

36. If the HEM, or any benchmark is used, it needs to be independently reviewed to ensure it is a realistic and reasonable estimate of household expenditure.

Credit limit increases after consent

Is the offer of a credit limit increase, where the customer has consented to receive such marketing, consistent with the NCCP Act obligation not to provide credit that is not unsuitable for the customer, having regard to their requirements and objectives?

37. The consent requirement does not address the failure to lend responsibly. It should be repealed. The only time a consumer should get a credit limit increase is if they apply for one and the lender assesses the increased credit to be not unsuitable.

Credit limit increases based only on bank information

Is the offer of a credit limit increase based only on information held by the bank about a customer a breach of the NCCP Act obligation to take reasonable steps to verify the consumer's financial situation?

38. Yes, it is a breach. Each assessment should be performed fresh and in compliance with the requirements under the NCCP Act. The information held by the bank is not complete and is no substitute for a complete responsible lending assessment.

Termination for fraud or misconduct and advising clients

When an employee or intermediary is terminated for fraud or other misconduct, should a licensee inform their clients of the reason for termination?

When an employee or intermediary is terminated for fraud or other misconduct, should a licensee review all the files or clients of that employee or intermediary for incidence of misconduct?

39. Yes. This is what the community would expect. They would also expect a review of their file and remediation if appropriate.

Value of add-on insurance

Are certain types of add-on insurance, by their nature, poor value propositions for customers?

40. Yes. There are certain types of add-on insurance that are poor value propositions for customers. ASIC has released a number of reports that have raised serious and systemic problems with the sale of add-on insurance for

loans.⁶ The most common type of add-on insurance is consumer credit insurance (CCI). The other types of add-on insurance are comprehensive car insurance, tyre and rim insurance, gap insurance and mechanical insurance.

41. With the exception of comprehensive car insurance, the remainder of these types of add-on insurance represent poor value for the consumer. They are all “junk insurance”. They all have serious problems including: narrow coverage, a low loss ratio, are bundled into the loan (so the consumer may not be aware of the purchase), there is little or no competition around their terms, the product is often unsuitable for the purchaser (selling consumer credit insurance to people who are unemployed), large commissions drive unethical behaviour and premium increases can cause financial hardship.
42. ASIC has done a lot of work trying to resolve these problems over many years. A great deal of consumer harm has happened in between times from the sale of this very poor value insurance. At a minimum, the insurance should never be financed up front in the loan and the sale of the insurance deferred/separated from the sale of the loan. Some of the types of insurances being sold should be banned immediately including tyre and rim, gap and mechanical as they are useless and harmful.

OTHER COMMENTS AND OTHER REFORMS NEEDED

A savings buffer needs to be part of consumer lending decisions

43. In 2016, we released a report called “Everyone Needs a Savings Buffer: Why Income and Expenditure Statements need a Default Savings Category”.⁷ The purpose of the report was to highlight the perverse situation that few, if any lenders, include a line item for saving when people apply for a loan.
44. We were particularly concerned in the report about people experiencing financial hardship. They are often asked to complete income and expenditure statements, so that a lender can assess what they can afford to repay. We argue that it makes no sense for a lender to expect that a person pay all of any surplus income toward debts, but without allowing for a savings buffer. Unexpected things happen in all of our lives and the absence of a savings buffer sets too many people up to fail.
45. Research by ANZ shows that, perhaps contrary to common perception, level of income is not the main driver of financial wellbeing. The two most important factors are **active saving** and not borrowing for everyday expenses.⁸

6 The sale of add-on insurance through car dealerships (reports 470,471 and 492) and in 2011 a report (256) on CCI sales by ADIs.

7 Financial Counselling Australia, Everyone Needs a Savings Buffer, May 2016, <https://www.financialcounsellingaustralia.org.au/getattachment/Corporate/Publications/Reports/Everybody-Needs-a-Savings-Buffer.pdf>

8 ANZ, Financial Wellbeing: A survey of adults in Australia, April 2018, <https://www.anz.com/resources/2/f/2f348500-38a2-4cfe-8411-060cb753573d/financial-wellbeing-aus18>.

46. Including a line for “savings” in an income and expenditure statement may seem a minor thing to do, but it isn’t. Doing this would start to normalise saving in the minds of borrowers and would have positive flow on effects for financial wellbeing.
47. It is ironic for the banking industry to talk about financial literacy, financial capability and financial wellbeing and concepts like “responsible borrowing” and then ignore the importance of saving in any meaningful way. The lack of focus on saving is symptomatic of our consumer culture and a financial services industry that focuses mainly on maximising borrowing. This could so easily be changed.

Problems with cancelling direct debits need to be fixed

48. A “direct debit” is a payment from a deposit or transaction account. A “recurring payment” is a payment from a credit card.
49. Financial counsellors may advise their clients to cancel direct debits and recurring credit card payments so they can prioritise their debts and manage expenditure. There are two main difficulties with these payment mechanisms.
50. First, both direct debits and recurring payments are hard to cancel. People are often told it is not possible to cancel these payments and they need to approach the merchant. Being able to cancel a direct debit or a recurring payment however is a basic banking right. A person who wants to cancel a payment, and manage their own money, is withdrawing their authority for a third party to access their bank account. Banks should act on that instruction.
 - a. There really is no excuse for ongoing problems in cancelling direct debits as deposit and transaction accounts are part of bank systems. Where a bank fails to act on a request to cancel a direct debit, a penalty should be imposed.
 - b. We accept that recurring payments are more complex, because they involve card issuers such as Visa or Mastercard. The Australian Banking Association is now doing some intense work on a solution. But it is not acceptable that these problems have been going on for so long and have been virtually ignored until now. People should not have to approach the merchant. The industry needs to commit to fixing the problem within 12 months.
51. Second, even when a direct debit was clearly cancelled or a deduction was unauthorised it can be very difficult to get the money back. Sometimes this can take weeks and in turn, this will compound any financial hardship. It is simply unfair that money can be taken so quickly and yet returned so slowly.
52. The industry needs to put in place faster mechanisms in these situations.

Last resort compensation scheme

53. The supplementary final report of the review of the financial system external dispute resolution and complaints framework recommended the establishment of a compensation scheme of last resort.⁹ We strongly support this recommendation. The scheme however needs to have a wider remit to ensure it covers all unpaid decisions, not just financial advice failures.
54. Trust and confidence in the financial services sector is eroded when people seek redress and do not receive the compensation to which they are entitled. This can have a devastating effect where the person cannot recover financially from being the victim of misconduct. The compensation scheme of last resort is a safety net and is necessary to maintain confidence in financial services in Australia.

External Dispute Resolution (FOS/AFCA)

55. Free and independent external dispute resolution (EDR) has been one of the most positive developments for consumers in the last thirty years. It is incredibly important that it continues to work well.
56. By and large, EDR has been a success story — we have confidence in the external review processes in place and the ongoing consultations and stakeholder engagement that is a hallmark of FOS/AFCA and allow it to adapt.
57. We are very concerned however that people are at a serious disadvantage in disputes:
 - a. which are complex, such as can occur in lending, but particularly in financial advice; and/or
 - b. where the disputant is vulnerable in some way.
58. In these circumstances, the consumer needs access to expert advice and assistance to run their dispute. AFCA needs to recognise these situations and ensure this assistance is provided.

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September 2017 available at <https://static.treasury.gov.au/uploads/sites/1/2017/11/Supplementary-Final-Report-2.pdf>

2

Small and medium enterprises

INTRODUCTION

59. Financial counsellors, particularly those answering calls on the National Debt Helpline, report more and more contact from small businesses experiencing financial difficulty. We are only able to partially help. This is because the licensing exemption for financial counsellors only applies in relation to assisting people with individual debts. For example, financial counsellors could assist if a person had provided a personal guarantee and their home was at risk, but not in relation to debts for the company that had been guaranteed.
60. There are also anecdotal reports of predatory lending to small business people which are very worrying.
61. There is a big gap in providing assistance to small businesses facing financial difficulty. This contrasts with the UK where they have a specialist advice line called Business Debt Help.¹⁰ This is run by the UK National Debt Line. The National Debt Line is the equivalent of Australia's National Debt Helpline (which FCA coordinates).
62. The reason we believe are receiving more contact probably reflects changes in the workplace, with more people working as contractors, rather than employees.

RESPONSE TO QUESTIONS IN THE INTERIM REPORT

Legal framework

Should there be any change to the legal framework governing small and medium enterprise (SME) lending?

In particular, should any lending to SMEs come within the reach of the *National Consumer Credit Protection Act 2009 (Cth)* (the NCCP Act)?

63. Small business should have basic consumer protections when accessing finance and should be included within the NCCP Act. These protections include:
 - a. adequate disclosure;
 - b. interest rate caps (currently 48% p.a. for consumer loans);

¹⁰ See <https://www.businessdebtline.org/>

- c. right to receive default notices with time to rectify a default;
- d. notices before repossession;
- e. a right to apply for financial hardship;
- f. a right to receive account statements.

64. Lenders to small business need to be members of AFCA.

3

Remote communities

INTRODUCTION

FCA involvement with round four

65. FCA's involvement in round four of the hearings included:
- the appearance of FCA staff member Lynda Edwards as a witness at the Commission's hearings in Darwin. Lynda is FCA's Coordinator Financial Capability;
 - after being granted leave to appear, providing a submission in response to the questions raised by Counsel Assisting in her closing address.
66. FCA provides support to financial counsellors and financial capability workers working in regional and remote communities with Aboriginal and Torres Strait Islander people. Our written submission, as well as Ms Edwards' witness statement, described the support we provide in some detail and is not repeated here.¹¹
67. Some of the policy points made in our written submission to round four are repeated or summarised below in answers to the questions posed by the Commission.

Acknowledging the good work that banks already do

68. There are many things that financial service providers can do better to assist their Aboriginal and Torres Strait Islander customers. It is important however to acknowledge that there are many positive things that the banking industry as a whole, or individual banks are already doing. This is not a full list, but some of these include Reconciliation Action Plans; ANZ's MoneyBusiness financial literacy program; Commonwealth Bank's Indigenous Customer Assistance Line (and we note Westpac has announced that it is also setting up a dedicated phone line); Westpac "pop up" branches in some remote locations and subsidised ATMs in a number of remote communities which makes them fee-free.

¹¹ Link to FCA's written submission is: <https://financialservices.royalcommission.gov.au/public-hearings/Documents/Round-4-written-submissions/Financial-counselling-australia-written-submission.pdf> - see paragraphs 4 – 9.

RESPONSE TO QUESTIONS POSED

69. Comments below from financial counsellors and financial capability workers were collected in by FCA in October 2018 to inform this submission. Some comments have been changed slightly for grammar or clarity.

Appropriate policies and procedures to assist Aboriginal and Torres Strait Islander People

Do financial services entities have in place appropriate policies and procedures to assist Aboriginal and Torres Strait Islander people:

- to overcome obstacles associated with the geographical remoteness?
- to address the cultural barriers to engagement that some face?
- to address the linguistic barriers to engagement that some face?
- to address the obstacles posed for some by their level of financial literacy?

“We can spend 1-2 hours with someone just to order a new card, or reset an online banking password along with having to remain calm and patient. The amount of times some community members just walk away because it is just too much to either deal with or just because they have waited way too long. There is no way a banking branch would allow this much time to be allocated to one person’s problem, so why is it ok for banks to provide such poor customer service to their remote customers?”

Financial counsellor

70. Although many of the banks have initiatives in place to assist Aboriginal and Torres Strait Islander people, as a general comment, financial services entities as a whole need to do much more to address the geographical isolation, cultural and linguistic barriers and low financial literacy that are part and parcel of life for many people living in regional and remote Aboriginal and Torres Strait Islander communities.
71. As an overarching comment, financial counsellors and capability workers say that physical access to banking services—either through branches or agencies—would make the most difference. This was a point that workers wanted to particularly emphasise in this submission.

- 72.** While dedicated phone numbers to contact banks are helpful, there is no substitute for people being able to actually go somewhere to do things like open accounts, prove identification or replace a lost card. In the absence of the physical presence of banks, financial counsellors and financial capability workers, spend a lot of time helping people to access the most basic of banking services.
- 73.** Other changes that are needed are:
- a. commitment by banks to engage in a partnership with local community services who may be able to offer a translation service;
 - b. geographical map in call centres to ascertain where people live compared to where bank branches are located;
 - c. that banks to commit to training for all bank staff around the AUSTRAC guidelines for identification for Aboriginal and Torres Strait Islander people;
 - d. ongoing cultural awareness training for bank staff;
 - e. banks identifying whether their customers are Aboriginal or Torres Strait Islander when opening accounts. By retaining that information, they would be better placed to ascertain whether the services they are delivering are meeting the needs of this customer group.
- 74.** The current Code of Banking Practice (2013), and the revised Code of Banking Practice, which comes into effect in 2019, both contain positive commitments toward helping Aboriginal and Torres Strait Islander people in remote communities with their banking needs, for example, in relation to suitable accounts.¹² Feedback from financial counsellors and capability workers however is that overall, these commitments are not followed through in practice.

Identification requirements

Are banks' identification requirements appropriate for Aboriginal and Torres Strait Islander customers?

If they are, are those policies sufficiently understood and applied by staff?

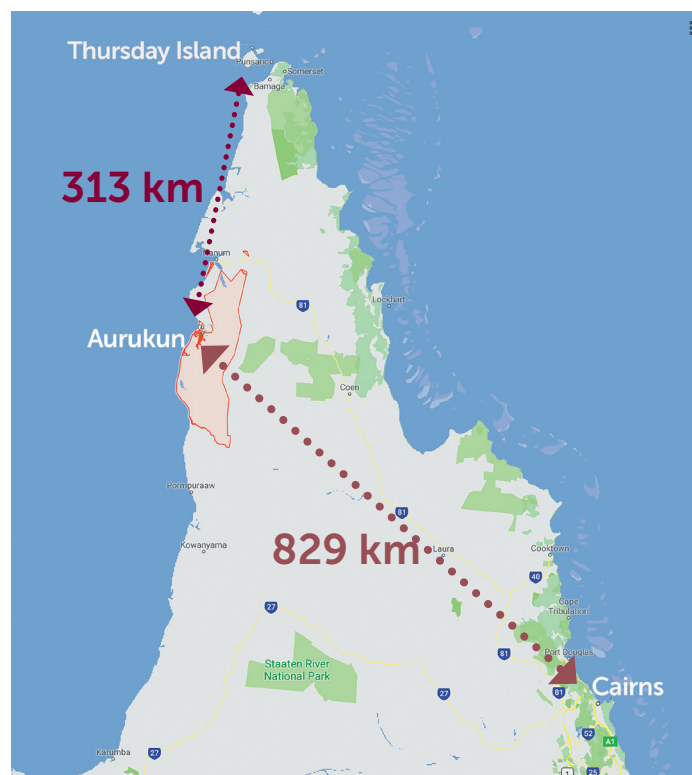
.....
12 Code of Banking Practice, clause 8 (b).

“A client came in concerned about suspicious transactions that had been deducted from her account. She had a printed statement and highlighted unknown transactions that she was sure that she didn’t do. I asked if the transactions may be coming out for a loan or if anyone had a card or her details; she said that no one had it. I assisted her to call the bank to discuss the payments, but she could not identify herself over the phone and was told to visit the nearest branch. I spoke to ANZ on her behalf to explain that she would need to travel to visit the branch and that she only wanted to identify suspicious activity. The bank staff member couldn’t assist and said that she would need to go to a branch as only the branch can take the lock off of her account after not identifying herself correctly.”

Financial capability worker

“NAB bank would have to be on the low for us out of the four – e.g. when a customer service representative doesn’t even know what AUSTRAC is and staff have to explain it, it is very concerning. We had an Aurukun community member call to activate a card, was unable to ID herself over the phone and locked out and told to go to the nearest branch.” (The map below shows that the closest NAB branches to Aurukun are either Thursday Island—313 km away or Cairns 829 km away.)”

Financial counsellor



75. In their submissions in response to round four of the hearings, each of the four major banks acknowledges the difficulties often faced by Aboriginal and Torres Strait Islander people living in regional and remote communities in relation to identification. Each bank has put in place arrangements that are meant to address this, including accepting the AUSTRAC guidance. The four major banks also commit to continuing to focus on this issue through initiatives such as ongoing training.
76. Based on feedback from financial counsellors and financial capability workers in regional and remote communities however, the problems are continuing in many areas.¹³ It seems therefore that the issue is one of implementation, rather than a lack of policy. We are sceptical that ongoing training will fix the problem because it hasn't in the past. This is one reason why dedicated phone lines would have more impact.

Telephone service staffed by specially trained employees

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

77. The Commonwealth Bank has had an Indigenous Consumer Assistance Line (ICAL) for a number of years. This is very helpful for Aboriginal and Torres Strait Islander people and financial counsellors and financial capability workers are generally positive about its operation. There have however been some concerns raised by some workers about its effectiveness recently, which we have passed on to the CBA's customer advocate. When operating as intended however, these type of services are useful for Aboriginal and Torres Strait Islander people because staff in them are trained to understand the specific issues facing them and respond appropriately to issues such as remoteness and identification.
78. In our experience, the Commonwealth Bank and Westpac have the most customers in regional and remote Aboriginal and Torres Strait Islander communities. ANZ and NAB may have fewer customers, but certainly have enough customers to justify a specialist telephone service. ANZ, in its submission in response to the round four hearings, says its preferred approach is not to set up a special line. NAB says there is not enough evidence of the need for a special line and that alternative forms of communication may be more equally or more effective. The NAB submission does not explain what those forms of communication might be.

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An agency in Darwin reported far fewer identification problems recently as the NT Government recently made free birth certificates available. The relevant government department visited a number of remote communities helping people to get certificates. Together with a Centrelink card and bank card, the 100 points of ID is easier.

79. We submit that the four major banks, because of their reach, have an obligation to provide telephone lines of this nature for two reasons. First, and most importantly, banks provide an essential service—everyone in our community needs to be able to access a bank account. Second, banks profit from having Aboriginal and Islander people as customers. If an organisation makes money out of a group of customers, then they need to actually provide services to that group.

Promotion of fee-free accounts

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

“An even larger issue that we see, is that front line banking staff don’t even know that these fee free accounts exist. It’s as if they only exist in concept and haven’t been promoted within institutions, let alone to customers that could use them.”

Manager of a financial counselling agency

“I for one have seen zero clients in Katherine who have one of these accounts, would be great to have the banks pursue this option with their customers as a standard procedure.”

Financial counsellor

80. Overall, the answer is no.¹⁴ The majority of feedback from our sector is that while there is passive promotion of the existence and availability of fee-free accounts by banks to eligible customers, for example on a website, there is no proactive contact. Some financial counsellors also gave examples of banks refusing to change clients from fee-charging accounts to fee-free, basic bank accounts.
81. This is an issue that affects Aboriginal and Torres Strait Islander people in remote communities, many of whom would be eligible for these accounts, as well as many other Australians, such as people in receipt of Centrelink payments, for example, the disability support pension. It is hard to know exactly how many people are missing out, but anecdotally we believe the numbers would be large.

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One financial counsellor gave an example of bank branch where the manager had instructed staff to change customers to fee-free accounts if they thought they would be better off as this was the right thing to do. He said this was an exception and had not heard of this happening before. Another financial counsellor said there had been a recent improvement in their view with the banks in their area opening the right accounts.

82. We asked financial counsellors and capability workers working in remote communities for examples of de-identified bank statements for any of their clients who were actually paying fees but would have been eligible for a fee-free account so that we could illustrate this issue. There are two examples below. Because many people on Centrelink incomes struggle to have enough money to live on and when they end up with a fee-charging account this can directly contribute to financial hardship. In both of the examples, the clients of the financial counsellor are charged ATM fees (see “other reforms needed” below), overdraw fees and debit interest.

CommonwealthBank
Commonwealth Bank of Australia
ABN 48 123 123 124
Australian credit licence 234945

Account Number [REDACTED]
Page 1 of 6

[REDACTED]

19 September 2018

[REDACTED]

Here's your account information and a list of transactions from 19/06/18-18/09/18.

Account name [REDACTED]
BSB [REDACTED]
Account number [REDACTED]
Account type Smart Access
Date opened [REDACTED]

Date	Transaction details	Amount	Balance
19 Jun 2018	Direct Credit 015884 AUS GOV FAMILIES 841B9969400707334V	\$278.84	\$263.16
19 Jun 2018	Direct Credit 015884 AUS GOV FAMILIES FB1B9969400707334V	\$108.64	\$371.80
19 Jun 2018	Wdl ATM CBA ATM ATHERTON B QLD 480002 AUS	-\$300.00	\$71.80
19 Jun 2018	Wdl ATM CBA ATM ATHERTON B QLD 480002 AUS	-\$20.00	\$51.80
19 Jun 2018	Overdrawing Approval Fee For overdrawing that occurred 18/06/18	-\$10.00	\$41.80
21 Jun 2018	Wdl ATM ANZ CAZALYS SOCIAL CLB WESTCOURT AU	-\$40.00	\$1.80
21 Jun 2018	Non CBA ATM Withdrawal Fee	-\$2.50	-\$0.70
01 Jul 2018	Direct Credit 001248 CTRLINK NEWSTART 411B0315400707334V	\$196.10	\$195.40
01 Jul 2018	Debit Excess Interest	-\$0.03	\$195.37
01 Jul 2018	Account Fee	-\$4.00	\$191.37
02 Jul 2018	Non CBA ATM Enquiry Fee	-\$2.00	\$189.37
02 Jul 2018	Wdl ATM Red DCP-5 Star Handim Herberton AU	-\$50.00	\$139.37

7/24/2018 NetBank - Transactions

CommonwealthBank *Current 3 mths.*

Streamline

Available + \$0.57 Balance + \$0.57

Date	Transaction details	Amount	Total
22 Jul 2018	Wdlt ATM CBA ATM ATHERTON SQ QLD 480099 AUS	- \$170.00	+ \$0.57
19 Jul 2018	Non CBA ATM Withdrawal Fee	- \$2.50	+ \$170.57
19 Jul 2018	Wdlt ATM Red DCP-Foodworks Rav Ravenshoe AU	- \$50.00	+ \$173.07
19 Jul 2018	Non CBA ATM Enquiry Fee	- \$2.10	+ \$223.07
19 Jul 2018	ERGON ENERGY QLD P/L NetBank BPAY 1552 114104265 Ergon electricity	- \$50.00	+ \$225.17
19 Jul 2018	Direct Credit 001248 CTRLINK NEWSTART 411B0809403369972J	+ \$329.92	+ \$275.17
13 Jul 2018	Overdrawing Approval Fee For overdrawing that occurred 12/07/18	- \$10.00	- \$54.75
12 Jul 2018	Direct Debit 495750 Eric Insurance L MOTFOA141072486M	- \$46.12	- \$44.75
05 Jul 2018	Wdlt ATM CBA ATM ATHERTON SQ QLD 480099 AUS	- \$280.00	+ \$1.37
05 Jul 2018	ERGON ENERGY QLD P/L NetBank BPAY 1552 114104265 Ergon electricity	- \$50.00	+ \$281.37
05 Jul 2018	Direct Credit 001248 CTRLINK NEWSTART 411B0429403369972J	+ \$329.92	+ \$331.37
01 Jul 2018	Account Fee	- \$5.00	+ \$1.45
01 Jul 2018	Debit Excess Interest	- \$0.22	+ \$6.45

83. This problem has been raised with the banking industry on numerous occasions. We have asked the banks if they could proactively contact customers in receipt of Centrelink payments who are paying fees on their bank accounts and consider whether they would be eligible for a basic bank account. While not everyone in receipt of Centrelink would be eligible, a large proportion would be. We have been told that the barrier is a technical one and that Centrelink codes for deposits vary and therefore cannot be consistently identified.
84. While not dismissing this as a rationale, we have some scepticism about this being the complete reason. We suspect it may also be because it would cost the banks to be proactive and would lead to reduced fee income. Bank statements do identify payments as coming from Centrelink. One would think that if bank systems were able to flag the income source consistently, it would be possible to undertake a matching exercise looking at which customers were in receipt of Centrelink and whether they were paying fees on their account.

85. We also note ANZ's submission in response to the round four hearings in response to question 30 from counsel assisting and the provision of informal overdrafts. ANZ explains that it: "does not offer informal overdraft facilities in response to a customer's request for credit unless the customer "passes" the relevant exclusion criteria". One of the exclusion criteria is that "the customer must not have received unemployment benefits within a specified period" – presumably Centrelink Newstart Allowance. It seems therefore that the bank can identify Centrelink payments after all.
86. We also submit that banks should be required to report on the number of customers in receipt of basic bank accounts so that there is some accountability and transparency for the industry about the provision of this important service. The Banking Code of Practice could be amended along these lines.

Basic bank accounts

If a customer seeking to open a basic bank account has no substantial income other than Centrelink benefits, should a bank ever try to sell the customer another form of account?

87. No. We find it difficult to imagine any circumstances where a person with no substantial income other than Centrelink, should be given any form of account, other than a basic bank account. Basic bank accounts allow people to access an essential service – a transaction account. One of the key features of these accounts is that they are fee-free. For people on low incomes this is a really important as every single dollar counts.
88. Financial counsellors and capability workers report that branch staff do not always know about the existence of basic bank accounts. For example, one wrote "I now advise the client that if the staff member says the account cannot be opened, to ask for a supervisor."

Informal overdrafts and Centrelink beneficiaries

Should informal overdrafts be allowed on a bank account if credits to the account are only, or are substantially, by payment of Centrelink benefits?

"I had a case where I had a client who was a survivor of economic abuse. She had gone through the court system and thought she had finalised the finances when she got contacted by a bank demanding \$4,000 due to them allowing her ex-partner to write cheques on an account with no facilities."

Financial counsellor

- 89.** Definitely not. Banks justify the provision of informal overdrafts as somehow meeting a customer “need”, such as not having enough money at a supermarket checkout. What happens more often than not is that these facilities leave people in receipt of Centrelink benefits with really expensive debt.¹⁵ Obtaining an overdraft, when someone is on a fixed, low income inevitably leads to having less money to live on—when the next Centrelink payment arrives as it has to go toward the debt. A short-term fix, can lead to long-term harm.
- 90.** More broadly, we submit any overdraft provided by a lender should be on the basis that a person opts in—we would characterise this as a formal overdraft. So-called informal overdrafts, which people do not explicitly request, should be prohibited.
- 91.** The words “opt in” mean making an informed choice. They do not mean, as ANZ argues disingenuously, because “the customer has actioned or requested a transaction in circumstances where the account contains insufficient funds”.¹⁶
- 92.** In relation to basic bank accounts, it should be the case that overdraft facilities cannot be attached. This is the case for example with Westpac.¹⁷ The main feature of a basic bank account is that it is fee-free. This is important as the target market for basic bank accounts are people on low incomes, generally in receipt of Centrelink payments. It is antithetical to allow for overdrafts which are a form of high cost credit. It is particularly egregious when they are unarranged or informal.
- 93.** In relation to the provision by ANZ of informal overdrafts, we hope that the bank will engage in a remediation program to identify and compensate people on Centrelink benefits who were given these inappropriate facilities.

Code of Operation

Should the application of the 90% arrangements provided by the Code of Operation be at the discretion of the bank, the customer or both? Or should banks apply these arrangements automatically?

- 94.** The Code of Operation places the onus on the bank to apply the 90% arrangement, not the customer. What is happening in practice however, and as the ANZ case studies in the round four hearings confirmed, the onus is inappropriately being placed on customers.
- 95.** It is fair to say that most people in receipt of Centrelink payments will not have heard of the Code of Operation. This means that if a person’s account overdraws, they will not know that they can ask the bank to apply the 90% arrangement. In our experience, it is often only after a financial counsellor or financial capability worker intervenes that the 90% arrangement is

15 In the case of ANZ’s informal overdrafts, \$60 per month and an interest rate calculated at the ANZ retail index rate plus 8.5 per cent (over 17% in total).

16 ANZ written submission in response to round four, paragraph 96.

17 Westpac written submission in response to round four, paragraph 102.

applied. The purpose of Centrelink payments is to provide basic food and accommodation. If Centrelink payments are significantly reduced in order to repay an overdraft, the impact on people is severe. It is appropriate, and makes more sense, for the current arrangement in the Code of Operation to continue and that the onus for applying the Code is placed on the bank. This will mean that the banks will need to have processes in place to identify customers who are receiving Centrelink payments and then if their account overdraws, apply the 90% arrangements.

96. The broader issue however is to reduce the incidences of overdrawn accounts. First, many people in receipt of Centrelink payments should have basic bank accounts, which generally preclude overdrafts, not fee-charging accounts that allow overdrafts. Our answer to the question above about the availability and promotion of basic bank accounts is relevant. Second, we submit that informal overdrafts should not be a default position, but only available to customers who provide informed consent and opt in.

Direct debit dishonour fees

If direct debits are dishonoured for want of sufficient funds, are there cases in which dishonour fees should not be charged?

“One problem we feel is still very prevalent are clients being charged fees for direct debits not being made, or dishonour fees. These can add up to \$100s of dollars a month.”

Financial counsellor

97. Direct debit dishonour fees are not charged on basic bank accounts. As set out in our answers to questions above if more people who were eligible for basic bank accounts actually had them, the problem of dishonour fees would reduce dramatically.
98. The other issue with direct debit dishonour fees is they soon add up. For example, the Commonwealth Bank charges an “overdrawing approval fee” of \$10 per day for each day they honour a transaction if a balance falls below zero or the balance exceeds an approved overdraft.¹⁸
99. We make more comments about direct debits generally in Part 1 of this submission.

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https://www.commbank.com.au/personal/apply-online/download-printed-forms/SavingsInvestment_ADB2852.pdf, p 17.

Funeral policies and product intervention powers

Are funeral policies, or particular kinds of funeral policy, financial products warranting intervention by ASIC in the exercise of its product intervention powers?

- 100.** All funeral insurance policies (including funeral expenses policies) should be subject to intervention by ASIC in the exercise of its product intervention powers. There are serious and systemic problems with the sale of funeral insurance to Aboriginal and Torres Strait Islander communities. There are two major systemic issues:
- a. it is a poor value product. ASIC provided evidence of this to the Commission including that premiums paid are often higher than the benefit, many policies are cancelled and the benefits paid are only one third of the premiums collected; and
 - b. the sale of funeral insurance has been completely inappropriate and exploitative. There has been no regard to suitability of the product and it has been sold unethically with enormous harm.
- 101.** The systemic harm in selling funeral insurance includes:
- a. leaving Aboriginal and Torres Strait Islander people with insufficient money to pay basic living expenses so the funeral premium is paid;
 - b. paying for insurance for children and young adults who, according to life expectancy tables, will not die until they are in their 70s;
 - c. seeing the policy cancelled after many years of payments because the person experiences hardship; and
 - d. being told the insurance will cover all the costs when it does not cover the travel of kin to the funeral.
- 102.** The sale of funeral insurance to Aboriginal and Torres Strait Islander people should urgently be subject to intervention by ASIC as soon as it has the power to do so. That power needs to be comprehensive and cover all types of funeral insurance. It would be a failure of regulation if these problems just continued by exploiting loopholes in how funeral insurance is regulated.
- 103.** ASIC cannot completely fix some of the issues identified here. There is a fundamental problem in expecting that for-profit insurance companies are going to ethically tailor a product for Aboriginal and Torres Strait Islander people. Another option would be a savings scheme through Centrelink that is developed with cultural sensitivity and to ensure that the premiums are affordable and the benefits are paid to cover the funeral expenses needed.

Funeral insurance and the Corporations Act

Should all forms of funeral insurance be financial products for the purposes of Chapter 7 of the Corporations Act 2001 (Cth)?

- 104.** Yes.

Funeral insurance and the ASIC Act

Should all forms of funeral insurance be covered by Part 2 Division 2 of the Australian Securities and Investments Commission Act 2001 (Cth)?

- 105.** Yes. There is no justification for the basic consumer protections in Part 2 Division 2, not including all forms of funeral insurance.

Selling funeral insurance to persons under 18 years

Should it be unlawful to sell funeral insurance for persons under 18 years?

- 106.** Yes. Funeral insurance policies for people under the age of 18 are effectively junk policies.
- 107.** Parents taking out funeral insurance on behalf of children are unlikely to claim and run the risk of paying thousands of dollars in premiums or find they are unable to keep up with the payments and lose the money anyway.
- 108.** In our round four submission we submitted that funeral insurance is of very poor value for anyone under 30. In summary, our reasons were:
- a. the average life expectancy for Australians is over 80 years of age. Life expectancy varies depending on when a person was born however the risk of dying when a person is under 30 is rare;
 - b. there is a real risk of paying premiums far in excess of the actual benefit received when funeral insurance is taken out when a person is young; and
 - c. It is likely that young people who do (unfortunately) die before the age of 30 will have parents who can afford to pay for, or raise money for, their funeral.
- 109.** It is likely that funeral insurance will be very poor value for people under 30. They are unlikely to claim until they are older and pay way too much for the product. It is also noted that when people under 30 die, they often have parents and siblings who can assist with the costs of the funeral.
- 110.** The Commonwealth Government has recently recognised the detrimental impact of insurance premiums on the superannuation balances of young people. It is currently proposed in the *Treasury Amendment (Protecting Your Super) Bill 2018* to make insurance opt-in for people under 25 years old. This recognises the poor value of life insurance for young people.
- 111.** Superannuation funds should have a streamlined process for paying out the funds in superannuation to pay for a funeral. FCA provided a detailed proposal for how this could assist people to avoid poor value funeral insurance in our submission to Treasury on the early release of superannuation.¹⁹

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See. 4.4 of joint submission Early Release of Superannuation Benefits Under Compassionate and Financial Hardship Grounds and for Victims of Crime, available at <https://www.financialcounsellingaustralia.org.au/Corporate/Publications/Submissions>.

OTHER REFORMS NEEDED

Product suitability requirements for funeral insurance

- 112.** There is no requirement in the law to require that the sale of funeral insurance is suitable for the needs of the person buying the insurance. The duty of utmost good faith has not prevented exploitative selling of completely inappropriate funeral insurance. A product suitability requirement is necessary to ensure that people buying insurance get the insurance they need. This is not about giving advice it is about ensuring that the product sold is fit for purpose and meets a person's needs.
- 113.** People rely heavily on insurance. It is the safety net for when things go wrong. It is absolutely essential that the safety net operates in a way that the person expected and actually operates to pay a reasonable claim. For Aboriginal and Torres Strait Islander people in remote communities insurance is a big expense that needs to meet their needs. When there is no requirement that insurance is suitable then the problems identified will continue.
- 114.** Double insurance may occur where a person buys insurance to cover the same risk. This can occur by buying different policies with overlapping coverage or by buying the same insurance twice. This is a poor outcome for people. Double insurance is usually a waste of money as you may be prevented from claiming on the second policy because of the terms of one or both of the policies. Product suitability requirements could address this issue by ensuring that the insurer asks questions about existing insurance held.

Unfair terms in insurance

- 115.** We also note the importance of unfair terms legislation being introduced to cover insurance products. It is an anomaly that unfair terms laws have been introduced for all other financial and consumer products but not insurance.

Minimum standards in insurance

- 116.** People, including Aboriginal and Torres Strait Islander people, usually do not read PDS documents. The PDS does not operate as an effective way to disclose. This means that most people have to hope the insurance policy covers the expected claims. Unfortunately, some insurance is very narrow in coverage which people only discover when a claim is refused. The *Insurance Contracts Act* contains standard terms which every insurance company in Australia contracts out of, so they can replace the terms with their own. This leaves people without any minimum standards of coverage for insurance. Minimum standards in insurance need to be part of the regulatory framework so people can have confidence that when they buy insurance they will be covered for at least the basics.

ATM fees

“It is appalling that our remote community members are so isolated from mainstream services yet are still required to do so much without the service being available to them. On top of the pressures people face day to day, there are still so many communities that do not have fee free ATMs. The only avenue to access their money is via the ATM which can charge between \$2.50 – \$2.90 per withdrawal or enquiry. How many times have we seen 3 – 4 ATM fees being charged on their bank statement merely by people checking if their pay has hit their account. We are continuously trying to educate and raise awareness around healthy money management practices and work with people to make the most of every dollar they receive only to find that some can pay up to \$60 in monthly bank fees per year and estimated average of \$240 in ATM fees per year. That is \$300 per year!!!!!!”

Financial capability worker

- 117.** As described in the round four hearings, the banks recognise the detrimental impact that the high cost of ATM fees can have on Aboriginal and Torres Strait Islander people in remote communities. To address this, collectively, with the authorisation of the ACCC, they are subsidising the cost of ATMs in a number of remote communities.²⁰ The problem is that not enough ATMs are included in the arrangement.
- 118.** To adequately fix this issue, there needs to be an audit to assess the numbers of regional and remote communities where fee-charging ATMs remain and there is no realistic access to other options for people to check their bank balances or withdraw cash.
- 119.** In the meantime, Appendix 1 is a list of communities that financial counsellors and capability workers believe would meet the criteria in the agreement, namely that they are genuinely remote, the ATM is in a community store which does not provide alcohol or gambling services and there are no alternative banking services.

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ACCC Authorisation No A91593. The agreement took effect on 12 January 2018.

4

Regulation and the regulators

INTRODUCTION

Comments about ASIC

- 120.** ASIC has come in for a reasonable amount of criticism as a result of the Royal Commission: some of it fair and some of it unfair. What this highlights is just how difficult it is to be a regulator. You can be damned if you do; and damned if you don't. For example, ASIC was criticised for its litigation in the Cash Store case by some media commentators – even though the decision was hugely important in relation to responsible lending, and the penalty at the time was the largest of its kind, the case was somehow said to be too easy, because the company by then was in liquidation.
- 121.** What we should not forget is that ASIC works in a highly political environment. We're kidding ourselves if we think that Governments make decisions about policy and legislation and the regulator based on a deliberate and considered weighing up of the evidence. These things are always highly contested – witness the Future of Financial Advice process. We should not be surprised that financial services lobbyists work overtime to wind back or stop changes that they believe may affect the bottom line of their businesses. The inner workings of this have also been exposed by the Royal Commission.
- 122.** While ASIC could definitely have been braver sometimes and also been prepared to litigate more, we should not lose sight of all of the good things that have occurred in terms of consumer protection. These include, and this list is just for illustration as there are many examples:
- a. a series of seminal reports on add-on insurance which resulted in refunds of around \$120 million to consumers and a fundamental change for the better in the industry business model;
 - b. the BMW Finance enforceable undertaking that led to \$72 million in remediation to affected consumers; and
 - c. litigation against consumer lease provider, Radio Rentals that led to \$6.1 million in refunds for consumers and write offs of debts.
- 123.** We also need to recognise that ASIC has not always had the tools it needs, such as the soon-to-be-introduced product intervention power (which should be extended to credit) nor adequate funding.

Outcomes based regulation

124. The Royal Commission is very interested in exploring whether there is a need to simplify the law in financial services. One approach that we definitely need to consider in Australia is a greater use of outcome or performance-based regulation. Current regulatory responses, with their over reliance on disclosure or prescriptive conduct obligations, are no longer fit for purpose.

125. Performance-based regulation moves the focus and responsibility to the outcomes of a firm's behaviour and the promises they make about their products and services. An example from US academic Lauren Willis, illustrates how it could work in practice:

"Take fees, such as overdraft fees on bank account debit card transactions, for example. While the law requires that fees be disclosed to consumers, nothing ensures that consumers understand each fee or are aware of each fee at the time that they could use this knowledge. A comprehension performance standard might require that at least 80 percent of consumers who are paying a given fee know the existence and amount of the fee at the time that they are deciding whether to take the action that will commit them to paying it. To assess performance, regulators or third-party auditors might survey a random sample of a firm's customers who have just incurred the fee. Failure to meet the 80 percent benchmark might result in a penalty, such as requiring the firm to disgorge fees or portions thereof over a look-back period. Exceeding the benchmark might result in a longer interval before the firm's next performance test."²¹

126. The beauty of this approach is that it would unlock competition. In the example above, sellers have an incentive to explain fees to their customers rather than hide them in the terms and conditions.

127. This kind of approach would not be needed in straightforward markets, but will be appropriate in complex markets like finance, telcos and energy. The approach may seem radical to some, because it would fundamentally change the way these big businesses operate - but for the better.

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Lauren Willis, Performance-Based Consumer Law, Legal Studies Paper No 2012-39, 82 U. Chicago L. Rev. 1309 (2015), p 1312.

RESPONSE TO QUESTIONS

128. We have not responded to all of the questions posed by the Royal Commission in this chapter.

Governing law and complexity

Is the law governing financial services entities and their conduct too complicated?

- Does it impede effective conduct risk management?
- Does it impede effective regulatory enforcement?

Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?

129. The law is extensive and sometimes complex. To a large extent this is because financial service products themselves are complex, sometimes deliberately so, and competition between providers isn't effective in driving good consumer outcomes.²² Instead, we need to rely on regulation to drive those consumer outcomes.
130. A good example is in relation to credit cards. Over time, Governments have progressively intervened in this market so that consumers are treated fairly and protected from harmful practices. For example, providers have been forced to: simplify the way interest on outstanding balances is calculated so that it is fair, allow people to cancel their credit cards online, cease sending unsolicited credit card limit increase offers and to assess affordability not on the minimum payment, but on the ability to repay the full limit within three years.
131. An outcomes-based approach to regulation, described above, may go some way toward simplifying the law, but it is hard to see how much of the specific, black letter law could be unwound without dire consequences. Our concern is that "simplification" in this context could be code for watering down the law.

ASIC's remit

Is ASIC's remit too large?

- If it were to be reduced, who would take over those parts of the remit that are detached?
- Why would detachment be better?

132. There is no doubt that ASIC's remit is large, reflecting the size of the financial services marketplace. The premise of this question however, is that if there are failings, they can at least in part be attributed to the size of ASIC's task. In

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See the Interim Report, Volume 1, p 268 also "Competition within the banking industry is weak."

our view however, the size of the task is not the most relevant factor.

133. In looking at structural changes, one option likely to be suggested by some stakeholders is to hive off ASIC's consumer protection roles from functions related to market conduct, accounting standards and so on.
134. We do not think this is a sensible idea. There is an old adage: divide and conquer. A smaller agency risks having less funding and less impact. In our experience, agencies focusing on "consumer protection" never seem to get the attention they deserve from governments and the important work they do is downplayed.
135. It would be helpful however if the ACCC and ASIC had concurrent powers in relation to the consumer protection provisions in the ASIC Act, so that the ACCC could take action on matters involving misleading or unconscionable conduct.

ASIC's enforcement practices

Are ASIC's enforcement practices satisfactory? If not, how should they be changed?

136. There are a number of measures that need to be in place for ASIC to be an effective regulator:
 - a. adequate funding is an obvious one, and that has not always been the case;
 - b. clear and unambiguous legislation that sets conduct standards;
 - c. an appetite and culture of enforcement and strong leadership;
 - d. a full suite of regulatory tools that is reviewed and updated as needed.
137. The debate should not be about whether there is less litigation or more litigation, or less use of enforceable undertakings or more use of enforceable undertakings. The principle is that the right enforcement tool is used at the right time. To some extent, this will always be a matter of judgment.
138. Funding is a major consideration if ASIC focuses on litigation. Litigation is costly and consumes time and resources. Litigation does however serve a range of important public interest purposes including clarifying the law, sending clearer messages to industry about appropriate behaviour, it may force law reform (if the litigation is unsuccessful) and may result in civil penalties.
139. For disclosure, we note that FCA and the financial counselling sector have been the beneficiaries of community benefit payments from ASIC enforceable undertakings. A number of worthy groups have also been recipients.
140. Enforceable undertakings in our view have their place. Importantly, they can lead to refunds to the people who lose money as a result of the poor behaviour, something that is less certain with court action. They are also much faster.

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Other relevant policy issues

141. This part covers other policy issues relevant to the work of the Royal Commission.

FUNDING FOR FINANCIAL COUNSELLING AND CONSUMER CREDIT LAWYERS

“When financial problems become acute, consumers can and do seek financial counselling.”

Interim Report, Volume 1, p 52.

142. The Royal Commission has clearly demonstrated the aggravating role that Australia’s biggest financial institutions play in causing financial hardship. They have lent irresponsibly, sold useless insurance products, lied to the regulator and not complied with the law or their own codes of practice.
143. The Commission found that irresponsible lending in particular has affected hundreds of thousands of people, and that the consequences can be “profound”.²³ This conduct is particularly harmful for people on low incomes.
144. Irresponsible lending is a common element of financial counselling and consumer legal centre casework. While lenders go to considerable trouble to avoid bad debts, the evidence from ASIC enforcement action²⁴ and the Royal Commission²⁵ shows there is still significant profit in pushing borrowers to the edge – not so far that they default (although some do), but far enough that they experience financial hardship.
145. There is also widespread irresponsible lending by financial services entities not included in the Royal Commission such as payday lenders and rent to buy household goods companies.²⁶

23 Interim Report, Volume 1, p 54.

24 For example, “Westpac admits to breaching responsible lending obligations when providing home loans and a \$35 million civic penalty”, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-255mr-westpac-admits-to-breaching-responsible-lending-obligations-when-providing-home-loans-and-a-35-million-civil-penalty/>.

25 Interim Report, Volume 1, p25.

26 Examples include: ASIC required Cash Converters to refund \$10.8 million to people who took out loans between 1 July 2013 and 1 June 2016 for failing to make reasonable inquiries into people’s income and expenses - <https://www.moneysmart.gov.au/tools-and-resources/news/cash-converters-refunds>; in May 2018, the Federal Court ordered Thorn Australia’s Radio Rentals to pay a \$2 million penalty for contravening its responsible lending obligations.

- 146.** People experiencing financial hardship can benefit from financial counselling (see Appendix 2) and consumer credit legal advice. Because demand for these services is at unprecedented levels however, many people miss out. For example, across Australia face to face financial counselling services have waiting lists, while calls to the National Debt Helpline (the phone financial counselling service) increased by 12% last year.
- 147.** The fundamental problem is that financial counselling is chronically underfunded. The Federal Government investment of \$20 million and State Government contributions of \$30 million is inadequate for the rising number of Australians needing help each year.
- 148.** We submit that financial services entities should contribute toward the costs of funding financial counselling and consumer credit legal services for a number of reasons:
- a. financial services businesses profit from their lending practices, including irresponsible lending, but rarely pick up any of the subsequent costs. These costs can be substantial and include increased demand on charities for food or vouchers to pay electricity or telco bills or emergency housing. There are detrimental flow on effects to health and relationships and these are borne by individuals, government and tax payers.
 - b. Banks in particular refer their customers to financial counsellors for help, but only provide minimal contributions to the sector.
 - c. The community expects banks to help customers in good and bad times. As a community, we confer enormous benefits on businesses granted a banking licence and it is reasonable to expect a contribution in return.
- 149.** Rather than relying on limited, unpredictable and piecemeal government funding, our suggested funding mechanism would be an industry levy that sourced financial counselling and consumer credit legal centre funding from those businesses generating much of the demand.
- 150.** This approach would replicate that in the UK, where an industry levy funds both the corporate regulator and community based financial counselling (called debt advice). We have part of this model in Australia with our corporate regulator ASIC now funded through an industry levy.²⁷ It would be relatively straightforward to adapt this model to source funding for financial counselling and consumer credit legal services.
- 151.** An industry levy would include all of the financial services entities regulated by ASIC such as payday lenders, debt collectors and insurers, as well as the major banks. All of these businesses interact with financial counsellors and consumer credit legal services.

.....

²⁷ The ASIC industry funding levy will raise about \$250 million in the 2018-19 financial year. Some regulated entities pay a flat fee, others pay a graduated fee depending on their size or level of business activity.

- 152.** There are 500 full-time equivalent financial counsellors in Australia at present. To go some way toward meeting demand, this number needs to double to 1,000 full-time positions. This funding would mean that:
- a. face to face financial counsellors could assist an additional 125,000 people; and
 - b. the National Debt Helpline would assist an additional 100,000 people.
- 153.** There is more information about this proposal in a separate submission lodged by the National Association of Community Legal Centres and Financial Counselling Australia.

EMPATHY AND KINDNESS

- 154.** And finally, we want to finish this submission by talking about empathy and kindness. That may seem strange in a submission of this nature and in the environment of a Royal Commission. But empathy and kindness are at the heart of restoring trust.
- 155.** Empathy means being able to understand the joy and sadness of others, to at least attempt to walk in their shoes: to hear what they hear, to see what they see, to feel what they feel.
- a. One of the reasons the Royal Commission has been so powerful is empathy. We have seen at first hand the impact that poor practices in banking, superannuation and insurance have had on the lives of people.
 - b. We heard from Nalini a single mother of two who ended up with a car loan she couldn't afford, from Robert a 72 year old an aged pensioner whose hardship left him seeking assistance from charities, from David who told the bank he had gambling problem but they gave him a loan anyway, from Grant whose 26 year old son with Down syndrome was sold junk funeral insurance ...
- 156.** And If we were just a little kinder to each other, we would do so much more for people who are experiencing vulnerability. We would understand that poverty and disadvantage is not primarily an individual failing, but a structural one.
- 157.** Our concern is that as a community we are becoming increasingly disconnected from one another. If we're wealthy, we rarely rub shoulders with people who are less well off.
- 158.** Some of our public commentary, critical of others such as those in receipt of Centrelink benefits, comes from a fundamental misunderstanding of what it is like to be poor or sick. We know as financial counsellors that people experiencing money and debt problems often feel shame and embarrassment and this means the extent of the problem, to some extent, remains hidden.
- 159.** How then do we build empathy and kindness into the business world? The

most important thing is for all of us, but particularly those in decision-making roles, to leave our desks. It isn't rocket science – we simply need to go and talk to people.

- 160.** It means consciously building empathy into product and policy development processes. It means understanding, at a deep level, the impact that decisions will have on people – not “customers” and not “members” and not “clients” – but people.
- a. It could mean coming and listening to some calls on the National Debt Helpline to understand how some people are grappling with whether to pay their utility bill or buy food.
 - b. Or it could mean traveling to a remote Aboriginal community to understand the challenges of distance and language and the importance of cultural obligations.
- 161.** We need to talk about empathy and kindness as fundamental values and recognise we live in a community, not an economy. Our collective aims – business, government and the community sector – are to advance our common interests. Not our self interest.

Appendix 1

LIST OF REMOTE COMMUNITIES MISSING OUT ON FREE ATMS

This list is based on feedback from financial counsellors and financial capability workers. This list is not definitive and is based on responses to an email request for information.

Queensland

Aurukun²⁸

Northern Territory

Galiwin'ku

Gapuwiyak

Groote Eylandt - The ATMs in stores in the Annindilyakwa Aboriginal Communities - Eylandt, Angurugu and Umbakumba - all charge fees.

Gunbalanya

Milingimbi

Ramingining

Warruwi

Financial counsellors and capability workers report there are 72 remote Aboriginal communities in the NT and only 37 of them have free ATMs. We were told that Minjilang (Croker Island) is included in the ATM agreement, but that the ATM is actually not free.

Western Australia

Beagle Bay community store

Bidyandanga (largest Aboriginal community in WA)

Camballin

Djarindjin

Imintji

Willare Roadhouse

Looma

Mount Barnett Roadhouse

Mowanjum

One Arm Point (Ardyaloon)

28 This has an agency for the Bendigo Bank, but it is not a realistic alternative banking service.

Appendix 2

DOES FINANCIAL COUNSELLING WORK?

Research into the effectiveness of financial counselling confirms it works.

2005 ANZ Qualitative Research

In 2005, ANZ commissioned qualitative research into financial difficulty. In relation to financial counselling the research concluded that:

“For people who saw a financial counsellor, it was unanimously a positive empowering experience for them, albeit at a negative point in their life. In addition, the majority stated it had changed the way they viewed their finances and changed their financial behaviour.”²⁹

2007 Consumer Affairs Victoria—randomly selected in-depth interviews

In 2007, the Consumer Affairs Victoria commissioned research as part of its review into the funding for financial counselling.³⁰ This involved 30 in-depth client interviews, randomly selected from files. Clients reported relief from stress and the pressure of their immediate financial situation. Arrangements between clients and creditors were negotiated in all cases. A significant number of clients maintained their financial stability.

2012 Swinburne University—Client Survey

In 2012, Swinburne University surveyed 225 clients who had accessed the Salvation Army’s MoneyCare service.³¹ Survey respondents indicated that as a result of financial counselling:

- 66% said their financial difficulties had been resolved

29 ANZ Bank, *Understanding Personal Debt and Financial Difficulty in Australia*, November 2005, p 17.
30 bluemoon research + planning Pty Ltd (2007) *Financial Counselling Program Research Report*, Victoria: Consumer Affairs Department.

31 Dr Nicola Brackertz, “I Wish I’d Known Sooner” *The Impact of Financial Counselling on Debt Resolution and Personal Wellbeing*, Swinburne University, 2012.

- 75% said they were better able to prioritise debt
- 74% said the advice had helped them avoid legal action
- 53% had avoided bankruptcy
- 74% were better able to budget
- 73% were able to access creditors' hardship programs

The research also demonstrated a link between early access to financial counselling and resolution of financial difficulties—people who sought financial counselling sooner were statistically more likely to report that their financial difficulties had been resolved (72%).

Financial counselling also provided broader social benefits:

- 51% of respondents indicated that their housing situation was more secure; and
- 45% of respondents indicated that their relationships with family and friends and their children (46%) had improved.

2014 Adelaide University—Cost-Benefit Analysis

A cost-benefit analysis of financial counselling services funded by the Wyatt Trust in South Australia, found that every \$1 invested provides a \$5 return. The research "*Paying it Forward*" was undertaken by the Australian Workplace Innovation and Social Research Centre at Adelaide University.

The report showed that:

- 46% of clients were on incomes of less than \$20,000 per annum;
- 82% of clients had experienced at least one financial crisis leading, most commonly related to credit card or store card debts (42%) and/or utility debts (40%). 55% had 2 or more financial crises.
- 86% of clients had experienced at least one personal crisis in the last year, with one-third of these related to housing issues (31%). 55% had at least two personal crises. Personal crises or those of family members can increase the impact of financial issues.

The researchers noted that the cost-benefit analysis did not include other benefits which are more difficult to quantify, such as improvements in financial literacy, stabilised housing or avoidance of legal action. In other words, the \$1:\$5 cost benefit is an understated and conservative measure of the benefit of financial counselling. For example, financial counselling clients often report improvements in health. The average cost of a general hospital admission in Australia is \$5,205 per day.³²

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Productivity Commission http://www.pc.gov.au/_data/assets/pdf_file/0003/132339/rogs-2014-volumee-chapter10.pdf.