Inquiry into the financial services regulatory framework in relation to financial abuse

Submission by the Australian Securities and Investments Commission

June 2024

Contents

Executive summary

1 The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' (PJC) Inquiry into the Financial Services Regulatory Framework in Relation to Financial Abuse.

2 ASIC administers and enforces a broad range of legislation relating to the provision of financial products and services including credit. Our regulatory activities include law enforcement and supervisory activities such as undertaking targeted reviews on financial products and services.

3 Broad conduct obligations that ASIC administers may be relevant to a situation where a financial firm responds poorly to a consumer experiencing financial abuse. However, there are no financial services laws explicitly directed towards how financial firms should treat consumers experiencing financial abuse. Therefore, ASIC's observations in this submission are based on insights from broader work streams that assess how financial firms are responding to consumers generally.

4 For example, recently ASIC carried out a review of the end-to-end policies, processes and practices of 10 large home lenders in responding to consumers experiencing financial hardship. Our review culminated in *Report 782 Hardship, hard to get help: Findings and actions to support customers in financial hardship* (REP 782). As part of this review, ASIC found that lenders had inadequate arrangements for supporting vulnerable consumers, including those experiencing family violence.

5 This finding is consistent with other reviews conducted by ASIC as outlined in this submission. We have found it common for financial firms to have policies in place on the treatment of vulnerable consumers, including consumers experiencing financial abuse. However, it is also our experience that some of these policies are not sufficiently robust and/or adhered to—including in circumstances where financial firms subscribe to industry codes that make voluntary commitments to provide extra care to consumers experiencing vulnerability.

6 ASIC supports initiatives that will reduce harms and protect consumers experiencing financial abuse, and we further believe that the views of experts, frontline organisations and those with lived experience should be considered in the development of such initiatives.

7 The PJC may wish to consider whether it is appropriate to introduce obligations concerning the manner in which financial firms respond to consumers experiencing financial abuse. We note that the development of outcome-focussed legislative requirements addressing financial abuse would

be complex and require careful consideration to ensure they achieve their desired aim.

8 Protecting vulnerable consumers is an enduring priority for ASIC. We support this Inquiry and welcome further discussions on the topic.

Our submission

9 In this submission we:

(a) set out the limits of ASIC's ability to take action in relation to poor conduct by financial firms and how they respond to consumers experiencing financial abuse;

(b) provide an overview of relevant regulatory and supervisory work looking at how financial firms respond to vulnerable consumers, including consumers experiencing financial abuse;

(c) set out ASIC's understanding (through the work of ASIC's Indigenous Outreach Program (IOP)) of the key challenges and experiences of First Nations consumers in relation to financial abuse; and

(d) provide ASIC's observations in relation to developments in industry to proactively identify consumers experiencing vulnerability, including financial abuse.

A Financial abuse in Australia

Key points

Financial abuse comes in many forms and affects people in different ways. How financial firms identify and interact with a person experiencing financial abuse is important to achieving good, supportive outcomes for consumers.

10 There is a growing need to address financial abuse in Australia.

11 ASIC's Moneysmart website describes financial abuse as:

> 'Financial abuse is when someone takes away your access to money, manipulates your financial decisions, or uses your money without consent.
>
> Financial abuse is a type of family violence. It often happens alongside other types of violence such as physical or emotional abuse. It can leave you feeling vulnerable, isolated, depressed and anxious. It can also take away your independence.
>
> Financial abuse can happen to anyone. The abuser could be your partner, or a family member, carer or friend.'

12 We are aware that advances in technology and the shift of financial products to online platforms can make it easier for financial abuse to occur (e.g. access to online accounts, monitoring location details and purchases in banking apps). Also, a reduction in face-to-face service channels to identify and support consumers experiencing financial abuse (i.e. through increased bank branch closures) could have detrimental impacts for First Nations consumers, particularly those in remote and regional communities.

Note: For more information see ASIC's submission to the *Inquiry into bank closures in regional Australia* (submission number 542), April 2023; and the ASIC *Financial Services Industry Workshop summary document* (PDF 376 KB), March 2024.

13 However, notably, people experiencing financial abuse may find it difficult to self-identify. They may not report financial abuse (to their financial firm or other service providers and organisations) for a variety of complex and intertwined reasons. These may include a fear of not being believed, fear of victim blaming, fear of making things worse (e.g. retaliation from the abuser, fear of losing the relationship), confidentiality concerns and cultural factors (see Section E for more information on the cultural values of First Nations consumers).

Note: See How do people respond to FDSV? On the Australian Institute of Health and Welfare website.

14 Therefore, a financial firm's ability to identify consumers experiencing financial abuse (including proactive identification) is paramount to being able to appropriately support them. Financial firms must also be able to

interact with these consumers in a considered and sensitive manner to reach good, supportive outcomes for consumers. This includes designing processes that are easy to navigate for consumers and do not cause additional stress.

B Potential areas for reform

Key points

ASIC's recent review into lenders' hardship practices may provide some useful considerations for the PJC into areas of focus for financial firms.

ASIC supports the exploration of potential obligations on financial firms to improve how they assist consumers experiencing financial abuse, while noting that the development of such obligations would be complex and require careful consideration.

Improving support for vulnerable consumers

15 In REP 782, ASIC has identified a range of ways that lenders can improve support for consumers experiencing financial hardship. Although specific to home lending and financial hardship, some of the report's recommendations could have broader application, for example—to how financial firms respond to consumers experiencing vulnerability in relation other financial products and services.

16 Relevantly, in REP 782 we have encouraged lenders to:

(a) have in place arrangements (including training) to ensure that staff identify whether a consumer giving a hardship notice may also be experiencing vulnerability; and

(b) take extra care and/or provide additional support to consumers giving hardship notices who may be experiencing vulnerability. This may include adopting a case-management approach, handling by speciality or more experienced staff, providing flexibility in the process for giving a hardship notice, or providing referrals to external services.

17 We have also urged lenders to manage their hardship function in a consumer-centric way, including to:

(a) ensure that there is a sufficient focus on consumer experience and outcomes in the purpose and key performance indicators for the hardship team(s), as well as for the staff and managers;

(b) have someone with responsibility for the end-to-end hardship process, including ensuring that hand-offs between teams are working effectively;

(c) ensure oversight of the hardship function by senior management, and that senior management is provided with sufficient information relating to consumer experience and outcomes;

(d) have arrangements in place to assess whether the hardship function is operating effectively, including by monitoring key performance measures and consumer experience and outcomes; and

(e) implement quality assurance arrangements that look at the end-to-end hardship (and, if applicable, collections) process from a consumer's perspective. The purpose should be to assess whether the hardship function is operating effectively and identifying continuous improvement opportunities.

Financial abuse

18 Based on our work, ASIC considers that financial firms can do more to better support vulnerable consumers, including consumers experiencing financial abuse. This includes improvements to the arrangements in place to identify and respond to consumers experiencing vulnerabilities and, importantly, how their staff are trained to follow those arrangements.

19 While ASIC has encouraged financial firms (such as lenders) to lift their standards in relation to how they support vulnerable consumers, we note that the particulars of what this entails for consumers experiencing financial abuse likely requires deeper consideration, including consideration of matters that sit outside of ASIC's regulatory expertise and remit.

20 Should the PJC identify ways in which financial firms can better support consumers experiencing financial abuse, it may wish to consider the appropriateness of mandating requirements. ASIC sees benefit in exploring potential legal obligations, particularly where they are clear and translate to genuine, improved outcomes for consumers experiencing financial abuse. We note that the development of outcome-focused legislative obligations addressing financial abuse would be complex and require careful consideration to ensure they achieve their desired aim.

C ASIC's role and the regulatory framework

Key points

There are no financial services laws explicitly directed towards how financial firms should treat consumers experiencing financial abuse, therefore ASIC's ability to take action in relation to poor conduct by financial firms is limited.

Where there are obstacles in the financial services legislative framework that constrain how a financial firm can effectively assist consumers affected by family violence, ASIC has granted relief and issued no-action letters to enable industry to better respond.

Overview of the laws ASIC administers

21 ASIC administers and enforces a broad range of legislation relating to the regulation of financial markets and products and services, including licensing, conduct, financial product advice and product obligations.

22 ASIC also administers the consumer law framework for financial products and services in Australia, found in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which includes prohibitions on financial firms engaging in unconscionable, or misleading or deceptive conduct.

Note: Legislation in the Terms of Reference of the Inquiry relevant to ASIC include, the *National Consumer Credit Protection Act 2009* (National Credit Act); the *Australian Securities and Investments Commission Act 2001* (ASIC Act); the *Insurance Contracts Act 1984*; and legislation and statutory instruments for superannuation.

23 ASIC has discretionary powers to grant relief from some provisions of this legislation, and ASIC has used these powers to facilitate the ability of financial firms to effectively respond to financial abuse.

24 Lastly, ASIC regulates companies including the registration of directors and other company officeholders. We consider this relevant to the Inquiry as we are aware of instances where a consumer experiencing financial abuse has become a director of a company without their knowledge or under duress.

How these laws interact with financial abuse

25 While these broad legislative requirements may be relevant to a situation where a financial firm responds poorly to a consumer experiencing financial abuse, there are no financial services laws explicitly directed towards how financial firms should treat consumers experiencing financial abuse. Put another way, financial abuse is not a harm or form of misconduct

specifically recognised by the laws ASIC administers, and there are no targeted obligations that are designed to allow ASIC to direct a financial institution to respond to financial abuse, or vulnerability more broadly, in a particular way.

26 Nevertheless, ASIC has expectations about how financial firms should treat vulnerable consumers (e.g. see paragraph 29), and there are obligations that apply to licensees that are relevant to this. These include the general obligation on licensees to act efficiently, honestly and fairly, as well as the obligation to provide access to dispute resolution for consumers and the requirement that credit licensees consider changing a credit contract if they receive a hardship application.

ASIC's definition of vulnerability

We note that ASIC's approach to defining consumer vulnerability is to recognise that consumers can experience vulnerability due to the combination or interaction of multiple factors, including personal or social characteristics; the actions of the market or individual providers; and experiencing specific life events or temporary difficulties (e.g. an accident or sudden illness, job loss or family violence).

Note: See *ASIC Corporate Plan 2019-23: Focus 2019-20* (PDF 1,383KB), p 12; and Regulatory Guide 274 *Product design and distribution obligations* (RG 274), at RG 274.47.

27 There are also a range of voluntary financial services industry codes that contain provisions relevant to the treatment of consumers experiencing vulnerability. However, the effectiveness of codes to respond to vulnerability may be limited by the strength of the code commitments and the voluntary nature of the codes. No current codes have provisions that ASIC can enforce.

The obligation to act efficiently, honestly and fairly

28 Financial service and credit licensees are required to do all things necessary to ensure that the financial or credit services covered by their licence are provided efficiently, honestly and fairly.

29 As part of this obligation, ASIC considers that financial firms should act in a way that supports consumers, particularly those experiencing vulnerability or financial hardship. For example, ASIC has issued an Information Sheet to assist the insurance industry meets its licence obligations in relation to claims handling and settling services. In doing so ASIC noted that:

- to provide services efficiently, honestly and fairly, licensees should ensure that their service can be tailored to consumers who are experiencing vulnerability, including family violence; and
- insurance industry codes provide useful indicators of what industry considers to be appropriate strategies for dealing with consumers experiencing vulnerability.

Note: See Information Sheet 253 *Claims handing and settling: How to comply with your AFS licence obligations* (INFO 253).

30 While ASIC encourages industry to support vulnerable consumers by reference to this obligation, the obligation is broad and not targeted specifically to vulnerable consumers. We note that how the obligation applies to vulnerable consumers has not been well tested before the courts.

Hardship notices and financial abuse

31 Financial abuse is relevant in the consideration of a hardship application. Under the law, consumers can advise their lender of their inability to meet their obligations under a credit contract (a 'hardship notice'). In response, a lender must consider whether to vary the consumer's credit contract to assist the consumer in meeting their obligations and notify the consumer of their decision.

Note: See s72 of the National Credit Code (at Sch 1 to the *National Consumer Credit Protection Act 2009* (National Credit Act).

32 While s72(2) of the National Credit Code specifies that the lender need not agree to change the credit contract, the section is accompanied by a note that explains what may constitute reasonable cause for a consumer's inability to meet their obligations, 'such as family violence, illness or unemployment'.

33 This note raises an expectation that the lender might change the consumer's credit contract in these circumstances. However, the hardship provisions do not require a lender to change the credit contract on this basis nor do they establish processes for lenders to identify and respond to a consumer affected by family violence.

Note: See paragraphs 44–50 for more information on our recent work in hardship.

Company directorships and financial abuse

34 While fulfilling its responsibility to maintain the company register, ASIC has become aware of instances where a consumer experiencing financial abuse has become a director of a company without their consent or under duress.

Note: See also Monash University research, V Chen, 'Hidden risks of economic abuse through company directorships', *University of New South Wales Law Journal*, 105, 20 July 2023.

35 Where these matters come to our attention, ASIC assesses them on a case-by-case basis. Where we have evidence that a director has been appointed without consent (e.g. with a fake signature), we are able to remove the person as a director from the company register.

36 In situations where there is no evidence that a person has been appointed without consent or under duress, ASIC will advise the person to seek legal

advice. ASIC does not generally take the role of arbitrator in company disputes about officeholders. This is because a court is able to call on evidence to support the allegations. ASIC will respond to a court order to remove somebody from the register.

37 Noting that it is an offence to make false statements to ASIC, we may also be able to investigate the conduct that led to any false appointment.

38 In November 2021, the Director Identification regime commenced. Directors (both existing and new) must now apply for a director identification number (director ID) before being appointed to a company.

39 ASIC is working on options to link the director ID to the company register, noting that a final decision will be made by the Government, and may require funding and legislative changes. Linking director ID to the company register will help to prevent the use of false and fraudulent identities and improve communications with directors on appointment, as well as the traceability of directors' relationships with companies over time.

Providing legislative relief to support industry responses to financial abuse

40 Industry has brought to our attention instances where legislative requirements impede efforts by financial firms to reduce harms caused by financial abuse. ASIC has granted relief and issued no-action letters to enable industry to withhold providing certain disclosures to joint account/policy holders, if doing so could place consumers experiencing financial abuse at risk of harm.

41 The relief described in the following examples of ASIC's intervention is temporary, and we encourage the PJC to consider whether permanent changes to relevant legislative requirements are warranted to give greater certainty to financial firms and protect consumers. In relation to the action taken by ASIC, whether a financial firm uses the flexibility afforded to them to better support consumers affected by family violence is discretionary.

Example 1: ASIC helps credit providers protect consumers affected by family violence

Under the mandatory comprehensive credit reporting regime, large banks are required to provide credit information about consumers to credit reporting bodies—this includes information about financial hardship arrangements.

Risk to vulnerable consumers

Industry raised concerns that including certain credit information in the credit reports of consumers affected by family violence (such as financial hardship information) could place those consumers at risk of further harm.

For example, where a consumer who is experiencing hardship holds a loan jointly with their partner (who is the perpetrator of family violence), there may be situations where they do not want their partner to be aware of an agreed financial hardship arrangement with their bank.

Action taken by ASIC

Due to these concerns, in July 2022 ASIC adopted a temporary no-action position to enable large banks to withhold the reporting of certain credit information on consumer credit reports: see Media Release (22-175MR) *ASIC helps credit providers protect victims of family violence* (8 July 2022).

At the time, ASIC recognised that these risks could also arise when a credit provider notifies a joint account holder of the outcome of a consumer's request for hardship assistance (disclosure required by law). Accordingly, ASIC has also adopted a no-action position that enables credit providers to withhold notices to joint account holders in these circumstances.

Example 2: ASIC helps insurers to respond to family violence

Since 1 January 2022, insurers have been required to provide a Cash Settlement Fact Sheet (CSFS) and transaction confirmation to joint policyholders when they offer to settle a claim by a cash payment.

Risk to vulnerable consumers

These CSFS notifications may contain information that could place consumers affected by family violence at risk of harm. For example, a CSFS may identify the location of the consumer or provide an opportunity for the perpetrator of violence to interfere with the cash settlement.

Action taken by ASIC

To address these concerns, ASIC granted relief to insurers—to expire in 2027—so that they do not need to provide these notifications when they reasonably believe providing them would pose risks of family violence: see Media Release (22-261MR) *ASIC helps insurers to respond to family violence* (28 September 2022).

ASIC expects this measure to supplement commitments made in industry Codes of Practice to consumers at risk of, or experiencing, family violence. These commitments include ensuring insurers have policies, systems and processes in place to identify and safely respond where they know or reasonably believe a consumer is experiencing family violence.

Insurers are required to keep records of the reasons for their belief that providing a CSFS and transaction confirmation would pose risks of family violence for a period of three years.

D How financial firms respond to consumers experiencing vulnerability

Key points

Through the course of carrying out our regulatory and supervisory work, ASIC has looked at how lenders, banks and insurers respond to consumers experiencing vulnerability. A common observation is that financial firms are not always taking appropriate steps to support vulnerable consumers. For consumers experiencing financial abuse, this can have serious consequences.

Examples of how financial firms respond to consumers experiencing vulnerability, discussed in this section, include:

- financial hardship;
- reports of systemic issues from AFCA;
- insurance claims handling and vulnerable consumers;
- misuse of guaranteed loans and co-debtor loans;
- financial elder abuse and powers of attorney; and
- financial elder abuse in reverse mortgages.

Financial hardship

Hardship notices and financial abuse

42 The reasons why a consumer may experience financial hardship are many and varied, but financial abuse can contribute to financial hardship. In particular, a consumer experiencing financial abuse may seek assistance from their lender (i.e. give a hardship notice) when they choose to leave an abusive relationship. This will likely cause the consumer substantial financial stress (alongside other acute stressors and harms)—exacerbated if debts have accrued or increased without their knowledge and/or when the abuser is no longer paying the loan—and may place the consumer at serious risk of harm.

Note: There is strong evidence demonstrating how economic and financial hardship and insecurity can be a barrier to consumers leaving an abusive relationship. See J Breckenridge, G Lyons, S Singh & M Suchting, Gendered Violence Research Network, *Understanding Economic and Financial Abuse in Intimate Partner Relationships* [report] (PDF 1,396 KB), University of NSW, October 2020.

43 The example below highlights the varied ways in which consumers may interact with their lender about hardship caused by separation.

Example 3: Failure in timely processing of online hardship notices

On 4 September 2023, ASIC commenced civil penalty proceedings against Westpac Banking Corporation (Westpac) for failing to respond to customers' hardship notices within the required timeframe: see Media Release (23-242MR) *ASIC sues Westpac for failing to respond to hardship notices* (5 September 2023).

A sample of online hardship requests that form the basis of this matter (see 23-242MR Concise Statement (PDF 1,807 KB)) are provided below. While some of the examples may not be from consumers experiencing financial abuse, we have included them to illustrate the importance of lenders being able to have considered and sensitive conversations with consumers, and to respond to triggers of potential vulnerability and find appropriate solutions to support them:

- 'My husband is currently on an AVO and is not currently residing in the family home. We will be undergoing a divorce and ultimate sale of the home. Our two daughters are in their final year of study. To provide security and stability (proximity to school, etc) in this very important year for them, they want to remain the family home. I commit to pay the mortgage for the next year while we make final arrangements towards sale. My husband is using financial abuse and threats as part of his techniques to have us removed from the home. I am also currently only intermittently employed (work as a contractor so there are stretches of unemployment). I will move heaven and earth to pay the mortgage for the next year, but I wondered if there was any scope at all to reduce the payments so that I can ease the burden, without having the consent of my husband because he is actively antagonistic to the decision for the girls to remain in the family home.'
- 'I split with my partner, in February, so I have been paying the home loan solo at the moment, and last week, I lost my job, so I would like to pause repayments.'
- 'My partner and I have recently separated, and I now have $1500 worth of outgoing expenses per fortnight as I have been left with all of the debt as it is all in my name. This leaves me with $500 a fortnight to spend on food and electricity and water.'
- 'I am unable to pay for the marital home as anymore as I am on my own and my ex-husband no longer pays for his half.'
- 'I am having issues with payments due to separation. I have moved in with my parents at this stage.'
- 'Separated from my long-term partner.'

ASIC's review of lender hardship practices

44 ASIC's REP 782 sets out the findings of our review of the practices of 10 large home lenders to understand how they support consumers experiencing financial hardship—this included data collection and a review of hardship notices from consumers.

45 ASIC's review found that most lenders had an organisation-wide policy and staff training on how to identify and handle consumers experiencing vulnerability. However, we identified a range of issues with how lenders—in practice—handled hardship notices from vulnerable consumers.

46 Case studies that relate to consumers experiencing family violence can be found in Appendix 1. These case studies raised concerns about:

(a) lenders failing to follow their own internal processes in relation to responding to consumers experiencing family violence;

(b) consumers finding themselves having to repeat their circumstances, which can be distressing;

(c) lenders failing to follow requests from consumers to take steps to help protect them (e.g. contacting the consumer rather than their authorised third-party representative); and

(d) when lenders have dedicated staff or teams to respond to consumers experiencing family violence, opportunities for referrals were missed and/or not timely.

47 The case studies highlight that even if lenders had good intentions, they were sometimes failing when it came to supporting consumers experiencing financial abuse. For example, while we consider it to be a positive step that some lenders have introduced special support teams for consumers experiencing financial abuse, this additional support serves little benefit if consumers that need specialised assistance can't access it.

48 These concerns were consistent with the review's general observations that saw numerous examples of vulnerable consumers not being provided with sufficient levels of care and support. This led to poorer outcomes for those consumers and unnecessary confusion, stress and anxiety.

49 We note that most of the 10 lenders subject to our review are signatories to industry codes that have commitments in relation to providing additional support to vulnerable consumers.

50 In response to our review, we expect all lenders to take steps to improve their practices, including:

- identifying where consumers may be experiencing vulnerability and take extra care, and provide additional support to these consumers; and
- have in place adequate systems, resourcing, training, compliance and other arrangements to enable hardship functions to operate effectively.

Reports of systemic issues from AFCA

51 The Australian Financial Complaints Authority (AFCA) must report certain matters to ASIC, including where they identify systemic issues that arise from their consideration of complaints.

52 AFCA has identified systemic issues relating to how financial firms are responding to consumers affected by financial abuse. Reports that AFCA has made to ASIC, include:

- a bank was not following their internal consumer mandate to restrict withdrawals on joint accounts, particularly in the event of a relationship dispute or breakdown where the joint account requires different authorities;
- in circumstances where a consumer was experiencing family violence and requested that their address details were redacted or not visible to joint account holders/co-borrowers, the bank's processes did not readily give effect to this. AFCA's report noted that the bank's approach did not appear to meet the requirements of the Australian Banking Association Industry Guidelines or the Australian Privacy Principles (the *Privacy Act 1988* (Cth)); and
- staff were not complying with a bank's policies and procedures when dealing with consumers experiencing family violence. AFCA reported that the root cause of the issue appeared to be a shortfall in staff awareness and/or training in the bank's family violence and vulnerability procedures and policies.

53 These systemic issues support the findings in REP 782, that lenders have not designed their processes and practices in a way that appropriately takes consumer vulnerability into account.

Insurance claims handling and vulnerable consumers

54 During 2022 and 2023, ASIC reviewed 150 home insurance claim files from six insurers, to assess claims-handling conduct relative to insurers' obligations: see Report 768 *Navigating the storm: ASIC's review of home insurance claims* (REP 768).

55 While ASIC did not identify financial abuse in the claims files, our review did include findings about the way in which insurers treated vulnerable consumers, for example:

(a) some consumers identified as vulnerable by an insurer were subject to a breakdown in communications, which led to a poor claims experience overall; and

(b) some consumers were not flagged as ‘vulnerable’, but likely should have been, and as a result were not treated appropriately.

Note: Evidence supports that general insurance policies and procedures can be used to perpetrate financial abuse, see C Fitzpatrick, *Designed to Disrupt: reimagining general insurance products to improve financial safety* (PDF 1,804 KB) [report], Sydney, Centre for Women’s Economic Safety, 2024.

56 In addition to claims files, we reviewed quantitative data (up to 46 datapoints) from participating insurers for 218,256 home insurance claims (building and/or contents) lodged between 1 January and 31 March 2022. Despite 43% of all claims involving a severe weather event—which can typically cause, or contribute to, a high percentage of consumers experiencing vulnerability, albeit temporarily—insurers identified consumer vulnerability in no more than 3% of their claims. This large disparity suggested under-identification of vulnerable consumers.

57 ASIC’s review called for insurers to recognise consumers experiencing vulnerability and tailor their services to treat them accordingly.

58 We note that the General Insurance Code of Practice commits subscribing insurers to take extra care with customers who experience vulnerability, and to have in place appropriate training to help staff identify and treat vulnerable customers. ASIC’s review only assessed subscribers to the Code.

Note: The 2020 Code will be reviewed in 2024 by a panel appointed by the Insurance Council of Australia.

Misuse of guaranteed loans and co-debtor loans

59 In 2019, ASIC commenced a review into the use of guarantees in consumer lending. This review was prompted in part due to the 2017 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, highlighting concerns with lender guarantor processes including the potential for misuse.

60 ASIC reviewed the policies and procedures of nine lenders for guaranteed loans and co-debtor loans where the co-borrower did not receive a benefit or substantial benefit from the loan. We also engaged with several government and non-government stakeholders with an interest in issues relating to guaranteed loans, co-debtor loans, financial abuse and elder abuse.

61 We observed that while lenders’ policies on identifying and dealing with vulnerable consumers appeared to have improved over the course of our inquiries, lenders could do more to identify vulnerabilities (both when a guaranteed loan or co-debtor loan is provided and throughout the ongoing performance of the loan).

62 We sent letters to lenders setting out the findings from our review with the expectation that they should make improvements to their processes. In relation to financial abuse, we noted the following:

(a) financial abuse was under-reported and poorly understood, even by those who experienced it, and there were significant barriers to reporting;

(b) sometimes a consumer may not become aware of abuse until a point of crisis in a loan;

(c) there were fundamental inequalities of process and outcome between those who had professional assistance through the dispute resolution process and those who did not;

(d) industry was inconsistently identifying financial abuse and rarely preventing financially abusive loans at the point of lending. However, lenders, particularly the larger ones, had made recent improvements in family violence awareness;

(e) policies on financial abuse and vulnerability were applied inconsistently by lenders; and

(f) evidence requirements for demonstrating financial abuse varied from lender to lender. Some lenders, mortgage brokers and debt collectors still insisted on copies of protection orders as evidence of financial abuse. Stakeholders told us that this was an unrealistic requirement due to the challenges in getting a protection order for financial abuse.

63 The 2021 report of the Banking Code Compliance Committee's (BCCC) review of banks' compliance with the guarantee obligations in the Banking Code of Practice expressed concern that, in practice, banks frequently failed to comply with the guarantee obligations. ASIC's communications to lenders outlined our expectation that subscribing banks should take action to address the BCCC's 23 recommendations.

Note: In 2022, the BCCC conducted an inquiry to examine the progress that banks had made since the 2021 Guarantees Report, See BCCC, *Follow-up inquiry: Guarantee compliance* [report], August 2023.

64 Separately, the 2021 independent review of the Banking Code of Practice made multiple recommendations to enhance guarantor protections, particularly to protect vulnerable guarantors: see Section 16 of the final report of the Code review. The Australian Banking Association (ABA) did not support these recommendations: see Consultation Paper 373 *Proposed changes to the Banking Code of Practice* (CP 373), at paragraphs 69–73.

Industry codes of practice for co-debtor loans

65 Industry codes such as the Banking Code of Practice and Customer Owned Banking Code of Practice, include protections for co-borrowers in instances

where it is apparent to the lender that the proposed co-borrower will not receive a 'substantial benefit' under the loan. For example, under the Banking Code of Practice, lenders must not approve the applicant as a co-borrower unless the lender:

(a) has taken reasonable steps to ensure that the applicant understands the risks associated with entering into the loan, and understands the difference between being a co-borrower and a guarantor;

(b) has taken into account the reasons why the applicant wants to be a co-borrower; and

(c) is satisfied that the applicant is not experiencing financial abuse.

66 However, in our 2019 review, we found that most lenders assumed a substantial benefit or had policy exceptions to the substantial benefit rule for co-borrower spouses and de-facto partners. We also found large variations in how each lender interprets 'substantial benefit'.

Financial elder abuse and powers of attorney

67 Commencing in 2020, ASIC conducted a targeted review of the processes of eight Authorised Deposit-taking Institutions (ADIs) in relation to powers of attorney—with a focus on misuse, including financial abuse. While ASIC has limited jurisdiction in relation to powers of attorney, this review was a discrete piece of work aimed at reducing the possibility of harm to older people by financial abuse.

68 ASIC's review found that the ADIs generally had:

- inadequate policies in place relating to the identification of, and responses to, financial abuse;
- poor record keeping in relation to disputes involving powers of attorney; and
- an overreliance on frontline staff to identify issues, particularly in an environment of increasing digitalisation.

69 Where policies on financial abuse did exist, the review found that these were generally reactive, focused on staff awareness and responding to issues as they were identified.

70 We sent letters to the eight ADIs setting out the findings from our review with the expectation that they should make improvements to their processes.

71 We note that there have been calls, including from the Australian Law Reform Commission and Australia's Age Discrimination Commissioner, for the establishment of nationally consistent laws and a national register for enduring powers of attorney.

Financial elder abuse in reverse mortgages

72 In mid-2017, ASIC commenced a review of lending for reverse mortgages. The aim of our review was to examine this market after the introduction in 2012 of enhanced responsible lending obligations and consumer protections for reverse mortgages. ASIC assessed five groups of lending brands.

73 Our findings, published in Report 586 *Review of reverse mortgage lending in Australia* (REP 586) included that some lenders:

- lacked policies, procedures or guidelines to help lending staff to either detect instances of financial elder abuse or to respond to suspected instances; and
- did not provide staff with training on financial elder abuse or capacity, while the other lenders touched on this topic through their staff training on responsible lending.

74 Our review identified 15 loan applications where a lender could have detected a sign of possible financial elder abuse and made further inquiries to identify whether abuse may have been occurring in relation to:

- repayment on a loan being made by an adult child;
- money transferred to a non-borrower;
- money provided to a child;
- involvement of children in the application;
- only non-borrowers receiving mandatory independent advice; and
- file notes indicating abuse by a sibling of the borrower.

Example 4: Loan application initiated unethically by family member

John, aged 86, took out a $50,000 reverse mortgage. He'd had a power of attorney established in August 2015, two months before his reverse mortgage was approved in October 2015.

The lender required borrowers to obtain independent legal advice. John's declaration for this advice was signed by his grandson. Another grandson, who was a financial adviser, signed the independent financial advice declaration.

75 However, in each loan where we detected a sign of possible financial elder abuse, we found no documented evidence that the lender had made or documented any further inquiries into whether the borrower may have been taken advantage of by a caregiver or family member.

E First Nations peoples and financial abuse

Key points

Awareness of First Nations cultural protocols is essential for financial institutions to understand financial abuse and the way it can present.

In March 2024, ASIC held a workshop focused on identifying and supporting First Nations consumers who may be experiencing or at risk of financial abuse. The workshop showcased real life consumer experiences and highlighted best practices that could be broadly adopted across the financial services industry.

ASIC's Indigenous Outreach Program

76 ASIC has maintained a dedicated Indigenous Outreach Program (IOP) team since 2009. The IOP is a specialist team working across ASIC to provide advice, insights and support to the organisation to ensure the needs and requirements of First Nations investors and consumers are understood and addressed appropriately, effectively, and in a way that is culturally sensitive and responsive. Through a range of channels, the IOP team also works collaboratively with First Nations communities and consumer advocates supporting and servicing First Nations consumers, financial services industry sectors, and broader service providers including government agencies.

Indigenous Financial Services Framework

77 ASIC published its *Indigenous Financial Services Framework* in February 2023. The Framework outlines Key Learnings relating to First Nations peoples' access to and engagement with the Australian financial system. These have been tested and confirmed by First Nations consumers and communities as important concepts to be acknowledged and understood as part of positive change.

78 The Key Learnings were:

- First Nations peoples had unique, established economies before colonisation. These economies continue today, and should be understood, respected and maintained;
- First Nations peoples have been prohibited and excluded from participating in the Australian financial system;
- financial wellbeing affects all aspects of First Nations peoples' lives; and

- First Nations peoples have many different versions of financial success. This needs to be accepted and encouraged. All First Nations peoples should be empowered to achieve their vision of success.

79 Part of ASIC's ongoing work to progress the long-term outcomes identified in the Framework has been to encourage industry to consider and embed the Key Learnings into their practices and policies. For industry this specifically includes the provision of accessible and appropriate financial products and services, and facilitating positive and culturally appropriate experiences for First Nations consumers when engaging with the financial services industry.

Industry workshop on financial abuse in a First Nations context

80 ASIC has hosted a series of workshops for industry on challenges experienced, barriers to access and issues of importance to First Nations peoples.

81 In March 2024, we held a financial services industry workshop focused on identifying and supporting First Nations consumers who may be experiencing or at risk of financial abuse. The workshop provided context on the unique cultural circumstances and experiences of First Nations consumers and highlighted opportunities for improvements across financial service providers, to ensure First Nations consumers impacted by financial abuse are appropriately and sensitively supported.

Note: For more information see *Financial Services Industry Workshop summary document* (PDF 376 KB), March 2024.

Characteristics of financial abuse within First Nations communities

Cultural values

82 Some of the nuances of how financial abuse is experienced within First Nations communities is due to unique cultural norms and protocols around the management of money and resources. While there is much diversity within and across First Nations communities, some examples of their financial management practices include:

- cultural obligations requiring, or community having a tendency of encouraging, the sharing of financial and other resources based on the cultural principle of reciprocity;
- a collective approach to ownership, management and use of money and resources, based on kinship obligations and cultural principles; and

- kinship structures providing additional levels of responsibility to immediate and extended family members, in addition to the points above.

83 While some studies have argued that demand sharing and reciprocity within family and community structures may in some cases increase the risk of financial abuse, these cases are not reflective or inherent of the broader culture or community. Rather, they are instances of harmful behaviour occurring within a broader kinship structure that contributes to the positive functioning of First Nations communities. Awareness of the positive functioning of First Nations cultural protocols and structures, including through partnering with communities, is essential in understanding and responding to financial abuse and how it can present.

Terminology

84 Appropriately articulating experiences of financial abuse is also nuanced within a First Nations context. Often terms such as 'humbug' and 'humbugging' are used when describing or referencing experiences and characteristics of financial abuse.

85 These terms are often used to describe behaviour in First Nations communities where demands are made for one party's money or resources with no intention of repaying or reciprocating it. ASIC understands that some First Nations peoples consider these should not be conflated or confused with healthy cultural norms and protocols of sharing, and where behaviours amount to financial abuse, that is what should be labelled.

Note: For a further explanation of First Nations community terminology, see H Loban, 'Aboriginal and Torres Strait Islander people and consumer law' [PhD thesis], (PDF 1,696 KB), College of Business, Law and Governance, *James Cook University*, March 2018.

Examples of financial abuse in First Nations communities

86 Instances of financial abuse in First Nations communities have been brought to the attention of ASIC's IOP team, including:

- individuals making purchases via book up (i.e. informal store credit and deferred debt) on another party's account, thereby obtaining a benefit of goods or services but requiring another to be financially responsible;
- family members, carers, or support workers making unauthorised withdrawals from an Elder's bank account including in situations where the Elder relies on them to withdraw cash on their behalf due to access issues;
- family members co-signing on credit contracts but not equally contributing to repayments, or not sharing the use of the goods

purchased with the credit arrangement (e.g. joint purchase of a vehicle that a family is financially liable for, yet is only accessible for use by one individual);

- family members not contributing to household costs and leaving other family members with the financial burden;
- one member of a family earning income who, due to the pressures of ongoing requests for money from other family members, sees little benefit in receiving that income and may end up leaving the workforce;
- fraud or coercion to forge signatures or alter legal documents such as the beneficiaries under an individual's will; and
- theft of money or items of value, for example—using unauthorised access to family members' digital banking platforms to complete transfers and transactions for personal benefit.

Power imbalance between traders and consumers

87 First Nations peoples can be impacted by financial abuse through relationships with traders involving significant power asymmetries. This is often compounded with other external factors such as limited access to goods and services and a lack of legal and financial supports services. For many First Nations consumers, the trust and value placed on relationships from a cultural perspective can create circumstances in which consumers are unaware that they are receiving a poor outcome.

88 An example of this is book up arrangements, which can create power asymmetries leading to financial abuse. In *ASIC v Kobelt* (2018), credit was offered to consumers by requiring debit cards and PINs to be left with the trader. Half of the consumers' income was transferred to the trader to apply against consumers' book up debts and the other half withdrawn by the trader only for spending at the trader's store. The court judgment noted that '…there was a high degree of control over how much and for what items a customer was able to withdraw funds.'

Elder abuse

89 As with other types of financial abuse, the circumstances and impacts of elder abuse within First Nations communities has its own nuances. These include expectations of reciprocity, and kinship relationships, which can have an impact on a consumer's capacity to report the offending. As noted by Kimberley Jiyagas for the Kimberley Community Legal Services:

> The culture is one of sharing, it was not on monetary terms. So old people still have the notion that they can share the money they have, because previously when they had meat, they broke it up and shared it. So, meat caught was shared but they did not give the best parts to the children, it went to the senior people. Trade happened and bartering, but

> not money. So, it [money] is a new concept. Every generation of Aboriginal people is living a new world experience.

Note: See Kimberley Jiyigas, *No more humbug: Reducing Aboriginal financial elder abuse in the Kimberley*, Kimberley Legal Services, December 2020, p 20.

90 We also note the complex challenges and barriers First Nations communities face in relation to general access to banking (such as remoteness) can compound the stress of a consumer's situation and impede efforts to help the consumer. The following case study was raised at the Broome Banking Roundtable held on 21 March 2023.

Case study: Elder abuse in remote communities

Mary lives in a remote community 200km from Broome. Mary is a First Nations person in her late fifties.

Mary has had her bank card compromised by family (and this has happened before). Her card was cancelled and unless she travels to the bank, she has no access to money. When the card was cancelled it also meant she couldn't pay her internet access.

With the help of a counsellor, Mary's bank was contacted, but due to identification issues the counsellor could not resolve Mary's issue over the phone. Mary had to make a 400km round trip to access her money and then wait for another credit card.

Each time her card is compromised, Mary will likely need to take the same steps.

F Proactively detecting financial abuse

Key points

ASIC supports initiatives by industry to proactively identify consumers experiencing vulnerability, including financial abuse.

We have found inconsistent approaches from industry in relation to the proactive identification of vulnerable consumers.

91 ASIC encourages financial firms to take steps to improve how they use data and information they have access to, to better detect consumers experiencing vulnerability. For example, see Media Release (23-183MR) *ASIC acts to ensure better banking outcomes for Indigenous consumers* (5 July 2023).

92 While ASIC is aware of some limited developments in relation to how financial firms are using data to detect financial abuse, we have not closely reviewed these initiatives or the effectiveness of them. Financial firms will be better placed to detail how they are detecting financial abuse beyond front line engagement with consumers—which we know is fraught, given detection relies on what is disclosed by a consumer and whether staff have been adequately trained to identify triggers and respond appropriately.

93 ASIC's experience has been mixed when trying to encourage improvements and innovation to proactively identify vulnerable consumers. We understand that this is in part due to industry concerns that the proactive identification and recording of consumers experiencing vulnerability may breach provisions in the *Privacy Act 1988* (Cth).

Review of the Banking Code of Practice ('the Code')

The 2021 independent review of the Banking Code of Practice, made the recommendation that if a vulnerable customer tells their bank about their personal or financial circumstances, subject to the customer's agreement, the bank will record this information to minimise the number of times the customer has to provide this information (see Recommendation 42).

The ABA supported this recommendation in principle, but did not make amendments to the Code to reflect Recommendation 42. The ABA noted that they are engaged in the Attorney General's review of the Privacy Act and are advocating changes that would make adoption of this recommendation permissible under the Privacy Act.

94 Relevantly, the Government's response to the Privacy Act Review has suggested a proposal that 'further consultation should be undertaken to clarify the issues and identify options to ensure that financial institutions can act appropriately in the interests of customers who may be experiencing financial abuse or may no longer have capacity to consent' (Proposal 17.3).

95 ASIC supports the proposed further consultation, so that industry uncertainty in relation to compliance with the Privacy Act and with appropriately responding to consumers experiencing financial abuse can be resolved.

Appendix 1: Consumer case studies

ASIC's review of lender hardship practices

96 Case studies on ASIC's review of lender hardship practices that relate to consumers experiencing family violence are listed below.

Note: See paragraphs 44–50 for more on ASIC's review of lender hardship practices.

Case study 1: Assistance provided following a permanent change in circumstances

The customer was represented by a financial counsellor who advised that the customer had escaped family violence and economic abuse (including debts incurred because of actions by their former partner who was not a co-borrower). The customer had accrued significant arrears on the home loan because of the separation and other debts, although even with these arrears the remaining balance of the loan was relatively low (less than $125,000). The customer's primary source of income was Centrelink payments, though they advised they had plans to obtain other income.

The financial counsellor requested that the lender enter a serviceability period to capitalise the arrears, review the interest rate on the loan, and extend the term of the loan by five years. They considered the payments would be affordable for the customer with their Centrelink income if these changes were made. However, the lender advised that the customer could not be assessed for a long-term solution because the customer was unemployed.

After the financial counsellor made a complaint, the lender restructured the loan to capitalise the arrears, extend the term of the loan by five years, and reduced the interest rate to a rate similar to the rate that new customers were receiving.

Case study 2: Branch staff advising customer they needed to contact the hardship team

The customer was experiencing domestic violence and called the lender (as advised by branch staff), as they were unable to meet their repayments on their own and their repayments had doubled.

On the phone to the hardship team, the customer said:

When I spoke with our bank manager from [name of branch], he said to give you guys a call about what we could do about changing the repayments for the next few months.

It was not clear why the branch staff advised the customer that they needed to call the bank (as opposed to the branch staff ensuring that the hardship notice was captured and referred to the hardship team in the branch). This also meant that the customer needed to repeat their circumstances again.

Case study 3: Inflexibility in handling of customer experiencing vulnerability, despite lender's policy allowing for this

A customer was experiencing domestic violence and had separated from their partner and was living in domestic violence housing. They were dealing with medical issues that had left them unable to work.

Despite the lender having specific arrangements in place to make the hardship process easier for customers experiencing family or domestic violence, such as waiving the requirement to provide further information, the lender did not apply these in practice.

We identified several concerns with the lender's handling of the customer's hardship notice. The lender:

- issued a generic request for further information to the customer;
- did not take the customer's details over the phone;
- did not refer the customer to financial counselling or any other support services; and
- sent correspondence relating to the hardship notice by mail despite the customer's request for this not to occur.

Case study 4: Delayed referral to the specialist extra care team and failure to deal with customer's authorised third party

A customer was experiencing family violence and had a financial counsellor representing them. The customer had dependants, was applying for Centrelink as they had no income, and was being helped by a charity. The home loan they were giving a hardship notice for was previously managed entirely by the co-borrower, to whom the customer was no longer speaking.

Initial call

The financial counsellor called the lender in response to collections contact to advise that the customer was experiencing domestic violence and could not make repayments. They also provided other information about the customer's situation, including that the situation is likely to take a long time to resolve.

The lender agreed to a two-month payment deferral. They also advised that if the customer required further assistance, they would need to speak to a different team that deals with longer term situations.

The financial counsellor advised the lender that they would like to be the contact on the account to protect the customer from the stress of the situation. They specifically mentioned that they wanted to protect the customer from any harassment or texts (e.g. collections contact). The lender agreed to send communications to the financial counsellor.

Collections and other contact with the customer after the initial call

Despite the agreement reached in the initial call, the lender continued to direct communications to the customer over several months (including making calls to follow up on arrears). The lender failed to refer the customer to their specialist extra care team, and also failed to apply a sensitivity flag to the account to notify other staff members to treat the customer with extra care. The customer had to repeat their circumstances on multiple occasions to various staff members. The customer sounded distressed in some of those calls. In one of the calls made by the lender, the customer was particularly distressed and sounded to be crying at various points. The lender's staff member did not appear to have read the notes on file and displayed a lack of sensitivity in dealing with the customer during this call. The staff member:

- asked on multiple occasions about the customer's plans to clear the arrears, including asking whether the customer had plans to sell their home;
- refused the customer's request for the lender to put information into an email, saying that they had to discuss it over the phone; and
- advised that 'the most [assistance] we can give is another month and then unfortunately it will be managed by our [escalated team]', creating uncertainty for the customer.

Referral to the specialist extra care team

Several days after the call above, the financial counsellor contacted the lender to repeat the customer's situation. The financial counsellor told the lender that the customer was under great stress and that they wanted correspondence sent to the financial counsellor so that the financial counsellor knew what was going on.

The financial counsellor also asked for more information on the process for escalation to the lender's escalated team. The lender transferred the financial counsellor to the escalated hardship team.

That team then referred the matter to the lender's specialist extra care team. The lender failed to apply a sensitivity flag to this customer account until after ASIC queried the failure to do so.

Case study 5: Difficulties for customer experiencing vulnerability to request hardship assistance

A customer was experiencing domestic violence. They were seeking a deferral of loan repayments so that they could afford rent on an apartment while they worked through the legal process of selling the property. The customer had not previously received hardship assistance.

We identified the following issues with the lender's handling of the customer's hardship notice, which demonstrate that extra care was not taken:

- The customer was placed on hold for an extended period of time (up to an hour before the call was dropped or terminated). Despite the customer's vulnerable circumstances, the lender did not make attempts to contact the customer after the call dropped out (other than to send an email with the application form).
- The request for supporting documents was onerous and not tailored to the customer's individual circumstances.

- The customer needed to repeat their circumstances on multiple occasions, and this appeared to be distressing for the customer.
- The lender lost the customer's hardship notice and therefore did not respond to their notice within the required timeframe.
- The customer was made to complete the form and provide supporting documents again due to the systems issue.
- Collections activity was erroneously undertaken during the hardship assistance period.

Key terms

Term	Meaning in this document
ABA	Australian Banking Association
ADIs	Authorised Deposit-taking Institutions
AFCA	Australian Financial Complaints Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
BCCC	Banking Code Compliance Committee
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
CSFS	Cash Settlement Fact Sheet
financial hardship	Where a consumer is unable to meet their obligations under a credit contract (i.e. making repayments)
financial hardship arrangement	Has the meaning given in s6QA(1) of the Privacy Act
financial hardship information	Has the meaning given in s6QA(4) of the Privacy Act
hardship notice	Has the meaning given in s204 of the National Credit Code
IOP	Indigenous Outreach Program
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
PJC	Parliamentary Joint Committee on Corporations and Financial Services
Privacy Act	Privacy Act 1988