

**Response to Position Paper 8**  
**ASIC's Directions Powers**

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## Introduction

CHERPA, the Consumer Household Equipment Rental Providers Association, represents 45 businesses and over 90 individual businesses around Australia. Our members write approximately 25%<sup>1</sup> of all consumer leases written in the market and currently service approximately 230,000 consumers directly with consumer leases which indirectly service 550,000 people.

## Background

### The Consumer Household Equipment Rental Providers Association (CHERPA)

2 The rental of household goods to consumers has been taking place happily and without problem in Australia for at least 80 years. Many CHERPA members have a very long history, 40+ years, of successfully renting essential household goods to happy consumers.

3 In the early 2000's the nature of the industry began to change with advent of the "rent-to-own" paradigm interplaying simultaneously with credit finance companies who began providing financing and loans for small amounts of credit on consumer goods – and confusingly using the word "rent" in their business name and product offering.

4 The resulting consumer confusion created the need for clarification which was supposed to arrive in the form of the NCCP Act.

5 However, the introduction of the NCCP Act in 2010 left the industry in a significant state of confusion. Since that time lessors then operating in the industry have been increasingly concerned to see the entrance of many new players in the market, including a proliferation of operators who appear to be of dubious and unethical intent.

6 **Industry Code of Conduct** - In 2013 the industry formed a peak body, the Consumer Household Equipment Rental Providers Association, CHERPA, to address concerns that the long term industry operators held. CHERPA began engaging with stakeholders to understand their concerns and in 2014 an Industry Code of Conduct was accepted at CHERPA's Annual General Meeting.

7 CHERPA has continued engaging with stakeholders since that time culminating in the recent voluntary upgrade to its Industry Code of Conduct for members to include:

- Return of items at no cost under hardship
- Estimated Retail price disclosure
- Specific percentage caps on both the amount of net income and discretionary income that can be used as payment for a consumer lease provided by members.

### CHERPA Members

8 On average CHERPA members have been in the industry for more than ten years

9 There are more than 10 members who have been in the business for more than 20 years

10 There are a few members who have been in the business as employees or business owners for more than 40 years.

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<sup>1</sup> Note that Radio Rentals/Thorn has about 50% share of the market

11 The estimated total number of goods rented out by CHERPA members is currently 300,000

12 Businesses range in size from:

>\$100,000 turnover with 200-300 units on lease and approx. 150 -200 customers to \$40,000,000 turnover with approximately 27,000 units on lease and approx. 24,000 customers.

13 CHERPA members as a cohort in the consumer leasing industry have been highly compliant with regulatory requirements, have excellent customer relations and have demonstrated ongoing industry best practice as evidenced by the very low number of complaints received by our members – an order of magnitude less (one-tenth) than complaints for mainstream mortgages, credit cards and personal loans.

14 CHERPA welcomes a positive approach to:

- a. More efficiently and more effectively applying regulation to industry
- b. Co-regulation with industry
- c. Enhancing both impact AND understanding of regulation
- d. Improve regulatory outcomes for consumers and industry alike.

15 CHERPA is committed to building, sustaining and maintaining the integrity and reputation of the consumer leasing industry so that the community at large and direct consumers of the leases can be confident that the behaviour of licensed lessors not only comply with their legal obligations but are also ethical and within reasonable expectations of the community.

16 CHERPA believes that, without a shadow of doubt, ASIC's strategic intent<sup>2</sup> of improving gatekeeper performance and industry and individual business culture would be very well served by the inclusion of CHERPA in co-regulation activities.

## **Response to Position and Consultation Paper 8 - ASIC's Directions Powers**

CHERPA is dismayed at the direction powers that are proposed for ASIC and outlined in the Position and Consultation Paper 8. We not convinced that they will provide a solution to operators who do not wish to comply but will simply add a further to burden to operators who are trying to comply within the regulated industry. Further we believe that the measures suggested in consultation paper (in the form of direction powers), are too extreme for the consumer leasing industry and only more appropriate for Securities industry. Finally the proposed powers, are placing ASIC into the position of a policy making body rather than regulatory body. According to ASIC on its website; "the laws we administer give us the facilitative, regulatory and enforcement powers necessary for us to perform our role" – not policy making.

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<sup>2</sup> ASIC's Corporate Plan 2016-2017 to 2019-2020

## Questions

- 1. Should ASIC be able to give a direction to a financial services or credit licensee requiring them to take or refrain from taking specified action in the conduct of their business where necessary to address or prevent compliance failures?*

As stated above CHERPA does not believe that ASIC should have the powers to give a direction to a financial service or credit licensee, however if they were granted these powers, CHERPA would prefer a system similar to the New Zealand Financial Markets Authority (FMA) whereby it must provide written notice that it may make an order and the reasons it is considering doing so at least 5 days (although we suggest a longer period of time) before making the order. Also as with the FMA, we believe ASIC must stipulate any reasonable steps the person must take in order to comply with the provision or to avoid or mitigate any actual or potential adverse effects of a contravention. We also believe the affected licensee should be provided with an opportunity to appear, or be represented at a hearing and to make submissions on the matter before the direction is made.

- 2. Should the directions ASIC can make be prescribed in the legislation (with an ability to extend the list by regulation)? If so, is the above list appropriate?*

CHERPA prefers that the directions should be prescribed in legislation for the purposes of clarity and certainty of compliance. CHERPA, however expresses concern at the level power that will be afforded by ASIC if granted the ability to perform all the actions on the list.

- 3. Alternatively, should a directions power be drafted broadly to allow for a wider variety of directions?*

As mentioned above CHERPA believes that the directions should be prescriptive and definable.

- 4. Should the directions power be triggered if ASIC has reason to believe that a licensee:*

- a) has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of a law relevant to the provision of services by the licensee?*

CHERPA believes that the directions power be triggered only if ASIC has reason to believe that a licensee has engaged or is engaging in a conduct in breach of relevant laws. The power to invoke a direction if ASIC believes a contravention will occur in the future is above and beyond how a regulatory body such as ASIC should function.

- b) has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do?*

Again, CHERPA believes that the act of refusing must have occurred before the directions power be triggered.

- 5. Alternatively, should broad public interest considerations or objectives provide the basis for ASIC making a direction? If so, are the objectives outlined above appropriate?*

CHERPA believes that broad public interest considerations or objectives should not be used as a guide for ASIC making a direction. We are concerned at the ambiguity this introduces. In addition, opinions on what would benefit the majority of public should be evidence based and up to law makers to decide rather than ASIC opinion. Again as stated above ASIC is a regulatory body and not a policy making body and should not be allowed to make decisions on public interest.

*6. Should ASIC be able to apply to a court to seek an order requiring a licensee to comply with the direction?*

CHERPA objects to ASIC being able to apply to a court to seek an order requiring a licensee to comply with the direction. If such a process becomes allowable, we would expect that there would be a right of reply for the parties involved.

*7. If so, should there be sanctions, in addition to those relating to contempt, for a licensee and/or its directors if the licensee breaches the court order?*

CHERPA believes that the introduction of sanctions is too extreme particularly for the consumer lease industry.

*8. Should failure to comply with an ASIC direction be a:*

*a) criminal offence?*

CHERPA believes that a criminal offence would not be appropriate.

*b) civil penalty provision?*

*c) breach of a financial services law or credit legislation and therefore a basis for administrative action?*

CHERPA believes that either a civil penalty provision or a breach of a financial services law or credit legislation is more appropriate.

*9. Should ASIC be required to give written notice to a licensee before making a direction setting out: its intention to make a direction, reasons and a period of time for the licensee to respond that is reasonable in the circumstances?*

As state above if ASIC were to have directive powers, CHERPA believes that ASIC should provide written notice of its intention to make a direction, reasons and a reasonable period of time for the licensee to respond. In addition we would expect that there would be statement(s) explaining steps required to avoid the direction being served.

*10. Alternatively, should ASIC be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions on the matter before making a direction? If so, should ASIC also be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame?*

CHERPA believes that in addition to providing written notice, that ASIC should be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions on the matter before making a direction. CHERPA does not agree that ASIC should be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame.