3 March 2021

Amanda Fairbairn
Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission

By email: remediation@asic.gov.au

Dear Ms Fairbairn

ASIC Consultation Paper 335 – Consumer remediation: Update to RG 256

The Australian Banking Association (**ABA**) welcomes the opportunity to provide our response to Australian Securities and Investments Commission (**ASIC**) Consultation Paper 335 on the update to Regulatory Guide 256 in relation to consumer remediation (**consultation paper**).

The ABA's position

Appropriately designed and implemented remediation programs are important to restoring the public's confidence and trust in the financial services industry. The ABA is supportive of remediation that is fair, transparent, timely, efficient, and that endeavours to restore customers to the position they would have been in had the failure not occurred.

Our member banks are currently conducting large scale remediation programs and we support ASIC expanding the scope of its Regulatory Guide 256 (**RG 256**) to cover remediation by all licensees and provide greater regulatory clarity to ensure consistency across the financial services industry.

The design of remediation programs and processes for returning money owed to customers could be improved.

It is important for the efficiency of remediation that there be consistency in the views of Government agencies on customer remediation. There is an opportunity for Government agencies, including ASIC, APRA, ATO, AFCA, and the Office of the Australian Information Commissioner to ensure a common whole-of-government approach to remediation. This will assist in providing consistency and timeliness to customer remediation.

As part of its review of RG 256, the ABA encourages ASIC to consider flexible and innovative approaches to ensure customers are compensated in both a fair and timely way. We are concerned that some of the proposals outlined in the consultation paper could make remediation programs more complex, not less, and continue to exacerbate some of the regulatory and practical barriers the industry faces returning money owed to customers.

Key points

- **Tiered approach to remediation**: ASIC's proposal to broaden the scope of the commencement of remediation to where loss has occurred to 'one or more' customers duplicates the function of a properly designed Internal Dispute Resolution (**IDR**) system and will create unnecessary complexity of process for the licensee. It is likely that this proposed

approach will delay the customer and licensee achieving resolution where there is a one-off error or a failure affecting a small number of customers.

The ABA does not support introducing a two-tiered approach to initiating remediation. ASIC's guidance should not require licensees to consider whether a remediation is warranted where the conduct does not meet the standard specified in Tier 1, but relates to a breach of customer expectations, certain industry codes of conduct, business values, and other standards and expectations.

- **Review period of remediation:** the removal of the seven-year review period to remediation will cause delays and introduces new complexities to the process of remediation. The need to gather and analyse records that could span over an indefinite period would cause delays to the process of remediating customers and would be inconsistent with privacy regulations and legislative limitations on record keeping.
- **Use of beneficial assumptions**: the objective of remediation is to restore customers to the position they would have been in had the failure not occurred. Applying only beneficial assumptions in remediation may lead to excessive overcompensation of customers. Licensees must balance their responsibilities to other customers and shareholders. We would suggest ASIC's guidance permit the application of reasonable assumptions by licensees. A 'reasonableness standard' is consistent with other legal approaches to compensation such as the awarding of damages for negligence under common law and compensation awarded under statue, and would allow the licensee to more fairly balance its obligations.
- **Retrospective application**: it is unclear from the consultation paper if ASIC intends for the updated regulatory guide to apply retrospectively to inflight or completed remediation. Inflight and completed remediation have been designed and delivered based on the prevailing requirements and the ABA would not support retrospective application. Notably, it could delay the payment of remediation to customers if programs need to be redesigned inflight. We would suggest the updated RG 256 apply to remediation commencing on or after the regulatory guidance is issued, and that ASIC allow for a transitional period.

Overall, licensees should be required to apply approaches that are reasonable. They have a general obligation to act fairly, honestly and efficiently, and applying a reasonable steps approach to finding and remediating customers and applying reasonable assumptions more broadly in conducting their remediation programs will balance fair customer outcomes, obligations to other stakeholders and remediation efficiency.

Specific comments

The ABA's specific comments on each section of the consultation paper are outlined in the attachment to this letter.

We thank you for the opportunity to provide comments on the proposed update to ASIC's regulatory guide on remediation and look forward to working with ASIC through this consultation process. Please contact me on or at if you have any questions.

Yours sincerely

Associate Director, Policy
Australian Banking Association

Australian Banking Association

Attachment – ABA feedback on consultation paper 335 – Consumer remediation

Section B – Two-tiered remediation approach

Tier 1

The proposed Tier 1 requires a remediation to be initiated where a licensee has engaged in misconduct, error, or compliance failure relating to a financial service provided by and covered under the licensee's relevant license. This is largely consistent with the current obligations on licensees and in line with remediation programs that licensees are currently undertaking. It reflects the scope of obligations a licensee must comply with and provides certainty for the licensee and the customer as to which breaches will trigger remediation. This approach would include a breach of the Banking Code of Practice, which forms part of the terms and conditions of the contract between the bank and the customer.

However, we raise concerns with ASIC's proposal to require a remediation to commence where loss has occurred to 'one or more' customers. This broadens the scope of remediation to include one-off errors that may affect only one customer and will have an impact on existing internal dispute resolution processes that licensees have in place to manage such a circumstance. While we agree that all errors should be rectified, and customers compensated as appropriate, initiating a remediation process subject to the regulatory guidance where there is a small number of impacted customers will impose a significant administrative compliance burden on the licensee and will likely cause a delay to the delivery of the outcome to the customer.

Recommendation – the ABA recommends that the updated regulatory guidance should not expand the scope of remediation to commence where loss has occurred to a small number of customers. Where loss has occurred in those circumstances, it should be addressed through the properly established internal dispute resolution processes of the licensee. This will ensure efficiency and the timely resolution of these one-off errors or failures.

Tier 2

The ABA does not support the proposal to require licensees to consider whether a remediation is warranted where the conduct has not breached the law, but has breached customer expectations, certain industry codes of conduct, business values, and other standards and expectations. This requirement is broad in nature and will introduce subjectivity to the process of determining when to commence a remediation. It will be practically difficult for licensees to identify when the Tier 2 threshold has been breached, particularly when many of the elements are inherently subjective and tend to vary over time.

There will also be circumstances where a breach of an obligation under an industry code would constitute a Tier 1 breach in any regard, such as under the Banking Code of Practice. Applying these standards, values and expectations as a trigger for initiating a remediation will result in different interpretations and the application of inconsistent approaches to the initiation of remediation across the industry.

Notably, the regulatory framework for financial services includes a wide scope of consumer protections, including obligations to act efficiently, honestly and fairly, general conduct obligations, unconscionable conduct and misleading and deceptive conduct provisions, and is governed by terms and conditions between the licensee and the customer. ASIC has not explained or given examples of what type of conduct would constitute a 'Tier 2' remediation and, if loss arose, how it would not be connected with a breach of the broad consumer protection framework (a Tier 1 breach).

If a licensee wanted to remediate for breaches of customer expectations or business values, that should be a commercial decision for the licensee and not indicated in updated RG 256.

If ASIC intends to proceed with its two-tiered approach to the initiation of remediation, then we seek clarity on ASIC's expectation around the governance required when a decision has been made on whether to remediate or not. It is unclear from the consultation paper whether licensees will be required to demonstrate reasons for their decision, and what the consequences will be where ASIC disagrees with the licensee's assessment and decision.

ASIC should also provide clear examples of where conduct requiring remediation does not constitute a breach of the law.

Recommendation – the ABA recommends that the updated regulatory guidance should not introduce the second tier for commencing remediation.

Scalability of remediation

The consultation paper outlines that ASIC intends to provide flexibility by stipulating in its updated guidance that once a remediation is initiated, it could be tailored and scaled for every circumstance. We would suggest ASIC clearly outline how the concept and application of scalability can be achieved to ensure consistent application across the industry, particularly on how ASIC intends for the full range of requirements of the updated RG 256 to apply to one customer remediation and how scalability would apply to the documenting and monitoring of any assumptions used by the licensee.

Section C – Review period of remediation

Obligation to maintain records

ASIC's current RG 256 sets an expectation that the licensee will generally not be required to review advice given to clients more than seven years before the licensee becomes aware of the misconduct or compliance failure. The consultation paper proposes to remove this reference to a seven-year review period for remediation. The ABA does not support this.

The obligation to hold records for a seven-year period is enshrined in the *Corporations Act 2001*. In addition to this, the Australian Privacy Principles require an entity to take reasonable steps to destroy or permanently de-identify personal information once it is no longer needed. The removal of the seven-year period may have unintended consequences with regards to record keeping and would introduce risks of future misuse and unauthorised access, and could conflict with current legislative record keeping obligations and privacy regulations.

A limitation period is also enshrined in existing statute laws and provisions in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth)*. ASIC's updated guidance should be consistent with these provisions.

Overall, where adequate data and records are available to the licensee beyond their record keeping requirements, then licensees may opt at their discretion to extend the remediation period beyond the look back period. In exercising discretion, licensees should consider extenuating factors driven by fair customer outcomes including but not limited to the need to ensure that remediation payments are not delayed.

ASIC's proposal notes that gaps in records should be filled by making beneficial assumptions. However, where no, or limited records are available, this may lead to significant remediation cost, inefficiency, and potentially inappropriate outcomes.

In addition, the ABA notes that ASIC is proposing to outline in its updated guidance that a remediation period begins on the date a licensee reasonably suspects the failure first caused loss to a customer. This will introduce subjectivity and may result in inconsistent approaches across licensees as to when the relevant remediation period begins. If ASIC intends to proceed with the "reasonably suspects" test, we suggest ASIC provides greater clarity through worked examples in its updated guidance.

Recommendation – ASIC should retain the current seven-year review period in RG 256 as a reference point and adopt a flexible approach that recognises that data issues may impact the remediation of historical periods beyond the seven-year period. The current proposed approach could conflict with the

legislative record keeping obligations of licensees and privacy regulations, and would cause delays to the payment of remediation to the customer.

Section D – Beneficial assumptions

Use of beneficial assumptions

The use of assumptions by licensees can produce good outcomes for customers, simplifies the remediation process, and ensures remediation payments are made in a timely manner. While we support ASIC providing greater clarity on the use of assumptions, we submit that the proposal to apply only beneficial assumptions in remediation may lead to excessive overcompensation of customers.

The objective of remediation is to restore customers to the position they would have been in had the failure not occurred, within the relevant remediation period. We are of the view that applying reasonable assumptions rather than beneficial assumptions would achieve this objective without leading to the excessive overcompensation of customers and delays to the payments of remediation. Any assumptions made should be governed by the following principles for all licensees:

- Reasonable, in the context of the remediation to which they apply
- Fair for customers, and designed to return the customer as closely as possible to the position they would have otherwise been in, and
- Evidence based and well documented

We would suggest ASIC provide clarity in its guidance on how licensees will be expected to evidence and test that the assumptions used were beneficial / reasonable for customers.

It would also be useful for ASIC to clarify its expectations of licensees in monitoring the effectiveness and distribution of an assumption when being applied in remediation. Requiring licensees to monitor effectiveness of an assumption is impractical and will be burdensome on licensees. It is important to ensure that any guidance on ASIC's expectations of licensees does not add complexity to the remediation process and result in delays to the payment of remediation.

<u>Use of assumptions that result in a partial refund</u>

The ABA considers that in some instances the use of assumptions that result in a partial refund for some affected customer or that involves a discount for a consumer's 'use' of a product, is appropriate. If a customer has benefited from a partial use of the product then that should be reflected in the compensation payment made by the licensee. We would welcome further guidance and examples from ASIC on the circumstances where assumptions that could lead to partial refunds for some affected customers would be appropriate.

<u>Use of assumptions that are based on averages</u>

We note that in particular circumstances, such as where the licensee no longer has customer records or where the outcome is considered fair to the customer, then the use of assumptions based on an average in calculating the amount of compensation to pay may be reasonable.

Recommendation – the ABA recommends that licensees should apply reasonable assumptions in remediation. The use of only beneficial assumptions may lead to the overcompensation of customers that would not be fair and reasonable in light of the licensee's obligations to other customers and shareholders.

Beneficial assumptions to account for absent records

The ABA supports the requirement for the licensee to use beneficial assumptions where the licensee has failed to keep records in accordance with its obligations. However, the use of beneficial assumptions should not be required where the licensee has at least met all their record keeping obligations, and records for an earlier period are no longer available.

The new updated regulatory guidance should also recognise that there may be circumstances where no records are available to identify assumptions to allow for remediation to be conducted, despite the licensee's best endeavours.

Recommendation - the ABA recommends that licensees should apply reasonable assumptions to account for absent records in remediation.

Using beneficial assumptions to increase efficiency

The ABA supports the use of reasonable assumptions to increase the efficiency of remediation.

We would be supportive of ASIC providing greater guidance and examples of when the use of these assumptions would be considered appropriate to increase efficiency and the timely payment of remediation. It should be noted, however, that the licensee should have flexibility in applying these assumptions, and they should be based on available evidence.

Recommendation – the updated regulatory guidance should allow for the use of reasonable assumptions to increase the efficiency of remediation. The licensee should have flexibility in applying these assumptions.

Section E – Foregone returns or interests

The consultation paper proposes to introduce a three-step framework on licensees in calculating forgone returns or interest. While we support ASIC providing guidance on this, we note that the framework should be governed by the underlaying concepts of fairness and reasonableness as they apply to both the licensee and the customer.

Step 1 – calculating forgone returns or interest

While the calculation of forgone returns or interest will accurately compensate the customer, we note that this can be difficult to determine in certain circumstances. In addition, requiring the licensee to undertake such a calculation where the compensation to be paid is small may result in delays. In this regard, we would suggest the updated guidance allow the licensee the opportunity to apply step 2 where the licensee has considered and concluded that the application of step 2 will be more efficient and timelier than step 1, while still achieving the intent of placing customers in the position they would have been had the failure not occurred. It is not uncommon in practice for licensees to undertake step 1 and 2 concurrently.

Recommendation – the updated regulatory guidance should allow the licensee the opportunity to apply step 2 where the licensee has considered and concluded that the application of step 2 will leave customers no worse off than step 1.

Step 2 – consider using beneficial refund assumptions

While we support the use of refund assumptions to calculate forgone returns and interest where they cannot be reasonably calculated, we are of the view that the use of these assumptions in step 2 should focus on compensating the consumer by putting them back in the position that they would otherwise have been in, within the remediation time period, if not for the breach / failure. The compensation derived should be based on available evidence, knowledge of consumer behaviour and market conditions, and should be appropriate and reasonable without materially over compensating the customer.

Recommendation – licensees should not be required to apply beneficial refund assumptions, rather they should be given the ability to apply reasonable refund assumptions to calculating forgone returns and interests.

Step 3 – applying a fair and reasonable default rate

The consultation paper outlines that where no evidence base is available and it is not possible to determine how a customer would have capitalised on the money, it may be appropriate for the licensee

to apply a fair and reasonable rate that is reasonably high, stable, and is objectively set by an independent body, that compounds daily. ASIC has provided the example of the Reserve Bank of Australia's cash rate plus 6% compounding daily as a fair and reasonable rate.

The ABA does not support applying a compounded daily rate, given that there are very few products in the market that offer such return. Applying a default rate that is compounded daily would be costly and would not be considered fair and reasonable to the licensee. In addition, while a cash rate plus 6% rate may be appropriate for some superannuation products and / or financial advice customers who were anticipating an equity related return on investments, it would be inappropriate and not considered fair and reasonable if it applied to credit and deposit products.

We therefore suggest ASIC clearly differentiate between investment product return and banking product return in its guidance and provide examples of fair and reasonable rates that would be applicable to each of those classes of products, noting that the licensee should have the flexibility to pick another rate where that rate is considered fair and reasonable.

Recommendation – licensees should not be required to apply a default rate that is compounded daily. This will be costly and would not be considered fair and reasonable. The compounding frequency should be aligned to that of the relevant product, where applicable.

ASIC should also differentiate between investment product and banking product return in its updated regulatory guidance.

Section F – Approach to finding and paying customers

Applying best endeavours to find and pay customers

The ABA supports the key principle of the regulatory guide that the licensee should aim to return all affected customers as closely as possible to the position they would have otherwise been in, within the remediation time period . The current RG 256 remains silent on ASIC's expectations of licensees when they need to find and make payments to affected customers and we support ASIC providing greater clarity.

We note ASIC is proposing to impose the application of a best endeavours standard on licensees in finding and automatically paying customers. We raise concerns that is a particularly high standard and may lead to uncertainty as to how far a licensee's communication approach should go before a licensee can conclude that the customer is uncontactable. This is of particular concern in relation to former customers of the licensee who may be disengaged from the process, whereby, the licensee may make multiple attempts at communicating with that customer, using a variety of methods, and yet still fail to elicit a response. In this regard, we would suggest ASIC adopt a reasonable efforts standard to ensure remediation payments are not delayed as a result of licensees diverting remediation resources to meet a best endeavours standard.

Applying a reasonable efforts standard would enable licensees the ability to design and implement an appropriately scaled communication approach that would consider the materiality of the particular customer remediation activity, time spent on contacting the customer, the administrative cost associated with the communication approach, resourcing, and the specific needs of any unique customer cohorts.

In addition, we raise concerns with ASIC clearly articulating in its updated guidance that the use of cheques is a method of payment of last resort. Cheques offer an appropriate solution for the licensee in making a compensation payment where the customer no longer has an open account with the financial institution that would allow for a direct payment, or where the licensee has made attempts to contact the customer with no success. Imposing such a restriction on the use of cheques is unnecessary. ASIC should not limit a licensee's ability to determine the method of payment that is most appropriate based on the circumstances and records available.

Recommendation – the ABA recommends ASIC adopt a reasonable efforts standard rather than a best endeavours standards. This reasonable efforts standard would consider the materiality of the particular customer remediation activity, time spent on contacting the customer, the administrative

cost associated with the communication approach, resourcing, and the specific needs of any unique customer cohorts. Licensees have a general obligation to act fairly, honestly and efficiently, and a reasonable efforts standard would balance fair customer outcomes and remediation efficiency.

In addition, the updated regulatory guidance should not impose restrictions on ability of the licensee to determine a method of payment of remediation.

Removal of the low value threshold

The ABA notes that ASIC is intending to remove the low value threshold and provide guidance that it is up to licensees to apply a low value threshold that is fair and appropriate in line with their obligations. The ABA supports allowing the licensee the flexibility to set their own low value compensation threshold, but note that the removal of the low value threshold may impose an administrative burden on smaller licensees by requiring them to determine their own threshold.

Recommendation – the licensee should be provided with the flexibility to apply their own low value threshold that is fair and appropriate.

Section G – Unreturned remediation money

The current RG 256 does not set out clear guidance on how licensees are to treat remediation money that cannot be returned to customers, and the ABA would welcome ASIC providing greater clarity on this. Specifically, we seek guidance from ASIC on the following:

- At what point does an unclaimed money regime's holding requirement commence in the context of a remediation payment? Should holding requirements apply in the context of remediation?
- At what point should a rate of return be applied to a compensation amount when the compensation is to be sent to an unclaimed money regime, particularly where significant effort and follow-up has occurred in an attempt to contact and pay the customer?
- What is an appropriate threshold for reasonable endeavours to find and pay customers?
- If a licensee sends a bank cheque, how and when can the licensee unilaterally cancel the bank cheque, before sending the compensation to an unclaimed money regime?
- How can licensees deal with compensation below the relevant unclaimed money regime's threshold after a reasonable follow up process?

Unclaimed money regimes

Remediation payments that go unreturned can be challenging for licensees to deal with efficiently. There currently exists multiple unclaimed money regimes with varying requirements including varying minimum thresholds, holding times, timing for collection, and this in itself is complex to manage. These varying requirements impose a greater administrative burden on licensees and can result in confusion for customers who seek to recover remediation payments that are owed after a licensee has made a payment to an unclaimed money regime.

Unclaimed money regimes have not been designed to contemplate unclaimed remediation payments made by licensees. For example, we note the consultation paper refers to the unclaimed money regime administrated by ASIC. This regime imposes a $500 minimum threshold for an unclaimed money payment, requires the relevant account to have been dormant for seven years, and requires the amounts to be legally payable. Such requirements impose barriers to making unclaimed remediation payments and exist across each unclaimed money regime to a varying degree.

The ABA would encourage ASIC to engage with other regulators to identify avenues to improve the ability to return funds to customers. One possible solution could be the creation of single national solution for the collection of unclaimed remediation funds from licensees that is managed by ASIC, and would not require a holding period, resulting in reduced complexity. This newly created regime would be fit for purpose and would offer efficiency and simplicity for both licensees and customers.

Recommendation - ASIC should engage with other regulators to identify avenues to improve the ability to return funds to customers. One option could be the creation of single national solution for the collection of unclaimed remediation funds from licensees that is managed by ASIC, and one that does not impose a holding period.

Section H – Settlement Deeds

ASIC's current RG 256 provides that settlement deeds are an important part of a remediation for an advice licensee, but that deeds should only be relevant to the conduct being remediated. While settlement deeds are not used often, they are an important tool in remediation particularly for large-scale remediation programs. In these scenarios, the use of these deeds is important to protect the interests of both the customer and the licensee. From the licensee's perspective, they manage risks of future litigations or claims, while from the consumer's perspective they offer closure and give finality to the remediation process. While we support ASIC providing greater clarity on their use in remediation, we are of the view that settlement deeds remain an appropriate tool for certain remediation programs.

Recommendation – the updated regulatory guidance should allow for the use of settlement deeds for certain remediation programs.

Application of the new guidance

ASIC's consultation paper remains silent on when the updated regulatory guide is to apply. The ABA does not support the updated regulatory guidance applying retrospectively to inflight remediation or completed remediation programs. Retrospective application of the new guidance to inflight remediation would be inefficient and would likely cause delays to the payment of remediation to customers. We would recommend ASIC explicitly state that the updated regulatory guide will not apply retrospectively and there is no expectation on licensees to revisit inflight and completed remediations.

In addition, the ABA notes the new requirements proposed by ASIC under the updated regulatory guide and we would recommend ASIC consider a transitional period for implementation from the date the updated regulatory guide is finalised and published.

Recommendation – the updated regulatory guidance should not apply retrospectively to inflight or completed remediation programs. ASIC should also allow for a transitional period for implementation from the date the updated guidance is finalised and published.