

24 March 2021

Ms Amanda Fairbairn
Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane, QLD 4001

By email: remediation@asic.gov.au

Dear Ms Fairbairn

**AFCA's submission to ASIC Consultation Paper 335: Consumer remediation:
Update to RG 256 – further information**

I refer to AFCA's earlier submission to ASIC's Consultation Paper 335: Consumer remediation: update to RG 256 and ASIC's request for further information seeking specific examples underpinning AFCA's submission.

In our systemic issues function, AFCA staff engage extensively with financial firms when we are investigating conduct that may be potentially systemic.

Our experience with financial firms as part of our engagement process is relatively varied. Sometimes in this engagement, financial firms will immediately understand our position and discussions will focus on the scope of impacted customers and approach to remediation. However, we also have situations where the financial firm will take a narrow stance in relation to its obligations and refuses to remediate and this position does not change. Finally, there is the situation where a financial firm's initial position might be to refuse to remediate, but as our investigation continues and we engage with the financial firm further about its overall obligations to put things right, it will ultimately accept responsibility to remediate customers.

In relation to remediations extending further than seven years, AFCA considered matters involving open review programs, including with CBA and Macquarie. These financial firms engaged with AFCA and agreed to extend time frames and compensation limits in excess of our Rules, in order to ensure customers impacted had opportunity for redress.

We note that several cases referred to ASIC as unresolved were not responded to directly by the financial firm. Rather, the financial firm had outsourced this responsibility to consultants. We have had significant issues receiving information from financial firms where they have outsourced their systemic issues responsibilities, for example to a third-party compliance consultant. This is an issue we see particularly with smaller financial firm members.

It is important to confirm that it is more common than not for financial firms to acknowledge their general obligations and accept responsibility for their actions, as AFCA engages with them as part of our systemic issues process.

Please find attached in Appendix 1 a range of examples (that have previously been reported to ASIC) which support our experience in dealing with these matters.

We appreciate the opportunity to provide information to the Commission to further your important work in this area.

If you have any queries, please do not hesitate to contact me on
or

Yours sincerely

**Head of Jurisdiction
Rules, Systemic Issues and Remediation
Australian Financial Complainants Authority**

Unresolved SI examples

NB these have been previously reported to ASIC on an identified basis by AFCA or predecessor scheme

Case Number	Financial Firm	Conduct	Summary
418067	Wealth & Risk Management	Misleading Conduct	The financial firm's (FF's) Responsible Manager failed to provide information requested, including to explain the links between multiple entities that were the subject of the issues raised. The FF absolved responsibility to other companies that were not members of AFCA and failed to provide information about the FF's conduct. AFCA entered discussions with the FF about its overall obligations. These discussions included direct meetings with the FF. AFCA provided ASIC with information in the early stages of our investigation about this matter. The matter was ultimately closed after ASIC media release 17-069MR set out similar operation and structural concerns relating to the FF and the Yes FS Group and its intention to proceed with legal action.
510037	Berndale Group	Compliance with the Corporations Act/Advice	AFCA's concerns about the FF's conduct related to specific compliance failings and that it was not meeting its general obligations to ensure financial services covered by its license were provided efficiently, honestly and fairly. Extensive discussions were had between the FF and AFCA on this matter. The matter was reported to ASIC as an unresolved systemic issue in June 2018.



502578	CBA	CCI	<p>The specific matter considered by AFCA was not captured for remediation in the Bank's broader CCI remediation. ASIC was involved in this case and meetings with the FF and auditor. The FF reached conclusions in this case despite a lack of records and did not remediate using beneficial assumptions. AFCA's final unresolved systemic issue's report to ASIC was provided in September 2019.</p>
705671	Highlow Markets	Undefined impact	<p>The FF's terms and conditions had misleading information about what it considered to be unauthorised activity (CFDs). The FF disagreed with AFCA about this status and about its general obligations in this regard. The FF ultimately agreed to amend the provision to address the matter. AFCA reported the matter to ASIC as unresolved. This was due to there being no way, for remediation purposes, to ascertain the impact of the misleading provision. AFCA considered that even if the FF provided context about the number of occasions it exercised its discretion in relation to this provision (which it did not), it would not capture the number of clients who may have refrained from seeking financial advice on opening and closing positions to their financial detriment.</p>
423519	Australian Planning Services	AR conduct	<p>The information provided by the FF indicated that 26 clients were identified as being within the original scope of its review and remediation program.</p> <p>As we understand it, the basis of the FF's rejection of the 26 matters was not due to a consideration of whether compliance failures impacted these clients, but rather that the complaints were made out of time.</p> <p>AFCA asked the FF to review those matters that were within the original scope of the remediation program and reminded the FF of its general obligations. However, the FF advised AFCA that it would not review these matters.</p>

As the remediation program did not provide redress to all potentially affected clients, and the FF declined our request to include these matters in its remediation program, the case was concluded as an unresolved definite systemic issue and reported to ASIC in July 2018.

481793 Clearview Conduct of AR

The FF informed AFCA that the reason why it terminated the AR in question were 'generally' not due to legal requirements. AFCA's investigation found issue with the FF's position and its basis for not conducting a full review of the AR's client files. As a result of further communication, the FF eventually agreed to a review by an independent compliance consultant.

The consultant's report found significant record keeping issues impacting their ability to provide informed assessments and also recommended that the FF consider whether adviser specific systemic issues or breaches existed (the review was limited to the one adviser).

The independent compliance report called into question FF's previous position about the AR's conduct, its obligations and the robustness of its compliance monitoring framework. Throughout the investigation, AFCA highlighted the financial firms its obligations to act efficiently, honestly and fairly and to put things right.

No remediation occurred. The matter was reported to ASIC in June 2020 as unresolved.

407048 Axicorp Corporations Act

The FF was unable to demonstrate that it was doing all things necessary to ensure that its financial services are provided efficiently, honestly and fairly. This related to how it was applying its discretion to amend, void and close a trade and how it applied its material error clause. AFCA interacted with the FF on an ongoing basis about its

general obligations in efforts to identify all impacted customers and remediate. As the FF was not able to show that it had identified and remediated all impacted customers, this matter was reported to ASIC in December 2018 as unresolved.

Resolved SI examples where remediation position changed

NB these have been previously reported to ASIC on a de-identified basis by AFCA or predecessor scheme

Case Number	Conduct	Summary
477195	Cash advance	<p>The FF charged purchases of lottery tickets as a cash advance. The FF's terms and conditions did not refer to lottery tickets but rather it captured these under its clause of 'casino chips or token.' The FF initially argued that all its customers should be aware of this and that it was meeting its obligations. AFCA did not hold this view and considered casino gambling chips or tokens, as defined in the conditions of use, and which were subject to a cash advance interest rate charge, were not lottery tickets, as those words are ordinarily understood.</p> <p>The FF ultimately accepted this position and its obligations and changed its cash advance definition to specifically include the purchase of lottery tickets. The FF refunded customers who had been charged fees under this clause for a defined period.</p>
475947	Disputed transaction process	<p>The definite systemic issue relates to the FF's practice of withdrawing funds from clients' accounts, via its AutoPay facility, to cover disputed transactions, prior to establishing customers liability for these transactions. The FF initially was of the view that it was acting consistent with its terms and conditions and obligations. AFCA had discussions with the FF on this matter that included about its general obligations. The FF then proposed to change its terms and conditions to continue carrying</p>

out the similar conduct. Further communication occurred at that time about the fairness of this approach and its obligations. Ultimately, the FF put in a temporary fix that lead to a permanent fix in February 2020. The FF remediated impacted customers and the matter was reported to ASIC in July 2019 as resolved.

47300 Disputed transactions

In the complaint referred to SI, the FF declined the complainants disputed transactions due to a delay in notifying it of the transactions and that it had lost its right to lodge chargebacks for the disputed transactions. The FF indicated that complainants have a duty of care to review their statements/internet banking and notify ING of any unauthorised transactions.

After AFCA approached the FF as part of its SI investigation and confirmed its overall obligations, the FF acknowledged that it had breached sections of the ASIC Act and Corporations Act. The FF lodged a breach report with ASIC and remediated customers. The FF's remediation scope looked at all affected customers from the introduction of the ePayments Code. The FF confirmed that it would look back at its compliance with the previous EFT Code.

489110 Misleading/Incorrect information provided in SOA's

The financial firm's initial position was that the matter was not systemic. The FF argued that no customer would presume that they could choose any resort, any villa type, any size, any check-in day and any length of stay using their club points. It was highlighted to the FF that this is precisely what was informed to customers in the FF's SOA's and was why it was misleading. Ultimately the FF acknowledged its inappropriate conduct and agreed to write to all affected customers and ensure they have the opportunity for IDR and EDR, if not resolve. The FF informed AFCA that it had established call centre teams in multiple countries in order to address any queries as a result of its letters to affected customers. This was an example of a FF moving from a defensive position to accepting responsibility for its conduct.

511390 Advisor Conduct and remediation

The FF initially did not accept responsibility for the advisor's conduct as it was outside the FF's license. The issue was further complicated by the advisers passing. AFCA communicated its position about the FF's overall obligations as part of this investigation. The FF ultimately agreed to remediate impacted customers and while it did not consider the matter to be a reportable breach, took the opportunity to inform ASIC of the issue and its remediation efforts.

436836 Charged double interest

The FF informed AFCA that it had addressed the issue and remediated all customers. At that stage, \$2.7M had been remediated. The information provided to AFCA did not demonstrate this. Through ongoing discussions, the FF identified further customers and final remediation applied was over \$4M. Throughout the SI investigation, the FF refused AFCA's direction that the matter should be reported to ASIC. The FF indicated that it was not technically a breach under the ASIC Act. After extensive discussions with AFCA about its overall obligations, the FF reported the matter to ASIC and later confirmed that it would adopt a more holistic approach to its breach reporting.