CONSULTATION PAPER 335

Consumer remediation: Update to RG 256

December 2020

About this paper

This consultation paper seeks feedback on the key issues we have identified for updating Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256).

The updated guidance will apply to:

- all licensees who hold an Australian financial service licence or Australian credit licence; and
- trustees of regulated superannuation funds (but not self-managed superannuation funds), approved deposit funds or pooled superannuation trusts, and retirement savings account providers.

We are seeking feedback from these stakeholders and also consumers and consumer representatives who have participated in a remediation.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 3 December 2020 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

This is the first round of a two-part consultation process.

You are invited to comment on the key issues and proposals in this paper, which are only an indication of the approach we may take and are not our final policy. The draft guidance will be included with the second round of consultation and will be informed by the feedback and insights from this consultation process.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess what your remediation experience or participation has been, the challenges you face, and any other impacts of our proposals. Therefore, we ask you to comment on:

- the proposals and provide evidence of your own remediation performance experience, and the consumer outcomes in support of any position;
- how you have approached remediation challenges, including whether you have found innovative solutions to problems or you found there to be no solution;
- whether you think the proposals in this paper are appropriately scaled, where relevant, for different types of licensees and remediations;
- any other issue related to remediation not addressed in this paper; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information from licensees, consumers and consumer representatives.

Information about impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section I, 'Regulatory and financial impact'. We will seek further information about this when we release the draft regulatory guide for the second round of consultation.

Our policy in Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256) will remain in effect until the revised remediation guidance is published.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 26 February 2021 to:

Amanda Fairbairn, Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: remediation@asic.gov.au

What will happen next?

Stage 1	3 December 2020	ASIC consultation paper released
Stage 2	26 February 2021	Comments due on the consultation paper
Stage 3	To be advised	Draft regulatory guidance released for further consultation

A Background to the proposals

Key points

Our current RG 256, published in 2016, applies specifically to advice licensees providing personal advice. However, many of the principles in our guidance are applicable to all licensees because they have a general obligation to do all things necessary to act efficiently, honestly and fairly when providing financial services, which includes taking responsibility for when things fail or go wrong.

Since 2016, we have monitored or overseen many remediations that have covered matters other than financial advice. We consider that product neutral remediation guidance is now necessary to help all licensees apply clear and consistent standards.

We note the recently introduced law reforms that respond to recommendations by the Royal Commission into Banking, Superannuation and Financial Services Industry will affect the conduct of remediations in the future.

This consultation paper seeks feedback on the key issues that we are proposing to update in RG 256 so that all licensees are empowered to take a consistent, efficient, honest and fair approach to remediating consumers.

Our objectives for this consultation paper

1 In this consultation paper, remediation refers to the process where a licensee investigates the full extent of a failure, and where appropriate, returns all consumers that have suffered loss as a result of the failure to the position they would have otherwise been in, as closely as possible.

> Note: For a description of who a 'licensee' is, see paragraph 3 and for what may be considered a 'failure', see Section B.

Clarifying who RG 256 applies to

2 Since publication of the current RG 256, we have monitored or overseen remediations across the financial system including in relation to insurance, superannuation and banking products and that experience informs the content of this consultation. It is not, however, our role to monitor or oversee all remediations, and currently there is a lack of transparency as to how remediations more broadly are being carried out. As a result, there is a need to update our guidance to ensure:

(a) that all licensees have the benefit of clear and consistent guidance on their obligations; and

(b) licensees understand how those obligations may apply to the wide range of issues that arise in carrying out a remediation.

3 We intend to clarify that our guidance is relevant to all:

(a) Australian financial services (AFS) licensees;

(b) Australian credit licensees (credit licensees); and

(c) trustees of regulated superannuation funds (but not self-managed superannuation funds), approved deposit funds or pooled superannuation trusts (RSEs) and retirement savings account (RSA) providers (superannuation trustees).

Note: In this paper, AFS licensees, credit licensees and superannuation trustees are referred to collectively as 'licensees'.

4 We will clarify this in our revised guidance because all AFS and credit licensees have a general obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. Other obligations also apply for superannuation trustees: see paragraphs 6–10.

The aim of this consultation

5 This first round of consultation aims to:

(a) clarify and seek feedback on when a remediation should be initiated;

(b) understand if and when assumptions can be relied on in a remediation;

(c) understand barriers and opportunities in effectively returning money to affected consumers; and

(d) identify any gaps in the current RG 256 and deliver the guidance necessary to empower all licensees to remediate consumers efficiently, honestly and fairly.

Obligations of AFS licensees, credit licensees and superannuation trustees

6 AFS licensees and credit licensees have an obligation to do all things necessary to ensure that their financial services are provided efficiently, honestly and fairly: see s912A(1)(a) of the *Corporations Act 2001* (Corporations Act) and s47(1)(a) of the *National Consumer Credit Protection Act 2009* (National Credit Act). Complying with this obligation includes licensees taking responsibility for the consequences of their actions if things go wrong when financial services are provided and clients suffer loss or detriment.

7 AFS licensees and credit licensees must also have compensation arrangements in place: see s912B of the Corporations Act and s48 of the National Credit Act (other than some licensees regulated by the Australian Prudential Regulation Authority (APRA)—see, for example, reg 7.06.02AAA(3) of the *Corporations Regulations 2001*).

> Note: Whether remediating consumers in a single instance of loss or as part of a broader remediation, licensees will often consider how their compensation arrangements can assist in providing remediation to consumers: see the current RG 256 at RG 256.68–RG 256.73.

8 Licensees must also ensure that they comply with the prohibitions on unconscionable conduct: see s12CA–12CC of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

> Note: In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No. 3)* [2020] FCA 1421, ANZ admitted and the Court declared that by not making remediation payments after 11 December 2013 to the affected customers between 11 July 2005 and 31 December 2007, ANZ engaged in unconscionable conduct on two occasions and breached its general obligations under s912A(1)(a) and (c). For a period of time in the particular circumstances, the absence of a decision to remediate any affected customer was a relevant consideration in the characterisation of the conduct as unconscionable.

9 Currently, most superannuation trustees must hold an AFS licence authorising them to deal in superannuation. This AFS licensing requirement will extend to all RSEs if the recently introduced Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (FSRC 2020 Bill) is enacted.

10 Superannuation trustees are also subject to the terms of the trust deed and a mix of general law duties and statutory duties and obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act)—for example, to perform their duties and exercise their powers in the best interests of members—that may be relevant to the remediation of their members. Fund managers of registered managed investment schemes also have additional statutory obligations—for example, to act honestly and in the best interests of their members.

Our regulatory experience in remediations

11 We have monitored or overseen hundreds of remediations, large and small, across the financial system. Licensees frequently seek our specific advice or guidance about the proposed design and execution of a remediation that they are responsible for. These requests have informed the subject matter of this consultation paper.

12 Although we have seen some positive changes from industry, our experience has been that licensees still sometimes use remediation approaches that are

not aligned with their stated values about the treatment of consumers and arguably with their legal obligations. Some licensees view remediations as a distraction from their core business, while others take a legalistic approach that neglects consumer interests or fails to prioritise or resource remediations.

13 In these circumstances, consumers potentially suffer twice—first through the initial actions by the licensee that caused them loss, and then through remediations that do not prioritise their interests.

14 In this paper, we are consulting on issues informed by our regulatory experience that will help to clarify licensee obligations and that will ultimately benefit consumers, who are owed money, and also benefit licensees by:

(a) promoting trust;

(b) reducing the costs of external dispute resolution, or individual or class actions; and

(c) not having to 're-do' remediations in the future.

Recently introduced law reform relating to remediation

15 In response to the recommendations of the Royal Commission into Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission), the Australian Government has recently introduced into Parliament the FSRC 2020 Bill. This Bill, among other things, implements recommendations that will affect the conduct of remediations across the financial system in the future: see paragraphs 16–18.

Enhanced breach reporting

16 The FSRC 2020 Bill implements the Financial Services Royal Commission recommendations 1.6, 2.8 and 7.2. This will, among other things, expand the application of the breach reporting regime to credit licensees, as well as extend the types of breaches that must be reported to ASIC. It will also require that ASIC publish data in relation to breach reports.

Notifying, investigating and remediating consumers of financial advisers and mortgage brokers

17 The FSRC 2020 Bill implements recommendations 1.6 and 2.9 of the Financial Services Royal Commission, which called for AFS licensees and credit licensees to be required, as a condition of their licence, to investigate potential and actual misconduct engaged in by financial advisers and mortgage brokers, and to inform and remediate affected consumers.

18 These obligations are aimed at a specific subset of licensees. Where the proposed obligations under these provisions apply, those licensees will be required to comply with the specific obligations relating to timeframes and arrangements for notifying consumers, investigating the nature and full extent of the misconduct, and compensating affected consumers. However, these measures sit within the broader remediation and compensation framework, including the obligations discussed at paragraphs 6–10 and internal and external dispute resolution schemes. This broader regulatory framework and RG 256 should be considered concurrently with these specific obligations.

Key issues for consultation

19 The key issues identified in this first round of consultation are relevant to whether a remediation is conducted in a manner that is efficient, honest and fair, and consistent with the obligations discussed at paragraphs 6–10. Given the variability in every remediation, the issues flagged for consultation address the common challenges, deficiencies and areas of uncertainty we have seen in remediations across the financial system and reflect the common questions that licensees conducting remediations frequently ask us.

20 In this paper, we use real case studies to illustrate some issues. These case studies are drawn directly from the practices we have observed from licensees and reflect the approach of those licensees in meeting their obligations.

21 Table 1 provides a summary of the key issues that we are seeking feedback on in this paper.

Table 1: Key issues for consultation

Key issue	Reference
Using a two-tiered approach to initiating a remediation	Section B
Reviewing the relevant period for a remediation	Section C
Using beneficial assumptions	Section D
Calculating foregone returns or interest rates on compensation payments	Section E
Applying best endeavours in finding and automatically paying consumers, and removing the low-value compensation threshold	Section F
Clarifying our guidance for remediation money that cannot be returned despite best endeavours	Section G
Settlement deeds and fair consumer outcomes	Section H

22 While this paper focuses on the key issues set out in Table 1, you may provide feedback on any other issue that has proven challenging for the conduct of your remediation if you are a licensee, or for your participation in a remediation if you are a consumer or consumer representative.

23 We intend that our revised remediation guidance will apply to all licensees, regardless of size, and that it can be tailored and scaled for every circumstance. As such, we are keen to receive feedback that helps us to understand any practical problems associated with the key issues discussed in this paper and our proposals.

B When to initiate a remediation

Key points

We are seeking feedback on a two-tiered approach to initiating a remediation that reflects what some licensees are already doing when they uncover evidence of a failure.

This approach can be scaled according to the size and scope of the failure.

Two-tiered approach to initiating a remediation

Proposal

B1 We propose to provide guidance on a two-tiered approach to initiating a remediation:

(a) Tier 1—a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and

(b) Tier 2—given the broad nature of the obligations on them, licensees should also turn their mind to whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values.

Note 1: The two-tiered approach is shown in Figure 1.

Note 2: In this paper, we refer to the conduct described in Tiers 1 and 2 collectively as a 'failure'.

Note 3: A remediation once initiated can be scaled according to the size or scope of the failure. If the failure only affects a small number of consumers, the process to rectify the loss may be simple and prompt and not require a full 'program' to be initiated: see paragraphs 35–36.

Your feedback

B1Q1 Do you agree with our proposed two-tiered approach to initiating remediation? If not, why not?

B1Q2 Are there any practical problems associated with this approach? Please give details.

B1Q3 What is your current policy and procedure for initiating a remediation? How do you describe the standard of conduct required in your organisation for initiating a remediation?

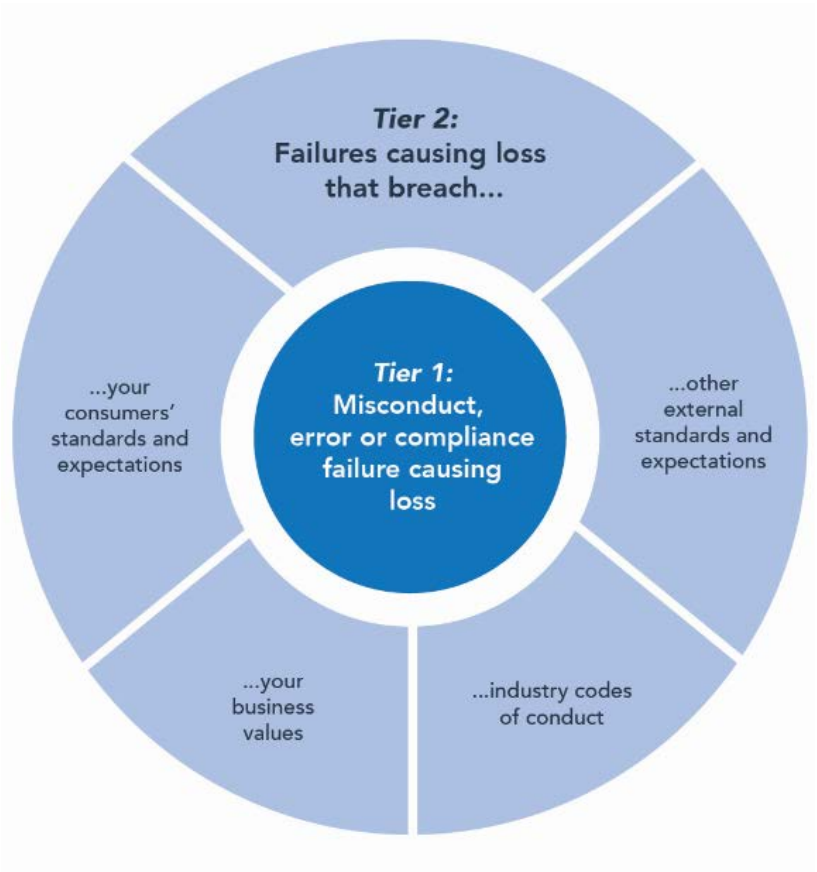
Rationale

24 All licensees have an obligation to do all things necessary to ensure that the financial services covered by the licensee are provided efficiently, honestly and fairly: see s912A(1)(a) of the Corporations Act and s47(1)(a) of the National Credit Act. They also have an obligation to have compensation arrangements in place: see s912B of the Corporations Act and s48 of the National Credit Act. These are ongoing obligations and apply to both the provision of financial services and to the consequences of providing those services.

25 We have seen some licensees adopt a remediation approach that is not limited to establishing a legal or compliance breach only—it also takes into account what their consumers and the broader community would expect in terms of 'righting wrongs'. Some licensees are also no longer waiting for consumer harm to become a systemic issue, and instead are initiating a remediation when they identify a single instance of loss.

26 We consider that the two-tiered approach to initiating a remediation set out in our proposal and shown in Figure 1 is consistent with licensee obligations and community expectations.

Figure 1: The two-tiered approach to initiating a remediation



Note: See paragraphs 28–34 for a description of the two-tiered approach to initiating a remediation.

27 We consider that a failure extends to a decision, omission or behaviour of:

(a) a licensee;

(b) a current or former representative of a licensee;

(c) a current or former third-party service or product provider of a licensee;

(d) a consultant engaged by a licensee; and

(e) a subsidiary of a licensee.

Note: A failure relating to financial services that is provided by an entity engaged or authorised by a licensee may fall under either Tier 1 or Tier 2 depending on the circumstances and any contractual arrangements the licensee may have in place.

Tier 1: When a remediation must be initiated

28 We are proposing that a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure relating to a financial service provided by and covered under the licensee's relevant licence and caused actual or potential consumer loss to 'one or more' consumers, rather than a 'number of consumers'. We are proposing to remove reference to systemic issues and the suggestion that it may not be appropriate to remediate product failures from the current RG 256.

29 Tier 1 includes 'error' as a failure to explicitly capture circumstances such as when:

(a) the actual outcome of a business process differs from the promised outcome because of inadequate, non-existent or failed processes, people, systems or external events; and

(b) conduct (such as a systems, processing or manual error) results in a contractual failing.

30 These types of errors are the subject of many current remediations to do with non-wealth financial system failures—for example, remediations involving a failure to charge fees or to apply price discounts in accordance with the terms and conditions of a product or marketing.

31 The types of failures that have caused consumer loss and fall under Tier 1 will generally involve a breach of the law or a contractual failing.

Tier 2: When the question of whether a remediation is warranted should be considered

32 Typically, cases involving failures that fall under Tier 1 will also breach values, standards and/or expectations under Tier 2. However, there may be some cases when failures causing loss do not strictly or clearly fall under Tier 1, but nonetheless breach other standards, expectations and/or values (e.g. industry codes, business values or promises made such as doing 'what is right' or putting the customer first). Tier 2 may cover failures causing loss

that are not formally reported to ASIC under s912D of the Corporations Act, but may have been reported, for example, as a breach to an industry code compliance committee.

33 When a case falls under Tier 2, a licensee should consider initiating a remediation that is in line with our revised remediation guidance and has regard to their general obligations, including those under s912A(1)(a) of the Corporations Act, their own values and how they wish to treat their consumers. This proactive approach reflects what we have seen from some licensees already.

34 For completeness, these Tier 2 considerations do not go beyond what is reasonable to expect. For example, it is unreasonable to expect a licensee to initiate a remediation because a consumer has suffered loss that is solely as a result of the investment performance of an authorised financial investment, unless it concerns non-disclosure, misrepresentation or other breaches.

Scalability of a remediation once initiated

35 We intend that once a remediation is initiated, the requirements in our revised remediation guidance can be tailored and scaled for every circumstance. There is no one-size-fits-all approach. Licensees will be able to tailor elements of the guidance to appropriately identify the consumers affected, calculate the loss or detriment, and effectively communicate what has happened and what the licensee has done to fix it.

36 To reinforce this, we will remove the concept of a ‘review and remediation program’ from the current RG 256. Launching a ‘program’ will not always be necessary—for example, if a handful of consumers have suffered loss and the cause is isolated in nature, the process to rectify the loss may be simple, prompt and not require a ‘program’. Similar to the current RG 256, simple remediations should still be able to incorporate the general concepts in our guidance, scaling as needed.

C The review period for a remediation

Key points

We are seeking feedback on replacing the seven-year minimum period referred to in the current RG 256 with guidance that the relevant review period for a remediation should start on the date a licensee reasonably suspects a failure first caused loss to a consumer.

Review period to start from when a failure first caused loss to a consumer

Proposal

C1 We propose to provide guidance that, as a starting point, the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer.

Your feedback

C1Q1 Do you agree with this proposal? If not, why not?

C1Q2 Are there any practical problems associated with this proposal? Please give details.

C1Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?

Rationale

37 The current RG 256 states at RG 256.85–RG 256.86 that:

> We will not generally expect you to review advice given to clients more than seven years before you became aware of the misconduct or other compliance failure. … However, in certain circumstances—such as where the client has held the product about which advice was given for a long period of time—it may be appropriate to review records going back further than the minimum seven years. We expect that you will act in a way that gives priority to the interests of your clients when deciding how far back to review advice given to clients.

38 Our experience since publishing the current RG 256 in 2016, underpinned by the findings of the Financial Services Royal Commission, is that many remediation issues go back more than seven years by the time they are uncovered and that the time period referred to in RG 256 may have created a disincentive for licensees to investigate the full extent of the problem. Further, some licensees have 'started' the time period from the point when they decide to commence a remediation rather than the point of discovery of the issue.

39 We have seen systemic factors contribute to delays in both identifying failures and remediating consumers, including when:

(a) systems have not been consolidated as new businesses have been acquired;

(b) systems have been the subject of a mixture of 'short-term fixes';

(c) systems have not been effectively updated for new processes or products;

(d) there has been a historical underinvestment by boards and senior management in maintaining technology systems, resulting in:

(i) multiple and overlapping IT processes and manual workarounds; and

(ii) fragmented databases with limited functionality and poor global search capability; and

(e) key staff who know legacy systems and issues have moved out of the business.

40 Taking responsibility for the consequences of a licensee's actions is a part of holding a financial services or credit licence: see paragraphs 6–10. We think this responsibility should extend in principle to each consumer who has suffered loss and that the remediation period should not be anchored to a seven-year timeframe.

41 If licensees have proper governance and risk management frameworks in place, then review periods for remediations should rarely exceed seven years. If a licensee's poor systems and governance frameworks result in delays to the identification of failures, it may not be efficient, honest and fair to rely on the late identification to limit the scope of consumers in a remediation. We do not want to create any possible incentives for licensees to avoid proactively identifying and remediating problems as they occur.

Note: For more information on government and risk management frameworks, see APRA, *Self-assessments of governance, accountability and culture* (PDF 785 KB), information paper, 22 May 2019.

42 When licensees have breached their record-keeping obligations, or when there are significant delays in identifying consumer harm that have resulted in absent records, then using beneficial assumptions may be an appropriate response: see Proposal D2.

43 In our experience, licensees have taken inconsistent approaches to determining the relevant remediation period. In practice, we have seen many cases where licensees have acted to rectify the full extent of their failures by determining and refunding the losses suffered by consumers beyond seven years, or applying beneficial assumptions when possible to account for deficient records. However, we have also seen cases where some licensees

have sought to anchor to the seven-year period as a starting point, regardless of the circumstances or the state of their records.

44 In view of changes over time to data management capabilities and IT systems and the increased value given to, and use of, product data, we understand that at least the larger licensee's incentive and ability to retain and access records may have improved since 2016. We therefore suggest it is no longer appropriate to prescribe a seven-year review period for every remediation, particularly because this could lead to unfair outcomes in some circumstances.

45 However, we acknowledge that smaller licensees may not have the same data management capability and that conflicts may exist in terms of privacy regulations for all licensees. We also recognise that many licensees experience logistical barriers when accessing consumer information or files when, for example, a third-party provider is involved, or an adviser has left the firm.

D Using beneficial assumptions

Key points

In some remediations, in order to save time and cost, remediate more efficiently or make up for absent records, licensees may consider the use of assumptions. We are aware that considerable uncertainty exists in terms of whether and when it may be appropriate to apply assumptions in a remediation.

We are seeking feedback on the use of beneficial assumptions in order to:

- define what a beneficial assumption is and the considerations when using assumptions;
- understand if it is reasonable for licensees to use beneficial assumptions when records are absent; and
- determine in what circumstances it may be appropriate to use an assumptions-based approach to increase the efficiency of a remediation.

Defining a beneficial assumption and the considerations when using assumptions

Proposal

D1 We propose to provide guidance that, overall, licensees should only use assumptions in a remediation if they are *beneficial* assumptions. In particular, this guidance would cover what a beneficial assumption is and set out what should be considered when using assumptions, including for specific types of assumptions.

Note: For a definition of 'beneficial assumption' and the considerations when using assumptions, see paragraphs 48–54.

Your feedback

D1Q1 Do you agree with our proposal for assumptions to be beneficial and that they should satisfy certain considerations? If not, why not?

D1Q2 Is it appropriate to use assumptions that result in a partial refund for some affected consumers or that involve a discount for a consumer's 'use' of the product? If not, why not?

D1Q3 Is it appropriate to use an assumption based on an average (e.g. in calculating loss, using the average premium or the average fees charged over a relevant period)? If not, why not?

D1Q4 Have you used an assumptions-based approach in remediations? Please provide details, including evidence of how the assumptions benefited the consumer and if you have used an average that resulted in a good consumer outcome.

Rationale

46 Using assumptions in a remediation—if properly designed, tested and monitored—can produce good consumer outcomes and save licensees a considerable amount of time and resources. An assumptions-based approach can be an alternative to or used in combination with one that is based on conducting reviews of individual files or accounts. Whichever approach is taken, it needs to be fair and appropriate in line with a licensee's obligations.

47 Licensees frequently seek guidance from ASIC on when and what assumptions could be used in a remediation. This is because the current RG 256 does not directly address the potential for licensees to use assumptions in a remediation. Instead, it focuses on conducting reviews of individual files, which may be appropriate for some financial advice remediations but may not be for those involving different products and services. To address this gap, we are proposing to provide guidance and a framework for licensees to confidently apply assumptions in their remediations. When using assumptions, licensees should have regard to certain considerations: see paragraphs 48–54.

What is a beneficial assumption?

48 When applying assumptions, licensees should first consider whether the assumption:

(a) aims to return all affected consumers as closely as possible to the position they would have otherwise been in (this may include giving a consumer the benefit of the doubt);

(b) is evidence-based and well documented; and

(c) is monitored to ensure the assumption continues to achieve the goal of returning consumers as closely as possible to the position they would have otherwise been in throughout the remediation.

49 Based on our practical experience, assumptions that are based on these considerations generally lead to fair and efficient outcomes.

50 An assumption that benefits all affected consumers on average may not necessarily meet a licensee's obligations. This will depend heavily on the nature of the distribution of the losses caused by the licensee. An averaging approach may work when there is a normal distribution and a low standard deviation but will fall dramatically short when there is an unusual or skewed distribution and/or a high standard deviation.

Considerations when using assumptions

51 In our experience, there are a few types of assumptions that can be made in a remediation. The two main assumptions involve:

(a) determining which consumers should be included in the remediation (scoping assumptions); and

(b) calculating the amount of actual or potential loss (refund assumptions).

52 Beneficial scoping assumptions should benefit consumers by preferencing inclusivity rather than exclusivity (i.e. the assumptions widen the net to capture more consumers rather than less).

53 Beneficial refund assumptions should:

(a) err on the side of overcompensation, rather than under compensation; and

Note: That is not to say that licensees are obliged to overcompensate, rather that if they choose to use assumptions to save time and cost or account for absent records, the assumptions should equate to actual loss or err towards overcompensation rather than risk returning less than what consumers are owed.

(b) not be used to justify limiting or preventing a consumer's right to challenge a remediation outcome through internal dispute resolution (IDR) systems or to make a complaint to the Australian Financial Complaints Authority (AFCA).

54 It is our experience that remediations that employ these types of beneficial assumptions in this way are usually more efficient, timely and generally lead to fair consumer outcomes. However, using assumptions to increase efficiency may not always be appropriate or possible and licensees should first consider if the remediation is properly resourced: see Proposal D3.

Note: A decision to use beneficial assumptions may need to be balanced with other factors and considered in the context of the licensee's other legal duties and obligations—for example, if using trust or scheme property to fund the remediation.

Using beneficial assumptions to account for absent records

Proposal

D2 We propose that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.

Your feedback

D2Q1 Do you agree with our proposal that beneficial assumptions should be used to make up for absent records? If not, why not?

D2Q2 Are there any practical problems associated with this proposal? Please give details.

D2Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?

Rationale

55 Generally, licensees should be able to review their records and determine the consumers that have been affected as a result of a failure and calculate the loss or detriment suffered.

56 Licensees have a range of record-keeping obligations that may be relevant to their ability to effectively conduct a remediation: see Section C.

57 Consumers should not be disadvantaged if a licensee fails to keep proper records in line with its record-keeping obligations, or if an authorised representative of the licensee has failed to comply with its obligations to provide records on request. Poor or incomplete records is rarely a justification for a failure to remediate consumers or to limit the scope of a remediation.

58 RG 256 currently includes guidance that clients should be given the benefit of the doubt where there is missing information: see the current RG 256.100. We intend to clarify that if a licensee has failed to keep records in line with its obligations and as a result is unsure whether a consumer has suffered a loss, we expect the licensee to make beneficial assumptions in that consumer's favour if there is evidence to suggest the consumer has been, or may have been, affected by the failure. The consumer should be returned as closely as possible to the position they would have otherwise been in.

59 Although it may be reasonable to ask a consumer for information in some cases, a consumer should also not be disadvantaged in a remediation if they are unable to fill the gaps in a licensee's records.

60 We acknowledge that the circumstances in which beneficial assumptions will be reasonable or possible beyond the seven-year record-keeping period may vary according to each remediation and a licensee's capabilities, including data management capabilities and resources. We expect that licensees will do what they can within their capabilities. For example, we do not expect that a small financial advice firm will have the same capabilities or resources as a larger firm.

61 In our experience, regardless of size, licensees can think creatively about where they may be able to source data from across their organisation, or from service providers or consultants, and what that data could tell them about their consumers, and how it may inform assumptions.

62 For example, a licensee should consider:

(a) what available data could inform an evidence base for the period when records are incomplete;

Note: The evidence base for these assumptions does not need to be of the same calibre as it would for assumptions used for efficiency purposes only because available records will differ.

(b) whether other internal or external information could be triangulated to inform scoping; or

(c) if it is known or suspected that a consumer has held the relevant product for a longer period of time than there is data available for, this could be factored into assumptions about how far back the remediation will go.

63 However, we will not generally expect a licensee to apply beneficial assumptions for the purposes of compensation if it is reasonably not possible to identify the potentially affected consumer.

64 In any event, a decision to apply assumptions should be well documented and appropriately justified.

65 Case studies 1–2 are real examples of licensees using assumptions beneficially to account for absent records. These are based on our actual experiences of remediations and decisions made by licensees.

Case study 1

Consumers that had a business lending facility with Firm X were required to obtain a 'key person' life insurance policy. In some cases, this policy was assigned to Firm X as a policy owner. For the last 10 years, when Firm X was the policy owner, correspondence received by Firm X from insurers may not have been provided to consumers. This meant that consumers may have unintentionally continued to pay for the policy after the relevant business facility was repaid and the condition lifted.

Instead of relying on insurance providers to provide historical premiums data and details of premiums actually paid (especially because the insurers may not have this information), Firm X assumed the most recent premium paid was the highest premium the consumer would have paid over the life of the policy. It used that assumption to determine the base refund rate for each consumer per year of impact.

Case study 2

Firm Q discovered that it had failed to apply benefits including fee waivers (e.g. a waiver on advice fees), interest rates discounts and bonus interest on QQ+ products for a period of 10 years. The remediation methodology incorporated a broad range of assumptions to account for a lack of data. For example:

- many fee types shared the same codes and it was not possible based on the available data to determine which fees were eligible for a discount. A beneficial assumption was made that all fee types were within scope and refunded; and
- due to a lack of records between 2004 and 2011, it was not always possible to determine whether a consumer was erroneously charged an advice fee when they were eligible for a waiver. A sample of available files showed that 78% of consumers did not receive the eligible waiver. When unsure or where the advice file was unavailable, Firm Q assumed that the advice fee should have been waived and refunded 100% of the fees.

When it may be appropriate to use assumptions to increase efficiency

Proposal

D3 We propose that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation.

Your feedback

D3Q1 Do you agree with this proposal? If not, why not?

D3Q2 In what circumstances do you think it is appropriate to use assumptions to increase the efficiency of a remediation? Please give reasons.

D3Q3 Have you applied beneficial assumptions to increase the efficiency of a remediation? Please provide details, including any relevant data and documentation.

Rationale

66 It may be appropriate to apply assumptions to increase the efficiency of a remediation, even when a licensee has good quality records. Licensees frequently seek guidance from ASIC about the use of assumptions in these circumstances.

67 The use of beneficial assumptions can offer a balance between timeliness and accuracy without a trade-off in quality. We seek to provide guidance that will offer a level of consistency in how licensees can increase efficiencies using assumptions. Licensees should keep evidence of and monitor the assumptions that they use to increase the efficiency of their remediations so that the assumptions continue to benefit the consumers.

68 Case studies 3–4 are real examples of when we have seen licensees using beneficial assumptions to increase efficiency.

Note: These examples do not provide a standard of general application for every case.

Case study 3

Firm V discovered one of its advisers failed to deliver ongoing advice services to financial advice clients who were charged fees for those services. Firm V reviewed all of the adviser's clients' files, and where Firm V did not find evidence that the adviser had provided the required services, it paid fee refunds and interest to the clients.

Separately, Firm V also sampled its other advisers and practices to determine if they had any fees for no service failures and was able to identify a cohort of clients that had likely received no service from certain advisers and practices. Instead of reviewing each client book in that cohort to determine whether the service had actually been provided, which would have taken considerable time, effort and resources due to the complexity of the matter, Firm V decided to make a beneficial assumption and refund 100% of that cohort's client's advice fees plus interest for the relevant period.

For the remaining clients of the advisers and practices, Firm V undertook individual file reviews. If the files did not contain evidence that the advisers provided the ongoing services to clients, Firm V refunded 100% of those client's advice fees plus interest for the relevant period.

Case study 4

Firm Z discovered that there were discrepancies in the charging of certain late payment fees for home loan products. Due to a systems error, the late fees had been charged by the IT system two days earlier than what was described in the relevant product terms. Instead of reviewing individual accounts to determine whether the late fee was justified, Firm Z decided to make a beneficial assumption and refund all late fees that were charged early plus any incorrectly charged interest.

69 However, an assumptions-based approach will not always be consistent with a licensee's obligations, and licensees should first consider whether the remediation is properly resourced. Sufficient resources can improve the quality of outcomes for consumers and significantly reduce timeframes. Further, if AFS and credit licensees—other than bodies regulated by APRA—do not have adequate resources allocated to a remediation, it may be considered a breach of certain licensing obligations: see s912A(1)(d) of the Corporations Act and s47(1)(l) of the National Credit Act.

70 In our experience, some licensees have sought to use a different approach from the one set out in Proposal D1 and apply assumptions that act to commercially benefit them rather than the consumer. For example, a licensee may conclude that a consumer did not suffer a detriment by making assumptions that do not give due weight to:

(a) the impact of the licensee's conduct;

(b) how the licensee's conduct may have contributed to the reasons why a consumer chose a certain product or retained a product; and

(c) a behaviourally informed understanding of consumer behaviour.

71 Further, some licensees have used efficiency and timeliness as reasons for compromising on the quality of a remediation, and accuracy and absolute precision as reasons for prolonged remediation timeframes. Prolonged remediations can cause inconvenience and stress for consumers and might exacerbate the detriment already suffered by them because of a licensee's failure. Prolonged timeframes also increase the costs of the remediations for a licensee.

E Calculating foregone returns or interest

Key points

We are seeking feedback on revising current guidance on calculating foregone returns or interest by setting out a three-step framework for how to make these calculations. This includes using assumptions when it is not possible to find out actual rates.

Three-step framework for calculating foregone returns or interest

Proposal

E1 We propose to revise our current guidance on calculating foregone returns or interest by setting out a three-step framework that involves:

(a) Step 1—licensees should attempt to calculate *actual* foregone returns or interest rates, without the use of any assumptions, if it is appropriate to do so in the circumstances;

(b) Step 2—if it is not appropriate, possible or reasonably practical to find out the *actual* rates, licensees should consider whether beneficial refund assumptions can be made if an evidence-base supports it; and

(c) Step 3—if there is no evidence base to support a beneficial assumption, licensees should apply a fair and reasonable rate that compounds daily and is:

(i) reasonably high;

(ii) relatively stable; and

(iii) objectively set by an independent body.

Note: The fair and reasonable rate in Step 3 is currently outlined in RG 256 at RG 256.131.

Your feedback

E1Q1 Do you agree with this proposal to set out a three-step framework for calculating returns or interest? If not, why not?

E1Q2 Are there any practical problems associated with this proposal? Please give details.

E1Q3 Should our guidance clarify whether the rate compounds (and at what interval) or whether it should be based on simple interest? Please give reasons.

Rationale

72 The current RG 256 sets out that, in most situations, licensees should be able to determine the actual investment returns or interest that a client would have received. For financial advice failures, this is typically done through reviews of individual files. RG 256 also sets out that the circumstances in which a proxy could be used to determine foregone returns or interest should be limited: see the current RG 256.132.

73 However, in our experience, it is not always possible for licensees to calculate the actual foregone returns or interest rates. As a result, they have:

(a) used the default rate set out in the current RG 256 at RG 256.133;

(b) sought to apply their own rates of return or interest rates for reasons that are not always clear or relevant to the circumstances; or

(c) made assumptions about a consumer's investment behaviour.

74 Clarifying our current guidance on calculating foregone returns or interest will promote consistent and fair outcomes and provide greater certainty to licensees about complying with their legal obligations.

Step 1: Calculate actual foregone returns or interest rates

75 As a first step, we expect that licensees will attempt to calculate actual foregone returns or interest rates without the use of any assumptions. However, it may not always be appropriate to apply the actual returns: see Example 7 in current RG 256.

Step 2: Consider using beneficial refund assumptions

76 If actual foregone returns or interest cannot be calculated, we expect that licensees will then consider whether it is appropriate to use beneficial assumptions. This may be appropriate when information on an individual level is not available or impracticable to obtain, but general characteristics are known about a particular cohort or the product that can form a reasonable evidence base: see Case study 5 for a real example. If assumptions are being made, we expect that licensees will take into account the considerations in Proposal D1, including monitoring the assumptions and adjusting them if more information becomes available.

Case study 5

Firm Y sold consumer credit insurance to consumers who may not have met the eligibility criteria for that insurance. In calculating the foregone interest rates on the remediation payments, Firm Y decided that for the consumers who paid for the insurance on their credit cards (noting most cards were issued by other financial institutions), it would apply the highest purchase interest rate over the remediation period (at 20.49% per annum) as an alternative to seeking to individually reconstruct the interest foregone for each consumer.

Step 3: Apply a fair and reasonable default rate

77 If no evidence base is available and it is not possible to determine how a consumer would have capitalised on the money, it may be appropriate to apply a fair and reasonable rate that is reasonably high, relatively stable, and objectively set by an independent body, that compounds daily.

78 Because our revised guidance will have a wider application, we will clarify that the cash rate set by the Reserve Bank of Australia plus 6% (as set out in the current RG 256) compounding daily is just one example of a fair and reasonable rate, noting that use of this rate does not infer that a remediation outcome has the same nature as a post-judgment outcome.

79 There is no one-size-fits-all approach, and we accept there may be circumstances that justify the use of an alternative default rate. However, it is the licensee's responsibility to ensure that the rate that is applied is fair and reasonable, documented and appropriately communicated to consumers.

80 We consider that it is generally beneficial to assume that the rate compounds daily because this is common for many credit and wealth products. While compounding daily is a method used in financial advice remediations, it may not be an appropriate method for every type of product that is the subject of a remediation (e.g. the rate may instead be based on simple interest).

81 We recognise that for managed investment schemes and superannuation funds conducting unit pricing remediations, Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94) should be followed when calculating foregone returns for existing members if the remediation is paid using trust or scheme property.

F How to approach finding and automatically paying consumers

Key points

The current RG 256 is silent on what we expect from licensees when they need to find and make payments to affected consumers, especially if a consumer has exited or closed a product or service. To address this, we are seeking feedback on guidance that licensees should apply best endeavours to find and automatically pay all consumers.

We are also seeking feedback on removing the broad low-value compensation threshold in our current guidance and instead enable licensees to decide whether to use a compensation threshold and what low value is fair and appropriate in line with their obligations.

Applying best endeavours to find and automatically pay all consumers

Proposal

F1 We propose to provide guidance that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort.

Note: Automatic or direct cash payments may not always be appropriate for superannuation-related remediations.

Your feedback

F1Q1 Do you agree with our proposal? If not, why not?

F1Q2 What has been your experience in finding and contacting consumers? What challenges have you faced?

F1Q3 What strategies have you employed to successfully reach all affected consumers? Please give examples of your experiences, including what has and has not worked and any lessons learnt.

F1Q4 Do you agree that cheques should be paid as a last resort? If not, why not?

F1Q5 What has been your experience in finding a consumer's bank account details and making a direct payment? Please give details.

F1Q6 If you are a third-party licensee for a superannuation fund or RSA, what challenges do you have in remediating members of that fund? Please give details.

F1Q7 If you are a superannuation trustee, what challenges do you have in accepting and/or facilitating remediation payments from third-party licensees? Please give details.

Rationale

Finding consumers

82 A key principle of our guidance is that licensees should aim to return all affected consumers as closely as possible to the position they would have otherwise been in.

83 One challenge to this outcome is that licensees do not always have current contact details for consumers. This is particularly the case for consumers who have exited or closed a product or service. In our experience, licensees take different approaches to finding current contact details, some more successful than others, especially for former consumers. For example, some licensees have used external specialists or third-party providers to match the data they have about consumers or get updated details.

84 All licensees have the potential to design and execute appropriately scaled and tailored communications plans that maximise reach and response rates. We have seen many licensees using a multi-channel approach and tailoring their communications to suit what they know and understand about their consumer cohorts with great success. Some licensees have also chosen to publish details of the remediation on their website for transparency purposes.

85 Responding quickly to any failure will improve a licensee's ability to efficiently and automatically pay the money owed to its consumers. In our experience, the longer a licensee takes to identify a failure, or subsequently take action, the harder it is to contact consumers to make a payment because, for example, during this time consumers may have exited a product or changed their contact or payment details.

86 While we consider that licensees should apply best endeavours to find consumers in order to pay the money owed to them, we recognise that there may be challenges to doing this. Feedback on this issue will help to better inform how we can address these challenges in our guidance.

87 For remediations involving superannuation products, we note that the provisions in the Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020 (RMS Bill), once enacted—including One Nation's proposed amendment—may address some of the challenges faced by superannuation trustees in terms of reuniting remediation money with former or lost members.

Making automatic payments

88 In our experience, the most effective way to ensure funds reach affected consumers is to obtain their current bank account details in order to make an automatic payment by electronic funds transfer to them. If this type of transfer is unavailable—for example, due to an inability to obtain account details—licensees should explore other options for payment and only issue cheques as a last resort.

> Note: Where the funds should be returned to will depend on the nature of the underlying product or service and the circumstances of the consumer. For example, a different process should be followed for money paid to members of superannuation funds or unit holders in pooled investment schemes.

89 The use of cheques in Australia has been declining by more than 20% each year since 2016. The effective cashing rates of cheques have been very low in remediations and require considerable follow-up communications with consumers, which can be costly for the licensee, for the cashing rates to increase.

> Note: For more information about the decline in the use of cheques, see Cheques on the Australian Payments Network's website.

90 Some licensees that do not have up-to-date bank account details have given consumers the option of providing updated bank details using various secure methods. Licensees should aim to make the process of providing these details as easy as possible, tailoring the process to the affected consumers.

Remediations involving superannuation

91 We note that automatic or direct cash payments may not always be the appropriate method for remediations involving superannuation. In a joint letter with APRA to superannuation trustees, we stated that certain payment standards requirements in the SIS Act mean that direct payments to members should generally not be made outside of the superannuation system without a condition of release being met.

> Note: See APRA and ASIC, *Oversight of fees charged to members' superannuation accounts* (PDF 247 KB), joint letter, 10 April 2019.

92 Superannuation trustees also have various duties and obligations that may apply when considering whether to pursue, accept and/or facilitate remediation payments from third-party advice licensees.

Removing the low-value compensation threshold

Proposal

F2 We propose to remove the low-value compensation threshold in current RG 256 and instead provide guidance that:

(a) the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value;

(b) it is up to licensees to decide how they will treat their unresponsive or lost consumers, and if applying a compensation threshold, what low value is fair and appropriate in line with their obligations; and

(c) if applicable, the reasons for the decision to apply a low value threshold should be well documented and appropriately justified.

Your feedback

F2Q1 Do you agree with our proposal? If not, why not?

F2Q2 Do you think that any licensee using a low-value compensation threshold should have to disclose it? If not, why not?

Rationale

93 The current RG 256 states at RG 256.135:

> Where the amount of compensation to be paid to a client is below $20 and the client cannot be compensated without significant effort on your part—for example, because the client no longer holds an account with you—you may instead make a community service payment …

94 RG 94 also allows for a minimum compensation amount for unit pricing error remediation payments and for payments to exited members. However, licensees may decide to compensate below this level. The circumstances and the relevant licensee's obligations need to be considered in each case. If applying a fixed dollar minimum, the licensee must disclosure this in the annual financial report for the relevant fund, and if relevant on its website: see RG 94 at pp. 83 and 98.

95 Our experience is that in practice licensees apply many different low-value compensation thresholds to remediations. In some instances, we have seen successful approaches taken to return all money regardless of value: see Case study 6. However, we have also seen cases where licensees have applied the default $20 threshold (or higher) even though they have current bank account details or contact information for consumers owed less than $20.

96 We are proposing to remove the broad low-value compensation threshold of $20 because we think it is a one-size-fits-all solution that is not going to be appropriate for all remediations. It also does not align with some of the positive industry practices that we have seen.

97 We consider that the starting position should be to return all money to consumers, however a licensee may decide, depending on each remediation, if it is appropriate to apply a low-value threshold and, if so, what that threshold should be. However, we generally expect that licensees should at least remediate all current consumers with active accounts regardless of value. Further, licensees should not use a threshold to justify the application of no effort. Money under the threshold should only be paid as a residual remediation payment (see Proposal G1) if the consumer is unresponsive or lost.

> Note: If enacted, the RMS Bill may help superannuation trustees to deal with the money owed to former or lost members.

98 In circumstances when licensees have contact details on file but consumers have been unresponsive, where possible, the licensee should give the consumer a final opportunity to respond and claim the compensation they are entitled to, by communicating the remediation outcome and reasons for it to the affected consumers.

99 Case study 6 is a real example of when a licensee has chosen not to apply a low-value compensation threshold in relation to a credit and banking product.

Case study 6

Firm O discovered that when refunding disputed transactions on consumers' credit cards and scheme debit cards, the transactions were correctly reversed but certain charges associated with the disputed transactions were not always correctly adjusted. This affected 382,564 consumers at an average of $14 each.

Because over 50% of consumers were owed $5 or less, Firm O decided it would not be appropriate to apply a threshold and to remediate all affected consumers regardless of value. Firm O proceeded to automatically refund all consumers that still had an active account. For those consumers that had closed accounts, Firm O decided to send a cheque.

G Remediation money that cannot be returned to consumers

Key points

We are seeking feedback on what licensees should do with money that cannot be returned to consumers despite a licensee's best endeavours.

Clarifying our guidance for remediation money that cannot be returned

Proposal

G1 We propose to clarify current guidance for when remediation money cannot be returned to consumers. That is, if a licensee cannot, despite best endeavours, find consumers to pay them compensation (including when cheques remain uncashed):

(a) the licensee must not profit from the failure (see the current RG 256 at RG 256.135);

(b) the residual funds should be sent to a relevant state or federal unclaimed money regime if available; and

(c) if the licensee is unable to lodge money with an unclaimed money regime, as a last resort, the money should be paid as a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for Profits Commission.

Note: Residual remediation payments cannot be paid using assets of a superannuation fund or a pooled investment scheme.

Your feedback

G1Q1 Do you agree with our proposal? If not, why not?

G1Q2 Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not?

G1Q3 What challenges are there in lodging unclaimed money? Please give details.

G1Q4 Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not?

G1Q5 Do licensees have evidence of consumers requesting that they be remediated after the finalisation of the remediation? How common is this?

Rationale

100 The current RG 256 does not set out clear guidance for how to treat compensation money that cannot be returned to consumers, but states that a licensee must not profit from a misconduct or other compliance failure. Instead, RG 256 suggests that where the compensation money to be paid to a consumer is below $20, a licensee may pay this money to an appropriate organisation if significant effort would be required to return it to the consumer and the consumer no longer holds an account: see the current RG 256.135.

101 We have seen in practice that sometimes licensees make a charitable donation with the remaining funds without first making a reasonable attempt to return money to consumers. We consider that this is generally not a fair approach and best endeavours should be made to return money to all consumers: see Section F.

102 If best endeavours are made and a consumer remains unresponsive, we consider that licensees should lodge the money owed into a relevant unclaimed money regime, if available. It is up to the licensee to determine which regime is appropriate and whether the requirements are met. This will ensure the money remains discoverable and accessible by consumers for as long as possible.

103 Licensees should clearly communicate that they will lodge the money into an unclaimed money regime to all consumers that were unresponsive—that is, all consumers they have attempted to contact—including details of how to lodge a claim for the remediation payment. Licensees should also try to notify consumers when they are holding the money on trust on behalf of the consumer in line with the relevant unclaimed money provisions.

104 We are aware, however, that there may be potential barriers to lodging in an unclaimed money regime. For example, the ASIC-administered regime restricts unclaimed money payments to a minimum of $500.

105 If an unclaimed money regime is unavailable, a licensee must not profit from their failures: see the current RG 256 at RG 256.135. We consider that it is appropriate for a licensee as a last resort to make a residual remediation payment with the remaining funds. However, if best endeavours are made, the residual remediation payment will be nominal.

> Note: Superannuation trustees or fund managers conducting remediations cannot make residual remediation payments if payment is to be made using the assets of the superannuation fund (such as the operational risk reserve) or scheme property.

106 A residual remediation payment is the remaining amount of remediation money that cannot, despite best endeavours, be returned to consumers that is paid to a charitable or community organisation (which will generally be a not-for-profit organisation). We will not consider it necessary for licensees to engage with ASIC about an appropriate recipient. If possible, the recipient should have a nexus to the relevant consumer harm.

> Note 1: We will replace terms such as 'community service payment' in the current RG 256 with 'residual remediation payment' when referring to residual money from a remediation only.
>
> Note 2: Residual remediation payments are different from community service obligations, which are payments made by entities under a court enforceable undertaking or other agreement with ASIC that are not directly referable to consumer loss but are an acknowledgement of the consumer harm caused, and can be made either in addition to or in replacement of a remediation: see Regulatory Guide 100 *Enforceable undertakings* (RG 100).

107 If a consumer seeks a remediation payment after the licensee has disbursed funds through a residual remediation payment, the consumer should be paid the compensation they are owed, regardless of additional costs.

H Settlement deeds

Key points

We are seeking feedback about in what circumstances it may be efficient, honest and fair to use settlement deeds or rely on a consumer's implied consent of an outcome as part of a remediation.

Settlement deeds and fair consumer outcomes

Proposal

H1 We propose to clarify our guidance about if and when using settlement deeds and relying on implied consent may or may not be appropriate as part of a remediation.

Your feedback

H1Q1 In what circumstances, if any, are settlement deeds essential to protect your legitimate interests? Please provide examples or other supporting evidence.

Rationale

108 The current RG 256 provides that settlement deeds, or contracts, are an important part of a remediation for advice licensees, but that deeds should only be relevant to the conduct being remediated.

109 We consider that asking consumers to enter into a settlement deed as part of a remediation will not always be efficient, honest and fair, and we know that it is not standard industry practice to require deeds in all cases. It may also not always be efficient, honest and fair to assume that a consumer has accepted the conditions of a remediation payment if the consumer has not responded to the licensee—especially in circumstances where the consumer only becomes aware of the failure when they receive the payment.

110 Settlement deeds can be problematic in that:

(a) they may act to limit or remove existing consumer rights, in particular the right to make a complaint through IDR and to AFCA, in situations where a consumer might not be able to determine whether an offer is adequate;

(b) they can require action on behalf of the consumer—for example, signing and returning the deed of settlement and release, and possibly requiring a witness. This is contrary to the principle that a remediation should be easy for a consumer and minimise consumer actions; and

(c) remediations are different from dispute resolution processes, because they tend to involve large-scale decision making about consumers who are unlikely to be aware of a failure or actively involved in a remediation. Relying on implied consent is more problematic in these circumstances because individual circumstances may not be considered in remediation outcomes.

I Regulatory and financial impact

111 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

(a) promoting confident participation in the financial system; and

(b) improving the performance of the financial system and licensees in it.

112 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options that could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and

(c) if our proposed option has more than a minor or machinery impact on business or on the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

113 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

114 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
consumer	A person or small business. It includes, at a minimum: • an individual consumer or guarantor; • a superannuation fund member or third-party beneficiary eligible to make a complaint to AFCA under s1053, or taken to be a member of a registerable superannuation entity or managed investment scheme, but excludes shareholders • a small business as defined in modified s 761G of the Corporations Act Note: This definition includes a former and/or current consumer.
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
failure	A misconduct, error or compliance failure relating to a financial service provided by and covered under a licensee's relevant licence, as well as a broader failure to meet certain standards, expectations and/or values Note: A failure also extends to the decisions, omissions and behaviour of a licensee's current and former authorised representatives, third-party service or product providers, consultants and subsidiaries related to the provision of financial services.
financial services	Includes financial services, credit activities or superannuation trustee services or superannuation

Term	Meaning in this document
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FSRC 2020 Bill	Financial Sector Reform (Hayne Royal Commission Response) Bill 2020
IDR	Internal dispute resolution
licence	An AFS licence, credit licence or RSE licence
licensee	An AFS licensee, a credit licensee and a superannuation trustee
loss	Includes actual or potential loss, detriment or disadvantage (monetary or non-monetary)
managed investment scheme	Has the meaning given in s9 of the Corporations Act
National Credit Act	*National Consumer Credit Protection Act 2009*
remediation	A process to investigate the full extent of a failure, and where appropriate, return all consumers that have suffered loss as a result of the failure to the position they would have otherwise been in, as closely as possible
residual remediation payment	Remediation money that cannot be returned to consumers despite best endeavours and an unclaimed money regime is unavailable Note: A residual remediation payment is different from a 'community benefit payment' or 'community service obligation', which are payments made under a court enforceable undertaking (or other agreement with ASIC) that are not directly referable to consumer loss but rather an acknowledgement of the consumer harm caused (often in addition to or in replacement of a remediation program): see RG 100.
RG 256 (for example)	An ASIC regulatory guide (in this example numbered 256)
RMS Bill	Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020
RSA	A retirement savings account as defined in the *Retirement Savings Accounts Act 1997*
RSA provider	A retirement savings account provider
RSE	A registrable superannuation entity (e.g. a regulated superannuation fund)
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
SIS Act	*Superannuation Industry (Supervision) Act 1993*

Term	Meaning in this document
superannuation fund	Has the meaning given in s10(1) of the SIS Act
superannuation trustee	A person or group of persons licensed by APRA under s29D of the SIS Act to operate a registrable superannuation entity (e.g. superannuation fund) (also known as an 'RSE licensee' and for the purposes of this paper includes 'RSA provider')
systemic issue	An issue that may have implications beyond the immediate rights of the parties to a complaint or dispute, or that may have implications for more than one consumer

List of proposals and questions

Proposal	Your feedback
B1 We propose to provide guidance on a two-tiered approach to initiating a remediation: (a) Tier 1—a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and (b) Tier 2—given the broad nature of the obligations on them, licensees should also turn their mind to whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values. Note 1: The two-tiered approach is shown in Figure 1. Note 2: In this paper, we refer to the conduct described in Tiers 1 and 2 collectively as a 'failure'. Note 3: A remediation once initiated can be scaled according to the size or scope of the failure. If the failure only affects a small number of consumers, the process to rectify the loss may be simple and prompt and not require a full 'program' to be initiated: see paragraphs 35–36.	B1Q1 Do you agree with our proposed two-tiered approach to initiating remediation? If not, why not? B1Q2 Are there any practical problems associated with this approach? Please give details. B1Q3 What is your current policy and procedure for initiating a remediation? How do you describe the standard of conduct required in your organisation for initiating a remediation?
C1 We propose to provide guidance that, as a starting point, the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer.	C1Q1 Do you agree with this proposal? If not, why not? C1Q2 Are there any practical problems associated with this proposal? Please give details. C1Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?

Proposal	Your feedback
D1 We propose to provide guidance that, overall, licensees should only use assumptions in a remediation if they are beneficial assumptions. In particular, this guidance would cover what a beneficial assumption is and set out what should be considered when using assumptions, including for specific types of assumptions. Note: For a definition of 'beneficial assumption' and the considerations when using assumptions, see paragraphs 48–54.	D1Q1 Do you agree with our proposal for assumptions to be beneficial and that they should satisfy certain considerations? If not, why not? D1Q2 Is it appropriate to use assumptions that result in a partial refund for some affected consumers or that involve a discount for a consumer's 'use' of the product? If not, why not? D1Q3 Is it appropriate to use an assumption based on an average (e.g. in calculating loss, using the average premium or the average fees charged over a relevant period)? If not, why not? D1Q4 Have you used an assumptions-based approach in remediations? Please provide details, including evidence of how the assumptions benefited the consumer and if you have used an average that resulted in a good consumer outcome.
D2 We propose that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.	D2Q1 Do you agree with our proposal that beneficial assumptions should be used to make up for absent records? If not, why not? D2Q2 Are there any practical problems associated with this proposal? Please give details. D2Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?
D3 We propose that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation.	D3Q1 Do you agree with this proposal? If not, why not? D3Q2 In what circumstances do you think it is appropriate to use assumptions to increase the efficiency of a remediation? Please give reasons. D3Q3 Have you applied beneficial assumptions to increase the efficiency of a remediation? Please provide details, including any relevant data and documentation.

Proposal	Your feedback
E1 We propose to revise our current guidance on calculating foregone returns or interest by setting out a three-step framework that involves: (a) Step 1—licensees should attempt to calculate actual foregone returns or interest rates, without the use of any assumptions, if it is appropriate to do so in the circumstances; (b) Step 2—if it is not appropriate, possible or reasonably practical to find out the actual rates, licensees should consider whether beneficial refund assumptions can be made if an evidence-base supports it; and (c) Step 3—if there is no evidence base to support a beneficial assumption, licensees should apply a fair and reasonable rate that compounds daily and is: (i) reasonably high; (ii) relatively stable; and (iii) objectively set by an independent body. Note: The fair and reasonable rate in Step 3 is currently outlined in RG 256 at RG 256.131.	E1Q1 Do you agree with this proposal to set out a three-step framework for calculating returns or interest? If not, why not? E1Q2 Are there any practical problems associated with this proposal? Please give details. E1Q3 Should our guidance clarify whether the rate compounds (and at what interval) or whether it should be based on simple interest? Please give reasons.

Proposal	Your feedback
F1 We propose to provide guidance that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort. Note: Automatic or direct cash payments may not always be appropriate for superannuation-related remediations.	F1Q1 Do you agree with our proposal? If not, why not? F1Q2 What has been your experience in finding and contacting consumers? What challenges have you faced? F1Q3 What strategies have you employed to successfully reach all affected consumers? Please give examples of your experiences, including what has and has not worked and any lessons learnt. F1Q4 Do you agree that cheques should be paid as a last resort? If not, why not? F1Q5 What has been your experience in finding a consumer's bank account details and making a direct payment? Please give details. F1Q6 If you are a third-party licensee for a superannuation fund or RSA, what challenges do you have in remediating members of that fund? Please give details. F1Q7 If you are a superannuation trustee, what challenges do you have in accepting and/or facilitating remediation payments from third-party licensees? Please give details.
F2 We propose to remove the low-value compensation threshold in current RG 256 and instead provide guidance that: (a) the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value; (b) it is up to licensees to decide how they will treat their unresponsive or lost consumers, and if applying a compensation threshold, what low value is fair and appropriate in line with their obligations; and (c) if applicable, the reasons for the decision to apply a low value threshold should be well documented and appropriately justified.	F2Q1 Do you agree with our proposal? If not, why not? F2Q2 Do you think that any licensee using a low-value compensation threshold should have to disclose it? If not, why not?

Proposal	Your feedback
G1 We propose to clarify current guidance for when remediation money cannot be returned to consumers. That is, if a licensee cannot, despite best endeavours, find consumers to pay them compensation (including when cheques remain uncashed): (a) the licensee must not profit from the failure (see the current RG 256 at RG 256.135); (b) the residual funds should be sent to a relevant state or federal unclaimed money regime if available; and (c) if the licensee is unable to lodge money with an unclaimed money regime, as a last resort, the money should be paid as a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for Profits Commission. Note: Residual remediation payments cannot be paid using assets of a superannuation fund or a pooled investment scheme.	G1Q1 Do you agree with our proposal? If not, why not? G1Q2 Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not? G1Q3 What challenges are there in lodging unclaimed money? Please give details. G1Q4 Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not? G1Q5 Do licensees have evidence of consumers requesting that they be remediated after the finalisation of the remediation? How common is this?
H1 We propose to clarify our guidance about if and when using settlement deeds and relying on implied consent may or may not be appropriate as part of a remediation.	H1Q1 In what circumstances, if any, are settlement deeds essential to protect your legitimate interests? Please provide examples or other supporting evidence.