

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

**Submission by Legal Aid Queensland**

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## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the ASIC Consultation Paper 335 – Consumer remediation: Update to RG 256.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers provide advice and representation to vulnerable clients in banking and finance, credit and debt, insurance, telecommunications and consumer law including clients with complaints about credit, banking, debt, and broker issues in relation to obtaining credit. This submission is informed by that knowledge and experience.

## Questions

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

**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**

**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.**

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

LAQ supports the proposed guidance on using a two-tiered approach to initiating remediation.

In respect of tier-1 failures, LAQ supports the substitution of ‘one or more’ consumers for ‘a number of consumers’. In our view, the appearance of systemic issues should not be the trigger for

initiating remediation. Consumers are at a disadvantage in dealing with licensees caused by a lack of financial literacy and awareness of their legal rights. Many consumers are unaware that they have suffered loss or, if they are, are unable to particularise or estimate that loss without engaging with the licensee. Licensees are uniquely placed to determine whether there has been a failure resulting in monetary loss and the extent of that failure.

In respect of tier-2 failures, LAQ supports the inclusion of obligations broader than failure as a result of misconduct or contractual breaches. The evidence before the Financial Services Royal Commission was of numerous failings in financial services conduct that fell short of community standards and expectations. Licensees who are attempting to remedy conduct that falls short of community standards and expectation through remediation should be supported with clear guidance.

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

We cannot identify any practical problems associated with this approach. We would support clear guidance for determining how non-monetary loss should be calculated.

**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?**

No comment.

**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?**

LAQ agrees with the proposal that the starting point should be when the licensee reasonably suspects the failure first caused loss to a consumer. In our view, tying the scope of review to the seven-year time frame for retention of records is in some respects inconsistent with licensee's obligations to provide financial services efficiently, honestly, and fairly. We agree with ASIC's view in paragraph 40 of the Consultation Paper that the remediation should not be anchored to a seven-year timeframe. For tier-2 failures, for example, conduct falling short of community expectations or business values, using a seven-year review period would not in our view align with the purpose of the remediation to remedy the harm done to the consumer. The same consideration applies to tier-1 failures. The review period should not be linked to a period, that although slightly lengthier, is analogous to the statute of limitations.

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

No comment.

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

LAQ supports clear guidance for licensees about the nature of their obligation to consider conducting remediation for loss resulting from tier-2 failures.

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.

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

LAQ supports the proposal to provide guidance around using beneficial assumptions provided:

- (a) the assumptions are clearly justified and explained to consumers;
- (b) there is independent oversight of any assumptions used; and
- (c) consumers have the option to question these assumptions through IDR and EDR.

**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?**

In our view, using assumptions that result in a discount for the consumer's 'use' of the product risk:

- (a) discounting the harm done to the consumer; and
- (b) not being beneficial assumptions.

As a tool for compensating consumers, methods of calculating financial and non-financial loss are in some respects inadequate to account for the full extent of consumer harm, for example, financial hardship resulting in consumers going without essentials or experiencing significant distress. Assumptions that result in a partial refund or discount for 'use' have the potential to result in an arbitrary reduction in compensation paid to the consumer that may not reflect their actual position. Partial refunds and discounting for 'use' are also more likely to impact vulnerable consumers who tend to use riskier products on a more frequent basis due to limited choice in the market. If the calculation of loss takes into account the consumer's 'use' of the product, provision should also be made for other factors such as financial hardship or the impact on the consumer's mental health.

**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?**

LAQ considers that, in some cases, it will be appropriate to use beneficial assumptions based on averaging. If averaging assumptions are used, then they should be clearly explained. Consumers should be able to ask to have their actual loss calculated where possible.



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.

**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.**

No comment.

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

We agree with the proposal that beneficial assumptions should be used in cases of absent records. We agree with ASIC's view in paragraph 57 of the Consultation Paper that consumers should not be disadvantaged as result of inadequate recordkeeping by the licensee.

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

No comment.

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

No comment.

**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?**

LAQ supports the proposal provided there is clear guidance that no consumer should be disadvantaged as a result of using beneficial assumptions.

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

Designing and conducting remediation is a matter for licensees. In our view, we would consider it appropriate to use beneficial assumptions to increase efficiency where the use of those assumptions reduces the costs of conducting the remediation by an amount more than the total amount paid to consumers.

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

No comment.

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

**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;**

**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**

**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:**

**reasonably high;**

**relatively stable; and**

**objectively set by an independent body.**

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

LAQ supports this proposal. Calculation of actual foregone returns or interest rates should be clearly disclosed and explained to consumers. Similarly, if beneficial assumptions are used, the basis of those assumptions should be disclosed and explained to consumers.

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

No comment.

**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.**

No comment.

**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.**

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

LAQ agrees with the proposal.

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

No comment.

**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.**

No comment.

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

LAQ supports issuing of cheques as a last resort.

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

No comment.

**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.**

No comment.

**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.**

No comment.

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

**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;**

**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**

**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?**

LAQ agrees with the proposal to remove the low-value compensation threshold subject to the observations in paragraph 97 of the Consultation Paper, namely, that the starting point should be to return all money to consumers and a residual remediation payment should only be made if the consumer is unresponsive or lost.

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

If a low-value compensation threshold is used, the licensee should disclose this along with the justification for arriving at the figure as a principle of transparency.

**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):**

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

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

**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.**

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

LAQ broadly agrees with the proposal to clarify the guidance for dealing with remediation money that cannot be returned to consumers. In LAQ's view, there should be clear guidance that residual remediation payments should be directed towards preventing or remedying the relevant consumer harm, for example, through funding financial counselling organisations or community legal centres.

Community benefit payments are a very important part of the remediation process because they:



- (a) provide consumers with the opportunity to seek assistance and representation from experts about the harm they are currently experiencing.
- (b) provide the community with access to services that prevent or mitigate harm being caused to consumers from future inappropriate conduct that is engaged in by financial firms.

**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?**

No comment.

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

No comment.

**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?**

No comment.

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

No comment.

**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.**

In LAQ's view, it would generally be inappropriate for a credit licensee to use a settlement deed except in limited circumstances. In most cases, an agreement based on simple contract, that is, offer and acceptance, should be sufficient to protect the interests of the licensee. We consider settlement deeds or agreements are more appropriate where there has been a negotiated agreement. Requiring a consumer to sign a deed or specifically drafted settlement agreement would, in our view, usually be unfair and inefficient. We support clear guidance that these should only be used where the licensee can provide clear justification.