REPORT 707

Response to submissions on CP 335 Consumer remediation: Update to RG 256

November 2021

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 335 *Consumer remediation: Update to RG 256* and details our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act or the National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see the attachment to Consultation Paper 350 *Consumer remediation: Further consultation*, and Regulatory Guide 256 *Client review and remediation conducted by advice licensees* for current guidance.

Contents

A Overview/Consultation process

1 On 3 December 2020, we released Consultation Paper 335 *Consumer remediation: Update to RG 256* (CP 335). The purpose of this consultation was 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 Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256) and deliver the guidance necessary to empower all licensees to remediate consumers efficiently, honestly and fairly.

2 This first round of consultation was open for 12 weeks between 3 December 2020 and 26 February 2021.

3 We received 7 confidential and 31 non-confidential responses to CP 335. Respondents represented a diverse range of stakeholders. We received feedback from industry sectors (such as financial advice, insurance, credit and banking, and superannuation), as well as professional service industry associations and consumer groups.

4 As well as receiving written submissions, we held over 20 informal workshops with Australian financial services (AFS) licensees, Australian credit licensees (credit licensees), professional service industry associations, the Australian Taxation Office (ATO) and the Australian Prudential Regulatory Authority (APRA). The purpose of the workshops was to give respondents the opportunity to raise questions, give feedback and share their practical experience of running remediations.

Note: In this report, we use 'licensees' to refer to AFS licensees, credit licensees and retirement savings account providers.

5 We are grateful to respondents for taking the time to send us their comments in response to CP 335. For a list of the non-confidential respondents to CP 335, see the appendix. Copies of these submissions are currently on the CP 335 page on the ASIC website.

6 This report highlights the key issues that arose out of the submissions received on CP 335 and our responses to those issues. This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 335. We have limited this report to the key issues and significant changes that we are proposing to make to guidance as currently set out in RG 256.

Responses to CP 335

7 Overall, respondents were supportive of our review of the existing remediation policy in RG 256. In particular, they supported the proposed explicit extension of the guidance beyond financial advice. While respondents agreed with the underlying intent behind many proposals, they also identified some challenges and practical limitations as potential barriers to effective compliance with the proposed guidance.

8 Most submissions requested we include further examples in our guidance. In response, we have included 25 examples in the draft regulatory guide (up from nine examples in RG 256).

9 The main issues raised by respondents in submissions and during workshops related to:

(a) how the guidance will be appropriately scalable for remediations affecting one or a small number of consumers;

(b) the scope and operation of the proposed 'Tier 2' threshold (for loss caused other than by misconduct, error or compliance failure) when initiating remediations;

(c) the relevant review period for a remediation;

(d) the use of assumptions, including what constitutes as 'beneficial' in practice;

(e) calculating foregone returns or interest rates on compensation payments for products and services beyond investments and advice;

(f) what constitutes 'best endeavours' in finding and automatically paying consumers, and the low-value compensation threshold; and

(g) challenges in lodging remediation payments in unclaimed money regimes.

Second round of consultation

10 The submissions to CP 335 and insights obtained from the first round of consultation have informed our guidance in draft Regulatory Guide 000 *Consumer remediation* (draft RG 000). We have released draft RG 000 as an attachment to Consultation Paper 350 *Consumer remediation: Further consultation* (CP 350).

11 You are invited to comment on CP 350 and draft RG 000, which is only an indication of the approach we may take and is not our final policy. Please see CP 350 for the draft regulatory guide and feedback questions.

When the updated guidance will come into effect

12 A few respondents queried when the updated guidance would come into effect, and whether it would apply retrospectively to remediations currently in progress or initiated before publication.

13 The final guidance will apply to remediations initiated on or after the date of issue. The guidance will not apply retrospectively. For remediations that pre-date the issue of final guidance, the 2016 version of RG 256 continues to apply. We note that a remediation is 'initiated' when a licensee makes the decision to address misconduct or other failure through a remediation process: see draft RG 000.16.

14 The guide may also be read in conjunction with *Making it right: How to run a consumer-centred remediation* (*Making it right*) (PDF 2.47 MB), published on our website on 3 December 2020. *Making it right* is a useful field guide that helps licensees with the day-to-day design and execution of consumer-centred remediations.

We will not provide a transition period

15 Some respondents recommended that we provide a transition period to allow licensees time to implement the changes in the updated guidance.

16 We have decided not to provide a transition period. The updated guidance does not introduce any new legal requirements. The guidance provides licensees with greater clarity about our expectations and what actions they can take to achieve fair and timely outcomes in line with their existing licensing obligations. We also understand that many licensees are already applying the principles and much of the updated guidance already.

17 We encourage licensees to consider the final guidance when conducting remediations that they began before we issued the final guidance. We consider that this will be especially useful if the licensee is in the early stages of scoping or design.

B Key issue: Initiating remediations

Key points

In CP 335 we proposed a two-tiered approach to initiating a remediation: see paragraphs 18–22. This section outlines the responses we received. We respond to feedback on:

- the standard of conduct threshold (see paragraphs 23–27); and
- the issue of scalability of remediations (see paragraphs 28–32).

When a remediation must be initiated

18 In CP 335 we proposed 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 (that would or might not otherwise fall into Tier 1) has breached certain standards, expectations and/or values.

19 This proposal set the expectation that licensees should proactively address and remediate consumer loss, once discovered and no matter the scale. The proposal also broadened the types or standards of conduct that might trigger a remediation.

20 We drafted ‘Tier 1’ as a requirement, intended to capture losses arising out of a breach of legal obligations including contractual failings.

21 On the other hand, we did not draft ‘Tier 2’ as a requirement. It asked licensees to consider initiating a remediation if a failure causing loss breached their business values, industry codes of conduct, their consumer’s reasonable standards and expectations, or other external standards and expectations. The underlying intent was to encourage licensees not to take an overly legalistic approach when identifying failures that should be remediated, but rather focus on obtaining good consumer outcomes.

22 We generally sought feedback on this approach, including whether the proposal was appropriately scaled, where relevant, for different types of licensees and remediations.

Stakeholder feedback on the standard of conduct

23 Most respondents agreed that Tier 1 was an appropriate trigger for a remediation, including contractual breaches. The consumer protection framework within the Australian financial system is very broad. It includes standards and norms of conduct—such as the general obligation of a licensee to provide financial services efficiently, honestly and fairly, and protections under the *Australian Securities and Investments Commission Act 2001*.

24 There was some support for the concept of 'Tier 2':

(a) consumer representatives wanted Tier 2 to be stronger, and suggested licensees should only decide not to remediate Tier 2 if it would be unreasonable;

(b) some reflected that the *Final report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services* often refers to conduct falling short of 'community standards and expectations', which offers support for Tier 2; and

(c) other respondents generally agreed the trigger should not be limited to 'systemic issues', but requested more guidance or examples about what 'values, standards and expectations' means in practice.

25 Many respondents who were against the proposed two-tiered approach agreed with the underlying intent of Tier 2. However, they requested that the guidance clarify the scope and how it would operate in practice, including with the use of examples. Given the broad coverage of Tier 1, including contractual failures, it was unclear what norms of conduct would be covered by Tier 2.

26 Other responses included:

(a) concerns that Tier 2 would lead to inconsistent application across industry, given the differing values and interpretation of standards and the challenges in applying community standards and expectations;

(b) suggestions that Tier 2 should be classified as best practice only and not a regulatory expectation under s912A(1)(a) of the *Corporations Act 2001* (Corporations Act). This feedback came from respondents who noted that it was already their practice to apply the Tier 2 threshold;

(c) that Tier 2 would likely not be covered by professional indemnity (PI) insurance policies; and

(d) that industry codes should not be included in Tier 2. This was because many, such as the Code of Banking Practice, would fall under Tier 1 if included in the terms and conditions, or as an enforceable provision, of the consumer contract. Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183) also already deals with remedies for industry code breaches.

27 Some alternatives to the two-tiered approach were suggested. For example, that in the event of an identified failure or weakness in a system, process or control, licensees should undertake sufficient investigations and analysis into the matter to have reasonable confidence that they have identified and ultimately remediated any and all errors that may have caused consumer loss. These respondents said 'reasonable confidence' will require judgement, industry expertise and skill, and will depend on ASIC's expectations, industry practice and the licensee's customers.

> *ASIC's response*
>
> In response to the submissions, we have removed the formal descriptor of the 'tiers' in draft RG 000 and focused more on legal and contractual breaches.
>
> We agree with respondents that existing consumer protections and the legal obligations on licensees are very broad and will cover a wide range of conduct in need of remediation. This conduct is now collectively described as 'misconduct or other failure' and includes breaches of financial services law or credit legislation, contractual failings, negligence or fraud, or a failure to meet or comply with other regulatory requirements: see draft RG 000.21–RG 000.28.
>
> Given the breadth of licensee's legal obligations, licensees should generally be focusing on ensuring good consumer outcomes. They should not be taking active steps to deliberately narrow the scope of their obligations in order to avoid remediation: see draft RG 000.29.
>
> In relation to industry codes, we agree that many breaches will likely fall under the definition of 'misconduct or other failure' (see draft RG 000.26), as well as misrepresentations of compliance with codes.

Stakeholder feedback on scalability

28 Respondents raised concerns about scalability, and specifically queried how the guidance will:

(a) apply to remediations affecting one or only a small number of consumers;

(b) interact with internal dispute resolution (IDR) requirements; and

(c) be scalable generally, based on the size and complexity of the remediation and the size of the licensee.

29 A number of respondents argued that having the threshold explicitly cover only one or a small number of consumers was overly burdensome and would be a waste of resources. They maintained that there are other, existing systems and processes in place to deal with consumer loss in these circumstances (e.g. under IDR processes or incident management systems).

30 Some respondents suggested that updated guidance should take into account the resources of the licensee, the nature and scale of the remediation, and the range of company structures, balance sheets and products affected.

31 A few respondents argued that flexibility should be retained for smaller licensees. Smaller licensees must work within the bounds of the PI insurance policy terms and may not have the same records, accessibility or resources.

32 On the other hand, some industry organisations argued the same standards should apply to smaller firms. They maintained that otherwise smaller firms will have no incentive to update their systems and processes.

ASIC's response

Underlying our approach to extending the guidance to one or more consumers is a philosophy that where a firm 'lifts up a rock' and finds a problem causing loss, it needs to respond to it, no matter how small. The response, however, can be scaled.

We have clarified that it is a matter for licensees to choose what processes, resources and governance structures they put in place to deal with misconduct or other failures causing loss, as long as it is fit for purpose. This means licensees can use existing IDR or incident management systems to deal with loss affecting one or a few consumers: see draft RG 000.35–RG 000.36.

If the misconduct or other failure only affects one consumer and that consumer has made an IDR complaint, then the IDR requirements and guidance in Regulatory Guide 271 *Internal dispute resolution* (RG 271) and *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* apply: see draft RG 000.38.

We have included an overall section on scalability at draft RG 000.35–RG 000.39 and Example 2.

C Key issue: Remediation review period

Key points

In CP 335 we set out our approach to when the review period for a remediation should begin: see paragraphs 33–35.

This section outlines the key responses we received about the remediation review period: see paragraphs 36–41.

The review period for a remediation

33 In CP 335 we proposed that the review period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer.

34 The current RG 256 states (at RG 256.85–RG 256.86):

> 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 … 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.

35 The intention behind the proposal was to address the potentially unfair reliance by licensees on the 'seven-year anchor'. We found that some licensees were limiting the scope of a remediation to seven years even if they held relevant records that extended beyond that period. We also proposed that licensees should use assumptions to fill knowledge gaps and achieve good outcomes that give consumers the benefit of the doubt. We were particularly interested in licensees using assumptions when there has been a breach in record-keeping obligations, or if the failure has not been identified for an unreasonable period.

Stakeholder feedback

36 Most respondents agreed that remediation for consumer loss should not be unfairly limited by anchoring to a seven-year review period where relevant records exist.

37 Most industry respondents raised concerns with the practical limitation of a proposal that could be interpreted as openly extending record-keeping obligations and expectations beyond seven years. Licensees often face

challenges in accessing reliable historical data, and some respondents noted the potential conflict of our proposal with:

(a) legal record-keeping obligations;

(b) privacy regulations;

(c) the new notify, investigate and remediate obligations applicable to certain licensees, which prescribe a 'legally enforceable right' requirement; and

(d) the statute of limitations.

38 Some industry respondents also suggested that remediating consumer loss beyond seven years will cause inefficiencies and delay to the overall process.

39 Some respondents suggested alternative approaches:

(a) that the seven-year period remain as a minimum standard, which allows licensees the flexibility to consider what data is available and whether assumptions can be used to fill the gaps. However, this approach shouldn't be treated as the default;

(b) that the review period should commence from the date a licensee reasonably ought to have known about the failure (rather than date of actual identification); and

(c) that the review period should take into account the resources of the licensee, and the nature and scale of the remediation.

40 Consumer representatives and some other respondents strongly agreed that remediations should no longer be anchored to seven years. For example:

(a) tying the scope of review to the seven-year time frame for retention of records is in some respects inconsistent with a licensee's obligations to provide financial services efficiently, honestly, and fairly; and

(b) a financial firm should not be able to rely on poor systems, record keeping or governance frameworks that delay the identification of all affected consumers in order to limit the scope of consumer remediation.

41 One respondent observed that superannuation trustees generally have access to extensive historical data that makes it possible to complete remediations in full, using data stored on the registry and other ancillary systems. While there may be residual problems relating to legacy systems, broadly the superannuation industry has transitioned to a more digitised operating model, meaning information should become more easily accessible in the future.

ASIC's response

We have maintained in draft RG 000 that the remediation review period should begin when the licensee reasonably suspects the misconduct or other failure first caused loss to a consumer: see draft RG 000.69–RG000.73.

By understanding the root cause and extent of the misconduct or other failure, licensees *should* be able to make this determination with the records available: see draft RG 000.70.

However, we accept that records may have been destroyed in good faith as a result of record-keeping obligations or privacy requirements. In these circumstance, if it isn't reasonable or possible to apply assumptions to fill the gaps, then the review period may be limited to no longer than seven years (for example): see draft RG 000.72. Licensees should do what they can in the circumstances to achieve good consumer outcomes.

The potential for delays can be managed with efficient remediation approaches, such as triaging consumer cohorts—something that we note many licensees already do: see draft RG 000.127–RG 000.129.

A number of financial sector reforms began in October 2021, including breach reporting, design and distribution obligations, and IDR requirements. We expect that, following these reforms, licensees will be able to identify and deal with failures much earlier. This will mean reviewing the impact of the misconduct or other failure back to when it first caused loss should rarely exceed record retention requirements. The challenges that licensees face in remediating historical failures should also not be as prevalent.

Generally, it is important to note that consumers have rights to proactively seek a review or compensation under other statutory frameworks, including IDR and via the Australian Financial Complaints Authority (AFCA). Different limitation periods apply to the exercise of these rights; these periods go beyond the standard statute of limitation periods. If a licensee does restrict this remediation review period, it cannot extinguish these individual rights: see draft RG 000.73.

D Key issue: Assumptions—Giving the consumer the benefit of any doubt

Key points

This section outlines the responses we received about the use of assumptions:

- in remediations, including what constitutes as 'beneficial' and how to monitor assumptions, deal with partial refunds and use averages (see paragraphs 42–56);
- to account for absent records (see paragraphs 57–59); and
- to increase efficiency (see paragraphs 60–65).

Using assumptions in remediations

42 Using assumptions in a remediation—if properly supported by evidence, applied and monitored—can produce good consumer outcomes *and* save licensees a considerable amount of time and resources. The use of assumptions is now common as a supplement or replacement methodology to a file review approach. It is important that we provide consistent standards for licensees to ensure the process remains consumer centred.

43 In CP 335, we proposed that when applying assumptions in a remediation licensees should first consider whether the assumption:

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

(b) is evidence based and well documented; and

(c) is monitored to ensure the assumption achieves the aim.

44 We said that *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). *Beneficial* refund assumptions should err on the side of overcompensation, rather than under compensation.

45 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. This avoids the risk of returning less than what consumers are owed.

Stakeholder feedback on the definition

46 There was strong support from industry respondents for guidance on the use of assumptions in remediations. They agreed it plays an important role in increasing the efficiency of remediations from both the licensees' and consumers' perspective.

47 Consumer representatives agreed that if assumptions are made, they should be beneficial to the consumer. However, they noted that the use and design of assumptions will vary depending on the remediation and affected consumers. They warned that the focus of the remediation should not be to make it cheap for licensees to remediate—it should be to provide full consumer redress, and learn from the breach to prevent any repetition in future.

48 Some industry respondents contended that 'beneficial' assumptions will likely lead to 'excessive' overcompensation. They believed our proposal implied that licensees need to overcompensate all consumers, and provide evidence at an individual level (which consequentially defeats the purpose of using assumptions).

49 Those respondents suggested that 'reasonable' assumptions that are not detrimental to the consumer would strike the right balance. Some other respondents agreed that erring on the side of the consumer should be the default characteristic; however, the degree of benefit should be reasonable.

50 Respondents often asked what we expect in terms of statistical reliance and the level of error tolerable. Further, they wanted to know whether the assumptions can be beneficial in aggregate rather than individually, given many different assumptions can be made at one time. Many responders requested more guidance about what evidence is required.

ASIC's response

We are of the view that many concerns raised by respondents arise from a lack of clarity about the meaning of 'beneficial'. We have carefully considered the feedback and updated our guidance in draft RG 000: see draft RG 000.96–RG 000.100. We have:

- updated our guidance on the use of assumptions to include a clearer focus on outcomes;
- removed reference to the need to return 'all' consumers to the position they would have otherwise been in as closely as possible; and
- provided clarity about what we mean when we refer to assumptions that are 'beneficial to consumers' or 'give consumers the benefit of any doubt'. These phrases mean that when there is uncertainty, the assumptions should minimise the risk of affected consumers falling out of scope,

and minimise the risk that affected consumers will be under compensated.

We note that minimising the risk of under compensation does not mean we expect licensees to overcompensate all consumers: see draft RG 000.99.

Applying assumptions that benefit the consumer will also benefit the licensee. It will increase the efficiency of the remediation and save licensees significant time and resources that would typically be associated with analysing all records or conducting individual file reviews: see draft RG 000.100.

We have also provided examples of what assumptions may and may not be appropriate in practice: see Examples 7–15 and Example 21–22 in draft RG 000. Over 90% of the examples were either provided by licensees or based on ASIC's experience.

We do not consider that a standard of 'reasonable' assumptions will strike the right balance between efficiency and good consumer outcomes. Given licensees also benefit from using assumptions, it is not appropriate to set a more commercially sensitive or oriented standard in this guidance.

There is wide variety in the type of remediations, and the availability of records. What evidence is necessary will be different case by case, so we are unable to provide standard guidance for licensees. However, to assist, we have included 11 examples in draft RG 000, reflecting good and bad outcomes, and given guidance on how licensees may develop and justify assumptions: see draft RG 000.101–RG 000.109, and RG 000.121–RG 000.123.

In developing the assumptions, licensees should access and analyse the data and information available (or a robust sample) to understand the scope and impact of the misconduct. It may be the case that, because of the nature of the misconduct and the way in which is affects consumers, using assumptions will not be appropriate. Licensees need to consider their obligations when determining the appropriate methodology to use, including whether it is efficient, honest and fair: see draft RG 000.81.

Stakeholder feedback on monitoring assumptions

51 Some firms requested further clarity on how licensees would be expected to *monitor* assumptions once payment has been made. Others argued that requiring licensees to monitor the effectiveness of an assumption is impractical and will be burdensome on licensees.

ASIC's response

We have clarified that licensees should monitor the outcomes of assumptions until payments are finalised: see draft RG 000.124. However, if new information arises (e.g. through IDR complaints) that suggests an assumption is not beneficial for a particular cohort or whole portfolio of affected consumers, then the licensee should consider whether additional compensation is necessary: see draft RG 000.125.

Monitoring of assumptions can help licensees ensure good consumer outcomes. It can also help licensees to identify and understand any problems as they arise, and decrease the risk of licensees having to redo the calculations at a later date when many resources have been spent.

There may be times, however, when a licensee applies assumptions and there is *no risk* of consumers falling out of scope, or being under compensated (for example a decision to refund 100% of fees charged). In these cases, there will be no monitoring necessary.

Stakeholder feedback on partial refunds

52 We asked whether it is 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. Most respondents agreed that if a consumer received a financial benefit from the product that should be factored into the compensation amount.

53 Consumer representatives did not support discounts for a purported 'benefit' or 'use' of the product, particularly in the context of irresponsible lending in breach of the National Credit Act. They said the remediation should reflect what is fair in the circumstances, considering the resulting financial and non-financial loss. For example, in their experience, licensee's calculations for 'benefit of use' will almost always result in the entire principal of an irresponsible car loan needing to be repaid.

ASIC's response

We have included guidance that partial refunds may be appropriate in limited circumstances, but only if the consumer has received a legitimate or demonstrable financial benefit in return: see draft RG 000.142.

Licensees should generally avoid making assumptions about the non-financial value a consumer places on a product. When considering whether a consumer received a legitimate and demonstrable *financial* benefit, licensees should not provide a partial refund if the product or bundle of products is inappropriate for the needs and circumstances of the consumer or has been mis-sold: see draft RG 000.141.

Stakeholder feedback on the use of averages

54 In CP 335, we asked whether it is appropriate in a remediation to apply an assumption based on an average.

55 Industry respondents suggested that licensees should be able to use the mean when consumers do not wish to engage with the licensee, or if the remediation involves low-value compensation and the standard deviation of distribution of losses is small. Further, they suggested that averaging may be appropriate if records are not available beyond seven years and the consumer impact is likely low and also in a narrow standard deviation.

56 On the other hand, some respondents argued that the mean will generally be inappropriate. They considered that licensees should use the highest or 'best of' to ensure that under compensation is minimised. They also argued that a median will generally be more reflective of the whole population than the mean. Some respondents noted that it may also be appropriate to segment consumers and to vary assumptions for the different cohorts, removing any 'high risk' or 'high impact' consumers and instead conducting individual reviews for them.

ASIC's response

We have set out in draft RG 000 that there are limited circumstances when it will be appropriate to use a median or mean as a basis for an assumption: see draft RG 000.107. This will depend on the skew and standard deviation of the distribution of losses caused by the misconduct or other failure. If the standard deviation is low, the risk of under compensation can be reduced.

Severely affected or high-risk cohorts of consumers may need to be excluded and assessed individually: see draft RG 000.106. We understand this is common industry practice now. If there is significant variation in the distribution of loss, then assumptions should be varied based on cohorts where possible. This is likely to be both efficient and fair.

We have provided an example of when the use of a mean may be appropriate to account for absent records beyond seven years: see Example 10 in draft RG 000.

Using assumptions to account for absent records

57 In CP 335, we proposed that licensees should apply beneficial assumptions if they need to make up for absent records. We considered this especially important if the absent records may be considered a breach of their record-keeping obligations.

Stakeholder feedback

58 All respondents agreed that assumptions should be used to account for breaches of record-keeping obligations. However, beyond that, some industry respondents argued that sometimes there will be significant or total

data gaps that cannot be filled using assumptions. They also asked us to consider the difficulties associated with contacting former customers in very aged remediations.

59 Most industry respondents argued that they should have the discretion to apply beneficial assumptions beyond record-keeping periods. A small number argued that remediation should be strictly limited to statutory limitations and/or record-keeping obligations, to ensure efficiency is maintained. These respondents did not think that beneficial assumptions to fill the gaps should be the expectation.

> *ASIC's response*
>
> We have provided guidance that if the misconduct or other failure extends beyond record-keeping obligations and there is limited data, licensees should assess whether it is possible or reasonable to use assumptions to fill the gaps: see draft RG 000.114–RG 000.117.
>
> It is not our intention to effectively extend a licensee's record-keeping or privacy obligations through the remediation standards. We are, however, asking licensees to do what they can in the circumstances. They should use what records they have, including triangulating data from different sources available: see draft RG 000.123.
>
> We accept there will be limits to whether using assumptions is reasonable or possible—especially if no data exists to reasonably identify affected consumers.
>
> If licensees are identifying misconduct or other failures early, then we consider that the need to use assumptions to account for absent records when remediating should be the exception and not the norm. see draft RG 000.113.
>
> We have provided a number of examples to illustrate when assumptions can be used: see Examples 10–12 in draft RG 000.

Using assumptions to increase efficiency

60 In CP 335, we proposed that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation, even when licensees have good-quality records.

Stakeholder feedback

61 Most respondents were supportive of guidance that allows for assumptions to increase the efficiency of a remediation, and requested more examples of when it may be appropriate.

62 Many industry respondents offered examples and case studies of when they have applied assumptions to increase efficiencies in the past. They provided examples of when it may be appropriate—for example:

(a) if there are large bodies of data available to indicate a trend to which the assumption can be applied.

(b) automatically refunding fees of a certain value and below; and

(c) if the time taken to calculate exact loss would lead to inappropriate or excessive delays.

63 Some examples of when it may be inappropriate included:

(a) if the remediation involves the consideration of individual circumstances;

(b) if the remediation involves 'high impact' or high loss groups; and

(c) if the data is inconsistent or too unreliable.

64 Some respondents also queried how the guidance will apply to unit pricing errors, especially for remediations using trust or scheme property.

65 Other respondents noted that, to aid consistency in the application of assumptions, there should be a mechanism through which assumption approaches are transparent and shared across industry.

ASIC's response

We have provided a number of examples to illustrate good outcomes from using assumptions to increase efficiency: see Examples 13–15 in draft RG 000.

Whether assumptions or file reviews should be applied to any particular remediation is a matter for licensees to decide. Using assumptions to increase efficiency may not always be appropriate. Individual file reviews may be necessary, depending on the nature of the service provided and the nature of the misconduct or other failure.

Licensees should be able to justify their assumptions with available evidence. They should also be clear when communicating with consumers about the use of assumptions and the effect that these may have on their individual loss calculation: see draft RG 000.102.

ASIC does not have the power to require licensees to publish details about their remediation methodology, including any assumptions used. However, we support industry transparency and sharing of learnings.

E Key issue: Calculating foregone returns or interest

Key points

This section outlines the responses we received about calculating foregone returns or interest rates on compensation payments. The responses were most concerned with:

- the three-step framework for calculating returns and interest, including examples for a fair and reasonable rate (see paragraphs 66–75); and
- whether fair and reasonable rate should compound daily (see paragraphs 76–77).

The three-step framework

66 In CP 335, we proposed to revise the current guidance on calculating foregone returns or interest. We proposed a three-step framework for how to make these calculations, mostly to introduce the application of assumptions (that give consumers the benefit of any doubt):

(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.

67 We are frequently asked by licensees for guidance on how they should calculate foregone returns or interest in specific remediations, or approval of their approach. We have also seen through our surveillance work licensees take very different approaches to this issue.

68 Our intention in clarifying our current guidance on calculating foregone returns or interest is to promote consistent and fair outcomes and to provide greater certainty to licensees about complying with their legal obligations. Ensuring that these calculations are fair for affected consumers is

particularly important where firms have not identified the underlying misconduct or other failure in a timely way, and the remediation is therefore protracted and aged.

Stakeholder feedback on the three-step framework

69 Generally industry respondents wanted clarity that licensees could use beneficial assumptions to calculate foregone returns or interest *before* exhausting all possibilities of determining and applying actual return or interest data.

70 Respondents often noted that calculations of foregone returns or interest vary across different product areas. Calculating the actual interest and/or returns may often be most appropriate for financial advice and unit pricing remediations. However, this does not apply in the same way to product remediations, and inevitably assumptions or benchmarks will be required.

71 Industry respondents wanted confirmation that Steps 1 and 2 could be considered concurrently or out of consecutive order (i.e. beneficial assumptions should be allowed in the first instance if more efficient).

72 For mortgage broker or credit assistance remediations, respondents said remedying the error is not always as simple as applying the difference in interest rates. It may involve a number of different factors, including rate, fees, loan-to-value ratio, customer type, security type, interest rate changes, whether the customer would have been approved at a lower rate, and changes to fees and charges.

ASIC's response

To avoid confusion, we have revised the three-step framework into guidance about the different approaches available: see draft RG 000.152–RG 000.166. Licensees may choose to apply assumptions that are beneficial to consumers rather than use the actual data if appropriate. We are not mandating a particular approach or sequence of approaches.

During individual workshops, it became clear that inconsistent or unfair approaches were being taken to the calculation of foregone returns or interest. This is also borne out by our experience in monitoring remediations. For example:

- often for banking and retail products, unfair assumptions were being made about a consumer's behaviour when accounting for unknown 'time value of money' (i.e. compensation to account for the time for which the consumer did not have access to the money they would have had but for the misconduct or other failure. This calculation is often used when a consumer has exited the product); and

> - sometimes the additional interest charged as a result of the failure was not accounted for (i.e. credit card interest on mischarged fee or premium).
>
> We found that further clarification was required about the different circumstances that may arise: see draft RG 000.148–RG 000.151. We have also further clarified the different approaches to calculation, including providing product-specific examples: see Examples 19–24 in draft RG 000.

Stakeholder feedback on the fair and reasonable rate

73 Industry respondents argued that the Reserve Bank of Australia (RBA) cash rate plus 6% (as currently set out in RG 256) is not a fair and reasonable rate when applied to product areas other than financial advice, superannuation and investments. They asked ASIC to distinguish between investment products and banking and consumer retail products, and provide more examples based on context. Only one respondent provided an example of a possible alternative—that the RBA cash rate plus 3% in certain timeframes could be used as a proxy for third-party home loan rates.

74 Some respondents noted that applying a fair and reasonable rate should generally be reserved for calculating foregone returns or interest for former customers and in circumstances where the time value of money is unknown. Firms should not make unfair or unfounded assumptions about a consumer's behaviour (i.e. whether they spend, save, pay debt or invest).

> *ASIC's response*
>
> We have provided another example of a fair and reasonable rate that may be relevant in the context of insurance and other non-investment remediations: see Example 24 of draft RG 000. We are also requesting feedback about other examples of a fair and reasonable rate.
>
> Licensees should first consider whether there is any applicable legislation that relevantly prescribes an interest rate in the circumstances or similar circumstances. For example, the Australian Government bond rate plus 3% is detailed in s57 of the *Insurance Contracts Act 1984* and reg 38 of the *Insurance Contracts Regulations 2017*: see draft RG 000.162.
>
> We consider that the Australian Government bond rate plus 3% is a fair and reasonable rate that satisfies the principles outlined in draft RG 000.163 in the context of insurance contracts generally. We think it can also be applied to other non-investment type remediations: see draft RG 000.162.
>
> The RBA cash rate plus 6% is one other example (in the absence of a prescribed rate), and likely most appropriate for financial advice and superannuation remediations: see draft RG 000.164.

Compounding daily

75 In CP 335 we proposed that the fair and reasonable rate under Step 3 should compound daily unless the product's compounding period is known.

Stakeholder feedback

76 Many respondents submitted that the rates and intervals should be aligned to the relevant products and services. In particular, they stated that 'daily compounding' would not be considered fair and reasonable in the context of credit and deposit products.

77 Some other respondents, however, noted that a daily form of compounding is the simplest and most sensible approach to conducting fair and reasonable rate calculations. Further, they considered that that monthly or daily compounding makes little difference.

> *ASIC's response*
>
> We have maintained in draft RG 000 that the fair and reasonable rate applied should generally compound daily.
>
> Compounding daily is the simplest and most consumer-centred approach to calculating the time value of money when this is unknown.
>
> Daily compounding reflects the continuous change in value of investment products and other alternative uses of funds available to consumers. It also accurately compensates consumers whose remediation period may include only part of a month, quarter, or year.
>
> This is not to say, however, that licensees cannot use a different compounding frequency (or simple interest) if that was how the relevant product the subject of the remediation operated (i.e. for calculations within the product—or outside the product, if known): see draft RG 000.167.

F Key issues: Making remediation payments

Key points

This section outlines the responses we received about making remediation payments, including:

- finding and automatically paying consumers (see paragraphs 78–86);
- the low-value compensation threshold (see paragraphs 87–95);
- what to do when remediation money cannot be returned (see paragraphs 96–106); and
- the use of settlement deeds in a remediation (see paragraphs 107–113).

Applying best endeavours to find and automatically pay consumers

78 In CP 335, we proposed that licensees should apply *best* endeavours to find and automatically pay consumers. The current RG 256 does not provide guidance about what is expected when making remediation payments.

Stakeholder feedback on the 'best endeavours' standard

79 All respondents welcomed guidance that clarifies the steps or efforts required to find and pay affected consumers in a remediation. However, many industry respondents submitted that *best* endeavours is a particularly high standard. They were concerned that it may lead to uncertainty about how far the communications approach needs to go to satisfy this requirement, especially for former customers.

80 It was their view that a 'reasonable endeavours' standard would allow licensees to implement an appropriately scaled communications approach. Appropriate scaling would consider the materiality of the particular remediation, time spent on contacting the consumer, administrative costs, resourcing and specific needs of different consumer cohorts. Reasonable efforts would balance fair consumer outcomes and remediation efficiency (and would be more aligned with the 'efficient, honest and fair' obligation).

81 One respondent suggested that guidance should include a list of activities that would satisfy a reasonable or, alternatively, a best endeavours standard.

82 There was also strong support for a broader, sector-wide solution to improve efficient retrieval or matching of lost consumer data: see paragraph 102.

> *ASIC's response*
>
> We accept that a 'best endeavours' standard is likely to cause uncertainty for licensees about how far they are expected to go to return remediation money. This will especially be the case for former or lost consumers that remain unresponsive.
>
> We have set out in draft RG 000 that licensees should apply *reasonable* endeavours to make remediation payments: see draft RG 000.177. Licensees should determine the 'reasonable endeavours' that are appropriate in the circumstances on a case-by-case basis. We have also included some examples of what the 'reasonable endeavours' standard does *not* look like: see draft RG 000.178.
>
> To ensure no unreasonable delays, licensees should triage their remediation payments and remediate 'easier' cohorts (e.g. cohorts with electronic funds transfer (EFT) details on file) and more vulnerable cohorts first: see draft RG 000.179.
>
> Licensees should do what they can to find updated details for consumers and use specialist or third-party services where available: see draft RG 000.181–RG 000.182.

Stakeholder feedback on automatic payments and cheques

83 Many respondents agreed that automatic payments to a consumer's suitable, eligible or nominated open account should be the preferred payment method. There were some suggestions for circumstances where cheques should be allowed, including:

(a) when requested by a consumer (e.g. a preferred payment method);

(b) when supported by appropriate follow-up processes;

(c) when multiple attempts to contact to update bank details have been unsuccessful, and the consumer has exited the product;

(d) for exited consumers (licensees claim they often get very low response rates from former customers to update bank details);

(e) if retrieving bank details will likely cause distress to any unique consumers cohorts; or

(f) for commercial accounts.

84 Some respondents from the general insurance industry submitted that they will generally have a higher proportion of former customers, due to the commoditisation of the general insurance market, and less access to EFT details than banks. Therefore, any policy that prioritises automatic bank transfer of remediation payments will be inequitable for those without ready access to that information.

85 Some industry respondents suggested that, particularly for large-scale remediations, it will cause undue delay to try to obtain updated bank details

from former customers. The respondents recommended sending cheques to last known addresses, noting that requests to update bank details may be perceived as a scam.

86 Respondents also requested guidance (or examples) about what steps licensees need to take before issuing a cheque as a last resort.

> *ASIC's response*
>
> Automatic payments to a consumer's active account should be the priority. Cheques should not be the default form of payment, and should be used only when other avenues for automatic payment are not reasonably available in the circumstances: see draft RG 000.195.
>
> If using cheques, they should be supported by an appropriate follow-up process (see Example 25 in draft RG 000). Follow-up communication should give consumers the opportunity to elect for a direct transfer instead of a cheque: see draft RG 000.196.
>
> *Making it right* (PDF 2.47 MB) is a useful field guide that can help licensees take a consumer-centred approach to and improve the effectiveness of their remediation. The field guide covers how to deal with non-responsive consumers.
>
> Monitoring consumer outcomes (including cheque-cashing rates) will help licensees identify risks and adapt their approach.
>
> There may be a risk that consumers perceive a licensee's communications as a scam. However, without quantitative evidence, this is not an excuse for low response rates. Considering how consumers will react to communications is a standard part of taking a consumer-centred approach and licensees should take steps to mitigate any risks.
>
> Consumers will respond to licensees' communications through various methods (e.g. complaints, contacts via hotlines, email, or social media, or activity on a licensee's public webpage if details of the remediation are made public). Licensees can use the tools available to them to monitor these responses and adapt their communications approach accordingly.
>
> For more guidance on how manage and monitor communications about a remediation, see *Making it right* (PDF 2.47 MB).

Low-value compensation threshold

87 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 by paying the amount to an appropriate organisation (which will generally be not-for-profit) to fund activities that could be characterised as a community service …

88 This is known as applying a 'low-value compensation threshold'. Our experience is that licensees have applied different low-value compensation thresholds to remediations, and sometimes for both current and former customers. In some instances, we have seen successful approaches taken to return all money regardless of value. In others, licensees have applied or sought to apply thresholds ranging from $1 to $200.

89 In CP 335, we proposed to remove the broad $20 threshold currently suggested in RG 256.135. We instead proposed a principles-based approach, as follows:

(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 compensation threshold should be documented and justified.

Stakeholder feedback on the removal of the low-value compensation threshold

90 There were mixed responses to this proposal:

(a) Some respondents supported the removal of the default threshold and the flexibility to set their own thresholds for exited or former customers. However, they sought more clarity on what evidence is needed, and more examples.

(b) Other respondents did not support the removal of the $20 threshold for exited consumers. They argued that the set threshold provides certainty across the organisation. Having no standard threshold would cause delays to the remediation, as licensees go through the process of determining an appropriate threshold from scratch. The threshold is also particularly useful for complaints referred to AFCA.

(c) An industry association noted that removing the threshold will likely create an administrative burden for smaller licensees.

91 In justifying the use of a low-value compensation threshold, a few respondents noted the risk to the 'consumer experience'—that is, that attempts to return low-value payments would likely annoy consumers, providing anecdotal examples but not data.

92 Most respondents agreed that no low-value compensation threshold should be applied for consumers with suitable, eligible or active account. One respondent argued that a $1 threshold for current customers is practical.

93 In terms of superannuation, some respondents submitted that low-value amounts should be retained by the fund for the benefit of the members. Paying members below $20 may not be an efficient use of fund resources. Others noted the new provisions under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Unclaimed Money Act) may be an alternative, but further guidance about when it would be considered in the best interest of the member to transfer the amounts to ATO would be useful.

ASIC's response

We are consulting on the appropriateness of a $5 low value compensation threshold.

We agree that retaining a standard low-value compensation threshold provides certainty for licensees, and allows for a more efficient outcome. The $20 threshold outlined in the current RG 256 was appropriate in 2016 for the investment and advice sector (given that many remediation payments were generally large in value, and well exceeded the $20 threshold). However, we consider that it is no longer appropriate to apply across all products and services.

We have provided guidance that if the licensee has current payment information on file (e.g. PayID or EFT details) or the affected consumer is a current customer, then remediation should be paid regardless of value: see draft RG 000.185.

We understand that some licensees are already applying lower compensation thresholds than $20, including a $5 threshold, as standard practice.

For current customers (and former customers owed more than $5), licensees should apply reasonable endeavours to return the money owed. However, if licensees are unsuccessful, then they should lodge the money in an unclaimed money regime (if available). If such a regime is not available, licensees should make a residual remediation payment: see draft RG 000.187.

A 'residual remediation payment' is a payment to a charity or not-for-profit organisation made up of consolidated remediation money that could not be returned to consumers despite reasonable endeavours, where an unclaimed money regime was unavailable. For more information, see draft RG 000.198–RG 000.209.

We have set out in draft RG 000 when it is appropriate for licensees to make a residual remediation payment, rather than making reasonable endeavours to pay the money directly to the consumer (otherwise known as applying a low value compensation threshold). This applies to former customers who are owed $5 or less (after interest) and who have no current payment information on file: see draft RG 000.186.

In terms of superannuation, s22 of the Unclaimed Money Act allows trustees to transfer amounts held on behalf of former members to the ATO if the trustee believes it to be in the member's best interests. For more information about this process see draft RG 000.191–RG 000.192.

Stakeholder feedback on disclosure of the low-value compensation threshold

94 In CP 335 we proposed that if a licensee applies a low-value compensation threshold in a remediation, it should be disclosed on the licensee's website or annual financial report. This is consistent with Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94).

95 On whether the threshold should be disclosed, again there were mixed responses:

(a) Some industry participants and consumer representatives supported the disclosure of the low-value compensation threshold. They considered that it would be appropriate for relevant information to be disclosed on a licensee's website.

(b) Many others were unclear about what disclosure meant. They supported transparency for the purposes of independent experts and regulators on request.

(c) One respondent suggested it should be up to the licensee whether they disclose it.

ASIC's response

We have set out in RG 000 that if a licensee imposes a low-value compensation threshold (or otherwise for unit pricing remediations), we expect them to disclose it on their website along with details of the residual remediation payment made or the amount retained for the benefit of members of the fund or scheme: see draft RG 000.189. This aligns with guidance provided in RG 94.

When remediation money cannot be returned

96 In CP 335 we proposed that if a licensee cannot, despite 'best' endeavours (now amended to 'reasonable' endeavours), find consumers to pay them compensation:

(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, territory 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 managed investment scheme.

97 Unclaimed money regimes (outside of superannuation) are not an ideal method of reuniting remediation payments with lost or unresponsive consumers. They are opt-in schemes that require consumers to take action before receiving payment. Any money that is not claimed will often be absorbed into consolidated government revenue, and will not be used to address the specific harm caused by the licensee that a residual remediation payment would.

98 Nevertheless, unclaimed money regimes do ensure that an affected consumer's money is made available to them for as long as possible. We are of the view that licensees should prioritise an approach that increases the likelihood that the actual consumers who have suffered loss receive the money owed to them. Licensees should first use reasonable endeavours to return the money directly and, only if not successful, use an unclaimed monies regime (if available).

Stakeholder feedback on unclaimed money regimes

99 Most respondents agreed that unclaimed money regimes should be considered before making a residual remediation payment. The exception to this was consumer representatives: see paragraph 104.

100 Despite the support for using unclaimed money regimes, many challenges were identified. These included:

(a) that state, territory and Commonwealth regimes have inconsistent requirements;

(b) that many do not specifically contemplate remediations and refunds as unclaimed money;

(c) the regimes apply different minimum thresholds for lodgement;

(d) it is unclear how the prescribed holding requirements apply in the context of remediation payments;

(e) most regimes require the time for recovering the money to have expired;

(f) consumer awareness of the regimes is low and it is an opt-in model (which places the burden on consumer);

(g) it is unclear what rate of return should be applied to a compensation amount when the compensation is to be sent to an unclaimed money regime, particularly where licensees have made significant effort and follow-up communications in an attempt to contact and pay the consumer; and

(h) it is unclear how uncashed cheques should be treated in the context of unclaimed money regimes.

101 One respondent pointed out that unclaimed money lodgements can only be performed on an annual basis, and suggested that we should consider a more frequent remit (such as quarterly). They argued this would allow consumers to access funds more readily.

102 Given the many challenges associated with unclaimed money regimes, and the challenges associated with contacting former customers especially, industry respondents were supportive of guidance or solutions that would improve the lost consumer challenge. Many options were proffered, including:

(a) expanding ASIC's unclaimed money jurisdiction to cover all financial services, credit and wealth products (beyond the *Banking Act 1959*, *Life Insurance Act 1995* and Corporations Act), removing the minimum lodgement threshold, and confirming the eligibility of remediation payments for lodgement;

(b) the ATO repatriation service (similar to the framework for superannuation under the Unclaimed Money Act);

(c) the ATO data matching service (allowing licensees to share records and match data with the ATO records, solely for the purposes of remediation);

(d) giving credit bureaus authority to use credit reporting data to improve the quality of consumer contact information (not just marketing data), solely for the purposes of remediation; and

(e) the use of open banking.

ASIC's response

We have set out in RG 000 what licensees should do if, despite reasonable endeavours, they cannot find and pay affected consumers. They should first lodge the money in an unclaimed money regime (if available) and, if not, make a residual remediation payment: see draft RG 000.198–RG 000.209.

We acknowledge that there are many challenges and barriers associated with lodging remediation money in various state, territory and Commonwealth unclaimed money regimes. A longer term fix is needed to address the lost consumer challenge, which cannot be achieved through guidance alone.

In addition to the conflicting requirements between state, territory and Commonwealth unclaimed money regimes, there are certain legislative procedures and requirements that make these regimes difficult for licensees. For example, the minimum $500 lodgement threshold and the requirement to lodge on an annual basis. These challenges would need law reform to change for the purposes of remediation.

Licensees should be aware of their unclaimed money obligations under state, territory and Commonwealth legislation, and consider whether remediation money meets the requirements: see draft RG 000.202.

We are actively working with Treasury and will continue to engage with industry to explore opportunities to address these challenges. We also encourage industry to consider what solutions to the lost consumer challenge they could provide.

Stakeholder feedback on residual remediation payments

103 Most industry respondents accepted that licensees must not profit from the misconduct or other failure to pay a consumer directly. They considered that it would be appropriate to make a residual remediation payment if a consumer is unresponsive and an unclaimed money regime is unavailable.

104 Consumer representatives submitted that it should be a matter for licensees to decide whether to lodge in unclaimed money regimes or make a residual remediation payment. It was their view that allowing for either option will inevitably create a disincentive to find the actually impacted consumers, as both require less effort than contacting consumers directly. Consumer representatives submitted that at least a residual remediation payment will ensure the money can be channelled into addressing consumer harm. They were concerned that prioritising unclaimed money regimes over residual remediation payments would inevitably lead to less funding for community organisations. These organisations help and provide services to vulnerable consumers and consumers that have suffered harm as a result of licensee misconduct in the financial system.

105 Some respondents suggested that an independent body should distribute residual remediation payments, rather than ASIC providing guidance on what organisation should be the recipient. They suggested the Financial Counselling Foundation, the Consumer Advocacy Trust or the Ecstra Foundation. This would avoid any actual or perceived conflicts of interest.

106 One respondent also submitted that licensees should not be allowed to claim a tax deduction on any residual remediation payments made. They considered that it goes against the principle of not profiting from the misconduct.

ASIC's response

We agree that unclaimed money regimes are not an ideal method of repatriating money owed to affected consumers (outside of superannuation).

It is worth noting, however, that most unclaimed money regimes have a minimum lodgement threshold. This means that residual remediation payments of consolidated low-value amounts will likely continue.

In terms of residual remediation payment recipients, licensees will not need to consult on this with ASIC. However, the recipients should not be related to the licensee (i.e. the licensee's partner foundation or charity, existing education program, or any affiliated organisations): see draft RG 000.207.

While we do not wish to be prescriptive about how residual remediation payments should be used, where possible their use should have a connection to the consumer harm: see draft RG 000.207.

In response to questions about superannuation, trustees cannot make residual remediation payments using trust assets. This may constitute a breach of obligations under the *Superannuation Industry (Supervision) Act 1993*.

Whether residual remediation payments are tax deductable is a matter for the ATO.

The use of settlement deeds in a remediation

107 In CP 335, we sought feedback about when 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.

Stakeholder feedback

108 Consumer representatives strongly supported a ban of settlement deeds. Settlement deeds can be confusing and complex, especially in circumstances where the consumer has no support or the benefit of legal advice. Typically, settlement deeds limit a person's rights and prevent them from seeking the full balance of their loss through IDR, AFCA or the courts.

109 Consumer representatives suggested that, if settlement deeds must be used, then confidentiality and non-disparagement clauses should at least be banned. These clauses are unfair on the person, who cannot share their experience. They can also curtail broader reform and prevent an exploration of the underlying systemic issues, both regarding the licensee's initial misconduct and the operation of the remediation.

110 Some respondents suggested that settlement deeds should not be accepted unless the consumer is offered funding to obtain legal advice and has taken that offer or made an informed decision not to. Licensees should also standardise their offer of legal assistance as an industry, to avoid inconsistent consumer outcomes.

111 Larger industry respondents submitted that, in practice, they rarely use settlement deeds in remediations. However respondents suggested there may be some limited circumstances in which they can be appropriate:

(a) in the case of a responsible lending breach, if the consumer wishes to remain in the security property;

(b) when the licensee has conducted a rigorous investigation of the individual’s needs and circumstances (e.g. inappropriate advice remediations);

(c) when there has been a negotiated agreement between both individual parties (e.g. following AFCA determination);

(d) when the remediation amount is high value, the consumer has been advised of their right to seek independent legal advice before entering the settlement deed, and the refund has been determined as part of a consistent and fair methodology; or

(e) large scale remediations.

112 Many respondents noted that settlement deeds are often necessary to receive a pay out from a PI insurer. This is especially important for small-to-medium size licensees that rely on PI insurance.

113 No respondent suggested explicitly that it would be appropriate to rely on implied consent in the context of a remediation.

ASIC’s response

We are of the view that licensees should generally not require settlement deeds with affected consumers in the context of a remediation. They should also not assume a consumer has consented to the conditions of a remediation payment if the consumer is unresponsive: see draft RG 000.222–RG 000.226.

We agree that a consumer’s right to review the remediation outcome, or complain about the conduct of the remediation and/or underlying misconduct, should not be unreasonably restricted.

However, we accept there may be some limited circumstances where a licensee is required to use settlement deeds to meet their obligations or to obtain PI insurance: see draft RG 000.224.

The guidance is not intended to prevent the legitimate use of legal instruments. However, licensees should consider whether their use is efficient, honest and fair in the circumstances. In addition, any settlement deeds used should be strictly limited to the misconduct or other failure that led to the remediation outcome, and not include confidentiality or non-disparagement clauses: see draft RG 000.225.

Appendix: List of non-confidential respondents

- AIA Australia
- Association of Financial Advisers
- Association of Securities and Derivatives Advisers of Australia
- Association of Superannuation Funds of Australia
- Australian and New Zealand Banking Group
- Australian Banking Association
- Australian Finance Group Ltd
- Australian Finance Industry Association
- Australian Financial Complaints Authority
- Australian Financial Complaints Authority (supplementary)
- Australian Institute of Superannuation Trustees
- Australian Institute of Superannuation Trustees (supplementary)
- Australian Small Business & Family Enterprise Ombudsman
- Bill Jovanov
- Consumer Action Legal Centre
- Ecstra Foundation
- Equifax
- Financial Counselling Foundation
- Financial Planning Association
- Financial Rights Legal Centre
- Financial Services Council
- Insurance Council of Australia
- KPMG Australia
- Legal Aid Queensland
- Maurice Blackburn
- Mortgage & Finance Association of Australia
- National Australia Bank
- Norton Rose Fullbright
- QMV Solutions
- Stockbrokers and Financial Advisers Association
- Westpac Banking Corporation