consumer action law centre

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By email: remediation@asic.gov.au

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Dear Amanda

Consumer remediation: Update to RG 256

Thank you for the opportunity to comment on ASIC Consultation Paper 335, *Consumer Remediation: Update to Regulatory Guide 256*.

We strongly support a continuing focus on consumer remediation by ASIC in its enforcement. Remediation programs have been a very welcome development and have contributed to increased redress for consumers. We agree with ASIC that product-neutral regulatory guidance on remediation (beyond financial advice) is now necessary.

In responding to this consultation, we have drawn on our many years of experience advising and assisting consumers on remediation programs across financial services and consumer products, and as a recipient of community benefit payments that have enabled us to provide services to affected communities, improve industry practice, and reform laws to benefit consumers as a whole.

Summary of key points

- We support remediation programs being established not just for misconduct but also breaches of industry code and other standards.
- We support that remediation should no longer be anchored to the prior seven years.
- We support the use of beneficial assumptions that are genuinely beneficial, and only after the firm fully understands the myriad impacts of its conduct on *people* – including impacts on physical and mental health, relationship breakdown, insolvency, and going without essentials like food – so as to remedy all the harm, where possible, and learn from the mistakes to prevent any repetition.
- We do not support discounts for the purported 'benefit' or use of the product, particularly for responsible lending breaches. Such discounts can produce incredibly unfair results and even lead to windfall gains for the lender. Instead, remediations should look at what is fair in all the circumstances, considering the consumer's resulting financial and non-financial loss. At a bare minimum, any discount for use must only apply where there was a real and tangible benefit to the consumer, and the resulting calculation is fair.
- We support requiring firms to take a 'best endeavours' approach to finding and remediating consumers. The first priority should be finding affected consumers and ensuring they are remediated, to minimise the amount of residual remediation funds requiring distribution.
- We are not opposed to removing the low-value compensation threshold, so long as it is disclosed.

- We strongly support the principle that licensees must not profit from their failure.
- We are strongly opposed to sending residual remediation funds to unclaimed money registers (and thus ultimately to various Government consolidated revenue funds) where people cannot be found. At present, these funds benefit consumers through community benefit payments that support the provision of consumer, credit and debt help services. These services are generally targeted at consumers experiencing vulnerability or disadvantage, who are often disproportionately impacted by corporate misconduct. ASIC's proposal would ultimately be a win for industry, which would benefit from reduced consumer advocacy and less empowered consumers, and a loss for consumers, who would have reduced access to much needed services.
- We recommend that residual remediation funds be distributed by an independent body with appropriate expertise in administering funding and grants for consumer organisations, such as ECSTRA, The Consumer Advocacy Trust or the Financial Counselling Foundation.
- Regardless of whether residual funds go to consolidated revenue or community benefit payments, a consumer should always be paid their compensation by the firm if they become aware of their entitlement at a later date.
- We are strongly opposed to the use of settlement deeds in remediation program, which limit consumers' rights.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Using a two-tiered approach

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

We support the move to a two-tier approach to encourage firms to institute remediation programs not merely for legal breaches, but also for breaches of industry codes, standards, expectations, or values.

We suggest that instead of 'considering' whether to institute a remediation in Tier 2, firms *should* commence a remediation for these breaches. This is particularly so for breaches of industry codes, which are promises made by members of an industry to their customers. Our concern is that many firms will 'consider' but ultimately decide not to commence a remediation in Tier 2 unless the wording is strengthened.

We also support the proposal to change the words 'a number of consumers' to 'one or more' consumers. Loss to one consumer should be sufficient to initiate a remediation. The experience of one consumer can reveal, upon a review, a systemic problem applying to many others. Commencing a remediation after loss to one consumer will minimise delays. Many of the problems discussed below, about lost paperwork or inability to contact affected consumers, are exacerbated by delays in commencing remediation.

The review period for a remediation

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

We strongly support Proposal C1 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.

Remediation should no longer be anchored to a 7-year timeframe. Many problems requiring remediation go back further than seven years from when they are uncovered, meaning that some consumers miss out on compensation. Limiting the review to the prior seven years also creates an incentive to sit on problems and not uncover issues within the firm. By anchoring the review period to the time of the loss, all consumers should be covered by the remediation.

This approach would have been helpful in past remediation programs, including for add-on insurance remediations. These delays have significant consequences. People have used Consumer Action's tool DemandARefund.com, (operational since 2016) to seek refunds for junk insurance sold to them going back as far as **1990** – well outside the time limits on the remediation schemes and class actions.

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

We agree that the remediation should be scalable, and acknowledge that smaller firms may not have the same data management capacity. However, all licensees should build in the possibility of remediation for all clients from the beginning of the customer experience. We note that para 45 of CP335 states that:

> We also recognise that many licensees experience logistical barriers when accessing consumer information or files when, for example, a third-party provider is involved, or an adviser has left the firm.

The updated Regulatory Guide should incentivise firms to *prevent* these logistical problems at the outset, rather than let firms of the hook once the harm has occurred. Advisers and other staff will always leave firms. Licensees should also have appropriate arrangements in place with any third-party providers to ensure access to outsourced records. Indeed, the *Corporations Act 2001* (Cth) and ASIC guidance is clear that licensees remain liable for outsourced functions.[1]

Future logistical barriers can be limited or prevented if firms set up, at the outset, systems to ensure relevant information and records are stored and accessible. It is also a general obligation for licensees to have adequate financial, technological and human resources to provide the financial services covered by the licence and to carry out supervisory arrangements.[2] Firms should be monitoring these systems along the way, which could help reveal any problems in a timely way and prevent harm to further consumers.

Using beneficial assumptions

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

We support the proposal that licensees should only use assumptions in a remediation if the assumptions are beneficial to the consumer. The examples in CP335 appear to be genuinely beneficial. The regulatory guidance should give examples of assumptions that would and would not be considered beneficial.

However, we do hold concerns that an increasing reliance on assumptions could have negative consequences.

The focus of remediation shouldn't be making it cheap for firms to clean up their mess – it should be on providing full consumer redress and learning from the breach to prevent any repetition in future. CP335 notes at para 46 that

[1] *Corporations Act 2001* (Cth) s769B; ASIC, *Regulatory Guide 104: AFS licensing: Meeting the general obligations*, RG104.33-36.
[2] *Corporations Act 2001* (Cth) s912A(1)(d); ASIC, *Regulatory Guide 104: AFS licensing: Meeting the general obligations*, RG104.85-88.

beneficial assumptions can produce good consumer outcomes and save licensees a considerable amount of time and resources. Remediation programs are already a very efficient form of consumer redress, particularly by comparison to the time and cost that would be involved if every affected consumer brought individual litigation, or even participated in a class action.

An overreliance on assumptions could enable licensees to avoid dealing with the impact on people from breaches of law. Firms must understand the human consequences of their misconduct, which can include stress, health complications, relationship breakdown, insolvency and, in the worse cases, self-harm. An overreliance on beneficial assumptions may fail to encourage a culture of corporate responsibility, engagement with individual customers and learning from mistakes and misconduct to prevent any repetition.

In our casework, we have seen examples of shortcuts or poor scheme design that contributed to unfair outcomes or inadequate consumer redress. Below are some concerns from welcome and important remediation programs that have not been able to provide fair or complete redress due to the use of proxies, strict eligibility criteria, or failures to fully understand the flow-on impacts of the misconduct:

- Motor Finance Wizard:[3] contracts where consumers managed to make repayments for the initial 12 months were excluded from remediation, even though repayments under some of these contracts may have caused substantial hardship.
- BMW Finance:[4] in one case, a consumer was bankrupted as a result of the unaffordable loan, so remediation failed to put them back in the position they would have been, but for the misconduct.
- Radio Rentals:[5] Although the firm admitted contraventions of the responsible lending laws in respect of 278,683 consumer lease contracts entered into between 1 January 2012 and 1 May 2015, only customers who defaulted on making a payment in the first 12 months or defaulted on 3 or more occasions during a term of a contract were eligible for redress. Defaulting on payments is not an effective proxy for financial hardship. Many Radio Rentals customers pay using Centrepay (a service to pay bills from Centrelink payments), so Radio Rentals payments were given priority over essential expenses. This means that the full impact of the wrongdoing – such as the inability to put food on the table and defaulting on other obligations or bills – was not fully captured by default rates. One client told us that, after deductions from Centrepay, she sometimes couldn't afford enough food for herself and just had to feed her kids.
- Cash Converters:[6] redress in respect of systemic contraventions of responsible lending laws was limited to those that had taken out loans in-store, rather than online.[7]
- Nimble:[8] redress for systemic contraventions of responsible lending laws was limited to customers showing evidence of hardship after a loan was issued based on hardship indicators such as entering a debt agreement under Part IX of the *Bankruptcy Act 1966*. Many people in financial hardship do not enter Part IX agreements, which have strict eligibility criteria under the Act and are a wholly unsuitable debt option for most consumers.

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[3] ASIC, *Enforceable Undertaking – Affordable Car Loan Pty Ltd & ors*, May 2017, available at: http://download.asic.gov.au/media/4266959/029490310.pdf.

[4] ASIC, *16-417MR ASIC action sees BMW Finance pay $77m in Australia's largest consumer credit remediation* program, 6 December 2016, available at: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-417mr-asic-action-sees-bmw-finance-pay-77-million-in-australias-largest-consumer-credit-remediation-program/.

[5] ASIC, *18-017MR ASIC acts against Thorn's Radio Rentals and secures multi million customer refunds for poor appliance rental outcomes*, 23 January 2018, https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-017mr-asic-acts-against-thorns-radio-rentals-and-secures-multi-million-customer-refunds-for-poor-appliance-rental-outcomes/.

[6] ASIC, *16-380MR Cash Converters to pay over $12m following ASIC probe* (9 November 2016), available at: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-380mr-cash-converters-to-pay-over-12m-following-asic-probe/.

[7] ABC, *Cash Converters loans: Corporate watchdog ASIC's investigation into payday lender 'half-baked'* (28 February 2018): http://www.abc.net.au/news/2017-02-28/asic-investigation-into-cash-converters-inadequate/8309870.

[8] ASIC, *16-089MR Payday lender Nimble to refund $1.5 million following ASIC probe* (23 March 2016), available at: https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-089mr-payday-lender-nimble-to-refund-15-million-following-asic-probe/.

- Add-on insurance remediation schemes: The refunds agreed to by insurers cover only certain classes of consumers who were patently mis-sold add-on insurance, and some may only be eligible for partial refunds. Claims of unconscionable conduct or misleading and deceptive conduct, which are often raised successfully using DemandARefund.com, were generally not covered by the schemes.

These examples demonstrate a range of problems in the design and implementation of remediation programs. We recognise that some of the defects in the design of these schemes relate to the limited power ASIC has to define remediation programs under existing settings. We strongly support ASIC being provided a 'directions power' in line with recommendations 46 to 50 of the ASIC Enforcement Review Taskforce. The review recommended that ASIC have a directions power that would enable it to direct the establishment of a suitable programme to remediate clients, including assessing claims for restitution or compensation to customers'.[9] The Federal Government committed to enacting a directions power in its response to the Financial Services Royal Commission.[10] We urge ASIC to raise this with the Federal Government—we will continue to see poor remediation outcomes without adequate power for ASIC.

Despite this, these examples also demonstrate that a beneficial assumption that may 'benefit' the consumer (by comparison to not using it) may still fall far short of providing complete and fair redress to that consumer. Moreover, it is not beneficial to consumer to limit the scope or eligibility for remediation schemes on the basis of 'this is all that can be negotiated with the financial firm'.

The RG should require that, in designing and testing any beneficial assumption, the licensee must have a sufficient understanding of how the breach has impacted on individual consumers in order to understand the position to which they should be returned.

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?

No.

We have seen some incredibly unfair and harmful outcomes from both remediation schemes (and AFCA) that result from discounting compensation for the purported 'benefit' of use of the product, especially in the context of irresponsible lending in breach of the *National Consumer Credit Protection Act 2009*. Remediations should disregard the consumer's apparent 'benefit of use' (or lack thereof) for a home or car purchased with irresponsibly lent finance. Instead, the remediations program should look at what is fair in circumstances considering the resulting financial and non-financial loss.

Allowing a discount is another way of requiring the entire principal of a loan to be repaid, without explicitly stating this. It can also have the effect of requiring the consumer to repay an amount equivalent to a large proportion of interest and does nothing to deter unlawful behaviour by lenders. This is because it results in little or no loss to the lender, the wrongdoer of the irresponsible lending. In fact, some calculations of 'benefit of use' will almost always result in the entire principal of an irresponsible car loan (or principal less junk add-on insurance and fees) needing to be repaid, unless there is significant specific compensation for non-financial loss. In the case of an irresponsible home loan, it can even result in a windfall gain for the lender.

We note evidence before the Financial Services Royal Commission that demonstrated that requiring a consumer to repay the principal of an irresponsible loan does not accord with community expectations or principles of fairness.[11] Commissioner Hayne wrote in the Financial Services Interim Report that a 'full repayment of the capital

[9] Australian Government, *ASIC Enforcement Review Taskforce Report*, December 2017, p 101, available at: https://treasury.gov.au/review/asic-enforcement-review/r2018-282438.
[10] Ibid 37.
[11] Financial Services Royal Commission, Interim Report (September 2018) Vol 2 p 51.

amount of the debt' would be 'inadequate redress' for a failure to comply with Australia's responsible lending obligations.[12]

Furthermore, it is not uncommon for a consumer to be the victim of an irresponsible car loan, which is used to purchase a lemon car that never properly works. We have assisted clients who purchased cars on irresponsible finance that needed to be constantly serviced, or cars that are now in parts because they never worked, or cars that drive only part of the time. Sometimes these even result in additional storage fees for the consumer. Assuming some sort of 'benefit' attaches to the consumer is then clearly without basis and has the effect of further punishing a consumer for the unlawful conduct of a lender.

Alternatively, and at a bare minimum, any discount for use must only apply where there is a real and tangible benefit to the consumer, and that the resulting calculation is fair.

Calculating foregone returns

No comment on Proposal E1, other than to note:

- reducing interest on compensation payments may reduce the current incentive for timely remediation;
- consumers may face penalty interest rates when unscrupulous firms – and the debt collectors and buyers they on sell debts to – pursue unrepresented people through the Magistrates' Court and obtain default judgment. For more about the experience of people with default judgments, please see our 2013 report, *Like Juggling 27 Chainsaws*.[13]

Applying best endeavours in finding and automatically paying consumers

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

Yes, we strongly support the proposal that ASIC 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.

Where possible, consideration should be given to making compensation 'automatic'. That is, where the firm can identify the amount of redress and has the customer's contact details, then the customer should immediately receive the funds rather than be required to step through hoops.

Indeed, best endeavours alone are not enough.

In the class actions context, there is a strong motive to identify as many class members as possible to ensure the viability of the class action – and even that can prove challenging when attempting to find people in vulnerable circumstances. In the case of remediation schemes, the same motive will likely not apply to the firm that has engaged in wrongdoing. Spending time and money to find remote or disadvantaged consumers will add to the costs of the scheme and the amount of compensation.

The difficulties in finding people with closed or inactive accounts is exacerbated by any reluctance and delay in establishing remediation programs, and failures at the point of sale. Firms may be slow to take action because the breach is lucrative for the firm and admitting the problem may bring bad press.

The add-on insurance remediation programs are an example. Problems with junk insurance were known for years and arguably decades. In the case of Commonwealth Bank (**CBA**), as late as May 2015, the problems were directly

[12] Financial Services Royal Commission, Interim Report (September 2018) Vol 2 p 51 in reference to Robert Regan's story.
[13] Like Juggling 27 Chainsaws Understanding the experience of default judgment debtors in Victoria A Report prepared for Consumer Action Law Centre by Dr Eve Bodsworth, Brotherhood of St Laurence, June 2013, available at: https://consumeraction.org.au/wp-content/uploads/2013/07/Like-Juggling-27-Chainsaws-June-2013-eVersion.pdf.

raised with the CEO in a (failed) attempt to stop sales of add-on consumer credit insurance (**CCI**)[14] and yet the remediation program was not announced until August 2017.[15]

Even once the CBA's CCI remediation program was initiated, there were problems with the rollout. In our view, CBA was too slow to identify the initial 64,000 unemployed customers who were mis-sold CCI and remediate them. Further, CBA's response, once it identified these customers, was inadequate because:

- CBA made an informal 'good governance notification' to ASIC in relation to only 27,800 customers, rather than a significant breach notification in relation to the full number of customers;[16]
- In 2015, CBA initially only intended to compensate unemployed customers who had active Credit Card Plus insurance policies. It failed to take any steps to address consumer detriment in relation to the sale of a similar Loan Protection Insurance product until ASIC made it aware of a consumer complaint in 2016. CBA did not take action in relation to lapsed CCI policies; and
- Other than students, unemployed customers were required to proactively respond to CBA in order to receive compensation. Vulnerable and disadvantaged customers are less likely to actively contact CBA and secure the refunds to which they are entitled. The people most likely to miss out on remediation include culturally and linguistically diverse people, people with low literacy and people who are not easily contactable (for example, due to housing insecurity or not owning a telephone).

It is unclear how CBA identified unemployed customers, given that they did not record this information at the point of sale (this also relates to our concerns at C1Q1 above). There also appears to be a gap in CBA's remediation program in respect of customers who were ineligible to claim for other reasons, for example, due to that fact that their work was casual or they were self-employed.[17]

Concerningly, we have also assisted a consumer who was not offered any remediation under a program on mis-sold life insurance and heavy-handed retention tactics (until after they sought assistance from our Centre) despite:

- still paying premiums on the life insurance policy; and
- repeated attempts to cancel the policy.

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

Yes, this should be disclosed in the interests of transparency.

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

As discussed above, the longer the firm waits, the harder it can be to find consumers. There is also a risk of ongoing harm in the interim, particularly where people are struggling with the consequential financial hardship.

We recommend that firms be careful of sending links that need to be clicked on via text messages and emails. We have assisted consumers who were contacted as part of the FOS Unpaid Determinations scheme, where the consumer assumed the link in a message from the Government department administering the scheme was a scam.

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[14] Australian Financial Review, *Banking royal commission: How CBA's Matt Comyn failed to stop junk insurance*, 21 November 2018, available at: https://www.afr.com/companies/financial-services/banking-royal-commission-how-cbas-matt-comyn-failed-to-stop-junk-insurance-20181120-h1840r.

[15] ASIC, Media Release, *17-268MR Commonwealth Bank to refund over $10 million for mis-sold consumer credit insurance*, 4 August 2017: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-268mr-commonwealth-bank-to-refund-over-10-million-for-mis-sold-consumer-credit-insurance/.

[16] See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission), Consumer Lending Hearings, Transcript of Proceedings (Day 6, 19 March 2018), 516–8, available at: https://financialservices.royalcommission.gov.au/publichearings/Documents/transcripts-2018/transcript-19-march-2018.pdf.

[17] See Witness Statement of Clive Richard Van Horen (CCP & LPP) to the Banking Royal Commission, Exhibit #1.95, CBA.9006.0001.0001, p 4–6, 14–16.

This is understandable, especially when these people had been trying for years without success to have the compensation owed to them paid, so trust in the system was low.

We also hear from consumers who have attempted to respond to remediation schemes and got nowhere, or have the firm prioritise finding the consumer for the purpose of car repossession but seemingly fail to find them for the purpose of compensation, as Jai's story demonstrates.

Case Study – Jai's Story

Jai (name changed) is in her twenties. She has a young child and receives a Centrelink payment.

Jai purchased a second-hand car with a loan from a Credit Provider when she was approximately twenty years old, in 2014, for more than $10,000. She had been working, earning approximately $400 per week and had been paying board while living with a friend. She began to struggle to pay the loan only months after entering it.

She received a letter about the Credit Provider's remediation scheme which said she might be owed money. She attempted to respond to their requests for information by phone, mail and email. She also received a number of bounce backs when she attempted to make loan payments, so she thought the loan was finished and the final amount was not required to be paid.

The Credit Provider discontinued Jai's participation in the remediation scheme because they didn't receive her responses to requests for information.

Approximately two years later, a debt collector came to Jai's house and said her car would be repossessed if she did not make payments.

Jai lodged a complaint in AFCA in early 2019 and later contacted Consumer Action. She spoke of her distress from the debt. With the support of Consumer Action Law Centre, Jai reached a settlement with the Credit Provider.

We also note the concerns about accessibility of consumer, credit and debt information and services for Victorian Aboriginal people raised in our 2020 joint report with the Victorian Aboriginal Legal Service (VALS).

The report, '*Consumer Issues in Victorian Aboriginal Communities*,' presents findings from the Integrated Practice project by VALS and Consumer Action – an important partnership that seeks to address unmet consumer credit and debt legal need in Victorian Aboriginal communities. Over 12 months, we held community engagement sessions across the state, spoke to more than 500 community members, and took on more than 80 cases. The report found:

> A common theme identified by those within the [Integrated Practice] Project team was inadequate access to legal and other mainstream services. Further, there appears to be a lack of action to ensure that Victorian Aboriginal communities are aware of their rights in relation to consumer, credit and debt issues and services.
>
> This is consistent with the research presented in the 2013 Indigenous Legal Needs Report and also our own Community Engagement Survey Data from the Portland community engagement session. In the survey, a large majority of people said that they had not sought legal or financial counselling advice for the issues

they reported in the survey. 50% of survey participants went on to indicate that they did not know that they could seek advice for these types of issues.[18]

The Report also comments on the interrelationship between consumer, credit and debt issues and other social determinants.[19] Victorian Aboriginal people usually face more than one consumer debt and credit issue, and at no fault of their own. This can be caused by a range of social determinants which may result in people being placed into a position of disadvantage.

Removing the low-value compensation threshold

Subject to our comments on Proposal G1 below, we are not opposed to Proposal F2 that ASIC remove the low-value compensation threshold in current RG 256 and instead provide guidance that:

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

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

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

However, we agree with ASIC that:

- the starting point should be to return all money to consumers; and
- consumers with an active account should be remediated, regardless of value.

Remediation money that cannot be returned despite best endeavours

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

No. Proposal G1 proposes to clarify guidance on circumstances where a licensee cannot, despite best endeavours, find consumers to pay them compensation, including when cheques remain uncashed.

In respect of Proposal G1, we only support sub-section (a) that 'the licensee must not profit from the failure.' This is an important principle underlying remediation and redress. It is important both through the lens of justice and of deterrence. If firms could keep windfall gains from misconduct and other breaches, there would be less incentive to prevent misconduct in the first place, and to find and remediate all affected customers.

However, we are strongly opposed to Proposal G1(b) and (c) that:

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

(b) 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.

We consider that where there are residual remediation funds, these funds have the most impact and benefit for consumers if distributed through community benefit payments that support the provision of consumer, credit and debt help services. We are concerned that ASIC's proposal would ultimately be a win for industry, which would benefit from consumers' reduced access to services and reduced consumer advocacy.

[18] *Consumer Issues in Victorian Aboriginal Communities: Integrated Practice Final Report 2020*, February 2020, page 26, available at: https://consumeraction.org.au/consumer-issues-in-victorian-aboriginal-communities-integrated-practice-project-report-2020/ (internal citations omitted).
[19] Ibid at page

Before setting out reasons for our opposition, it is important to disclose that Consumer Action Law Centre has been the recipient of residual remediation payments (previously known as community benefit payments), including directly from BMW Finance remediation and indirectly (via Financial Counselling Australia and the Financial Counselling Foundation) from the Cash Converters remediation.

This is an obvious conflict in responding to Proposal G1. However, being a recipient of funds also gives us insight to the beneficial impact these payments can have in providing critical services to the class of people affected by misconduct, and changing industry practice and laws to benefit consumers as a whole.

For example, the community benefit payment from the BMW Finance remediation enabled our Centre to establish an integrated financial counselling and legal practice. Many of our legal practice clients work with a community-based financial counsellor, however there can be challenges making referrals due to wait lists. This project enabled us to provide dedicated and integrated financial counselling to existing legal representation clients. One of the people we assisted through the integrated practice with responsible lending and mis-sold consumer credit insurance claims ultimately gave evidence to Financial Services Royal Commission about their experience.

We are opposed to sending residual funds to unclaimed money registers (instead of programs to benefit the cohort of affected consumers) for the following reasons:

- In the likely event that money is not subsequently claimed, it will be transferred to various state and federal consolidated revenue funds. For ASIC's unclaimed money regime, the money will be transferred to Commonwealth Consolidated Revenue Fund. This is a worse outcome for consumers as a whole, as the money will not be required to be used to benefit the cohort of people affected by the firm's misconduct.
- While at first glance it may seem that Proposal G1 will help people eventually find their owed compensation, the reality is that most affected consumers will not search unclaimed monies registers.
    - Many people do not know they are entitled to – or have a realistic prospect of – compensation.
    - Many legal needs analyses have revealed that people do not see consumer credit and debt issues as legal problems, so don't seek legal advice on the issue. In some cases, it is only when a consumer advocate asks questions about a person's financial difficulty that we uncover the underlying irresponsible car or home loan, or breaches of consumer protections for payday loans and consumer leases that is the subject of current (or future) remediation.
    - We reiterate the findings from the 2020 report on *Consumer Issues in Victorian Aboriginal Communities*,[20] excerpted at page 8 above.
    - Even where people are aware of their rights, they may have such low trust in the financial firm (due to the misconduct and early failures in IDR) and in systems of redress (given the delay in compensation often associated with remediation) that they eventually give up on looking for avenues for compensation.
- In the unlikely event that a consumer is found using unclaimed monies registers, it may be in the form of unsolicited contact from for-profit companies that troll these registries and then offer to 'help' make a claim but take a massive cut of the proceeds. In this case, if the consumer is contactable by the claims company, they should also be contactable by the financial firm in the first place (as the contact details would be the same) and should be found using best endeavours in the first place, and without a middle company taking a share of their compensation.

[20] Consumer Action and Victorian Aboriginal Legal Service, *Consumer Issues in Victorian Aboriginal Communities: Integrated Practice Final Report 2020*, February 2020, page 26, available at: https://consumeraction.org.au/consumer-issues-in-victorian-aboriginal-communities-integrated-practice-project-report-2020/

- Firms may take this is as the easy and cheap option to remediation, rather than making an effort to find and remediate all affected consumers. ASIC's concerns at para 101 of CP335 that some firms make a charitable donation without first making a reasonable attempt to return money will equally apply to a system in which funds can be sent to unclaimed monies registers.
- Retaining community benefit payments need not prevent individual consumers from getting their own payment down the track. Regardless of whether the residual funds ultimately end up in consolidated revenue or the current system of community benefit payments is retained, any consumer who later discovers they were entitled to compensation should have that compensation paid by the firm. The potential in rare cases for 'double payment' should incentivise firms to not to engage is misconduct in the first place, to keep relevant records, and put resources into finding consumers. It is also offset by the huge efficiencies from which firms benefit when compensating through remediation programs rather that defending individual (or class) legal actions from every affected consumer.
- Some of the people hardest to reach may be those experiencing very difficult circumstances – fleeing family violence, or without access to stable accommodation or continuous phone service due to poverty. It appears likely that it is people in these circumstances whose remediation funds will ultimately end up in consolidated revenue, and not in the provision of much needed services that can offer assistance and support – including to retrospectively claim any owed remediation payments.

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?

As above.

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?

Yes, this should be disclosed in the interests of transparency.

We also suggest that residual remediation payments be distributed via an appropriate and independent organisation with relevant expertise – such as ECSTRA, the Consumer Advocacy Trust or the Financial Counselling Foundation – rather than ASIC. This would ensure greater independence and avoid any perceived or actual conflicts of interest with those receiving the funds.

There should remain a nexus between the cohort of people affected and the program receiving the funds, and only registered charities and not-for-profits should be eligible to receive funds. ASIC should retain ultimate oversight.

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

We assisted at least one affected consumer who approached us after the remediation program had closed (see Jai's story above), however this is not very common in our experience – likely for many of the reasons described above. We have also identified and assisted people who were eligible under an open remediation program but were unaware of it when they contacted us for help initially for another purpose, such as financial hardship.

Settlement deeds and fair consumer outcomes

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

We are strongly opposed to the use of settlement deeds in remediation schemes. The updated Regulatory Guidance should explicitly ban the use of settlement deeds.

Consumers should not be stopped from pursuing the balance of their claim through AFCA and other forums Typically, settlement deeds operate to limit a person's claim, and prevent them seeking the balance of their claim through IDR, EDR or courts. This is particularly concerning, given that many remediation schemes failure to provide complete redress to consumers – see our comments in response to D1Q1.

We are particularly concerned about people signing settlement deeds, which are confusing and complex, without access to legal advice. We have spoken with people who did not understood the settlement deed, understandably, and are now likely unable to access AFCA for a fairer resolution of their matter. Firms are unlikely to inform consumers that they may get a better outcome through AFCA.

Given the limited and underfunded nature of free legal services in Australia with expertise in credit and financial services, many consumers will not be in a position to obtain advice on a settlement deed. If, contrary to our views, settlement deeds are permitted, the remediation scheme should fund access to legal advice on the settlement offer.

Settlement deeds can also gag people from talking about their experience, with onerous non-disparagement and confidentiality requirements. This is unfair on the person, who cannot share their experience, and on broader reform and the resolution of systemic issues, as it can prevent an exploration of the underlying and systemic issues, both with the firm's initial conduct and the operation of the remediation scheme.

Other matters

Guidance on customer-centred remediation

We recommend that ASIC develop and publish behavioural science-informed best practice guidance on how to run a consumer-centric remediation program.

AFCA-operated remediation

We have concerns about large consulting firms being the main provider of remediation services. In our experience, these firms can be ill-equipped and unskilled in dealing with people in vulnerable circumstances.

We recommend consideration be given to empowering the Australian Financial Complaints Authority to run remediation schemes. There would be many advantages, including that:

- AFCA is already equipped to deal with directly with consumers about their experience of (the failings of) financial firms, unlike major accounting and consulting firms, which usually provide services at business and government, not individual members of the public
- AFCA has process and systems to identify and respond when a person is experiencing vulnerability
- AFCA has the knowledge of consumer credit and financial services law, and so can identify claims and the relevant compensation owing
- AFCA hears disputes arising from the same conduct that gave rise to the remediation where a consumer chooses to take their complaint to AFCA instead of the remediation program – usually where the remediation program is not providing full redress to the consumer due to narrow eligibility criteria or low compensation.

Enforcement action for repeating the same misconduct

Taking responsibility for the consequences of a firm's actions is a part of holding a financial service or credit licence. Frustratingly, we see firms failing to live up to the spirit of remediation by continuing the same harmful conduct that is the subject of remediation in the lead up to, during and even after a remediation program has finalised. In one very distressing case involving an irresponsible car loan that caused significant mental ill-health, the firm repossessed the person's car in the same week as ASIC's media release on the enforceable undertaking for the

very same conduct. In another example, a firm contested liability in an AFCA complaint on the same conduct that was subject to a current remediation program, increasing stress for the consumer and wasting resources of our Centre and AFCA. Where this occurs, ASIC should take enforcement action against the firm and seek civil penalties.

Principles for consumer redress

We have concerns about the design of certain remediation schemes. For our views on principles that should underpin consumer redress, please see our submission to the Australian Law Reform Commission's Inquiry on Class Actions and Third-Party Litigation Funders.[21]

Central list of remediation programs

We recommend ASIC or MoneySmart create a central page linking information to all current and closed financial system remediations, whether established pursuant to an enforceable undertaking or otherwise. This would assist the public and caseworkers to quickly identify remediation programs that may apply.

A directions power for ASIC

As noted above, the Federal Government has failed to progress a general directions power for ASIC. This was recommended by the ASIC Enforcement Review and by Commissioner Hayne in the Final Report of the Financial Services Royal Commission, which recommendation was accepted by Government over two years ago. Although it is a matter for Government, we strongly support this reform, which would finally give ASIC the tools to require recalcitrant firms to establish remediation programs.

Contact details

Please contact Senior Policy Officer on or at if you have any questions about this submission.

Yours Sincerely,
CONSUMER ACTION LAW CENTRE

| CEO

[21] **Available at:** https://consumeraction.org.au/wp-content/uploads/2018/08/180817-CALC-Submission-to-ALRC-Class-Actions-and-Third-Party-Litigation-Funders.pdf.