



**ASIC**  
Australian Securities &  
Investments Commission

## REGULATORY GUIDE 277

# Consumer remediation

September 2022

### **About this guide**

This guide sets out our guidance on consumer remediation conducted by:

- Australian financial services (AFS) licensees; and
- Australian credit licensees (credit licensees).

This guide comes into effect on the date of publication (i.e. 27 September 2022). For remediations initiated before the date of publication, [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256) applies.

This guide may be read in conjunction with [Making it right: How to run a consumer-centred remediation](#).

### About ASIC regulatory documents

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

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

**Regulatory guides:** give guidance to regulated entities by:

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

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

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

### Document history

This guide was issued in September 2022 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Regulatory Guide 256 *Client review and remediation conducted by advice licensees*, issued September 2016

### Disclaimer

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

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

For the Australian financial system to operate effectively, and for consumers to engage with trust and confidence, licensees that engage in misconduct or other failures when providing financial services or credit activities, and cause consumer loss as a result, must initiate a remediation.

Licensees must have adequate systems and processes in place to ensure that misconduct or other failures are identified when they occur, and to protect and compensate consumers for the loss suffered as a result.

This guide sets out our guidance for remediations conducted by all licensees within the Australian financial system.

Note: For the meaning of 'licensee' in this guide, see RG 277.5–RG 277.6.

### The need for proactive, effective remediation

RG 277.1 For our financial system to operate effectively, and for consumers to engage with trust and confidence, misconduct or other failures that cause consumer loss must be proactively remediated by the licensee. Proactive remediation is critical because very often a consumer of financial products or services will not be aware (nor have any reasonable way to be aware) that they have suffered loss as a result of a licensee's misconduct or other failure.

Note: For a description of 'misconduct or other failure', see Section B.

RG 277.2 Remediation means a process *large or small* to:

- (a) investigate the scope of the misconduct or other failure; and
- (b) if appropriate, return consumers who have suffered loss as a result of the misconduct or other failure to the position they would have otherwise been in, as closely as possible. This could be by way of monetary or non-monetary remedies, or a combination of both.

RG 277.3 Licensees must have adequate systems and processes in place to ensure that misconduct or other failures are identified when they occur, and to protect and compensate consumers for the loss suffered as a result. Whether a licensee promptly initiates and effectively conducts a remediation on discovery of the misconduct or other failure is an important aspect of a good corporate culture. It is also a key indicator of whether the licensee is meeting its licensing obligations.

RG 277.4 The remediation framework described in this guide is underpinned by the general obligation on Australian financial services (AFS) licensees and

Australian credit licensees (credit licensees) to do all things necessary to ensure that the financial services or credit activities covered by the licence are provided efficiently, honestly and fairly: see s912A(1)(a) of the *Corporations Act 2001* (Corporations Act) and s47(1)(a) of the *National Consumer Credit Protection Act 2009* (National Credit Act). Complying with this ongoing obligation includes licensees taking responsibility for the consequences of their misconduct or other failures, and remediating consumers who have suffered loss as a result. AFS licensees and credit licensees must also have compensation arrangements in place: see s912B of the Corporations Act and s48 of the National Credit Act.

## Who this guide applies to and when it applies

### Who this guide is for

- RG 277.5 This guide applies to:
- (a) AFS licensees, including limited AFS licence holders; and
  - (b) credit licensees.
- RG 277.6 For the avoidance of doubt, this guide also applies to the following entities:
- (a) *superannuation trustees*—from 1 July 2021, all superannuation trustees (other than self-managed superannuation funds) must hold an AFS licence with authorisations to deal in superannuation interests and to provide a superannuation trustee service;
  - (b) *retirement savings account (RSA) providers*—this guide applies to the extent the RSA provider provides a financial service within the meaning of s766A of the Corporations Act, including if the RSA provider deals in an RSA (see 764(1)(h) of the Corporations Act), unless an exemption applies;
  - (c) *providers of debt management services*—from 1 July 2021, subject to transitional arrangements, providers of debt management services must hold a credit licence with an authorisation that covers debt management services; and
  - (d) *providers of claims handling and settling services*—from 1 January 2022, those entities that carry on a business in Australia of providing claims handling and settling services and belong to certain prescribed categories must hold an AFS licence with authorisations to provide such services, or be authorised by a person who holds a claims handling authorisation, unless an exemption applies.
- RG 277.7 This guide can also be used as good practice guidance by entities that provide financial products or services (or engage in credit activities) to retail consumers under the financial services or credit legislation, but who are not

licensed under the Corporations Act, the National Credit Act or the *Superannuation Industry (Supervision) Act 1993* (SIS Act). This includes entities that are required to have a dispute resolution system consisting of an internal dispute resolution (IDR) procedure and membership of the Australian Financial Complaints Authority scheme (AFCA).

### When this guide applies

RG 277.8 This guide applies to all licensees conducting remediations initiated on or after the date of issue of this guide (i.e. 27 September 2022). For remediations that were initiated before 27 September 2022, [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256) continues to apply.

Note: In this guide, a remediation is ‘initiated’ when a licensee makes the decision to address misconduct or other failure and starts a remediation process. If misconduct or other failures have been identified but the remediation has not started (e.g. the remediation is sitting in a backlog, queue or similar) then the remediation has not been ‘initiated’.

RG 277.9 A licensee may choose to apply new concepts or methodologies included in this guide to remediations that pre-date the issue of this guide. However, it is important that licensees do not pick and choose elements to preference their interests over ensuring fair and timely outcomes for consumers.

## Purpose of this guide

RG 277.10 To help licensees proactively and effectively conduct remediations, this guide:

- (a) aims to provide a streamlined and clear consumer-centred remediation framework for licensees to apply; and
- (b) sets out nine key principles for conducting a remediation efficiently, honestly and fairly, in line with the general licensing obligations.

RG 277.11 This guide primarily concerns remediations of retail consumers. However, in some situations, it may be appropriate to include other types of consumers (e.g. wholesale clients) within the scope of the remediation. Licensees should make this assessment on a case-by-case basis.

RG 277.12 Applying this guidance will ultimately improve outcomes for consumers who are owed money, and will also benefit licensees by:

- (a) promoting trust;
- (b) reducing the costs of external dispute resolution, or individual or class actions; and
- (c) not having to ‘re-do’ remediations in the future.

## Scalability of the remediation process

- RG 277.13 This guide is not intended to apply in its entirety to all remediations. If the misconduct or other failure only affects one or a small number of consumers and the cause is isolated in nature, the process a licensee follows will likely use existing resources, be simple and prompt, and not require a full ‘program’ to be initiated.
- RG 277.14 While it is still necessary to return those consumers to the position they would have otherwise been in, parts of this guide are likely to not apply or will not be relevant (e.g. using assumptions and finding lost consumers).

Note: For more information on scalability, see RG 277.36–RG 277.39.

## Interaction with other remediation guidance and laws

- RG 277.15 This guide is designed to apply to all licensees. While the guidance is occasionally tailored for specific licensees or sectors within the financial system, it will not always take into account specific legislative requirements, business structures, contractual arrangements, constitutions or trust deeds unique to particular licensees or types of misconduct or other failures.
- RG 277.16 To the extent that other laws or legal duties conflict with this guide, the former will prevail. For further information about other legislative requirements and consumer remediation, see the appendix to this guide.
- RG 277.17 We have issued other specific guidance that is relevant to remediating consumers, including:
- (a) [Regulatory Guide 94](#) *Unit pricing: Guide to good practice* (RG 94);
  - (b) [Information Sheet 232](#) *Fees for no service: Remediation* (INFO 232); and
  - (c) [Information Sheet 259](#) *Complying with the notify, investigate and remediate obligations* (INFO 259).
- RG 277.18 These documents provide more detail about how to conduct a remediation in particular circumstances and should be read in conjunction with this guide, where relevant. Further guidance may be issued in the future, and any such guidance should also be read with this guide.

Note: When there are conflicts between [RG 94](#) and this guidance, RG 94 will prevail.

## Overview of the framework for conducting a remediation

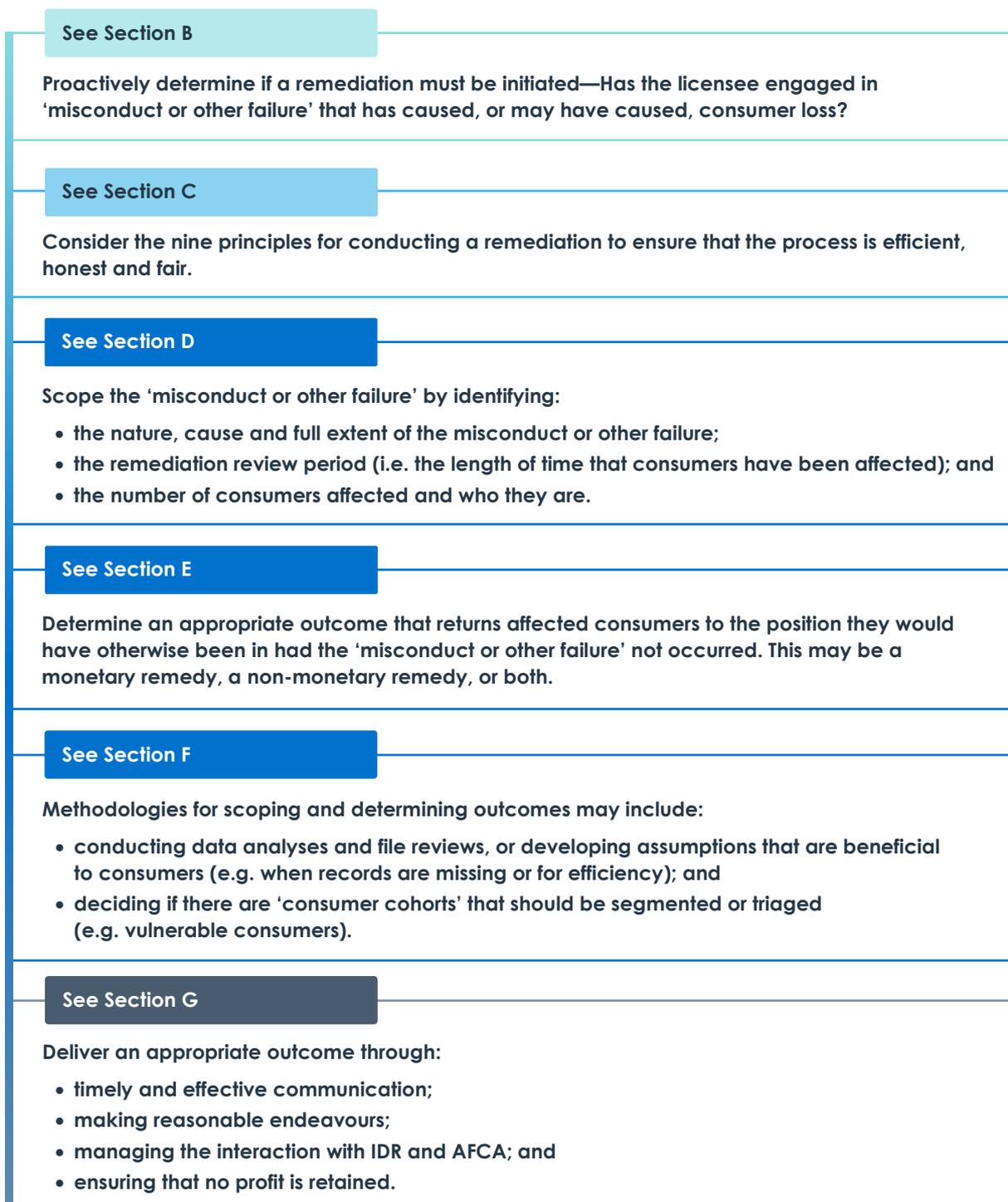
- RG 277.19 In this guide, we have described the framework for conducting a remediation. While every remediation will be different, a remediation will generally involve:
- (a) proactively initiating a remediation (see Section B);

- (b) conducting the remediation, which includes:
  - (i) adopting a process that is efficient, honest and fair, taking into account the nine key principles for conducting a remediation (see Section C);
  - (ii) scoping the misconduct or other failure, including identifying when it first began and who has been affected (see Section D);
  - (iii) determining appropriate outcomes, which may include monetary and/or non-monetary remedies (see Section E);
  - (iv) deciding the methodology for determining the scope and appropriate outcomes, such as data analyses, file reviews and/or the use of assumptions (see Section F);
  - (v) delivering outcomes with timely and effective communication, making reasonable endeavours, managing the interactions between remediation, IDR and AFCA, and when closing the remediation ensuring no profit is retained (see Section G);
- (c) ensuring that:
  - (i) remediations are adequately resourced;
  - (ii) appropriate governance arrangements are in place;
  - (iii) proper records are kept; and
  - (iv) where appropriate, the licensee reports publicly on the remediation (see Section H); and
- (d) engaging with external organisations, such as AFCA, the Australian Taxation Office (ATO), the Australian Prudential Regulation Authority (APRA), and other external organisations (see Section I).

RG 277.20 Figure 1 provides a high-level overview of the remediation process. Some stages of the remediation will occur consecutively and others concurrently. Licensees may need to revisit the stages if new information arises, or if the remediation is not working as expected. In larger remediations, licensees may also consider triaging groups so that ‘easier’ cohorts, or those cohorts that may be experiencing financial difficulty, are addressed first. For smaller remediations and licensees, not all processes described in the remediation framework will be relevant.

RG 277.21 Licensees should also be aware of how the remediation interacts with other obligations: see the appendix to this guide. For example, some licensees must consider the specific requirements under the notify, investigate and remediate obligations described in [INFO 259](#). In doing so, the licensee must also consider this guide and the broader remediation framework when conducting the remediation.

Figure 1: Overview of the general process for conducting a remediation



Note 1: If the misconduct or other failure only affects one or a small number of consumers and the cause is isolated in nature, the process is likely to be simple and prompt, and not require a full remediation ‘program’ to be initiated.

Note 2: A remediation may interact with other obligations, such as IDR and breach reporting obligations.

Note 3: Licensees should learn from and adapt the remediation when new information becomes available or when something is not working as expected.

Note 4: For detailed guidance about the process in this figure, see Sections B–G (accessible version).

## B Proactively initiating remediations

### Key points

Licensees that engage in misconduct or other failures when providing financial services or credit activities and cause consumer loss must initiate a remediation: see RG 277.22–RG 277.29.

Licensees should have and maintain adequate systems and processes to identify misconduct or other failures when they arise: see RG 277.31–RG 277.35.

The processes a licensee should apply to any remediation will depend on the scale, age and complexity of the underlying misconduct or other failure: see RG 277.36–RG 277.39.

### When a remediation must be initiated

- RG 277.22 A remediation must be initiated if a licensee has engaged in misconduct or other failure when providing financial services or credit activities, and the misconduct or other failure has caused, or may have caused, consumer loss.
- RG 277.23 ‘Misconduct or other failure’ includes decisions, omissions or behaviours of a licensee, as well as those of:
- (a) a current or former representative of a licensee;
  - (b) a current or former third-party service or product provider of a licensee;
  - (c) a consultant engaged by a licensee; or
  - (d) other significant related entities of a licensee.
- RG 277.24 A licensee should initiate the remediation promptly when it becomes aware of the misconduct or other failure, rather than wait for a consumer to make a complaint or until proceedings are issued against the licensee.
- RG 277.25 The types of ‘misconduct or other failure’ causing consumer loss that a licensee must remediate include:
- (a) a breach of financial services laws or credit legislation;
  - (b) a contractual failing;
  - (c) conduct constituting negligence or fraud under common law; or
  - (d) a failure to meet or comply with other applicable regulatory requirements.

RG 277.26 For the avoidance of doubt, ‘misconduct or other failure’ also includes conduct causing loss that can be characterised as:

- (a) system failures that result in consumers being delivered products or services that are different from what was agreed or promised;
- (b) errors in pricing algorithms that result in the miscalculation of fees or interest rates, or failures to apply rebates, discounts or benefits; or
- (c) failures or errors due to inadequate internal processes, systems or external events that result in an outcome that differs from the promised outcome.

RG 277.27 Breaches of an industry code of conduct may also constitute a breach of financial services law, credit legislation or contract. Misrepresentations about compliance with codes may also result in a contravention of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and/or the prohibited conduct provisions of Pt 7.10 of the Corporations Act or Pt 2 of the National Credit Act. If such a breach or misrepresentation causes consumer loss, a remediation must be initiated.

RG 277.28 The types of ‘misconduct or other failure’ causing consumer loss are not limited to reportable situations as defined under s912DAA of the Corporations Act or s50B of the National Credit Act. This is because some misconduct or other failures may be excluded by operation of the *Corporations Regulations 2001* (Corporations Regulations), the *National Consumer Credit Protection Regulations 2010* (National Credit Regulations), or the significance test. It is expected that the licensee will address any consumer loss suffered as a result, regardless of whether it is reportable to ASIC or not.

Note: If the misconduct or other failure constitutes a reportable situation and has caused or will cause loss or damage, it may trigger obligations for certain licensees to notify, investigate and remediate: see RG 277.310–RG 277.314.

RG 277.29 The financial services regulatory framework in which licensees operate covers a wide range of consumer protections. These protections, including those under contract, are broad. Licensees should focus on ensuring good consumer outcomes, and not take an overly technical or legalistic approach when identifying misconduct or other failures in need of remediation.

Note: The primary pieces of Commonwealth legislation under the financial services regulatory framework include, among others, the ASIC Act, the Corporations Act, the National Credit Act (which also includes the National Credit Code), the SIS Act, the *Insurance Contracts Act 1984* (Insurance Contracts Act), the *Insurance Act 1973* (Insurance Act) and the *Life Insurance Act 1995* (Life Insurance Act).

RG 277.30 Example 1 and Example 2 set out circumstances for initiating remediations.

Note: The examples in this guide are purely for illustration. They are not exhaustive and are not intended to impose or imply particular rules or requirements.

**Example 1: Failure to initiate a remediation**

Every year, Vasey Insure Pty Ltd (Vasey) asked customers to inform them if any changes had been made to their insured asset. The information related to a factor that Vasey's premium guide had identified as a pricing factor.

Due to a systems error, Vasey failed to take into account the information that customers had provided relevant to their risk through a particular distribution channel. As a result, some customers were undercharged or overcharged premiums.

Following a review, Vasey decided not to initiate a remediation for potentially affected consumers because they considered the circumstances were not reportable to ASIC under the Corporations Act.

**Commentary**

The licensee should have initiated a remediation to investigate and compensate all those affected by the overcharged premiums. The remediation should not have been contingent on whether it was a reportable situation, but whether the misconduct or other failure resulted in consumer loss.

**Example 2: Proactive initiation of a remediation**

XYZ Loans Pty Ltd (XYZ) is a medium-sized credit repair business that provides debt management services to retail consumers. When conducting their annual compliance review, XYZ discovered a number of staff members had made misleading representations to clients. Staff represented that XYZ would be able to remove negative listings from the client's credit file when in fact the client had no defaults on loans or other credit infringements listed on their credit file. On other occasions, some staff took payment for their debt management services in circumstances where XYZ was unable to assist the consumer.

XYZ reported the likely breach to ASIC. It initiated a remediation to investigate the misconduct and sales practices of its employees, and to compensate clients who did not receive the service they expected (with reference to their stated purpose for engaging the services).

**Commentary**

It was appropriate for XYZ to initiate the remediation for all affected clients after discovering the misconduct. It would not be appropriate for XYZ to only remediate clients who complained, or to wait for ASIC or AFCA to raise the issue.

## Identifying misconduct or other failures

RG 277.31 Licensees should have and maintain adequate systems and processes to identify misconduct or other failures that have or may have led to consumer loss.

Note: A failure to have and maintain adequate systems and processes to deliver a product or service as promised, or to have a proper control environment or systems for identifying and reporting issues, may be a breach of s912A(1)(a) of the Corporations Act. This is broadly consistent with the observations of Justice Beach in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790.

RG 277.32 Misconduct or other failures may be identified through a number of different channels, including (but not limited to):

- (a) through a single complaint that suggests an issue might have caused detriment to other consumers who have not yet complained;

Note: If the misconduct or other failure only affects one consumer and that consumer has made an IDR complaint, then the IDR requirements and guidance under [Regulatory Guide 271 Internal dispute resolution](#) (RG 271) and [ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#) apply. If an investigation confirms that a systemic issue exists, licensees should initiate and conduct a remediation in line with this guidance.

- (b) by analysing trends in complaints made through IDR processes;
- (c) through a whistleblower complaint;
- (d) from a licensee's compliance checks or audits, including file reviews, or a licensee's breach reporting systems and processes;
- (e) by proactively monitoring and analysing data and trends that might show anomalies in services or product provision; or
- (f) following discussions, referrals or directions from ASIC or AFCA, other regulators such as APRA, or a code monitoring body.

Note: A licensee must not wait for AFCA, or regulators such as ASIC, to direct or request it to take action to address the consumer loss.

RG 277.33 Licensees subject to design and distribution obligations must also monitor consumer outcomes and review products to ensure that consumers are receiving products that are likely to be consistent with their likely objectives, financial situation and needs.

Note: See [Regulatory Guide 274 Product design and distribution obligations](#) (RG 274).

RG 277.34 It is important that licensees have the flexibility in their remediation practices to quickly identify and respond to new and emerging harms, as products develop and new technology is introduced.

RG 277.35 Timely identification of misconduct or other failures will improve the overall efficiency of the remediation process, as it will minimise the instances of absent records or lost customers that are typical when remediating historic misconduct.

## Scalability of the remediation process

- RG 277.36 The processes a licensee should apply to any remediation will depend on the scale, age and complexity of the underlying misconduct or other failure, and therefore what steps need to be taken to return consumers to the position they would have otherwise been in. If the misconduct or other failure only affects one or a small number of consumers and the cause is isolated in nature, the process is likely to be simple and prompt and not require a full remediation ‘program’ to be initiated.
- RG 277.37 For example, licensees can choose to use existing incident management, compliance or IDR processes and resources if the misconduct or other failure affects only a small number of consumers. While it is still necessary to return those consumers to the position they would have otherwise been in, parts of this guidance are likely to not apply or will not be relevant (e.g. using assumptions and finding lost customers).
- RG 277.38 It is up to licensees to decide their own thresholds for when a remediation becomes a ‘program’ and when it can be effectively dealt with through other processes. For example, in relation to advice licensees, the thresholds considered may include the number of clients affected, the number of advisers involved, and the nature of the misconduct or other failure.
- Note: If the misconduct or other failure only affects one consumer and that consumer has made an IDR complaint, then the IDR requirements and guidance under [RG 271](#) and [ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#) apply.
- RG 277.39 While the remediation process itself may be scalable, regardless of the size of the licensee when misconduct or other failures are discovered, a remediation must be initiated.

### Example 3: Small-scale remediations

A small-sized advice licensee Brown & Co Advisers (Brown & Co) discovered, after receiving a complaint from one of its clients, that one of its advisers had been giving inappropriate advice to acquire a margin lending facility. Brown & Co suspects it may be a systemic issue and allocates the matter to a compliance officer. The compliance officer conducts a file review, determines that the adviser had given inappropriate advice to five clients, and makes appropriate compensation offers.

#### Commentary

It was appropriate for the licensee to conduct the remediation using its existing compliance resources. Brown & Co was able to review each file and return affected clients to the position they would have otherwise been in, without using any assumptions. Given that only one adviser was involved and a small number of clients were affected, no additional resources were necessary.

## C Nine principles for conducting a remediation

### Key points

When conducting a remediation, licensees should adopt a process that is efficient, honest and fair, taking into account the nine principles described in Table 1. Adopting the nine principles in this guide will help achieve fair and timely outcomes for all affected consumers.

**Table 1: The nine principles for conducting a remediation**

Principle	Description
<b>1 Return affected consumers as closely as possible to the position they would have otherwise been in had the misconduct or other failure not occurred</b>	<p>The guiding principle of any remediation is to return affected consumers, as closely as possible, to the position they would have otherwise been in had the misconduct or other failure not occurred. This should be the aim regardless of scale or complexity, and generally underpin remediation decision making.</p> <p>There are rare situations where it would not be appropriate or possible to return a consumer to the position they would have otherwise been in: see RG 277.61–RG 277.63 for further information.</p>
<b>2 Understand the nature, extent and impact of the misconduct or other failure</b>	<p>Licensees should aim to identify all consumers who have or may have suffered loss as a result of the misconduct or other failure. Licensees will need to understand the nature, extent and impact, including undertaking a root cause analysis: see RG 277.45–RG 277.48.</p> <p>By understanding the nature, root cause and extent of the misconduct or other failure, licensees should be able to determine when they reasonably suspect the misconduct or other failure first occurred and caused loss to a consumer: see RG 277.49–RG 277.53.</p> <p>If the licensee is identifying and remediating misconduct or other failures promptly, rarely should the remediation review period exceed record retention requirements.</p>
<b>3 Give consumers the benefit of the doubt, and minimise the risk of under-compensation</b>	<p>In some remediations, in order to save time and program costs, remediate more efficiently or make up for absent records, licensees may consider using assumptions that are beneficial for consumers: see RG 277.113–RG 277.141.</p> <p>Overall, licensees should only use assumptions in a remediation if they are beneficial to consumers and will result in an outcome that:</p> <ul style="list-style-type: none"> <li>• returns affected consumers, as closely as possible, to the position they would have otherwise been in had the misconduct or other failure not occurred; and</li> <li>• is evidence based and well documented.</li> </ul> <p>If assumptions are used for scoping or calculating loss, licensees should give consumers the benefit of the doubt, and minimise the risk of consumers falling out of scope or being under-compensated: see RG 277.114–RG 277.117.</p>

Principle	Description
<p><b>4 Ensure that key decisions are justified and documented</b></p>	<p>Licensees should document and track the remediation by keeping accurate and relevant records of the remediation approach, decision making, progress and consumer outcomes. ASIC may ask to see these records.</p> <p>Note: Licensees subject to the notify, investigate and remediate obligations must keep records to demonstrate compliance with the obligations: see RG 277.304.</p> <p>Key decisions about scoping and remedies that will affect consumer outcomes should be evidence based and appropriately justified in the circumstances.</p> <p>Monitoring the remediation, specifically the consumer outcomes, will help improve this and future remediations. Learning and adapting to new information as it becomes available will help licensees achieve good consumer outcomes.</p>
<p><b>5 Apply reasonable endeavours when making remediation payments</b></p>	<p>Licensees should apply reasonable endeavours in making remediation payments to affected consumers, or when providing remedies. Payment methods that require no consumer action should be prioritised (e.g. electronic funds transfer (EFT) or PayID): see RG 277.153–RG 277.171.</p> <p>Licensees should return remediation money owed to current customers regardless of value. However, for former customers who are owed \$5 or less (after interest), licensees may instead make a residual remediation payment without applying reasonable endeavours: see RG 277.160–RG 277.163 on low-value compensation thresholds.</p> <p>Note: A ‘residual remediation payment’ is a payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for-profits Commission (ACNC) made up of consolidated remediation money that could not be returned to consumers despite reasonable endeavours: see RG 277.194–RG 277.197.</p>
<p><b>6 Be timely without sacrificing quality consumer outcomes</b></p>	<p>Remediations should be initiated and conducted promptly. Efficient and timely remediation benefits everyone, as long as there is no trade-off in quality. Delayed identification of misconduct or other failures, and slow initiation and conduct of remediations can:</p> <ul style="list-style-type: none"> <li>• exacerbate detriment already suffered, especially if the consumer is suffering financial hardship;</li> <li>• increase the likelihood that records become lost or get destroyed;</li> <li>• increase the likelihood that consumer information becomes outdated, and existing customers become ex-customers; and</li> <li>• significantly increase the cost of the remediation program for a licensee, also risking reputational damage.</li> </ul> <p>What a reasonable timeframe is for a remediation will depend on the nature and complexity of the matter and the availability of data, with reference to factors like the nature of the misconduct or other failure, the size of the licensee, the number of affected consumers, the type of loss experienced by those consumers, and the quality of contact and payment information.</p>

Principle	Description
<p><b>6 Be timely without sacrificing quality consumer outcomes</b> —<i>continued</i></p>	<p>For larger or complex remediations with longer timeframes, it might be appropriate to conduct a tiered remediation—for example, by focusing on segments of affected consumers, or first prioritising payments for consumers who can be paid easily or are experiencing hardship: see RG 277.142–RG 277.144.</p> <p>Note: Particular timeframes apply to licensees subject to the notify, investigate and remediate obligations: see RG 277.310–RG 277.314.</p> <p>However, if a remediation is unjustifiably protracted or delayed, this may indicate that the licensee has breached its general licensee obligations.</p> <p>Note: See <a href="#">Regulatory Guide 78 Breach reporting by AFS licensees and credit licensees</a> (RG 78), Table 2: Examples of deemed significant breaches, Example 3(g).</p> <p>Assumptions that are beneficial to consumers can offer a balance between timeliness and accuracy without a trade-off in quality: see RG 277.134–RG 277.136.</p>
<p><b>7 Make the process easy for consumers by minimising complexity and, where possible, limiting their involvement in the process</b></p>	<p>A remediation should be made easy for consumers by minimising complexity and the need for consumer action: see RG 277.150–RG 277.152. Remediations should also be free for all consumers.</p> <p>Consumers who have or may have been affected by the misconduct or other failure should be automatically included in the scope of a remediation. They should not be asked whether they want to participate (otherwise known as an ‘opt-in arrangement’). An in-scope consumer should not be excluded from a remediation or disadvantaged merely because they fail to respond to correspondence, or cannot provide evidence of their loss.</p>
<p><b>8 Do not profit from the misconduct or other failure</b></p>	<p>Licensees must not profit from the misconduct or other failure. If affected consumers are lost or uncontactable despite reasonable endeavours, licensees should lodge the outstanding payments in a relevant unclaimed money regime, or make a residual remediation payment to a charity or not-for-profit organisation registered with the ACNC: see RG 277.188–RG 277.197.</p> <p>Note: Licensees remediating unit pricing errors should have regard to <a href="#">RG 94</a>.</p>
<p><b>9 Ensure the remediation has adequate resourcing, governance and accountability</b></p>	<p>Remediations must have adequate resourcing and governance arrangements in place, including commitment from senior management.</p> <p>Larger licensees should ensure that the people who are managing the design and conduct of remediations have appropriate training and skills to deliver fair and timely consumer outcomes. This may also involve engaging an independent expert to provide assurance about the governance and operation of the remediation process: see RG 277.220–RG 277.226.</p> <p>Licensees should consider whether it may be in the public interest or required under their disclosure obligations to report publicly on the remediation. ASIC may also from time to time publicly report on the existence, progress and outcome of remediations that we are monitoring: see RG 277.233–RG 277.235.</p>

## D Scoping the misconduct or other failure

### Key points

Once the misconduct or other failure has been identified, licensees should take all reasonable steps to access and secure the evidence, records and data necessary to complete the remediation: see RG 277.40–RG 277.44.

Conducting a remediation will generally first involve investigating the nature and extent of the misconduct or other failure, including identifying when the misconduct or other failure first began and who has been affected: see RG 277.45–RG 277.60.

To identify the scope and affected consumers, licensees may use a number of methods, including data analysis, file reviews, assumptions or a combination, see Section F. These methods are also relevant for determining appropriate outcomes: see Section E.

### Accessing evidence, records and data

- RG 277.40 Licensees have a range of record-keeping obligations that are relevant to their ability to effectively conduct remediations: see RG 277.296–RG 277.300.
- RG 277.41 Licensees should ensure that relevant records are readily accessible, including, for example, when acquiring a third-party provider, administrator or financial adviser.
- RG 277.42 Licensees should take all reasonable steps to access and secure the evidence, data and records held by the business or relevant external third parties that are necessary in order to complete the remediation. This process should occur as early as possible in the remediation process to avoid any accidental or automatic erasure of evidence.
- RG 277.43 Authorised representatives have obligations to provide records to licensees on request: see [Class Order \[CO 14/923\]](#) *Record-keeping obligations for Australian financial services licensees when giving personal advice*. This obligation continues to apply even if the authorised representative ceases its relationship with the licensee. Licensees should be open and transparent with the third parties involved to ensure that the provision of relevant records and evidence is as efficient as possible.
- RG 277.44 Sometimes the evidence will already be easily accessible. For example, in situations of overcharged fees, an analysis of the data may reveal exactly what systems or products are implicated, which consumers have been affected, and the loss suffered. If the misconduct or other failure is identified quickly, there will rarely be challenges associated with accessing reliable evidence. Licensees that have data capability and accurate, digitised records will also generally be better placed to efficiently conduct a remediation.

## Investigating the nature and cause of misconduct or other failure

RG 277.45 When conducting a remediation a licensee should assess the root cause(s) or underlying drivers to understand the nature and extent of the misconduct or other failure. One failure could have multiple root causes and licensees should not just ask what happened, but why and how it happened: see Example 4. Sometimes the cause(s) might be difficult to identify, while at other times the cause(s) of the misconduct or other failure will be readily identifiable.

### Example 4: Investigating the cause of misconduct or other failure

Lima Insurance (Lima) sold a range of life insurance products direct to potential consumers through outbound telephone calls. The products sold in its outbound telephone sales were more expensive and of lower value than products sold through other channels. Many of the products offered very limited benefit to consumers, were sold using pressure-selling tactics or mis-selling conduct, and had poor disclosure. It was likely that the telephone sales were in breach of the anti-hawking provisions.

Lima began a remediation and investigated the underlying causes of the hawking and pressure-selling misconduct.

Three causes of systemic compliance issues were identified:

- a remuneration structure that incentivised staff to make as many sales as possible at the expense of consumers' interests;
- a culture and governance that enabled unfair and aggressive sales tactics at the cost of compliance, which included aggressive objections handling approaches and the circumvention of the conflicted remuneration provisions; and
- large deficiencies in its risk management practices, including its quality assurance and compliance program.

#### Commentary

Investigating the underlying drivers of the misconduct led to Lima identifying a range of systemic compliance issues. This work will help inform the scope of the remediation, and ensure the full extent and impact of the misconduct is understood and affected consumers are identified.

## Investigating the full extent of misconduct or other failure

RG 277.46 It is important that licensees ensure that the full extent of the misconduct or other failure has been investigated, to identify how many consumers have been affected. There might be a question about whether the misconduct or other failure is more widespread than what initial evidence suggests.

RG 277.47 Licensees may use data, complaints, trend analysis and known risk indicators to investigate how far the misconduct or other failure extends, and

this will help licensees understand which consumers are affected. Generally, licensees should assess:

- (a) whether other products, brands, advice or services might be involved;
- (b) whether systems, processes or policies might have failed;
- (c) whether representatives or employees might be implicated;
- (d) whether platforms or sales channels may be affected; or
- (e) whether business groups, product or service providers, subsidiaries or licensees might be impacted.

#### Example 5: Investigating the full extent of misconduct or other failure

In 2020, Grossman Insurance (Grossman) internally identified an error in some of its pricing algorithms for a certain brand product, which effectively meant that renewing customers did not receive the correct eligible discounts. The disclosure and marketing materials did not accurately reflect how the premiums were calculated and how discounts were applied.

Grossman lodged a breach report with ASIC under s912D of the Corporations Act, and informed ASIC about the remediation program that had been initiated.

ASIC was concerned that Grossman was not investigating the underlying drivers and full extent of the misconduct. ASIC challenged Grossman to do this analysis as well as review all its brands and systems for relevant breaches, given the nature of the misconduct.

As a result, Grossman identified several pricing errors impacting a number of branded policies.

Grossman also identified the following underlying drivers:

- complex and outdated 'legacy' technology systems that significantly increase the likelihood of financial and compliance risks occurring;
- equally complex and often poorly disclosed pricing practices; and
- poor governance, controls, and monitoring and supervision to ensure compliance with obligations to consumers.

Grossman also reviewed whether certain breaches may have occurred not just in the pricing algorithms but also through errors that were hard coded into policy administration systems.

#### Commentary

Before finalising the scope of the remediation, Grossman should have investigated the underlying drivers to help identify the full extent of the pricing and systems errors across other products and brands.

RG 277.48 Depending on the approach and nature of the misconduct or other failure, licensees may also need to consider whether file sampling is necessary to test whether the misconduct or other failure is more widespread than the evidence at hand indicates.

## Determining the remediation review period

- RG 277.49 It is important that the right timeframe is selected as part of the remediation. This involves investigating over what period of time the relevant misconduct or other failure may have occurred and the length of time that consumers have potentially been affected (remediation review period).
- RG 277.50 By understanding the nature, root cause and extent of the misconduct or other failure, licensees should be able to determine, based on available information, when they reasonably suspect the misconduct or other failure first occurred and caused loss to a consumer. This should always be a licensee's starting point for the remediation review period.
- RG 277.51 If licensees have adequate systems and processes in place to identify misconduct or other failures promptly, the remediation review period should rarely exceed any record-retention requirements, and licensees will not have to consider using assumptions to account for absent records. If a remediation review period does extend beyond seven years, it may indicate a systemic underinvestment in systems to deliver products and identify misconduct or other failures as they arise.
- RG 277.52 When the misconduct or other failure extends beyond record-retention requirements, and records have been destroyed in good faith, the remediation review period may be limited. However, licensees should consider if it is possible or reasonable to apply assumptions to identify and compensate consumers who suffered loss beyond such period (such as seven years): see RG 277.129–RG 277.133 for more information.
- RG 277.53 Licensees should remember that individual consumers have rights to seek a review or compensation under other statutory frameworks, including IDR and through AFCA. No limitation to a remediation review period can extinguish these rights.

Note: Other frameworks such as the state, territory and Commonwealth unclaimed money regimes have also been established to ensure that money owed to consumers remains available to them beyond the expiry of any statutory limitation period.

### Example 6: How to determine the remediation review period

Belair Financial Pty Ltd (Belair) is a small financial advice firm. In 2022, following a compliance review, Belair discovered that an authorised representative had recently given inappropriate advice about particular high-risk investments. As soon as Belair discovered this, it took steps to recover and secure all of the authorised representative's client files.

The adviser had been an authorised representative of Belair since 2014, but Belair did not know when the relevant misconduct first occurred. Belair reviewed samples of the representative's advice for each year between 2014 and 2022 and found instances of inappropriate advice between 2018 and 2022. All of the representative's advice from 2014 to 2017 that Belair

reviewed was appropriate advice in clients' best interests. As a result of this analysis, Belair determined the remediation review period to be 2018 to 2022.

### **Commentary**

This is an example of how a licensee may determine a remediation review period. If Belair had identified evidence of advice on high-risk investments or inappropriate advice before 2017, it may be reasonable to extend the review period back to 2014 (when the adviser first become an authorised representative of Belair). Because Belair has secured the files, it would be able to remediate back to 2014 if required, despite this being longer than standard record-keeping requirements.

The root cause analysis and the nature of the misconduct could also provide reasonable evidence as to how far back the misconduct may go, including whether other authorised representatives may have engaged in similar misconduct.

## **Identifying affected consumers**

- RG 277.54 Once the nature, cause and extent of the misconduct or other failure is understood, licensees should be able to identify consumers who have or may have been affected by the misconduct or other failure. Working out who may have been affected is an exercise that should be robust and inclusive.
- RG 277.55 Licensees should review the evidence and records necessary to determine which consumers have or may have been affected as a result of the misconduct or other failure. Depending on what went wrong, reviewing all records may be the only appropriate approach: see RG 277.104–RG 277.112 for more guidance on file reviews.
- RG 277.56 In some cases, however, licensees may need to use assumptions to account for absent records or increase efficiency to achieve fair and timely outcomes (e.g. using assumptions rather than requiring affected consumers to provide evidence of their financial loss or eligibility). See RG 277.113–RG 277.141 for further guidance on giving consumers the benefit of the doubt.
- RG 277.57 It is not appropriate to ask consumers who are likely to fall within scope (with a reasonable level of certainty) whether they wish to participate or 'opt in' to a remediation. They should be included automatically. If a consumer contacts the licensee and requests inclusion in the remediation, the licensee should consider their eligibility. If the licensee subsequently determines the consumer has suffered loss as a result of the relevant misconduct or other failure, this likely warrants a review of the original scope.

Note: For more information on 'calls to action', see RG 277.150–RG 277.152.

**Example 7: Inappropriate opt-in methodology**

Jupiter Advisory (Jupiter) incorrectly charged adviser service fees from consumers' cash management trusts to which Jupiter had access. This happened in a number of situations, including when the adviser was inactive, or when the consumer had asked for the adviser to be removed from their account. As a result, consumers did not receive the services that they paid for. A remediation was initiated.

Jupiter proposed an opt-in methodology that would involve the licensee writing to consumers to ask them whether they would like their fees refunded. Jupiter knew that the 'likely outcome' of taking this approach was that Jupiter would have to pay less compensation.

**Commentary**

Once Jupiter has proactively identified all of the affected consumers, these consumers should be compensated automatically. Consumers should not be asked to opt in. The remediation process should minimise complexity and consumer action, preferably by making any remediation payments directly to a consumer's bank account.

**Reviewing and testing the scope**

- RG 277.58 Further misconduct or other failures may be identified during the remediation. If this occurs, the scope of the remediation may need to be revised (e.g. other failures in product areas not originally anticipated, or representatives and/or staff not previously identified). Licensees should also consider whether any closed matters in the remediation need to be re-examined.
- RG 277.59 Licensees should also have processes in place to review and monitor complaints that relate to the scope. For example, a licensee should:
- (a) be able to determine whether there are consumers who have had previous complaints reviewed by IDR or AFCA that would fit within the parameters of the current remediation; and
  - (b) have processes in place to review circumstances of consumers who indicate later—including after the remediation has been concluded—that they should be considered.
- RG 277.60 Licensees may consider testing the scope of the remediation to ensure that it properly captures all affected consumers.

**Example 8: Revising the scope of the remediation**

Vade Advisory (Vade) began a review of consumer files after becoming aware that three of its advisers had been giving inappropriate insurance advice. After reviewing a sample of advice by the three advisers, Vade felt certain that the deficiencies in the advice related only to insurance advice.

After commencing a review of all consumers who received insurance advice by the three advisers in the past four years (the length of the

advisers' employment), it became apparent that one of the advisers was also giving superannuation advice that was inappropriate.

Vade reviewed a sample of the adviser's superannuation advice over the past four years and found further instances of inappropriate superannuation advice. As a result, Vade decided to expand the scope of the remediation to include superannuation advice given by that adviser.

**Commentary**

It was appropriate for the advice licensee to revise the scope of the remediation.

## E Determining an appropriate outcome

### Key points

Remediation outcomes for affected consumers must be fair and timely. The aim is to return affected consumers *as closely as possible* to the position they would have otherwise been in had the misconduct or other failure not occurred: see RG 277.61–RG 277.63.

Table 2 provides a non-exhaustive list of possible remedies to consider when determining appropriate outcomes for affected consumers in a range of circumstances.

Depending on the circumstances, an appropriate outcome may include:

- a monetary remedy, which may require the calculation of foregone returns or interest (see RG 277.69–RG 277.87); and/or
- a non-monetary remedy, such as providing legal or other assistance (see RG 277.88–RG 277.100).

Licensees should also consider what tax consequences the consumer may incur as a result of the remediation payment to ensure that they are returned to the position they would otherwise have been in, as closely as possible: see RG 277.101–RG 277.103.

For guidance on the methodologies to use in determining an appropriate outcome, see Section F.

## Returning consumers to the position they would have been in

RG 277.61 Once the nature, cause and the extent of the misconduct or other failure is understood and affected consumers are identified, licensees should start to think about how to deliver appropriate consumer outcomes that are fair and timely, including the type of remedies.

RG 277.62 The guiding principle for all remediations is to return affected consumers *as closely as possible* to the position they would have been in had the misconduct or other failure not occurred. However, there are some rare circumstances when this may not be appropriate: see Example 9.

### Example 9: When it may not be appropriate to return consumers to the position they would have otherwise been in

BBNG Advisory (BBNG) designed a large-scale remediation for consumers who had paid fees for ongoing advice but did not receive the advice in return. BBNG intended to return consumers to the position they would have been in if the misconduct had not occurred by:

- refunding the fees that were incorrectly deducted (refund amount); and
- adjusting the payment to reflect the interest or earnings that the refund amount would have earned if it had remained in a consumer's account or investment fund.

For most consumers, this resulted in payment of the refund amount plus interest or investment earnings. However, for a group of consumers, the value of the investment fund that the fees were deducted from had declined. A rigid application of BBNG's compensation principles would have resulted in these consumers receiving negative interest or earnings, so they would have been compensated with less than the fees they had paid.

BBNG decided to set a minimum floor on the refunds and compensation paid, so that no consumer would have their compensation reduced by negative interest or earnings, and all affected consumers would receive at least the value of the fees incorrectly deducted plus an interest component.

#### **Commentary**

It was appropriate for the licensee to not apply negative interest or earnings in determining the amount to be paid to affected consumers.

RG 277.63 In other cases, it may not be possible to return consumers to the position they would have otherwise been in: see Example 10. Licensees should do what they can to compensate the consumer for the disadvantage caused by the misconduct or other failure.

#### **Example 10: When it may not be possible to return consumers to the position they would have otherwise been in**

Steel Financial Solutions (Steel) has discovered that one of its representatives has been routinely advising consumers to move out of their defined benefit superannuation schemes, and into an accumulation fund. Consumers have accepted the advice and moved funds.

File reviews confirmed that the advice was not appropriate for the 150 consumers in question and was contrary to their best interests.

The core impact on consumers is that they had been moved from a superannuation fund that had no investment risk to a superannuation fund under which the consumers bore investment risk.

Due to the nature of defined benefit superannuation, the consumers could not be returned to that superannuation fund and thereby returned to the position they would have been in had the misconduct or other failure not occurred. Instead, Steel appropriately compensated the consumers for their loss by:

- refunding all advice fees to the consumer's superannuation account; and
- purchasing a guaranteed annuity on equivalent terms to replace the foregone guaranteed income.

#### **Commentary**

It was appropriate for the licensee to think of alternative remedies that could ensure that the affected consumers were not further disadvantaged by the misconduct, despite not being returned to the position they would have otherwise been in. Due to the complexity of the case, Steel could also consider appointing an independent expert to assess its methodology and approach.

## Determining monetary and non-monetary remedies

- RG 277.64 The types of remedies to address consumer loss can be monetary or non-monetary, or a combination of both.
- RG 277.65 Licensees should consider a broad range of possible remedies to address how the misconduct or other failure has affected the consumer to date, and what needs to be done to avoid the risk of ongoing harm or future consequences as a result of the misconduct or other failure.
- RG 277.66 To determine an appropriate remedy, licensees may need to assess available records to identify ‘features’ of affected consumers (or cohorts of consumers) that may be relevant to how the misconduct or other failure may have affected them. For example, consumer cohorts who are suffering financial hardship or difficulty because of the misconduct or other failure, or have been identified as potentially experiencing vulnerability, may need additional remedies such as support services or professional assistance.
- Note: For more information on how to do this in practice, see p. 4 and Resources A and B in [Making it right: How to run a consumer-centred remediation](#) (*Making it right*).
- RG 277.67 Some consumers may also suffer loss that is not immediately apparent to a licensee. It is important licensees provide a consumer with clear information about how they have calculated compensation (or if the calculations are complex, an opportunity to request further information), so that the consumer is able to provide detail of any additional loss that was not considered by the licensee when determining the appropriate remedy.
- RG 277.68 Table 2 provides a non-exhaustive list of possible remedies to consider when determining appropriate outcomes for affected consumers in the relevant circumstances.

**Table 2: Remedies to consider when determining appropriate outcomes**

Misconduct or other failure	Possible remedies and considerations
Misconduct related to providing financial product advice	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• refunding advice fees plus foregone returns or interest;</li> <li>• offering free remedial financial advice;</li> <li>• compensating for lost investment performance or interest;</li> <li>• compensating for a lost or inferior insurance position; and</li> <li>• moving consumers into an appropriate product.</li> </ul>
Fees for no service	See <a href="#">INFO 232</a> .

Misconduct or other failure	Possible remedies and considerations
Misconduct related to insurance products	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• refunding past premiums plus foregone returns or interest (including to consumers eligible and ineligible to claim under the relevant policy);</li> <li>• compensation for indirect financial loss (e.g. interest on credit cards used to pay for the premiums);</li> <li>• revisiting previously declined claims and allowing for retrospective claims;</li> <li>• cancelling the policy with consumer consent and providing a refund of past premiums plus interest from the date of misconduct to the date of cancellation;</li> <li>• if the policy cannot be cancelled or a customer chooses to remain in the policy, and they are ineligible to claim, a licensee should (in addition to refunding past premiums plus interest) consider: <ul style="list-style-type: none"> <li>– refunding or waiving future premiums;</li> <li>– reducing premiums to cost; and/or</li> <li>– waiving eligibility criteria or other conditions; and</li> </ul> </li> <li>• offering to cover costs of obtaining remedial financial advice, particularly when consumers are presented with different remediation outcomes to choose from.</li> </ul> <p>For policies where claims have been made that were declined based on the offending eligibility requirements, a licensee should reopen and reassess the claim. When a payment is made for open policies, it may be acceptable for the claim payment to be reduced with reference to outstanding premiums. Under s57 of the <i>Insurance Contracts Act 1984</i>, interest must be awarded from the date the claim should have been accepted.</p>
Systems failures or errors related to banking products	<p>In remediations relating to systems failures or errors that have resulted in, for example, mischarged fees or interest, or the failure to provide benefits, discounts or waivers, a licensee should consider the following remedies:</p> <ul style="list-style-type: none"> <li>• refunding mischarged amounts such as fees or interest, plus foregone returns or interest;</li> <li>• compensating for the failure to apply benefits, discounts or waivers; and</li> <li>• compensating for any other indirect financial loss suffered as a result of the misconduct or other failure (e.g. overdraft fees, late fees and/or related charges by other creditors if known).</li> </ul>
Misconduct related to bundled fees	<p>If a consumer paid bundled fees (i.e. a single fee for a number of services or products, including the subject of the misconduct or other failure in question), a licensee should consider the following remedies:</p> <ul style="list-style-type: none"> <li>• refunding fees for the services or products not provided plus interest (the licensee should be able to calculate the relative financial value of the service(s) or product(s) not provided as part of a bundle); and</li> <li>• unbundling the products or fees.</li> </ul> <p>If the licensee cannot ascertain the financial value of the service(s) or product(s) not provided as part of the bundled fee, assumptions should be made that are beneficial to consumers, including assumptions that might result in the entire fee being refunded.</p>

Misconduct or other failure	Possible remedies and considerations
Misconduct related to consumer lease or credit contracts	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• refunding fees, charges and interest (including any establishment fees, dishonour fees, late payment fees, monthly fees or enforcement fees);</li> <li>• varying or voiding the contract;</li> <li>• reducing interest rates;</li> <li>• reducing the principal, waiving the outstanding debt and/or providing a refund of amounts already paid under the loan;</li> <li>• where a loan is secured or involves goods subject to a consumer lease, allowing the consumer to retain the underlying asset if appropriate for the consumer;</li> <li>• accounting for any capital losses that have been incurred as a result of the loan;</li> <li>• if the unsuitable loan or consumer lease resulted in bankruptcy or other enforcement proceedings, considering what other remedial action can assist the consumer; and</li> <li>• offering to cover free remedial financial advice.</li> </ul> <p>Principal or interest rate reduction is called for when a consumer is likely suffering substantial hardship as a result of the licensee's misconduct or other failure. It is generally not acceptable to lower regular repayments by extending the term of the loan (and expecting a consumer to remain indebted for longer than they had agreed).</p> <p>Similar considerations should be made where other forms of lender error (e.g. failing to convert an interest only loan to principal and interest) has led to consumer loss.</p> <p>A licensee should also consider whether the consumer's credit information (including consumer credit liability information, repayment history information and default information) is inaccurate, out of date, incomplete, irrelevant or misleading under the <i>Privacy Act 1988</i> and the <i>Privacy (Credit Reporting) Code 2014</i> as a result of the misconduct or other failure. If so, the licensee must correct the information and, if the licensee has previously disclosed any of that information to a credit reporting body (or anyone else), notify the relevant credit reporting body of that correction (and those other recipients).</p>
Misconduct related to mortgage brokers or other credit intermediaries	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• compensation for any fees, interest and costs that the consumer would not have otherwise incurred;</li> <li>• offering to cover free remedial advice from a credit assistance provider to review the consumer's circumstances; and</li> <li>• where appropriate, assisting the consumer to request the relevant lender to change features on their existing loan or move to another suitable loan.</li> </ul>

Misconduct or other failure	Possible remedies and considerations
Misconduct related to superannuation products	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• refunding or adjusting fees;</li> <li>• compensation to reflect investment returns had the misconduct or other failure not occurred;</li> <li>• adjusting and/or refunding insurance premiums;</li> <li>• adjusting defined benefit entitlements; and</li> <li>• compensation for foregone returns due to the delay in rolling over benefits.</li> </ul> <p>A licensee should consider the direct financial loss as well as how the misconduct or other failure was carried forward (investment switch) or crystallised (member exit). Further monetary or non-monetary remedies may be required to address any indirect flow-on impacts to benefit calculations, insurance benefit eligibility and cover levels, and preservation ages.</p> <p>It may be appropriate to offer to cover the costs of remedial professional advice, particularly if the remediation is complex or if the member may need to switch products.</p> <p>Superannuation trustees should also consider the tax consequences that may result from the remediation payment, particularly in communicating outcomes to their members.</p>
Unit pricing errors	See <a href="#">RG 94</a> .
Misconduct related to over-the-counter (OTC) derivative products	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• the refunding of any fees and charges relating to the misconduct or other failure that are determined to be inappropriate;</li> <li>• the rescission of contracts where the licensee has facilitated unlicensed conduct; and</li> <li>• compensation where appropriate to account for consumer loss suffered as a result of, for example: <ul style="list-style-type: none"> <li>– the licensee failing to price and execute its transactions transparently, based on relevant benchmarks and publicly available pricing data and available pricing at the time;</li> <li>– mis-selling based on false or misleading statements before opening an account or entering into a trade; and</li> <li>– trading platform failures or outages (e.g. failed transactions, delayed execution of orders, or inability to manage open positions and/or risk).</li> </ul> </li> </ul>
Misconduct related to debt management services	<p>A licensee should consider the following remedies when relevant:</p> <ul style="list-style-type: none"> <li>• refunding fees plus interest;</li> <li>• compensation for costs incurred as a result of the misconduct or failure (e.g. compensation for additional interest charged on a credit contract a debt management service provider was engaged to reduce);</li> <li>• assisting consumers to access free alternatives to manage their financial situations (e.g. referring a consumer to the National Debt Helpline or financial counsellors); and</li> <li>• compensation for any known non-financial loss caused by the misconduct or other failure.</li> </ul> <p>Note: See <a href="#">Information Sheet 254</a> <i>Debt management services: Applying for a credit licence or variation</i> (INFO 254) for some other relevant considerations.</p>

## Monetary remedies

- RG 277.69 When determining direct financial loss, licensees may decide whether it is appropriate to calculate the actual financial loss or use assumptions that are beneficial to consumers: see RG 277.104–RG 277.112 for file reviews or RG 277.113–RG 277.141 for use of assumptions. What the appropriate approach is will depend on the circumstances: see Table 2.
- RG 277.70 Depending on the circumstances, compensation for financial loss will generally include foregone returns or interest: see RG 277.74–RG 277.87.
- RG 277.71 Licensees should also consider if any indirect financial loss was suffered as a result of the misconduct or other failure—for example, overdraft fees or late payment fees. Depending on the nature of the remediation and if the licensee has a high level of engagement with individual affected consumers, it may also be appropriate for a licensee to compensate the consumer for any known non-financial loss suffered as a result of the misconduct or other failure: see Example 19.
- Note: AFCA may consider claims for non-financial loss when appropriate: see the [AFCA Complaint Resolution Scheme Rules](#) (AFCA’s Rules) at Rule D3.3.
- RG 277.72 If relevant, when calculating financial loss, a licensee should not discount the compensation owed to account for any unrealisable benefits. For example, it is not appropriate for a licensee to discount the compensation owed for a mis-sold insurance product because it believes holding the insurance policy gave the consumer ‘peace of mind’, or because the consumer chose to remain in the relevant product.
- RG 277.73 A partial monetary remedy may be appropriate in limited circumstances, but only if the consumer has received a legitimate and demonstrable financial benefit in return. If making assumptions about a consumer’s financial benefit, licensees should apply the guidance at RG 277.113–RG 277.141.

## Foregone returns or interest

- RG 277.74 The guiding principle for determining compensation is to return consumers, as closely as possible, to the position they would have been in had the misconduct or other failure not occurred. To achieve this, licensees must account for consumers’ foregone returns or interest—specifically:
- (a) returns or interest the consumer would have received but for the misconduct or other failure; and/or
  - (b) interest the consumer would not have incurred but for the misconduct or other failure.

- RG 277.75 Depending on the circumstances of the remediation and the licensee's preferences, a licensee may:
- (a) calculate the *actual* foregone returns or interest (see RG 277.80–RG 277.81); or
  - (b) apply *assumptions* that are beneficial to consumers (see RG 277.82–RG 277.87).
- RG 277.76 Licensees may also use a combination of both approaches. For example, the licensee may calculate the *actual foregone returns or interest* for the period the consumer was in the product, and apply *assumptions* from the date the consumer exited the product.
- RG 277.77 Licensees should first consider whether using assumptions is appropriate in the circumstances (as opposed to calculating actual foregone returns or interest), considering their relevant legal duties and obligations. For example, licensees remediating unit pricing errors should follow [RG 94](#) where compensation is to be made using trust or scheme property.
- RG 277.78 For either approach, licensees should also determine whether simple interest or compounding interest applies.
- RG 277.79 For compounding interest, licensees need to consider the compounding period and frequency of the interest calculations. Licensees should apply the known compounding period and calculation frequency when available. In circumstances where the licensee does not have access to any actual data of foregone returns or interest, it should make assumptions that are beneficial to consumers and at least apply compounding interest. If using assumptions, simple interest will rarely be appropriate unless a licensee can justify that it is beneficial to consumers.

Note: When using assumptions, licensees must refer to the guidance at RG 277.113–RG 277.141. For specific guidance on using assumptions when calculating foregone returns or interest, see RG 277.82–RG 277.87.

#### *Calculating actual foregone returns or interest*

- RG 277.80 Calculating the actual foregone returns or interest could involve, but is not limited to:
- (a) retrieving actual product returns or interest data for the relevant period;
  - (b) identifying each consumer's payment method and, if paid with credit, the actual interest rate applied; and/or
  - (c) determining the actual returns or interest the consumer would have received had compliant advice or services been provided.
- RG 277.81 Example 11 illustrates how a licensee might calculate actual foregone returns or interest.

**Example 11: Calculating actual foregone returns or interest**

In 2020, CAPE Superannuation (CAPE) discovered that it had overcharged members' administration fees. These fees were deducted directly from members' superannuation balances in 2016. The overcharged fee amount would have otherwise remained in members' balances and continued to generate investment returns within the product.

CAPE is able to access its own data showing each member's actual investment return (as a percentage) between 2016 (the date of the misconduct or other failure) and 2020 (the remediation payment date). CAPE applied this return to the overcharged fee amount to calculate what each member was owed. In other words, CAPE compensated members for both their overcharged fee amount and their associated foregone investment returns.

**Commentary**

This is an example of how a licensee may use data or records to calculate the actual returns members would have received had the misconduct not occurred.

*Applying assumptions*

- RG 277.82 Alternatively, when calculating foregone returns or interest, licensees may choose to apply *assumptions* that are beneficial to consumers. Licensees may do so, for example, if applying assumptions is more efficient or to account for absent records. This approach should satisfy the considerations at RG 277.115–RG 277.116 and be reasonably justified.
- RG 277.83 Assumptions that are beneficial to consumers are likely to also be useful when a licensee does not know how the consumer would have used the money but for the misconduct or other failure (e.g. the consumer could have spent, saved, paid debt or invested the money in a number of different ways).
- RG 277.84 A prescribed interest rate under legislation may be relevant to the circumstances of some remediations. For these remediations, ASIC will treat the use of a prescribed rate as being beneficial to consumers and reasonably justified. For example, s57 of the Insurance Contracts Act and reg 38 of the *Insurance Contracts Regulations 2017* (Insurance Contracts Regulations) prescribe an interest rate reflective of the 10-year Australian Government bond rate plus 3%.
- RG 277.85 If no prescribed interest rate applies, licensees should apply their own assumptions that are beneficial to consumers and are reasonably justified in the circumstances. When developing assumptions to calculate foregone returns or interest, licensees should consider (in addition to the guidance under RG 277.122–RG 277.125), among other things:
- (a) the context in which the misconduct or other failure occurred;
  - (b) the relevant remediation period; and

- (c) how to justify the assumptions using internal data (i.e. a sample of actual data from the affected consumer cohort) and/or reputable external data sources.

RG 277.86 ASIC has previously provided guidance about the Reserve Bank of Australia (RBA) cash rate plus 6% being acceptable—particularly in the context of financial advice or investment type remediations where licensees are unable to calculate the actual foregone returns or interest. Licensees may continue to use this rate if it is beneficial to consumers and justified in the circumstances.

Note: The use of the RBA cash rate plus 6% does not imply that a remediation outcome has the same nature as a Federal Court post-judgment outcome.

RG 277.87 Example 12–Example 17 illustrate how licensees might apply assumptions that are beneficial to consumers in different circumstances. Licensees should document their decision and rationale, and inform consumers that assumptions have been used in the calculation.

#### Example 12: Applying assumptions to calculate interest incurred in an insurance remediation

Greenworth Insurers Pty Ltd (Greenworth) discovered that a number of its customers had been mis-sold life insurance and were ineligible to claim.

Approximately 6% of affected customers paid for their insurance policy using a credit card issued by other financial institutions. These customers may have incurred interest on their card in relation to their purchase.

When determining an appropriate remediation outcome, Greenworth decided that, rather than trying to access records and calculate the actual credit card interest rate for each affected customer, it would use assumptions and apply the highest purchase interest rate available over the remediation period (20.49%).

#### Commentary

This is an example of how a licensee used assumptions that benefited consumers when calculating the interest incurred by the consumer. The use of assumptions also increased the efficiency of the remediation.

#### Example 13: Applying assumptions to calculate foregone interest in an insurance remediation

Flora Insurance (Flora) was conducting a remediation involving the sale of its income protection insurance policies. A number of consumers had purchased policies on the basis of false and misleading representations by Flora representatives about their eligibility. When some of these consumers went to make a claim, they were rejected. As part of the remediation, Flora reviewed all the rejected claims made by consumers within scope. Flora fulfilled the claims by mis-sold policy holders and added a foregone interest component to compensate consumers for the delay in paying out the claim.

In these circumstances, Flora applied the 10-year Government bond rate plus 3% as prescribed in the Insurance Contracts Act and the Insurance Contracts Regulations from the date the claim ought to have been paid to the date of the remediation payment.

#### **Commentary**

It was appropriate for the licensee to apply the interest rate prescribed in the Insurance Contracts Act and the Insurance Contracts Regulations.

#### **Example 14: Applying assumptions to calculate foregone interest in a banking remediation**

In January 2019, EVI Bank (EVI) discovered that it had underpaid interest to consumers in its savings products between 2015 and 2017. A number of these consumers had since closed their accounts. EVI was able to calculate each consumer's actual foregone interest up until they closed their account. EVI was unable to calculate actuals for foregone interest after consumers closed their accounts, so instead applied assumptions beneficial to consumers.

EVI assumed that consumers who had exited its savings products would have likely put their funds into savings products with other providers, so it consulted publicly available data published by the RBA, specifically *Statistical Table F4—Retail deposit and investment rates*. EVI made an assumption beneficial to consumers by referring to the average interest rates for three-year term deposits over the remediation review period. To minimise the risk of under-compensation (e.g. due to some consumers potentially putting their money in higher interest savings products), EVI added a 1.5% buffer to these average rates. EVI used these rates (calculated daily, compounded monthly) to calculate foregone interest from each consumer's exit date to the remediation payment date.

#### **Commentary**

This is an example of how a licensee can use assumptions to calculate the interest a consumer would have received but for the misconduct or other failure. By choosing the average three-year term deposit rate and adding a small buffer, the licensee minimised the risk of under-compensation.

#### **Example 15: Applying assumptions to calculate interest incurred in a home loan remediation**

Abacus Bank (Abacus) discovered in early 2019 that it had mischarged fees to some of its home loan customers' accounts for more than nine years. This would have affected the amount of interest the customers paid on the principal of the loan.

Abacus was able to determine the actual interest incurred since January 2012 within the product. However, it had large gaps in its records with respect to the affected customers' applicable variable interest rates between January 2010 and December 2011. Abacus assessed the available internal and external data, including the distribution and change in interest rates over that period, and decided to use each customer's last known interest rate (i.e. the rate applied in January 2012) to account for the remaining two years.

**Commentary**

This is an example of how a licensee used assumptions to calculate the interest incurred by the consumer as a result of the misconduct or other failure. These assumptions benefited consumers and made up for absent records.

There was some risk that a consumer was charged slightly higher interest between 2010 and 2011 than they were in 2012. In this case, several factors already existed that mitigated this risk, including:

- the low variability and stability of interest rates during the remediation review period;
- the licensee being able to use some internal (as opposed to external) data; and
- the licensee having some relevant interest rate data specific to each consumer (as opposed to using an average).

These factors meant that the assumption appropriately minimised the risk of under-compensation, and further assumptions beneficial to consumers (such as the addition of an interest rate buffer) were not necessary.

**Example 16: Applying assumptions to calculate foregone returns in a superannuation remediation**

In 2020, YAK Super (YAK) discovered an error in the calculation of investment and administration fees. It commenced a remediation to compensate members for losses incurred since the error began in 2009.

Some members, however, had since rolled their superannuation over to a new fund, and YAK no longer has records of the rollover. As it was not possible to calculate the actual returns the former member would have received had the misconduct or other failure not occurred, YAK decided to apply assumptions. YAK compared publicly available Australian superannuation fund performance data since 2009 to its own returns and found that its own returns were lower on average over the relevant period. Based on this information, it decided to apply the RBA cash rate plus 6%, calculated and compounded daily to account for the foregone returns from the date of rollover. This rate equated to the average superannuation fund returns between 2009 and 2020 rounded up (i.e. the rate included a small additional interest buffer) to minimise the risk of under-compensation.

**Commentary**

It was appropriate to use the RBA cash rate plus 6% as it was beneficial to consumers and minimised the risk of under-compensation, based on the data available and the relevant period.

### Example 17: Applying assumptions to calculate foregone returns in a financial advice remediation

XYZ Bank (XYZ) initiated a remediation to return fees to clients who had paid for an advice service that was not provided to them.

For most of the affected clients, XYZ repaid the fee, plus an amount for the foregone returns or interest or earnings the client would have received if not for the misconduct or other failure.

However, for a very small group of affected clients, XYZ was unable to accurately determine the foregone returns or interest component. This was because the relevant data was held by external product issuers, and XYZ had failed to keep adequate client records and files.

XYZ decided to apply assumptions beneficial to consumers. It considered the available internal and external investment yield data, the significant variability in the types of investments held by its clients, and the need to compensate its consumers in a timely way. Having considered these factors, XYZ decided to apply the RBA cash rate plus 6% (calculated and compounded daily) to calculate foregone returns or interest.

#### Commentary

It was appropriate for the licensee to use assumptions because it was unable to accurately determine the actual foregone returns or interest. The RBA cash rate plus 6% benefited consumers as it minimised the risk of under-compensation based on the available internal and external data.

## Non-monetary remedies

- RG 277.88 Non-monetary remedies may be appropriate in some circumstances—for example, if consumers:
- (a) received non-compliant advice;
  - (b) were placed in an inappropriate product;
  - (c) were mis-sold a product;
  - (d) misunderstood key features of a product due to inadequate or misleading disclosure or marketing; or
  - (e) were subject to the misconduct or other failure but have not yet suffered a monetary loss.
- RG 277.89 Non-monetary remedies may include things like moving, or assisting to move, consumers into more appropriate products, voiding or varying contracts (such as waiving eligibility criteria), correcting inaccurate information, or providing other forms of rectification, assistance or support.
- RG 277.90 If it is not possible to move a consumer out of an inappropriate product (e.g. because the consumer is unresponsive), licensees should take reasonable steps to ensure the consumer is not disadvantaged: see Table 2 for further information on remedies.

- RG 277.91 Licensees should consider the affected consumer or cohorts of consumers' circumstances in determining what other non-monetary remedies or outcomes may be appropriate. For example:
- (a) providing legal or other assistance (see RG 277.92–RG 277.94);
  - (b) postponing or ceasing action (see RG 277.95–RG 277.97); or
  - (c) pausing or waiving statutory limitation periods (see RG 277.98–RG 277.100).

#### Example 18: When a non-monetary remedy may be appropriate

David is 42 years old, has no dependants and owns a house with a mortgage of \$550,000. He recently inherited \$100,000 following the death of a relative.

David sought advice from Harvey, an adviser at Green and Brown Advisory Services (Green and Brown), about what to do with the inheritance. David was asked to answer a series of questions that were designed to help Harvey understand David's personal circumstances, priorities and risk profile.

The results of the questionnaire showed that David had a conservative risk profile and his priorities included reducing debt and saving for retirement. Despite this, Harvey recommended that David invest all of his inheritance in a high-risk managed investment scheme.

When the firm reviewed the advice given to David, it determined that David received advice that did not address his personal circumstances and risk profile. However, given favourable market conditions, the managed investment scheme that was recommended to David had performed well over the past few years and had resulted in a gain that outweighed the benefit David would have received if he had been advised to pay the inheritance into his mortgage or superannuation fund.

David did not suffer a monetary loss. However, Green and Brown explained to David that he had not received appropriate advice and that an alternative strategy would be more appropriate for him, assuming his circumstances and risk profile had not changed.

David was offered a free review by one of Green and Brown's advisers, or a reimbursement of fees if David chose to see an adviser from another firm.

#### Commentary

It was appropriate for Green and Brown to offer a free review so that the client may be placed in a product appropriate for his circumstances and risk profile.

### Example 19: When a non-monetary remedy and compensation for non-financial or indirect financial loss may be appropriate

From 2018 to 2022, Wilson Online Loans Pty Ltd (Wilson) had a processing error that meant some customers' loan repayments were not credited to their personal loan accounts for over six months. This meant that Wilson incorrectly recorded on consumers' credit records that they were behind on repayments and, in some instances, even default listed consumers.

When Alberta applied for a new car loan, she was rejected because her credit record contained a Wilson default listing. As a result of the rejected application, Alberta said she was forced to delay starting a new job, which required access to a personal vehicle.

Alberta lodged a complaint with Wilson. It apologised to her and notified the credit reporting body of the inaccurate information. Wilson also refunded all late fees and other charges incurred as a result of the error and provided Alberta with some additional compensation for the inconvenience caused.

After receiving the complaint, Wilson reviewed all notifications sent to the credit reporting body and requested that it update any inaccurate or misleading information contained on credit reports. Wilson also sent communications to each customer advising them about what had happened, and that they could contact Wilson and seek further compensation if they had been personally impacted by the credit reporting error.

#### Commentary

It was appropriate for Wilson to provide a monetary remedy for any late fees and other charges incurred as a result of the processing error, as well as the non-monetary remedies of correcting the inaccurate information on the affected consumer's credit reports and notifying the relevant credit reporting body.

It was also appropriate for Wilson to provide additional compensation to Alberta since Wilson was aware of the inconvenience and indirect financial loss caused by the error.

#### Providing legal or other assistance

- RG 277.92 Licensees should consider whether it is appropriate to offer assistance to consumers to seek their own independent professional advice about the remediation and proposed remedy. Depending on the nature of the remediation, financial, legal and/or taxation advice might be advisable for all, or a class of, the consumers receiving remediation.
- RG 277.93 This might be appropriate when the remediation or underlying issues are complex and the value of the remediation offer is large, or the consumer is offered a choice of outcomes that could have significant financial implications. In these circumstances, the consumer might reasonably want to test the offer but may not have the resources to do so.

- RG 277.94 Assistance could come in different forms—for example:
- (a) offering to reimburse the consumer for professional advice sought by the consumer (e.g. advice from a lawyer, taxation accountant or financial adviser);
  - (b) offering the services of a group of professionals independent of the business to provide advice to the consumer, free of charge (e.g. contracting a consumer legal centre, or financial counselling organisation to assist); or
  - (c) offering to cover the costs of any adverse tax consequences as a result of the remediation payment.

### **Postponing or ceasing action**

- RG 277.95 When the misconduct or other failure relates to a credit contract or lease, it may sometimes lead or contribute to an affected consumer currently being in arrears or suffering financial hardship (i.e. a consumer has been provided unsuitable credit and is now in default). In these circumstances, licensees should refrain from commencing or continuing with enforcement proceedings or giving default notices (enforcement action) until:
- (a) the remediation outcome has been determined; or
  - (b) where applicable, any resultant IDR and AFCA complaints have been finalised and a response provided.

Note: For requirements relating to postponing or ceasing action during IDR, see RG 271.89–RG 271.90, and at AFCA, see AFCA’s Rules at Rule A7.

- RG 277.96 Fair, timely and effective remediation can mitigate any additional risks that some consumers may be further disadvantaged by the postponement of enforcement action.

- RG 277.97 The only exception to this is when the statute of limitations for the enforcement proceedings is about to expire. In such cases, proceedings may be commenced but should be stayed until the remediation outcome has been determined or any resultant complaints to IDR or AFCA have been finalised. Following these processes it might be determined that a fair outcome is for the enforcement proceeding to be withdrawn.

### **Pausing or waiving the statutory limitation period**

- RG 277.98 Prolonged remediation outcomes will sometimes surpass the statutory limitation period or AFCA time limit for a consumer to take their own action. This means that consumers are put in the difficult position of predicting whether the remediation will satisfactorily compensate their detriment, or whether they should separately pursue their own cause of action.

RG 277.99 When a consumer's ability to take individual action within the required time limit has been impacted by the existence of a remediation process, we consider that a licensee should waive the limitation period. Licensees may need to discuss this with their relevant PI insurer.

RG 277.100 Licensees should consider whether other limits (e.g. monetary) that may constrain AFCA's jurisdiction to consider a complaint about a remediation should also be waived.

Note: AFCA maintains a right to refuse to accept a complaint that does not fall within its time or other limits, notwithstanding a licensee's willingness to waive those limits.

### Tax consequences of payments for consumers

RG 277.101 Some remediation payments will have tax consequences for consumers. Licensees should, where relevant:

- (a) inform consumers that the remediation payment may result in tax consequences;
- (b) clearly communicate the different components of any remediation payment that might be subject to different taxation treatment (e.g. refund versus interest);
- (c) clearly communicate the time period that payments relate to; and
- (d) counsel consumers to seek advice, and for larger or complex remediation payments, consider providing consumers with support to seek that advice.

RG 277.102 Remediation payments can result in different tax outcomes. The tax treatment of remediation payments will depend on factors such as who has the legal right to the compensation, what the money is paid for (is it a refund, loss of return on investment, or interest) and whether the consumer has retained or disposed of the investment. In the context of superannuation, it will also depend on whether the payment increases the capital of the fund and whether they exceed the member's personal contributions cap.

RG 277.103 Licensees should consider the ATO's general guidance about the tax treatment of certain remediation payments in the first instance, such as:

- (a) [\*Compensation received by super funds from financial institutions and insurance providers\*](#);
- (b) [\*Deficient financial advice\*](#);
- (c) [\*Fees where no service is provided\*](#);
- (d) [\*Overcharged insurance premiums\*](#);
- (e) [\*PAYG withholding and reporting obligations relating to remediation payments\*](#); and
- (f) [\*Super contribution caps\*](#).

Note: There are more [ATO fact sheets on remediation](#) on the ATO website. For more information on engaging with the ATO, see RG 277.244–RG 277.246.

## F Methodologies for determining the scope and appropriate outcome

### Key points

Licensees must decide what methodology to use to determine the scope of the remediation (see Section D) and appropriate outcome (see Section E). For example, licensees may:

- conduct data analyses, file reviews (see RG 277.104–RG 277.112); and/or
- use assumptions that are beneficial to consumers—for example, to save time and program costs, remediate more efficiently and/or make up for absent records (see RG 277.113–RG 277.141).

For larger or more complex remediations, licensees should consider whether there are cohorts of consumers who share common features or experiences (to enable triaging of consumers): see RG 277.142–RG 277.144.

Licensees should consider their obligations when determining the appropriate methodology to use, including whether it is efficient, honest and fair.

### Conducting file reviews

RG 277.104 In some remediations a file review or some form of individual assessment of advice or eligibility will be needed to accurately determine who has been affected by the misconduct or other failure and the loss suffered (if any). For example, file reviews might be necessary to determine whether promised products or services were delivered competently and in accordance with the law, if at all.

RG 277.105 Licensees may also consider that conducting sample testing of files is necessary to understand the extent and impact of the failure. A combination of file reviews and using assumptions can also increase the efficiency of a remediation, or may be needed if there are absent records. For more information on using assumptions, see RG 277.113–RG 277.141.

#### The file review process

RG 277.106 It is essential that consumer files, or the quality of services provided to the consumer, are reviewed in a consistent and fair manner. Licensees should develop principles and guidance for reviewing files or the provision of services to ensure that this is the case.

- RG 277.107 The review process should not be unnecessarily complex. Templates are a useful way to guide reviewers and assist in record keeping. However, the review process should not be a ‘tick-a-box’ exercise—it should be flexible enough to make changes where lessons are learned.
- RG 277.108 Where there are indications of fraudulent or misleading or deceptive behaviour by a representative, licensees should be prepared to look beyond the face of the file to determine whether what the file suggests occurred actually did occur.
- RG 277.109 Licensees should have already identified consumers who may be suffering hardship or have special circumstances, and these consumers’ files should be reviewed as a priority.

### **File reviewers and peer review**

- RG 277.110 Files should be reviewed by people who meet the training and competence requirements to provide the services or products to which the file relates. The more complex the underlying products and services provided, the more training and competence will be required to review the files.

Note 1: See [Regulatory Guide 146](#) *Licensing: Training of financial product advisers* (RG 146) and [Regulatory Guide 206](#) *Credit licensing: Competence and training* (RG 206).

Note 2: The *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* modified the Corporations Act in relation to education, training and ethical standards of financial advisers.

- RG 277.111 After an initial review of a file has occurred and a determination made, in some cases a file should be ‘peer reviewed’ by another appropriately qualified and experienced person to ensure consistency and fairness. In many cases a peer reviewer will be internal to the business; in others, such as when there are no suitably qualified people available, external assistance may be required.
- RG 277.112 We do not expect that peer reviewing, or regular peer reviewing, will be required in all circumstances. Whether peer reviewing is appropriate will depend on the nature of the misconduct or other failure, the size of the remediation and the complexity of the consumer files. It may also be appropriate when the remediation is still at its early stages and reviewers are developing ways to ensure that reviews are conducted consistently.

## Using assumptions in a remediation

RG 277.113 To save time and program costs, remediate more efficiently and/or make up for absent records, licensees may consider the use of assumptions when they are beneficial to consumers.

### Giving consumers the benefit of the doubt when using assumptions

RG 277.114 There are two key circumstances in which assumptions may be applied:

- (a) when determining which consumers should be included within the scope of the remediation; and
- (b) when calculating the amount of actual or potential loss, including foregone returns or interest.

RG 277.115 Overall, licensees should only use assumptions in a remediation if they are *beneficial* to consumers and will result in an outcome that:

- (a) returns affected consumers *as closely as possible* to the position they would have otherwise been in had the misconduct or other failure not occurred; and
- (b) is evidence based and well documented.

RG 277.116 When we refer to assumptions that are ‘beneficial to consumers’, or ‘give consumers the benefit of the doubt’, we mean that, when there is uncertainty, the assumptions should:

- (a) minimise the risk of any affected consumers falling out of scope (when identifying affected consumers); and
- (b) benefit consumers by minimising the risk of under-compensation (when determining remedies).

Note: Licensees are not expected to over-compensate all consumers.

RG 277.117 Using assumptions will also likely save licensees time and resources in conducting the remediation that would ordinarily be associated with analysing all records or conducting individual file reviews. This means the use of assumptions will benefit the licensee as well as the consumer. If there is an element of over-compensation for some affected consumers, this program cost saving should be taken into account when determining what is an appropriate overall outcome.

### Determining when to use assumptions

RG 277.118 When using assumptions, the outcome should be beneficial to consumers to ensure that the licensee is complying with its obligations to act efficiently, honestly and fairly. Depending on the circumstances, it may be more appropriate to undertake individual file reviews (this could be for certain cohorts or all those potentially affected).

- RG 277.119 Licensees need to be able to justify their assumptions with available evidence. A licensee should advise consumers where appropriate that it has used assumptions to determine their individual loss calculation, so that the consumer has an opportunity to seek further information or make a complaint.
- RG 277.120 A decision to use assumptions may need to be balanced with other factors and considered in the context of the licensee's other legal duties and obligations: for more details on the interaction between superannuation and remediation, see the appendix to this guide.
- RG 277.121 Licensees remediating unit pricing errors should refer to [RG 94](#) when using estimates.

### Developing the assumptions

- RG 277.122 When developing assumptions, there are a number of factors licensees should consider to ensure that they are beneficial to consumers. For example, licensees should consider the variability within the affected consumer portfolio, including between consumer cohorts, and whether different assumptions should apply.
- RG 277.123 There will be limited circumstances when it will be appropriate to use a median or mean as the basis for an assumption. It may only be appropriate when the standard deviation of losses is low, and/or the skew of the distribution of losses minimises the risk of under-compensation.
- RG 277.124 There will generally be a margin of error associated with the use of assumptions. Licensees should minimise the margin of error and the risk of under-compensation. Ultimately, it is a matter for licensees to decide what margin of error and risk is fair and appropriate in the circumstances.
- RG 277.125 Some of the factors that may indicate that the assumptions are not beneficial to consumers include (but are not limited to):
- (a) unjustifiably narrow scoping;
  - (b) unjustified discounting or inappropriate averaging;
  - (c) if the outcome of using assumptions appears to commercially benefit the licensee over the consumer;
  - (d) if evidence has been excluded or new information ignored that may change the assumptions; or
  - (e) if the licensee has not taken reasonable steps to use all of relevant data that is reasonably available to them.

## Using assumptions when records are missing

### When record-keeping obligations have been breached

- RG 277.126 Licensees have a range of record-keeping obligations: see RG 277.296–RG 277.304. Breaches of record-keeping obligations can have serious consequences for any subsequent remediation.
- RG 277.127 If a licensee has breached its record-keeping obligations, and as a result is unsure whether a consumer has suffered a loss, the licensee must make assumptions that are beneficial to consumers where there are reasonable grounds to suspect loss may have occurred. It may not be efficient, honest and fair if consumers are disadvantaged because a licensee has failed to keep proper records in line with its record-keeping obligations, or if an authorised representative of the licensee has failed to comply with its obligations to provide records on request.

Note: See [INFO 232](#) for the correct approach to remediations for fees-for-no service. If the licensee cannot identify reliable evidence that an annual review was provided, it is expected that it will refund the fees paid by a consumer.

- RG 277.128 Although it may be reasonable to ask a consumer for information in some cases, if the consumer is unable to fill the gaps in the licensee’s records then assumptions that are beneficial to the consumer should be made when there are reasonable grounds to suspect loss may have occurred.

#### Example 20: Record-keeping breach—assumption beneficial to consumers

MintVest Bank (MintVest) discovered a systems error that meant that some of the benefits promised as part of a financial package were not delivered. MintVest had failed to keep sufficient records consistent with its obligations, so it was unclear which customers had received what benefits from the financial package.

An assumption was made that no customer had received the benefits from the financial package. All customers were compensated for the cost of the package.

#### Commentary

This is an example of an assumption that is beneficial to consumers where a licensee has breached its record-keeping obligations.

#### Example 21: Record-keeping breach—assumption beneficial to consumers and the licensee

MintVest Bank (MintVest) was conducting another remediation for misconduct that occurred between November 2021 and August 2022. It was unclear whether customers had already received compensation through the internal or external complaints process because they had not been fully documenting

their complaints. Therefore, rather than asking the customer, an assumption was made that no customer had been previously compensated.

#### **Commentary**

This is an example of an assumption that is beneficial to consumers where a licensee has breached its record-keeping obligations (it became an enforceable requirement to record all complaints from 5 October 2021). It is also beneficial to the licensee in terms of reduced time and costs in trying to reconstruct complaints records.

#### **Example 22: Record-keeping breach—assumption *not* beneficial to consumers**

Salaried advisers of advice licensee Rudisao Advisers (Rudisao) provide personal financial advice to Rudisao clients, including advice to switch superannuation products. Through random quality checks, Rudisao recently discovered that some of these advisers may not have met their obligation to undertake a reasonable investigation of new products when recommending a switch. As a result, some advisers were identified as high risk and relevant audio files and documentation were reviewed.

The quality of some audio files was poor and records are incomplete. However, Rudisao decided that it could not conclude that problematic advice had been given based on the information available and assumed that if no complaints had been made, then the clients must be satisfied with the advice.

#### **Commentary**

This is not an assumption that is beneficial to consumers. Rudisao should not assume that because a client has not complained that they should not be included in the scope of the remediation. Given Rudisao has breached its record-keeping obligations, the licensee should assume that clients who received advice from high-risk advisers in situations where records are incomplete are within the scope of the remediation.

#### **When a remediation review period extends beyond the record-retention requirements**

- RG 277.129 If licensees are maintaining adequate systems and processes to identify and remediate problems when they arise, rarely will a remediation review period extend beyond record-retention requirements (which is generally seven years). This means that there will rarely be a need to consider the use of assumptions to account for absent records beyond seven years.
- RG 277.130 If the remediation review period extends beyond the relevant record-retention requirements, it may not be possible to access or retrieve certain records. Records may have been destroyed under relevant privacy laws.
- RG 277.131 If records have been destroyed in good faith, this is likely to affect a licensee's ability to effectively remediate for older misconduct or other failures. However, licensees should consider whether it is possible and reasonable to apply assumptions that are beneficial to consumers to fill in the necessary gaps.

- RG 277.132 There may be circumstances when it is not possible to apply such assumptions—for example, if affected consumers cannot be identified with the data available. If that occurs, the licensee may make a residual remediation payment if the profit made can be reasonably ascertained: see RG 277.194–RG 277.197.
- RG 277.133 If affected consumers are known or can be reasonably identified, then generally licensees should use assumptions to calculate the loss and compensate the consumers.

#### Example 23: Applying assumptions beyond record-retention requirements

In 2020, Influence Insurance (Influence) discovered a manual processing error that resulted in duplicate home and contents insurance policies being created in its operating system when consumers amended their existing policies. An investigation found this misconduct or other failure had begun in 2003.

Influence was able to identify the affected consumers and refund the additional premiums the consumers had paid plus interest between 2008 and 2020.

For the period between 2003 and 2007, Influence was able to access legacy systems and conduct a desktop review to identify the consumers who had likely paid for duplicate policies. However, the data on the additional premiums paid by individual consumers was unavailable.

Considering that Influence could reasonably identify the consumers who had likely been affected, it decided to analyse its financial reporting data and refund the consumers the mean premium value paid for home and contents policies over the relevant period where there were no records.

#### Commentary

In these circumstances, it was appropriate for Influence to triangulate the data it held within the organisation to develop an assumption that would be beneficial to consumers, given the records it had available.

#### Example 24: Applying assumptions to account for absent records

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

Instead of relying on insurance providers to extract historical premium data and details of premiums actually paid (especially because the insurers may not have retained this information), Lussen determined that the most recent premium paid was the highest premium the consumer would have paid

over the life of the policy. It used that assumption to determine the base refund rate for each consumer for each year of impact.

### Commentary

This is an example of how a licensee made up for absent records by using an assumption that was beneficial to consumers. It also significantly increased the efficiency of the remediation, which was beneficial to the licensee.

### Example 25: Applying assumptions to account for absent records

Bellen Bank (Bellen) discovered in 2014 that it had failed to apply benefits, including fee waivers (e.g. a waiver on advice fees), interest rate discounts and bonus interest on 'BB+' products for a period of 10 years. The remediation methodology incorporated a broad range of assumptions to account for a lack of data. For example:

- Many fee types shared the same codes and it was not possible based on the available data to determine which fees were eligible for a discount. An assumption was made that all fee types were within the scope of the remediation and were refunded plus interest.
- Due to a lack of records between 2004 and 2008, it was not always possible to determine whether a consumer was erroneously charged an advice fee when they were eligible for a waiver. A sample of available files showed that 78% of consumers did not receive the eligible waiver. When unsure or when the advice file was unavailable, Bellen assumed that the advice fee should have been waived. It refunded 100% of the fees plus interest.

### Commentary

This is an example of how a licensee used the information available, despite the lack of complete or accurate records, to develop an assumption that was beneficial to consumers.

## Using assumptions for efficiency purposes

- RG 277.134 Assumptions that are to the benefit of consumers can also be used to increase the efficiency of a remediation, even when a licensee has good quality records.
- RG 277.135 Such assumptions can offer a balance between timeliness and accuracy without a trade-off in quality. If considering this approach, licensees should first ensure that the considerations at RG 277.115–RG 277.116 are satisfied.
- RG 277.136 Fund managers of managed investment schemes and superannuation trustees should refer to [RG 94](#) when remediating unit pricing errors using scheme or trust property.

**Example 26: Applying assumptions to increase efficiency**

Vault Advisers (Vault) discovered one of its advisers failed to deliver ongoing advice services to financial advice clients who were charged fees for those services. Vault reviewed all of the adviser's client files, and where it did not find evidence that the adviser had provided the required services, it refunded the fees plus interest to the clients.

Separately, Vault also sampled its other advisers and practices to determine if they had engaged in fees-for-no-service conduct. Vault subsequently discovered a cohort of clients who had likely received no service from certain advisers and practices.

Instead of reviewing each client file in that cohort to determine whether the service had actually been provided, which would have taken considerable time, effort and resources due to the complexity of the matter, Vault decided to make an assumption and refund 100% of that cohort's advice fees plus interest for the relevant period.

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

**Commentary**

It was appropriate for the licensee to compensate clients where there was no evidence that advice had been provided. The approach taken for other advisers and practices is an example of using a combination of assumptions that were beneficial to consumers as well as an example of using file reviews to increase overall efficiency and accuracy.

**Example 27: Applying assumptions to increase efficiency**

Hondo Bank (Hondo) discovered that, from December 2017 to November 2019, an error with the calculation of daily interest on commercial overdraft facilities occurred intermittently. Hondo decided it was more efficient to include all of its customers who held the overdraft facility during that time period in the remediation, rather than seeking to identify specific customers affected by the error.

**Commentary**

This is an example of how a licensee used an assumption to increase efficiency and benefit consumers.

**Example 28: Applying assumptions to increase efficiency**

Jost Sky Pty Ltd (Jost Sky) is a large financial advice firm. It was conducting a remediation after charging incorrect fees since the introduction of a new advice package two years ago.

Instead of undertaking a file review to understand exactly how much every consumer was overcharged, Jost Sky decided it would be more efficient to apply an assumption and automatically refund all fees paid below a set dollar threshold plus interest. For the remaining affected consumers who

were charged fees above the threshold, Jost Sky conducted individual file reviews to determine whether they had been mischarged.

### **Commentary**

This is an example of how a licensee used a combination of an assumption and individual file reviews to increase efficiency and benefit consumers.

## **Justifying the assumptions**

- RG 277.137 Before applying an assumption, licensees must ensure it is evidence based, documented and appropriately justified. ASIC may request these records if necessary.
- RG 277.138 Regardless of size, licensees can think creatively about where they may be able to source data from across their organisation, or from service providers or consultants, and what that data could tell them about their consumers, and how it may inform assumptions.
- RG 277.139 For example, in cases where licensees are applying assumptions to account for absent records, a licensee should consider:
- (a) what available data could inform an evidence base for the period when records are incomplete;
 

Note: The evidence base for these assumptions may differ from the evidence base available for assumptions used for efficiency purposes only (where accurate and complete records exist).
  - (b) whether other internal or external information could be triangulated to inform scoping; or
  - (c) if it is known or suspected that a consumer has held the relevant product for a longer period of time than there is data available for, this could be factored into assumptions about how far back the remediation will go.

## **Monitoring the assumptions**

- RG 277.140 If new information arises or becomes reasonably available during or following the remediation that suggests that any assumptions made are no longer beneficial to consumers, licensees should revisit the assumptions and consider whether any supplementary compensation is necessary.
- RG 277.141 ASIC may request the remediation monitoring data if necessary.

## **Segmenting and triaging consumers**

- RG 277.142 For larger or more complex remediations, licensees should consider whether there are cohorts of consumers who share common features or experiences that can be identified. The way a licensee decides to determine consumer

cohorts will depend on the specifics of the remediation and the characteristics of those specific consumers—there is no ‘one-size-fits-all’ approach that can be used.

RG 277.143 Licensees may wish to use consumer cohorts to triage consumers through the remediation—at both the investigation stage and when determining and delivering the remedy. This will help with the timeliness, efficiency and fairness of the remediation.

RG 277.144 It is appropriate for licensees to triage different consumer cohorts so that licensees can begin providing remedies for some segments while still completing the scoping of other segments. This decision could consider the following:

- (a) cohorts that are the simplest or most complex to remediate;
- (b) cohorts that hold the largest number of affected consumers;
- (c) cohorts that are receiving the largest payments;
- (d) cohorts that the licensee has contact and/or payment details for; and/or
- (e) cohorts that are experiencing situational vulnerability (this may include financial difficulty or hardship).

## G Delivering an appropriate outcome

### Key points

Delivering an appropriate outcome when conducting a remediation generally involves:

- communicating effectively with consumers (see RG 277.145–RG 277.152);
- applying ‘reasonable endeavours’ to make remediation payments (see RG 277.153–RG 277.171);
- managing the interactions between remediation, IDR and AFCA (see RG 277.172–RG 277.187); and
- dealing with money that cannot be returned to consumers, including ensuring that no profit is retained (see RG 277.188–RG 277.197).

Licensees should generally not require settlement deeds in a remediation: see RG 277.198–RG 277.202.

### Communicating with consumers

RG 277.145 The effectiveness and quality of communications to affected consumers plays a significant role in determining the success or failure of the remediation. Licensees should start planning the communications approach early in the process: see *Making it right*, pp. 6–12.

RG 277.146 Licensees should have a communications plan that seeks to ensure affected consumers:

- (a) understand what has happened;
- (b) are provided with updates when necessary and appropriate;
- (c) understand the remediation outcome and what it means for them, including how they can make further inquiries;
- (d) are able to easily follow any necessary calls to action, with support when needed (see RG 277.150–RG 277.152); and
- (e) are told how they can make a complaint about the remediation outcome (see RG 277.176).

Note: For more detailed information on how to do this in practice, see *Making it right*, pp. 7–10.

RG 277.147 Licensees should decide the appropriate means of communicating with affected consumers. This will include considering, among other things, the timing and frequency of communications and the channel(s): see *Making it right*, p. 7. The approach can vary in any given remediation and should be

scaled appropriately: see *Making it right*, p. 9. Writing communications with good communication principles (see *Making it right*, Resource C), and using a multi-channel approach, can help maximise reach and response rate.

Note 1: Licensees subject to the notify, investigate and remediate obligations must adhere to the prescribed timeframes for communicating with affected consumers: see RG 277.310–RG 277.314.

Note 2: Although contact preferences are important to consider, it should not restrict the communication channels utilised, especially if the consumer is non-responsive.

- RG 277.148 Staff who communicate verbally with consumers should be appropriately trained and quality assurance processes should be used. Any material communication that is provided to a consumer verbally should also be followed up in writing within 10 business days.
- RG 277.149 Licensees should refer to *Making it right* for further guidance on how to take a consumer-centred approach to communications, including how to test and monitor communications, and adapt the plan when required.

### **‘Calls to action’ in communications should be limited**

- RG 277.150 A key principle of conducting a remediation is that it should minimise complexity and consumer action. Accordingly, asking an affected or potentially affected consumer to take any action (i.e. a ‘call to action’) should be rare and should not be used to ask affected consumers who are likely to fall within scope (to a reasonable degree of certainty) to opt in to a remediation.
- RG 277.151 Generally, licensees should prioritise using assumptions when records are absent rather than using a ‘call to action’, such as asking the affected or potentially affected consumers to provide more information or evidence of their loss. However, there may be times when a licensee will decide it is unavoidable to ask a consumer for a response or information, or to take some form of action in response to a communication (e.g. a communication that asks an affected consumer to nominate a bank account).
- RG 277.152 See [Making it right](#) (pp. 7–9) for more information about calls to action and what to do if consumers do not respond to a call to action.

Note: ‘Non-responsive consumers’ also includes consumers who are sent refunds in the form of a cheque and do not cash them.

## **Applying ‘reasonable endeavours’ to making remediation payments**

- RG 277.153 We expect licensees to apply ‘reasonable endeavours’ to contact and make remediation payments to affected consumers, or to otherwise deliver the remediation outcome if non-monetary.

- RG 277.154 What ‘reasonable endeavours’ are appropriate in the circumstances should be determined on a case-by-case basis. In principle, reasonable endeavours are not, for example:
- (a) prioritising timely finalisation over making successful contact and payment;
  - (b) relying on one single communications channel if other forms of contact are reasonably available and the consumer is unresponsive; or
  - (c) sending a cheque without tracking cashing rates (see RG 277.169–RG 277.171).

Note 1: Superannuation trustees should refer to RG 277.165–RG 277.166 in the context of making payments to former members.

Note 2: For further guidance on applying reasonable endeavours and making low-value compensation payments, see RG 277.160–RG 277.163.

- RG 277.155 Licensees may choose to triage affected consumers by segmenting consumers into cohorts and making payments to the ‘easier’ cohorts or cohorts experiencing situational vulnerability first.
- RG 277.156 Licensees subject to the notify, investigate and remediate obligations must take reasonable steps to make remediation payments within 30 days of completing the investigation if the consumer is eligible to receive payment. Licensees may consider this guidance in meeting those obligations. If remediation payments cannot be made within 30 days despite reasonable steps, while the licensee may have complied with this specific obligation, the broader obligations relating to the remediation still apply. This means reasonable endeavours to make the payments may still need to continue beyond the prescribed period.

Note: For more information on the notify, investigate and remediate obligations, see RG 277.310–RG 277.314.

### **Obtaining up-to-date contact and payment information**

- RG 277.157 Licensees should do what they can to improve the quality or accuracy of the affected consumers’ contact and payment information. Licensees may wish to conduct this process early (for some or all cohorts) to avoid delays when making payments. Reasonable endeavours to obtain up-to-date contact and payment information may include (but are not limited to):
- (a) utilising the expertise of recovery teams, where available;
  - (b) matching data with information held in other parts of the organisation, where possible;
  - (c) accessing or purchasing data from information merchants that might assist in locating consumers;

- (d) contacting the representative, dealer or introducer who had initial contact with the consumer (where applicable); or
- (e) contracting external specialists to assist in finding current details of the consumer—this might be appropriate when larger amounts of money are owed.

RG 277.158 In circumstances where licensees do need to obtain contact and payment information directly from the consumer, the licensee should consider [Making it right](#) (pp. 6–8).

RG 277.159 If licensees cannot find any current contact details or have not received a response despite reasonable endeavours, licensees should lodge the money in a relevant state, territory or Commonwealth unclaimed money regime or make a residual remediation payment: see RG 277.188–RG 277.197.

### Low-value compensation threshold

RG 277.160 If licensees have current payment information on file (such as a bank account, PayID or EFT details), remediation payments should be made regardless of value and regardless of whether the consumer is a current or former customer.

RG 277.161 However, for former customers owed \$5 or less (after interest) with no current payment information on file, rather than making reasonable endeavours to pay the money directly to the consumer, it is appropriate for the licensee to instead *automatically* allocate the amounts towards a residual remediation payment to a charity or not-for-profit organisation registered with the ACNC (known as applying a ‘low-value compensation threshold’).

Note: For unit pricing errors, [RG 94](#) allows licensees to impose a \$20 fixed dollar minimum to payments owed to former members or lower at the licensee’s discretion.

RG 277.162 For all remaining current customers (and former customers owed more than \$5), licensees should apply reasonable endeavours to contact them. What constitutes ‘reasonable endeavours’, including the number of contact attempts, can be scalable based on value and will depend on the context (e.g. the quality or accuracy of the contact information reasonably available, and the steps already taken to update or enhance the information). If the money cannot be returned following reasonable endeavours, licensees should lodge it in an unclaimed money regime or make a residual remediation payment: see RG 277.188–RG 277.197.

RG 277.163 For remediations conducted by superannuation trustees or fund managers of managed investment schemes using trust or scheme property, if a low-value compensation threshold is applied the consolidated compensation amounts under the threshold may be retained for the benefit of the beneficiaries and/or unitholders of the same fund or scheme. A residual remediation payment cannot be made using trust or scheme assets.

## Where to return remediation money

RG 277.164 Where to return remediation money will depend on the nature of the underlying product or service subject to the remediation, and the circumstances of the affected consumer: see Table 3. For example, different processes should be followed for money paid to superannuation fund members or investors in pooled investment vehicles.

### Making payments to former members of superannuation funds

RG 277.165 Under s22 of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Unclaimed Money Act), superannuation trustees may pay an amount held on behalf of a member, former member or non-member spouse to the ATO if the trustee reasonably believes this is in the best financial interests of the member, former member or non-member spouse. The ATO is then required to take action in respect of amounts transferred to them, which may include paying the amount to a member's current superannuation account.

RG 277.166 If a superannuation trustee has recent contact information for a former member, generally trustees should at least take reasonable steps to provide notice to the former member at their last known postal address, to give them an opportunity to provide alternative instructions before the superannuation trustee transfers any amounts to the ATO in accordance with the Unclaimed Money Act: see [Information Sheet 90 Notifying members about superannuation transfers without consent](#) (INFO 90).

Note 1: The ATO has published further guidance on making voluntary payments under s22 of the Unclaimed Money Act, including an example relating to a remediation payment—see [Trustee voluntary payment of other amounts](#).

Note 2: The [Supplementary Explanatory Memorandum to the Treasury Laws Amendment \(Reuniting More Superannuation\) Bill 2020](#) provides further guidance and examples (see Chapter 1).

**Table 3: Remediation payments made in particular circumstances**

<b>Consumer is deceased</b>	<p>If the consumer is deceased (and is not a former member), reasonable endeavours should be made to make the remediation payment to the estate of the deceased person.</p> <p>Where a former member for whom remediation is required has died, the trustee may consider paying these further amount(s) in accordance with the original death benefit distribution decision to those nominated by the member in any binding death benefit nomination or otherwise to the member's dependants or legal personal representative.</p> <p>Trustees should consider the legal requirements under the trust deed, the SIS Act, the <i>Superannuation Industry (Supervision) Regulations 1994</i> (SIS Regulations), the Corporations Act and the relevant tax consequences relating to the payment of a death benefit (where relevant).</p>
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<b>Consumer is bankrupt</b>	<p>When a consumer is suspected of being bankrupt, any remediation payment should generally be directed to the individual (rather than seeking to identify the relevant trustee, administrator or creditors).</p> <p>A remediation payment may or may not be claimable by a bankruptcy trustee, depending on the nature of the compensation and the misconduct or other failure.</p> <p>A consumer who is bankrupt may need to seek legal advice and inform their trustee about a remediation payment. Licensees may wish to provide the consumer with support to seek legal advice about the payment: see RG 277.92–RG 277.94.</p>
<b>Payments related to loan products</b>	<p>If the remediation payment relates to a credit or consumer lease product that was not suitable for a consumer, licensees should consider the most appropriate method of payment, including direct to the contract (i.e. reducing the balance of the loan) or direct to the consumer.</p>
<b>Payments by superannuation trustees to superannuation accounts</b>	<p>When a superannuation trustee has engaged in misconduct or other failure and is conducting a remediation of superannuation accounts, the superannuation trustee should generally allocate the remediation amount to the affected member's superannuation interest, where it relates to that interest.</p> <p>Superannuation trustees must comply with their duties, including those under legislation and the trust deed—relevantly, prohibitions on early release of money from superannuation.</p> <p>Superannuation trustees should carefully consider the tax consequences for the affected members when undertaking remediation: see RG 277.101–RG 277.103.</p> <p>If a member has since exited the fund, the superannuation trustee may decide to transfer the amounts held for them to the ATO in accordance with the Unclaimed Money Act: see RG 277.165–RG 277.166.</p>
<b>Payments involving third parties and superannuation accounts</b>	<p>Superannuation trustees should take steps to recover, or facilitate the return of, fees paid to third parties (e.g. financial advisers) when the third party has failed to provide them the agreed service. Subject to the particular contractual arrangements, third-party licensees remediating a superannuation trustee should pay the money to that fund and not directly to the member or to the former member's current superannuation fund. Trustees should then reinstate members' accounts within the superannuation system in a timely manner.</p> <p>Note: For more information, see ASIC and APRA joint letters to registrable superannuation entities (RSEs): <a href="#">Further guidance on oversight of advice fees charged to members' superannuation accounts</a>, published 30 June 2021, and <a href="#">Oversight of fees charged to members' superannuation accounts</a>, published 10 April 2019.</p> <p>Superannuation trustees should carefully consider the tax consequences for the affected members when reinstating member accounts: see RG 277.101–RG 277.103.</p>

<p><b>Consumer is a pensioner</b></p>	<p>A remediation payment may relate to a superannuation interest where the consumer has reached preservation age and subsequently commenced a pension. In these circumstances, the remediation amount cannot be added to the capital value of the pension if the amount is a contribution or rollover. Additional contributions to other retirement products may also be restricted or have tax or other benefit consequences for the member.</p> <p>Depending on the circumstances, noting the tax considerations described in RG 277.102, the trustee may consider that it is appropriate to allocate an amount (to the extent the compensation relates to that superannuation interest) to:</p> <ul style="list-style-type: none"> <li>• a current member's superannuation interest that is supporting a superannuation income stream in retirement phase;</li> <li>• a current member's superannuation interest that is in accumulation phase (this may also be addressed through the establishment of an accumulation-phase account for the benefit of the member); or</li> <li>• a superannuation interest that is in accumulation phase for a former member.</li> </ul> <p>Depending on the current or former members' circumstances, there may be a range of options available to them in dealing with the superannuation interest, including:</p> <ul style="list-style-type: none"> <li>• retaining the remediation amount in the accumulation-phase account and generating investment earnings;</li> <li>• withdrawing the remediation amount as a superannuation lump sum and being taxed at the rates set out in Div 301 of the <i>Income Tax Assessment Act 1997</i>;</li> <li>• commencing another pension from the capital value of the remediation payment; or</li> <li>• commuting their original pension and commencing a new pension from the combined capital value of the commuted pension and the remediation payment.</li> </ul> <p>Note: Establishing an accumulation-phase account may have contribution cap effects. See <a href="#">Super contribution caps</a> for further guidance.</p>
<p><b>Payments related to pooled investment scheme products</b></p>	<p>Remediation payments involving pooled investment vehicles should be treated in accordance with this guide and <a href="#">RG 94</a>. In situations of conflict, RG 94 should be applied.</p>
<p><b>Payments into client money accounts</b></p>	<p>If a licensee does not receive payment instructions from a current client within a reasonable period of time, relevant licensees may pay the amounts into their client money account maintained under Pt 7.8 of the Corporations Act and retain it for the benefit of the client pending instructions.</p>
<p><b>Payments related to trading accounts</b></p>	<p>Payment should be made directly to the consumer (e.g. into their bank account), rather than transferred directly into the trading account.</p>
<p><b>Payments owed to deregistered companies</b></p>	<p>Under the Corporations Act, money that is the property of a deregistered company (s601AD(2)), including property held by the deregistered company as trustee (s601AD(1A)), may be forwarded to ASIC as unclaimed money.</p> <p>If the company was in liquidation before deregistration, the licensee should consider whether these funds are payable to a creditor or member, and if they should be dealt with under s544 of the Corporations Act.</p>

## How remediation money should be returned

### Automatic payments

- RG 277.167 In most cases, licensees should prioritise making automatic payments—for example, by EFT, or by another viable means to process funds automatically. This could include a consumer’s PayID details, or details of an account that a consumer holds with another reputable payment system.
- RG 277.168 If a licensee does not have appropriate account details that would enable an automatic payment to be made to the consumer, the licensee should consider if it is appropriate to contact the consumer to seek payment instructions, or to nominate an account for refunds to be credited to.

### Use of cheques

- RG 277.169 Cheques should not be the default form of payment (unless specifically requested by the consumer) and are not necessary to satisfy a reasonable endeavours standard for smaller value amounts. Licensees may choose to send a cheque when other avenues for automatic payment are not reasonably available and particularly if the only valid contact point is a home mailing address.
- RG 277.170 Licensees should monitor and record cashing rates, and reminders should be sent where appropriate to consumers who have not cashed their cheques within a reasonable period of time. Supporting communications and reminders should provide the option of allowing a consumer to securely provide their bank account details.
- RG 277.171 For actions to take on uncashed cheques despite reasonable endeavours, see RG 277.188–RG 277.197.

## Interactions with dispute resolution systems

- RG 277.172 Licensees must have a dispute resolution system that consists of:
- (a) an IDR procedure that meets the standards or requirements made or approved by ASIC; and
  - (b) membership of AFCA.

Note: See s912A(1)(g) and 1017G(1) of the Corporations Act, s47(1)(h) and (i) of the National Credit Act, s101(1) and (1A) of the SIS Act, and s47(1) and (2) of the *Retirement Savings Accounts Act 1997* (RSA Act).

- RG 277.173 Dispute resolution standards and requirements are set out in [RG 271](#), which explains how financial firms must meet their IDR obligations.

Note: There are particular standards and requirements in [ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#) and highlighted in RG 271 that are enforceable.

- RG 277.174 [AFCA's Rules](#) set out the rules and processes that apply to all complaints submitted to AFCA. Further, the [AFCA Operational Guidelines to the Rules](#) (AFCA's Operational Guidelines) provide more information about the operation of AFCA's Rules. [Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority](#) (RG 267) sets out how we perform our oversight role of AFCA.
- RG 277.175 While there are similarities between internal and external dispute resolution obligations and remediation obligations, there are also distinct differences:
- (a) *IDR*—Licensees must accept and respond to complaints initiated by consumers who have typically identified an underlying problem or issue, and have the opportunity to provide details of their individual circumstances.
  - (b) *Remediation*—Licensees proactively initiate the identification of consumers who may have been affected by an identified misconduct or other failure (regardless of the existence of complaints). Consumers may not be aware of or engaged in the process, and licensees may not always have access to information about their individual circumstances.
  - (c) *External dispute resolution*: AFCA reviews complaints by consumers if they are not satisfied with the licensee's decision following IDR.
- RG 277.176 When communicating key pieces of information to affected consumers during a remediation (e.g. the final remediation outcome), licensees should provide details of how to lodge a complaint through IDR. Licensees must also provide consumers with details about how to access AFCA in various circumstances: see [RG 271](#) at RG 271.113.

### **Interaction between remediation, IDR and AFCA**

- RG 277.177 When a remediation is underway, the IDR obligations will not apply to most of the consumers within the scope of the remediation. This is because these consumers will have been identified by the licensee as being affected and will not have made a complaint about the actual or potential misconduct or other failure.
- RG 277.178 If a consumer makes a complaint relating to a remediation, then the IDR requirements set out in [RG 271](#) (including maximum IDR timeframes) will apply to that complaint. The existence of a remediation does not exempt a licensee from its IDR obligations.
- RG 277.179 This includes complaints about:
- (a) the misconduct or other failure the subject of a remediation (i.e. when the consumer has not been included within scope or is yet to be contacted);
  - (b) the remediation process itself (e.g. delays, lack of communication); and
  - (c) the final remediation outcome.

- RG 277.180 For the remediation process to be effective, licensees should establish and maintain appropriate links between their remediation and IDR processes, and AFCA.
- RG 277.181 It is important for the complaints management function to be able to request information and share details of IDR outcomes, or outcomes at AFCA, with those conducting the remediation so they can test and review the remediation approach if the new information justifies it.
- RG 277.182 We acknowledge that sometimes licensees will receive complaints relevant to a remediation before finalising the scoping or design of the methodology. We expect licensees to meet the IDR timeframes mandated by RG 271. However, there may be some instances where there is no reasonable opportunity for the licensee to provide the IDR response within the relevant maximum IDR timeframe because the resolution of the individual complaint is particularly complex: see [RG 271](#) at RG 271.64–RG 271.66. When this exception is relied on, licensees must provide a delay notification, which informs the complainant of the reason for the delay, AFCA’s contact details and their right to escalate the complaint to AFCA.
- RG 277.183 If a licensee has resolved complaints that later become the subject of a remediation, the licensee should investigate whether the outcome of that complaint was equivalent to or better than the outcome they would have received during the remediation process. If not, the licensee should revisit the complaint and consider providing additional compensation or outcomes.

### **When to refer consumers to AFCA**

- RG 277.184 It is important that consumers have access to AFCA if they are not satisfied with the decision made in relation to whether the misconduct or other failure has occurred and whether the final remediation outcome is appropriate for them. Licensees must advise consumers that they can have their remediation outcome reviewed by AFCA, following the outcome of an IDR process.
- RG 277.185 Licensees should provide consumers with relevant information about the outcome, taking into account good communication principles: see [Making it right](#), Resource C. We recognise, however, that there may be some limited circumstances when it is appropriate to withhold certain information and documents. These circumstances might include when the release of information would endanger a third party or when it would compromise general security measures.
- RG 277.186 If AFCA receives a remediation-related complaint that has been through IDR (post-IDR referral), AFCA will not automatically refer the complaint back to the licensee. In most cases, AFCA will register the complaint and commence the case management process. This helps to ensure that consumers who have been through a remediation process and an IDR

process are not required to go through a subsequent IDR refer-back before their complaint is considered by AFCA.

- RG 277.187 To ensure that consumers have access to AFCA, depending on the nature of the misconduct or other failure, licensees may need to consider waiving any monetary or time limit, or other limits that may constrain AFCA's jurisdiction: see RG 277.98–RG 277.100.

## Dealing with money that cannot be returned to consumers

- RG 277.188 Money that cannot be returned directly to consumers, despite reasonable endeavours, cannot be kept by a licensee. Licensees must not profit from the misconduct or other failure. If the money cannot be returned despite reasonable endeavours, licensees should lodge the money in a relevant state, territory or Commonwealth unclaimed money regime or make a residual remediation payment.

Note 1: Residual remediation payments cannot be paid using scheme or trust property (such as the operational risk reserve). As such, these amounts may be retained for the benefit of the members or unitholders of the same fund or scheme.

Note 2: Licensees are responsible for the administrative expenses incurred in remediating consumers. Licensees should not pay expenses using the money that could not be returned to consumers.

- RG 277.189 Where relevant, licensees should communicate to affected consumers that, should they not respond, the licensee will lodge the money in an unclaimed money regime or otherwise make a residual remediation payment. The communication should set out that the affected consumer will remain eligible to claim the compensation owed.

### Unclaimed money regimes

- RG 277.190 All states and territories have legislation that enables them to accept and hold unclaimed money on behalf of people who are owed money. The Commonwealth also has legislation that covers, among other things, lost money related to superannuation, banking and life insurance. ASIC in particular is responsible for handling all unclaimed money from:
- (a) authorised deposit taking institutions, under s69 of the *Banking Act 1959* (Banking Act);
  - (b) life insurance companies and benefit fund friendly societies, under s216 of the Life Insurance Act; and
  - (c) companies with unclaimed money or property, under s414, 544, 601AD(2), 601AD(1A), 601NG, 668A, 668B, 1017E, 1343 and 1343A of the Corporations Act.

- RG 277.191 Licensees should be aware of their unclaimed money obligations under relevant state, territory and Commonwealth legislation and whether it applies to the remediation payments.
- RG 277.192 Money that is lodged into an unclaimed money regime is held on trust by the Australian Government as consolidated revenue and remains available for the rightful owner to claim (sometimes for a specific period of time) after it has been lodged. Some regimes may require a licensee to hold the lost money on trust for a period of time before lodgement.
- RG 277.193 Most state, territory and Commonwealth unclaimed money regimes have a minimum threshold amount. For example, provisions in the Banking Act do not allow authorised deposit-taking institutions to lodge an amount less than \$500. In these circumstances it would be appropriate to pay amounts less than \$500 as a residual remediation payment following reasonable endeavours to return the money: see RG 277.194–RG 277.197.

Note 1: See s69 of the Banking Act and reg 25 of the *Banking Regulation 2016*.

Note 2: Other state, territory and Commonwealth regimes may impose different minimum value thresholds (if any).

### **Residual remediation payments**

- RG 277.194 As an alternative to lodging the unreturned funds in an unclaimed money regime, a residual remediation payment should be made to a charity or not-for-profit organisation registered with the ACNC within 12 months of the remediation being finalised. If reasonable endeavours have been made, the residual remediation payment (or surplus) should be small.
- RG 277.195 When a licensee holds pooled funds (e.g. in a managed investment scheme or in a superannuation fund), residual remediation payments cannot be paid using scheme or trust property. It is appropriate that surplus funds are instead held for the benefit of members of the same relevant scheme or fund.
- RG 277.196 Generally, it will not be necessary for licensees to engage with ASIC about an appropriate recipient of the residual remediation payment. However, if possible, the recipient should have a connection to addressing the relevant consumer harm and should not be associated with the licensee undertaking the remediation. The recipient should also be given sufficient information so it can understand the reason for the residual remediation payment. A residual remediation payment should not be promoted by the licensee as a charitable donation.
- RG 277.197 If an affected consumer seeks compensation after the licensee has disbursed funds via a residual remediation payment, the consumer should still be paid the compensation they are owed, regardless of additional costs.

## Settlement deeds

- RG 277.198 Licensees should generally not require settlement deeds in a remediation, or assume consent to the conditions attaching to a remediation payment if a consumer has not responded to the licensee.
- RG 277.199 The use of settlement deeds in remediations can be problematic, as:
- (a) they may act to limit or remove existing consumer rights, in particular the right to make a complaint through IDR and to AFCA, in situations where a consumer might not be able to determine whether an offer is adequate;
  - (b) they can require action on behalf of the consumer—for example, signing and returning the deed of settlement and release, and possibly requiring a witness. This is contrary to the principle that a remediation should be easy for a consumer and minimise consumer actions; and
  - (c) remediations are different from dispute resolution processes because they tend to involve large-scale decision making about consumers who are unlikely to be aware of the underlying misconduct or other failure or actively involved in a remediation. Relying on implied consent is more problematic in these circumstances because individual circumstances may not be considered in remediation outcomes.
- RG 277.200 There may, however, be some limited circumstances where a licensee may be required to enter settlement deeds in order to comply with their legal duties or obligations, or comply with the conditions under the PI coverage. Licensees should consider whether the settlement deed is necessary, and whether its use is efficient, honest and fair in the circumstances.
- RG 277.201 If a settlement deed is required, we expect the deeds to be strictly limited to the specific misconduct or other failure that is the subject of the remediation payment. The settlement deed should not include confidentiality or non-disparagement clauses. For example, it should not restrict a consumer's ability to speak about the matter with ASIC (or other Commonwealth, state or territory agencies), an adviser (such as a financial counsellor or lawyer) or AFCA, including about the original misconduct or other failure that gave rise to the remediation outcome.
- RG 277.202 We expect licensees will take all reasonable steps to ensure a consumer's right to review a remediation outcome is not unreasonably restricted. This may also include providing additional support where appropriate.

Note: For those licensees subject to the notify, investigate and remediate obligations, under s912EB(10) of the Corporations Act and s51B(9) of the National Credit Act nothing in the section affects the right of the affected consumer to recover loss or damage that the consumer suffers, or will suffer, as a result of a reportable situation. This includes by way of internal or external dispute resolution.

## H Resourcing, governance and accountability

### Key points

Licensees should ensure that:

- remediations are adequately resourced (see RG 277.203–RG 277.209);
- appropriate governance arrangements are in place, including when outsourcing or obtaining independent expert assurance, where appropriate (see RG 277.210–RG 277.229); and
- there is proper record-keeping of the work that is done, and the conclusions reached (see RG 277.230–RG 277.232).

Licensees should also consider whether it may be in the public interest to report publicly on the remediation, and provide updates on progress: see RG 277.233–RG 277.235.

### Allocating adequate resources

RG 277.203 Adequate resources should be allocated to the remediation to ensure that the process is efficient and fair. For larger remediations, senior management should assess, and regularly review, the need for resources and provide them promptly.

Note: AFS licensees and credit licensees (other than APRA-regulated entities that are subject to other obligations) must have adequate resources to provide financial services or engage in credit activities authorised by the licence: see RG 277.278–RG 277.180.

RG 277.204 What are adequate resources will depend on the size and complexity of the remediation. Adequate resources could include, but are not limited to:

- (a) adequate financial resources;
- (b) the appropriate number of people;
- (c) people with the relevant knowledge, qualifications, experience, skills, training and support;
- (d) the appropriate mix of people with different specialties;
- (e) appropriate record-keeping systems;
- (f) staff with sufficient seniority who are able to sign off on decisions or respond to unexpected challenges efficiently; and
- (g) adequate technological and data infrastructure, or other resources.

RG 277.205 If a licensee (other than APRA-regulated entities that are subject to other obligations) does not have adequate resources to conduct the remediation and to provide remedies to affected consumers, it may be a breach of the

licensee's general obligations under s912A(1)(d) of the Corporations Act or s47(1)(l) of the National Credit Act.

- RG 277.206 We are likely to look more closely at the way in which remediations are being conducted if there is a significant delay in initiating the remediation process from when the misconduct or other failure was identified, or if the timeframe for remediating consumers is lengthy, taking into account (among other things) the nature of the misconduct or other failure and the number of affected consumers. Unjustified delays may indicate a lack of adequate resources to conduct the remediation, or that the licensee is not prioritising the remediation of consumers and acting efficiently, honestly and fairly. This may mean a breach of licensing obligations.

### Training of staff and utilising expertise

- RG 277.207 The selection, support and training of people involved in remediation are particularly important. Staff who are leading or managing the remediation should be aware of this guide, [Making it right](#), consumer laws relating to financial products and services, AFCA approaches to complaint resolution and relevant industry codes of practice. Staff should also be trained in the licensee's remediation policy and process, as well as the IDR requirements and procedures, especially if they are in a customer-facing role.
- RG 277.208 Licensees should also actively draw on the expertise they have available. This will vary across different organisations. Larger organisations should leverage their access to specialties such as marketing, consumer insights, behavioural insights, data analytics, data science, user experience design and so on to contribute to different aspects of the remediation.
- RG 277.209 If a licensee has a customer advocate, consider the role the customer advocate could play in shaping, overseeing, reviewing or making a positive difference to remediation processes. A customer advocate can bring a fairness lens to the remediation and assist in balancing the power imbalance between consumers and their licensee by taking the consumer viewpoint and challenging decisions that might otherwise be seen to preference a licensee's interests over consumers.

## Governance and accountability arrangements

- RG 277.210 Ensuring fair and timely consumer outcomes, including by remediating loss suffered as a result of misconduct or other failures, should be a priority for licensees. Licensees should develop and maintain a positive remediation culture, which can produce beneficial outcomes for both consumers and licensees.

RG 277.211 When a remediation is initiated, the governance arrangements and accountability structures required (including the type of involvement) will depend on the size of the licensee's business and the nature and scope of the remediation. The roles and responsibilities should be clearly understood by the licensee and person(s) with oversight of the remediation. These arrangements should be documented and made readily accessible internally.

Note: On 8 September 2022, the Australian Government introduced into Parliament the Financial Accountability Regime Bill 2022. The regime, if passed, will apply to APRA-regulated entities, and will be jointly administered by APRA and ASIC. As part of this regime, the Minister may make rules prescribing responsibilities relating to accountable entities. It is expected that accountable entities will need to nominate a person responsible for the management of remediation.

RG 277.212 Accountability over remediation is important. Licensees should have processes in place to record and report on remediation outcomes, including for smaller remediations conducted in the normal course of business.

RG 277.213 Large remediations should have a level of oversight by a senior person who is able to make, and is experienced in making, decisions for the business on a day-to-day basis. This person should receive regular and direct reporting on the progress and outcomes of the remediation to ensure consistency with ASIC guidance and any internal remediation guidance if applicable. For incorporated businesses, this may include reporting to the board or appointing a director or senior executive as the person responsible for the remediation.

RG 277.214 In some cases, it may also be appropriate to provide for oversight by a senior person who is internal to the business but removed from the operation of the remediation (e.g. the internal auditor, compliance officer or internal audit team). The person(s) providing oversight should not oversee their own work.

RG 277.215 The type of involvement of the person(s) overseeing remediations could include:

- (a) reviewing and testing the design of the remediation (including any assumptions used);
- (b) reviewing a selection of files to ensure that assessments are being undertaken consistently and fairly;
- (c) general oversight of the remediation process and checking operational effectiveness;
- (d) ensuring adequate resourcing;
- (e) ensuring a strong governance framework (including data governance where relevant) is in place to support the remediation;
- (f) meeting the requirements of any accountability regimes, if appropriate; and
- (g) providing a compliance attestation that the remediation has been conducted in a manner consistent with this guide.

RG 277.216 If a licensee has a group structure with multiple financial services brands and businesses under its licence, depending on the nature and organisation of the group, the licensee should generally ensure that it has an appropriate centralised remediation governance framework and independent oversight, with regular reporting to its board. This will ensure consistency and compliance with internal policies and procedures, mitigate institutional silos, and promote information and intelligence sharing across the whole organisation.

## Outsourcing

RG 277.217 Licensees may outsource parts of the remediation process if necessary. This may be appropriate if, for example, the remediation is particularly large scale, complex or involves vulnerable consumers, and the licensee does not have the requisite internal function or capability. However, licensees are ultimately responsible for the remediation's operation and ensuring that remediation has been conducted in a manner consistent with this guide.

RG 277.218 When outsourcing a remediation function, it should be done in a way that maintains a consumer-centred approach. Licensees that outsource part, or all, of their remediation process should:

- (a) have measures in place to ensure that due care and skill is taken in choosing suitable service providers;
- (b) ensure that the service provider is aware of the interacting obligations, in particular the trigger for and obligations of IDR under [RG 271](#);
- (c) have service level agreements in place that consider this guide and any other relevant ASIC resources (such as *Making it right*);
- (d) regularly monitor the ongoing performance of service providers; and
- (e) appropriately deal with any actions by service providers that breach service level agreements or fall short of their obligations, including reporting any significant breaches to ASIC in accordance with [RG 78](#).

RG 277.219 We encourage licensees to develop their own in-house remediation capabilities where possible. This will increase consistency, efficiency and learning in the long term.

## When it is appropriate to engage an independent expert

RG 277.220 In some situations, it may be appropriate for a business or person external to the business and any related entities, who has the relevant expertise, to be engaged to provide independent assurance over the governance, design and operation of the remediation.

RG 277.221 Engaging an independent expert may be appropriate for situations that include, but are not limited to:

- (a) large scale or complex remediations;
- (b) when a number of assumptions are made that may materially affect the scope or amount of compensation;
- (c) when the independent assurance forms part of an enforceable undertaking or ASIC-imposed licence condition(s);
- (d) when reporting to the public would be appropriate;
- (e) when a licensee has nobody sufficiently independent internally; or
- (f) when ASIC, APRA or AFCA requests the involvement of an expert.

RG 277.222 If a remediation forms part of a court enforceable undertaking, in some cases ASIC may appoint the independent expert: see the appendix in [Regulatory Guide 100](#) *Court enforceable undertakings* (RG 100).

RG 277.223 An independent expert should usually be retained directly by a licensee and not through a third party (other than ASIC or another regulator if relevant).

RG 277.224 Licensees should ensure that the expert they choose:

- (a) is, and remains, genuinely independent;
- (b) is able to exercise objective and impartial judgement; and
- (c) has appropriate measures to manage any conflicts of interests that might flow from the fact that they have been appointed by the licensee.

RG 277.225 For a list of non-exhaustive factors that are indications of the potential risks to an expert's ability to exercise objective and impartial judgement—see the appendix in [RG 100](#).

Note: The guidance about expert impartiality is relevant to all remediations whether undertaken as part of a court enforceable undertaking or not.

RG 277.226 Licensees should have regard to [Regulatory Guide 111](#) *Content of expert reports* (RG 111) and [Regulatory Guide 112](#) *Independence of experts* (RG 112) when commissioning an expert report.

### **Conflicts of interest**

RG 277.227 Licensees should have controls in place to avoid or manage any conflicts of interest. Generally, licensees should ensure that any staff or providers who engaged in the misconduct or other failure (if relevant) are not involved in the remediation and are unable to influence anyone who is involved in the remediation (e.g. file reviewers, peer reviewers, decision makers and those providing oversight of the remediation).

RG 277.228 If a conflict of interest cannot be avoided, it must be adequately managed and documented. Licensees may need to consider engaging an independent expert to provide assurance over the remediation design and execution.

- RG 277.229 An independent expert selected and appointed by the licensee should also ensure that they have appropriate measures to manage any conflicts of interest that may arise during the engagement, including from their appointment by the licensee.

## Documenting the remediation and justifying decisions

- RG 277.230 Licensees should document the remediation methodology and process. Records should track key steps and decision milestones (many of which are outlined at various points in this guide).
- RG 277.231 Good record keeping is an important part of any remediation and will help licensees:
- (a) track the remediation against consumer outcomes and monitor progress;
  - (b) justify the decision-making rationale;
  - (c) report to senior staff and ASIC if required;
  - (d) demonstrate compliance with legal obligations and this guide; and
 

Note: Licensees subject to the notify, investigate and remediate obligations must keep records of the remediation in order to demonstrate compliance: see RG 277.310–RG 277.314.
  - (e) learn from the remediation after it is finalised.
- RG 277.232 Records will also help the licensee’s IDR team and AFCA to review a remediation decision if a consumer makes a complaint about their remediation outcome.

## Reporting publicly

- RG 277.233 In general, we believe licensees should be transparent about their remediations. Public reporting (e.g. prominent disclosure on the licensee’s website) will be especially important for a larger scale remediation or a remediation that follows public reports of consumer losses, or alleged misconduct or other failures. Licensees must also comply with their continuous disclosure and financial reporting obligations in relation to remediation where relevant.
- RG 277.234 For more information about how to use transparency in a remediation, see [Making it right](#), pp. 7–8.
- RG 277.235 We may also from time to time publish details about the existence, progress or outcomes of the remediations that we are monitoring: see RG 277.266–RG 277.268.

# I Engaging with external organisations

## Key points

Licensees may need to engage with AFCA, the ATO, APRA and/or other external organisations in relation to their remediation. Licensees should also have appropriate procedures and systems in place in the event an affected consumer chooses to be legally represented.

## Australian Financial Complaints Authority

- RG 277.236 Licensees must have in place a dispute resolution system that consists of:
- (a) IDR procedures that comply with the standards and requirements made or approved by ASIC (see [RG 271](#)); and
  - (b) membership of AFCA.

Note: See s912A(1)(g) and 1017G(1) of the Corporations Act, s47(1) of the National Credit Act, s101(1) and (1A) of the SIS Act, and s47(10) and (2) of the RSA Act.

- RG 277.237 Consumers have a right to make a complaint about a remediation, including the final outcome decision. For more information about the interaction between remediation, IDR and AFCA, see [RG 277.172–RG 277.187](#).

- RG 277.238 [AFCA's Rules](#) and [AFCA's Operational Guidelines](#) set out AFCA's approach to complaints. AFCA can award compensation for financial loss suffered because of a licensee's misconduct or other failure. AFCA's decisions are binding on a licensee.

Note: AFCA's Rules at Rules D.1–D.6 set out the types of remedies that AFCA can award, including compensation for direct financial loss, indirect financial loss and non-financial loss.

- RG 277.239 It is a legislative requirement that a licensee take reasonable steps to cooperate with AFCA in resolving complaints. AFCA will report any non-cooperation to us.
- RG 277.240 Non-compliance with an AFCA scheme decision—in particular, the non-payment of a determination—is reportable to ASIC under s1052E(1)(d): see [RG 267](#) at [RG 267.173](#). AFCA must also give particulars of a contravention, breach, refusal or failure to the appropriate authorities that it becomes aware of in connection with a complaint: see s1052E(1).

## AFCA's systemic issues role

- RG 277.241 Misconduct or other failures may be identified by a licensee or a regulator. A systemic issue may be identified by AFCA as part of its systemic issues role and reported to a regulator. Regardless of the method of identification, we expect licensees to initiate and conduct the remediation in accordance with this guidance.
- RG 277.242 If AFCA considers that there is a systemic issue arising from the consideration of complaints, it must give particulars of the issue to one or more of APRA, ASIC, or the Commissioner of Taxation: see s1052E(4) of the Corporations Act.

Note: For the purposes of RG 267, a systemic issue is an issue that may affect more than one complainant, involve many complaints that are similar in nature, affect all current or potential complainants at a particular firm or affect more than one firm: see RG 267.198.

- RG 277.243 AFCA—in consultation with ASIC—is reviewing its systemic issues function and processes in response to recommendations of the 2021 Independent Review of AFCA.

Note: On 24 November 2021, Treasury published its review of AFCA under s4 of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*. For AFCA's response, see [AFCA Independent Review](#).

## Australian Taxation Office

- RG 277.244 Licensees may need to engage with the ATO on the taxation impacts on consumers when remediation payments are made and/or if there are uncertainties with the tax treatment of the remediation payment.
- RG 277.245 In some cases, drawing consumers' attention to ATO guidance about tax treatment of the remediation payment might be sufficient: see, for example, RG 277.103. In others, there may be more complex ramifications of payments and the nature of the remediation may not be covered by existing ATO guidance.
- RG 277.246 It is important that licensees consider the taxation impacts on consumers early, and consider obtaining advice to determine the best way to ensure consumers receive an appropriate amount of compensation after any tax liability tax is paid.

## Australian Prudential Regulation Authority

- RG 277.247 All APRA-regulated institutions must comply with certain breach notification requirements. A breach notification arises when an APRA-regulated institution is required, in accordance with the industry's relevant

legislation, to notify APRA of a ‘significant’ breach of a prudential requirement.

Note: See s29JA of the SIS Act, s132A of the Life Insurance Act, s38AA of the Insurance Act, s62A of the Banking Act and s95 of the *Private Health Insurance (Prudential Supervision) Act 2015*.

- RG 277.248 If a breach of APRA-administered legislation involves financial loss to members, policy holders or depositors of the institution, APRA will generally refer the matter to ASIC if it has not already been dual-reported.
- RG 277.249 If we do decide to monitor the conduct of a remediation, ASIC will usually have the primary supervisory role. Depending on the circumstances, however, ASIC and APRA may take a coordinated approach in the supervision of the remediation (if necessary) and the rectification of the related misconduct or other failure.

## Other external organisations

### PI insurers

- RG 277.250 Licensees must have arrangements for compensating consumers for loss suffered as a result of a breach by the licensee or its representatives of their obligations under Ch 7 of the Corporations Act.
- RG 277.251 Licensees with PI insurance policies should engage with their insurer at an early stage of the remediation process to assess the pool of funds available for the remediation.
- RG 277.252 Licensees should also consider discussing with their PI insurer, as early as possible in the remediation process, whether they would prefer to review any proposed remediation methodology or communications with clients. This is to minimise the risk that the rights of the PI insurer will be prejudiced by any action taken by the licensee that, as a consequence, may void or reduce cover.

### Consumer advocates and representatives

- RG 277.253 Licensees should have appropriate procedures and systems in place in the event an affected consumer chooses to be legally represented. Licensees should:
- (a) confirm the legal representative has the appropriate authority in a timely manner, and be able to adapt promptly to challenges associated with obtaining authority from consumers experiencing vulnerability or those in remote locations; and
  - (b) ensure all communications during the remediation are directed to the authorised legal representative.

## J Our role in remediations

### Key points

Licensees should be proactively conducting remediations irrespective of our involvement.

There may be some cases, however, when we will consider using the various regulatory tools and actions available to us if a licensee has not initiated a remediation when it should have, or if a licensee is not conducting its remediation in a manner consistent with this guide.

### How ASIC may become involved in a remediation

- RG 277.254 We may become aware of misconduct or other failures and remediation through proactive surveillance, reports of misconduct from the public or code monitoring bodies, information sharing from other Commonwealth financial sector regulators such as APRA or the ATO, notifications of reportable situations from licensees, or reports of systemic issues from AFCA.
- RG 277.255 Getting a remediation right is the responsibility of a licensee and we will generally not be actively involved in the conduct of a remediation. A licensee should not:
- (a) wait for us to require it to start a remediation process after it has identified the misconduct or other failure causing consumer loss; or
  - (b) assume that notifying us of the existence of a reportable situation and linked remediation means that we have assessed whether the remediation process is adequate.
- RG 277.256 In some cases, we will decide that we require further information about, or involvement in, a particular remediation. A licensee should engage with us in an open, constructive and cooperative way and give high business priority to the resolution of the remediation.

### Reports to us through the breach reporting regime

- RG 277.257 Many remediations will result from a reportable situation and therefore should be reported to us through the breach reporting regime: see RG 277.305–RG 277.309. If a remediation does not meet the significance test and is not due to a reportable situation, then it does not need to be reported to us.

- RG 277.258 When submitting a breach report under s912DAA of the Corporations Act or s50B of the National Credit Act, a licensee must provide information relevant to any consumer loss suffered and remediation conducted, and notify us when it is complete.
- RG 277.259 Depending on the circumstances, we may ask a licensee to provide specific information and metrics to us about the remediation and its progress on a regular basis using the prescribed breach reporting form, or through other channels as requested on a case-by-case basis.
- RG 277.260 We may also give written notice to direct a licensee to provide a written statement containing specified information about a remediation that we are aware of. We may require that this statement be audited or prepared by a suitably qualified person. This might be on a one-off or on a periodic basis.

Note: See, for example, s912C of the Corporations Act or s30 and 33 of the ASIC Act.

### **ASIC-initiated action and use of regulatory tools**

- RG 277.261 We expect remediations will be initiated and conducted in a manner consistent with this guide, and in line with a licensee's legal obligations irrespective of our involvement.
- RG 277.262 If we determine that a licensee has not initiated a remediation when it should have, or that a licensee is not conducting its remediation in a manner consistent with this guide, we may consider using the various regulatory actions and tools available. These may include (but are not limited to):
- (a) general monitoring of the remediation process;
  - (b) reviewing and commenting on the design and conduct of the remediation;
  - (c) requesting regular reporting on the progress of the remediation, and providing feedback on those reports;
  - (d) enforcement action;
  - (e) issuing public statements;
  - (f) requesting a senior executive or relevant accountable person to provide an attestation that the remediation has been conducted in a manner consistent with this guide;
  - (g) seeking an independent expert report on the design and conduct of the remediation;
  - (h) using other regulatory tools; or
  - (i) a combination of the above.

- RG 277.263 As an example, we may seek information from a licensee about its use of assumptions and justification if we believe the assumptions are not beneficial to consumers, particularly consumers experiencing vulnerability.
- RG 277.264 Where a licensee has engaged in a breach of the law that has led to a need to remediate, separate consideration may be given to enforcement action in relation to the underlying conduct that led to the consumer loss, including the use of compensation orders.
- RG 277.265 We may accept a court enforceable undertaking proposed by a licensee that covers remediation, if we consider it will achieve an effective and appropriate regulatory outcome that is in the public interest. For example, we may commence civil proceedings against a person but also accept an undertaking that results in remediation outcomes for a wider class of affected consumers than those referred to in the court proceedings.

Note: See [RG 100](#) for more information.

## ASIC public statements

- RG 277.266 We may publish information about the existence, progress and/or outcomes of remediations that we are monitoring. In the interests of transparency, we may publish names of entities if doing so will promote market integrity and consumer protection. This decision will be balanced against other factors such as the impact on the identifiable entity, on fair and orderly markets, and on regulatory proceedings and competition.
- RG 277.267 There are limitations on informing the public of our regulatory activities: see [Information Sheet 152](#) *Public comment on ASIC's regulatory activities* (INFO 152).
- RG 277.268 When we have accepted an enforceable undertaking from a licensee that requires reporting by an independent expert, we will make publicly available a summary of the final report, or a statement that refers to the contents of that report, on our [enforceable undertakings register](#) on our website. We may also refer to the contents of the report publicly.

## Appendix: Interaction with licensing obligations and other laws

RG 277.269 We expect licensees to conduct remediations in a manner consistent with this guide and in line with their general licensing obligations. This guidance does not always consider all potential laws, legal obligations or private arrangements unique to particular licensees. Licensees should also be cognisant of those requirements.

RG 277.270 Licensees should be aware of how the remediation interacts with the general licensing and other obligations, and remain aware of any imminent law reform. This appendix gives an overview of some of these obligations, including:

- (a) general licensing obligations including what underpins the need for an efficient, honest and fair remediation (see RG 277.271–RG 277.282);
- (b) the need for licensees to have arrangements in place for compensating consumers for detriment suffered (see RG 277.284–RG 277.287);
- (c) specific obligations relating to superannuation trustees and fund managers (see RG 277.288–RG 277.292);
- (d) the design and distribution obligations (see RG 277.293–RG 277.295);
- (e) record-keeping obligations (see RG 277.296–RG 277.304);
- (f) breach reporting obligations (see RG 277.305–RG 277.309); and
- (g) obligations to notify, investigate and remediate (see RG 277.310–RG 277.314).

Note: For the interaction between a remediation and dispute resolution requirements, see RG 277.172–RG 277.187.

### Licensing obligations

#### Providing services efficiently, honestly and fairly

RG 277.271 Underpinning our guidance is the general obligation on AFS licensees and credit licensees to do all things necessary to ensure that the financial services or credit activities covered by the licence are provided efficiently, honestly and fairly: see s912A(1)(a) of the Corporations Act and s47(1)(a) of the National Credit Act. Complying with this ongoing obligation includes licensees taking responsibility for the consequences of their misconduct or other failures, and remediating consumers who have suffered loss as a result.

RG 277.272 This obligation also extends to remediations of consumers who have suffered loss because of the licensee's current or former authorised representatives. It may also extend to misconduct or other failures of related entities described under RG 277.22.

### Complying with contractual obligations

RG 277.273 If a licensee has contractual obligations to consumers and breaches the terms of the contract (e.g. by failing to deliver products or services in accordance with the terms and conditions), this conduct could amount to a failure to provide financial services or credit activities efficiently, honestly and fairly.

Note: See Section C of [Regulatory Guide 104 AFS licensing: Meeting the general obligations](#) (RG 104) and Section C of [Regulatory Guide 205 Credit licensing: General conduct obligations](#) (RG 205).

RG 277.274 Continuing and maintaining systems that are not capable of ensuring compliance with contractual or general conduct obligations to consumers may also amount to a breach of the efficient, honest and fair obligation.

Note: See, for example, *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790. The Commonwealth Bank of Australia (CBA) admitted and the Federal Court declared that CBA breached s912A(1)(a) of the Corporations Act (among other things) for failing to apply benefits to customer accounts when it was contractually required to do so, mischarging annual fees, and continuing and maintaining systems that were not capable of ensuring compliance with obligations to customers.

### Complying with financial services and credit laws

RG 277.275 As part of holding an AFS licence or a credit licence, licensees must comply with financial services laws or credit legislation respectively: see s912A(1)(c) of the Corporations Act and s47(1)(d) of the National Credit Act.

RG 277.276 This includes complying with the prohibitions on unconscionable conduct: see s12CA–12CC of the ASIC Act.

RG 277.277 When communicating with consumers about a remediation, the licensee should ensure it is not engaging in misleading or deceptive conduct (see s12DA of the ASIC Act), or making any false or misleading representations: see s12DB of the ASIC Act.

### Having available adequate resources

RG 277.278 With limited exceptions for some APRA-regulated bodies that are subject to other obligations, licensees must have available adequate resources (including financial, technological and human resources) to provide the financial services, or engage in the credit activities, authorised by the licence and to carry out supervisory arrangements: see s912A(1)(d) of the Corporations Act and s47(1)(l) of the National Credit Act.

- RG 277.279 If a licensee does not have adequate resources to conduct the remediation (when appropriate), and to provide remedies to consumers, the licensee may be in breach of this obligation.
- RG 277.280 See RG 277.203–RG 277.209 for more detail about what constitutes adequate resources in the context of a remediation.

### Ensuring proper monitoring and supervision

- RG 277.281 Licensees must:
- (a) take reasonable steps to ensure that authorised representatives comply with the financial services laws or credit legislation (see s912A(1) of the Corporations Act and s47(1)(e) of the National Credit Act); and
  - (b) ensure that authorised representatives are adequately trained, and competent to provide the financial services or engage in credit activities authorised by the licence (see s912A(1)(f) of the Corporations Act and s47(1)(g) of the National Credit Act).
- RG 277.282 When the misconduct or other failure is identified in relation to an existing representative, licensees should take steps to rectify any deficiencies in the representative's behaviour, and any resulting detriment should be remedied where appropriate.

Note: See [RG 104](#) and [RG 205](#) for further information.

### Dispute resolution systems

- RG 277.283 For guidance on dispute resolution system obligations, and how to manage the interaction with remediation, see RG 277.172–RG 277.187.

## Arrangements for compensating consumers

- RG 277.284 Under s912B of the Corporations Act, and s48 of the National Credit Act, a licensee must have arrangements for compensating consumers for loss or damage suffered because of a breach of the relevant obligations under Chapter 7 of the Corporations Act or contraventions of the National Credit Act by the licensee or its representatives.
- RG 277.285 These arrangements must:
- (a) satisfy the requirements for licensees to have PI insurance that is adequate, considering the nature of the licensee's business and its potential liability for compensation claims (see reg 7.6.02AAA of the Corporations Regulations and reg 12 of the National Credit Regulations); or

- (b) be approved by ASIC as alternative arrangements.

Note 1: [Regulatory Guide 126 Compensation and insurance arrangements for AFS licensees](#) (RG 126) and [Regulatory Guide 210 Compensation and insurance arrangements for credit licensees](#) (RG 210) set out what ASIC regards as the minimum requirements for adequate PI insurance. The guides also provide information about when we will approve alternative arrangements.

Note 2: The Corporations Regulations and National Credit Regulations provide exemptions from the requirements to have compensation arrangements for some licensees that are regulated by APRA or are related to an entity regulated by APRA, however these entities are subject to other obligations.

Note 3: See also RG 277.250–RG 277.252.

- RG 277.286 Section 52(8) of the SIS Act requires superannuation trustees to formulate and give effect to a risk management strategy, and to maintain capital, a reserve, or both, covering the entity’s operational risk.

Note: Further detail about the size of this reserve and how it may be used is set out in APRA’s [Prudential Standard SPS 114 Operational Risk Financial Requirement](#). It notes that examples of operational risks that may lead to operational risk events are provided in APRA’s Prudential Practice Guide SPG 220 *Risk management*. This guide can be accessed from the [Prudential and reporting standards for superannuation webpage](#) on APRA’s website.

- RG 277.287 In response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Australian Government committed to establishing a forward-looking and industry-funded compensation scheme of last resort that extends beyond personal advice. The scheme will operate as a last resort mechanism to pay compensation owed to some consumers and small businesses that receive a determination from AFCA but where the licensee is unable to pay. The proposed scheme will not apply to remediation programs unless an affected consumer has received an AFCA determination in their favour.

Note: On 8 September 2022, the Australian Government introduced a package of legislation to establish the compensation scheme of last resort into Parliament by way of the Financial Sector Reform Bill 2022, Financial Services Compensation Scheme of Last Resort Levy Bill 2022 and the Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022.

## Obligations relating to superannuation trustees and fund managers

- RG 277.288 Superannuation trustees must hold an AFS licence and are subject to the terms of the trust deed, general law duties and statutory duties and obligations under legislation that includes the Corporations Act and the SIS Act—for example, *doing all things necessary* to provide the financial services covered by its licence efficiently, honestly and fairly (s912A(1)(a) of the Corporations Act) and to comply with the covenants in s52(2) of the SIS Act. Importantly, decisions about remediation (including the manner and

extent in which to remediate) must be made in the context of complying with all of a superannuation trustee's relevant legal obligations.

- RG 277.289 Fund managers of registered managed investment schemes also have additional general law and statutory obligations—for example, to act honestly and in the best interests of their members.
- RG 277.290 Superannuation trustees should document decisions concerning remediation, including the manner and extent of remediation. The trustee should be able to provide evidence on request that their decision was, for example:
- (a) in the best financial interests of members; and
  - (b) compliant with their other obligations such as those under the Corporations Act.
- RG 277.291 There may be times when a third-party licensee (such as an advice business, insurer or administrator) is conducting a remediation for misconduct or other failure affecting a superannuation trustee's or fund manager's members. Depending on the nature of the misconduct or other failure and the contractual relationship(s), trustees and fund managers may have obligations relating to pursuing and/or facilitating remediation payments from third-party licensees, such as obligations to 'get in' trust or scheme property and to ensure a member's account is made whole.
- RG 277.292 This guidance is general only and will not take into account particular circumstances, trust deeds, duties or obligations specific to a fund or scheme.

## Design and distribution obligations

- RG 277.293 Issuers and distributors of financial products must comply with the design and distribution obligations in Pt 7.8A of the Corporations Act. These obligations are intended to help consumers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products.
- RG 277.294 If a consumer suffers loss or damage due to a licensee's breach of the design and distribution obligations in s994B, 994C, 994D, 994E(1) or (3) of the Corporations Act, they can seek to recover that loss or damage in court by taking action against the entity.
- RG 277.295 When a consumer has suffered loss or damage—whether monetary or non-monetary, or both—as a result of an entity's breach of the design and distribution obligations, we expect that the entity will remediate. This may include (but is not limited to):
- (a) waiving any conditions or obligations on the consumer under contract;
  - (b) terminating the contract at no cost or disadvantage to the consumer;

- (c) refunding any money paid by the consumer plus interest;
- (d) providing free remedial financial advice; and
- (e) moving the consumer into an appropriate product.

Note: See [RG 274](#) at RG 274.248.

## Record-keeping obligations

RG 277.296 Licensees have a number of record-keeping obligations that refer to different record-retention periods (if any). These obligations are relevant to the identification of misconduct or other failures and its impact on consumers, as well as how efficiently a remediation will run.

RG 277.297 Specific record-keeping obligations apply for AFS licensees and for credit licensees, including in relation to their authorised representatives and credit representatives respectively.

Note: See [Regulatory Guide 175](#) *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) and [\[CO 14/923\]](#) for record keeping and personal advice, and [RG 205](#).

RG 277.298 Superannuation trustees have additional record-keeping obligations as set out under the SIS Act, SIS Regulations, and APRA prudential and reporting standards. For example, under s103 of the SIS Act, trustees must keep, and retain for at least 10 years, minutes of all meetings at which matters affecting the entity were considered. Section 105 of the SIS Act requires trustees to keep copies of all member or beneficiary reports for at least 10 years.

RG 277.299 If a licensee outsources the record-keeping functions or allows a representative to hold records, the licensee remains responsible for complying with these obligations. Licensees should ensure that records held by a third party are readily accessible.

RG 277.300 If licensees have absent records as a result of breaches of record-keeping obligations and as a result cannot determine all consumers affected or what they are owed, we expect the licensee to apply assumptions where appropriate: see RG 277.126–RG 277.128.

## Documenting the remediation

RG 277.301 Licensees should ensure proper systems and processes are in place to document and record the remediation.

RG 277.302 Other than specific record-keeping obligations imposed on licensees, record-keeping requirements are implied by the general duties imposed under s912A of the Corporations Act and s47 of the National Credit Act. The relevant duties of a licensee that imply such a record-keeping obligation include:

- (a) the duty to do all things necessary to ensure that the financial services and credit activities covered by the licence are provided efficiently, honestly and fairly (see s912A(1)(a) and s47(1), respectively);
- (b) the duties to comply with the financial services and credit legislation and to take all reasonable steps to ensure its representatives comply with these laws (see s912A(1)(c)–(ca) and s47(1)(d)–(e), respectively);
- (c) the duty to have an adequate dispute resolution system (see s912A(1)(g) and s47(1)(h), respectively); and
- (d) the duty to have adequate risk management systems in place (see s912A(1)(h) and s47(1)(l), respectively).

RG 277.303 AFS licensees and credit licensees also have a duty to take reasonable steps to ensure that their representatives comply with the obligations under the Corporations Act and National Credit Act.

RG 277.304 The notify, investigate and remediate obligations impose criminal sanctions on particular licensees for failing to maintain records to demonstrate compliance with the requirement to notify, investigate and remediate misconduct.

Note: See s912EC(1) of the Corporations Act and s51C(1) of the National Credit Act.

## Breach reporting obligations

RG 277.305 AFS licensees and credit licensees must report to ASIC a range of conduct that the law describes as ‘reportable situations’: see s912DAA of the Corporations Act and s50B of the National Credit Act. This may include conduct engaged in during the remediation process in breach of s912A(1)(a) of the Corporations Act or s47 of the National Credit Act, if it constitutes a significant breach.

Note: For guidance about what is a reportable situation, see [RG 78](#) at RG 78.24–RG 78.33 and at Example 3(g) of Table 2: Examples of deemed significant breaches.

RG 277.306 AFS licensees and credit licensees must report to ASIC using the prescribed form (through the ASIC Regulatory Portal) within 30 days after first knowing, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see s912DAA(2)–(3) of the Corporations Act, and s50C(2) and 50B(4) of the National Credit Act.

RG 277.307 Reportable situations include (among other things) breaches that are deemed significant, such as breaches of some civil penalty provisions, and breaches resulting in, or likely to result in, material loss or damage to consumers. This can include material loss or damage for one consumer: see [RG 78](#) at RG 78.45. Other breaches may be significant having regard to certain factors under s912D(5) of the Corporations Act or s50A(5) of the National Credit Act.

RG 277.308 Many remediations will result from reportable situations. When lodging the prescribed reportable situation form, licensees must provide details of any remediation that has been or is being developed to compensate consumers who have suffered loss, including expected timeframes, and should provide information about the completion of remediation.

Note: See [RG 78](#), Table 8 for further information.

RG 277.309 If the misconduct or other failure is not reportable to ASIC, but requires compensation to consumers or needs to be rectified in some other way, we expect licensees to take appropriate remedial action even though they are not required to report the breach. In other words, licensees should be remediating misconduct or other failures regardless of whether they are reportable situations.

## Obligations to notify, investigate and remediate

RG 277.310 AFS licensees that provide personal advice to retail clients and credit licensees that provide mortgage broking services to consumers (and their representatives) must follow the notify, investigate and remediate obligations in certain circumstances: see [INFO 259](#). Licensees must consider these obligations in the context of their broader obligations under the existing remediation framework.

RG 277.311 If the obligations are triggered, the licensee must notify the affected consumers of the reportable situation, investigate the nature and full extent of the reportable situation and remediate affected consumers within certain timeframes. Licensees must also maintain records to show compliance with these obligations.

Note: These obligations are set out for AFS licensees in Pt 7.6, Div 3, Subdiv C of the Corporations Act, and for credit licensees in Pt 2-2, Div 5, Subdiv C of the National Credit Act.

RG 277.312 The obligation on AFS licensees and credit licensees to notify, investigate and remediate is broadly as follows:

- (a) firstly, when a licensee has reasonable grounds to believe there has been a certain reportable situation, the licensee must:
  - (v) within 30 days, take reasonable steps to notify affected consumers of the reportable situation; and
  - (vi) within 30 days, start an investigation into the nature and full extent of the reportable situation (including the loss or damage the affected consumer suffered or will suffer). The investigation should be completed as soon as is reasonably practicable after it is commenced; and

- (b) secondly, once an investigation is complete, the licensee must:
  - (vii) within 10 days, take reasonable steps to notify affected consumers of the outcome of the investigation; and
  - (viii) within 30 days, take reasonable steps to pay affected consumers remediation of an amount equal to the loss or damage.

Note: Under these specific obligations, licensees must pay remediation to a consumer if they reasonably believe the consumer has suffered or will suffer loss or damage as a result of the reportable situation, and the consumer has a legally enforceable right to recover that loss or damage.

RG 277.313 These obligations are aimed at a subset of licensees (those that provide personal advice and credit assistance) and address conduct that historically remained undetected for undue periods. It does not replace existing obligations, but builds on the existing remediation framework under a licensee's general obligations. Financial advisers and mortgage brokers will need to conduct remediations in a manner that is consistent with this guide and comply with the obligations to notify, investigate and remediate.

Note: See paragraphs 12.12–12.13 of the [Explanatory Memorandum to the Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (Explanatory Memorandum).

RG 277.314 To illustrate, the Explanatory Memorandum makes clear that in circumstances where a person falls out of scope at any stage of the obligations to notify, investigate and remediate, the licensee must continue to consider the requirements under the existing remediation framework in deciding whether it is efficient, honest and fair to remediate.

Note: See paragraphs 12.33–12.126 of the [Explanatory Memorandum](#) and [INFO 259](#) for more information.

## Key terms

Term	Meaning in this document
ACNC	Australian Charities and Not-for-profits Commission
AFCA	Australian Financial Complaints Authority—the external dispute resolution scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
AFCA's Operational Guidelines	<a href="#"><u>AFCA Operational Guidelines to the Rules</u></a>
AFCA's Rules	<a href="#"><u>AFCA Complaint Resolution Scheme Rules</u></a>
affected consumer	Refers to both a client and a consumer as these terms are defined in the Corporations Act and the National Credit Act
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
Banking Act	<i>Banking Act 1959</i>
consumer	A person or small business, which includes, at a minimum: <ul style="list-style-type: none"> <li>• an individual consumer or guarantor;</li> <li>• a superannuation fund member or a third-party beneficiary eligible to make a complaint to AFCA under s1053, or taken to be a member of a regulated superannuation fund or approved deposit fund, or a holder of an RSA, as provided for by s1053A, but excludes shareholders; and</li> <li>• a small business as defined in modified s761G of the Corporations Act</li> </ul> <p>Note: This definition includes a former and/or current customer.</p>

Term	Meaning in this document
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	<i>Corporations Regulations 2001</i>
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit assistance	Has the meaning given in s8 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds a credit licence under s35 of the National Credit Act
EFT	Electronic funds transfer
enforcement action	Includes 'enforcement proceedings' as defined in the National Credit Act, Schedule 1 (National Credit Code), and the giving of default notices, which is required before commencing enforcement proceedings under s88 of the National Credit Code
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
IDR procedures (or IDR processes)	The internal dispute resolution procedures that meet the requirements and standards made and approved by ASIC under <a href="#">RG 271</a> and <a href="#">ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98</a>
INFO 232 (for example)	An ASIC information sheet (in this example numbered 232)
Insurance Act	<i>Insurance Act 1973</i>
Insurance Contracts Act	<i>Insurance Contracts Act 1984</i>
licence	An AFS licence, credit licence or RSE licence
licensee	An AFS licensee or a credit licensee
Life Insurance Act	<i>Life Insurance Act 1995</i>
loss	Includes actual or potential loss, detriment or disadvantage suffered by one or more consumers. Loss could be monetary or non-monetary, or both
<i>Making it right</i>	<a href="#"><u><i>Making it right: How to run a consumer-centred remediation</i></u></a>

Term	Meaning in this document
managed investment scheme	Has the meaning given in s9 of the Corporations Act
member	A member of a superannuation entity, and includes a prospective member
misconduct or other failure	<p>Misconduct or other failure relating to the provision of financial services or engagement in credit activities covered under or authorised by a licensee's relevant licence. It covers conduct described in RG 277.22–RG 277.29</p> <p>Note: Misconduct or other failure extends to the decisions, omissions and behaviour of a licensee, and its current and former authorised representatives, third-party service or product providers, consultants and other significant related entities.</p>
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Regulations	<i>National Consumer Credit Protection Regulations 2010</i>
notify, investigate, and remediate obligations	Obligations for AFS licensees under in Pt 7.6, Div 3, Subdiv C of the Corporations Act, and credit licensees in Pt 2-2, Div 5, Subdiv C of the National Credit Act
non-financial loss	<p>Where the consumer has experienced an unusual amount of:</p> <ul style="list-style-type: none"> <li>• physical inconvenience;</li> <li>• time taken to resolve a situation;</li> <li>• interference with the consumer's expectation of enjoyment or peace of mind.</li> </ul> <p>If the misconduct or other failure relates to privacy rights, and includes situations where the consumer has suffered humiliation or injured feelings.</p>
PI insurance	Professional indemnity insurance
RBA	Reserve Bank of Australia
remediation	A process, large or small, to investigate the scope of the misconduct or other failure and, if appropriate, return consumers who have suffered loss as a result of the misconduct or other failure to the position they would have otherwise been in, as closely as possible
remediation payment	<p>An amount of money owed to a consumer as a result of a remediation process.</p> <p>Note: For taxation purposes, the amount may not be characterised as a remediation payment as this will depend on the context and individual circumstances.</p>

Term	Meaning in this document
representative	Means: <ul style="list-style-type: none"> <li>• a person authorised in accordance with s916A or 916B of the Corporations Act to provide a financial service or financial services on behalf of the AFS licensee; and</li> <li>• a representative of a credit licensee, as defined in s5 of the National Credit Act</li> </ul>
residual remediation payment	Remediation money that cannot be returned to affected consumers despite reasonable endeavours, which is paid to a charity or not-for-profit organisation registered with the ACNC
RG 104 (for example)	An ASIC regulatory guide (in this example numbered 104)
RSA	A retirement savings account as defined in the RSA Act
RSA Act	<i>Retirement Savings Accounts Act 1997</i>
RSA provider	A retirement savings account provider
RSE	A registrable superannuation entity (e.g. a regulated superannuation fund)
RSE licence	A registrable superannuation entity licence (granted by APRA)
RSE licensee	A registrable superannuation entity licensee—has the meaning given in s10 of the SIS Act
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
significant related entity	A body corporate that is a subsidiary of the licensee, and has or is likely to have an effect on the licensee (or its business or activities) that is material and substantial, and is a constitutionally covered body.  Note: A significant related entity of a RSE licensee is the same, but instead of a subsidiary, the body corporate must be a connected entity of the RSE licensee.
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
superannuation fund	Has the meaning given in s10(1) of the SIS Act
superannuation trustee	A body corporate or group of individual trustees licensed by APRA under s29D of the SIS Act to operate a registrable superannuation entity (e.g. superannuation fund)
systemic issue	A matter that affects, or has the potential to affect, more than one consumer
Unclaimed Money Act	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>

## Related information

### Headnotes

adequate resources, AFCA, AFS licensees, APRA, assumptions, ATO, compensation, consumer remediation, credit licensees, detriment or disadvantage, file reviews, fund managers, general licensing obligations, governance arrangements, IDR, independent expert, licensee, loss, managed investment schemes, misconduct or other failure, PI insurance, record keeping, remediation, retail client, RSA provider, settlement deeds, superannuation trustees, tax, unit pricing

### Regulatory guides

[RG 78](#) *Breach reporting by AFS licensees and credit licensees*

[RG 94](#) *Unit pricing: Guide to good practice*

[RG 100](#) *Court enforceable undertakings*

[RG 104](#) *AFS licensing: Meeting the general obligations*

[RG 111](#) *Content of expert reports*

[RG 112](#) *Independence of experts*

[RG 126](#) *Compensation and insurance arrangements for AFS licensees*

[RG 146](#) *Licensing: Training of financial product advisers*

[RG 175](#) *Licensing: Financial product advisers—Conduct and disclosure*

[RG 205](#) *Credit licensing: General conduct obligations*

[RG 206](#) *Credit licensing: Competence and training*

[RG 210](#) *Compensation and insurance arrangements for credit licensees*

[RG 256](#) *Client review and remediation conducted by advice licensees*

Note: RG 256 only applies to a remediation that was initiated before 27 September 2022.

[RG 267](#) *Oversight of the Australian Financial Complaints Authority*

[RG 271](#) *Internal dispute resolution*

[RG 274](#) *Product design and distribution obligations*

## Information sheets

[INFO 90](#) *Notifying members about superannuation transfers without consent*

[INFO 152](#) *Public comment on ASIC's regulatory activities*

[INFO 232](#) *Fees for no service: Remediation*

[INFO 254](#) *Debt management services: Applying for a credit licence or variation*

[INFO 259](#) *Complying with the notify, investigate and remediate obligations*

## Consultation papers

[CP 335](#) *Consumer remediation: Update to RG 256*

[CP 350](#) *Consumer remediation: Further consultation*

## Reports

[REP 707](#) *Response to submissions on CP 335 Consumer remediation: Update to RG 256*

[REP 737](#) *Response to submissions on CP 350 Consumer remediation: Further consultation*

## Legislative instruments

[\[CO 14/923\]](#) *Record-keeping obligations for Australian financial services licensees when giving personal advice*

[ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#)

[SPS 114](#) *Operational Risk Financial Requirement*

## Legislation

*Australian Securities and Investments Commission Act 2001*, s12CA, 12CB, 12CC, 12DA, 12DB, 30, 33

*Banking Act 1959*, s62A, 69

*Banking Regulation 2016*, reg 25

*Corporations Act 2001*, Ch 7; Pt 7.6, Div 3, Subdiv C; Pt 7.8; Pt 7.8A; Pt 7.10; s414, 544, 601AD, 601NG, 668A, 668B, 764, 766A, 912A, 912B, 912C, 912D, 912DAA, 912EB, 912EC, 994B, 994C, 994D, 994E, 1017E, 1017G, 1052E, 1343, 1343A

*Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*

*Corporations Regulations 2001*, reg 7.6.02AAA

Financial Accountability Regime Bill 2022

Financial Sector Reform Bill 2022

Financial Sector Reform (Hayne Royal Commission Response) Bill 2020  
(Explanatory Memorandum)

Financial Services Compensation Scheme of Last Resort Levy Bill 2022

Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022

*Insurance Act 1973*, s38AA

*Insurance Contracts Act 1984*, s57

*Insurance Contracts Regulations 1985*, reg 38

*Life Insurance Act 1995*, s132A, 216

*National Consumer Credit Protection Act 2009*, Pt 2; Pt 2-2, Div 5,  
Subdiv C; s47, 48, 50A, 50B, 50C, 51B, 51C

*National Consumer Credit Protection Regulations 2010*, reg 12

*Privacy Act 1988*

*Privacy (Credit Reporting) Code 2014*

*Private Health Insurance (Prudential Supervision) Act 2015*, s95

*Superannuation Industry (Supervision) Act 1993*, s29JA, 52, 101, 103, 105

*Superannuation Industry (Supervision) Regulations 1994*

*Retirement Savings Accounts Act 1997*, s47

*Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*, s4

Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020  
(Supplementary Explanatory Memorandum)

*Unclaimed Money Act 1995*, s22

## Cases

*Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790

## Other documents

[AFCA Complaint Resolution Scheme Rules](#)

[AFCA Operational Guidelines to the Rules](#)

ATO, [Compensation received by super funds from financial institutions and insurance providers](#)

ATO, [Deficient financial advice](#)

ATO, [Fees where no service is provided](#)

ATO, [Overcharged insurance premiums](#)

ATO, [PAYG withholding and reporting obligations relating to remediation payments](#)

ATO, [Super contribution caps](#)

ATO, [Trustee voluntary payment of other amounts](#)

[Making it right: How to run a consumer-centred remediation](#)

SPG 220 *Risk management*

Note: SPG 220 can be accessed from the [Prudential and reporting standards for superannuation webpage](#) on APRA's website.