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Dear Ms Fairbairn

### **CONSULTATION PAPER 335 – CONSUMER REMEDIATION: UPDATE TO RG256**

Thank you for the opportunity to provide feedback on the proposed update to Regulatory Guide 256. AIA Australia is supportive of ASIC's intent to update RG 256 to enable a consistent, efficient, honest and fair approach to remediation, as this will lead to better outcomes for consumers.

Our submission provides comments in relation to the objectives of the consultation paper and where we believe further clarity is required. We have also provided feedback on Parts B to F, highlighting areas where clarity or change to the guidance will ensure that the objectives can be met.

#### **Objectives of the consultation paper**

Page 6 of the consultation paper sets out ASIC's objectives, including that "*a licensee... where appropriate, returns all consumers that have suffered a loss as a result of the failure to the position they would have been in, as closely as possible*". We agree that it is appropriate to remediate all customers that have suffered loss, and this is reflected in our current practice which is to routinely remediate back to product inception.

Remediation back to product inception can be difficult, for example when a claim reveals an issue in our processes that requires remediation. Claim-related remediations are typically not data-driven and would require a review of each and every claim to ascertain if the customer was impacted. Undertaking a review of each claim file would significantly increase the cost of remediations. We query whether ASIC's objective contemplates manual reviews of every claim file that may be impacted.

Further, claims records may be incomplete for a number of reasons, which can impede our ability to manually identify all impacted customers:

- In the case of claims handling, we are prevented from collecting more information than we reasonably need to assess the claim.
- Systems and capabilities often change materially from the initial product application to when a claim or redemption is made, especially in life insurance and investments which are long term products. Improvements in technology and capability don't necessarily mean that the records were poor when they were collected. For example, while historical endowment policy records may not be consistent with the amount of information we collect today, these historical records are still considered to be complete.

We propose that guidance should make it clear that where a review of historical records is largely manual and resource-intensive, licensees can use sound reason-based sampling to satisfy itself as to whether customers have suffered loss.

## **Part B - When to initiate a remediation**

AIA Australia is broadly supportive of the two-tiered approach proposed by ASIC.

While it is appropriate to remediate customers even where a breach or a significant breach does not exist, we are concerned about the uncertainty of the phrase “*a failure causing loss has breached certain standards, expectations and/or values*” contained in Proposal B1(b).

Particularly in life insurance, standards, expectations and values change over time and from person to person. This could mean that it is very difficult for licensees to determine whether a remediation is required, due to the changing nature of community standards or expectations.

Given this changing nature, there is a possibility of never being able to complete remediations as standards, expectations and values continually change. In addition, this may limit desire by licensees to improve customer experience or lift standards and values, since doing so might suggest that what was done in the past does not meet current benchmarks.

We propose that guidance should be clear that the measurement against standards, expectations or values should be tied to the relevant time. That is, the standards, expectations or values that operated at the time the failure occurred.

In addition, further clarity is needed in the updated guidance in the following areas:

- the “other external standards and expectations” referenced in Figure 1 on page 13 could be supplemented with some relevant examples.
- circumstances where remediations involve multiple AFSL holders, including responsibility and accountability for timeframes by all AFSL holders regardless of who made the error; and
- the scope of the types of consultants engaged by a licensee as contemplated in paragraph 27.

## **Part D – Using beneficial assumptions**

Paragraph 58 states that clients should be given the benefit of the doubt where there is missing information and that updated guidance will clarify that ASIC expects licensees to make beneficial assumptions in that customer’s favour if there is evidence to suggest the customer has been, or may have been, affected by the failure.

While we agree that the customer should be returned as closely as possible to the position they would have otherwise been in, we are concerned that this guidance may lead to inconsistent approaches.

For example, we interpret the guidance to suggest we refund the precise amount to those customers where we hold data, however estimate the amount by rounding up for a cohort of customers who may have purchased the product earlier and for whom we don’t hold accurate data. We query whether this approach would be deemed “fair and appropriate”, as noted in paragraph 46.

We do not consider the inconsistent or different treatment towards separate cohorts of customers to constitute unfairness. For example, payments may be made to a cohort of customers with more beneficial assumptions than another cohort of customers to efficiently complete remediation.

We propose that the guidance provide clarity on the application of beneficial assumptions such that licensees are not required to retrospectively apply these beneficial assumptions to other cohorts of customers where the use of beneficial assumptions are not needed.

## **Part E – Calculating foregone returns or interest**

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

As the revised guidance will have a wider application, ASIC intends to have clarify that the cash rate set by the Reserve Bank of Australia plus 6% compounding daily (as set out in the current RG 256) is just one example of a fair and reasonable rate.

We propose that in addition to the above clarification, guidance includes examples of rates of return that would be considered independent, fair and reasonable.

In a life insurance context, we believe the use of the 10-year Australian Government Bond yield plus 3% (as prescribed in Part 4 of the Insurance Contracts Regulations 2017) would be an independent, fair and reasonable rate under step 3 of ASIC's three-step framework.

## Part F – How to approach finding and automatically paying consumers

Proposal F1 suggests *“licensees should apply best endeavours to find and automatically pay customers, and that cheques should be issued as a last resort”*. However, in practice, seeking to contact customers who have become lost is challenging where we don't have up-to-date contact details.

There would be substantial value in the Government facilitating the sharing of information, particularly from the ATO, to enable direct payment to customers who do not have an open, suitable account. By allowing licensees and product issuers to share records and access records through the ATO, solely for the purposes of remediation, it is likely to substantially increase a licensee's and product issuer's ability to find and directly pay compensation to customers.

Proposal G1 proposes to clarify current guidance for when remediation money cannot be returned to customers, despite best endeavours.

The current RG 256 briefly mentions that licensees should make “reasonable efforts” to contact a customer when they don't respond to communications that ask the customer to respond to a specific timeframe. Some remediation communications may request the customer contact the licensee or product issuer to receive a refund but do not impose a timeframe. Therefore, removing the reference to a specified timeframe would provide more clarity. Guidance in respect to what is considered an appropriate approach to finding customers would assist licensees.

In general terms, “best endeavours” is a high standard and may lead to uncertainty as to how far a licensee's communication approach needs to go in order for the licensee to be able to conclude that a customer is uncontactable. Additionally, we note the challenge with using “reasonable efforts” or “best endeavours” where a customer has passed away. As we often don't have the information or records of a customer's estate, we rely on the executor of the estate for information about beneficiaries, which subsequently causes a delay in being able to pay compensation.

We propose

- Government facilitate the sharing of information solely for the purposes of remediation to increase the likelihood of being able to pay compensation directly to customers.
- ASIC provide guidance as to what constitutes “reasonable efforts” or “best endeavours” and that this should be practical and the cost involved to the licensee or product issuer to use “reasonable efforts” or “best endeavours” should not be disproportionate to the actual loss suffered by the customer.

Should you wish to discuss any aspects of our response, please contact  
Affairs in the first instance, on or .

, Head of Regulatory

Yours sincerely

CEO and Managing Director  
AIA Australia and New Zealand