

25 February 2021

Amanda Fairbairn, Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: remediation@asic.gov.au

By email to: remediation@asic.gov.au

Dear Amanda,

**Submission to ASIC re CP 335
Consumer remediation: Update to RG 256**

As the peak national body representing the mortgage broking industry, the Mortgage & Finance Association of Australia (**MFAA**) welcomes the opportunity to provide this submission to the ASIC on the update to *Regulatory Guide 256: Consumer remediation (RG 256)*.

1. About the MFAA

With more than 13,500 members, the MFAA is Australia's leading professional association for the mortgage broking industry, with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders, including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

2. Introduction

The MFAA is supportive of there being comprehensive guidance in place to ensure that consumers are treated honestly and fairly, and receive adequate and appropriate remediation if a consumer is harmed by the actions of a licensee.

Given that the vast majority of brokers are small businesses, the MFAA welcomes the opportunity to discuss with ASIC how the updates to RG 256 will impact brokers, who are not covered by the existing RG 256. The MFAA considers that the updates to RG 256 need to balance the needs of small businesses which may be lacking resources to implement remediation programs.

Our responses to the questions posed by Consultation Paper 335 (**CP 335**) are set out below.

3. B1 – Two-tiered approach to initiating a remediation

ASIC proposal at B1:

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

- a. Tier 1—a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and*
- b. Tier 2—given the broad nature of the obligations on them, licensees should also turn their mind to whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values.*

ASIC questions:

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

The MFAA agrees that consumers should be remediated where the misconduct, error or compliance failure of a licensee has caused loss to a consumer. However, given the imprecise and subjective nature of some of the obligations on brokers, in particular brokers' principles-based best interest duty (**BID**), the MFAA is concerned about how widely interpreted this approach may be, and is particularly concerned about the inclusion of 'potential' loss rather than actual loss in Tier 1, and a loss breaching 'expectations' in Tier 2.

We consider that a broker should only be required to remediate consumers where there has been an actual loss that has occurred, and where it is clear that the loss has resulted from the misconduct, error or compliance failure of the broker as opposed to market movements in interest rates, or due to changes or information provided by a third party (such as a lender).

A broker's obligation to a consumer is to recommend a loan that is in the consumer's best interests from the loans that the broker can access and recommend, based on a consumer's needs, objectives, priorities, preferences and financial situation. There are many variables involved in the process, including:

- the sufficiency of the panel of lenders the broker has access to;
- the information about each lender's policies and loans that are, or should reasonably be, known by the broker;
- the accuracy of the information provided by the consumer during the loan selection process;
- the priorities and preferences of the consumer during the selection process;
- the lenders that would be suitable for that consumer.

Accordingly, if something occurs which leads the consumer to be placed in a loan where a different loan would have been perceived as being 'better', whether the different loan is objectively 'better' and the reasons why the 'incorrect' loan was recommended could be due to a number of factors. However, under the new tiered system, a broker may need to commence remediation in circumstances where the loss is only potential, and a consumer's subjective expectations have not been met, as opposed to in a situation where the broker has, from an objective standpoint, acted in error and caused the consumer to incur a loss.

Importantly, BID is a new regulatory initiative which has not yet been tested, therefore it remains to be seen how this new law will be interpreted by ASIC, AFCA and the courts. As such, it should only be more extreme and clear cases of misconduct that should necessitate remediation.

Further, BID for a mortgage broker is principles-based and arguably a higher obligation than the safe-harbour equivalent for a financial adviser (for whom RG 256 was initially drafted). As mortgage brokers are already being assessed under the higher BID we do not believe that the remediation obligations should be further expanded to include expectations of consumers not being met.

It is also difficult to assess whether an error has occurred and the loss involved when considering expectations. Contrast this to a situation where a consumer has been charged an incorrect fee (either charged by a lender or a broker). In this instance, it is clear that an error has occurred, and that the consumer has suffered a loss. This sort of error is much easier to recognise and quantify, and RG 256 should recognise that different types of obligations and conduct need to be treated differently.

We consider that the guidance in RG 256 needs to ensure that it is not cast too widely because doing so will drain the resources of smaller licensees in particular and could erode consumer trust in the finance industry. In this regard, it is worth noting that 46% of mortgage brokers are sole operators and a further 15% are two-broker small businesses.¹

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

As per our response to B1Q1, when a law is principles-based, it is harder to determine whether action has occurred that necessitates remediation. The new RG 256 must take the more subjective nature of some of our financial services laws into account.

B1Q3 What is your current policy and procedure for initiating a remediation? How do you describe the standard of conduct required in your organisation for initiating a remediation?

The MFAA Code of Practice requires members to '*keep up to date with and comply with all applicable laws, regulations and practices relevant to the conduct of their business*'. This includes compliance with the general conduct obligations of licensees under section 47 of the *National Consumer Credit Protection Act 2009* (Cth), which include the obligation for licensees to, amongst other things:

- do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
- have compensation arrangements in accordance with section 48.

¹ MFAA Industry Intelligence Service – 10th Edition by Comparator page 35

4. C1 – The review period for a remediation

ASIC proposal at C1:

C1. We propose to provide guidance that, as a starting point, the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer.

ASIC questions:

Your feedback

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

Currently RG 256 states that ASIC does not generally expect advisers to review advice given more than seven years before misconduct is identified. However, many licensees do review advice beyond this time frame. CP 335 proposes to remove this time period so that remediation will cover all consumers impacted.

The MFAA agrees that brokers should not be subject to a hard and fast rule on the time period for remediation. However, as acknowledged in CP 335.45, smaller entities may not have the same data management capabilities as larger licensees and may also be reliant on third parties or contractors or employees who have left the brokerage.

Accordingly, we consider that the updates to RG 256 should state that the review period for a remediation should be as far back as a licensee can reasonably go, taking into account:

- the legal requirements for document retention – if records have been destroyed in accordance with the law, a licensee should not be required to re-construct these records (if this is even possible);
- the resources of the licensee; and
- the nature and scale of the remediation – a licensee should not be required to exhaust limited resources to remediate a small number of consumers for a non-material loss.

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

As mentioned in our response to C1Q1, smaller entities, and entities that do not retain records past the date those records are legally required (which may be due to costs associated with data and document storage), may not be able to locate all records relating to a particular issue and may therefore not be able to identify all impacted consumers. The new RG 256 must be fair and balanced in this respect and acknowledge that, particularly in relation to losses that are historical and non-material, the consumer detriment will be very low.

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

We have no further comment.

5. D1 – Using beneficial assumptions

ASIC proposal at D1:

D1. We propose to provide guidance that, overall, licensees should only use assumptions in a remediation if they are beneficial assumptions. In particular, this guidance would cover what a beneficial assumption is and set out what should be considered when using assumptions, including for specific types of assumptions.

Note: What is a beneficial assumption?

When applying assumptions, licensees should first consider whether the assumption:

- a. aims to return all affected consumers as closely as possible to the position they would have otherwise been in (this may include giving a consumer the benefit of the doubt);*
- b. is evidence-based and well documented; and*
- c. is monitored to ensure the assumption continues to achieve the goal of returning consumers as closely as possible to the position they would have otherwise been in throughout the remediation.*

ASIC questions:

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

The MFAA is supportive of an approach to remediation that ensures that an innocent party is remediated as completely as is reasonably possible given all the circumstances.

We note that CP 335.50 states that use of averages may not provide a fair result, and that CP 335.52-53 states that licensees should err on the side of including more consumers than fewer in a remediation, and cover compensation rather than under compensate.

We are generally supportive of beneficial assumptions being made but believe misconduct under BID is complex, often involves judgmental assessments or subjective assessments of past judgment decisions and it may be difficult to determine the extent of an error or any resulting loss.

We consider that the updated RG 256 should still allow for the size and resourcing of the licensee's business and the nature of the loss to be taken into account and allow brokers to make reasonable assumptions about the extent of an error or loss.

An example about the subjective nature of BID is as follows. A consumer may request that they only obtain a loan through a socially responsible lender. The broker puts forward three lenders that their research shows are socially responsible and the customer selects the lender with an interest rate that is 0.50% lower than the other two lenders. In due course the customer finds out that the lender they have selected is not classified as one that is considered socially responsible and that the broker made an error.

In this instance, there has been an error, but it is not clear that there has been a loss (in fact there has actually been a saving). The broker should be able to make reasonable assumptions in order to rectify this error.

Again, contrast a situation of a BID 'error' with the charging of an incorrect fee or interest rate where it is clear that a loss has occurred. In these circumstances, the use of beneficial assumptions is clear, but for less obvious errors such as failure to make a disclosure (for example, about commission) or not pushing a cheaper loan on to the consumer with

sufficient 'force' and the loss suffered may be less clear, particularly given that the customer may not have been approved at the time for the loan that appeared to be cheaper. The guidance in RG 256 needs to allow licensees to be reasonable in their scoping.

Again, there should also be a materiality threshold where bolder assumptions can be used for non-material losses.

D1Q2 Is it appropriate to use assumptions that result in a partial refund for some affected consumers or that involve a discount for a consumer's 'use' of the product? If not, why not?

This may be appropriate where the loss to the consumer is non-material.

D1Q3 Is it appropriate to use an assumption based on an average (e.g. in calculating loss, using the average premium or the average fees charged over a relevant period)? If not, why not?

This may be appropriate where the loss to the consumer is non-material and where such remediation does not result in under-payment.

D1Q4 Have you used an assumptions-based approach in remediations? Please provide details, including evidence of how the assumptions benefited the consumer and if you have used an average that resulted in a good consumer outcome.

The MFAA does not have direct experience in this area.

6. D2 – Using beneficial assumptions to account for absent records

ASIC proposal at D2:

D2. We propose that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.

ASIC questions:

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

We agree with this proposal in circumstances where a licensee has breached its record keeping obligations.

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

We have not identified any problems with this proposal.

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

There are no other matters that we suggest ASIC consider.

7. D3 – When it may be appropriate to use assumptions to increase efficiency

ASIC proposal at D3:

We propose that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation.

ASIC questions:

D3Q1 Do you agree with this proposal? If not, why not?

The MFAA agrees with this approach so long as licensees, particularly those which are a small business, can be reasonable with their assumptions as set out by us in our response to D1Q1.

We consider that RG 256 should, in particular, allow small business to use reasonable assumptions, particularly if the cost for obtaining additional resources will be prohibitive.

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

We consider that, for small businesses, where the cost to obtain additional resourcing will be prohibitive and not materially lead to better consumer outcomes, it is appropriate for reasonable assumptions to be used. This is particularly the case where the consumer loss is not material. Allowing small business to use assumptions will allow those small businesses to focus their attention on servicing their customers and improving their processes and systems rather than diverting their attention away from these important matters.

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

The MFAA does not have direct experience in this area.

8. E1 – Three-step framework for calculating foregone returns or interest

ASIC proposal at E1:

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

- a. *Step 1—licensees should attempt to calculate actual foregone returns or interest rates, without the use of any assumptions, if it is appropriate to do so in the circumstances;*
- b. *Step 2—if it is not appropriate, possible or reasonably practical to find out the actual rates, licensees should consider whether beneficial refund assumptions can be made if an evidence-base supports it; and*
- c. *Step 3—if there is no evidence base to support a beneficial assumption, licensees should apply a fair and reasonable rate that compounds daily and is:*
 - i. *reasonably high;*
 - ii. *relatively stable; and*
 - iii. *objectively set by an independent body*

ASIC questions

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

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

E1Q3 Should our guidance clarify whether the rate compounds (and at what interval) or whether it should be based on simple interest? Please give reasons.

The framework in the current RG 256 is specific to the financial planning industry, and as such, the MFAA has no comment except to say that a similar framework should not be imposed for brokers. This is because, even if a broker was to recommend a higher cost loan to a consumer in error, remedying the error would not be as simple as working out the difference in interest rates between the two loans.

Loan costs depend on a number of different factors, including rate, fees, loan-to-value ratio, customer type, security type, interest rate changes, and changes to fees and charges (just to name a few). A loan with different interest rates at the start may end with the same amount of interest ultimately payable due to changes in the rate over time (which can be up to 30 years). While the law does accommodate a 'comparison rate' regime, this regime is far from perfect, and the problems with it are well known and the rate is easily able to be manipulated. There is also no certainty that the customer would have been approved at the time by the second lower priced lender.

For these reasons, we consider that the new RG 256 should not apply such a framework for errors by brokers, and should rather state that brokers should be able to determine suitable remediation calculated to ensure that a consumer is not under compensated.

**9. F1 – Applying best endeavours to find and automatically pay all consumers
Three-step framework for calculating foregone returns or interest**

ASIC proposal:

We propose to provide guidance that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort.

ASIC questions:

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

The MFAA agrees with this proposal so long as what is considered 'best endeavours' is scaled to take into account the more limited resources available to small business. For example, CP 335.83 mentions the use of third party providers to assist in locating impacted consumers. This will not be feasible for many small businesses, particularly where the loss being remediated is not material.

What are considered 'best' endeavours in any particular case should take into account the size and resourcing of the licensee and the materiality of the remediation.

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

The MFAA does not have direct experience in this area.

F1Q3 What strategies have you employed to successfully reach all affected consumers? Please give examples of your experiences, including what has and has not worked and any lessons learnt.

The MFAA does not have direct experience in this area.

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

The MFAA agrees that issuing of cheques should be a last resort.

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

The MFAA does not have direct experience in this area.

F1Q6 If you are a third-party licensee for a superannuation fund or RSA, what challenges do you have in remediating members of that fund? Please give details.

The MFAA has no comment.

F1Q7 If you are a superannuation trustee, what challenges do you have in accepting and/or facilitating remediation payments from third-party licensees? Please give details.

The MFAA has no comment.

10. F2 – Removing the low-value compensation threshold

ASIC proposal:

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

- a. the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value;*
- b. it is up to licensees to decide how they will treat their unresponsive or lost consumers, and if applying a compensation threshold, what low value is fair and appropriate in line with their obligations; and*
- c. if applicable, the reasons for the decision to apply a low value threshold should be well documented and appropriately justified.*

ASIC questions:

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

The MFAA supports this proposal.

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

The MFAA agrees that if a low-value compensation threshold is applied, it should be disclosed.

11. G1 – Clarifying our guidance for remediation money that cannot be returned

ASIC proposal

We propose to clarify current guidance for when remediation money cannot be returned to consumers. That is, if a licensee cannot, despite best endeavours, find consumers to pay them compensation (including when cheques remain uncashed):

- a. the licensee must not profit from the failure (see the current RG 256 at RG 256.135);*
- b. the residual funds should be sent to a relevant state or federal unclaimed money regime if available; and*
- c. if the licensee is unable to lodge money with an unclaimed money regime, as a last resort, the money should be paid as a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for Profits Commission.*

ASIC questions:

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

The MFAA supports this proposal.

G1Q2 Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not?

The MFAA considers that this is appropriate.

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

The MFAA does not have direct experience in this area.

G1Q4 Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not?

The MFAA considers that a payment in such circumstances should be disclosed.

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

The MFAA does not have direct experience in this area.

12. H1 – Settlement deeds and fair consumer outcomes

ASIC proposal:

We propose to clarify our guidance about if and when using settlement deeds and relying on implied consent may or may not be appropriate as part of a remediation.

ASIC questions:

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

Settlement deeds are essential in some circumstances where a complaint or issue:

- has remained unresolved for some time, particularly if the consumer is acting unreasonably and refusing fair settlement offers;
- the complaint or issue has already been dealt with by an EDR scheme, or in a court, and it would be vexatious for the consumer to re-initiate EDR or court proceedings after resolution of the issue; and
- the complaint or issue is complex and it is prudent for the parties to record their agreement.

The MFAA extends its thanks to ASIC for the opportunity to respond to CP 335. If you require further information to supplement this submission, please do not hesitate to contact me on or by emailing

Yours sincerely

Chief Executive Officer
Mortgage & Finance Association of Australia