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26 February 2021

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Australian Securities and Investments Commission

By email: remediation@asic.gov.au

Dear Ms Fairbairn,

NAB'S RESPONSE TO ASIC'S CONSULTATION PAPER 335: CONSUMER REMEDIATION

Thank you for the opportunity to submit comments on ASIC's Consultation Paper 335 – Consumer Remediation: Update to RG 256 dated December 2020 (**CP 335**).

The NAB Group (**NAB**) welcomes the spirit of ASIC's proposed updates to RG 256 outlined in CP335. NAB acknowledges that CP335 aims to ensure that licensees receive clear and consistent guidance to meet their licence obligations when conducting remediation that will ultimately benefit consumers.

NAB is committed to our customers, and in particular to putting things right where we have fallen short of our obligations. NAB seeks to achieve positive and timely customer outcomes through our remediation programs. To achieve this, we have focussed and invested heavily in uplifting our remediation governance, capability, capacity and processes over the last 18 months. However, we have not stopped and are always looking to improve.

NAB is aligned with the intent of the proposals in CP335 of putting the customer first. This is how we approach remediation as an organisation and the challenges it presents for us to do better.

NAB particularly welcomes the following aspects of CP 335:

- Providing a framework for calculating foregone returns or interest which will provide greater certainty and consistency across the industry when remediating consumers (E1).
- The removal of the low value compensation threshold for *current customers* that hold an eligible account to receive a remediation payment and allowing licensees to determine their own low value compensation threshold for unresponsive, lost *and former* customers (F2).
- Clarifying how remediation money should be treated when it cannot be returned to customers despite *reasonable* endeavours (G1). To this end, NAB encourages ASIC to review the existing unclaimed money regimes, including lowering the current threshold to help return the lower value compensation payments to more customers and consider a single national solution for the collection of unclaimed remediation funds from licensees and the searching of unclaimed remediation funds by customers. NAB also suggests that

ASIC work with other government agencies to facilitate a quicker return of remediation monies to customers.

However, the key to a successful remediation is in execution and effectively delivering quality and timely customer outcomes (as well as effective business rectification). NAB is concerned that there may be possible unintended consequences with some proposals as currently drafted. These include:

- The proposed time period for remediating customers including the removal of the limitation period (C1). NAB disagrees with ASIC's proposal as it does not align with existing limitations laws and is likely to lead to delaying payment to customers. NAB proposes that the relevant period for remediation be determined from the date the issue is identified by the licensee, taking into consideration whether the licensee ought reasonably to have known about the issue prior to actual identification.
- The requirement that where assumptions are used, they only be "beneficial". NAB is concerned that this will result in overcompensation of customers and delay in scoping, calculating and paying compensation. NAB therefore proposes that licensees use *reasonable* assumptions and considers that these will still result in favourable outcomes for customers.
- The proposed two-tier approach to initiating remediation (B1), more specifically:
 - the requirement to initiate remediate when one or more customers have been impacted, which may only delay compensating customer where the existing complaints process can appropriately deal with these customers; and
 - the introduction of Tier 2, which is broad, vague and subjective and likely to lead to confusion and inconsistency in remediation across the industry.

NAB is confident that these matters can be adequately addressed and still achieve fair and timely outcomes for our customers.

NAB's detailed response is attached. The examples provided in the Appendix are for illustrative purposes for ASIC only and NAB requests that the Appendix be removed or redacted before publishing NAB's response on its website or otherwise publicising NAB's response.

NAB welcomes the opportunity to work further with ASIC in relation to its update to RG256. Should you have any questions regarding this submission, or require any further feedback, please contact _____, Associate Director, Regulatory Affairs ASIC on _____ or at _____.

Yours sincerely,

Group Executive, Legal & Commercial Services
National Australia Bank Ltd



NAB RESPONSE TO ASIC CONSULTATION PAPER CP335

Consumer Remediation: Update to RG 256

26 February 2021

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B1 ASIC Proposal

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.*

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

NAB agrees *in part* with the two-tiered approach proposed by ASIC.

NAB understands that the first tier reflects circumstances when ASIC says a remediation *must* be initiated. This largely reflects current obligations and includes when a licensee has engaged in a misconduct, error or compliance failure, resulting in actual or potential loss, detriment or disadvantage to customers. NAB is agreeable with this. However, NAB does not agree that a remediation, albeit scalable, is proportionally appropriate in the case of a nominal number of impacted customers. Events impacting a nominal number of customers are best addressed utilising existing complaints handling processes and infrastructure as these will most likely provide customers with the quickest outcome. Remediation programs and the associated processes should continue to apply to larger customer cohorts.

NAB understands that the second tier includes failures that may not fall under Tier 1, but nonetheless breach other standards, expectations and/or values, including industry codes, and cause loss. It should be noted that in some instances, a licensee's failure to comply with Code obligations (eg. Banking Code of Practice) would constitute a Tier 1 event, as banks are required to comply with the Code's terms and conditions. NAB notes that when a case falls under Tier 2, ASIC's position is that a licensee *should consider* initiating a remediation and that Tier 2 considerations do not go beyond what is reasonable to expect and are not mandatory.

NAB strives to operate in a matter consistent with community standards for the benefit of our customers. This is not limited to initiating remediation but is seen more broadly as NAB's responsibility in conducting its business as a major Australian financial institution. However, NAB is concerned with Tier 2 as proposed and does not consider that this general standard needs to be captured within a regulatory guide. It is NAB's view that if it is ASIC's intention for licensees to think broadly about the circumstances in which they might initiate remediation (to include industry code breaches and non-financial impacts of conduct on customers), this can be achieved without the formal two-tiered approach currently proposed.

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

Deciding whether to remediate a Tier 2 event

Tier 2 seeks to encourage licensees to remediate beyond their legal obligations and to use ever-evolving standards and expectations of customers and other unidentified third parties as a basis to consider whether to remediate. A general reference to "other standards, expectations and/or values" is very vague, broad and subjective and does not provide the industry with clarity. This is likely to lead to varying interpretations and approaches by licensees across the industry and

possible inequity for customers generally, which seems at odds with the purpose of the proposed update to RG256.

Further, it is unclear if ASIC will require licensees to be able to demonstrate why it was considered reasonable not to initiate remediation in particular circumstances. Given Tier 2 refers to subjective concepts such as standards, expectations and values, it could potentially cover many and varied circumstances. NAB would not expect to be required to record a decision in respect of every such event.

“one or more consumers”

To initiate remediation when *“one or more consumers”* are impacted broadens the scope of remediation to include one-off errors that may impact only one customer. The administrative and governance requirements for initiating remediation for such a small cohort may be unnecessary where customers in such instances can be remediated via the existing complaints processes and infrastructure. Using the complaint handling procedures can result in quicker outcomes for customers, while still capturing the need for any business remediation. It also minimises the risk of any failure to comply with existing regulatory guidance for complaints handling (currently RG165) to the extent of any inconsistency between the guidance notes.

**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?**

NAB’s Customer Remediation Principles seek to ensure that NAB delivers fair outcomes for customers by:

- remediating customers who have suffered loss or detriment due to an error or failure in a consistent, efficient, timely and reasonable way;
- designing customer remediation programs that are customer centric;
- making reasonable assumptions in favour of the customer;
- preventing additional impact to customers by implementing business rectification as soon as reasonably possible.

NAB’s Customer Remediation Guidelines direct Event Owners (the Executive responsible for investigating and managing all aspects of the event and the remediation program) on how to design and execute remediation programs which deliver on the Remediation Principles.

An event that impacts customers will be captured and considered by the Event Owner for remediation. The Event Owner will investigate the event, including identifying the impacted customers and how they were impacted to determine the scope of any remediation program.

Further, NAB has adopted a Tiered Governance model for remediation. The model recognises the opportunity to scale our remediation processes to accelerate remediation for less complex programs (of which the number of customers impacted is one consideration) and support our objective of getting money back to impacted customers quickly. NAB already considers whether to remediate based on the proposed Tier 1 standard, including where a failure causing loss breached an industry body code.

C1 ASIC Proposal

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.

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

NAB disagrees with ASIC's proposal.

Although NAB does remediate customers beyond the limitation period in some cases where it is fair and appropriate to do so, it is important that any ASIC guidance be consistent with existing limitation laws. These laws, which have long been recognised by the Courts¹, constitute Parliament's determination and reflect relevant public policy considerations. Moreover, as recognised in Commonwealth and State model litigant policies, model litigants are not prevented from pleading limitation periods.

The position that remediation periods should extend indefinitely is also inconsistent with the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020*,² which requires that "the affected client has a legally enforceable right to recover the loss or damage from the licensee" (and therefore incorporates requirements from various state and territory limitations acts, which in most instances will be six years). That bill has been passed by both houses of Parliament and is currently awaiting royal assent.

In our view, consistency between the soon-to-be-implemented legislation and ASIC guidance is important, and we would advocate for ASIC to align its guidance to the legal position reflected in that bill (that is, aligned to any legally recognisable cause of action, which will often be six years from the date the licensee identifies an issue causing customer loss).

The following non-exhaustive list of existing rationales applicable to causes of action being litigated within a limited time period should equally apply to remediation unless there are circumstances where it would be unfair or improper to rely upon a limitation period:

- (1) to preclude stale claims which a licensee would find it hard to resist by reason of the passage of time;
- (2) it is impractical and unreasonable for licensees to not be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a claim has become time barred; and
- (3) it can be challenging for a licensee to identify the existence of material relevant to a potential claim after the limitation period which gave rise to the action has passed.

To remove a time period for remediation completely will present significant challenges to licensees, particularly where documents/data are no longer available or able to be recreated. Short-term impacts of the proposal on individual programs include delay in paying customers and then closing programs and difficulty with scoping and communicating with long time former customers. If licensees are required to remediate for an indefinite period, longer-

¹ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552-3; 139 ALR 1 at 9; 70 ALJR 866; BC9604531 per McHugh J; *Ryan v Forstaff Engineering Personnel Pty Ltd* [2011] NSWSC 1009; BC201106789 at [31] per Barr AJ.

² In particular see proposed s 912EB(8) of the *Corporations Act 2001* (Cth) and proposed s 51B(8) of the *National Consumer Credit Protection Act 2009* (Cth).

term impacts include extending the expected tenure of all remediation programs due to the challenges arising from retrieving data from any legacy technology, data inadequacy and record keeping requirements. Ultimately, there is a real risk that the increased complexity of remediation programs will potentially cause further delays in remediating customers.

NAB acknowledges ASIC's concern (expressed in CP335 at 38) that some licensees have 'started' the time period (working backwards) from the point at which they decide to commence a remediation. Instead, NAB proposes that the relevant period for remediation be determined from the date the issue is identified by the licensee, taking into consideration whether the licensee ought reasonably to have known about the issue prior to actual identification. To the extent necessary if there is uncertainty, this date should err in the customer's favour. From this date licensees should be able to apply the limitation period. NAB acknowledges that there may be circumstances where it may not be appropriate to rely on the late identification of particular issues to exclude customers from the remediation cohort or extenuating factors may warrant an extended time period and so agrees that licensees should not rely on limitation periods where such circumstances arise. Licensees should therefore determine on a case by case basis whether remediation of customers should extend beyond the limitation period.

Contrary to paragraph 41 of the Consultation Paper, we do not believe that there currently exists any incentive for licensees to avoid proactively identifying and remediating problems as they occur. In particular, where a licensee reasonably suspects that there is an issue causing customer loss, that date will be the date from which any remediation period would be calculated, and therefore there is no incentive to delay an investigation from that date onwards. Conversely, where a licensee has no reasonable basis to suspect any error, the benefits of proactive investigation of potential issues (including through the internal audit and risk functions) will inevitably far outweigh any perceived financial benefit to a licensee in delaying or avoiding making such inquiries. One such benefit of the timely identification and initiation of remediation is less interest payable by licensees on the compensation paid to customers.

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

As noted in response to C1Q1, by reason of the passage of time, relevant information and material may be destroyed, be lost, become inaccessible or deteriorate, especially if data is sourced from multiple systems and platforms. In these circumstances, a licensee may be placed in a position of significant prejudice if required to extend a remediation period indefinitely. In addition, the further back remediation programs are required to extend, the greater the demand will be across the remediation portfolio for key internal subject matter experts (in relation to matters including product, technology and data) that have historical experience with the licensee. Such resources are limited, are required on other remediation programs and cannot be replicated (ie. with new employees). The impact of this is that these resources are utilised seeking historical data or information, which may not readily exist, when they could be better placed progressing other remediation programs. A longer remediation time period risks adding further complexity to remediation programs and potentially delaying customer outcomes, particularly where additional data quality issues arise and/or data needs to be recreated.

In support of proposal C1, ASIC notes that "*in view of changes over time to data management capabilities and IT systems and the increased value given to, and use of, product data, we understand that at least the larger licensee's incentive and ability to retain and access records may have improved since 2016*". In our view, this justification is overly simplistic, and doesn't take account of the different types and granularity of information that are necessary to fully investigate events requiring remediation. While there may have been improvements to the ability to retain certain information and advances in (for example) cloud storage, it remains an onerous and unreasonable obligation to expect a licensee to retain all materials for an indefinite period of time as a precaution against then-unknown issues arising in future.

Where complete information is not available, the proposed guidance that a licensee will remediate for an indeterminate period could lead to remediation payments being made that are not reflective of actual loss suffered by customers. This is particularly the case when combined with assumptions that are not adequately reflective of the customer's anticipated loss, as discussed further below at D1. Moreover, as ASIC identifies, record-keeping difficulties are likely to be exacerbated in smaller licensees and some Authorised Representatives.

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

Refer to responses provided regarding ASIC Proposal C1 above.

D1 ASIC Proposal

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.

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

We agree with the notion of making assumptions in favour of the customer. The use of assumptions allows for the efficient delivery of remediation programs, minimises complexity and enables prompt payments to customers. However, licensees would benefit from sensibility in applying these assumptions and so NAB suggests changing the phrase “beneficial assumptions” to “reasonable assumptions” or “assumptions which are not detrimental to customers”. Assumptions should be based on the evidence matrix specific to the event and not necessarily applied in a manner that over-compensates customers.

Further, licensees would benefit from ASIC detailing its expectations of licensees to monitor the effectiveness of and the distribution of an assumption (CP335 at 48(c) and 50). Monitoring the effectiveness of an assumption requires a comparison point. However, in practice assumptions are most likely to be made when licensees either don’t have the data to inform the initial comparison point or there is a trade-off between the cost to execute and the compensation paid for the sake of efficiency and timeliness.

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?

Yes, a partial refund or discount for “use” of the product is appropriate where a customer may have *benefited* from the use of the product. It is therefore reasonable to discount the amount of compensation by the value of the benefit (provided that it can be quantified) and giving due consideration to the detriment suffered by the customer. It is also appropriate in cases where customers do not wish to unwind the entire transaction. More specifically, many customers are content to remain in a loan and receive an amount for compensation in relation to the specific error that has occurred.

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?

Yes, NAB considers it is appropriate where it is fair to customers to do so and seeks to return customers *as closely as possible* to the position they would otherwise have been in. It is also of relevance in circumstances where customers do not wish to engage with the licensee and provide details of actual loss suffered. Using assumptions in these cases allows the bank to ensure that it has remediated impacted customers regardless of their level of participation in the process.

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.

Yes. NAB has conducted programs where it has assumed that *all potentially* impacted customers were impacted where the cost to determine the actual number of impacted customers would exceed the cost to remediate. This has benefited customers by facilitating payment promptly and paying customers who may not have been adversely impacted.

D2 ASIC Proposal

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 recordkeeping obligations.

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

Yes, NAB agrees with the use of *reasonable* assumptions to make up for absent records as it can facilitate an efficient remediation and timely payment to customers. However, it will be important to ascertain the basis for “absent records”.

If a licensee has failed to keep records in line with its obligations and as a result is unsure whether a customer has suffered a loss, it is appropriate for a licensee to make reasonable assumptions in the customer’s favour. This proposition extends to both scoping assumptions and compensation assumptions.

If records are absent as a result of legitimate data destruction the use of reasonable assumptions should not be the default position. In these circumstances it should be seen as wholly appropriate to ask customers to provide information and, if there are gaps, the assumptions open to be applied should include those that are supported by the best evidence available.

There may be instances where an assumption supported by the evidence, which may not be in the customer’s favour, can still be beneficial for the customer because it enables the licensee to provide the customer with an assessment outcome that is more likely to be aligned with the facts, and it allows for that assessment outcome to be issued in a more timely manner. It is important that licensees are transparent in this regard and disclose to the customer the assumptions made and that assumptions are rebuttable.

It is acknowledged that assumptions may not work in all circumstances, for example an assumption may be contrary to a customer’s relevant personal circumstances at point-in-time, which is unknown to the licensee.

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

ASIC proposes that beneficial refund assumptions should err on the side of overcompensation and beneficial scoping assumptions should err on the side of inclusivity. There is a risk however of a compounding benefit to customers where multiple beneficial assumptions are made, which may overcompensate customers well beyond putting them back in the position they would otherwise have been in such that licensees are penalised for their failure. A possible consequence of overcompensating customers is the tax treatment which may be applied to the payment if the ATO considers it to be an amount beyond what would compensate the customer, leaving the customer with an unexpected tax liability.

Refer to the **Appendix** for a detailed example.

It should be acknowledged that while beneficial assumptions made across a remediation program may benefit a cohort of customers collectively, there remains a risk that assumptions will not provide a perfect outcome of remediating all customers as would be the case had data existed and it was feasible to review that data. In spite of this however, there is an overall benefit to customers as the assumptions allow the cohort to be efficiently scoped and paid in a timely manner (rather than the scoping exercise taking significantly longer for minimal additional benefit and delaying the payment of compensation to the customer cohort).

In NAB's view, these practical problems can be overcome by making "reasonable assumptions".

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

No.

D3 ASIC Proposal

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

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

Yes. NAB agrees that using *reasonable* assumptions is appropriate to increase efficiency when the cost of investigation (which includes the financial resources dedicated to the investigation, the time expended and business stakeholders engaged in the process while diverted from other customer focussed activity) outweighs the compensation to be paid to customers. Reasonable assumptions used for this purpose can assist licensees to balance their obligations to customers, and to shareholders and the community to execute remediation programs promptly and efficiently. Therefore, it is important for licensees to have flexibility in applying assumptions. Changing the phrase “beneficial assumptions” to “reasonable assumptions” or “assumptions which are not detrimental to customers” will provide this flexibility. Assumptions should be based on the evidence matrix specific to the event and not necessarily applied in a manner that over-compensates customers.

Licensees would benefit from ASIC providing guidance and examples to illustrate how licensees could strike the right balance between accuracy in remediation (ie. remediating *almost, if not* 100% of loss suffered to all impacted customers) and making timely and prompt payments to impacted customers. In seeking to achieve precision in identifying, calculating and paying impacted customers, speed and time are often sacrificed such that payment is delayed by many months for little or no customer benefit. It is NAB’s view that it is fair and reasonable to strike a balance between accuracy and pace, which will generally benefit the overall cohort of impacted customers.

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

By way of example, using metrics based on data held by NAB to identify customers who are in hardship or in default of their loan repayments allows us to more quickly identify and pay compensation to those customers who are *most likely* to be affected, rather than going through the process of undertaking manual file reviews which are laborious and can be inefficient.

We do not suggest that file reviews not be undertaken. However, once the most likely affected customers have been identified, we could commence manually reviewing the files of potentially affected customers who did not fall within the metrics used.

Reasonable assumptions can also be of real assistance in remediation programs where the time to ascertain and remediate customers for their *actual* loss is excessive. This may be due to lack of quality data or complexities associated with determining redress.

An example of this is where a cohort of customers is incorrectly charged a transaction fee within a known range. If we are unable to ascertain what fee was in fact charged to each customer without considerable data analysis and detailed reconstruction of transactions, a better outcome may be to assume that all customers were charged the maximum fee and remediate on that basis.

Any efficiency uplift that arises through the application of reasonable assumptions must be real and demonstrable. The application of reasonable assumptions must be appropriate in all of the circumstances.

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

Yes. On occasions, NAB has remediated customers by paying the higher of the interest rates charged across a product, instead of calculating individual rates for customers. This has enabled a more efficient remediation and better outcome for customers.

Refer to the **Appendix** for a more detailed example.

E1 ASIC Proposal

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.

Note: The fair and reasonable rate in Step 3 is currently outlined in RG 256 at RG 256.131.

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

Yes, we agree with Steps 1, 2 and 3 subject to the following comments:

- Step 1: NAB accepts this is the ideal method. However, for advice or investment related remediations, where a historical value of customer detriment is to be determined (ie. refund of fees or a loss value attributed to inappropriate advice) a licensee does not know how the customer would have used that money at that time. The expectation is that a licensee would therefore use the customer’s actual portfolio return as the basis for interest compensation. Often this is very difficult to accurately determine and requires significant effort which is not commensurate with the value of the interest return due to the customer.
- Step 2: As noted in Step 1, while it may be possible to determine an interest amount based on a customer’s actual portfolio return, due to the effort required relative to the compensation and the material delay in remediating the customer, calculating actual interest foregone may not be the most efficient approach. We therefore suggest that “... or require effort not commensurate with the estimated interest compensation or cause material delay to customer remediation” be added to Step 2 considerations, which would allow some flexibility.

Further, the principles of compensation require that the wrongdoer put the impacted person back into the position they would have been but for the misconduct, error or failure. The principles do not speak to putting the impacted person back into a position that is better than the position they would have been in but for the misconduct, error or failure. Beneficial refund assumptions appear to seek to penalise the bank (which conduct is often created through innocent mistake or systems set up) rather than to compensate impacted persons. Assumptions should be based on available evidence which, based on knowledge of customer behaviour and market conditions, is considered to be suitable to provide appropriate and reasonable compensation – i.e. to put the customer back in the position they would have been in but for the misconduct, error or failure. NAB therefore suggests that *reasonable* refund assumptions be made.

- Step 3: NAB agrees that the rate of interest to compensate customers should be fair and reasonable – however it does not accept that the rate should be:

- Compounding daily: NAB does not consider that interest compounding at daily rates equates to the likely experience that the impacted persons suffered as a consequence of the misconduct, error or failure. There are few, if any, products that are offered by the bank that provide interest accruing at daily compounding rates. Rates should be applied consistent with the product affected.
- Reasonably high: the interest rate should be commensurate with the likely customer position but for the misconduct, error or failure. The aim of remediation is not to penalise the bank, but to compensate the customer for actual harm done. The rate should be considered in light of these principles
- Relatively stable: The aim of remediation is to put the customer back in the position they would have been in but for the misconduct, error or failure. Setting a rule that the rate must be relatively stable may be appropriate for some circumstances; however, it may not be for others. This should be cautiously adopted.
- Objectively set by an independent body: NAB accepts that the Federal Court pre-litigation interest rate has appeal as the rate of last resort in remediation as it is the likely outcome should a customer issue proceedings and succeed in obtaining a favourable compensation order.

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

The volume of work necessary to assess actual earnings or losses depends on the customer/product impacted by the misconduct, error or failure. When balanced with time efficiencies and returning money to customers, it may be more reasonable and appropriate to adopt an assumption or a Court rate of interest. Each event should be considered on its own as to what, in the view of the licensee having considered all matters relevant to the event and the remediation approach, is the most reasonable and efficient manner of remediating customers.

We suggest that the revised draft of RG256 expressly clarify that, in circumstances where it is not reasonably practicable to determine the actual interest a client would have received, that licensees have the flexibility to choose a default rate provided it satisfies the principles set out in the guidance (albeit that ASIC consider RBA+6% will be a fair and reasonable rate in these circumstances). The current guidance states that in such circumstances 'it is appropriate' (to use RBA+6%) – but ASIC's commentary on the guidance suggests RG256 is intended to convey flexibility for licensees to choose a default rate.

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.

Yes. In doing so, we ask that ASIC consider that Courts generally award simple interest. Awarding compound interest is a matter of discretion for the Court. It is usually awarded in cases in which the court considers that simple interest would not adequately compensate the party's loss. In cases in which Courts have awarded compound interest, the interest is usually compounded yearly.

In determining whether to award simple or compound interest the type of claim is not necessarily relevant. What is relevant is ensuring the interest awarded properly compensates the party for the loss of the use of its money. What use a plaintiff would otherwise have put the money to is of course dependent on the particular circumstances of each case. Compound interest is more readily awarded in cases involving a breach of trust or of fiduciary obligations.

The interest paid should provide adequate compensation for the client being “out of the money” they would otherwise have had but for the licensee’s conduct or error. It follows that the amount of interest should be comparable to the returns that the customer could have made on that money if they had retained it. In exercising their discretion to order compound interest, Courts will apply yearly rates, unless there is evidence to suggest that the rate should be monthly or daily reflecting what the customer’s earning position would have been but for the deduction of the fee.

F1 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.

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

Yes, however NAB suggests that licensees apply *reasonable* endeavours to find and pay customers. In practice, although automatic payments are preferred, automatic payments only work if the licensee has current bank account details into which deposits can be made.

Contacting existing and former customers is heavily dependent on them engaging with the licensee and ensuring they provide current contact information. ASIC has suggested the use of third-party providers to supply data to assist with locating customers. However, this is not always effective as third parties have similar constraints around accessing customer details and the additional information they can access is limited, thereby impacting their value in assisting.

There are some benefits to the use of cheques. For example, they:

- can often be a safer form of payment than electronic transfers, thereby preventing fraud;
- limit the need for customers to share information and fill out forms.

NAB does not generally use cheques to make remediation payments. However, cheques are still used for advice related remediation payments. Therefore, NAB suggests that whether a payment by cheque is the best approach to remediate customers expeditiously should be left to the licensee to determine.

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

NAB uses best endeavours to locate and pay all impacted customers. A multi channelled approach is used which might include making phone calls and sending SMS and/or emails. Without current contact information, finding and contacting customers that are owed remediation payments is very difficult. The impact is that a remediation program remains on foot for longer and more resources are deployed in order to identify/locate customers to confirm current banking information.

ASIC is correct in noting that engaging with former customers is challenging as their details may not be up to date or customers may simply not respond. NAB has used “behavioural insights” informed approaches to consider how we can engage former customers and improve response rates (for example sending correspondence in blank envelopes). However, even with current contact information, engagement with customers has varying degrees of success. Depending on the framing of correspondence, the level of customer engagement and responsiveness might be as high as 60% (for former customers receiving higher value remediation payments), or as low as 20%-40% (for lower value remediation payments). Challenges that we have faced include:

- customers not responding to letters or other forms of communications and multiple attempts being necessary;
- customers not interested in participating in the remediation;
- customers changing their contact information and not updating licensees;
- customers not willing to provide account information so that licensees can process remediation payments;
- the longer a customer has not been with a licensee, the more difficult it is to successfully make contact with them; and
- changes to customers circumstances – e.g. deceased, bankrupt, insolvent etc.

We also find former customers often suspect our contact is a scam and are reluctant to engage. The use of a combination of communication channels to help our customers know that our correspondence is genuine can assist, but customer distrust and apathy remains a concern.

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.

Further to our response to F1Q2, NAB has employed multiple strategies to reach affected customers including:

- trialling the use of different communication channels;
- using combinations of channels (including sending correspondence in non-branded envelopes); and
- using varied language in correspondence to address possible emotional triggers, in efforts to improve the effectiveness of its contact strategy.

NAB also engaged the services of a third-party vendor to support in updating customer contact details. NAB conducted a pilot program with a third party to improve the quality of its customer contact details and increase response rates from former customers. The outcome of the trial was an uplift in customer responses by less than 1%. It was found that:

- there was an increased risk in sending customer data to the third party for “washing”;
- there was no guarantee the third party could provide updated and accurate information; and
- the process added lead time, complexity and cost to the remediation program (with no material improvement).

Employing this approach was not considered sufficiently successful to adopt for future programs.

Successfully reaching impacted customers will continue to be an area of focus for NAB.

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

Further to our response to F1Q1, issuing cheques should not be considered a last resort method of payment. Determining the method of payment should be left to the licensee. It should be noted that issuing a cheque (in some circumstances) to a known address limits the customer contact and engagement required. It means customers don't have to share personal information or complete forms. It also provides them with the funds and they alone are able to call on the cheque. For these reasons, among others, payment by cheque may be the preferred method for many customers.

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

For existing NAB customers this is relatively easy. However, care still needs to be taken to ensure that existing customer bank account details are current and not in fact dormant or subject to a stop or block (for example to protect against fraud) Customers' circumstances change, for example changes to marital status and death or change to trustees.

For existing NAB customers with accounts that do not accept deposits and former customers, both of whom do not have current contact information, we encounter the difficulties referred to in F1Q2. This also results in delays in money getting into the customers hands.

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.

Not applicable.

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.

Not applicable.

F2 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.*

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

We agree with the principle of this proposal, subject to the following comments:

- (a) return *all* customers – NAB generally refunds all *current* customers, regardless of the value of compensation to be paid. However, NAB does apply the current \$20 low value compensation threshold to customers who no longer hold an account we can pay;
- (b) licensees to decide how to treat unresponsive or lost customers – NAB considers the effort in making reasonable attempts to contact impacted customers for small compensation amounts and then processing small value payments is significant. It is inefficient to pay former customers a nominal compensation sum, where the cost of corresponding and engaging with the customer exceeds the value of the compensation. Further, there is a substantial risk of causing further adverse customer impact and a poor experience (for example customers can become frustrated and angry at the attempts to communicate and engage (or “pestering”) for small remediation sums), which can lead to an increase in customer complaints. This in turn impacts the expediency of the remediation program. It is therefore imperative that licensees should determine any low value threshold. As to whether it should be set on a case by case basis or otherwise, is a matter for the licensee to determine. NAB may prefer to set a standard across the enterprise (with an exceptions process) given the volume of events and the need to have operationally efficient processes;
- (c) justify and document decisions – NAB agrees that a licensee should document and be able to reasonably justify their chosen low value compensation threshold. If a standard threshold is set across the enterprise, the rationale for this should be appropriately documented, and any change or exceptions to the standard properly documented and justifiable on each occasion.

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

ASIC’s proposal is unclear. It does not specify to whom the disclosure should be made nor the form that disclosure should take.

If ASIC is considering disclosure of the use of a low value compensation threshold, we suggest that any proactive disclosure be made at the discretion of the licensee (ie. there be no requirement to contact individual customers if they sit below the threshold). Further consideration should be given to the nature and purpose of disclosure if licensees are required to have reasons for applying a low value compensation threshold well documented and appropriately justified.

G1 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.

Note: Residual remediation payments cannot be paid using assets of a superannuation fund or a pooled investment scheme.

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

Yes, NAB agrees in principle however suggests that licensees use *reasonable* endeavours (rather than *best* endeavours) to find customers.

Licensees would welcome ASIC refining the existing unclaimed monies regime. Currently there are multiple regimes with varying requirements (although these don't all apply to ADIs), which leads to complexity. The current regime may also create confusion for customers seeking to recover funds owed to them as they may not know which jurisdiction to search in and the effort may not be worthwhile for very small amounts, resulting in fewer customers actually being compensated.

NAB considers that the unclaimed monies regime in the *Banking Act* is not "fit for purpose" for unclaimed remediation funds. Specifically, s.69 of the *Banking Act*:

- only applies to ADIs (meaning non-ADI licensees are not captured, which may be confusing for customers);
- imposes a \$500 minimum amount per customer (meaning low value amounts are not captured);
- requires the relevant customer account to have been dormant for 7 years (meaning the ADI must hold the funds until the time period has elapsed), thereby slowing down the process for returning money to customers;
- requires the amounts to be legally payable (which is problematic for amounts to be paid under ASIC's proposed "Tier 2" category set out in Proposal B1); and
- requires the "the time within which proceedings may be taken for the recovery [of amounts] has expired" (which is problematic for amounts owing for less than 6 years, the recovery of which is not statute barred).

Similar criticisms can also be made in relation to state based unclaimed money regimes.

Given that ASIC already administers the *Banking Act* unclaimed monies regime, we believe that there is an opportunity for ASIC to step in and offer a single national solution for the collection of unclaimed remediation funds from licensees (including lowering the current threshold for payment into the fund) and the searching of unclaimed remediation funds by customers. A single regime would be simpler for licensees and customers and enable more remediation funds to be returned into the hands of customers more quickly. While we acknowledge that such a national scheme would require legislative amendment, we consider that the customer and licensee benefit is sufficient to warrant consideration by ASIC and Treasury.

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?

Yes. However, licensees would benefit from clarity regarding when and how those funds should be passed on to the various regimes. As noted in G1Q1, a single national unclaimed money regime for residual remediation funds would greatly simplify the process for customers and licensees if ASIC proposes to provide this guidance.

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

Further to the response to G1Q1, licensees would benefit from lodging un-presented cheques sooner than the minimum 7-year period required (following at least a minimum number of contact attempts made to the customer) to enable a program to be finalised in a reasonable and timely manner and resources reallocated to efficiently implementing other current programs.

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?

ASIC's proposal is unclear. It does not specify to whom the disclosure should be made nor the form that disclosure should take. Clarity on ASIC's proposal would be beneficial to better understand its expectations.

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

While it is unusual, NAB will remediate customers seeking a remediation payment even after the finalisation of the remediation program. Unclaimed monies are either held with NAB's unclaimed monies team (pending transition to ASIC) or, for amounts less than \$500, paid via a charitable donation. Where NAB has made a charitable donation, it will still pay the amount again to any eligible customer.

H1 ASIC Proposal

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

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

Although it is not NAB's practice to require customers to enter into settlement deeds, there are some circumstances where settlement deeds are appropriate to protect the customer and the licensee's interests, particularly where large remediation payments are to be made. For example, where customers who have been impacted by a responsible lending breach wish to remain in their security property following receipt of compensation (where this may be appropriate), NAB will enter into a settlement deed. The settlement deed seeks releases from the customer concerning any future losses that may arise from remaining in the property. A settlement deed may also provide certainty to the customer regarding the outcome and finality so that the matter cannot be revisited by way of litigation.

Should clarification be made to ASIC's guidance regarding the use of settlement deeds, it is important to recognise that any potential disadvantage to customers posed by settlement deeds can be effectively mitigated by the licensee offering to reimburse the customer for independent legal advice on whether the remediation offer and associated settlement deed are appropriate (up to a limit that is reasonably proportionate to the settlement amount being offered).

Further feedback and comments

No retrospective application

We seek confirmation from ASIC that any amendments or additions to RG256, made following the consultation process, will not have retrospective application. This approach would be consistent with the approach taken by ASIC when RG256 was originally issued (i.e. RG256.12 provided that the guidance only applied to client review and remediation initiated on or after the RG256 issue date).

Should ASIC not provide clarity on this point, it could:

- expose licensees to considerable risk if the new RG256 amendments or additions (RG256 Changes) were not applied to ongoing client remediation; or
- significantly impact timeliness and cost (including re-work) if the RG256 Changes were to be incorporated into ongoing client remediation.

Appendix

Refer to Attachment