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Dear Ms Fairbairn

**Westpac Group response to ASIC Consultation Paper CP 335**

The Westpac Group (**Westpac**) welcomes the opportunity to provide a response to Consultation Paper 335 (**CP 335**), released on 3 December 2020.

Westpac is fully committed to remediating customers where things go wrong in the provision of our products and services. We are supportive of ASIC's intention to update RG256, including expanding the guidance to be product neutral.

Westpac's aim is to ensure we are able to remediate customers as fairly and quickly as possible, and we are generally supportive of ASIC's proposals set out in CP 335.

We outline the proposals we are supportive of and those where unintended consequences (principally delay in remediation outcomes for customers) may arise in the Appendix to this letter.

To address the scope for applications that may have adverse consequences, we propose that three general principles be included at the beginning of the guidance. The proposed governing principles are:

- Licensees must ensure that customer remediation is undertaken efficiently, honestly and fairly;
- Customer remediation methodologies should be reasonable in all the circumstances; and
- Customer remediation activities should be scalable.

If the proposed guidance were applied with these principles in mind, it would support the intent of the guidance and minimise the scope for unintended consequences. Further, where novel situations arose in a remediation context which were not covered by the guidance, remediation decisions could be based on these principles to ensure appropriate outcomes are achieved for customers.

Please let me know if you have any queries regarding our response.

Yours sincerely

General Manager, Group Customer Remediation  
Westpac Group



**B. When to initiate a remediation**

***Proposal 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.***

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

Tier 1 is capable of being readily applied in remediation contexts. It requires a customer remediation activity to be established where customer loss or harm is caused by a breach of the law or contractual failing. On the other hand, Tier 2 does not share this characteristic. Under Tier 2, ASIC proposes that a customer remediation would cover errors and failures causing loss that breach certain standards, expectations and/or values.

We are concerned that Tier 2 in its current form is ambiguous and will likely be applied inconsistently across the industry, given the scope for differing interpretations of standards, expectations and values. This Tier is unnecessary given that Tier 1 already includes standards or norms of conduct such as the general obligation of a licensee to provide financial services efficiently, honestly and fairly.

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

Tier 2 introduces subjective elements with respect to determining whether a remediation activity must be initiated. It is a proposal which is highly sensitive to conflicting opinions and does not have the benefit of the Tier 1 elements (such as the general obligation to act efficiently, honestly and fairly) which have a significant body of judicial guidance on required consumer outcomes. Given that the underlying intent of Tier 2 is already covered by decision-making required under norms of conduct in Tier 1, there is no need for Tier 2.

**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?**

Westpac’s Group Customer Remediation Policy (**Policy**) provides that customer remediation activity must be established to remediate multiple customers who have suffered actual or potential loss or detriment as a result of a common or similar issue caused by Westpac’s conduct. A customer remediation activity may also be established at the discretion of a division or business unit.

Our Policy definition for initiating a customer remediation activity is accordingly quite broad in its application. It does not contemplate single customer remediation as ASIC has proposed. This is because addressing loss or harm to a single customer is dealt with by our existing complaint management and incident management processes, which we believe to be working as an efficient and effective way of approaching single remediations in a way that satisfies current regulatory expectations. Further, when we triage a complaint or incident, we consider systemic issues and whether a customer remediation is required if multiple customers are identified as impacted by the same root cause error or failure. If that activity identifies wider issues, then our Policy requires customer remediation activity to be undertaken. In all cases, our processes are designed to ensure that substantive outcomes for customers are appropriate.

Single customer remediation as proposed by CP 335 would likely prevent the quick resolution of customer issues that occur on a smaller scale. Rather than focusing on the number of customers impacted, we consider that a better approach would be for the guidance to acknowledge the following:



- That the remediation approach needs to be fit for purpose. If one customer or a few customers are impacted, then it may be entirely appropriate for a licensee to remediate these customers through established complaints or incident management frameworks (supported by established root cause and systemic issues disciplines);
- Where more than a single customer or limited number of customers were impacted, then a discrete remediation project or program could be established;
- In any case, all remediation activity would need to comply with the overarching principles mentioned in the cover letter of this response as well as the individual elements of the proposed guidance.

### C. The review period for a remediation

***Proposal 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.***

**C1Q1 ASIC proposes 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. Do you agree with this proposal?**

We consider that remediation activity could extend past a 7-year period subject to adequate documents, data and records being available to support the identification and remediation of customers beyond a 7-year period. The challenges of extending the period beyond 7-years and in many cases beyond the period for which records need to be retained by law (noting privacy law requirements to delete certain records) needs to be acknowledged in the guidance. In other cases, it will be reasonable to do so. For example, where an incorrect interest rate has been used in connection with an existing customer who has held a product for 8 years and the licensee has data for the 8 years, it would be reasonable for the customer remediation activity to have a look back period of 8 years.

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

As above, Westpac notes that the proposal is not stated to be subject to data availability and signals a marked departure from current obligations and industry approach to document and record retention.

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

We are pleased that ASIC has proposed at paragraphs 35 and 36 of CP 335 that the requirements in updated RG 256 will be able to be tailored and scaled for every circumstance and that the concept of needing to launch a remediation program will not always be necessary. This also aligns with our response under B1Q3 and the guiding principles set out in the cover letter of this response.

### D. Using beneficial assumptions

***Proposal 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.***

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

We consider that there is a valid role for beneficial assumptions. There are circumstances where it is much more efficient to make a beneficial assumption in favour of customers to expedite remediation activities and put things right for customers more quickly: see examples under D1Q4 below. We support this proposal where it can be implemented at a cohort or portfolio level. If the beneficial assumption had to be proven at the individual level, then it could lead to inordinate delays. In this scenario, a licensee could be forced to look at actual product or service performance, a time-consuming exercise which an assumption is seeking to prevent. Another aspect to ensure the guidance addresses is the degree of

benefit that an assumption should provide. We consider that where a beneficial assumption is made, the extent of the associated benefit should be reasonable. See response to D1Q4 below for examples of beneficial assumptions we have made in some of our remediation activities.

Further, if the requirement were to be interpreted as only ever being able to use assumptions beneficial to customers, it could also cause uncertainty about the use of statistical approaches in remediation. For example, in large remediation scenarios both in Australia and overseas, it is often necessary to use statistical approaches to perform remediation fairly and efficiently. Sampling and other statistical approaches necessarily involve reasonable assumptions to be made to expedite activities such as population scoping. If reasonable assumptions used as part of statistical modelling (such as the approach to sampling and the statistical inferences drawn from results) were not available to a licensee, the only alternative would be to engage in time consuming exercises of seeking to establish actual historical patterns. This would come at a huge cost in time and money and would not lead to demonstrably better outcomes for customers.

**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 would depend on the facts of the incident which has given rise to a customer remediation activity. If a customer derived value from the use of a product or service, then that would be a relevant factor to consider.

**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, for example, in certain remediation activities which are data-led, low value and low standard deviation, an assumption based on an average would be appropriate, in the interest of ensuring timely remediation.

**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.**

We have used certain beneficial assumptions in some of our remediation programs where it has been reasonable in the circumstances to do so, for example:

- Assuming a common interest rate for a set of customers who had varying rates, where the common interest rate results in a remediation for each customer which equals or exceeds their true entitlement;
- Assuming a 'pay without review' approach to automatically refund fees below a set dollar threshold without undertaking a file review;
- Assuming that no customers who were wrongly charged a fee, previously had that same fee refunded;
- Assuming that all customers who held a particular credit card type were charged the maximum interest rate applicable to that credit card type (even though some sub-types were charged lesser rates).

***Using beneficial assumptions to account for absent records***

***Proposal 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.***

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

We support this proposal to the extent beneficial assumptions can be made to ensure a fair and reasonable outcome.

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

There are practical problems with using beneficial assumptions to determine which customers should be in scope for a customer remediation activity. For example, in our experience, absent records are typically those which are more than 7 years old. In such cases, it may not be possible for us to know which customers held the relevant product or received the relevant service from the date of the error or failure and if so impacted, by how much. It may also be in some cases that that records are not absent at all, but rather that they never existed because the customer never actually held a product or acquired a service.



ASIC recognises at paragraph 60 of CP 335 that the circumstances in which beneficial assumptions will be possible or reasonable beyond the 7-year record-keeping period may vary according to each remediation and a licensee's capabilities and resources. Further, ASIC goes on to state that it expects licensees to do what they can within their capabilities. We support this statement if this effort is to be evaluated by what is fair and reasonable in the circumstances.

We also note that the expectation to use service providers or consultants to help inform scoping and refund assumptions, as contemplated in paragraph 61, may cause delay in returning monies to consumers if the appropriate capability already exists within an organisation. Where that is not the case, seeking external assistance would be appropriate. We support this principle to the extent that it leads to fair and reasonable remediation approaches based on the circumstances.

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

Paragraph 67 of CP 335 notes that licensees should keep evidence of and monitor the assumptions that they use to increase the efficiency of their remediations so that the assumptions continue to benefit the consumers. We support this statement to the extent that the intent is to ensure the assumptions continue to hold true and are otherwise fair and reasonable. If for example, an assumption about a common interest rate mentioned in the response under D1Q4 above was found to be too low as a remediation program progressed, then of course it would not be fair and reasonable, and an adjustment would need to be made.

*When it may be appropriate to use assumptions to increase efficiency*

***Proposal D3 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?**

Westpac agrees with ASIC's proposal as mentioned at D2Q1. Westpac notes, however, that the evidentiary and monitoring requirements with respect to beneficial assumptions need to be reasonable so that complying with these requirements does not unduly compromise the efficiency of remediation.

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

An example of when it would be appropriate to use assumptions to increase the efficiency of a remediation would be where the value of individual remediation payments is nominal. This is because in such cases the risk of underpayment is limited and allows us to proceed with the remediation more efficiently.

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

Yes, see response to D1Q4 above.

**E. Calculating forgone returns or interest**

***Proposal 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.***

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

Westpac generally supports this approach.

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

In relation to Step 1, the ideal approach is to calculate actual foregone returns where it is appropriate to do so. In certain cases, Step 1 may be complex/time consuming and likely to lead to a delay in completion of the remediation. In those cases, we agree that an alternative approach is required.

In relation to Step 2, in some cases, given the nature of assumptions, it will not always be clear if an assumption will be beneficial for any particular customer without knowing actual foregone returns. What will be clear is whether there is a fair and reasonable basis for an approach when considered as a whole. For that reason, we support the approach described in Step 3 of applying a fair and reasonable rate where it is not appropriate to calculate actual foregone returns.

We note in Step 3 a reference to licensees applying a compounded daily rate. We query the basis for this reference as there are very few products in the market that offer such return. A fair and reasonable rate of return would be one that is informed by the characteristics of the relevant product or service that is the subject of the remediation.

**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.**

What is fair and reasonable in the circumstances should be the relevant test in this context. This will depend on the product or service characteristics. In light of the product or service characteristics over the remediation timeframe, the key focus should be a licensee taking a fair and reasonable approach to remediating the customer for their loss and to return them to the position they would have been in had the error or failure not occurred.

**F. How to approach finding and automatically paying consumers**

***Proposal F1 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?**

We undertake reasonable efforts to locate and contact customers who are in scope for a customer remediation activity. The process involved in demonstrating and evidencing that reasonable efforts were taken to locate and contact customers varies depends on the nature, size and complexity of the customer remediation activity. There are a range of unique customer cohorts which require additional management (such as deceased estates and deregistered companies).

Given we have a general obligation to act fairly, honestly and efficiently, a reasonable efforts standard would be preferred to balance fair customer outcomes and remediation efficiency.

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

On a practical level, a process needs to be designed and implemented to verify customer contact information and for customers to contact Westpac if they need to nominate a bank account into which the remediation amount may be paid.

Obtaining information to effect payment in respect of inactive investment or super accounts can also be challenging because of low customer response rates. There are also privacy law requirements that need to be managed carefully when dealing with customer data and sharing information with other external licensees.





**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 communication strategy and channels used for a customer remediation activity will depend on the nature of the customer remediation activity, the purpose of the customer communication, the customer's circumstances (e.g. financial literacy, language skills and age) and the customer's preferred or previously agreed form of communication. Our remediation programs are encouraged to use a multi-channel approach as this may increase the likelihood of customer response.

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

We agree that cheques should only be used as a last resort where Westpac bank account details are not available, except where the customer has specifically requested their remediation payment by cheque (for example, where customers or their estate request that a cheque be sent to them). We also note that our process for superannuation/pension refunds (and active investments by individual agreement with internal and external platform providers) is to return funds to the platforms provider and not to pay by cheque.

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

Where our records indicate that the customer no longer has an open account, we will undertake reasonable efforts to locate and contact the customer, for example, by searching our records for the customer's last known address and depending on factors such as the materiality of the customer remediation activity and the value of the remediation payment, leveraging third party address validation services, conducting multiple attempts to contact the customer and where available, using alternative communication channels.

When a customer is no longer an active customer, it has proven very difficult in our experience to obtain customer bank account details with other banks to make an electronic payment. Further, customers can be wary of providing us with their bank account details in response to an email/SMS due to fears of fraud. For superannuation, there is also a tendency for customers to provide personal bank account details rather than their active superannuation account details, which results in us having to further engage with customers to obtain the latter given remediation payments must be paid into the superannuation system.

If the ATO had legislative power to engage in TFN matching for the purposes of customer remediation, licensees could pay remediation amounts to the ATO for the ATO to deposit into the customer's nominated bank account for tax refunds. An ATO mechanism or scheme could solve for remediation payments and unclaimed monies more broadly.

**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.**

N/A

**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.**

Challenges are presented in respect of the closed accounts of exited members. Obtaining payment instructions from such customers often requires follow up several times, with the high likelihood of no response.

There is added complexity of determining beneficiaries where the exited member is deceased given the laws that apply to superannuation death benefits.

Superannuation trustees also need to ensure when accepting remediation payments from third-party licensees, that the payments are in the members' best interests.



## **Removing the low value compensation threshold**

**Proposal F2 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?**

While enabling licensees to set their own low-value compensation threshold at an organisational or remediation by remediation basis will provide flexibility, a low-value compensation threshold set by ASIC provides certainty and clarity for licensees and consistency across the industry. For example, different super trustees across the industry may take a different view to what constitutes a low value compensation threshold and request funds be returned to the fund. In the absence of a specific threshold and given that the low value threshold would not apply outside unit pricing,<sup>1</sup> the scope for uncertainty would increase.

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

We consider determining the applicable threshold in respect of a customer remediation activity to be a material decision that should be subject to record keeping and governance requirements under the remediation policy of the licensee. The rationale for decisions about thresholds would need to be made available to ASIC as required and also be disclosed to parties (internal and external) undertaking assurance work in respect of remediation activities.

## **G. Remediation money that cannot be returned to consumers**

**Proposal G1 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.**

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

Westpac agrees with the proposal. We note that the range of applicable laws, various holding periods and regulators involved can make the management of unclaimed monies challenging for licensees with a broad product set, such as Westpac.

### **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?**

Westpac supports this proposal, noting it aligns with our current practice of undertaking reasonable efforts to locate and contact customers and then deeming any unpayable remediation amounts eligible for lodgement in the applicable unclaimed money regime or for payment to charity (where the amounts are beneath the low-value threshold or beneath the applicable unclaimed monies financial threshold).

<sup>1</sup> Regulatory Guide 94: Unit Pricing - Guide to Good Practice, August 2008



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

The difference in the applicable financial threshold across the unclaimed monies regimes and lack of clarity as to when the applicable holding period commences and concludes can be challenging for licensees. Time and resources need to be invested to manage, track and remit unpayable remediation amounts which are subject to an unclaimed monies regime for each remediation activity. The start and end date for the holding period will be different for each customer remediation activity. Accordingly, from an operational perspective, managing, tracking and reporting on unpayable remediation amounts can be onerous and time consuming.

Law reform to establish a national unclaimed monies regime or to standardise the applicable holding period and when the holding period starts and concludes would be immensely helpful. A clear, uniform and streamlined process for the lodgement of unclaimed monies would enable licenses to conclude remediation activities in a timely manner for customers.

**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?**

We do not think that licensees making residual remediation payments to a charity or not-for-profit should have to disclose it. Our reasoning here is in line with our Policy, we have already made reasonable efforts to locate and contact closed customers directly before deeming monies to be unpayable and we adhere to unclaimed monies legislative requirements. If the intent of disclosing these payments is to alert the public to then contact us to see if they are due any amounts, we estimate a low likelihood of the closed customers impacted by such a payment seeing a particular disclosure relevant to them then taking the time to contact us to see if they are impacted, also noting individual amounts paid to charity are relatively low value. Disclosure of such amounts would, in our view, be ineffective in terms of reuniting closed and exited customers with nominal refund amounts. The reform of the various unclaimed monies regimes would be much more likely to be effective, both in terms of awareness, consistency and consumer experience.

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

In our experience, post-remediation call volumes are typically extremely low as are complaints in relation to customer remediation outcomes. Customers may contact us after closure of a customer remediation activity typically in relation to lost or expired cheques (which we will honour, irrespective of how much time has lapsed).

**H. Settlement deeds and fair consumer outcomes**

***Proposal H1 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***

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

While our Policy contemplates that consideration may be given to the use of settlement deeds based on legal advice, they are generally not used in relation to customer remediation activities. However, if it eventuates that the customer remediation definition should apply to single customer matters as contemplated under Proposal B, we do have instances where we require a settlement deed, for example, insurance payments made as a Good Value Claim (GVC) rather than the insured benefit and also in relation to death benefit objection complaints.