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25 February 2021

Att. Ms Amanda Fairbairn
Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: remediation@asic.gov.au

Dear Ms Fairbairn,

We welcome the opportunity to provide feedback in relation to Consultation Paper 335 - Consumer remediation: Update to RG 256 (CP 335).

Please do not hesitate to contact me and my colleagues on or at if we can further assist with ASIC's important work.

Yours faithfully,

Principal Lawyer
Maurice Blackburn

Submission in Response to Consultation Paper 335 - Consumer remediation: Update to RG 256

February 2021

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Superannuation, Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years, including through remediation schemes such as the CBA's Open Advice Review Program as one of three Independent Customer Advocates, delivering compensation for hundreds of our clients.

We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team. At any one time we provide legal assistance to approximately 3500 to 4000 clients.

A major part of this work involves providing comprehensive legal advice and representation in cases involving often egregious and negligent behaviours on the part of financial service providers.

We witness first-hand the ramifications and impacts of poor corporate behaviours by financial service providers which can create significant financial hardship in our clients' lives.

Our Submission

Maurice Blackburn is grateful for the opportunity to contribute a response to CP 335. We congratulate ASIC on the structure and content of the document.

We note the stated aims, as detailed in paragraph 5 of CP 335, namely:

> *This first round of consultation aims to:*
>
> > *(a) clarify and seek feedback on when a remediation should be initiated;*
> > *(b) understand if and when assumptions can be relied on in a remediation;*
> > *(c) understand barriers and opportunities in effectively returning money to affected consumers; and*
> > *(d) identify any gaps in the current RG 256 and deliver the guidance necessary to empower all licensees to remediate consumers efficiently, honestly and fairly.*

In our submission, we highlight the importance of ensuring that remediation processes are characterised by the core principles of transparency, fairness and accountability.

All Maurice Blackburn submissions to public policy inquiries are based around the lived experience of the clients we represent. To this end, we have only sought to respond to those

sections of CP 335 which have a direct bearing on our work – namely the review period for remediation, the use of beneficial assumptions, the calculation of interest and the use of settlement deeds.

Our detailed responses to those sections appear below. We would welcome the opportunity to discuss these further with the team if that would be beneficial.

Responses to Specific Sections of CP 335

Section C: The Review Period for a Remediation

We note Proposal C1 as detailed in CP 335:

> *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.*

We are pleased to see that the issue of delay, and the impact of that issue on consumers, is being addressed through this consultation.

We share ASIC's concern, as described in paragraph 38, that:

> *….many remediation issues go back more than seven years by the time they are uncovered and that the time period referred to in RG 256 may have created a disincentive for licensees to investigate the full extent of the problem.*

In our experience, consumers affected by a company's wrongdoing may be prejudiced by the effluxion of time spent in a remediation scheme process, which can sometimes take years to produce an outcome, whether successful or otherwise.

We have been approached by many consumers whose legal claims had become statute barred while they waited for the outcome of an investigation/remediation program. In each case, these consumers had participated in the review scheme in good faith, but were never warned or advised of the expiring statutory time limit. Indeed, many such participants had foregone obtaining legal advice under an assumption that their rights would be preserved whilst they participate in the remediation scheme.

The Australian Lawyers Alliance drew a clear example of this to the attention of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) in their written submission[1] .

They wrote, in relation to the negotiation and implementation of the Macquarie Equities Limited (MEL) remediation program:

> *In that example, serious compliance deficiencies identified in 2011 finally catalysed an Enforceable Undertaking in January 2013 which required MEL to initiate a so called 'independent' investigation and obtain a report from KPMG before finally writing to customers inviting them to participate in a review in early 2014**. By that time, many customers' time limits for court proceedings had expired and MEL did not agree to any waiver of such limits**.*

For this reason, Maurice Blackburn recommends that ASIC should have the power to compel Financial Service Providers (FSPs) under investigation to undertake that they will not raise any limitation period defence in response to litigation bought by a consumer in respect to the issues under investigation, providing the litigation is commenced within a reasonable period of time after the completion of the investigation/remediation program (which we submit would be within 12 months in ordinary circumstances).

[1] https://www.lawyersalliance.com.au/documents/item/1360; para 104 (our emphasis)

We believe that, above all, there should be a requirement that consumers are warned of any time limits which could come into play during an AFCA investigation. We submit that:

- While a matter is subject to review, AFCA time limits should be waived, as should time limits on starting court actions.

  Or at the very least:

- Warnings should be given that, if time limits have not been waived, this should be made clear to impacted consumers, and they should receive notification that they should seek legal advice.

We urge ASIC to consider embedding this requirement in RG 256 for the reasons above and on public policy grounds. Specifically, for a remediation scheme to function and be perceived as a truly proper alternative to litigation (i.e. to operate with social licence) it must ensure good faith participation is never prejudicial to consumers.

Section D: Using Beneficial Assumptions

Maurice Blackburn endorses proposal D1, as described on page 19 of CP 335, namely:

> *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.*

We further endorse the definitional elements outlined in paragraph 48, under the heading "What is a beneficial assumption", namely:

> *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.*

We strongly endorse the implementation of the 'but for' approach outlined in 48(a) – that beneficial assumptions should aim to return the consumer to a position that they would be in 'but for' the inappropriate actions of the FSP.

At present, we are aware of a number of major banks whose approach to responsible lending breaches under the *National Consumer Credit Protection Act 2009* (the NCCP), including through their remediation programs, do not meet this standard.

In our experience, banks generally limit quantified losses for proven lending breaches to a repayment of the interest paid (less any benefit received such as rental income). Their compensation methodology does *not* include any capital losses suffered by the forced or voluntary sale of the security property, being a property that would not have been purchased 'but for' the responsible lending breach.

This is especially significant for consumers who purchased properties using irresponsibly loaned funds in locations where property values have decreased due to factors outside their control, such as the end of the mining boom. We have had clients whose property value has decreased during the course of a review. In such circumstances, for those consumers to achieve an outcome based on 'but for' assumptions, they should be compensated for the decrease in capital value. Without such compensation, consumers are left to meet the capital losses, often leading to bankruptcy.

The approach we advocate is entirely consistent with the remedies available under s.178 of the NCCP which allows for the payment of compensation for loss or damage which has resulted from the contravention of a civil penalty provision or offence.

It is also consistent with the Common Law where courts have interpreted similar provisions in other Acts[2] to mean that the loss or damage which is caused by the contravening conduct can be recovered, and that the contravention of an Act only needs to be *a* cause of the loss or damage sustained, not the sole cause of the loss or damage[3]. It is sufficient to show that the contravening conduct materially contributed to the loss or damage[4].

In our experience, it is likely that a court will make an order in favour of wronged consumers for at least the amount of compensation for the capital loss suffered on the property, due to the FSP's contravention of the NCCP.

We encourage ASIC to consider providing advice in relation to the quantification of capital losses in remediation programs concerning irresponsible lending, as part of the review of RG 256.

We believe that this will become more important for consumers as we head into a period of significant debt hardship that will correspond with COVID debt holidays ending, combined with the maturation of years of accumulated interest only loans[5].

Maurice Blackburn suggests that ASIC should be prescriptive about this in RG 256. We note the key principle of ASIC advice noted in paragraph 82, which reads:

> *A key principle of our guidance is that licensees should aim to return all affected consumers as closely as possible to the position they would have otherwise been in.*

We submit that the inclusion of beneficial assumptions which take capital loss into account in the compensation methodology would help satisfy this principle.

[2] Corporations Act 2001 (Cth) s 1041I; Competition and Consumer Act 2010 (Cth) s 82, Schedule 2 s 236; Australian Securities and Investments Commission Act 2001 (Cth) s12GF.
[3] Wardley Australia Ltd v Western Australia (1992) 109 ALR 247; I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109 at [57]
[4] Henville v Walker (2001) 206 CLR 459
[5] https://www.ratecity.com.au/home-loans/mortgage-news/deferrals-end-450-000-mortgages-apra-sends-banks-warning

Section E: Calculating Foregone Returns or Interest

We note the proposed 3 step approach, as outlined in Proposal E1:

> *(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.*

We further note paragraph 78, which says:

> *Because our revised guidance will have a wider application, we will clarify that the cash rate set by the Reserve Bank of Australia plus 6% (as set out in the current RG 256) compounding daily is just one example of a fair and reasonable rate, noting that use of this rate does not infer that a remediation outcome has the same nature as a post-judgment outcome.*

Maurice Blackburn supports the inclusion of the three step approach, as outlined in Proposal E1, in RG 256.

We note that there appears to be a great deal of variation and even internal inconsistency in the approaches taken by FSPs in relation to which rates they are required to use.

In a recent settlement discussion with NAB, the initial offer had interest payable for compensation on closed loans at the Federal Court post-judgement rate of 9.5% p/a (being RBA cash rate plus 6%). However after we lodged submissions regarding unrelated points of the compensation, they advised that:

- *"Since the first offer that was sent to the customer (May 2020) we have completed an end to end review of our process which also includes reviewing our calculators.*
- *The compensation calculator has since changed from May 2020 and interest calculations on closed loans has changed from using the highest RBA cash rate since the loan closure plus 6%. The interest is now calculated by the highest RBA cash rate each year from the date the loan was closed and then compounding".*

This reduced the interest payable, with NAB claiming that the Federal Court post-judgement rate was the RBA cash rate plus 3.5%. We pointed out that they were clearly wrong, but they have made it clear that they will not be entertaining changes to their decision.

It is clearly unacceptable that FSPs are able to 'change their calculators' to a rate that suits them better. The stepped approach outlined in Proposal E1 may help to minimise these issues.

Maurice Blackburn fully supports the benchmark articulated in paragraph 78, and urges ASIC to retain such a benchmark in RG 256.

We believe that the proposal should be extended to reflect that the appropriate standard should be:

Steps 1, 2 & 3, or the paragraph 78 benchmark – whichever is greater.

Such a standard would send an important message - an assumption that the consumer would have used his/her assets well, 'but for' the poor behaviour of the FSP.

Section H: Settlement Deeds

Maurice Blackburn is pleased to see the issue of settlement deeds included in this consultation process.

As consumer advocates, we often see a lack of consistency in the approach FSPs take in relation to settlement deeds.

We agree with the statement in paragraph 109 of CP 335 which reads, in part:

> *We consider that asking consumers to enter into a settlement deed as part of a remediation will not always be efficient, honest and fair, and we know that it is not standard industry practice to require deeds in all cases.*

We also endorse the description of the problems associated with settlement deeds outlined in paragraph 110, in relation to the limiting or removal of consumer rights, and the reliance on implied consent.

Maurice Blackburn believes that a consumer's acceptance of a settlement deed should not be accepted by the FSP unless the consumer has been offered funding assistance to get legal advice and has:

- Obtained that legal advice, or
- Has made an informed decision not to do so.

It's crucial that consumers are given this offer.

One of the central inequities associated with settlement deeds lies in the very nature of review processes. Given that the review will almost certainly be conducted by the FSP themselves, the FSP is functionally the judge and jury in their own cause.

Central to this is the fundamental power imbalance which exists within the complaints process. This power asymmetry is heightened in circumstances where the consumer has specific disadvantage that may inhibit their ability to understand or advocate their position, or understand the process. For example:

- Consumers from non-English speaking / cultural and linguistically diverse backgrounds
- Inexperience with financial matters
- Illiteracy or lack of education
- Poverty (or need of any kind)
- Consumers with mental health issues, or other physical illness
- Age or emotional dependency
- Other groups that may experience disadvantage in the current systems.

We believe that review responses should clearly identify circumstances where consumers have a particular vulnerability, or there is an inequality of bargaining power between the consumer and the FSP, which affects the consumer's ability to make a judgment as to their own best interests.

FSPs have access to powerful and expensive legal support in determining their approach to reviews. Consumers often do not have this support, nor a matching familiarity with the process.

We note that CP 335 indicates that ASIC is aware that consumers are not always well placed to know whether an offer is adequate or not.[6]

Compounding this is an inconsistent approach to the funding of the provision of legal support across review types and across FSPs.

For example, from our experience:

- The NAB payment offer for legal assistance in financial advice reviews has, until recently, been $5,000 (including GST) – which we believe is an appropriate minimum. They dropped that to $2,000 (including GST) in mid 2020. This is an unrealistic figure, and will mean that claimants will struggle to find assistance, unless they are willing/able to contribute to the costs. The same FSP offers $5,500 (including GST) for financial advice matters related to MLC, and $2,000 for responsible lending reviews.

- Westpac offers $2,000 (including GST) for responsible lending matters but have, on occasion, increased to $5,000 (including GST) when the client is advised to request more realistic funds for review through AFCA – but this is not consistent. We have also experienced situations where Westpac take an offer off the table when a client has requested a draft settlement deed and fees.

- ANZ offers $5,000 (including GST) for responsible lending matters, although the general experience is they offer nil at the outset.

- AMP offers zero contribution for legal fees for financial advice reviews.

Other FSPs, like AMP, have a starting offer of zero, but may go on to offer some funding when pressed. Unrepresented consumers will not know that.

We urge ASIC, through this consultation process, to seek standardisation in these matters.

Finally, Maurice Blackburn believes that ASIC guidance should forbid the use of confidentiality and non-disparagement (AKA ‘gag clauses’) in settlement deeds, especially where the review concluded wrongdoing by the FSP.

Any release of consumers’ rights should never impinge on their right to complain to AFCA, seeking a review as to the fairness or reasonableness of the remediation outcome or the deed itself. Nor should a wronged consumer be prevented from speaking out regarding their experience just because they have sought their rightful compensation.

[6] See for example paragraph 110(a)

Other Observations – Transparency and Accountability

There have been a number of high profile cases where the FSPs have conducted audits of their systems and processes following revelations of misconduct, only to selectively curate the results by withholding such audit reports from the public or even the affected consumers.

A notable example was when CommInsure was exposed for conducting a review following a damning and highly publicised expose' by Adele Ferguson[7]. Following a series of *mea culpas* concerning the specific case studies raised, two independent reviews commissioned by CommInsure from DLA Piper and Ernst & Young in 2017 were not released to the public on the ground of confidentiality and privilege[8]. That was despite the fact that CommInsure self-selected parts of those reports to support its assertion that it was clear of any serious or systemic wrongdoing in its investigation into its claims handling practices.[9]

Another important example emerged from the Royal Commission during the AMP testimony[10] where a report characterised as 'independent' was submitted to ASIC after a number drafts passed between Clayton Utz and AMP wherein significant changes were made at AMP's request. As the interim report notes[11]:

- *Clayton Utz provided AMP with numerous drafts of the report. (It was suggested to Mr Regan that 25 drafts were supplied. The better view appears to be, and I proceed on the assumption, that the correct figure is 22 different drafts.)*
- *AMP made many suggestions about the content of the drafts. Some of those suggestions were made in two telephone calls on 21 September 2017 and a further telephone call after 25 September 2017.*
- *AMP sent numerous emails to Clayton Utz with marked up drafts or suggested amendments to the draft.*
- *The amendments proposed appear on their face to suggest alterations to what findings were made in the report about the extent of the knowledge and involvement of particular executives of AMP in the impugned ongoing service fee conduct.*

Such reports are often material to ASIC's decision making as to the appropriate course of action to take against a financial services firm. Where it is determined that an Enforceable Undertakings is appropriate, these reports can be material to the terms negotiated including the parameters of any remediation scheme[12].

Maurice Blackburn submits that RG 256 should be prescriptive about this by setting out standards for transparency and due process where FSP's engage third parties/auditors whose reports and advice form the foundation for remediation programs. The current iterative, negotiated process has been demonstrated to leave open a moral hazard whereby reports are curated or watered down to suit the FSP's interests.

[7] https://www.abc.net.au/4corners/money-for-nothing-promo/7217116
[8] https://www.afr.com/companies/financial-services/comminsure-to-keep-independent-reviews-private-20170301-guo54v
[9] https://www.commbank.com.au/guidance/newsroom/comminsure-releases-deloitte-report-into-claims-handling-201702.html
[10] https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-2.pdf; s.1.10.2, p.145
[11] Ibid, p.147
[12] See for example the https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-022mr-macquarie-equities-limited-enforceable-undertaking-and-next-steps/

Maurice Blackburn believes that a requirement that such reports be made public would help lead to a more robust and objective outcome from the audit process and any resultant remediation scheme would be better for it.