

26 February 2020

Ms Amanda Fairbairn
Policy Lawyer
The Behavioural Unit
Australian Securities and Investments Commission

By email: remediation@asic.gov.au

Dear Ms Fairbairn

Re: ASIC Consultation Paper CP 335: Consumer Remediation

QMV welcomes the opportunity to provide a submission regarding ASIC Consultation Paper CP335: Consumer Remediation.

QMV is an independent financial services consulting firm providing advisory, consulting, technology and legal services to Australia's leading superannuation, insurance, banking and wealth management organisations. Since company inception in 2008, QMV has performed remediation activities across the financial services sector, but with a specialised focus on the superannuation industry. These activities cover a range of engagements across all superannuation funds, products and account types, ranging from large-scale complex data remediation and reconciliation to full member recreation and rebuild.

General comments

QMV strongly supports ASIC's review into consumer remediation practices and agrees that updated guidance is required for all industry participants.

Following the *Royal Commission into Banking, Superannuation and Financial Services Industry*, industry and consumer expectations have shifted, whereby consumers legitimately expect that licensees remediate issues that impact them in a timely manner, regardless of nuanced issues related to legality and interpretation of significance it may have at a broader licensee level.

QMV has extensive experience in complex and large-scale remediation efforts across the superannuation and wealth management sector. We have compiled this submission based on this experience, and have outlined the remediation programs that we consider to be the most prevalent:

- **Unit pricing adjustments**, where an incorrect unit price has been applied to member accounts, requiring a full reconstruction and recalculation of all subsequent transactions to correct the benefit calculation for members;
- **Fees charged incorrectly**, whether it be an incorrect rebate, incorrect assessment of member eligibility for fee refund or a discrepancy between Registry fee calculations and what was disclosed or agreed by the parties;
- **Insurance premium calculation adjustments**, commonly resulting from incorrect levels of cover being applied, changes to the underlying member data upon which premiums are derived or incorrect premium configuration within the administration systems;

- **Defined Benefit calculation adjustments**, where Registry systems are incorrectly configured for the acceptance, translation, storage or utilisation of employer-provided defined benefit data, resulting in an incorrect benefit calculation for members; and
- **Incorrect data provided by an employer**, which may be backdated months or even years, which subsequently has flow-on impacts to benefit calculations, insurance benefit eligibility and cover levels, preservation ages and creates significant superannuation administration complexity.

QMV has observed inconsistencies in the remediation approach across both organisations and industries. This can lead to circumstances where identical member errors can result in a different remediation outcome depending on which fund they belong to. We note ASIC have specifically listed this as a key reason for issuing revised guidance. With these types of errors in mind, QMV is pleased to provide our commentary on our experience in relation to consumer remediation, the revised guidance and proposals contained within.

Principles and approach for consumer remediation

There are three core principles that QMV believes are vital to ensure consumer remediation efforts are accurate, consistent and transparent.

Principle 1: Use real data and limit assumptions

Given the significant access to data and technical capability within the industry, it is expected that most remediation can be completed in full, using data stored on the registry and other ancillary systems.

Superannuation licensees (for the most part) already have access to vast amounts of data created through organisation product areas, member administration, previous remediation efforts and historical fund financial information such as unit prices and investment fees. Furthermore, superannuation licensees are obliged to maintain, retain, and safeguard a significant amount of information to effectively administer their products.

Broadly, the industry has transitioned to a more digitised operating model, meaning information should become more easily accessible in the future.

Historical and current information that is often leveraged in remediation may include, but is not limited to:

- Investment unit pricing (underlying assets and trust units);
- Benefit and insurance designs;
- Insurance premium and administration fee information;
- Employer supplied data (including contribution and member employment information); and
- Member initiated transactions.

Whilst access to historic information may be onerous, this alone should not be a rationalisation to avoid a full reconciliation and remediation.

Accordingly, we are of the view that the reliance on assumptions in calculating financial impact should be limited, and only required in limited instances.

We do acknowledge that there are genuine circumstances where data is either not available, not in an interrogatable format or is otherwise limited in availability. However, it is our view that these discrepancies should be interrogated to determine *why*, to challenge ourselves and the superannuation industry more broadly to better manage our data.

In our experience, the most common causes of limited data availability are:

- historical data has been transferred or merged across service providers or administration systems, where only a subset of historic data or a limited suite of itemised transactions are included;
- the use of off-system technology solutions, for which records cannot be located or are stored in a sub-optimal format;
- inadequate data quality risk management, whereby the retained data is considered unreliable and therefore not usable; and
- a lack of understanding of the impact data has in the end-to-end data supply and utilisation chain.

It is important to note that most of the issues faced by licensees regarding access and usability of data are only applicable in a historical context. With adequate establishment of risk management frameworks which include preventative and detective controls on data risks, the vast majority of remediation activity would not require a significant backdating effort, making the abovementioned hurdles to accurate and timely remediation somewhat redundant.

However, a consistent challenge is the limited and/or non-interrogatable data transferred by an incumbent outsourced service provider (administrator) to a new provider or platform. The loose interpretation of data retention requirements on transition has had a significant impact on the ability to perform consumer remediation activities in the past and continues to do so.

Given the ongoing trend of consolidation (in the superannuation industry in particular) and administration transitions, we expect this problem will only continue and be further exacerbated unless regulatory obligations and guidance are more effective in ensuring the reliability and availability of data necessary for accurate remediation.

Principle 2: Follow the Money

QMV strongly believes that unless not possible, calculation and financial analysis of remediation activity should 'follow the money', whereby impacted accounts are reconstructed using a first principles approach. In simple terms, the objective of this principle is to return the member to the financial position they would have been in had the error not occurred.

In our experience, this should be undertaken using a two-phase approach:

- **First order impacts**, these represent the events where a direct financial impact of the error requires remediation. For example, in a unit pricing error, the first order impacts will include any transactions that occurred under the error (e.g. buy at an incorrect unit price), as well as any subsequent transactions that either crystallised (e.g. member exit) or carried forward the error (e.g. investment switch).
- **Second order impacts**, these represent events that are not the direct result of the remediation, however may impact the remediation calculations, compensation eligibility and communication strategy. This includes things such as Family Law splits and on-claim members along with assessing the impact of both current and former remediation events.

Without appropriate data, it is especially difficult to reconstruct an error to establish the true financial impact, making it near impossible to revert the member fully and accurately to the position they would have been in had the error not occurred.

In our experience, there is significant disparity across superannuation trustees and service providers in performing this analysis, particularly in relation to the second order impacts. When identified, confusion and lack of documented fund rules often result in an inconsistent approach to remediation.

Principle 3: Establish a remediation framework

In QMV's experience, remediation projects tend to be reactive and treated as 'one off' events. As most organisations do not plan for remediation, their approach is often disjointed, reactive and inefficient.

QMV strongly recommends that all licensees establish their own framework for how errors will be managed and ensure this aligns with all standards and guidance released by the applicable Regulators. This must link into and align with other risk and data management structures already in place and must be embedded into the company culture for all employees to adhere to.

Our experience informs the view that there are three fundamental elements to the framework that should be established:

People, as engaging those with the appropriate skillset across business units will usually be required for any remediation activity, especially considering the second order impacts of an error. It is not uncommon for a simple fee deduction error to require the skills and efforts of a range of resources, including operations, communications, finance, insurance, compliance and even the contact centre, depending upon the remediation approach undertaken.

The level of commitment required from such resources cannot be underestimated, especially considering that remediation efforts are usually performed alongside the individual's daily duties. This becomes especially problematic when the resource required is a subject-matter-expert and is already spread thinly across several other specialised projects.

Process, as a robust set of business rules and procedures must be used to manage any remediation exercise to ensure consistency and to minimise the risk of rework. Of particular importance are the business rules pertaining to compensation, including the methods for calculation and distribution, and specific guidance on remediating errors where a member may have gained as a result. These policies should balance the needs of the individual member with the needs of the membership as a whole.

Further, the process must consider the recording and storage of any remediation activity undertaken for future reference and audit purposes. The objective is to ensure that all remediation has been performed in a manner consistent with fund policy, which in turn, allows the fund to easily communicate this information to the member or other interested parties.

Technology, as the primary vehicle for performing the remediation and storage of the adjustments must be kept within the Registry system or ancillary systems. Traditionally, there has been too-heavy a reliance upon off-system remediation methodology which is not clearly linked to individual member records or is lost altogether.

It is not uncommon for individual members to be impacted by multiple remediation programs running in parallel. Where there is insufficient information pertaining to a remediation effort, it becomes increasingly likely that subsequent remediation programs will create new errors, further compromising the member's data and benefit calculations.

QMV believes that regulatory guidance should continue to encourage investment in effective preventative and detective controls to ensure that in a future state, the need for large scale remediation is mitigated. We agree with ASIC's view that the presence of robust governance and risk management frameworks will also mitigate the need for large-scale remediation.

Regulatory Guidance

Whilst it is imperative that a licensee apply the above principles in their remediation approach, this can be promoted by specific guidance from ASIC on how remediation should be performed. As previously noted, there is currently significant variability observed in how the same remediation may be undertaken across two different organisations, all the while adhering to the applicable legislation and guidance.

In this regard, QMV strongly advocates for ASIC to supply additional guidance for licensees regarding consumer remediation methodology. Specifically, we request the following be incorporated into the updated guidance:

- A checklist or framework that a licensee must utilise when devising their own remediation framework
- Tangible examples of common errors and a detailed explanation of how ASIC expect the remediation to be performed:
 - This is especially relevant for superannuation errors in relation to date of birth, whereby a change to this value can create significant second order impacts to a member (e.g. benefit calculations, contribution cap limits, insurance eligibility, cover levels and premium calculations, member disclosure, statutory reporting)
- Combination of cross-industry and industry-specific examples and guidance, ensuring a complete suite of references are available for all licensees
- Clarification on the approach to remediating an error where the member has gained overall as a result, and what considerations a licensee must make in applying their own business rules to this scenario
 - This is especially relevant for superannuation errors as the retention of unintentional gains because of an error is effectively funded by other members of the fund
- Any terminology should be accompanied by a definition, explanation, and examples
- Any calculations should be accompanied by an explanation and examples
 - This is especially relevant for superannuation errors, where remediation may be performed based on a dollar-value of loss, rather than using the best-practice approach of correcting the error based on number of units held

The overarching principle within the finalised guidance should be that two licensees remediating the same error should not arrive at different conclusions about how the remediation should be performed and what the outcome is for the member.

By providing the requested level of detailed guidance, a licensee can ensure that their own internal remediation framework, in addition to any licensee business rules that overlay the framework, adheres to ASIC's expectations, and will result in consumers being remediated in a fair and consistent manner.

Specific comments

We have provided feedback in relation to a selection of specific proposals outlined by ASIC within the consultation paper.

Proposal: Two-tiered approach to remediation

QMV strongly supports the notion that both financial and non-financial failures should be remediated and broadly supports the concept of a tiered approach. However, we request that further guidance is provided, particularly in relation to the definition of 'detriment' and in the form of specific case studies to further detail ASIC's expectations across the spectrum of possible failures that may occur.

This is especially relevant for the purposes of Tier 2 remediation, as the subjective nature of the failure makes it more difficult to quantify and remediate for potential loss. Whilst we acknowledge that consumers may expect any such failures to be 'fixed', exactly how that occurs must be clearly outlined within ASIC guidance.

Proposal: Relevant remediation period

QMV broadly agrees with this proposal, noting the underlying rationale to be the removal of the seven-year period currently referred to within the current RG256. However, we are concerned that the current language of '*begin on the date a licensee reasonably suspects the failure first caused loss to a consumer*' may be misconstrued and requires amendment.

Instead, QMV proposes that the relevant period for a remediation '*begin on the date a licensee reasonably suspects the failure first occurred*'. We believe that it is the **error** that requires remediation, not simply the loss experienced as a result.

This amendment adheres to QMV's '*follow the money*' principle, whereby the first and second order impacts are assessed to determine the consumer's net position before any further remediation activity is undertaken. Assessing consumer impact purely from the date that loss was deemed to occur may negate earlier periods where a gain was experienced by the consumer, which we believe must be taken into consideration when assessing the overall impact of an error.

To be clear, we are not advocating for licensees to "claw back" a gain experienced by a consumer, but to instead apply the fund business rules (based on ASIC guidance) to determine the appropriate course of action.

QMV has identified several practical considerations that may complicate this approach:

- the availability of accurate records beyond the current seven-year timeframe; many licensees may not have access to records exceeding this period;
- whether the loss is ongoing;
- the scale and significance of the failure and whether any materiality threshold should be introduced;
- the impact of the statute of limitations and whether a legal obligation exists with respect to remediating a potential loss;
- how to remediate consumers who gain from an error as allowing a gain to be retained may disadvantage the membership base as a whole; and
- a longer remediation program will inevitably increase costs for the licensee across a range of areas including data, systems, communications, technology, and compliance.

We request that ASIC provide specific guidance with case studies and common examples to confirm ASIC's expectations in these situations.

Proposal: Beneficial assumptions

QMV broadly agrees with the use of assumptions in remediation in limited circumstances, however, reiterates that full and accurate data should be utilised in the first instance and that remediation should be performed using a *'follow the money'* approach to reconstruct the error in accordance with first principles.

However, whilst first principle remediation is in the best interest of members, we acknowledge it may not be practical in all instances given historical constraints. For that reason, beneficial assumptions may be best used only in circumstances where the time and cost to assess member level impacts can be demonstrated to be detrimental to consumers compared to the value of the remediation where qualified assumptions would result in a similar, albeit beneficial outcome for the consumer.

We also acknowledge that a reduced time to remediate via the use of beneficial assumptions, providing there is no significant impact to the quality of the remediation, has the capability to reduce the cost of remediation to the fund. Traditionally, significant resourcing costs are attributed to remediation programs of work, which ultimately have an ancillary impact to the non-impacted membership.

Where first principle remediation is not possible, the use of an average or defined amount based on qualified assumptions should be used to return the member as closely as possible to the original position.

When beneficial assumptions are applied within a remediation, it is critical that the appropriate documentation be retained and systems updated to ensure transparency in the remediation process, as well as enabling the accuracy of ongoing administration of impacted members.

The absence of information or capability should not preclude the member from remediation.

A licensee's remediation framework should consider the use of assumptions, especially in circumstances where impacted members may fall outside a reasonable tolerance in which to use assumptions. This information would be extremely helpful if presented in the form of case studies when the revised guidance is released.

QMV believes that the following should be considered when utilising assumptions during remediation:

- Where possible, assumptions should not result in an inconsistent treatment of members that are impacted by the same issue as this may create inequity within the membership which may have unintended consequences to both member balance and fund administration.
- Guidance on use of assumptions in remediation should include a requirement that the assumption be reflected in interrogatable registry information to ensure future accurate administration either by the incumbent administrator or following any system transitions.

Proposal: Calculating forgone returns or interest

QMV agrees that licensees should make every effort to calculate earnings or interest by using the actual rates available. Within the superannuation and wealth management industry, the data to perform this analysis is largely available and becoming increasingly so as the use of technology by licensees improves.

An exception to this is where the error may have caused loss outside of the licensee's information systems. By way of example, where an error results in a delay in transferring money to another super fund, external investment vehicle or bank account, and the consumer has experienced a loss in investment returns in this external environment.

In accordance with ASIC's proposed remediation steps, assumptions have been required for the purposes of compensation calculations, and we agree that evidence should be obtained by the licensee to support any

assumptions and resulting calculations. The determination of how specific calculations are performed, including the use of compound interest, should form part of a licensee's remediation framework.

Proposal: Best endeavours to find and pay consumers

QMV agrees that licensees should apply best endeavours to find and pay consumers where remediation is required, and further agree that cheques should only be used as a last resort.

As the financial landscape has shifted to an almost unilateral preference for digital banking, consumer expectations have also shifted and as an industry, this shift must be embraced.

However, it is important to remember that compensation within the superannuation environment will generally be required to be paid to a superannuation account and not paid to the consumer directly due to the preservation requirements under the *Superannuation Industry (Supervision) Act 1993*. There are very limited circumstances where direct payment to a consumer is possible and these are primarily restricted to where the recipient has met a condition of release or the compensation covers losses experienced outside of the superannuation environment.

The issues arise where the consumer has exited the product or does not hold a product into which a compensatory payment can be made. However, even in such cases, the superannuation fund does not have the ability to simply make a direct payment but must facilitate an alternative payment arrangement within the superannuation system. This may or may not require consumer contact before performing the transaction but will always be required to confirm the transaction after-the-fact.

QMV has observed the following challenges when attempting to make a payment in this scenario:

- Bank account details are not generally held for superannuation members, so contact is required to complete the payment to an appropriate bank account
- Where a bank account may be recorded, there is often little to no maintenance of these details, making them highly unreliable and thereby requiring member contact to confirm
- The currency of member contact details and/or Registry system maintenance of 'Lost' members results in an inefficient, ineffective, and unnecessarily costly engagement
- A low value payment may impact the level of consumer engagement and resulting success of making a payment via cheque as consumers are far less likely to engage where there is a perceived deficiency in reward for effort
- Where a member has exited the product, there is no longer an affiliation to the licensee, thereby reducing engagement, making it more difficult to arrange contact. This is particularly true where members have exercised portability and made a conscious decision to leave the fund.

QMV believes that the following should be considered to address these issues:

- Mandate attempted contact by the licensee to obtain electronic payment details before issuing a cheque – in the same way as superannuation licensees are required to make a reasonable effort to obtain updated contacted information before reporting a member as 'Lost', licensees should be required to undertake the same efforts before issuing a cheque which may or may not be received by the member;
- Be creative in encouraging consumers to maintain banking details, either via Open Banking reforms or proactive account management, as well as contact details to enable more efficient and effective engagement;

- Utilise technology to maintain currency of member information and 'Lost' identification by mandating and expanding the use of services such as the ATO's Provision of Details (POD) Service which is currently optional but designed to use ATO personal contact data to prevent members becoming 'Lost'; and
- Utilise different engagement methods (SMS, Member Portal push notifications) to increase the digital engagement capability and mitigate postage cost and time delay.

Specific guidance is required to ensure a clear definition of 'best endeavours' is evident. We are concerned that some licensees may nominate members as uncontactable with little or no effort made based on managing their own costs.

Proposal: Approach to reuniting consumers with remediation compensation

QMV strongly agrees with the existing position that licensees should not profit when unable to return money to consumers and that residual monies should not be retained within the fund in these instances. This extends to the scenario whereby a member account is created for the purposes of facilitating a remediation payment, in which the charging of fees should be prohibited to prevent any continued profit made by the fund.

To mitigate these issues, QMV strongly advocates for remediation monies to be transferred to the ATO in the first instance, and strongly supports the expressed intention by the Government to pass laws allowing all superannuation trustees to voluntarily transfer amounts to the ATO where the trustee believes it is in the best interests of that member.

The changes sought through amendments to the [Treasury Laws Amendment \(Reuniting More Superannuation\) Bill 2020](#) will assist superannuation trustees to make remediation payments to an exited member's superannuation where the trustee is unable to contact the former member. In accordance with the proposed amendments to the above legislation, the ATO would be responsible for accepting and reuniting the remediation monies, in the same way as is currently required under the superannuation unclaimed money processes.

QMV believes this will lead to improved member outcomes given the ATO's comprehensive and efficient operating model for reuniting members with unclaimed monies due to the amount of member data held that stretches beyond the superannuation regime. We expect this process to also align with member expectations that, in the digital age, the superannuation industry would have the means to automatically reunite them with any residual balances, without requiring any undue effort by the member.

Conclusion

This submission has broadly focussed on QMV's experience across the superannuation and wealth management industries in relation to the questions and measures proposed by ASIC. We conclude by reiterating the key themes which we believe are central to accurate, consistent and transparent remediation:

1. There are two key principles that should represent the foundation of consumer remediation:
 - All consumers should be returned to the financial position they would have been in had the error not occurred; and
 - Remediation of the same error should result in the same member outcome, even when performed across different organisations.
2. Specific case studies and tangible examples should be provided to accompany the guidance to support a consistent remediation approach and minimise the breadth of interpretation
3. All organisations should have a robust remediation framework which recognises the importance the people, process and technology

We thank you for the opportunity to provide this submission and welcome any further discussion regarding the contents. Please contact _____, *Partner, QMV Legal* at _____ with any queries.

Your sincerely,

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Senior Regulatory Consultant