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Australian Securities and Investments Commission  
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**By email:** [remediation@asic.gov.au](mailto:remediation@asic.gov.au)

Dear Ms Fairbairn

**AFCA's submission to ASIC Consultation Paper 335: Consumer remediation:  
Update to RG 256**

Please see attached the Australian Financial Complaints Authority's response to ASIC's Consultation Paper 335: Consumer remediation: update to RG 256. We appreciate the opportunity to provide information to the Commission to further your important work in this area.

If you have any queries or would like further information, please do not hesitate to contact \_\_\_\_\_, Head of Jurisdiction on \_\_\_\_\_ or \_\_\_\_\_.

Yours sincerely

**Chief Ombudsman and Chief Executive Officer  
Australian Financial Complaints Authority**

# Consumer Remediation: Regulatory Guide 256

Submission to ASIC's Consultation Paper 335

Australian Financial Complaints Authority

March 2021

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## Introduction

The Australian Financial Complaints Authority (**AFCA**) is the independent external dispute resolution (**EDR**) scheme for the financial sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. It does this not only by providing fair dispute resolution services, but also by working with financial firms to improve their processes and improve industry standards of service, thereby minimising complaints.

In addition to providing solutions for financial complaints, AFCA has responsibilities<sup>1</sup> to identify, resolve and report on systemic issues and to notify the Australian Securities and Investments Commission (**ASIC**), and other regulators, of serious contraventions of the law. More broadly, AFCA plays a key role in restoring trust in the financial services sector.

AFCA welcomes the opportunity to provide a submission<sup>2</sup> in response to consultation by ASIC on its proposed expanded remediation guidance, which will form part of *Regulatory Guide 256 Client review and remediation conducted by advice licensees* (RG 256).

This submission is informed by the experience of AFCA and its predecessor schemes. In the first part, we provide commentary about the role of remediation generally. We focus on issues that go to the effectiveness of remediation as a mechanism of redress for consumers, both individual and small business. Later we provide our comments to the specific issues raised in the consultation paper.

### Key points

- Financial firms have the primary obligation to remediate consumers where wrong doing and error have caused harm or loss to customers. Remediation should be consumer-centric and concerned with the impact and consequences the error or wrongdoing has caused.
- AFCA welcomes the proposals put forward by ASIC which expands its remediation guidance.
- The proposals to broaden the scope and breadth of remediation programs across the sector is an important step forward.

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<sup>1</sup> Refer to Part C, Reporting Requirements, of [ASIC Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority](#).

<sup>2</sup> This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

- The proposals provide relevant guidance for all licensees about remediation programs that might be conducted, irrespective of the nature, size and scope of the program and how initiated.
- The broadening of RG 256’s scope and language in relation to industry sectors, conduct time periods requiring remediation and the conduct itself (legal/regulatory and other broader obligations), supports a holistic, fair approach to providing redress when financial firm’s products or services have caused impact, harm or loss to a consumer or small business.

In this submission we refer to licensees by the broader term “financial firms”.

## A. Overview – our general observations

Financial firms have a primary legal obligation to resolve concerns raised by consumers and small business about the services and products they provide. Financial firms also have a general obligation to act on systemic wrongdoing and error where it occurs and once identified, remediate consumers for the impact, harm and loss that may be caused.

In our view, the following principles should guide all remediation programs:

- The program should be consumer centric.
- Consumers should receive fair, respectful and consistent treatment.
- There should be transparent and open information about the nature of the program, how it has impacted the consumer, how the firm will remediate and how the consumer can raise concerns if they are dissatisfied with the outcome or the process.
- They should be conducted as quickly and as efficiently as possible and with a decision-making framework that is beneficial to the consumer.
- They should be easy to navigate.
- The impact of any harm caused should be acknowledged by the financial firm, in addition to any compensation outcome.
- There should be transparent reporting of all remediation outcomes.

AFCA also considers that there should be a seamless interface between a financial firm's remediation program and AFCA to ensure that:

- the consumer experience is efficient and uniform with AFCA's approach to dispute resolution, and
- AFCA's role as an independent reviewer of remediation process and outcomes is well understood and accessible.

In our experience, some remediation programs lack a real and tangible focus on the impact on consumers and small business of the harm and consequences of error or wrongdoing. The impact on customers needs to be acknowledged, in addition to compensation paid, as ultimately without it, trust and confidence in the financial system is lost.

## **AFCA's Remediation Experience**

### **Identifying the need for remediation**

The need for financial firms to initiate remediation can be identified in various ways, including:

- Self-identified by the licensee,
- ASIC regulatory action or direction, and
- As a result of an AFCA systemic issues investigation.

### **AFCA plays a key consulting role in the establishment of some remediation programs**

Some financial firms have historically sought guidance from AFCA about the methodology, framework and communications they will adopt when establishing a remediation program by themselves or following regulatory intervention. We welcome these discussions. We are happy to share our insights and understand the nature, size and scope of the program and ensure the outcomes of remediation are aligned to the AFCA approach.

This engagement also ensures that, amongst other things, AFCA:

- understands the compensation methodology to be applied by the firm.
- is informed about, and is ready for, any complaints which might be lodged with AFCA about a remediation program.

- has sufficient resources to deal with any complaints arising from any remediation program.
- facilitates the effective interface between the financial firm and AFCA in handling these complaints.
- can co-ordinate communications for our case workers when responding to consumer queries about a program.
- can be satisfied consumers will receive effective and transparent communication about a consumer's right to lodge a complaint with AFCA if they are not satisfied with remediation outcome or process.

AFCA's systemic issues and remediation teams then interact with financial firms once remediation programs are known to us to ensure these objectives are met. As a result of this interaction, AFCA has seen a steady improvement by the industry in its overall remediation capability and awareness of AFCA's role. This includes some financial firms taking steps to adopt some of the proposals in ASIC's consultation paper, especially around the use of beneficial assumptions.

AFCA considers that the proposals put forward by ASIC, will assist in promoting consumer-centred remediations. We also consider that the proposed guidance will promote timely and effective remediation when an error and resulting consumer impact, loss or harm has been identified.

### **Remediation programs arising from AFCA's systemic issues investigations**

It is appropriate that ASIC's guidance covers all of the circumstances in which a remediation program might be established, including as an outcome of an AFCA systemic issues investigation.

AFCA's obligation to identify and report contraventions, breaches and systemic issues, that may ultimately lead to financial firm remediation, is contained in section 1052E of the Act, and ASIC *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority* (RG 267).

Most systemic issues investigations conducted by AFCA, are initiated after a complaint lodged by a consumer or small business indicates a possible systemic issue in the financial firm's conduct, processes or systems. A systemic issue is defined in our Rules as an issue that will have an effect on other persons, beyond the parties to a complaint.

In these instances, AFCA refers the issue to the financial firm for a response. If a definite systemic issue is ultimately identified by AFCA, we work with the financial firm to correct the error or misconduct, including any remedial activity that should be undertaken if customers have been impacted. In these instances, we provide

guidance on the fairness and reasonableness of the financial firm's proposed remediation to affected customers. This may include scope, timeliness, methodology and compensation.

### **A tailored and effective communication plan is essential**

However, a remediation program is established, AFCA supports the proposal that financial firms must design and execute appropriately scaled and tailored communications plans as part of their remediation programs. While some financial firms use a multi-channel approach and tailored remediation communications, AFCA's experience is that other financial firms do not always explain to consumers in sufficient and clear terms:

- why the program was necessary
- what error or conduct has occurred
- how remediation will be or was conducted
- why the compensation paid or payable is fair and how it was calculated, and
- steps the customer can take if they are not satisfied with the process or the outcome.

The provision of timely and transparent information to consumers is critical to the success of any remediation program. Communication with consumers should clearly explain the events that have occurred and conclusions reached, (including any compensation payable), to ensure consumers understand what the firm has done and why and what the consumer can do if they are not satisfied. Many complaints to AFCA arise because of confusion and misunderstanding of what has taken place.

Financial firms should have a robust communication plan for their interaction with customers affected by remediation. This may include having online information and dedicated contact lines and staff for customers to call with any remediation enquires.

We have seen recent examples where internal dispute resolution (**IDR**) staff have had to ask customers to provide details about remediation programs run by their own organisations because this information was not available even to them. This is clearly inefficient and causes significant confusion.

Any communication breakdown, especially when interacting with customers in these circumstances, has the potential to significantly increase the harm and inconvenience caused to consumers.



The remediation principles AFCA has proposed should ensure that financial firms are mindful of both their regulatory obligations and community expectations to remediate customers in a timely, efficient, tailored, transparent and fair way.

The following sections of this submission deal in detail with the specific issues raised in the consultation paper.

## B. When to initiate remediation – two-tiered approach

We consider that ASIC’s two-tiered remediation proposal about when to initiate remediation, and its guidance on expanded remediation review periods, has the potential, amongst other things, to increase:

- consistency of remediation practices across financial firms
- the number of consumers being identified and remediated
- timeliness of remediation to consumers while decreasing complexity (for consumers)
- the level of beneficial consumer outcomes.

ASIC’s proposals effectively inform and guide financial firms as to the circumstances in which they should consider initiating remediation. It ensures financial firms are prompted to conduct appropriate remediation where the circumstances warrant, without delay and reliance on regulatory input, and also when remediation may not be required. The use of proposed provisions by ASIC to preference the inclusivity of consumers into remediation and “widen the net”, encourages financial firms to effectively extend their remediation to cover all affected consumers.

The proposed guidance reflects that remediation should not be limited to addressing misconduct and compliance failings. Rather, there is an emphasis on the broad nature of financial firm responsibility when a failure causing loss or harm has breached certain standards, expectations or values.

In AFCA’s experience, some financial firms have been reluctant to remediate consumers unless they consider a clear, serious and specified regulatory or legal systemic breach of obligation has occurred. We have seen several examples through our systemic issues investigations, where this reluctance reflects little to no consideration or insight about the impact wrongdoing or error can have on consumers.

ASIC’s two-step proposal for instigating remediation, prompts financial firms to look at their conduct holistically. In doing so, financial firms will be less likely to establish remediation practices that misjudge the impact of wrongdoing or error or the numbers of customers that might have been affected by that conduct.

The proposed guidance also assists financial firms to flexibly scale remediation programs to the nature, size and scope of the issue to be addressed. This flexibility is key to ensuring that barriers to timely remediation are removed. We agree with ASIC's 'Making it Right – How to run consumer-centred remediation (Dec 2020)' guide, that remediation does not happen in a vacuum. Minimising complexity and reducing the time to 'make things right' is crucial to ensure that any impact of financial firm failures is reduced as much as practically possible.

### **The proposed guidance must apply across the sector**

ASIC's proposed revised guidance should help lift remediation standards across the sector. It will give greater clarity for financial firms who may have been uncertain about their remediation obligations or the framework they should adopt for specific remediation programs.

## **C. The review period for remediation**

AFCA strongly agree with ASIC's proposal to remove any reference to a seven-year period for remediation purposes from RG256. In its place, ASIC will affirm that remediation should start from when a failure first caused loss to a consumer.

AFCA and its predecessor schemes have always advocated that remediation should include any affected consumer, irrespective of when loss occurred. This guidance, if followed, has the potential to assist financial firms to rebuild consumer trust. The fundamental tenant is to ensure that all consumers impacted by financial firm misconduct or error, are identified and remediated.

AFCA has seen many examples where financial firms have extended their remediation programs back further than seven years, where it was appropriate to do so. This is to be commended. In our view, a financial firm should not be able to rely on poor systems, record keeping or governance frameworks that delay the identification of all affected customers in order to limit the scope of consumer remediation. Poor systems and record-keeping should not be a justification for whether or not affected consumers receive compensation for harm, loss or impact caused.

We support clear guidance to financial firms on this issue. The time taken by financial firms to identify and address failures and any poor systems and governance frameworks that may have contributed to these failures, should not be used as a basis to restrict remediation efforts.

## **D. Using beneficial assumptions**

Beneficial assumptions in favour of the affected customer are a useful tool to help guide decision making in a remediation program (when used appropriately). AFCA agrees with ASIC's proposal that such assumptions should be actively used in remediations and that they should satisfy specific criteria.

AFCA has seen some remediation programs either prolonged or not instigated by financial firms, in circumstances where beneficial assumptions would have led to a different outcome. In some instances, financial firms have also spent inordinate amounts of resource, time and money trying to exactly determine small amounts owing to each customer, which has significantly delayed the allocation of compensation. Delays in compensating customers in these scenarios may be overcome with the use of beneficial assumptions.

In one instance, AFCA informed the financial firm that a holistic approach to compensating customers was to be preferred in circumstances where a lack of records was leading to significant delays in calculating precise but small amounts of compensation to many customers. AFCA believed the financial firm could have relied on data presented in an external auditor's report as an indicative guide to loss caused and to support a consistent process and compensation methodology.

The financial firm instead chose to make assumptions that were not beneficial to its customers, based on incomplete records. Remediation was delayed by the financial firm as a result. AFCA reported the matter to ASIC in September 2019 as an unresolved definite systemic issue.

We consider greater emphasis on the concept of beneficial assumptions by financial firms, has the potential to improve the timeliness and costs of remediation programs, the experience of affected consumers and reduce the number of complaints to AFCA, about process and outcome.

## E. Calculating foregone returns or interest

We support ASIC's three-step framework for calculating returns or interest. In our experience, it covers a cross section of remediation scenarios.

As part of AFCA's individual complaint resolution process, we ask financial firms to attempt to calculate *actual* foregone returns or interest rates, without the use of any assumptions, where possible.

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

AFCA supports ASIC's proposed guidance that financial firms should apply best endeavours to find and automatically pay consumers by electronic transfer if possible. Cheques should generally be issued as a last resort. We consider that these steps will facilitate easier and quicker payment of compensation to affected consumers.

Given many financial firms who conduct remediation programs have an existing relationship with their customers, the starting point should always be to automatically

compensate using banking information currently available (or after verification, if needed).

We have experienced financial firms delay applying remediation funds to defined groups of customers, until issues/remediation calculations for other groups have been finalized. We strongly encourage any guidance to financial firms that encourages the application of compensation to each cohort of customers, at the earliest opportunity.

In most cases at AFCA, the complainant is directly involved. Therefore, there is generally no basis for issuing compensation by cheque in place of electronic payment.

There have been instances in larger remediations, where it has been appropriate for financial firms to issue cheques to parties to last known addresses as a last resort. This generally only occurs where the party receiving compensation is no longer a customer of the financial firm and where attempts to locate the customer have failed.

In these instances, it is good practice for the financial firm to provide a written notice to inform an affected customer about the refund, the time frame available to deposit the cheque, and that any unbanked cheques after that period would be donated to a charity or unclaimed monies.

It will become increasingly critical for financial firms to have efficient processes in place to locate past customers, for the purposes of remediation programs. This includes the increasing portability of financial products and the introduction of consumer data rights.

### Removing low value thresholds

We agree with ASIC's proposal to remove the broad low-value compensation threshold of \$20, as this is not appropriate for all remediations. We consider the removal of any reference to a low value threshold, reflects changes to industry practice and community expectations.

AFCA's starting position, consistent with the proposed changes, is for financial firms to return consumers as closely as possible to the position they would have otherwise been in but for the issue, regardless of the compensation amount. AFCA and its predecessor schemes have generally approached financial firms and asked for justification as to why all customers should not be put back into the position they were in, if not for the financial firms' conduct.

## G. Where remediation money cannot be returned to consumers

AFCA agrees with the fundamental principle that financial firms should not profit from any misconduct or compliance failure, (which will be carried over from the current version of RG 256).

AFCA accepts that if a financial firm's reasonable endeavours to locate all affected consumers fails, residual funds should be sent to unclaimed money regimes. As a last resort, AFCA supports the proposal that these unallocated funds be donated to a registered charity or not-for-profit organisation, but only after the financial firm has demonstrated the steps taken.

AFCA's guidance to financial firms who cannot locate a group of consumers for the purposes of allocating remediation funds, has generally aligned with ASIC's current proposal. We have seen multiple examples where financial firms have paid monies to an unclaimed money regime or where these proceeds are paid to a charity.

If financial firms seek to make donations in lieu of consumer payments, AFCA has in the past nominated the Jan Pentland Foundation (**the Foundation**). The Foundation was founded in memory of Jan Pentland, a financial counsellor who campaigned for a better deal for people on low incomes or who were vulnerable.

The Foundation awards a number of scholarships to new financial counsellors to help cover the costs of studying the Diploma of Financial Counselling. In this way, the funds at least support resources that assist customers in financial hardship.

## H. Settlement Deeds

Our experience is that it is not standard industry practice to use deeds of settlement when compensation is paid in remediation programs. We support ASIC's proposal however to provide further guidance to financial firms about the use of settlement deeds in these circumstances.

It is not always the case that consumers are adequately informed of all their rights during a remediation program and so informed agreement before signing a deed may be challenging.

In addition, this practice can cause anger, confusion and additional harm if not handled appropriately. AFCA has experienced one program where a financial firm asked its customers to sign a deed of release only to discover subsequently that further funds were owed.