REPORT 737

Response to submissions on CP 350 Consumer remediation: Further consultation

September 2022

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 350 *Consumer remediation: Further consultation* and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act or the National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 277 *Consumer remediation* and Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256) for current guidance.

Contents

A Overview/Consultation process

1 On 3 December 2020, we released Consultation Paper 335 *Consumer remediation: Update to RG 256* (CP 335). Details of the responses to CP 335 are outlined in Report 707 *Response to submissions on CP 335 Consumer remediation: Update to RG 256* (REP 707).

2 On 17 November 2021, we announced the second consultation phase with the release of Consultation Paper 350 *Consumer remediation: Further consultation* (CP 350), which sought feedback on draft Regulatory Guide 000 *Consumer remediation* (draft RG 000).

3 This second round of consultation was open for 12 weeks between 17 November 2021 and 11 February 2022.

4 This report highlights the key issues that arose out of the submissions received on CP 350 and our responses to those issues.

5 This report is not meant to be a comprehensive summary of all responses received. We have limited this report to the key issues and significant changes that we have made in Regulatory Guide 277 *Consumer remediation* (RG 277).

6 We received 22 non-confidential and four confidential responses to CP 350. Respondents represented a diverse range of stakeholders. We received feedback from industry sectors (such as financial advice, insurance, credit and banking, and superannuation), as well as professional service industry associations and consumer groups.

7 We are grateful to respondents for taking the time to send us their comments in response to CP 350. For a list of the non-confidential respondents to CP 350, see the appendix. Copies of these submissions are currently on the CP 350 page on the ASIC website.

Responses to CP 350

8 The submissions to CP 350 and insights obtained from the first and second rounds of consultation have informed our final guidance in RG 277.

> Note: For an overview of the differences between Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256), draft RG 000 and RG 277, see the attachment to this paper, *What has changed since RG 256?*

9 Respondents to CP 350 were broadly supportive of how we had replied to the key issues raised during the first round of consultation (CP 335), acknowledging

the number of practical adjustments reflected in draft RG 000 to address stakeholder concerns. Respondents also advised that:

(a) in most cases our proposed guidance was in line with current remediation practices; and

(b) the examples were helpful in providing practical illustrations of how the guidance should operate in practice. While some respondents requested that we use more useful scenarios in some examples, respondents only advocated for more, not fewer, examples (e.g. more credit assistance or intermediary examples).

10 Respondents were also generally supportive of the draft guidance on:

(a) when to initiate a remediation;

(b) the key principles for conducting remediations;

(c) the use of assumptions that are beneficial to consumers;

(d) the remediation review period, with a few exceptions; and

(e) the reasonable endeavours standard to find and make payments—however, respondents requested further guidance on what this means in practice.

11 Most of the concerns raised about draft RG 000 were from an operational and process perspective, rather than principled objections to the rationale behind the policy positions. The main outstanding issues raised by respondents related to:

(a) the need for a transition period;

(b) examples and remedies relating to credit misconduct or other failures, compensation for non-financial loss and a discounting for a consumer's 'use' of a financial product;

(c) the use of fair and reasonable rates (for calculating foregone returns or interest) for products and services beyond investments and advice;

(d) the frequency and content of communications, and monitoring assumptions;

(e) the proposed $5 low-value compensation threshold, applying reasonable endeavours to find affected consumers and the use of cheques;

(f) the lack of transparency and public reporting of the existence, progress and outcome of remediations;

(g) clarifying the interaction between remediation, internal dispute resolution (IDR) and the Australian Financial Complaints Authority (AFCA);

(h) other outcomes to consider, particularly postponing or ceasing enforcement action during a remediation;

(i) challenges unique to superannuation; and

(j) money that cannot be returned to consumers (unclaimed money and residual remediation payments).

Drafting consistency

12 Some respondents were also concerned about some of the language used. In particular, drafting that appeared to set a higher standard than may have been intended. For example, in draft RG 000 we said that when applying assumptions, licensees should give consumers the benefit of *any* doubt. We agree with the feedback that this risks misinterpretation, and have amended the language so licensees should 'give consumers the benefit of *the* doubt': see Table 1, Principle 3.

> Note: In this report, when we refer to 'licensees' we mean Australian financial services (AFS) licensees (including superannuation trustees) and Australian credit licensees (credit licensees).

13 Similarly, we have tried wherever possible to ensure consistency in language to minimise any confusion. For example, we have tried to ensure references to *remediation* are not conflated with *compensation*, so that licensees understand that including a consumer in a remediation does not automatically mean the consumer will receive compensation. Remediation means a process *large or small* to:

(a) investigate the extent of the misconduct or other failure; and

(b) if appropriate, return consumers who have suffered loss as a result of the misconduct or other failure to the position they would have otherwise been in, as closely as possible.

14 We have however maintained the term 'remediation payment', which for the purposes of the guidance and this report means an amount of money owed to a consumer as a result of a remediation process.

> Note: For taxation purposes, the amounts received may not be characterised as a 'remediation payment' and may depend on the context and the individual circumstances of the recipient.

B Key issue: Transition period

Key points

This section outlines the responses we received on when the updated guidance will come into effect: see paragraphs 15–18.

When the updated guidance will come into effect

15 Draft RG 000 did not include a transition period. We considered that a transition period was not necessary because the updated guidance:

(a) did not introduce any new legal requirements; and

(b) would only apply to remediations initiated after the date the final guide is issued.

16 In REP 707 we explained that the guidance provides licensees with greater clarity about our expectations and what actions they can take to achieve fair and timely outcomes in line with their existing licensing obligations. We also understood from both rounds of consultation that many licensees were already applying the principles and much of the updated guidance: see paragraphs 16–17 in REP 707.

Stakeholder feedback

17 A number of respondents to CP 350 raised concerns about our position to not include a transition period. Respondents submitted that there were a number of new concepts in draft RG 000 that will take time to implement operationally. For example:

(a) complying with the guidance will cause substantive changes at a whole-of-organisation level, including updating organisational policies, procedures, detailed remediation guidance, systems, controls, and implementing new or revised processes; and

(b) calculators, automated processes and procedures will need to be updated or amended.

18 Two respondents requested a transition period of 12 months, one respondent thought six months would be a reasonable period of time, and two other respondents requested a transition without specifying the time period.

ASIC's response

We have carefully considered the feedback and decided to maintain our position and not include a transition period: see RG 277.8–RG 277.9.

The final guidance will apply to remediations initiated on or after the date of issue. The guidance will not apply retrospectively. For remediations initiated before the date of issue, Regulatory Guide 256 *Client review and remediation conducted by advice licensees* (RG 256) continues to apply. We note that a remediation is 'initiated' when a licensee makes the decision to address misconduct or other failure and *starts* a remediation process. Any remediations in the 'backlog', 'queue' or similar that have not started are not 'initiated'.

The guide may also be read in conjunction with *Making it right: How to run a consumer-centred remediation* (*Making it right*). *Making it right* is a useful field guide that helps licensees with the day-to-day design and execution of consumer-centred remediations.

While we accept that some licensees (in particular the larger institutions) will need to update their internal policies and procedures in response to RG 277, we are of the view that providing a transition period will result in confusion and inconsistent practices. We understand that many licensees are already applying the principles and standards expressed in draft RG 000, which are not significantly different from the final guidance in RG 277. We also know that licensees are very capable of adapting their remediation approach when presented with a novel situation or new information, and consider that licensees are similarly capable of applying RG 277 to remediations initiated after publication.

Licensees may choose to take advantage of the new RG 277 and apply it to existing remediations (e.g. the use of assumptions that are beneficial to consumers), especially those in industries outside of financial advice. When applying new concepts or methodologies from the guidance, it is important that licensees do not pick and choose elements to preference their interests over ensuring fair and timely outcomes for consumers: see RG 277.9.

C Key issue: Determining appropriate remedies

Key points

This section outlines the feedback we received about:

- the appropriate remedies to consider in relation to specific products or misconduct or other failures (see paragraphs 19–25);
- compensation for non-financial loss (see paragraphs 26–29); and
- discounts for benefit of use (see paragraphs 30–32).

Examples and remedies covering different financial sectors

19 While there is no one-size-fits-all approach to remediations, we have provided principles-based guidance where appropriate to guide licensees to apply a fair and consistent framework when conducting their remediations. However, we recognise that sometimes licensees may benefit from more tailored guidance for particular situations and financial products.

20 In draft RG 000 we provided a number of examples to illustrate the practical application of the guidance as it relates to specific product areas. For example, Table 1 provided a non-exhaustive list of possible remedies to consider when determining and delivering appropriate outcomes for affected consumers. We also included 25 examples covering a number of different products and financial services sectors.

Stakeholder feedback

21 Some respondents observed that draft RG 000 did not include enough credit intermediary and assistance examples, including a list of possible remedies in Table 1.

22 Some respondents also advocated for guidance in circumstances where there are multiple parties involved in an intermediated lending remediation. For example, if the loss suffered by a consumer was caused by the misconduct of a mortgage broker, but the investigation process is affected by the aggregator and the appropriate remedial action for the consumer is within the lender's control. Specific examples include circumstances where the:

(a) consumer wanted a fixed rate loan, but was placed in a variable rate loan instead;

(b) consumer wanted a principal and interest loan, but was placed in an interest-only loan; and

(c) consumer requested a rate lock but failed to receive the rate lock on settlement.

23 Respondents reflected that remediation in the intermediated lending sector can be complex and involve multiple parties, and that we should provide guidance that when remediation is required, all parties cooperate (including the lender and the aggregator).

24 The consumer representatives said the list of remedies in Table 1 was a useful resource; however, they also provided suggestions for how the remedies in Table 1 could be improved to ensure they are fair and appropriate. Some key considerations included:

(a) in relation to insurance contracts, if a consumer elects to stay in a product, licensees should provide a refund of the portion of premiums paid that represent its profit;

(b) in relation to systems failures or errors in banking products, compensation for overdraft or late fees should include related charges by the bank and any other creditor (indirect losses);

(c) in relation to consumer lease or credit contracts, the remedies appear restrictive—especially when considering the available remedies for claims including unjust transactions under s76 of the National Credit Code (at Sch 1 to the *National Consumer Credit Act 2009* (National Credit Act)); and

(d) amendments for dealing with responsible lending breaches, particularly where a full debt waiver may be appropriate.

25 Other respondents provided useful technical feedback to ensure the guidance more clearly and accurately reflects how the product or particular remedy would operate in practice (e.g. the guidance relating to over the counter (OTC) derivative products and the possible remedies).

ASIC's response

Where appropriate, we have amended the remedies in Table 2 in RG 277 to reflect the feedback provided. For example:

- *misconduct related to insurance products*—we have included additional remedies, such as reducing premiums to cost if the consumer chooses to remain in the policy;
- *systems failures or errors related to banking products*—we have clarified that licensees should consider whether any indirect financial loss has occurred as a result of the misconduct or other failure (e.g. overdraft fees, late fees, or related charges by other creditors if known);
- *misconduct related to mortgage brokers or other credit intermediates*—we have added a new section detailing possible remedies, such as compensation for any fees, interest and costs that the consumer would not have otherwise incurred; offering to cover remedial advice from a credit assistance provider to review the consumer's

circumstances; and, where appropriate, helping consumers ask lenders to change features of their existing loan, or move the consumer to a suitable loan product;

- *misconduct related to consumer lease or credit contracts*—we have included additional remedies to reflect those available under the National Credit Code for breaches of credit legislation and provided for remedies associated with the provision of unsuitable loans. We have also clarified the process for correcting a consumer's credit information, and notifying the relevant credit reporting bodies;
- *misconduct related to OTC derivative products*—we have amended the guidance to ensure consistency with the general drafting of Table 1 and to avoid misinterpretation. The recission of contracts where the licensee has facilitated unlicensed conduct has also been added as an additional remedy to consider; and
- *misconduct related to debt management services*—we have added a new section detailing possible remedies, such as refunding fees plus interest, providing compensation for costs incurred, helping consumers access free alternatives, and providing compensation for any known stress or inconvenience caused.

We have also included some new practical examples with a focus on credit and debt management, bringing the total number of examples in RG 277 to 28.

Compensation for non-financial loss

26 In draft RG 000, we described the types of remedies available to address consumer loss. Remedies can be monetary, non-monetary, or a combination of both. We also provided guidance that licensees should consider any additional fees or charges that may have been incurred as a result of the misconduct or other failure (e.g. overdraft fees or late payment fees).

27 Some consumers may also suffer loss that is not immediately apparent to the licensee. Because of this, licensees should provide a consumer with clear information about how they have calculated compensation. This will enable the consumer to provide details of any detriment that was not considered by the licensee when determining the appropriate remedy.

Stakeholder feedback

28 Consumer representativeness submitted that draft RG 000 failed to clearly state the need for compensation for non-financial impacts—for example, distress, physical and mental ill health, relationship strain and breakdown, defaulting on other bills, taking out other forms of credit, loss of assets, and

the lifetime impacts of bankruptcy. In these cases, compensation is likely to be the only available remedy.

29 This is not a new concept—AFCA will award consumers compensation for direct and indirect financial loss, as well as non-financial loss (but AFCA's ability to award compensation is limited—see AFCA's Complaint Resolution Scheme Rules (AFCA Rules) at 'D.4 Monetary limits for complaints other than Superannuation Complaints').

ASIC's response

We have included guidance that, depending on the nature of the remediation and whether the licensee has a high level of engagement with individual affected consumers, it may be appropriate for a licensee to compensate the consumer for any known non-financial loss suffered as a result of the misconduct or other failure: see RG 277.71 and Example 19.

We note that AFCA may consider claims for non-financial loss up to certain limits where appropriate: see AFCA Rules, D.3.3 and D.4. If remedies for non-financial loss are available to consumers who seek redress through AFCA following a remediation outcome and IDR response, to ensure fair and timely consumer outcomes the same remedies should be available during the remediation where the relevant loss is known.

Benefit of use

30 In draft RG 000 we provided guidance that a partial monetary remedy may be appropriate in limited circumstances, but only if the consumer has received a legitimate and demonstrable financial benefit from the mis-sold product. Licensees should assess whether the consumers received the specific products or services they paid for.

Stakeholder feedback

31 Consumer representatives strongly disagreed that licensees should be able to discount compensation owed for the purported 'benefit' or use of the product, particularly for responsible lending breaches. Such discounts can produce unfair results and lead to windfall gains for the lender, particularly for consumer leases and 'lemon' cars. Instead, consumer representatives said that remediations should look at what is fair in all the circumstances, considering the consumer's resulting financial and non-financial loss. Consumer representatives suggest that, at a bare minimum, any discount for use of the product must only be applied where there was a real and tangible benefit to the consumer, and the resulting calculation is fair.

32 Other industry respondents requested clarification on the limited circumstances in which a partial remedy may be applied, including supporting examples.

ASIC's response

The guiding principle for licensees when determining remedies is to return the consumer to the position they would have otherwise been in, as closely as possible, while also ensuring the licensee does not benefit from the misconduct. What is fair and appropriate will depend on the circumstances, and the considerations can also include things like whether the consumer received a financial benefit. However, if discounting the compensation, licensees should be satisfied that the consumer received a legitimate and demonstrable financial benefit in return.

If making assumptions about a consumer's financial benefit, licensees should apply the guidance at RG 277.113–RG 277.141, including that the assumption be documented and well justified. The calculation should also be clearly explained to the consumer, if requested, so that they can obtain advice or make a complaint.

D Key issue: Calculating foregone returns or interest

Key points

This section outlines the responses we received about calculating foregone returns or interest rates on compensation payments. The responses were most concerned with:

- the example of a fair and reasonable rate in the context of credit and banking (proposed 10-year Australian Government bond rate plus 3%) (see paragraphs 33–41); and
- the fair and reasonable rate compounding daily (see paragraph 42).

Fair and reasonable rates

33 We proposed to revise the guidance in RG 256 on calculating foregone returns or interest on compensation payments: see proposal E1 in CP 335. In draft RG 000, attached to CP 350, we clarified the different approaches that a licensee may take, including calculating the actual foregone returns or interest, applying beneficial assumptions, or using a fair and reasonable rate: see draft RG 000.152–RG 000.167.

34 During our consultations (and through our monitoring experience) we also discovered licensees were sometimes taking inconsistent or unfair approaches when calculating foregone returns or interest. For example, often for banking and retail products, licensees were making unfair assumptions about a consumer's behaviour when accounting for the unknown 'time value of money': see 'ASIC's response' at paragraph 72 in REP 707.

35 To address this, we included further guidance in draft RG 000 on the different circumstances that may arise. We provided a number of examples, including another example of a fair and reasonable rate: see Example 24 of draft RG 000.

36 We considered that the 10-year Australian Government bond rate plus 3%, as prescribed for some insurance contexts by s57 of the *Insurance Contracts Act 1984* and reg 38 of the *Insurance Contracts Regulations 2017* (bond rate plus 3%) was a fair and reasonable rate that satisfied the principles outlined in draft RG 000.163. In our opinion, the rate is fair and reasonable in the context of insurance contracts generally, but could also be applied to other non-investment type remediations: see draft RG 000.162. We also retained the Reserve Bank of Australia (RBA) cash rate plus 6% as another example (in the absence of a prescribed rate), mostly appropriate for financial advice and superannuation remediations: see draft RG 000.164.

Stakeholder feedback

Fair and reasonable rates for insurance, credit and banking

37 We received a lot of feedback on our proposal to include the bond rate plus 3% as another example of a fair and reasonable rate in the context of insurance contracts generally, as well as credit and banking. No general insurer argued against applying the bond rate plus 3%, other than one respondent who argued for greater flexibility. Most, if not all, the concerns raised about the rate came from credit and banking stakeholders.

38 The most common arguments made against using the bond rate plus 3% were that:

(a) this rate offers generous risk-free returns that are unrealistic;

(b) the fair and reasonable rate should be flexible and depend on 'what would have been the consumer's most likely use of deprived funds';

(c) it is a penalty rate designed to penalise delayed settlements of insurance claims. It is not intended to penalise firms for unintentional fee charges or misconduct. The use of legislated rates should be minimised in favour of identifying actual impact and appropriate fair and reasonable rates; and

(d) this rate would significantly overcompensate consumers, especially those owed compensation over a long period of time.

39 A number of alternative rates were suggested for particular products:

(a) the RBA cash rate plus 1% for retail products outside of wealth (termed the 'best of savings rate');

(b) three-year term deposit rate plus 1.5% buffer for banking errors;

(c) the average business rate of return for businesses affected;

(d) the RBA cash rate plus 3% for secured lending products; and

(e) the consumer price index (CPI) for no-interest-earning transaction accounts or pension accounts.

40 One respondent submitted that a three-year term deposit rate plus a buffer of 1.5% for banking misconduct is fair and reasonable. They argued that this is because it is generally reasonable to assume that the consumer would have retained the funds within a banking product rather than seeking to invest the funds in a medium- or high-yield investment option.

ASIC's response

We have removed the guidance on using fair and reasonable rates to simplify the different approaches licensees can take: see RG 277.74–RG 277.87. Licensees may *choose* to calculate the

actual foregone returns or interest or use assumptions that are beneficial to consumers.

It is important that consumers are not further disadvantaged by the licensee's misconduct. They should be appropriately compensated for any interest that they would not have otherwise incurred, as well as for the returns or interest they would have otherwise received, but for the misconduct or other failure.

To make this calculation, licensees may use the actual records or data to reconstruct the foregone returns or interest. This may be relatively straightforward in some cases (i.e. if a fee is incorrectly charged to a current member's superannuation account, the licensee may apply the same returns the account received over the relevant period). In other cases, licensees may need to make assumptions about what the consumer would likely have done with the funds had they had access to them (e.g. if the consumer exited the product).

We have replaced the guidance on the fair and reasonable rates with more detailed guidance about calculating foregone returns or interest using assumptions. Given the variety of contexts in which misconduct or other failures occur, the relevant time periods and the variability in consumers' likely use of the money but for the misconduct or other failure, we no longer consider that the guidance on fair and reasonable rates is fit for purpose. We also wanted to provide guidance that would be adaptable to changing economic conditions.

While we have provided licensees with greater discretion, the guidance outlines some considerations that should be taken into account when developing the assumptions: see RG 277.85. We have also included a number of examples of assumptions that may be appropriate in particular contexts (e.g. RBA cash rate plus 6%). However, it is not mandatory to use the rates described in the examples. Licensees can rely on internal and reputable external data sources to develop an assumption about the likely foregone returns or interest that is beneficial to consumers and is justified in the circumstances.

Importantly, licensees should document their decision and rationale, and inform consumers that assumptions have been used in the calculation.

Fair and reasonable rates for superannuation

41 In relation to superannuation, a few respondents suggested that when applying foregone returns for former members, trustees should apply their own fund's returns over the relevant period as a proxy, rather than the RBA cash rate plus 6%. Respondents requested that Example 23 be amended to reflect this feedback.

ASIC's response

We are of the view that superannuation trustees should apply assumptions that are beneficial to consumers to account for the foregone returns of former members if it is not possible to reconstruct the actual returns. In our view it will not *always* be appropriate to use the fund's own returns as a proxy, given the enhanced scrutiny of persistent poor fund performance. If using a fund's own returns as a proxy for former members, superannuation trustees will need to be able to justify it and show that it is beneficial to consumers (i.e. minimises the risk of under compensation). See Example 16 in RG 277 for clarification.

Compounding daily

42 We provided draft guidance that the fair and reasonable rate should compound daily where the compounding frequency is unknown: see draft RG 000.167.

Stakeholder feedback

43 We received three responses on the compounding period of the fair and reasonable rate. One respondent claimed that it was unaware of any financial product that compounds daily. The respondent indicated that investment products typically compound quarterly or half-yearly and the guidance should allow flexibility here.

44 Another respondent stated that the guidance should articulate both the calculation frequency and compounding frequency (i.e. the rate can be calculated daily but compounded monthly, which is typical for banking products).

45 Another respondent uses a daily simple interest rate, which it thinks is appropriate given the buffer it applies to the rate itself.

ASIC's response

We have amended the guidance to clarify that when calculating foregone returns or interest, licensees need to determine whether simple interest or compounding interest applies: see RG 277.78–RG 277.79. For compounding interest, licensees need to consider the compounding period and frequency of the interest calculations. Licensees should apply the known compounding period and calculation frequency when available. In circumstances where the licensee does not have access to any actual data of foregone returns or interest, it should make assumptions that are beneficial to consumers and at least apply compounding interest. The compounding frequency or calculation can be tailored to the specific sector the relevant misconduct took

place in (where relevant). For example, for banking products it may be appropriate for the interest to be calculated daily, compounded monthly. These decisions need to supported by evidence (such as available data) and documented.

We consider that applying simple interest will rarely benefit consumers, particularly over longer periods of time, unless the relevant product operates in such a manner.

E Key issue: Communications and monitoring

Key points

This section outlines the responses we received about the scalability of the communications guidance (see paragraphs 46–54), and our expectations of licensees when monitoring assumptions (see paragraphs 55–59).

Communication scalability

46 In draft RG 000, we provided guidance that a licensee should consider the consumer experience when delivering outcomes and designing the communications approach. The frequency of communication with affected consumers during a remediation will vary. However, generally speaking there are three types of communication:

(a) an initial communication;

(b) ongoing communications; and

(c) a final outcome communication.

47 We also referred readers to p. 7 of the December 2020 version of *Making it right*, which provides more tips on what to consider when making the communications plan.

Stakeholder feedback

Scalable to the type of remediation

48 Respondents were concerned that the communications guidance was not appropriately scalable.

49 Respondents submitted that requiring an initial, ongoing and final communication for every type of remediation is not practicable or appropriate. Some licensees advised that often they do not communicate with consumers until their eligibility is confirmed or an outcome has been determined (e.g. they communicate once, at the conclusion of the remediation).

50 Some suggested the communications need to be commensurate with the consumer impact and experience. However, respondents stressed that this should not mean that licensees are expected to draft bespoke communications, which can be very problematic, especially for larger remediations.

ASIC's response

We have amended the guidance about communicating with consumers to allow for better scalability: see RG 277.145–RG 277.152. We have adopted an outcomes-based approach so that licensees aim to ensure affected consumers:

- understand what has happened;
- are provided with updates where necessary and appropriate;
- understand the remediation outcome and what it means for them, including how they can make further inquiries;
- are able to easily follow any calls to action, with support when needed; and
- are told how they can make a complaint about the remediation outcome.

Licensees should also refer to *Making it right* for more detailed information about understanding the consumer journey and planning communications.

Scalable to the value of the payment

51 Some respondents also suggested that sending communications should be flexible and scalable to the value of the payment. For example, one respondent said that it does not send a communication at all when providing low-value remediation, meaning the consumer is not provided with details of their review rights.

ASIC's response

Consumers should generally be given the opportunity to find out about the misconduct or other failure, and be notified of their rights to review the outcome. We do not think it is appropriate, even in relation to small values, for consumers to receive a remediation payment without any indication of what it is for, or who they can contact for more information.

Licensees can choose how they communicate this to the consumers—for example, licensees can set up a public or consumer-facing website detailing the remediation and contact channels for the affected consumers. This website can then be linked in a very short and simple communication sent directly to the consumer.

Specific communication content

52 In draft RG 000, we provided guidance about the content we would expect to see in consumer communications. For example, under draft RG 000, in the final outcome communication licensees should:

(a) provide consumers with details of their review rights;

(b) provide details of how the amount was calculated especially if assumptions were used; and

(c) clearly communicate to consumers who were unresponsive that the licensee will lodge the money into an unclaimed money regime, and include details of how to lodge a claim.

Stakeholder feedback

Level of detail about assumptions

53 Respondents were concerned about the level of detail required when communicating the assumptions used to calculate the consumer's loss. Many suggested this will be inefficient and difficult to explain, especially for lower value amounts, and current market practice is to only provide this information on request. They argued that flexibility should be maintained in terms of how assumptions are communicated, depending on the complexity of the calculations and method of communication. It was suggested that often a general statement that assumptions have been used should suffice.

ASIC's response

We accept that it may not always be appropriate to provide detailed explanations in communications to a consumer about how assumptions were used to calculate the compensation. Licensees should, at a minimum, communicate that assumptions that benefit consumers have been applied and that the consumer can request more information about the assumptions through the channels provided: see RG 277.87 and RG 277.119.

Details about unclaimed money regime

54 In terms of communicating details of the unclaimed money regime, respondents disagreed that this should be a requirement. They maintained that, due to the complexity of the different regimes and the waiting periods involved, it would not be useful to explain the process to the consumer. The respondents submitted that, alternatively, licensees should only have to include a generic message about the unclaimed money regime when issuing their final outcome communication.

ASIC's response

We have revised the guidance to provide that, when issuing the final communication, licensees should advise consumers that if they do not respond, the money will be lodged in an unclaimed money regime or otherwise paid as a residual remediation payment. Licensees should also advise consumers that they will remain eligible to claim the compensation owed: see RG 277.189.

Monitoring outcomes

55 In draft RG 000, we outlined the principles of using assumptions that are beneficial to consumers. An important aspect of using assumptions is to monitor them until payments are finalised to ensure they are still beneficial to consumers, as expected.

56 We provided further guidance about monitoring outcomes, including that licensees should have processes in place to:

(a) review and monitor complaints about the remediation;

(b) monitor and track the effectiveness of communications and proactively adapt the approach when required; and

(c) monitor and record the cashing rates of cheques.

Stakeholder feedback

57 Some respondents raised concerns about the extent of monitoring required, and whether this is expected on an individual or class level. These respondents suggested that monitoring may increase complexity and timeframes, and more flexibility should be allowed depending on the nature and complexity of the compensation calculation and remediation outcome.

58 One respondent suggested that if sufficient analysis and investigation was performed upfront to ensure the compensation returned consumers to the position they would have otherwise been in, including pilot testing, it should not be necessary to implement extensive monitoring of outcomes.

59 Respondents also raised concerns about a licensee's ability to monitor remediation outcomes if the payments are made to a third party who is then in control of delivering the outcomes. Respondents requested that we provide guidance that acknowledges that licensees will be limited in what steps they can take to monitor the consumer's outcomes.

ASIC's response

We have amended the guidance on monitoring assumptions. We have clarified that if new information arises or becomes reasonably available during or following the remediation that suggests any assumptions made are no longer beneficial to consumers, then licensees should revisit the assumptions and consider whether any additional compensation is necessary: see RG 277.140–RG 277.141.

F Key issue: Low-value compensation threshold

Key points

This section outlines the responses we received about the proposed $5 low-value compensation threshold. Respondents were particularly concerned about:

- what reasonable endeavours are necessary to find and return money to affected consumers, especially those owed low-value amounts (see paragraphs 60–66); and
- the use of cheques (see paragraphs 67–71).

$5 low-value compensation threshold

60 RG 256 states (at RG 256.135):

> Where the amount of compensation to be paid to a client is below $20 and the client cannot be compensated without significant effort on your part—for example, because the client no longer holds an account with you—you may instead make a community service payment by paying the amount to an appropriate organisation (which will generally be not-for-profit) to fund activities that could be characterised as a community service …

61 This is known as applying a 'low-value compensation threshold'.

62 In CP 335 we proposed to remove the broad $20 threshold in RG 256 and replace it with a principles-based approach. Under this approach, it would be up to licensees to decide what low-value threshold is fair and appropriate in the circumstances, in line with their obligations. There were mixed responses to this proposal, but a majority preferred the certainty and efficiency that a fixed threshold in guidance provides. Most respondents also supported the clear exclusion of current customers and those with current payment information on file from the imposition of the threshold (e.g. they should be directly remediated irrespective of value).

63 In CP 350, in responding to feedback and the preference for a fixed threshold, we consulted on the appropriateness of a $5 low-value compensation threshold for former customers who have no current payment information on file. We asked respondents to describe any practical challenges associated with this guidance, with reference to relevant data and documentation: see question A1Q1 of CP 350.

64 We selected a lower threshold in part to reflect the fact that RG 256 was originally drafted primarily with advice-related remediations in mind—which tend to involve larger per-consumer remediation payments—whereas RG 277 explicitly covers sectors that have a greater incidence of large-scale low-value remediations.

Stakeholder feedback

65 While most respondents supported the guidance referring to a fixed threshold, many questioned the rationale behind lowering the amount from $20 to $5. In particular:

(a) some industry stakeholders claim the operational costs associated with remediating former customers far outweigh the benefit. One respondent advised that sending a cheque costs $11, and another respondent claimed it costs a minimum of $44.75 per consumer, with additional variable costs of $7.95, to make a remediation payment;

(b) the dedication of resources for issuing, managing, monitoring and cancelling uncashed low-value cheques prevents their allocation to other remediation activities;

(c) consumers are less likely to cash low-value cheques. One confidential respondent provided data that suggested 34% of cheques between $0 and $15 are cashed. During a recent remediation, another licensee advised that 41% of cheques between $5 and $10, and 46% of cheques between $10 and $15, had so far been cashed;

(d) some stakeholders claim the low response rates for amounts less than $20 is likely a result of heightened scam activity and consumer concerns about responding to requests to update information. No data was provided in support of this claim;

(e) $5 is inconsistent with Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94), which set a $20 threshold for remediating unit pricing errors in 2008; and

(f) the general insurance industry does not possess bank details en masse and often has to remediate a higher number of former customers (given their contracts typically are on annual renewal). These customers don't expect to receive money from their insurer, which can create confusion and uncertainty. Again, no data was provided in support of this claim.

66 Some respondents still advocated for greater flexibility, so licensees can tailor their responses based on the circumstances of the remediation, the value of the payment, and the likelihood the consumer would respond.

ASIC's response

We have sought to clarify the guidance on the low-value compensation threshold: see RG 277.160–RG 277.163.

We have clarified that, for former customers who are owed $5 or less (including interest) with no current payment information on file, licensees can *automatically* make a residual remediation payment rather than applying reasonable endeavours to find and pay them: see RG 277.161.

Note: A 'residual remediation payment' is a payment to a charity or not-for-profit organisation made up of consolidated remediation money that could not be returned to consumers despite reasonable endeavours: see RG 277.194–RG 277.197.

For current customers (and former customers owed more than $5) licensees should apply *reasonable endeavours* to contact them. To be clear, this is a reasonable standard of conduct. What effort (including number of contact attempts) is appropriate can be scalable based on value and will depend on the context (i.e. the quality of information and steps already taken to improve or enhance the information): see RG 277.162.

If these consumers cannot be contacted (due to the low quality of the customer data or because the consumer is unresponsive), licensees may make a residual remediation payment or lodge the payment in an unclaimed money regime (if applicable). This includes where the payment is more than $5.

Licensees can also segment their customers into different cohorts so the overall efficiency of the remediation is not impacted by efforts to return low-value amounts.

We requested data to support any submissions about the appropriateness of the $5 threshold. Only one firm provided data about the relative cashing rates according to the value of a cheque. While useful to a degree, no context was provided about the communication approach or whether consumers were given tools to help them cash their cheques. For example, we are aware that a number of the larger financial institutions offer an ability for customers to scan cheques through their app, so attending a branch in person is not always necessary.

This firm reported that 34% of consumers cashed cheques between $0 and $15. In our experience, cashing rates can vary considerably by remediation. Nevertheless 34% is a reasonable percentage and, in our view, high enough to justify at least a *reasonable attempt* to return the money.

Another respondent provided new data on the relative cost associated with making remediation payments per consumer (minimum of $44.75 plus additional variable costs of $7.95). While some breakdown was provided, the respondent acknowledged on further inquiry that any costs data is a function of the nature, scale, complexity and size of the remediation driving the consumer refund. We also understand that the minimum costs of $44.75 may include operational costs that would otherwise be incurred in establishing the program and paying all consumers.

Ultimately, we were not provided with enough data or evidence to convince us that the $5 threshold is too low or that it would not provide consumers with any benefit. We think that lowering the threshold is also necessary to incentivise firms to continue to enhance their data management and retention capabilities.

Use of cheques

67 In draft RG 000, we provided guidance that, in most cases, licensees should prioritise making automatic payments (e.g. electronic bank transfer or another viable means to process funds automatically). In some cases, licensees may choose to send a cheque and give consumers the option of providing alternative payment details. However, we said that cheques should not be the default form of payment.

68 If sending cheques, licensees should monitor the cashing rates and send reminders to consumers who have not cashed their cheques within a reasonable period of time.

Stakeholder feedback

69 Various respondents to CP 350 wanted to maintain the ability to send a cheque if other means of automatic payments were not reasonably available. Some went further and suggested licensees should be able to send cheques without first exploring opportunities to provide the payment automatically.

70 Others were supportive of the prioritisation of automatic payments. They agreed cheques should only be used as a last resort, if at all, given the significant operational costs associated with issuing, monitoring and sending reminders to consumers to cash their cheques. One respondent said sending a cheque may do more harm than good for vulnerable consumers, and the multiple reminders may be perceived as a scam by consumers and limit the uptake. Another respondent preferred we not refer to 'cheques' at all, and rather employ technology neutrality (i.e. avoid specifying specific payment methods). It noted that according to the latest figures from the Reserve Bank of Australia (RBA) in 2019, cheques now account for only 0.2% of consumer payments and the RBA has signalled the gradual end of the cheque system.

71 The cost of cheques was particularly raised in the context of the low-value compensation threshold.

ASIC's response

We have maintained our position that cheques should not be the default form of payment; however, licensees may choose to send a cheque particularly if other avenues for automatic payment are not reasonably available and particularly if a home mailing address is the only valid contact channel available. For lower value amounts, we have sought to address the concerns by clarifying that sending a cheque is not a necessary step in applying reasonable endeavours: see RG 277.169.

The quality of a licensee's customer data and information will vary significantly. Some licensees may have access to bank account

information, due to the nature of their business. In other cases, the misconduct may be so prolonged that a majority of the consumer contact information has now become outdated. Sometimes, all a licensee may have is a consumer's home address.

If a licensee has made efforts to improve its customer data (e.g. through internal or external data matching), but has been unable to locate a valid home address, or any contact details, we think it is reasonable for the licensee to allocate the money towards a residual remediation payment. If the licensee does have a valid home address, it can choose to send a cheque. This is generally a better outcome than lodging the money in an unclaimed money regime, particularly if the amount is of a higher value.

In relation to technology neutrality in the guidance, in the context of remediations the use of cheques is still common. Thus while there is a decline in cheque usership more widely, we still need to provide some guidance to assist licensees in the interim.

G Key issue: Transparency about remediations

Key points

This section outlines the responses we received about:

- the lack of robust guidance on transparency and public reporting of remediation details, progress and outcomes (see paragraphs 72–77); and
- the expectation that licensees publish details of a low-value compensation threshold (if applied) or residual remediation payments on their website (see paragraphs 78–82).

Public reporting about remediations

72 There is limited to no public reporting about the existence, progress and outcomes of remediations conducted in the financial services sector. Much of the published information is made available by ASIC either as a result of requirements under an enforceable undertaking or court orders, or where we seek to publicise the (ongoing) impact of large-scale remediations.

73 ASIC does not have the legislative powers to direct licensees to publicly report on all of their remediations, nor can we require licensees to provide ASIC with detailed ongoing information about their remediation programs other than through the issuance of statutory notices.

74 We collect some information about specific, often large-scale, remediations that we are monitoring through our supervisory function (often provided voluntarily), but this represents only a fraction of the programs ongoing at any given time. We do obtain additional data about consumer loss and the impact of reportable situations through the breach reporting regime; however, because breach reports are often received before a remediation program commences, or in the early stages of a remediation, they do not allow ASIC to obtain a complete picture of the remediation program and whether it is compliant with our guidance, at least not without further inquiries being made.

75 After the licensee has reported a reportable situation to ASIC, the accuracy of the information is reliant on firms voluntarily providing updates on the remediation program through the portal. It is often very difficult for licensees to understand the full extent of the problem when they report the reportable situation.

Stakeholder feedback

76 Consumer representatives submitted that the lack of mandatory public reporting in draft RG 000 is its biggest failing. Their view is that all licensees should be required to publicly report on all remediation programs (including scope and outcomes) in the interests of transparency, accountability and consumer awareness. Public reporting is necessary for affected consumers and their advocates to understand the scope of the remediation and whether or not they are eligible, and to pursue that matter with the licensee or AFCA if they have not been contacted.

77 Consumer representatives suggested the current guidance is inconsistent with the shift towards naming entities (e.g. in the new internal dispute resolution data reports, and now AFCA names firms in its determinations). Some industry respondents were against any transparency measures, and submitted that we must publish data on reportable situations, which should be enough for consumers to proactively assess whether an organisation has engaged in misconduct and caused loss in particular circumstances.

ASIC's response

ASIC has no powers to require licensees to publish details of the existence, progress and outcomes of all their remediations.

We are of the view that the current framework under the breach reporting regime was not intended—and is not sufficient—to provide accurate information about remediations in the financial services sector. However, for ASIC to collect more data, and to publish it, would require legislative reform.

In the meantime, we are still strongly supportive of greater transparency of remediations. We consider that it is best practice for licensees to be transparent and accountable about their remediation programs. Licensees should conduct themselves as if they were in the public eye, and only deliver outcomes they would be comfortable justifying in a public forum.

While not mandatory, we have updated *Making it right* to provide licensees with some tips about what transparency looks like in practice.

Disclosing low-value compensation threshold and residual remediation payments

78 In draft RG 000, we set out that, if a licensee chose to apply a low-value compensation threshold, it should disclose details of both the remediation and the threshold on its website.

79 Similarly, if the licensee made a residual remediation payment, it should also disclose this on its website.

Stakeholder feedback

80 The responses on this issue were mixed. Some respondents agreed there should be greater transparency, but asked for clarity about when and how this should be reported. For example, one licensee suggested details should only be published if the residual remediation payment is greater than $1,000. Another respondent requested that publication be limited to large-scale remediations, and that we provide guidance on the criteria and level of detail necessary for the public report. Examples to illustrate our expectations were also requested.

81 Others disagreed on this issue, arguing this level of transparency has no benefit to consumers. They considered that publicising details of the residual remediation payment could be seen by the public as a charitable donation, which is inconsistent with the principle of not benefiting from the misconduct. They also considered that it may lead to further discontent among consumers ineligible for remediation.

82 One respondent noted there is no legal requirement for firms to publish details of its misconduct, other than following court orders or as agreed with the regulator—as such, all guidance on transparency should be removed.

ASIC's response

We have removed the guidance on transparency from RG 277. We have included some principles and practical tips on transparency in the updates to *Making it right* at p. 7.

H Key issue: Interaction between remediation, IDR processes and AFCA

Key points

This section outlines the responses received about the interaction between IDR and remediation. In particular, respondents were concerned about:

- whether complaints about a final remediation outcome should be dealt with under IDR or can be referred directly to AFCA (see paragraphs 83–86);
- when the IDR requirements apply (i.e. can complaints about the misconduct or other failure that is the subject of the remediation, or the remediation program itself, be referred to the remediation, meaning the IDR requirements don't apply) (see paragraphs 87–90); and
- the appropriate feedback loop between IDR and remediations (see paragraphs 91–92).

Complaints about the remediation outcome

83 We state at RG 256.54 that:

> If a client makes a complaint about your decision—following a review of their advice as part of the review and remediation process—the client should be directed to your EDR scheme and not to your IDR processes. In most cases, because you have already reviewed the advice given to the client, there would be little value in re-examining this advice. Doing so is likely to add an unnecessary layer of complexity and result in delays for the client.

84 In draft RG 000, we proposed to amend the guidance so that where a complaint is made to a licensee about a final remediation outcome, the complaint should be handled through the licensee's IDR processes. This was to provide licensees with the opportunity to address the consumer's concerns or assess any additional information that they previously did not have access to, noting again that the new guidance extends substantially beyond financial advice failures.

Stakeholder feedback

85 The consumer representatives advocated against guidance that complaints about a remediation outcome should be referred to a licensee's IDR scheme in the first instance, as opposed to consumers being directed straight to AFCA. They claimed that the staged process is highly likely to cause confusion and complaint fatigue. Further, consumer representatives argued that many consumers who receive a poor remediation outcome will be

sceptical that any review by the licensee via IDR will result in a different outcome, and may drop out of the process.

86 Respondents also raised concerns that allowing licensees to have a second chance to review the decision would not incentivise licensees to provide fair and appropriate outcomes from the outset.

ASIC's response

We are still of the view that complaints about a final remediation outcome decision should be dealt with through the licensee's IDR processes in the first instance: see RG 277.177–RG 277.187.

We agree that it is not ideal for a consumer to go through an IDR process when they have already undergone a detailed assessment and engagement with the licensee. In these circumstances, we would expect the licensee to fast track the complaint wherever possible. This will ensure the consumer can access an independent review if needed without too much delay.

However, unlike an individual quality-of-advice file review, as envisaged in RG 256, many licensees will be relying on data analytics and assumptions to calculate consumer loss. This means a consumer's individual circumstances will not always be considered. A large proportion of affected consumers will likely find out about the remediation when they receive the final outcome decision, or notice the payment in their bank account (if they missed the final communication).

AFCA advised us that a vast majority of complaints about remediation outcome decisions are about the quality of communications (i.e. the consumer is confused about what the remediation is for, or how it was calculated). So, on balance, for most consumers we believe going through IDR in the first instance will lead to a more efficient and fair resolution of their complaint.

We have confirmed with AFCA that, if a consumer lodges a complaint about a remediation outcome at AFCA after the IDR process, AFCA will not automatically refer the complaint back to the licensee as per its usual process. AFCA will register the complaint and commence its case management process. This helps to ensure that consumers who have been through a remediation process and an IDR process are not required to go through a subsequent IDR refer-back stage before their complaint is considered by AFCA: see RG 277.186.

When the IDR requirements apply

87 In draft RG 000, we provided guidance that if a consumer complains about a matter that falls within scope of a remediation, or about the conduct of a remediation before they receive a final remediation outcome (e.g. about

delays, lack of communication), the IDR requirements set out in Regulatory Guide 271 *Internal dispute resolution* (RG 271) (including maximum IDR timeframes) apply to that matter.

Stakeholder feedback

88 Some respondents wanted further clarification on the interaction between remediation and IDR, including what happens if a complaint is referred to the remediation program and, if so, whether the IDR requirements continue to apply.

89 One respondent mentioned the overlap with the new notify, investigate and remediate obligations under s912EA–s912EC of the Corporations Act and s51A–51C of the National Credit Act. The respondent suggested that if the new obligations apply, then any complaint within scope should be exempted from RG 271.

> Note: The timeframes under the notify, investigate and remediate obligations are specific in terms of when a licensee must communicate with a consumer and make compensation payments; however, the duration of the investigation is not prescribed and must only be completed within a 'reasonable period of time', as opposed to 45 days under the IDR requirements.

90 Consumer representatives submitted that licensees often do not understand when their IDR obligations are triggered before or during a remediation process, and they have seen varied and inconsistent practices when a remediation is involved. For example, they have observed:

(a) inconsistency in when the licensee will refer the consumer to the remediation scheme following a request for information (i.e. some are dealt with through IDR, others are referred to the remediation program);

(b) that some consumers who are referred to the remediation program are given limited information about next steps and not informed about what has happened to the IDR complaint; and

(c) that consumers can experience significant delays during the referral to the remediation program, and afterwards.

ASIC's response

We are still of the view that when a consumer makes a complaint that is relevant to a remediation, the IDR requirements under RG 271 apply: see RG 277.177–RG 277.183. For example, the IDR requirements apply to a complaint or expression of dissatisfaction about:

- the misconduct or other failure that is the subject of the remediation (e.g. the consumer has not been included in scope, or has not yet been contacted by the licensee);
- the remediation process itself (e.g. lack of communication or delays); and

- the final remediation outcome.

It is not appropriate for a licensee to refer a complaint to the remediation program and cease to comply with its IDR obligations regarding that complainant. The notify, investigate and remediate obligations do not override the standards and requirements in *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98.* The Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 clearly states that '[a]ll of the affected consumer's rights continue to exist alongside the investigation and remediation process, including the affected consumer's rights to complain through internal and external dispute resolutions processes' (see paragraph 12.149).

Licensees should have effective links between their complaint management system and remediation so that the relevant complaint can be identified as within scope of a remediation and dealt with efficiently: see 'ASIC's response' at paragraph 93. We have also included guidance at RG 277.182 that acknowledges licensees will sometimes receive complaints relevant to a remediation before finalising the scoping or design of the methodology. While we expect licensees to meet the prescribed IDR timeframes, sometimes there may be instances where there is no reasonable opportunity for the licensee to provide the IDR response within the relevant maximum IDR timeframe because the resolution of the individual complaint is particularly complex: see RG 271.64–RG 271.66.

Feedback loop between IDR processes and remediation

91 In draft RG 000, we provided guidance that licensees should monitor any complaints they receive through the IDR process. If any new information arises as a result of the complaint, the licensee may need to review any assumptions or scoping decisions made (e.g. the complaint may indicate the scope of the remediation is too narrow, and a broader number of consumers have been affected by the misconduct or other failure).

Stakeholder feedback

92 One respondent suggested that there should be no requirement for licensees to cross-reference all complaints received against all current and completed remediations. They argued that this would:

(a) create an impractical and undue burden for licensees,

(b) affect remediation efficiency; and

(c) require significant infrastructure investment to link the remediation and IDR processes.

93 The respondent submitted that it is often difficult to identify whether a complaint falls within scope of an existing remediation, especially if incomplete information is provided by the complainant.

ASIC's response

We are of the view that licensees need to establish appropriate links between their remediation and IDR processes: see RG 277.180–RG 277.181.

A licensee's IDR processes can be a useful mechanism to test whether any assumptions used or the remediation approach taken is fair and appropriate. For example, if consumers are confused about remediation communications and make a complaint, this should then feed back to the remediation team so they can adjust their approach if appropriate.

If a consumer makes a complaint about the underlying misconduct or other failure that is the subject of the remediation, and the IDR team finds that the consumer has suffered loss, this new information should be provided to the remediation team as it suggests the scope of the program is too narrow.

I Key issue: Other outcomes to consider

Key points

This section outlines the responses received about the guidance on other outcomes to consider, including:

- postponing or ceasing enforcement action (including debt collection activities) while a remediation is ongoing, and until any AFCA complaints have been resolved (see paragraphs 94–105);
- offering legal or other forms of assistance (see paragraphs 106–109);
- communicating the tax consequences of payments for consumers (see paragraphs 110–112); and
- settlement deeds (see paragraphs 113–115).

Postponing or ceasing action

94 In draft RG 000, we provided guidance that a licensee should refrain from commencing or continuing with legal proceedings or any other enforcement action (e.g. debt collection activities):

(a) that could adversely affect a consumer who is the subject of a remediation until the remediation process has been completed and, where applicable, any resultant complaints to AFCA have been finalised and an AFCA response has been provided; and

(b) where the legal proceedings are related to the underlying misconduct or other failure that has led to the need for remediation (e.g. where a consumer has been provided unsuitable credit and is now in default).

95 The only exception to this is if the statute of limitation period is about to expire.

Stakeholder feedback

96 Some respondents submitted that it may not be in the consumer's interests for all debt collection activities (including informal reminders of missed payments) to cease during a remediation, especially if the misconduct is not related to the enforcement action. They stressed this was particularly the case with the longer remediation timeframes. Respondents also noted that ceasing enforcement action (including debt collection activities) for the duration of a remediation will likely create uncertainty and operational challenges.

97 It was also unclear to the industry respondents what types of activities would fall under 'debt collection activities', as this is not a defined term. On the other hand, because 'enforcement proceedings' is defined under the National Credit Act they found it could be more easily implemented. This interpretation would mean that licensees would only be required to cease or refrain from 'late stage' debt collection activities (i.e. court proceedings following the expiry of a default notice). For example, it would not preclude licensees from issuing default notices.

98 An industry respondent also referenced a number of practical difficulties generally in discontinuing debt collection activities, including that:

(a) every relevant remediation would need to centrally file details of the impacted consumer population;

(b) enforcement proceedings would need to be paused at a time when the materiality of the affected consumer's remediation payment is not yet known;

(c) remediation teams would need to cross-reference the confirmed consumer population against a list of consumers in the process of legal proceedings or enforcement action;

(d) legal and enforcement teams would need to cross-reference the central list of consumers due for remediation before commencing any proceedings or action; and

(e) manual reviews in the steps in paragraphs 98(c)–98(d) would need to occur to determine if the proceedings and the remediation were related.

99 The respondent argued that, while many of these practical difficulties would remain regardless, the scope would be smaller if we updated draft RG 000 to apply the legislative definition of 'enforcement proceedings' rather than the wider 'enforcement action'.

100 On further consultation, we were provided with some practical examples to illustrate when it may not be appropriate to cease all enforcement action including debt collection activities. The two scenarios described included:

(a) when the expected remediation compensation relative to the arrears owed is immaterial; and

(b) when the underlying reason why the consumer was in arrears or did not make their repayments is disconnected from the impact they experienced as a result of the remediation issue.

101 In both scenarios, it was said that suspending enforcement action and proceedings could cause further deterioration of the consumer's financial position.

102 Additional risks to consumers were highlighted, including that ceasing all debt collection activities could lead to:

(a) consumers not understanding the true extent of their arrears, and the options available to fix it (e.g. alternate payment plans, and financial hardship assistance where appropriate);

(b) consumers feeling they are not being provided sufficient assistance to manage their arrears;

(c) licensees not being able to properly connect with customers to understand the reasons why the repayments have been missed or the customers' circumstances (particularly relevant for potentially vulnerable customers). As such, licensees could not offer appropriate support, including non-financial support services such as referrals to partner employment services and financial counsellors;

(d) consumers' future credit applications may be negatively impacted, for example:

(i) for some credit cards, licensees may cancel a consumer's card once they are several months in arrears, and require the consumer to re-apply for a new credit card once arrears are repaid; and

(ii) if consumers were not aware of mounting arrears (e.g. due toa simple failed auto-pay arrangement), they would be further affected by needing to re-apply for a credit card with the challenge of a lower credit score due to their failure to make repayments; and

(e) licensees needing to make assumptions about the reason the consumer has missed repayments.

103 We drafted some proposed amendments to the guidance and conducted further targeted consultation. In particular, we suggested that enforcement action be defined as 'enforcement proceedings per the definition in the National Credit Act, and the giving of default notices'. Industry still disagreed, arguing that the giving of default notices was too early in the process.

104 We also consulted with consumer representatives on this issue, and their views were as follows:

(a) in circumstances where the underlying misconduct is not related to the arrears, it is reasonable to continue with early debt collection practices;

(b) the guidance should rest on the general principle that the consumer should not be placed in a worse position as a result of the licensee's misconduct—including through delays to remediation that led to a deterioration of the consumer's overall position;

(c) licensees can mitigate any adverse consequences by pausing interest accrual while the remediation is on foot. This would also incentivise timely remediation, which is in everyone's interest;

(d) ASIC should avoid allowing an approach that would lead to worse outcomes compared to if the consumer complained to AFCA. If a consumer applied to AFCA, under Rule A7 the repossession proceedings would typically stop, especially in the context of a responsible lending complaint; and

(e) in practice, when a remediation commences it will typically be very difficult for a licensee to judge whether a remediation outcome is likely to be material. Instead of engaging in a materiality assessment, licensees should cease enforcement action and conduct the remediation in a timely manner to minimise any adverse consequences.

105 In addition, consumer representatives agreed that 'enforcement proceedings' under the National Credit Act sets too high a threshold because licensees will still be able to give default notices during a remediation, which can lead to serious financial and emotional consequences for the consumer. Increasingly, these can include impacts on people's ability to obtain insurance (e.g. some insurers ask whether a person has been in default on a credit product).

ASIC's response

We have clarified that the definition of enforcement action includes 'enforcement proceedings' (per the definition in the National Credit Act) *and* the giving of default notices. We have also redrafted the section to make the link between the misconduct and arrears/hardship clearer, and to draw out the principle that fair, timely and effective remediation can mitigate any additional risks that consumers may be disadvantaged as a result of the postponement of enforcement action: see RG 277.95–RG 277.97.

We accept the term 'enforcement action (e.g. debt collection activities)', which was included in draft RG 000, may create uncertainty and is too broad in scope. It may not always be in a consumer's best interests for a credit provider to postpone or cease enforcement action when a remediation commences. In many cases it will be important that the consumer continues to make payments towards their debt and, if they do miss any payments, that some collection activity (e.g. an informal reminder message) would be appropriate.

However, we consider that the definition of 'enforcement proceedings' under the National Credit Act sets too high a threshold. Licensees will still be able to give default notices during a remediation, which can lead to serious financial and emotional consequences for the consumer (for example, it can affect a consumer's ability to obtain insurance).

Legal or professional assistance

106 In draft RG 000, we provided guidance at draft RG 000.210 that:

> Licensees should consider whether it is appropriate to offer assistance to consumers to seek their own independent professional advice about the remediation and proposed remedy. Depending on the nature of the remediation—financial, legal and/or taxation advice might be advisable for all, or a class of the consumers receiving remediation.

Stakeholder feedback

107 Many respondents suggested that offering legal, tax or other forms of assistance may generally be more relevant or appropriate to wealth and/or advice type remediations. General insurance respondents submitted that this offer would present practical challenges for their sector—for example, they may not hold enough information about a consumer's financial situation to determine whether the size of a remediation offer is large compared to the consumer's overall wealth. Banking respondents also submitted that their remediations often involve smaller value, large volume payments, so its impractical to offer this assistance for each case.

108 The industry respondents argued that if they have to send this offer to all consumers, it will affect efficiency approaches adopted for simple or low-value amounts.

109 Consumer representatives argued that the offer of legal, taxation and/or financial advice should be mandatory when:

(a) the firm is offering a choice of remedies or outcomes;

(b) the consumer is currently bankrupt; or

(c) using a settlement deed.

ASIC's response

The offer of legal or other forms of assistance is ultimately discretionary. We have amended the guidance at RG 277.93 to make it clear that an offer might be appropriate where:

- the underlying issues are complex and the value of the remediation offer is large; or
- the consumer is offered a choice of outcomes that could have significant financial implications.

To be clear, we are not suggesting that assistance be provided proactively—we are suggesting that it may be appropriate to make the offer to consumers, who may or may not accept.

Tax consequences of remediation payments for consumers

110 In draft RG 000, we provided guidance that licensees should:

(a) inform consumers about the tax implications of the remediation payment (if relevant); and

(b) offer tax assistance, particularly when the payment is significant compared to the consumer's overall wealth.

111 We included this guidance because the remediation payment may affect a consumer's tax position or entitlements, which may need to be accounted for when providing the remedy to ensure the consumer is returned as closely as possible to the position they would have otherwise been in, had the misconduct not occurred. This is especially relevant for larger payments, and when payments relate to superannuation.

Stakeholder feedback

112 Many respondents were concerned that the guidance expected them to provide tax assistance to the consumers, or to explain the tax treatment of the relevant remediation payment as it relates to the consumer's personal circumstances. The respondents suggested that we qualify the language in the guidance so that licensees should, *where relevant*, inform consumers that the remediation payment *may* result in tax implications.

ASIC's response

We agree that informing consumers about the tax consequences of a remediation payment will not be appropriate or relevant in all circumstances. We have amended the guidance so that licensees should inform consumers that the remediation payment may result in tax consequences *where relevant*: see RG 277.101.

Settlement deeds

113 In draft RG 000 we provided guidance that licensees should generally not require settlement deeds in a remediation, or assume consumer consent to the conditions attaching to the remediation payment if a consumer does not respond. However, in response to feedback received on the issue raised in CP 335, we accepted that there may be times when a settlement deed is required (e.g. to comply with the conditions of a professional indemnity (PI) insurance policy). If required, we expect the settlement deed:

(a) to be strictly limited to the specific misconduct or other failure that is the subject of the remediation;

(b) not to include confidentiality or non-disparagement clauses; and

(c) not to unreasonably restrict a consumer's right to review the remediation outcome.

Stakeholder feedback

114 Some respondents argued settlement deeds should not be restricted at all, given they are as a result of compromise and agreement between the parties. Unduly restricting settlement deeds will put further pressure on obtaining PI insurance, and will result in more complaints to AFCA, placing strain on the system.

115 Consumer representatives were strongly supportive on banning settlement deeds. They argued that if the deed is absolutely necessary, then licensees must be required to provide consumers with legal and/or financial advice.

ASIC's response

We are still of the view that settlement deeds should generally not be used in a remediation context: see RG 277.198–RG 277.202. This is because more often than not the consumer will be dis-engaged from the remediation process and will not have had previous opportunities to negotiate or review the outcome before they are presented with a settlement deed. The consumer may wish to interrogate the outcome, but may not have the resources or time to do so. Further, settlement deeds can operate to remove otherwise available legal protections for consumers (e.g. their access to AFCA). We are of the view these practices should be avoided where possible.

We do, however, accept that settlement deeds may be necessary in some limited circumstances (e.g. to obtain PI insurance). In other areas of the guidance we have suggested licensees consider offering to cover the costs of legal or other advice for consumers where appropriate. We particularly recommend this if the issues are complex and the value of the remediation offer is large, or the consumer is offered a choice of outcomes that could have significant financial implications: see RG 277.93.

J Key issue: Superannuation and remediation

Key points

This section outlines the responses we received about particular issues and challenges associated with conducting remediations when superannuation money is involved. Submissions were concerned with:

- how the best financial interest duty interacts with remediation (see paragraphs 116–122);
- the principle of returning remediation money to superannuation fund accounts (see paragraphs 123–126);
- practical barriers and frictions in third-party licensees remediating superannuation fund members (see paragraphs 127–133); and
- the reasonable steps expected of trustees before transferring amounts to the Australian Taxation Office (ATO) under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Unclaimed Money Act) (see paragraphs 134–136).

Best financial interests duty and remediation

116 In draft RG 000, we provided guidance that superannuation trustees must consider and balance their various obligations when applying the guidance, especially when dealing with trust or scheme property: see draft RG 000.291–RG 000.293.

117 Superannuation trustees must hold an AFS licence (meaning they are subject to the general conduct obligations, such as to provide financial services efficiently, honestly and fairly) and are subject to a range of other obligations under the trust deed, general trust law and legislation such as the *Superannuation Industry (Supervision) Act 1993* (SIS Act) (including the obligation to act in the best financial interests of members). While our guidance does apply to superannuation trustees, it is general only and will not always take into account particular circumstances, duties or obligations specific to a fund.

Stakeholder feedback

118 A few respondents were concerned that draft RG 000 did not adequately acknowledge how the various obligations on superannuation trustees under the SIS Act and trust law interact with the proposed remediation framework.

119 One respondent suggested that a superannuation trustee's duty does not extend to avoiding all loss or errors that an ordinary prudent superannuation

trustee could commit, and that it may be a breach of the best financial interests duty to remediate some members if the costs of doing so would outweigh the benefit to *all* members. Further, the respondent suggested the obligations under the SIS Act and trust law govern trustee conduct and that the remediation guidance should only apply as far as it is consistent with the SIS Act.

120 Consumer representatives strongly disagreed. In their opinion, the obligations to act efficiently, honestly and fairly, and in the best financial interests of members, are fundamental to remediation. In considering what action to take, they argued that superannuation trustees need to read these obligations in line with ASIC's guidance on consumer remediation.

121 In response to the argument that it may be acceptable for a superannuation trustee to not remediate on the basis of the best financial interests duty, the consumer representatives submitted that:

> It is hard to see how a trustee could land in a position where it is not in the best financial interests of all members to remediate them for misconduct when they have breached the law or its agreements with members. If such a position were maintained by a trustee, this would warrant significant attention and potentially strong action from ASIC. The best financial interests obligation cannot be a 'get out of gaol' card to avoid appropriately remediating misconduct.

122 The consumer representatives also strongly advocated for greater transparency from superannuation trustees following decisions not to remediate. When weighing the best financial interests duty against any proposed remediation action, these decisions by trustees should be transparent, public and brought to the affected members attention.

ASIC's response

We have clarified the interaction between obligations relating to superannuation trustees and remediation: see the appendix of RG 277 at RG 277.288–RG 277.292.

Superannuation trustees are subject to a number of obligations, including:

- those in the *Corporations Act 2001* (Corporations Act) and the SIS Act;
- the terms of the trust deed; and
- those in general trust law.

We do not accept as a general proposition that it would be a breach of a superannuation trustee's best financial interests duty if the costs of remediation outweighs any benefit to members, or that the best financial interests duty otherwise prevents remediation of members if it is not beneficial to members as a whole. Importantly, decisions about remediation, including the manner in which to remediate, and the extent of the remediation,

must be made in the context of complying with all of the superannuation trustee's relevant legal obligations.

We expect that decisions about whether or not to remediate, and the manner and extent of remediation, are ones that would be appropriately recorded. We also expect that the trustee will be able to provide evidence on request that their decision was (for example) in the best financial interests of members and compliant with their obligations under the Corporations Act: see RG 277.290.

Money relating to superannuation accounts

123 In CP 335 we noted that automatic or direct cash payments may not always be the appropriate method for remediations involving superannuation. We referred to ASIC and the Australian Prudential Regulation Authority's (APRA) joint letter to superannuation trustees that certain requirements in the SIS Act mean that direct payments to members should generally not be made outside of the superannuation system without a condition of release being met.

Note: See APRA and ASIC, *Oversight of fees charged to members' superannuation accounts* (oversight of fees letter), joint letter, 10 April 2019.

124 This guidance was not explicitly included in draft RG 000.

Stakeholder feedback

125 We received some feedback from respondents on the principle that money improperly paid out of member accounts should not be made outside the superannuation system, as further outlined in the joint letter to RSE licensees published on 30 June 2021: see APRA and ASIC, *Further guidance on oversight of advice fees charged to members' superannuation accounts* (further guidance on oversight of advice fees letter), joint letter.

126 Some respondents requested that ASIC make this position clear in the regulatory guide, to give certainty about the operation of the preservation rules in superannuation law. They also requested that we provide guidance for circumstances where a member had since commuted into a pension.

ASIC's response

We have updated the guidance in RG 277, Table 3 in relation to superannuation accounts and pensioners.

When a superannuation trustee has engaged in misconduct or other failure and is conducting a remediation of superannuation accounts, the superannuation trustee should generally allocate the remediation amount to the affected member's superannuation interest, where it relates to that interest.

There are a number of legal obligations that a superannuation trustee must consider when allocating these amounts, including, prohibitions on the early release of superannuation.

Superannuation trustees should carefully consider any tax consequences that could adversely affect their members when undertaking the remediation: see RG 277.101–RG 277.103.

We have also provided guidance for licensees in circumstances where a member has since commuted into a pension.

Third-party licensees remediating superannuation trustees

127 In CP 335, we requested feedback from stakeholders about any challenges experienced as a third-party licensee remediating members of a superannuation fund. Similarly, we also requested feedback from superannuation trustees about their experiences facilitating payments from third-party licensees to their members.

Stakeholder feedback

128 During both consultation phases, both superannuation trustees and licensees described a number of practical barriers or frictions associated with transferring or facilitating payments into super.

129 Licensees claimed that superannuation trustees can take inconsistent approaches to accepting or facilitating payments from third-party licensees to member accounts. It appears that some trustees request very detailed information about the remediation methodology to ensure that all members have been accurately compensated. This may be due to the trustee's statutory and general law duties, such as the best financial interests duty and duty to 'get in' trust property, which may render them liable for any shortfall in the third-party licensee's calculation of member loss. Superannuation trustees also advised that third-party licensees can lack transparency in terms of what the remediation relates to when transferring payments to the trustee.

130 Licensees suggested their desire to use assumptions and proxy rates to account for foregone returns, such as the RBA cash rate plus 6 %, has also created tension—some trustees accept the rate, while others require the licensee to calculate the actual foregone returns for each individual member.

131 Licensees also claimed that trustees can be unresponsive, delaying the process, and lack transparency in terms of when the payments will or have been paid into member accounts.

132 One respondent specifically requested that we provide further guidance:

(a) that remediation should be credited to member accounts in a timely manner;

(b) on what action should be taken if a superannuation trustee rejects the payment; and

(c) about how a licensee can monitor remediation outcomes when a third party like a superannuation trustee is in control of the delivery.

133 Superannuation trustees also requested further guidance on what steps are necessary to determine the appropriateness of remediation methodologies.

ASIC's response

ASIC and APRA have set out their expectations in the oversight of fees letter and the further advice on oversight of advice fees letter, our joint letters to RSE licensees. These letters are specific to an RSE licensee's oversight of advice fees charged to members' superannuation accounts, but reflect ASIC and APRA's broader position on the preservation of superannuation money.

Trustees should take steps to recover, or facilitate the return of, fees paid to financial advisers (or third parties) where the third party has failed to provide them with the agreed service. Subject to the particular contractual arrangements, third-party licensees remediating superannuation trustees should pay the money to that fund and not directly to the member or to the former member's current superannuation fund. Trustees should then reinstate members' accounts within the superannuation system in a timely manner: see Table 3, RG 277.

As stated in the further advice on oversight of advice fees letter, we expect that trustees would also communicate effectively with financial advisers about when members will, or have been, compensated.

While we have not included this explicitly in the guidance, we do expect all parties involved in a remediation to cooperate to ensure the remediation methodology is fair and leads to the best possible outcomes for members. We think this needs further attention from both licensees and superannuation trustees.

Superannuation and unclaimed money

134 In draft RG 000, we provided guidance that under s22 of the Unclaimed Money Act, superannuation trustees may transfer amounts held on behalf of former members to the ATO if the trustee reasonably believes this is in the members' best interests.

135 Generally, superannuation trustees should at least take reasonable steps to notify a former member before transferring money to the ATO. This gives the member an opportunity to provide alternative instructions. If a superannuation trustee has recent contact information for the member, 'reasonable steps' would include mailing them at their last known postal address: see Information Sheet 90 *Notifying members about superannuation transfers without consent* (INFO 90) for further guidance.

Stakeholder feedback

136 Some respondents submitted that engagement campaigns with former members have historically resulted in very low response rates and the costs of mailing campaigns may be significant for little-to-no advantage. These respondents questioned whether attempting to notify members before transferring money to the ATO is in the members' best financial interests.

ASIC's response

Under s22 of the Unclaimed Money Act, some level of inquiry should be conducted by the superannuation trustee before transferring amounts to the ATO. The superannuation trustee must reasonably believe that paying the amount to the ATO would be in the best interests of the member, former member or non-member spouse. The ATO has provided further guidance to superannuation trustees in relation to making voluntary payments to the ATO: see *Trustee voluntary payment of other amounts*. We have included a reference to this guidance at RG 277.166.

The Supplementary Explanatory Memorandum to the Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020, which was the Bill that introduced s22 of the Unclaimed Money Act, may also assist superannuation trustees as it outlines a number of factors and examples to consider.

K Key issue: Money that cannot be returned to consumers

Key points

This section outlines the responses received about what licensees should do with the money that could not be returned to affected consumers despite reasonable endeavours—in particular, lodging payments in unclaimed money regimes and making residual remediation payments: see paragraphs 137–142.

Unclaimed money regime and residual remediation payments

137 In draft RG, we provided guidance on what licensees should do if, despite reasonable endeavours, they were unable to return money to affected consumers. In these circumstances, the licensee should:

(a) if applicable, lodge the money in a relevant state, territory or Commonwealth unclaimed money regime; or

(b) if not applicable, make a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for-profits Commission (ACNC).

138 We understood from the feedback on CP 335 that unclaimed money requirements can be onerous, inconsistent and not always fit for purpose in a remediation context. However, we were of the view that the unclaimed money regimes at least increased the chance of unresponsive or lost consumers receiving the remediation money they are owed: see paragraph 98 of REP 707.

Stakeholder feedback

139 Respondents frequently raised concerns and challenges associated with remediation money and unclaimed money regime requirements.

140 Respondents reiterated that the various unclaimed money regimes are not fit for purpose when it comes to remediation. We were informed through consultation meetings that, on average, approximately 20% of all remediation payments meet the eligibility criteria. Respondents continued to express the need to integrate capabilities and data held by the ATO, Services Australia, ASIC, credit reporting bodies and licensees to transform the remediation repatriation process so that the onus is not on the consumer to take action or opt-in to find any unclaimed money they are owed.

141 The consumer groups continued to advocate against guidance that prioritises unclaimed money regimes over residual remediation payments to not-for-profit organisations who support and advocate for consumers in the financial services sector. They too were concerned that the regimes do not benefit consumers or the impacted group—especially those most vulnerable or in remote communities who are more likely to be unreachable.

142 Other related submissions were concerned about:

(a) how cheques should be treated in the context of unclaimed money;

(b) how licensees are expected to communicate their intention to lodge the money in a relevant regime to consumers; and

(c) whether licensees need to exhaust all state, territory and Commonwealth regime eligibility before making a residual remediation payment.

ASIC's response

Licensees should recognise and understand their unclaimed money obligations (including under state/territory and Commonwealth legislation) and how it relates to the remediation payments. However, as only a relatively small proportion of remediation payments appear to be eligible, we suspect that licensees will make residual remediation payments to charity or other organisations registered with the ACNC a majority of the time.

We support reforms to the unclaimed money legislation, and will continue to offer our assistance to the Australian Government and industry stakeholders. We encourage industry to continue to advocate for a solution to the lost-customer challenge that places minimal burden on consumers.

Appendix: List of non-confidential respondents

- Australian and New Zealand Banking Group
- Australian Banking Association
- Australian Finance Group
- Australian Finance Industry Association
- Association of Financial Advisers
- Australian Institute of Superannuation Trustees
- Australian Retail and Credit Association
- Australian Small Business and Family Enterprise Ombudsman
- Australian Payments Network
- Consumer Action Legal Centre, Financial Rights Legal Centre and Super Consumers Australia
- Finance Brokers Association of Australia
- Financial Planning Association
- Financial Services Council
- Governance, Risk, Compliance Institute
- Insurance Council Australia
- Industry Super Australia
- KPMG Australia
- LegalAid NSW
- Maurice Blackburn Lawyers
- Mortgage & Finance Association of Australia
- Pepperstone Group
- REA Group