



5 March 2021

Amanda Fairbairn
Policy Lawyer, The Behavioural Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: remediation@asic.gov.au

Dear Ms Fairbairn,

ASIC CP 335: Consumer remediation: Update to RG 256

Thank you for the opportunity to comment on ASIC's Consultation Paper 335 re: Consumer remediation and updating RG 256.

In summary, the Financial Rights Legal Centre (**Financial Rights**):

- supports a two-tiered approach to initiating remediation but believe the second arm regarding the breach of certain standards and expectations and/or values needs to be stronger;
- supports the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer and the removal of the reference to a seven year period;
- supports licensees only using assumptions in a remediation if they are beneficial assumptions but cautions against allowing licensees to over rely on assumptions since it allows licensees to avoid dealing with the impact on individuals;
- supports providing guidance that licensees apply best endeavours to find and automatically pay consumers;
- does not support the proposal to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime. We do on the grounds that it:
 - will lead to significant decreases in a critical funding to support harmed consumer cohorts;
 - will not increase the ability for consumers to be remediated;

- shifts the onus on the remediation process away from the licensee to harmed consumers;
- allows the business to make a cost benefit analysis to shift the remediation process to others to save money.
- supports ASIC not being involved in the decision to pay a remedial remediation payment but that ASIC must continue to provide oversight over the decisions made by licensees to ensure, for example, that there is a genuine nexus between the harmed consumer group and the charity or not for profit organisation chosen to be the recipient of funds.
- supports consideration of engaging an independent body – such as ECSTRA, the Consumer Advocacy Trust or the Financial Counselling Foundation – to assist in the distribution of residual remediation payments and ensure greater independence in the distribution and administration of these payments;
- supports licensees being required to be transparent about all remediation activities for accountability purposes;
- supports explicitly preventing licensees from using settlement deeds since they can act to limit or remove consumer rights;
- supports ASIC retaining (and strengthening) oversight powers in the current RG 256 not addressed in the consultation paper;
- supports AFCA being funded (by industry) to play a greater role in administering remediation programs in partnership with licensees;
- supports ASIC developing a best practice remediation document to assist licensees in establishing and conducting remuneration programs;
- supports RG 256 explicitly addressing the issue of tax deductions arising out of residual remediation payments made to not for profits and charities who are likely to hold deductible gift recipient (DGR) status.

Note that, for simplicity's sake, Financial Rights uses the term “residual remediation payments” throughout this submission to refer to residual remediation payments, as well as “community benefit payments” or “community service obligations” made under a court enforceable undertaking. While they are different in form and origination, the principles and views put in this submission apply equally to all these forms of payments.

When to initiate a remediation

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

ASIC proposes that there be a two tiered approach to remediation involving:

1. requiring a remediation when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and

2. encouraging licensees to consider whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values.

While Financial Rights generally supports a two-tiered approach we do think the second arm needs to be stronger than mere consideration. Mere consideration will lead to many licensees not undertaking a remediation program. We believe that in the alternative there should be an assumption that such breaches of standards and expectations and or/values should be subject to remediation and licensees not be required to remediate only where the licensee can demonstrate that to do so would be unreasonable – similar to the example provided at para 34. This would help promote improved consumers outcomes, promote improved industry practices and be in line with the approach the Financial Services Royal Commission took with respect to the community standards and expectations.

The review period for a remediation

C1Q1 Do you agree with this proposal? If not, why not?

Financial Rights agrees with the proposal that the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer, for the reasons outlined in the consultation paper. We support the removal of the reference to seven years.

Using beneficial assumptions

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

Financial Rights supports the proposal that licensees should only use assumptions in a remediation if they are beneficial assumptions.

However Financial Rights does remain concerned about over relying on assumptions since it allows licensees to avoid dealing with the impact on individuals, the consequential problems that these individuals face (including subsequent financial losses and stress), and works against building a culture of corporate responsibility, engagement with individual customers and learning from mistakes and misconduct. A good example of how a broad class based remediation program to lead to poor outcomes for consumers over individual engagement and redress can be found below in Tabitha's story under our response to H1Q1 regarding settlement deeds.

Calculating foregone returns or interest

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

No comment

How to approach finding and automatically paying consumers

F1Q1 Do you agree with our proposal? If not, why not?

Financial Rights strongly supports the proposal to provide guidance (where there is currently none) that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort.

Remediation money that cannot be returned to consumers

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

We do not agree with the proposal – specifically the proposal to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime. The reasons for this are outlined below.

G1Q2 Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not?

It is important to state upfront that Financial Rights has been a beneficiary of residual remediation payments arising out of remediation programs, enforceable undertakings and other programs. We therefore have a clear conflict of interest in approaching this issue and expressing a view on any potential changes in the policy. However we believe that it critical that ASIC to understand and appreciate the impact that these payments have had on individual consumers, industry practice and our service, as well as the potential consequences for changing the policy in the form proposed in this current consultation.

Financial Rights strongly supports with the principle that licensees under taking a remediation should make best endeavours to return victims of misconduct or compliance failure to the position they were in prior to the behaviour.

Financial Rights also supports the principle that a licensee not profit from a misconduct or other compliance failure

Consequently we agree that it is poor practice for a licensee to:

make a charitable donation with the remaining funds without first making a reasonable attempt to return money to consumers.

All licensees undertaking a remediation should not simply make a charity donation without making a reasonable attempt using best endeavours to return money to consumers. Otherwise licensees will make a cost benefit analysis and defer to making the charity donation with no

effort. This would generally be in line with the principles of *cy-près* doctrine¹ and its application in Australia.²

We also support the principle that consumers be given every opportunity to engage with a licensee to obtain monies owing under a remediation scheme no matter how small. We are however concerned with the proposal to support this end by requiring a licensee to lodge any unclaimed monies with an unclaimed money regime. These concerns are:

- there is the potential that licensees simply replicate the cost benefit analysis of the example above and lodge unclaimed money with an unclaimed money regime sooner than appropriate in order to save money;
- it places the burden of claiming money back on the victims of misconduct or compliance failures;
- many regimes won't accept monies less than a set threshold (eg \$100 at NSW Revenue, \$500 at ASIC);
- any unclaimed money not subsequently claimed is transferred to various state and federal consolidated revenue funds - in the case of ASIC's unclaimed money regime, the Commonwealth Consolidated Revenue Fund - rather than being directed to a charitable or community organisation that supports consumers cohorts related to the harm caused.

This latter point will lead to significant poorer outcomes for consumers since it will lead to decreases in a critical funding source for these services supporting consumers - including our own.

In the case of Financial Rights we have received numerous community service payments arising from remediation programs, enforceable undertakings and other similar schemes. These funds have enabled the chronically underfunded Insurance Law Service, National Debt Helpline and Mob Strong Debt Help to keep functioning and help meet a significant proportion of the unmet need for advice and assistance. Without remediation funding, these services would be assisting far fewer vulnerable consumers, if any at all.

Residual remediation payments have been made to Financial Rights in a number of cases to specifically support:

¹ The *cy-près* doctrine generally refers to the power of a court to amend a legal document to enforce it "as near as possible" to the original intent of the instrument, in situations where it becomes impossible, impracticable, or illegal to enforce it under its original terms.

² See *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 at para 22: "In Australia, for a court to order a *cy-près* scheme, there must be either: (a) a case of initial impracticality or impossibility and either an out-and-out intention to benefit charity or a general charitable intention and a possible mode of effectuating that intention; or (b) a case of supervening impracticability or impossibility; or (c) a case where a trust has exhausted its original purpose and a surplus remains: Heydon, J D, *Jacobs' Law of Trusts in Australia* (2016, 8th ed) at 182 [10-70]."

- the employment of additional staff to provide advice to insurance consumers on the Insurance Law Service;
- the employment of additional staff to assist Aboriginal clients on the Mob Strong Debt Help service
- employment of financial counsellors to assist with financially vulnerable consumers on the National Debt Helpline;
- supporting funding consumer research and advocacy programs; and
- supporting financial literacy programs and creating educational material and tools for the benefit of consumers of insurance.

The funds provided by residual remediation payments have ranged from approx. \$50,000 to in one case \$2 million. Largely payments of this sort fall within the \$150,000 to \$300,000 range.

As an indication of the value of these payments are to financial service consumers, for every additional \$150,000 our service receives in funding we are able to engage roughly one caseworker (solicitor or financial counsellor) who will be able to provide over 700 instances of advice provision per annum, undertake 35-40 tasks assistance³ and 10-13 casework or representation files⁴, plus 100-300 information provisions or referral services,⁵ 2-3 education sessions and in some cases policy contributions.

Every single additional caseworker providing assistance to financial service consumers goes some way to addressing the unmet need in the community. And the unmet need is not inconsiderable. For example, in our last evaluation period we were only able to provide approx. 13,500 services to consumers out of 40,000 calls to the Insurance Law Service over a two year period. That is only 34% of the need in the community for assistance.

Helping just one additional client can have a huge financial impact for the individual helped. For example we assist vulnerable consumers to obtain insurance claims up to and over \$200,000

³ Task assistance is where one of our solicitors or financial counsellors undertakes an activity for, or with, a client to assist the caller to resolve their problem, usually during or immediately after an advice call, but the case worker does not take on any ongoing responsibility to represent the client. We consider task assistance to be a very important part of our role because it is a very efficient way of assisting a larger number of people to navigate the system and use the dispute resolution services available to them effectively. Task assistance can include a range of activities from calling the insurer with the caller on the line to try to clarify the status of the claim and the issues in dispute, to lodging a complaint on line with the Australian Financial Complaints Authority (“AFCA”) or drafting a dispute letter or the client’s submissions in an AFCA dispute.

⁴ Representation services (casework) includes matters where the Financial Rights has opened a file and represented the client, either in a dispute with their financial service provider, or in relation to a claim from another financial service provider where for example our client has been involved in an accident and is uninsured. Most case work consists of direct advocacy and negotiations with insurance companies, or the conduct of a dispute through the AFCA.

⁵ Information and referral services represent one-on-one conversations with callers about their debt or in the case of the ILS, the law in general as it applies to insurance and insurance related debts, the processes for resolving disputes, or defending claims, and referrals to other relevant services.

that they would have otherwise struggled to obtain without assistance. We regularly are able to assist vulnerable consumers obtain debt waivers.

Case study – John’s story Cape York, Queensland

John is a 60 year old indigenous male living in a remote community at the tip of the Cape York Peninsula. He is isolated, doesn’t have any family around him and when he came to us, was receiving only a Centrelink income, though he worked casually from time to time. John estimated he had paid more than \$12,000 on premiums on six funeral insurance policies with four companies in recent years.

As part of investigating whether he had a case for seeking the return of the amounts paid – the recordings were requested and damning: In one instance he was told he was just being called to deliver more information after he completed a survey but he was signed up on the spot. In another he was asked whether he had funeral insurance already and replied “I think so” but the salesperson proceeded to sign him up to another one anyway. The worst was where he answered the phone and said “I’m not having a good day, I’m in hospital” but the sales rep persists with the hard sell despite his replies being unintelligible most of the time.

We raised disputes with two companies; one settled relatively quickly and the other we had to lodge three disputes with the Financial Ombudsman Service (now AFCA). Ultimately John received substantial refunds. We were also able to assist John with a credit and debt matter through our other funding streams, successfully getting a \$20,000 debt from an old car loan waived after raising a dispute.

Financial Rights was only able to conduct this work (and many more examples) because of funding for front line caseworkers arising out of residual remediation payments.

The non-financial impact is also significant. People we assist can lead them directly to be able to afford to eat properly or consult specialists for medical assistance, retain assets, avoid bankruptcy or go bankrupt if appropriate.

The funds also go towards assisting systemic changes that have improved outcomes for all financial services consumers. Financial Rights has been able to use our National Debt Helpline, Insurance Law Service and Mob Strong Debt Help advice and casework experience to great effect to drive improvements in regulation, self-regulation and industry practice.

For example using residual remediation payments Financial Rights has been able to:

- produce an influential report into insurance investigations that has led to significant changes in industry practice;
- Involve itself in the in the development of the improved Codes of Practice leading to improved outcomes for consumers;
- provided significant regular data to ASIC on frontline natural disaster issues, consumer complaints to support their investigations; and
- has made many submissions to government inquiries and ASIC consultations.

In some of these processes Financial Rights was the only consumer organisation involved. These funds will enable us to continue to provide a vital consumer voice to policy development processes.

The proposed new policy from ASIC will fundamentally undermine Financial Rights and other organisation's ability to assist consumers and the significant unmet need in the community. Community based services, such as community legal centres and financial counselling organisations assist customer cohorts who are least likely to benefit from either remediation programs or to ever claim on an unclaimed monies fund. Many of our clients are itinerant and move addresses often; they may have escaped family violence and have intentionally covered their trail for safety reasons, or they may be subject to frequent bouts on poor connectivity due to their inability to consistently pay for telecommunications services (or a combination of these factors). As a result they are those most likely to be uncontactable in a remediation scenario.

These client cohorts are also more likely to have dealt with licensees at the shonkier end of the spectrum (credit repair, debt management advice), who may have failed to keep good records and will not be in a good position to locate their customer base in the event of a remediation. They are also unlikely to ever claim monies from an unclaimed monies fund, unless they were assisted to do so by a predatory operator who makes unsolicited contact with them and then takes a significant cut of any funds recovered.

While it is clear that there will be some residual remediation payments will continue to be made to nominated charities and community organisations – the explicit intention of the new proposed policy however is that these payment will be “nominal.”

The practical end result of Proposal G1 would be to simply remove much needed resources away from community organisations assisting directly related cohorts of consumers subject to harm and improving outcomes for consumers generally towards increasing consolidated revenue that is likely to be used for purposes unrelated to supporting consumers or preventing ongoing harms.

In the cost benefit analysis of unclaimed funds ending up in consolidated revenue versus the potential benefits to larger numbers of consumers related to the cohort subject to the harm, we believe that on balance allowing licensees to make residual remediation payments following a best endeavours attempt to return monies will produce improved outcomes for consumers subject to the harm.

We therefore believe the best way to resolve the problem identified (i.e. that licensees simply make a charitable donation with the remaining funds without first making a reasonable attempt to return money to consumers) is to introduce stronger requirements to ensure licensees undertake best endeavours to return money in all cases. After a genuinely thorough remediation search has occurred - *and only then* - a residual remediation payment should be able to be made to a charitable or community organisation related to the harmed consumer group. The Consultation Paper makes a proposal intended to apply to the few remaining residual remediation payments: that consumers who then subsequently become aware of unclaimed monies should be paid the compensation they are owed, regardless of additional costs. This principle should be applied universally to provide additional motivation for licensees to genuinely seek to locate affected consumers prior to making any donation.

In this scenario:

- most if not all consumers affected by misconduct or compliance failures are brought back to the position that they were in prior to the misconduct;
- untraceable consumers remain able to claim monies owed at any point in time, and
- consumers in the cohort of related harm are assisted and supported more generally.

Finally, we agree that ASIC should not be involved in any decision by a licensee as to which organisation may be appropriate to pay a residual remediation payment: see cf RG 256.135. However ASIC must continue to play an oversight role over the decisions made by licensees in this respect. That is, ASIC must retain the power to examine whether there is a genuine nexus between the harmed consumer group and the charity or not for profit organisation chosen to be the recipient of funds. Financial Rights would also support consideration of engaging an independent body – such as ECSTRA, the Consumer Advocacy Trust or the Financial Counselling Foundation – to assist in the distribution of residual remediation payments and ensure greater independence in the distribution and administration of these payments. It would also ensure greater independence and avoid any perceived or actual conflicts of interest with those receiving the funds.

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

No comment

G1Q4 Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not?

Licensees should always be transparent with customers and the public with respect to remediation payments made to charity or not-for-profit organisation and should always disclose it.

We submit that it is critical that licensees be transparent about all remediation activities for accountability purposes – the public, regulators like ASIC, ACCC and APRA, government and other stakeholders should be aware when breaches have occurred and what actions have been taken to remedy those breaches. While it would be preferable that mistakes and misconduct did not occur, it is inevitable that it will. Whether an entity quickly identifies and effectively remedies customers in these circumstances is an important aspect of a good corporate culture and a key indicator of whether they are meeting their license obligations and community expectations.

Full transparency is also essential to ensure oversight and scrutiny of the decisions made by a licensee in their remediation program, and to assist regulators and other interested parties to evaluate the laws that have been breached, whether they are effective to curtail harm and identify potential reforms to improve outcomes for consumers.

It is also important that charity or not for profit organisation recipients are able to be transparent about where they receive funding. This would assist address potential issues of actual or perceived conflicts of interest on the recipient's behalf, and raise confidence in the process.

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

No comment

Settlement deeds

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

Financial Rights supports explicitly preventing licensees from using settlement deeds.

Asking consumers to enter into a settlement deed as part of a remediation is not appropriate since they can act to limit or remove consumer rights (such as accessing IDR and EDR) or place a burden on consumers to take actions that may be difficult (such as finding a witness).

A consumer may have another cause of action or right to damages and the existence of a settlement deed may remove the consumer's right to pursue those additional losses suffered. Even where the deed does not preclude such a right, it may confuse the consumer into believing they have no recourse or action.

There are also insufficient free or low cost legal assistance services to advise consumers whether they should accept the settlement.

Case study – Tabatha's story - C142115

Tabatha is a 58 year old widow living rural NSW. Her husband Tony was in construction, but in later life they purchased a contract to operate a bus line. One day in 2013, there was a knock on the door. It was a door to door insurance sales man and Tony, who was concerned about his 30 years in the sun doing construction work, signed up on the spot for what he believed were several types of life insurance that would pay for "anything but suicide".

In 2017, Tabatha contacted Financial Rights on the Insurance Law service advice line. In early 2017 she had lost her husband to skin cancer. She had claimed on the insurance, including income protection when he was sick and, on his death, the funeral insurance and death benefits. The insurer had paid substantially less than she expected on the income protection claim, and denied her claim outright for the funeral and death benefits. It turned out that her husband was not, as he believed, covered by life insurance; rather he had an accidental death benefits policy only. Tabatha had since been contacted by the insurer who offered a refund of premiums as a result of an ASIC enforceable undertaking taken against the insurer following an investigation into their sales conduct.

On her behalf we raised a complaint with the internal dispute resolution (IDR) of the insurer. The insurer had declined her claim of \$200,000, and indicated the appropriate remedy was a refund of \$4,764.24 in premiums.

Financial Rights represented Tabatha in AFCA against the insurer in relation to the misleading and deceptive conduct of the insurer's representative. The Insurer was not able to establish that it provided either a copy of its statement of advice to Tony, or the

annual renewal statements that would have revealed that Tony was given accidental and not life cover.

Financial Rights and Tabatha were successful in their arguments and Tabatha has been awarded in excess of \$220,000 from life and funeral cover as well as some refunded premiums. Tabatha was also awarded interest from the date of the original internal dispute resolution complaint. You can read the decision, by searching 546131 on the AFCA determination page.

Tabatha has now received the money and is very happy. In the course of the dispute she has had to sell land to make ends meet, and has been treated for anxiety and depression. The money will go to paying her joint debts, which is what Tony had wanted – that is, for her to be financially stable if he died.

Other comments on RG 256

- We understand that CP335 is directed at consulting on a set of 7 key issues (outlined at Page 10). However we note that there are a series of oversight powers and roles outlined in the current version of RG 256 that are not mentioned or touched upon in this focused first round of consultation. We wish to state that we strongly support ASIC retaining (and even strengthening) these powers or oversight as being essential for accountability purposes.
- Consideration should be given to supporting AFCA to be funded (by industry) to play a greater role in administering remediation programs in partnership with licensees.
- ASIC should develop a best practice remediation document to assist licensees in establishing and conducting remuneration programs.
- RG 256 should explicitly address the issue of tax deductions arising out of residual remediation payments made to not for profits and charities who are likely to hold deductible gift recipient (DGR) status. It is important to uphold the principle that the licensee must not profit from the failure (RG 256.135). Therefore the licensee should be prevented from claiming a tax deduction otherwise they will have benefited from the arrangement.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



Karen Cox
Chief Executive Officer

Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: karen.cox@financialrights.org.au

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.