ASIC Consultation Paper 350: Consumer remediation

FSC Submission

14 February 2022

FINANCIAL SERVICES COUNCIL

1. Contents

1. About the Financial Services Council 4

2. Executive Summary 5

3. Consultation paper 350 7

 3.1. Our proposed draft guidance – application date and lack of transition period 7

 3.2. A1Q1 Do you agree with our proposed updates and/or clarifications in draft RG 000? For example, our proposal to introduce a $5 low-value compensation threshold. Feedback may be provided with reference to REP 707 or relate to issues not previously addressed. 8

 3.3. A1Q2 Are there any practical challenges associated with applying the draft RG 000? Please provide details, including relevant data and documentation. 8

 3.4. A2Q1 Do you agree with our examples? If not, why not? 8

 3.5. A2Q2 Do you think there should be fewer examples in the draft RG 000? If so, which of the examples should be removed? 8

 3.6. A2Q3 Can you provide any other examples of a 'fair and reasonable rate' when calculating foregone returns or interest? 9

4. When remediation is required 10

 4.1. Scalability 10

5. Conducting the remediation: Part 1 – Investigate the nature and extent of the misconduct 11

 5.1. Reviewing and testing the scope 11

 5.2. Give consumers the benefit of any doubt when using assumptions 12

6. Conducting the remediation: Part 2 – Determine and deliver an appropriate outcome 13

 6.1. Communication frequency 13

 6.2. Low-value compensation threshold 14

 6.3. Where to return remediation money 17

 6.4. Receipt of remediation by an AFS licensee 18

 6.5. Use of cheques 18

FSC FINANCIAL SERVICES COUNCIL

7. Other remediation outcomes to consider 19

7.1. Overcompensation and overall outcomes 19

7.2. Adequate systems and processes 19

7.3. Monitoring of assumptions 19

7.4. Payment within 30 days 20

7.5. Tax implications of payments for consumers 20

8. Resourcing, governance and accountability 22

8.1. Governance and accountability arrangements 22

8.2. Reporting publicly 22

9. Engaging with external organisations 25

10. Interaction with licensing and other laws 26

10.1. Conflicts with other laws 26

10.2. Breach reporting 26

FSC FINANCIAL SERVICES COUNCIL

1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC welcomes the opportunity to provide a submission to the Australian Securities & Investments Commission (ASIC) relating to Consultation Paper (**CP**) 350 Consumer remediation Further consultation, together with draft Regulatory Guide 000 Consumer remediation (**RG**), released on 17 November 2021.

The FSC acknowledges the importance of an appropriate remediation framework in financial services to improve confidence in the financial services system, by providing customers with appropriate recompense where relevant laws and regulations are not met.

As an overall comment, the FSC is broadly supportive of ASIC's proposals in the CP and RG and considers in most cases it is in line with current remediation practices.

The FSC's members wish to ensure their affected customers are put back in the position they would have been in had the event not occurred. However, we encourage ASIC to consider the following key issues which are of concern to our members:

No transition period. At present no transition period is envisaged. We submit that a 12 month transition period should be provided for to allow licensees appropriate time to update remediation related policies, procedures and processes and ensure that they have adequate resources in place. See section 3.1.

Scalability. Clearer guidance could be provided in the RG regarding what the meaning of a "small number of consumers" would mean in practice, with the guidance indicating that a licensee should have some flexibility to make a determination as to its meaning, depending on the facts and circumstances. See section 4.1.

Testing the scope. We do not agree with the suggestion that licensees may choose to invite consumers who are likely to fall out of scope to participate in the scoping process of a remediation, on the basis that this may lead to confusion amongst consumers and is contradictory to other statements made in the RG. See 5 section 1.

Communicating with customers about assumptions and other matters. The RG should clarify that when communicating to customers about assumptions, the level of detail can vary, and take into account the complexity of the calculations and the method of communicating of the particular remediation. See 5.2. Similarly, the RG should be less prescriptive (even as to a general position) in terms of number of types of communication, recognising that communications required for particular remediations will vary regarding form and content as well as number of communications. See section 6.1.

Low-value compensation threshold. Introducing a reduced low-value compensation threshold of $5 would mean disproportionate additional operational costs to licensees, increased risk of scam activity and other potential customer detriment. The RG should be updated so that the low-value compensation threshold of $20 or less for former customers is maintained. See section 6.2.

Return of remediation monies, unpresented cheques and unclaimed money regimes. We submit that the RG should provide guidance on when remediation monies should be paid back into superannuation in order to comply with the preservation rules in the superannuation law, as well as on dealing with deregistered companies, unpresented cheques and telling customers about unclaimed money regimes. See section 6.3 to 6.5.

Other remediation outcomes to consider. We suggest improvements regarding certain miscellaneous matters referred to in Section 7 of the RG regarding (a) the interplay between overcompensation and overall outcomes, (b) monitoring of systems and processes, (c) the scope of expected monitoring of complaints, (d) clarification that the obligation to make payments within 30 days only applies to remediations relating to personal financial advice, and (d) confirming the legitimate role of limitation periods and guidance on helping members identify relevant causes of action. See section 7.

Resourcing, governance and accountability. We suggest that the RG clarifies when a centralised remediation governance framework is required and that this should depend on the nature and organisation of the licensee group. See section 8.1.

Publishing information. We do not agree with the proposed requirement for licensees to publish information about remediations on their website – we submit that this would be potentially confusing for customers, undermine trust in the financial services industry, be inconsistent with wider regulatory requirements and potentially result in added costs for industry. See section 8.2

Engaging with external organisations. We submit that ASIC provide greater clarity on how it proposes to work with other external organisations in investigating, overseeing or supervising remediations, particularly the ATO and APRA, and whether there is any intention to issue joint regulatory guidance on these matters. See section 9.

Industry codes of practice. The RG should clarify the status of industry codes of practice. See section 10.

3. Consultation paper 350

3.1. Our proposed draft guidance – application date and lack of transition period

We note that paragraph 6 of CP 350 states “the final guidance will apply to all remediations initiated on or after the date that it is released, which will be after the second round of consultation. For remediations that pre-date the issue of the final guide, RG 256 will continue to apply”.

The FSC notes that it is not proposed to have a transition period, and in REP 707 at paragraph 16 ASIC expressly argues against providing a transition period, on the basis that:

- the updated guidance does not introduce any new legal requirements,
- the guidance is providing greater clarity about ASIC’s expectations and what actions they can take to achieve fair and timely outcomes in line with their existing obligations, and
- ASIC understands that many licensees are already applying the principles and much of the updated guidance.

The FSC respectfully disagrees with the proposal not to have a transition period, on the basis that

- while the updated guidance may not be introducing new legal requirements, it is introducing new expectations and these expectations must be considered by licensees,
- the greater clarity being provided goes to what ASIC expects licensees should be doing in connection with legal requirements, which, again, licensees must consider, and
- while many licensees may well be already applying the principles and much of the updated guidance, it is also the case that many are not, and that even for those that are, this is often times only in a preliminary manner and subject to ongoing modification and review.

We also note that the most recent draft of the guidance proposes some materially significant changes when compared to the previous draft (for example, the reduction of the low-value compensation threshold from $20 to $5, discussed in Section 6 of this submission), the full implications of which will take time to work through and implement effectively.

Given the above, the FSC **recommends** that a transition period of twelve months be introduced to allow licensees appropriate time to update remediation related policies, procedures and processes and ensure that they have adequate resources in place.

The FSC also **recommends** that industry be given as much notice as possible of the expected implementation date of the final guidance.

The FSC also notes that the RG states:

> *In this guide, a remediation is 'initiated' when a licensee makes the decision to address misconduct or other failure through a remediation process [page 8]*

This comment raises the question as to whether there are any particular expectations regarding how licensees will make the decision, or how they should document and evidence making the decision to initiate a remediation.

The FSC suggests that the guidance provide some flexibility in this regard, recognising that the governance processes and documentation surrounding remediations will vary across industry and what may be appropriate for a larger or more complex remediation may not be sensible for a smaller or more straight forward remediation. Given that ASIC states that RG 256 will continue to apply to remediations that have already been initiated, the FSC submits that it is particularly important to provide further clarity on this point.

The FSC **recommends** that ASIC clarify its expectations regarding this issue.

3.2. A1Q1 Do you agree with our proposed updates and/or clarifications in draft RG 000? For example, our proposal to introduce a $5 low-value compensation threshold. Feedback may be provided with reference to REP 707 or relate to issues not previously addressed.

Please see the following sections of our submission for specific comments on proposed updates and clarifications to draft RG 000. In particular we do not agree with the proposal to reduce the low-value compensation threshold to $5.

3.3. A1Q2 Are there any practical challenges associated with applying the draft RG 000? Please provide details, including relevant data and documentation.

Please see the following sections of our submission for specific comments on practical challenges associated with applying draft RG 000.

3.4. A2Q1 Do you agree with our examples? If not, why not?

We are generally in agreement with the examples provided, however see our specific comments in Sections 4.1 and 6.4

3.5. A2Q2 Do you think there should be fewer examples in the draft RG 000? If so, which of the examples should be removed?

We do not think any examples should be removed.

3.6. A2Q3 Can you provide any other examples of a 'fair and reasonable rate' when calculating foregone returns or interest?

We note that the guidance states (at 000.164 on page 47) that the RBA cash rate plus 6% is generally considered to be fair and reasonable as explained at 000.163 (i.e. it is "reasonably high" and objectively set by an independent body). We would suggest it would be useful to provide a little more detail behind the reasoning here, and also include another example of a fair and reasonable rate with an explanation of when the different alternatives could apply, given that in our view the RBA cash rate plus 6% may not be fair and reasonable in a number of instances.

For example, this is unlikely to be a fair and reasonable rate when dealing with remediation relating to fixed income managed investment schemes whose annual returns will typically be considerably lower than RBA plus 6%.

Another example where it may not be a fair and reasonable rate would be in common types of non-investment errors that result in an overpayment from a bank account. An incident in February 2022 would require an interest rate of 6.10%, which appears to be excessive given that the funds may otherwise have been earning little or no interest in most cases.

Further, as the RBA cash rate has been at 1.50% or below since August 2016, the "RBA cash rate plus 6%" does appear to be disproportionately high in many non-investment situations given the possibility that the funds alternatively may have only been in a bank account at the time. As such, we submit that a lower rate be considered for products without investment components.

The RG also refers to the 6% rate as being effectively the Federal Court's post-judgment interest rate, In this regard we would note that the rate applied by the court both incentivises judgment debtors to pay as soon as possible, and also penalises them for each day that they do not pay. We would suggest that the RG provides more detail of the reasoning behind when this would be considered fair and reasonable in the context of a remediation.

4. When remediation is required

4.1. Scalability

We note that at page 13 ASIC states the processes a licensee should apply to any remediation will depend on the scale, age and complexity of the underlying misconduct or other failure, and therefore what steps need to be taken to make it right. If the misconduct or other failure only affects one or a “small number of consumers” and the cause is isolated in nature, the process is likely to be simple and prompt and not require a full remediation ‘program’ to be initiated.

The FSC supports in principle the proposition that the processes adopted in remediations should be tailored where appropriate, and in this context further **recommends** that the guidance indicate that a licensee should have some flexibility to make a determination as to the meaning of “small number of customers”, depending on the nature of the remediation and the circumstances applicable to it, such as the number of consumers affected in relation to the total number of customers. Perhaps another example (in addition to the example provided on page 14 or a more detailed version of it) could be provided for a small number of consumers affected where the remediation is managed using existing incident management processes/resources.

5. Conducting the remediation: Part 1 – Investigate the nature and extent of the misconduct

5.1. Reviewing and testing the scope

ASIC has made the following comment in respect to testing the remediation scope (emphasis added):

> *Licensees may consider testing the remediation scope to ensure that it properly captures all affected consumers.* ***For example, licensees may choose to invite consumers who are likely to fall out of scope to participate in the scoping process of the remediation as a means of testing any decisions or assumptions made****. But remember, licensees should always adopt an inclusive approach in determining the scope of the remediation and minimise consumer action. [page 23]*

FSC members consider that the above paragraph is unclear and may cause customer confusion (and the RG makes the same point again at RG 000.175 on page 50). If a licensee has adequate records and is complying with its record retention obligations, then it should have all available information at hand to determine and capture all affected customers within the relevant limitation periods or beyond these periods as applicable. Failing this, there is useful guidance in the draft regulatory guide about applying beneficial assumptions to ensure that all affected customers are captured and within scope of the remediation.

Given this, FSC members are uncertain about why a licensee would make an invitation to customers who are likely to fall outside of scope of the remediation. If a licensee has conducted a thorough investigation and has complied with its record keeping obligations, then all affected customers will be captured. FSC members are of the view that it would not be a good customer experience to receive a letter where the organisation is unsure about whether they have made an error in relation to that customer's account or policy. We submit it is not appropriate to rely on customers to verify whether they have a particular product, and in turn may have suffered loss.

Being invited to be part of programs that do not ultimately lead to any actual remediation may impose an unnecessary time and administrative burden on the customer, leading to a poorer overall experience. In addition to reputational harm to the licensee, this could adversely impact the reputation of industry and confidence in the financial services sector in general.

Further, licensees being required to make unsolicited contact to likely out-of-scope customers is inconsistent with the principle of efficient and timely remediations which benefit all stakeholders involved (draft RG 000.52), provided of course that the licensee correctly scopes and delivers the remediation in line with the law and regulatory guidance.

The FSC also submits this approach is contradictory to other recommendations in the guidance, for example on page 26 in the section headed “give consumers the benefit of any doubt when using assumptions” (see also below), or where ASIC states earlier:

> *It is not appropriate to ask consumers who are likely to fall within scope (with a reasonable level of certainty) whether they wish to participate or ‘opt-in’ to a remediation. A key principle of conducting a remediation is to make the process easy for consumers and minimise ‘calls to action [page 22].*

Therefore, the FSC **recommends** the sentence in bold, italics in the statement on page 23 and paragraph RG000.175 on page 50 are deleted accordingly.

5.2. Give consumers the benefit of any doubt when using assumptions

In the draft guidance ASIC states:

> *Licensees need to be able to justify their assumptions with available evidence and be clear when communicating with consumers about the use of assumptions and the impact that these may have on their individual loss calculation [page 27]*

ASIC also states:

> *It is important licensees provide a consumer with clear information about how they have calculated compensation, so that the consumer is able to provide detail of any detriment that was not considered by the licensee when determining the appropriate remedy [page 37]*

The FSC notes that communicating with customers about assumptions which have been used and how compensation has been calculated may be challenging where the calculations are complex or where remediation matters involve small amounts, and the communication medium used is statement messaging (as there are character limitations regarding number of characters per line and number of lines per communication). Full details such as assumptions used may be difficult to include for certain communication channels such as statement messaging given these limited character and line limitations for disclosure. Statement messaging can be a simple and effective communication channel for very simple refund matters. Clarity as to whether assumptions used always need to be communicated to customer would be welcomed.

The FSC **recommends** that the guidance could add a statement that the level of detail required can take into account the complexity of the calculations and the method of communicating of the particular remediation.

FSC FINANCIAL SERVICES COUNCIL

6. Conducting the remediation: Part 2 – Determine and deliver an appropriate outcome

6.1. Communication frequency

ASIC has stated the following on page 49 of the draft guidance:

"Generally speaking there are three types of communication that will need to be made during the remediation: initial communication, ongoing communication (e.g. follow-ups, updates, reminders or other supporting communications), and final outcome communication." [page 49]

The FSC notes that this statement raises some questions, such as:

1) What does ASIC mean by a "final outcome communication";
2) What is ASIC's expectation for the content of an ongoing and final communication;
3) What does ASIC mean by other supporting communication; and
4) What is the preferred timing between these communications and expected frequency.

The FSC **recommends** that the guidance be less prescriptive (even as to a general position) in terms of number and types of communication, recognising that practices will vary regarding form and content as well as number of communications. For example, for some remediations (and some businesses) it may be appropriate to issue a single communication to impacted customers which sets out the nature of the problem identified (for example, an incorrect fee deduction), the remedy that has been identified (that the fee will be reimbursed with interest) and that a single payment has already been made to their account to address the harm. Arguably, keeping communications simple and minimising them is also a better customer experience in many circumstances.

The guidance should not suggest that industry have to follow a "one size fits all" communication process or be required to produce different types of letter or email in an effort to align every remediation with a single set procedure, which would in our view be an inefficient and impractical use of resources and detract from the remediation itself.

Instead, the FSC submits the guidance should be principles-based and recommend communications to customers be as simple as possible. This should help provide customers with confidence that the issue has been addressed, leading to a better overall customer experience.

The FSC **recommends** that the guidance state that the number and types of communications made to the customer during the remediation should reflect the nature, scope and complexity of the remediation and allow businesses to develop their own procedures and protocols accordingly.

6.2. Low-value compensation threshold

We note that in CP335 ASIC consulted on the proposal to remove the low-value compensation threshold of $20 for former customers. In our submission in response to CP335 dated March 2021, the FSC respectfully disagreed with the removal of the $20 low-value compensation threshold for former customers and outlined several reasons for why it should remain, including relevant examples and data.

ASIC is now seeking feedback on its proposal to maintain a low-value compensation threshold approach for former customers, but we note the threshold has been reduced amount to $5 after interest is applied. This is a little more than the cost of a single cup of coffee.

We acknowledge and appreciate that this low-value compensation threshold has been maintained as it provides clarity, consistency and efficiency for licensees when formulating its remediation approaches, but we do not agree that $5 is a sensible or practical threshold to apply. We also note that this would be inconsistent with RG 94 *Unit pricing: Guide to good practice*, which has a $20 threshold (see "*Payments to Exited Members*" at page 98), and it is not clear to us why there should be such a distinction.

The FSC **recommends** that the $20 low-value compensation threshold as set out in RG256 be maintained for a number of reasons as set out below.

Disproportionate additional operational costs to licensees. This is evidenced by data provided earlier to ASIC and Treasury which demonstrated that it costs a licensee (at a minimum) **$44 up to $59** to remediate just one former customer. For completeness, we have restated these examples below. On that basis, we submit this evidence demonstrates that $5 is not an appropriate threshold to apply when compared to the operational costs a licensee will incur and the potential to inconvenience , frustrate and/or alarm customers.

One large licensee has used the $20 threshold in the following customer remediations, (with refunds paid to a charity):

1) A premium refund remediation with 989 affected former customers with a refund of $20 or less
2) A claims CPI remediation with 2,500 affected former customers with a refund of $20 or less
3) Remediation relating to CPI and cover cessation with 8 affected former customers with a refund of $20 or less

An FSC member has estimated it costs a licensee **$44.25** to process a refund of $20 or less for one former customer. If the $20 threshold is reduced to $5, the Licensee's operational costs are almost nine times the actual refund amount owing to the customer. A Licensee would reduce operational costs by an estimated minimum of $44.25 each time it, for example, donated a refund of less than $20 to charity as opposed to the processing costs involved in locating and seeking to find, and then pay, a former customer. Using the first

remediation example above with 989 affected customers, there may also be an additional $7.65 in variable costs, such as:

- creating a separate letter for this cohort of former customers;
- ongoing project meetings with relevant stakeholders;
- managing a remediation where there are multiple communication points with external stakeholders, such as a trustee; and
- managing the unclaimed money process for lost customers or for customers who simply do not respond.

This $7.65 will vary (will be lower or higher in value) depending on the amount of customers the project costs are apportioned to, for example, if there were 500 affected customers the amount in variable project costs would be $15.11 (estimate) when the apportioned project costs are allocated to each customer. Therefore, it can cost between **$51.83 to $59.36** (estimate) to process a refund of $20 or less for one former customer - depending on any variable costs applicable and the number of affected customers.

Concerns about scam activity

A lower threshold also raises substantial concerns about unwanted and suspicious communications offering money. In a recent media release issued by the ACCC in response to its scam activity report[1], 2020 saw a record amount of scams during the pandemic, including payment redirection scams which resulted in $128 million in losses. As result of these widespread scams and recent media attention people are becoming more and more cautious and sceptical of emails, hyperlinks and SMSs offering a payment or refund. Therefore, when an organisation contacts a former customer to try and pay a nominal amount of $19 or less, we submit that for most reasonable people they would not feel comfortable providing bank details over the phone or in a web form for a such a low amount due to the risk that it could be a scam, where such risks outweigh the value of the refund. In particular, the risk of the customer losing thousands of dollars from a scam to receive a small refund amount into their bank account.

Given the above, the FSC **recommends** that ASIC engages with other government agencies (particularly the ACCC and the Australian Cyber Security Centre) about the increased risks from financial services businesses making offers of small-scale refunds to customers.

Potential consumer detriment

The estimated cost of $44.25 (plus, potentially any variable costs of between $7.65 and $15.10) per former customer (for less than $20 remediation amounts) referred to above is

[1] https://www.accc.gov.au/media-release/scammers-capitalise-on-pandemic-as-australians-lose-record-851-million-to-scams

purely the operational costs incurred by the Licensee and importantly does not take in account the potential adverse impacts on the customer. These could include:

- the effect of any delay in successfully concluding the remediation;
- customer dissatisfaction having to receive/deal with multiple communications in respect to a small refund amount;
- customer concerns about possibly being targeted by a financial scammer, and the inconvenience and/or concern caused by this; and
- customer dissatisfaction with their choice of financial service provider and the financial services industry more broadly.

These adverse impacts for the customer would also come with additional costs for the licensee, and accordingly the actual all-inclusive costs could be higher than the estimates above (for remediation amounts below $20).

In our view, from a customer perspective, any call to action for a refund between $6 to $19 would, for most people, not be worth their time and effort. FSC members anticipate that response rates to remediation communication in the form of letters/emails or SMSs to be extremely low where the amounts are in this low range.

We also note that where customers do respond, for some customers the effort involved in obtaining remediation monies can be particularly disproportionate where the amounts are below $20, for example:

a) where a customer lives overseas and receives a cheque, the customer would typically have to wait until they are back in Australia to be able to cash it, or inconvenience a relative or friend to cash it on their behalf;
b) where the remediation involves a deceased estate, the additional procedures involved in processing and distributing additional small amounts in compliance with applicable law can be significant and cumbersome and end up being an irritation for the customer(s) who are intended to benefit;
c) in situations where a refund cannot be made directly (for example in some life insurance situations), customers are often required to complete forms (and sometimes provide proof of ID or condition of release) and / or cash a cheque for under $20. This results in a significant number of unpresented cheques and immaterial amounts going to unclaimed money regimes.

Adding to the problem, we also note that where customers do not respond, the licensee cannot just assume that the person is not responding because the value of the refund is not worth the effort pursuing, therefore, a licensee would need to apply reasonable endeavours to return remediation money to the customers instead of a residual payment to a charity. ASIC has also provided examples of what it considers reasonable endeavours to mean, including:

- obtaining up to date contact and payment information from another area of the business or related entity;
- using the expertise of recovery teams;

- using external specialists; and
- purchasing or accessing data from information merchants.

The example of $44 outlined above has not taken into account the costs of applying reasonable endeavours to low-value compensation payments between $6 to $19, and as it is anticipated there would be a low response rate from customers who are owed remediation payments that range between $6 to $19, this will likely result in the licensee's costs becoming even more disproportionate to the refund owed to the customer.

Given all of the above, the FSC believes that lowering the low-value compensation threshold from $20 to $5 will significantly and disproportionately increase costs for a licensee, often for little or questionable consumer benefit. It also has the potential to frustrate and possibly cause customer distress and reputational harm to organisations if the customer mistakes a remediation communication as spam.

In view of the above, the FSC strongly **recommends** that the guidance be updated so that the low-value compensation threshold of $20 or less for former customers is maintained.

Further, we recommend that the existing RG 256.135 be amended to provide licensees with discretion to make a payment to a relevant charitable organisation for amounts below $20 without needing to satisfy the test that the client cannot be compensated without significant effort.

6.3. Where to return remediation money

The draft regulatory guidance does not contemplate the need for remediation monies to be paid back into superannuation in order to comply with the preservation rules in the superannuation law. However, the FSC notes the ASIC and APRA joint letter dated 10 April 2019 and joint letter dated 20 June 2021 to superannuation trustees each of which confirmed ASIC's position on the need for adviser remediation monies to be paid into superannuation in certain circumstances in order to comply with the preservation rules in the superannuation law. This position is not reflected in the "Where to return remediation money" section in the draft guidance (paragraphs 190-192 on pages 52/53). The FSC is concerned that it will create uncertainty in the financial services industry and raise questions regarding ASIC's current position if ASIC released a regulatory guide which considered where to return remediation monies but did not refer to the position set out in these two joint letters.

Accordingly, the FSC **recommends** that the final regulatory guide include information which reflects ASIC's position in these two joint letters.

With regards to Table 2 on page 53, the FSC also **recommends** that inclusion of guidance on payments in respect of deregistered companies would be useful.

6.4. Receipt of remediation by an AFS licensee

In some cases, remediation is received by a licensee, for example remediation received by a trustee of a large superannuation fund. We **recommend** ASIC provide additional guidance on how licensees should treat the receipt of remediation, for example, guidance:

- stating remediation should be credited to member accounts in a timely manner.
- providing assistance to payers of remediation where there is remediation relating to superannuation but the old fund is closed and the new fund will not accept the payment.
- Relating to monitoring of remediation involving a third party (see Section 7.3 below).

We would be keen to discuss with ASIC the specific scenarios in this area where guidance would assist. See also Section 9 below.

6.5. Use of cheques

ASIC comments at page 54 of the guidance:

> *Licensees should monitor and record cashing rates, and reminders should be sent to consumers who have not cashed their cheques within a reasonable period of time. Supporting communications and reminders should provide the option of allowing a consumer to securely provide their bank account details [page 54].*

And further:

> *If a consumer remains unresponsive despite a licensee's reasonable endeavours, the licensee should first lodge the money owed into a relevant unclaimed money regime, if available. This will ensure the money remains discoverable and accessible by consumers for as long as possible. [page 56]*

The FSC and its members are generally supportive of using cheques, particularly in circumstances where the licensee doesn't hold payment details for the client,. Further guidance around the concept of "reasonably available" in this context would also assist industry.

Further, in view of the above comments, the FSC **recommends** an expansion of example 25 to illustrate what would constitute a reasonable period of time before deeming an unpresented cheque as unpayable.

7. Other remediation outcomes to consider

7.1. Overcompensation and overall outcomes

Paragraph RG 000.100 of the guidance contains the following statement (emphasis added):

> *Using assumptions will also likely save licensees time and resources in conducting the remediation that would ordinarily be associated with analysing all records or conducting individual file reviews. This means the use of assumptions will benefit the licensee as well as the consumer.* ***If there is an element of overcompensation for some affected consumers, this program cost saving should be taken into account where determining what is an appropriate overall outcome****.*

The FSC assumes that the point being made here is that while a particular amount of overcompensation may be effectively offset by savings made by way of the use of appropriate assumptions. The FSC submits that this could be made clearer, or otherwise suggests that the third sentence in the statement be removed as the concept of an "appropriate overall outcome" is not clarified elsewhere in the guidance and we do not understand the utility of the sentence. Where customers are put into the position they should have been in (or better in the case of the application of assumptions and overcompensation), does it matter if licensees can conduct the remediation efficiently and achieve cost savings?

7.2. Adequate systems and processes

ASIC comments at page 30 of the guidance (RG 000.113):

> *if licensees are maintaining adequate systems and processes to identify and remediate problems when they arise, rarely will a remediation review period extend beyond record-retention requirements (which is generally seven years).*

The FSC **recommends** that paragraph 113 be deleted from the guidance as it does not provide any guidance and is merely a comment that is not accurate.

7.3. Monitoring of assumptions

RG.000.124 in the guidance provides:

> *Licensees should monitor the assumptions until payments are finalised to ensure fair and timely consumer outcomes are achieved and continue to be what was expected*

The FSC **recommends** that the RG adds a provision to the effect that monitoring should enable licensees to satisfy themselves that the beneficial assumptions applied are appropriate for the event being remediated, and clarify that there is no expectation that each and every circumstance of every customer must be monitored. Some monitoring is accepted to ensure the reasonableness of beneficial assumptions and apply consistency to different customers throughout the remediation process ensuring equity among clients. However, the FSC submits this monitoring obligation should not generally occur at the level of each individual.

We also note payment of remediation can occur through a third party, for example payment to a superannuation fund for the benefit of a fund member. In these situations, once the payment is made to the third party, there are little or no opportunities for the payer of remediation to monitor outcomes (see also Section 6.3 above). The FSC **recommends** the guidance note the ability to monitor in these situations will be limited.

RG.000.125 in the guidance provides:

> *If new information arises (e.g. through subsequent complaints) during or following the remediation that suggests that any assumptions made are not to the benefit of consumers, licensees should consider whether any supplementary compensation is necessary*

This statement is broad and not limited in time.

The FSC **recommends** that ASIC clarify what it expects in the way of complaints monitoring in the remediation context and include an example as to the length of time following the completion of the remediation that would be reasonable to continue monitoring complaints about a remediation?

7.4. Payment within 30 days

RG 000.180 requires licensees to take reasonable steps to make remediation payments within 30 days of completing the investigation. It appears this statement relates to section 912EB of the Corporations Act which only applies to remediations relating to personal financial advice. As ASIC notes that 'the updated guidance does not introduce any new legal requirements', the FSC assumes RG 000.180 should contain the important qualifications on the 30 day obligation that appear elsewhere in the draft guidance, that confirm that the obligation only applies to a "subset of licensees": see RG 000.329.

The FSC **recommends** including the words "licensees subject to notify, investigate and remediate obligations" or "AFS licensees who provide personal advice to retail clients and credit licensees who provide mortgage broking services to consumers" in line with RG 000.326.

7.5. Tax implications of payments for consumers

We note the draft RG states at RG 000.213 (***emphasis added***):

> *Some remediation payments might have tax implications for consumers. Licensees should……: (a)* ***inform consumers in consumer communications about the tax implications****;*

Given that the licensee making the payment may not know the specific tax circumstances of the client receiving the payment, the FSC submits that the emphasised wording be removed to avoid any expectation that a licensee will provide specific tax advice to a recipient of remediation. If there are specific situations that ASIC considers need to be addressed (for

example, certain obligations of superannuation trustees) then the RG should be clear on which situations are being addressed and allow flexibility for different types of licensees.

We note it would be appropriate for a licensee to counsel customers to seek their own tax advice, a point that is already covered in RG 000.213(d).

.

8. Resourcing, governance and accountability

8.1. Governance and accountability arrangements

The RG states that a licensee should generally have a centralised remediation governance framework:

> *Where a licensee has a group structure with multiple financial services brands and businesses under its licence, the licensee should generally ensure it has an appropriate centralised remediation governance framework and independent oversight, with regular reporting to its board. This will mitigate institutional silos and promote information and intelligence sharing across the whole organisation. [page 64].*

The FSC is broadly supportive of this proposal. However, we note that for some licensees, material aspects of their governance arrangements may not be located in Australia and there may be competing jurisdictional expectations. For example, there may be a requirement for a licensee's overseas parent to have a corporate governance function based outside Australia which would be responsible for the oversight of the remediation governance framework taking place in Australia, while the operational aspects of the remediation governance framework would be supervised locally. For others, such as multinational groups, their remediation governance frameworks may be distributed across different business centres.

In view of the above, the FSC **recommends** that ASIC clarifies that whether a centralised remediation governance framework is required (and the location thereof) can depend on the nature and organisation of the licensee group.

8.2. Reporting publicly

The FSC notes that ASIC have made several comments within the draft guidance stating that licensees should publish information about the remediation on its website, namely:

> *If a licensee imposes a low-value compensation threshold, details of the remediation and the threshold applied should be disclosed on the licensee's website. This includes where low-value compensation is retained for the benefit of unitholders/beneficiaries of the same fund (where relevant). [page 52]*
>
> *Licensees should be transparent about any residual remediation payment made and disclose it on their website [page 57]*
>
> *In general, we believe licensees should be transparent about their remediations. Public reporting (e.g. prominent disclosure on the licensee's website) will be especially important for a larger-scale remediation or a remediation that follows public reports of consumer losses, alleged misconduct or other failures. [page 67]*

An important part of increasing trust in the financial services industry is the existence of efficient and transparent remediation programs, involving admitting mistakes or failures and compensating customers for those mistakes and failings in a timely manner. The financial

services industry offers valuable and important products and services to consumers. The website of a licensee is designed to deliver information about those products and services to consumers via a digital and efficient solution. It is not a forum to publish what it has done wrong. Members are supportive of correcting a wrong and being open and transparent with the customers they may have wronged. However, publishing this information to the general public affects all customers, not just customers affected by the remediation.

It has the potential to dissuade customers from purchasing products from licensees who adopt ASIC's guidance and publish information about remediation online and mislead them to purchase products from other licensees who may not follow ASIC's suggested approach to publish their remediations online. These statements within the draft guidance may create inconsistent approaches and remove the level playing field.

It also has the potential to drive an increased amount of telephone calls to call centre operations due to customers being confused as to whether the remediation applies to them and requiring further information about the remediation, reassurance or clarity.

It is also not certain that every recipient of a residual remediation payment (for example a charity) may wish to be identified publicly as a recipient of the payment in this way.

Members are fully supportive of rectifying errors, compensating customers for losses and taking steps to ensure the conduct is rectified and not repeated. Requiring organisations to publicly display information about a remediation, including whether a low-value threshold has been applied could lead to serious reputational and brand damage. Media organisations can use and exploit this information to report on this information without proper context or a full understanding of the issue.

It is not clear whether ASIC has considered the effect of any reputational or brand damage and what this may do to consumer trust in an industry which has undergone a plethora of reform. The risk and the actual cost of reputational or brand damage from loss of consumer trust in the financial services industry is difficult to quantify and even harder to restore. We submit that it is not in the public's best interests and references to publishing information about remediations online should be removed from the draft guidance.

We also note that there is no general requirement for financial services businesses to publish every error, breach of law, mistake (and so on) that they make. In this context, it is unclear why remediation information should always be published on a website – in comparison other errors would only be published where specifically required by law, regulator, or Court.

By contrast, we note that ASIC will be publishing information on its website about licensee breach reporting soon pursuant to s912DAD of the Corporations Act 2001. As a result, we consider that consumers will have sufficient information available should they wish to proactively assess whether an organisation has reported any breaches.

In view of the above, the FSC **recommends** that the requirement for licensees to also publish information about remediations on its website be removed.

9. Engaging with external organisations

We note that ASIC intends to take a coordinated approach when working with AFCA and APRA.

In this regard, with respect to AFCA, the RG states:

> *When AFCA identifies a systemic issue that is likely to affect consumers, AFCA will work with the licensee to ensure all parties affected are identified and appropriately compensated for any financial detriment, and appropriate action is taken to prevent the problem from recurring. If we are investigating, or overseeing the remediation of, the same or a similar systemic issue, we will work with AFCA to ensure a coordinated approach. [page 69]*

And regarding APRA, the RG makes the comment:

> *ASIC will usually have the primary supervisory role in relation to the conduct of the remediation. Depending on the circumstances, however, ASIC and APRA may take a coordinated approach in the supervision of the remediation (if necessary) and the rectification of the related misconduct or other failure. [page 70]*

The FSC **recommends** that ASIC clarify whether there is any intention to issue joint regulatory guidance on how ASIC proposes to work with other external organisations in investigating, overseeing or supervising remediations (for example, as is the proposed with regards to the new Financial Accountability Regime). For example, if ASIC and APRA are going to be jointly asking for data from members, it would be useful to have guidance on who would usually be expected to be the main point of contact in discussing and responding to such requests.

The RG indicates that licensees may need to engage with the ATO in relation to taxation issues of remediation (RG 000.266). We submit that this comment could usefully be extended to cover engagement with the ATO and/or APRA where necessary in relation to the rules applying to superannuation remediation.

While the draft guidance indicates that ASIC may coordinate its work with APRA (RG 000.271), the guidance makes no such commitment in relation to the ATO. However, our previous submission indicated the lack of coordination with the ATO has caused issues for remediation programs. Therefore, the FSC **recommends** the guidance state that ASIC will take ‘a coordinated approach’ (or similar) with the ATO.

10. Interaction with licensing and other laws

10.1. Conflicts with other laws

We note that ASIC states the RG is designed to be applicable to all licensees, but will not always take into account specific legislative requirements, business structures, contractual arrangements, constitutions or trust deeds unique to particular licensees or particular types of misconduct or other failures.

ASIC further states:

> *To the extent that other laws or legal duties conflict with this guide, the former will prevail. See Section I for further information about other legislative requirements that relate to consumer remediation. [page 7]*

The FSC notes that these paragraphs are silent as to how industry codes of practice would be considered here and queries whether the reference to other laws or legal duties would include enforceable code provisions contained in industry codes. Codes are mentioned elsewhere in the RG e.g. at page 11 but not here.

The FSC **recommends** that ASIC clarify this issue.

10.2. Breach reporting

With regards to breach reporting, we note the RG states at RG 000.324:

> *When lodging the prescribed reportable situation form, licensees must provide details of any remediation that has been or is being developed to compensate consumers who have suffered loss, including expected timeframes, and should provide information about the completion of remediation [page 79]*

FSC members have significant concerns about how the portal accommodates breaches related to remediation. Aspects of the portal appear to dictate only a binary response, where the accurate response is not binary, and requires explanation and context (that is, the portal response does not allow sufficient flexibility to provide an accurate answer to the regulator where the information is still being obtained or the response is not definitive).

For example, presently, when submitting a breach report via the portal, the drop downs only accommodate a binary response for loss estimates and payment timing and do not allow a licensee to comment on the specific stage of remediation. There is a free text field in the breach description section which provides some opportunity to clarify but we submit it would be more helpful to include it in the loss section.

For the initial breach report required within 30 days, a licensee may not know the loss incurred by a customer and so the value being entered as the loss is sometimes inaccurate, especially for best interest breaches or similar which require time to investigate and quantify. The portal requires data fields to be completed even if unclear what the amount is. To facilitate breach reporting for remediation it would be better if fields in the portal are tailored

to remediation where a licensee may indicate this breach is related to remediation and caters to situations where the loss amount is as yet undetermined.