Australian Banking Association

15 February 2022

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The Behavioural Research and Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
By email: remediation@asic.gov.au

Dear Ms Fairbairn,

CP 350 Consumer remediation: Further consultation

The Australian Banking Association (ABA) welcomes the opportunity to provide feedback on the Australian Securities and Investments Commission (ASIC) consultation on Consumer Remediation through consultation paper CP 350 and the draft regulatory guide RG 000 (RG 000).

Our position

The ABA supports the draft regulatory guide and appreciates the number of recommendations adopted by ASIC in RG 000 following industry feedback received in response to CP335. We thank ASIC for constructively engaging with ABA members during this consultation and support the clarifications in the draft RG 000. The ABA supports industry administering remediation programs efficiently and providing the best possible outcomes for consumers entitled to a remediation payment.

Recognising the importance of this guidance, the ABA has sought to provide ASIC with detailed feedback on RG 000, addressing feedback at a thematic and at a clause level. The ABA considers this level of detail is warranted given the comprehensive nature of this draft guidance and our desire to ensure fair and consistent outcomes that can be operationalised in an efficient and effective manner.

In line with our approach, there are several points on which the ABA raises concerns, and requests for amendments to the draft guidance to clarify expectations and enhance the effectiveness of this guidance, specifically:

- **A $5 low-value compensation threshold –** lowering the current $20 threshold will increase the cost, effort and time required to complete remediations, while also reducing the community benefits of residual remediation payments.
- **Disclosing the adoption of low-value compensation thresholds and residual remediation payments –** requiring a licensee to disclose they have adopted ASIC's guidance in these areas will not benefit consumers. There is also a risk that in publicising residual remediation payments, licensees will inadvertently be perceived as having made a proactive donation to the charities involved.
- **Beneficial assumptions –** some of the requirements surrounding beneficial assumptions can reduce the efficiency of remediation payments.
- **Linking complaints and remediations to identify affected consumers –** requiring licensees to cross-reference all complaints received against all active and completed remediations will be impractical to implement and will substantially impact the efficiency of remediation activities.
- **Determining additional remedies for some consumers –** the requirement for licensees to proactively identify features of affected consumers across all remediations will require additional time and resources, ultimately delaying remediation payments for limited consumer benefit.
- **Communicating with consumers –** while the *Making it Right* guide aims to balance mandatory aspects of communications to consumers and allow licensees to tailor communications to suit

the remediation, various clauses are at times overly broad or prescriptive and at odds with the aim of the *Making it Right* guide. This can limit licensees' ability to send communications that are commensurate to the consumer impact of a remediation. This will increase costs and slow remediations without benefiting consumers.

- **Foregone returns or interest –** example rates referred to in the guide at RG 000.162 and RG 000.164 will not generally be appropriate for calculating the 'time value of money' in banking product remediations. In addition, guidance on the compounding frequency should be flexible enough for licensees to determine and justify what frequency is appropriate.
- **Postponement or cessation of action –** as drafted, the broad scope of this clause will lead licensees to pause or refrain from actions which will otherwise have benefited consumers, and in relation to remediations that will not materially impact those actions. This overly broad scope could lead to increased consumer harm.
- **Transition period –** The current RG 000 clarifies the guide does not apply retrospectively from the date it comes into effect, but it does not include a transition period. We note that a transition period is necessary as it can be difficult and inefficient for licensees to commence operationalising changes before regulatory guidance is final, given the need to ensure that implementation is consistent with the final guidance. It will take all licensees time to align policies, processes, and support material with the updated guidance.

Key recommendations

1. **Retain the $20 low-value compensation threshold.** While the ABA agrees that licensees should return all remediation money owed to current consumers with available payment details, regardless of value, we do not agree with lowering the low-value compensation threshold from $20 for former consumers. The time spent working through smaller payments will come at the cost of prioritising more significant payments and will reduce the efficiency gains and community benefits of residual remediation payments.
2. **Remove the requirement for licensees to disclose the adoption of low-value thresholds and residual remediation payments on their website.** ABA members make residual remediation payments and use the low-value compensation threshold in accordance with ASIC's guidance. Given there is no benefit to consumers in the disclosure of this information, the ABA does not believe that compliance in these areas warrants disclosure. Our members are also concerned that the disclosure of residual remediation payments may be viewed as a donation of some kind, and thus will conflict with the intent of RG 000.59 which requires that licensees not profit (including in reputational terms) from the misconduct or failure.
3. **Clarify and address conditions to applying beneficial assumptions.** There are requirements in the draft guide that may reduce the efficiency of remediation payments. For example, the need to proactively communicate all assumptions to consumers is impractical for smaller payments and will reduce the efficiency of higher value remediation payments.
4. **Remove the requirement to link complaints and remediations to identify affected consumers.** ABA members believe the requirement to enjoin complaints management processes to the scoping of remediations is not required. This is because ASIC's guidance on using complaints data to identify affected consumers, where appropriate, is already effectively addressed in other ways within RG 000.
5. **Clarify when determining additional remedies for some consumers is appropriate**. ABA members agree that consumers experiencing hardship or vulnerable circumstances may need additional assistance or remedies throughout a remediation. However, this requirement is only relevant for remediations where there is a material impact to consumers. It will not be appropriate or beneficial when remediating, for example, low-value fee overcharges or interest miscalculations. For these remediations, licensees should focus on expediting payments to all impacted consumers.

6. **Ensuring an appropriate level for consumer communications.** The guidance appears in various places to add administration for communicating with consumers by adding obligations that appear excessive under different circumstances. We consider that communications should be commensurate with the consumer impact and in consideration of the consumer experience. Communications should also avoid the need for bespoke communication for each customer remediation as that will significantly add to remediation programs that use automated communication methods.
7. **Clarity is required in relation to foregone interest calculations.** The ABA considers further clarity and refinement of this guidance is required to ensure licensees can calculate foregone returns or interest correctly and efficiently.
8. **Clarity as to when postponement or cessation of action is appropriate.** ABA members consider that this guidance needs to be refined to ensure it is applied only where appropriate. They also believe that postponement or cessation of action should be limited to legal proceedings or any other enforcement proceedings. This will ensure consumers can continue to benefit from informal collection activities such as initial contact calls and automated email reminders where a single payment has been missed, which enable them to take corrective action to avoid interest and other charges, as well adverse credit reporting.
9. **Introduce a six-month transition period.** ABA members will need to make substantive changes at a whole-of-organisation level, and will include updating organisational policies, procedures, detailed remediation guidance, systems, and implementing new or revised processes. This process takes time and effort to ensure changes are managed and implemented successfully.

The ABA further supports ASIC's intentions around ensuring compliance with the guideline consistent with RG 000.339 but will appreciate further clarity on ASIC's approach to enforcing these guidelines.

Further feedback and clarity on the recommendations raised above is outlined in the attachment to this letter. For ease of reference, the numbers listed above under recommendations are maintained below in providing further detail.

Thank you for the opportunity to provide feedback.

Yours sincerely,

Fiona Landis
Executive Director, Policy

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Attachment – Further detail on ABA recommendations

In this section we provide further detailed feedback on the key recommendations above:

General comments

A1 Q2. Are there any practical challenges associated with applying the draft RG 000? Please provide details, including relevant data and documentation.

Commentary on practical challenges has been provided on relevant clauses in each section.

Examples

A2 Q1. Do you agree with our examples? If not, why not?

The ABA generally agrees with the examples provided but recommends amendments to the following examples. Detailed feedback on each example is provided in the relevant section of this submission.

Examples to be clarified	• Example 9: What kind of assumption will not be to the benefit of consumers? (Section 2) • Example 18: Where non-monetary remediation of clients may be appropriate (Section 5) • Example 23: Calculating time value of money outside an investment product using a fair and reasonable rate (Section 7); and • Example 25: Tracking cheque cashing rates (Section 8).
Example proposed to be removed	• Example 24: Calculating time value of money outside the credit product using a fair and reasonable rate (Section 7).
Proposed example to be added	• After Example 2, one more to be added on scalability. We will welcome an example for a small number of consumers affected where the remediation is managed using existing incident management processes/resources.

A2 Q2. Do you think there should be fewer examples in the draft RG 000? If so, which of the examples should be removed?

Per our response to A2 Q1, the ABA recommends Example 24 be removed. However, we also request ASIC consider providing additional examples to provide clarity on a range of points, and we have identified those opportunities in relevant clauses throughout this submission.

A2 Q3. Can you provide any other examples of a 'fair and reasonable rate' when calculating foregone returns or interest? If so, please provide reasons and any relevant data.

One of our members has provided examples of fair and reasonable rates, which are included in Appendix A for ASIC's consideration.

1. The low-value compensation threshold

RG 000.51

Licensees should return all remediation money owed to current consumers regardless of value. However, for former consumers who are owed $5 or less (after interest), licensees may instead make a residual remediation payment: see RG 000.185–RG 000.189.

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 and where an unclaimed money regime was unavailable: see RG 000.198–RG 000.209.

A1Q1. Do you agree with the proposed update / clarification?

While the ABA agrees that licensees should return all remediation money owed to current consumers with available payment details, regardless of value, we do not agree with lowering the low-value compensation threshold from $20 for former consumers.

The basis for setting the $20 low-value compensation threshold in RG 256 was that it will apply in circumstances where a client cannot be compensated without *"significant effort"* on the part of the licensee, with the example being where *"the client no longer holds an account"* with a licensee.

The ABA believes that:

- the basis for setting the original threshold has not changed and as such, neither should the threshold.
- the additional time spent working through smaller payments will come at the cost of prioritising more significant payments.
- lowering the threshold will reduce the efficiency gains and community benefits of residual remediation payments, while increasing the costs, effort and time required to complete remediations by licensees (particularly given the existing challenge in locating and obtaining payment instructions from former customers for amounts less than $20, making payments at this threshold is already difficult).

Additionally, in response to ASIC's comments in RG 000.186 that the $20 threshold remain for unit pricing errors, the ABA believes the low-value compensation threshold should be consistent across financial products.

Additionally, in response to ASIC's comments in RG 000.186 that the $20 threshold remain for unit pricing errors, the ABA believes the low-value compensation threshold should generally be consistent across all retail financial products, because it is the dollar value and the effort required to contact consumers and ultimately cancel any associated unpresented cheques that are the material considerations, not the underlying product being remediated.

2. Disclosing the adoption of low-value compensation thresholds and residual remediation payments

RG 000.189

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).

Note: This is consistent with RG 94 in relation to unit pricing error remediations, pp. 83 and 98.

RG 000.209

Licensees should be transparent about any residual remediation payment made and disclose it on their website.

A1Q1. Do you agree with the proposed update / clarification?

The ABA disagrees with clauses RG 000.189 and RG 000.209 because there is a risk that the charities that are recipients of such payments may wish to avoid any unnecessary, unhelpful, or erroneous association with the cause of the relevant remediation.

Recommendation – the ABA recommends that these disclosure requirements be removed.

3. The use of beneficial assumptions

The ABA supports ASIC's intent for licensees to use beneficial assumptions to remediate consumers more efficiently. However, the proposed guidance appears to impose conditions on the use of beneficial assumptions. The ABA is concerned that, when some of these conditions are considered collectively, they may have the unintended consequence of discouraging licensees from using assumptions. Fewer assumptions will lead to less efficient remediations and slower outcomes for consumers and licensees.

3.1 Licensees should only use assumptions in a remediation if they are beneficial to consumers

RG 000.98

Overall, licensees should only use assumptions in a remediation if they are beneficial to consumers and will result in an outcome that:

(a) returns affected consumers as closely as possible to the position they will have otherwise been in had the misconduct or other failure not occurred;

(b) is evidence based and well documented; and

(c) is monitored to ensure the assumption continues to achieve the goal of returning consumers as closely as possible to the position they will have otherwise been in throughout the remediation.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees with the intent of part (c) but has concerns with the current framing for the following reasons:

- Specifically requiring that assumptions be monitored is not necessary if licensees are meeting parts (a) and (b) of this requirement.
- Monitoring should be on a reasonable endeavours' basis, to account for the specific circumstances in each remediation. Otherwise, licensees may need to implement monitoring that is unnecessarily onerous or impractical, which will result in slowing all remediations that have used assumptions.
- This in turn will lead licensees to reduce the use of assumptions, which will undermine ASIC's intent and the potential benefits to consumers and licensees.

Recommendation – the ABA recommends that this clause be clarified to avoid an overly broad monitoring requirement.

3.2 Communicate assumptions to consumers

RG 000.102

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.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees that licensees need to be able to justify their assumptions with available evidence.

However, as currently worded, the clause implies that personalised communication about assumptions will be required for each consumer who receives a remediation payment in remediations where assumptions are used, to explain how those assumptions may have impacted their individual loss calculation. It also implies that this will be necessary regardless of complexity and compensation payment amounts.

A remediation might involve many assumptions, and the impact & relevance of those assumptions will vary for individual customers. Developing individualised communication on assumptions will be highly inefficient and may not produce a consumer-friendly outcome. If RG 000.98 is interpreted to mean that assumptions can only be used if detailed written communication to all consumers, this will lead to:

- the use of fewer assumptions, and
- longer, more costly and less efficient remediations.
- more complex communications that consumers may find confusing or not understand, hence negatively impacting the customer experience.

The ABA recommends ASIC amend this clause to specify under what circumstances this information needs to be provided, for example:

Recommendation – the ABA recommends this clause be re-worded as:

*Licensees need to be able to justify their assumptions with available evidence and **should consider** communicating with consumers **where appropriate** about the use of assumptions and the impact that these may have on their individual loss calculation.*

A1Q2. Are there any relevant practical challenges?

As currently framed, this clause implies that if assumptions are used then in all cases a detailed communication needs to be sent to all consumers, regardless of remediation complexity, type of assumption, or payment value.

This will negatively impact the customer experience by providing more complex communications, limit efficiencies that licensees gain by appropriately tailoring consumer engagement approaches, reduce the adoption of assumptions overall, and slow down remediations.

3.3 Beneficial assumptions example

Example 9: What kind of assumption will not be to the benefit of consumers?

Salaried advisers of advice licensee Rudisao Advisers (Rudisao) provide personal financial advice to Rudisao clients, including advice to switch superannuation products. Through random quality checks, Rudisao recently discovered that some of these advisers may not have met their obligation to undertake a reasonable investigation of new products when recommending a switch. As a result, some advisers were identified as high risk and relevant audio files and documentation were reviewed.

The quality of some audio files was poor and records are incomplete. Notwithstanding these circumstances, Rudisao decided that they could not conclude that problematic advice had been given based on the information available and assumed that if no complaints had been made, then the clients must be satisfied with the advice.

Commentary

This is not an assumption that is beneficial to consumers. Rudisao should not assume that because a client has not complained that they have not suffered loss. Given Rudisao has breached its record-keeping obligations, the advice licensee should assume that clients that received advice in situations where records are incomplete are within the scope and should be included in the remediation.

A2Q1. Do you agree with the example? If not, why not?

The ABA suggests updating the example to clarify that, while those customers with missing records should be included within the scope of the remediation, the missing records themselves should not be considered 'inappropriate' advice which must be remediated.

It is important to note that unlike fee-for-no-service remediations, the absence of records more generally does not necessarily mean that consumers have suffered a loss. While licensees should use assumptions where appropriate, it will not be reasonable or possible to compensate consumers where consumer loss is not suspected.

4. Linking complaints and remediations to identify affected consumers

RG 000.79

Licensees should also have processes in place to review and monitor complaints that relate to the remediation scope. For example:

a) determine whether there are consumers who have had previous complaints reviewed by IDR or AFCA that will fit within the parameters of the current remediation; and

b) have processes in place to review circumstances of consumers who indicate later—including after the remediation has been concluded—that they should be considered.

A1Q1. Do you agree with the proposed update / clarification?

The ABA generally supports ASIC's guidance regarding licensees' requirements to identify affected consumers. However, we raise concerns that requirements to enjoin complaints management processes to the scoping of remediations is unnecessary and will likely delay both the resolution of consumer complaints and the completion of remediations.

This is based on the scale and volume of remediations, consumer complaints managed by many of our members, and the infrastructure investment that will be required to link complaints and remediations processes in all cases. Furthermore, we believe ASIC's guidance on using complaints data to identify affected consumers where appropriate is already effectively addressed in other ways within RG 000.

The ABA does not support this requirement, which appears to require licensees to cross-reference all complaints received against all current and completed remediations. It will create an impractical and undue burden for licensees and impact consumer remediation timeliness. This is because:

1. Other RG 000 requirements lead licensees to draw on complaints data where appropriate.
    a. Per RG 000.43, every remediation must involve a robust 'root cause analysis' and identification of potentially affected consumers.
    b. this can at times include using complaints data to determine the extent of the misconduct or failure, as per RG 000.65; however, this step may not be necessary in all cases.
2. Complaints can be useful but are not exhaustive.
    a. Complaints can be a useful method to validate the scope of a remediation, but cannot always be linked or attributed to an underlying failure or misconduct if the consumer has given incomplete information or has misinterpreted the issue they are complaining about.
    b. Therefore if licensees did not have robust processes to identify potentially affected consumers then complaints can be useful, but ultimately cannot be completely relied upon.
3. Thorough remediation and complaint management practices can be more effective. Complaint data is more appropriately incorporated into remediations in the following ways:
    a. Reviewing complaints data to inform or validate remediation scope where appropriate, as per RG 000.65.
    b. Having a mechanism in place to assess complaint-driven systemic Issues (as per RG 271) and determine whether remediation is required.
    c. Where a complaint is received in relation to the outcome of a remediation process (as opposed to a general complaint), it is reviewed to ensure that both the remediation outcome was appropriate and that the underlying root cause has been effectively resolved.

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5. Determining additional remedies for some consumers

RG 000.136

To determine an appropriate remedy licensees should assess available records to identify 'features' of affected consumers that may be relevant to how the misconduct or other failure may have affected them.

Consumer cohorts who are suffering financial hardship or difficulty because of the misconduct or other failure, or have been identified as potentially vulnerable, may need additional remedies such as support services or professional assistance.

Note: Licensees may refer to p. 4 and Resources A and B in Making it right: How to run a consumer-centred remediation (Making it right) (PDF 2.5MB) for more information on how to do this in practice.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees that consumers experiencing hardship or vulnerable circumstances may need additional assistance or remedies throughout a remediation. This could include prioritising compensation payments to a particular cohort or providing financial assistance for a consumer to engage professional legal or accounting advice.

However, the ABA considers that this section should be qualified to recognise that:

- in larger scale remediations licensees will typically segment customers into 'cohorts' with different features, and this will be done at an aggregate level rather than identifying customer features at the individual customer level; and
- in some circumstances it may be appropriate to focus on expediting payments to all impacted consumers rather than focusing on the segmentation and prioritisation of particular cohorts (e.g. where refunds involve small dollar amounts).

Further, while this requirement should be relevant for remediations where there is a material impact to consumers, it will not be appropriate or beneficial when remediating, for example, low-value fee overcharges or interest miscalculations. For these remediations, licensees should focus on expediting payments to all impacted consumers.

Recommendation – the ABA recommends that ASIC re-frame this requirement to:

*Licensees should **consider whether it is appropriate to** assess available records to identify 'features' of affected consumers **(or cohorts of consumers)** that may be relevant to how the misconduct or other failure may have affected them.*

***For example,** consumer cohorts who are suffering financial hardship or difficulty because of the misconduct or other failure, or have been identified as potentially vulnerable, may need additional remedies such as support services or professional assistance.*

6. Ensuring an appropriate level for consumer communications

The ABA supports the use of a consumer-centred approach to communications. However, we raise concerns with the current broad framing of some requirements, which will potentially require licensees to implement specific communication strategies for all remediations, as opposed to only remediations where it is appropriate and necessary.

Furthermore, some of the requirements appear to require bespoke communication with customers which is of concern for large remediation programs that operate using automated methods of communications.

The ABA believes that these requirements will result in longer, costlier, and less efficient remediations, ultimately delaying outcomes for consumers.

6.1 Communicating effectively with consumers

RG 000.169

Communicating effectively with affected or potentially affected consumers is a key element of a consumer-centred remediation and essential in delivering appropriate outcomes. A consumer-centred approach to communications includes:

a) understanding the consumers included in the remediation;
b) understanding the consumer experience of the remediation;
c) having a communications plan which at a minimum includes:
   i. communication frequency (RG 000.170);
   ii. communication channels (see RG 000.171); and
   iii. potential consumer 'calls to action' (see RG 000.173);
d) writing communications with good communication principles; and
e) testing, monitoring, and tracking the effectiveness of the communications and proactively adapting the approach when required.

A1Q1. Do you agree with the proposed update / clarification?

While the ABA agrees with the intent of this requirement, we suggest qualifying RG 000.169 to clarify that it is appropriate to scale communications (and the approach to planning, managing and monitoring communications) according to the circumstances of the remediations. If each aspect of the guidance was required to be applied to all remediations this will result in longer, costlier, and less efficient remediations.

This could be achieved, for example, by adjusting the opening sentences to read as follows and leaving sub-sections (a) - (e) unchanged:

Communicating effectively with affected or potentially affected consumers is a key element of a consumer-centred remediation and essential in delivering appropriate outcomes. A consumer-centred approach to communications ***should be scaled to be commensurate to the consumer impact, and may include:***

a) *understanding the consumers included in the remediation;*
b) *understanding the consumer experience of the remediation;*
c) *having a communications plan which at a minimum includes:*
   i. communication frequency (RG 000.170);
   ii. communication channels (see RG 000.171); and
   iii. potential consumer 'calls to action' (see RG 000.173);
d) *writing communications with good communication principles; and*
e) *testing, monitoring, and tracking the effectiveness of the communications and proactively adapting the approach when required.*

6.2 Using multichannel communications

RG 000.171

A multichannel communication approach is one that uses different communication channels simultaneously to increase reach and response rates. Licensees should engage with and inform consumers across different communication channels that are fit for purpose and appropriate to consumers' circumstances and preferences.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees with the intent of this clause but notes there are certain limits as to when multichannel communications are available and appropriate.

For example, in non-complex, low dollar value remediations where automatic payment methods are used, an appropriate communication approach may be to provide a simple statement description that explains the payment into the account. Using different communication channels simultaneously for these remediations will not be appropriate and will delay remediations. It also poses the risk of raising levels of customer concern or confusion, encouraging higher levels of enquiry where the remediation may be a simple one.

The ABA recommends ASIC re-word this requirement to:

A multichannel communication approach is one that uses, ***where available and appropriate****, different communication channels simultaneously,* ***or as part of a follow-up communication strategy,*** *to increase reach and response rates.*

Licensees should engage with and inform consumers across different communication channels that are fit for purpose and appropriate to ***the nature of the remediation as well as*** *consumers' circumstances and preferences.*

A1Q2. Are there any relevant practical challenges?

If this requirement applies to all remediations, and when considered together with a $5 low-value compensation threshold, it will add significant time, complexity and costs without necessarily improving consumer outcomes.

6.3 Communicating tax implications for consumers

RG 000.213

Some remediation payments might have tax implications for consumers. Licensees should:

(a) inform consumers in consumer communications about the tax implications;

(b) clearly communicate the different components of any compensation payment that might be subject to different taxation treatment (e.g. refund versus interest);

(c) clearly communicate the time period that payments relate to; and

(d) counsel consumers to seek advice, and for larger compensation payments, consider providing consumers with support to seek that advice.

A1Q1. Do you agree with the proposed update / clarification?

The ABA supports the intent of this requirement but recommends the clarifications below to avoid misinterpretation.

The ABA notes that licensees are limited in the way they can practically meet the requirements of this clause, as they

- may not be licenced to provide tax advice and so are limited to referring clients to ATO guidance. and
- typically have no knowledge of a consumer's tax position and therefore no knowledge of the potential tax implications of a remediation payment.

This means that licensees are only able to meet part (a) of the clause by advising consumers that any remediation payment may have tax implications.

The ABA recommends the clause be re-worded as:

Some remediation payments might have tax implications for consumers. ***Where it is appropriate to provide detailed information regarding remediation payments,*** *licensees should:*

(a) inform consumers in consumer communications about ***potential*** *tax implications;*

(b) clearly communicate the different components of any compensation payment that might be subject to different taxation treatment (e.g. refund versus interest);

(c) clearly communicate the time period that payments relate to; and

(d) counsel consumers to seek advice, and for larger compensation payments, consider providing consumers with support to seek that advice.

A1Q2. Are there any relevant practical challenges?

If the scope of this requirement is not limited to relevant remediations and appropriate consumer communications, it will increase the effort, cost and duration of remediations.

7. Calculation of foregone returns or interest

The ABA raises concerns regarding the guidance on calculating foregone returns or interest, specifically:

- Guidance to broadly consider example rates (RG 000.162)
- Expectations regarding compounding periods (RG 000.167).

Further detail of each of the above dot points is provided below:

7.1 Considering legislated rates that may be fair and reasonable

> **RG 000.162**
>
> In these circumstances, licensees may apply a fair and reasonable rate.
>
> In doing so, licensees should first consider whether there is any legislation that may be relevant in terms of what fair and reasonable rate should apply.
>
> For example, in the case of insurance products, licensees should refer to the s57 of the Insurance Contracts Act and reg 38 of the Insurance Contracts Regulations 2017, which prescribes an interest rate reflective of the 10-year Australian Government bond rate plus 3%.
>
> We consider this rate to be fair and reasonable taking into account the principles at RG 000.163, and can be generally applicable to insurance contracts or other non-investment type remediations.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees that relevant legislation should be considered to inform the selection of an appropriate (fair and reasonable) rate. However, we raise concerns with the suggestion that the 10-year Australian Government bond rate plus 3% will be a fair and reasonable rate that is generally applicable to insurance contracts and other non-investment type remediations. Similar concerns are raised about the example rate referred to in RG 000.164 (the RBA cash rate plus 6%).

This is because this rate is a legislated rate for the purposes of penalising certain behaviours around delayed settlements, as outlined by the context of the rate in the legislation and supporting commentary. It is not designed as a 'fair and reasonable' proxy rate of return, for insurance products or other products.

We believe using this legislated rate as a proxy for consumer returns – particularly when the remediation was caused by unforeseeable error rather than misbehaviour – misunderstands the intent of the rate and will create confusion for licensees in how they should think about calculating foregone returns for the consumer.

Also, the suggested rate will not be appropriate in banking product remediations where the impacted product is not an investment product and generally the remediation involves low-value fee overcharges or interest miscalculations.

A1Q2. Are there any relevant practical challenges?

If this rate was adopted as a generally fair and reasonable rate for a broad range of remediations it will lead to inappropriate outcomes that may be unfair and unreasonable, as they will not represent the actual loss. It will also incorrectly expand the use of this specific rate beyond the intended legislative use case.

Recommendation – the ABA recommends this clause be re-worded to ensure licensees minimise the use of legislated rates, in favour of identifying the actual consumer impact and appropriate fair and reasonable rate.

7.2 Clarifying the rationale for selecting different fair and reasonable rates

Example 24: Calculating time value of money outside the credit product using a fair and reasonable rate

Mita Bank discovered that they had incorrectly charged fees on a number of its home loan products for more than 10 years. These fees were added to the balance of the loan and incurred interest at the home loan interest rate.

Some of Mita Bank's home loan consumers had since exited the product after fully paying off their loan. Mita Bank was able to easily calculate the actual additional interest each of these consumers had incurred within its own product up to the exit date.

However, it was difficult for Mita Bank to determine the consumers' foregone returns or interest outside of the product from the date the consumer paid off the fees and additional interest (i.e. the exit date when the full balance of the loan was paid) to the remediation date.

Mita Bank therefore decided to apply a fair and reasonable rate of the 10-year Australian Government bond rate plus 3% to account for the time value of money from the date of exit, to the date of remediation payment.

Commentary

In this example, it was appropriate to use the 10-year Australian government bond rate plus 3% as it is consistent with the principles of a fair and reasonable rate in the circumstances.

A1Q2. Do you agree with the example? If not, why not?

The ABA believes Example 24 should be removed for the following reasons:

1. Per our feedback on RG 000.162, this particular legislated rate is designed to curb certain behaviours and is not an appropriate proxy to calculate foregone returns; it is a penalty rate disconnected from the purpose of returning affected consumers as closely as possible to the position they will have otherwise been in had the misconduct or other failure not occurred.
2. The ABA requests ASIC enhance its guidance to describe why different proxy rates were selected in Examples 23 and 24, given that in both examples, the product with the error has been closed or rolled over, with the licensee unable to determine a likely use of the funds after a certain date (i.e. actual rates are unknown and a fair and reasonable proxy is unknown). Clarity on why a particular rate was selected as more appropriate for the circumstances will create more consistency across licensees and reduce the need for unnecessary independent review to validate selected rates, increasing the speed of remediation.

The ABA also requests that ASIC provide guidance on a 'default' or 'penalty' rate when actual or proxy rates cannot be reasonably determined by remediations.

Doing so will create certainty for the industry and remove the need for licensees to spend time developing bespoke rates and validating their approaches with independent experts.

This will increase the timeliness of consumer payments for all relevant remediations.

Recommendation – the ABA recommends this example be removed, and requests ASIC provide clarification on the rationale for using different rates in Example 23 and Example 24.

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7.3 Expectations regarding compounding periods

> **RG 000.167**
>
> Where the relevant compounding period is known, licensees should use this compounding period to calculate foregone returns or interest.
>
> Where the relevant compounding period is not known, licensees should use daily compounding.

A1Q1. Do you agree with the proposed update / clarification?

The guide should be flexible enough for licensees to determine what is an appropriate compounding period for the selected fair and reasonable rate. The ABA suggests that to enhance clarity, the clause be re-worded as:

When the relevant compounding ***frequency for an interest rate used to determine compensation*** *is known, licensees should use this compounding* ***approach*** *to calculate foregone returns or interest.*

When the relevant compounding ***frequency for an interest rate used to determine compensation*** *is not known, licensees should refer to the appropriate period for the underlying product and/or use* ***the guidance in RG 000.163 to support the rationale for a fair and reasonable rate.***

We disagree with the use of daily compounding frequency where the compounding frequency is unknown. This is because the interest on most retail banking products is 'calculated daily and compounded monthly'. Investment products compound less frequently, where distributions are commonly received on a quarterly or half-yearly basis.

In ASIC's response in *Report 707* it mentioned 'daily compounding reflects the continuous change in value of investment products.' The daily change in unit prices is a combination of asset value and expected returns. It is not an example of daily compounding in the finance industry. The ABA is unaware of any daily compounding financial product and does not agree this is fair and reasonable.

Further, can ASIC clarify it intends for RBA plus 6% to be calculated on a compounding basis when a fair and reasonable proxy cannot be determined under RG 000.163? If so, the ABA recommends ASIC specifically identify this expectation to provide clarity for remediation projects and to the industry. This is best done by including the compounding frequency when identifying a rate in the guidance.

Should ASIC expect RBA plus 6% (and any legislated rate) be calculated on a compounding basis, then we recommend removing the reference to the legislation or the Federal Court Rate. This is because in practice these rates are applied on a simple interest basis and have a particular purpose to incentivise prompt payment. Their context and purpose are not meant as fair and reasonable proxies for a consumer's foregone returns.

A1Q2. Are there any relevant practical challenges?

As referenced above.

Recommendation – the ABA recommends the guidance does not adopt a daily compounding rate, and that ASIC clarify expectations regarding the use and calculation of RBA plus 6% as a proxy rate.

8. Postponement or cessation of action

RG 000.216

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).

A1Q1. Do you agree with the proposed update / clarification?

The ABA supports the intent of this clause, and believes it is intended to replicate the protections made for consumers in ASIC's *RG 271 Internal dispute resolution* (RG 271): RG 271.89 and RG 271.171.

However, the ABA raises concerns with the framing of this clause, which differs in key aspects from the operation of equivalent clauses in RG 271. The ABA believes those differences make the scope of this clause overly broad and impractical to implement.

The ABA raises the following concerns:

1. The actions that should not be commenced or continued are overly broad.
    - The ABA notes that the definition of relevant activities, being "legal proceedings or any other enforcement action (e.g. debt collection activities)" is aligned to RG 271.89.
    - However, while RG 271.89 is limited to *'complaints involving default notices'*, no limiting criteria is applied in the draft guidance for RG 000.216
    - The ABA believes that the activities that should not be commenced or continued, where they relate to the remediation, should be defined in line with the term *"enforcement proceedings"* in the *National Credit Code* (NCC) and the *Banking Code of Practice* (BCOP).
    - This will mean that licensees will only be required to cease or refrain from 'late stage' debt collection activities, i.e. from court proceedings or enforcement proceedings once a default notice has expired.
    - This definition is appropriate and required because:
        - the term in RG 000.216, *"debt collection activities"*, will include informal collection activities such as initial contact calls and automated email reminders where a single payment has been missed, which enable consumers to take corrective action to avoid interest and other charges, as well adverse credit reporting, and
        - the additional criteria used in RG 271.89 (*'complaints involving default notices'*) is appropriate in the context of complaints which will typically be resolved within 30 days, but inappropriate for remediations, which could take significantly longer and potentially increase harm to consumers by delaying the resolution of a default and increasing the debt the consumer owes.

- The ABA recommends that:
    - the term *“debt collection activity”* be removed, and
    - *“enforcement action”* be replaced with *“enforcement proceedings”*, in line with the definitions for that term used in the NCC and the BCOP.

2. The clause does not consider whether the remediation outcome will be material.
    - Whereas RG 271.171 contains a similar requirement, it includes the qualifier *“Where appropriate”*, which is absent from RG 000.216.
    - The impact of this omission is that licensees will be compelled to pause enforcement proceedings for the duration of a remediation, even where the final remediation outcome for the consumer could be immaterial in the context of the proceedings or otherwise unrelated.
    - This will result in the proceedings being extended or delayed unnecessarily, and in many cases putting the consumer in an even worse position by, for example, unnecessarily increasing the total interest owed on a debt.
    - Without the ability for licensees to assess materiality and relevance in deciding whether to commence or continue legal proceedings or enforcement action, this requirement will lead to greater consumer harm.

The ABA therefore recommends the clause be re-worded as:

*A licensee should****, where appropriate,*** *refrain from commencing or continuing with* ***legal proceedings or any other enforcement proceedings****:*

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).

A1Q2. Are there any relevant practical challenges?

There will be practical challenges in implementing processes to meet the requirements of this clause if it requires:

- every relevant remediation to centrally file details of the impacted consumer population;
- enforcement proceedings to be paused at a time when the materiality of the affected customer’s remediation payment is not yet known;
- remediation teams to cross-reference the confirmed consumer population against a list of consumers in the process of legal proceedings or enforcement action;
- legal and enforcement teams to cross-reference the central list of consumers due for remediation before commencing any proceedings or action; and
- manual reviews in each of the two steps above to determine if the proceedings and the remediation were related.

While the practical challenges will exist even if this clause is re-worded in line with our recommendation, if the clause is not re-worded to provide clearer definitions and the flexibility to consider materiality, the application and impact will be broader than it should be.

Australian Banking Association

9. The need for a transition period

ASIC has stated that the updated guidance will apply to all remediations where the decision to remediate is made on or after the date the final guidance is issued.

Consistent with our feedback on CP 335, the ABA raises concerns with this approach and recommends ASIC provide a six-month transition period before licensees are expected to have implemented the updated guidance.

> **RG 000.16**
>
> This guidance applies to all remediations initiated on or after the date of issue of final guidance. For remediations that pre-date the issue of final guidance, the 2016 version titled Regulatory Guide 256 Client review and remediation conducted by advice licensees (RG 256) continues to apply.
>
> Note: In this guide, a remediation is 'initiated' when a licensee makes the decision to address misconduct or other failure through a remediation process.

A1Q1. Do you agree with the proposed update / clarification?

The ABA notes ASIC's rationale for not providing a transition period, outlined in *Report 707*. However, we do not believe that the updated guidance in RG 000 could be implemented immediately by any licensee.

Effectively implementing the updated guidance will require, for many ABA members, substantive changes at a whole-of-organisation level, and will include updating organisational policies, procedures, detailed remediation guidance, systems, controls, and implementing new or revised processes.

For large, complex organisations with robust governance processes, this process takes time and effort to ensure changes are managed and implemented successfully.

Having reviewed ASIC's proposed updated guidance and the potential impact on ABA members, we recommend the guidance be applied to all remediations initiated on or after the date that is six months after the final guidance is issued.

This will allow licensees to effectively update internal governance, processes, systems, controls and assurance requirements.

Recommendation - The ABA recommends ASIC provide licensees with a six-month transition period

Feedback on additional issues

In addition to the feedback on the points raised above, the ABA makes further observations and recommendations below. The issues discussed below cover the topics of:

10) Non-monetary remedies

11) Making remediation payments, and what to do when money cannot be returned

12) Third party liability

10. Non-monetary remedies

The ABA supports the guidance related to non-monetary remedies, but requests that ASIC clarify Example 18 to avoid possible misinterpretation.

> **Example 18: Where non-monetary remediation of clients may be appropriate**
>
> David is 42 years old, has no dependants and owns a house with a mortgage of $550,000. He recently inherited $100,000 following the death of a relative. David sought advice from Harvey, an adviser at Green and Brown Advisory Services (Green and Brown), about what to do with the inheritance. David was asked to answer a series of questions that were designed to help Harvey understand David's personal circumstances, priorities and risk profile.
>
> The results of the questionnaire showed that David had a conservative risk profile and his priorities included reducing debt and saving for retirement. Despite this, Harvey recommended that David invest all of his inheritance in a high-risk managed investment scheme.
>
> When the firm reviewed the advice given to David, they determined that David received advice that did not address his personal circumstances and risk profile. However, given favourable market conditions, the managed investment scheme that was recommended to David had performed well over the past few years and had resulted in a gain that outweighed the benefit David will have received if he had been advised to pay the inheritance into his mortgage or superannuation fund.
>
> David did not suffer a monetary loss. However, Green and Brown explained to David that he had not received appropriate advice and that an alternative strategy will be more appropriate for him, assuming his circumstances and risk profile had not changed.
>
> David was offered a free review by one of Green and Brown's advisers, or a reimbursement of fees if David chose to see an adviser from another firm.
>
> <u>Commentary</u>
>
> In this example, non-monetary remediation was appropriate for the client.

A2Q1 Do you agree with the example? If not, why not?

The ABA agrees with the proposed guidance, but recommends that to improve clarity, it should be expressly stated that the consumer (David) was still invested in the managed investment scheme at the time the remediation was conducted.

This is because if David was no longer in that scheme, and had since moved to a product that was appropriate to him, then a free review will not be required as a remedy.

11. Making remediation payments, and what to do when money cannot be returned

The ABA notes ASIC's comments regarding the current legislative and practical limitations facing licensees in attempting to contact and pay many consumers.

In the detailed feedback below, the ABA:

- seeks clarification on the requirement to consider whether a consumer is bankrupt, which we believe will unnecessarily delay remediation and not provide a benefit to the consumer (Table 2: Consumer is bankrupt)
- notes ASIC's focus on ensuring consumers are aware that by not responding to communications or cashing a cheque, the remediation payment may be transferred to an unclaimed money regime. However, we raise concerns that this requirement in its current form will create a considerable burden on licensees and fail to drive consumer engagement, and
- Makes suggestions in terms of deceased estates, exited members of superannuation funds and the use of micro payments

11.1 Considering whether a consumer is bankrupt

Table 2: Payments made in particular circumstances - Consumer is bankrupt

If the consumer is suspected as bankrupt, any compensation should generally be paid directly to the individual (rather than seeking to identify the relevant trustee, administrator or creditors).

A compensation payment may or may not be claimable by a bankruptcy trustee, depending on the nature of the compensation and the misconduct or other failure.

A consumer who is bankrupt may need to seek legal advice and inform their trustee about a compensation payment. Licensees may wish to provide the consumer support to seek legal advice in relation to the payment: see RG 000.210.

A1Q1. Do you agree with the proposed update / clarification?

The ABA agrees with the intent of this requirement, but recommends it be clarified to

- avoid the interpretation that licensees are required to investigate whether consumers are bankrupt ahead of any remediation payment. This will delay remediation payments unnecessarily, especially if the payment is to be ultimately made directly to the consumer, and
- allow sufficient flexibility to allow licensees to make payments to trustees where considered appropriate.

The ABA recommends that the clause is re-worded as follows:

Where a consumer is suspected as being *bankrupt, any compensation should generally be paid directly to the individual (rather than seeking to identify the relevant trustee, administrator, or creditors). Licensees should consider whether it is appropriate in some situations to make payments to trustees.*

A compensation payment may or may not be claimable by a bankruptcy trustee, depending on the nature of the compensation and the misconduct or other failure.

A consumer who is bankrupt may need to seek legal advice and inform their trustee about a compensation payment. Licensees advised by a consumer of their bankruptcy may provide the consumer support to seek legal advice in relation to the payment: see RG 000.210.

A1Q2. Are there any relevant practical challenges?

Without clarification, licensees may be compelled to assess all consumers in a remediation to identify potential instances of bankruptcy. This will delay remediation payments unnecessarily. Ultimately it will not benefit the consumer, as payments will otherwise be made directly to them, regardless of any bankruptcy.

11.2 Advising consumers that payments may be transferred to an unclaimed money regime

> **RG 000.204**
>
> Licensees should clearly communicate that they will lodge the money into an unclaimed money regime to all consumers who were unresponsive—that is, all consumers they have attempted to contact—including details of how to lodge a claim for the remediation payment.
>
> Licensees should also try to notify consumers when they are holding the money on trust on behalf of the consumer in line with the relevant unclaimed money provisions if applicable.

A1Q1. Do you agree with the proposed update / clarification?

The ABA raises concerns with how this requirement is currently proposed, as unclaimed money regimes in different states and territories have differing criteria, requirements and claims processes; requiring licensees to monitor and then communicate at a point in time each regime's processes will be time-consuming and provide limited consumer benefit.

The ABA recommends that this requirement be re-framed as:

Licensees should clearly communicate, when issuing a final follow-up communication to relevant consumers, that they will lodge a consumer's money into an unclaimed money regime when the relevant criteria for the regime is met.

In addition, we recommend clarifying that licensees are not expected to exhaust all commonwealth, state and territory unclaimed monies regimes before making a payment to charity, except as legally required to do so.

A1Q2. Are there any relevant practical challenges?

The effect of this requirement as proposed will be to slow down remediations by creating additional costs and effort required on each remediation with very little benefit to the consumer.

This is particularly relevant where a licensee is holding money on trust for consumers when they have been unresponsive.

11.3 Additional areas for guidance

The ABA makes some further suggestions to further clarify ASIC expectations, including:

- On where to return remediation money (Table 2), inclusion of guidance in Table 2 on payments in respect of deregistered companies will be welcomed.
- On payments to exited members of superannuation funds (RG 000.190-192), suggest that ASIC reinforce the joint position reached with APRA that the Trustee should accept payments from advice licensees remediating superannuation monies and engage a VTP/Lost Monies approach separately.
- Use of micro payments: some members have raised that micro payments (< $1) to current customers (with current payment details available) are instead made to charity as customers in receipt of such low payments have raised concerns that they are being scammed (as this is a common tactic for scammers).

12. Third party liability

On third party liability (RG 000.22) the guidance states that misconduct or failure includes acts or omissions of "a current or former third-party service or product provider of a licensee."

A1Q1. Do you agree with the proposed update / clarification?

In the case of a bank acting as a distributor of an insurance product provided by a third party, it is not clear whether or when the bank or the principal provider is responsible for the remediation. The ABA suggests this point be clarified explicitly or through an example.

A1Q2. Are there any relevant practical challenges?

On occasion a bank will request information from a third-party involved in the original value chain of the advice or product, who will hold pertinent information regarding fees, transaction data or contact information. Some third parties are reluctant to share the information out of concern that it may conflict with their Privacy obligations.

Although it is appropriate to share such information, we suggest an explicit reference in the RG to cooperation from third parties. This will remove barriers to paying customers, increase speed and efficiency and alleviate expensive and time-consuming NDA styled approaches.

Appendix A – Examples of fair and reasonable rates

In response to ASIC's request (A2Q3 of the consultation paper), one ABA member has provided the following examples of fair and reasonable rates to calculate foregone returns or interest, based on specific scenarios that could be used to develop a compensation methodology in a remediation program.

#	Impacted product	Scenario	Remedy	Rate of return	Rationale for rate of return
1	Insurance (claim)	Consumer lodged an insurance claim for $10,000 on April 2019. Claim was approved, but processing of the claim was unreasonably delayed by the insurer (it should have been paid by June 2019). Payout: $10,000 on January 2020.	Pay foregone returns on $10,000 from the date the claim should have been paid (June 2019) to January 2020. Consider whether premiums paid after April 2019 should be refunded, depending on the type of policy (e.g. disability).	10-year Treasury bond + 3%[1], calculated on a simple interest basis.	Prescribed rate by insurance legislation.
2	Insurance (premiums)	Consumer has been overpaying insurance premiums between February 2016 and February 2020 as the insurer erroneously opened a duplicate policy. No claims were processed on the duplicate policy over the period.	Refund overpaid premiums amount between February 2016 and February 2020 (principal amount). Pay foregone returns on principal amount from 1 February 2016 to 'today'. Ensure duplicate policy is cancelled and no further premiums are scheduled in following month.	Savings account	Investigation shows that consumer was making premium payments out of their transaction account, which is not generating interest. The consumer had a savings account opened over the period and was regularly depositing funds. We can reasonably assume the funds will have been deposited into the savings account.

[1] Insurance Contracts Act 1984 s57; Insurance Contracts Regulations 2017 s38

#	Impacted product	Scenario	Remedy	Rate of return	Rationale for rate of return
3	Savings or Investments account	As a result of Bank error, the consumer was put in an inappropriate or erroneous investment or savings product.	Calculate the amount of return the consumer will have earned on the appropriate product. If actual returns earned are less than the appropriate returns, refund the delta to the consumer (principal amount). Pay foregone returns on principal amount to 'today'.	Appropriate savings or investment account rate of return.	Had the consumer been in the appropriate product, they will have earned that product's rate of return.
4	Secured Loan	On opening a loan account in January 2012, the Bank erroneously applied an incorrect interest rate, which in turn inflated the amount of monthly repayments the consumer should have made. The consumer refinanced the loan in December 2018 with another financial institution.	Refund all excess repayments made between January 2012 and December 2018 (principal amount). Pay foregone returns on principal amount from each repayment date to 'today'.	Impacted loan account actual interest rate between January 2012 and December 2018. RBA cash rate + 3%, calculated daily and compounded monthly, between December 2018 and 'today'.	Had the issue not occurred, the excess repayments made by the consumer will have gone towards repaying the loan faster. Therefore applying the actual product rate is appropriate. As we do not know what interest rates have been applied by the other financial institution after refinancing, using a proxy rate is appropriate for the period following refinancing date. RBA + 3% calculated daily and compounded monthly, is an appropriate proxy to mimic secured lending products.
5	Transaction account	The Bank has processed a series of unauthorised purchases (e.g. fraud) on the consumer's transaction account 3 years ago. The impacted account is not generating any interest.	Refund all unauthorised transactions + any related fees (principal amount). Pay foregone returns on principal amount from each transaction date to 'today'.	CPI	The consumer is a pensioner and rarely deposits any funds onto their savings account. Considering the nature of the consumer, it is reasonable to assume that they will have spent the funds had the issue not occurred. Therefore use of CPI is appropriate.