

Amanda Fairbairn
Policy Lawyer
ASIC
GPO Box 9827
Brisbane QLD 4001

remediation@asic.gov.au

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Dear Ms Fairbairn

CONSULTATION PAPER 335: CONSUMER REMEDIATION: UPDATE TO RG 256

The Insurance Council of Australia (Insurance Council)¹ appreciates the opportunity to provide comments on *ASIC Consultation Paper 335: Consumer remediation: Update to RG 256*.

Executive summary

We recommend that:

1. A “tailored and scaled” approach is appropriate for the revised RG 256 – especially in relation to review periods and assumptions.
2. The revised RG 256 should not apply in relation to industry codes.

Recommendation 1: A “tailored and scaled” approach is appropriate for the revised RG 256 – especially in relation to review periods and assumptions

While we understand the rationale for seeking to expand RG 256 to all licensees, we also agree with ASIC that it can (and should) be tailored and scaled for every circumstance

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

September 2020 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of \$51.8 billion per year and has total assets of \$136.5 billion. The industry employs approximately 60,000 people and on average pays out about \$171.4 million in claims each working day.

Over the 12 months to September 2020 the industry’s net profit after tax (NPAT) was \$0.9 billion - a 73 per cent decrease from the prior year’s NPAT of \$3.4 billion. The industry’s underwriting result was \$1.6 billion, falling by 16 per cent from \$1.9 billion in the prior year.

(paragraph 23, CP 335). This is particularly relevant in relation to the relevant review period for remediation and the use of assumptions.

Remediation periods

In CP 335, ASIC proposes to provide guidance that, as a starting point, the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer. This is a significant departure from the guidance in the current RG 256 which states that ASIC will not generally expect relevant financial institutions to review advice given to clients more than seven years before they became aware of the misconduct or other compliance failure.

We appreciate that this is in response to more recent findings, including in the context of the FSRC, that many remediation issues go back more than seven years by the time they are uncovered. ASIC also notes that the seven-year period may have created a disincentive for licensees to investigate the full extent of the problem, and also notes that it has seen systematic factors contribute to delays in both identifying failures and remediating consumers, including when systems have not been consolidated as new businesses have been acquired, and where there has been a historical underinvestment by boards and senior management in maintaining technology systems.

We are concerned however that ASIC's proposed approach could effectively mean that all licensees will need to investigate and remediate loss no matter how long ago it occurred, which is inconsistent with consumers' rights under limitation periods and commentary under paragraph 12.85 of the FSRC Act. Paragraph 12.85 of the explanatory materials to the FSRC Act contemplates remediation only in relation to where the consumer has a "legally enforceable right" to recover the relevant loss or damage. Furthermore, assuming it is feasible in the first place, we are also concerned that setting up the necessary systems to be able to go back historically without limitations could lead to prohibitive compliance costs for financial institutions.

In that context we believe that a "tailored and scaled approach" could be taken in relation to remediation periods to address these concerns. As a starting point, one possible approach could be for the current arrangements to be maintained on a default basis, with the view of providing guidance in the updated RG 256 regarding when more extended remediation periods may apply in relation to those financial institutions where "*systemic factors contributing to delays in both identifying failures and remediating customers*" (as noted in paragraph 39 of CP 335) have been identified. We would be interested in further discussions with ASIC and other industry stakeholders to develop an approach which would ensure better customer protections in relation to areas of identified concern, while maintaining a more feasible approach for other financial institutions.

Beneficial assumptions

ASIC also proposes to provide guidance that, overall, licensees should only use assumptions in a remediation if they are beneficial assumptions. Assumptions will generally be used in instances where data may no longer be available, or where data held may be incomplete for the purposes of completing a remediation program. Assumptions may also be used to simulate system behaviour. In instances where assumptions are used, additional tolerances are often built into the modelling to try and ensure, overall, that the assumptions used are beneficial to the majority of affected customers. In certain circumstances, the use of

assumptions helps to expedite the remediation process and may also reduce the need to ask for additional or missing information from affected customers.

ASIC suggests that an assumption that benefits all affected customers, on average, may not necessarily meet a licensee's obligations as this will depend heavily on the nature of the distribution of the losses caused by the licensee. We consider a licensee would have difficulty in being able to satisfy the proposed approach as information held by the licensee will vary and also depend on the circumstances giving rise to the remediation. We consider that it is appropriate to use assumptions based on averages, provided that additional tolerances are incorporated to ensure balanced representation.

We are also concerned that ASIC's proposed approach does not contemplate the different industries that will be subject to ASIC's guidance. For example, the data available to a general insurance company will in most cases differ to the data available and held by a bank given the nature of their business and products. This has the potential to create inconsistencies in the way ASIC's proposed guidance may be applied. In that context we believe that a "tailored and scaled approach" should also be taken in relation to assumptions that address these concerns.

More broadly, in relation to the suggestion in CP 335 that the use of assumptions helps to expedite the remediation process, we also note the importance of processes for proper investigation to determine whether remediation is required, and the scope and method of remediation where enabling information is available. While we understand the importance of timely remediation of customers, an allowance should be made to allow licensees to conduct thorough reviews where quality information is available.

Recommendation 2: RG 256 should not apply to industry code provisions

We also note ASIC's proposal to update RG 256 so it includes a two-tiered approach to customer remediation, including when ASIC expects general insurers will provide customer remediation for a breach of a provision in the 2020 General Insurance Code of Practice. We consider this approach problematic because it does not seem to contemplate the introduction of enforceable code provisions.

In the event ASIC decides to include commentary in RG 256 about codes, we note the remediation principles for Tier 2 scenarios would at the most only set out ASIC's expectations for best practice, and not minimum standards for regulatory compliance. We however note that once enforceable code provisions come into play, the distinction between a breach of the law and a breach of a code as presented by Figure 1 (CP 335, page 13) may no longer be the case. Further, we understand ASIC intends to consult on updating its RG 183 for enforceable code provisions in 2021. As ASIC RG 183 already sets out ASIC's minimum expectations for remediating customers for a breach of a code (that is, compensation for direct financial loss or damage caused to an individual by a breach of the code), it would be desirable if this commentary remains in one regulatory guide, the preference being RG 183 for ease of reference and as this appears to be the most intuitive home.

Other considerations

We would appreciate further discussions on other aspects of CP 335 including how ASIC envisages "Tier 2" remediation cases would be operationalised in relation to breaches of "business values or promises" – for example in relation to when financial institutions would

be able to ascertain when there are breaches, and how remediation decisions would be made in that context.

We would also be interested in discussions around how CP 335 would apply specifically to the general insurance industry. For another example in addition to our earlier comments regarding data available to insurers as opposed to banks, we also note that CP 335 proposes that licensees should use best endeavours to find and automatically pay customers. We note that for products like general insurance, where relationships with customers may not extend beyond the life of the policy (generally one year), contacting past customers for remediation has been challenging. We would appreciate further guidance from ASIC on what "best endeavours" entails.

Our submission focuses on key areas of ICA member interest in relation to CP 335 and we would greatly appreciate an opportunity to meet with ASIC to discuss this submission and next steps in the consultation process, ahead of the updates to Regulatory Guidance (RG) 256 that ASIC plans to release for further consultations.

If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager Policy, Regulation Directorate, on telephone: 02 9253 5176 or email: areddy@insurancecouncil.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Andrew Hall', is positioned above the printed name.

Andrew Hall
Executive Director & CEO