

From the Desk of Director Marija Pajeska



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Response to Consultation Paper 335 – Consumer remediation: Update to RG256

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of Consultation Paper (CP) 335 – Consumer remediation: Update to RG256.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

Section 912A(1)(a) of the Corporations Act 2001 (Cth) is a General Obligation which states

'A financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'

There is numerous literature in the courts regarding the meaning of efficiently, honestly and fairly which centres on the standards that should be applied when delivering financial services to clients. None of this literature makes reference to remediation programs or implies that

'Complying with this obligation includes licensees taking responsibility for the consequences of their actions if things go wrong when financial services are provided and clients suffer loss or detriment.'

Therefore, we disagree with ASIC's interpretation of Section 912A(1)(a) of the Corporations Act 2001 (Cth) and do not believe it is supported by any legal precedent or legal requirement.

In ASIC Regulatory Guide RG256 titled 'Client review and remediation conducted by advice licensees', ASIC makes reference to 'Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation); In the Matter of Camelot Derivatives Pty Limited (In Liquidation) [2012] FCA 414' as supporting its interpretation that having procedures to remediate clients is a general obligation under Section 912A(1)(a) of the Corporations Act 2001 (Cth).

We note that the reference to Section 912A(1)(a) of the Corporations Act 2001 (Cth) in this case is as follows:

'Failure to conduct financial services business fairly, efficiently and honestly

8. During the period between March 2008 and October 2010, Camelot engaged in an options trading strategy on behalf of clients in circumstances where it knew or ought to have reasonably known that it was furthering Camelot's interests in earning commissions and not acting in the interests of its clients.
9. By reason of the matters set out in Order 8 above, Camelot failed to do all things necessary to ensure that the financial services provided by Camelot as covered by Australian Financial Services Licence Number 277719 (AFSL) were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act.
10. Mr King, as Managing Director of Camelot, caused Camelot to engage in the conduct set out in Order 8 above in contravention of s 912A(1)(a) of the Corporations Act, knowing that Camelot would thereby fail to do all things necessary to ensure that the financial services provided by Camelot as covered by the AFSL were provided efficiently, honestly and fairly.
11. By reason of the matters set out in Orders 8 to 10 above, Mr King, within the meaning of s 1324 of the Corporations Act:
  - a. aided, abetted, counselled or procured; and
  - b. was knowingly concerned in, or party to,

a failure by Camelot to do all things necessary to ensure that the financial services provided by it as covered by the AFSL were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act.'

It is our simple understanding that the breach of Section 912A(1)(a) of the Corporations Act 2001 (Cth) arose as a result of Camelot not acting in the clients best interest. We note that there is no mention in this case that under Section 912A(1)(a) of the Corporations Act 2001 (Cth) that an AFS Licensee has a duty to remedy wrongdoings and if they do not they have breached Section 912A(1)(a) of the Corporations Act 2001 (Cth).

In the note linked to paragraph 8 of CP 335 ASIC states:

'Note: In Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No. 3) [2020] FCA 1421, ANZ admitted and the Court declared that by not making remediation payments after 11 December 2013 to the affected customers between 11 July 2005 and 31 December 2007, ANZ engaged in unconscionable conduct on two occasions and breached its general obligations under s912A(1)(a) and (c). For a period of time in the particular circumstances, the absence of a decision to remediate any affected customer was a relevant consideration in the characterisation of the conduct as unconscionable.'

We note that in the case Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No. 3) [2020] FCA 1421:

- ANZ charged fees to clients that it was not contractually entitled to do so and failed to make remediation payments to clients after 11 December 2013 which resulted in the determination of unconscionable conduct;
- the determination that ANZ engaged in unconscionable conduct resulted in the determination that ANZ had breached Section 912A(1)(a) of the Corporations Act and Section 912A(1)(c) of the Corporations Act;

So this case clearly identifies that the breach of Section 912A(1)(a) of the Corporations Act 2001 (Cth) was as a result of a licensee engaging in unconscionable conduct (ie. being the act of charging fees to clients that it was not contractually entitled to charge and then choosing not to refund those fees) which is a breach of Section 12CB(1) of the Australian Securities and Investment Commissions Act (Cth).

Therefore, the mere act of failing to implement the remedy did not constitute unconscionable conduct it was the initial action of charging fees to clients it contractually was not entitled to charge that constituted unconscionable conduct and hence a failure to comply with Section 912A(1)(c) of the Corporations Act 2001 (Cth).

Our position is that ASIC as the regulator has a duty and responsibility to prove, unambiguously that a breach of the law has arisen or a licensee has a responsibility to identify and report that a breach has arisen. As a result of such process the licensee can initiate a remediation program, if appropriate, or work with ASIC to initiate a remediation program.

To imply that failing to initiate a remediation program identifies a failure to comply with Section 912A(1)(a) of the Corporations Act 2001 2001 (Cth) is not supported at law as the initiation of a remediation program is not a provision of financial service on the basis that a remediation program is neither a financial product or a financial service.

Recommendation 1.6 of the Royal Commission Report titled Misconduct by mortgage brokers states:

'ACL holders should:

- be bound by information-sharing and reporting obligations in respect of mortgage brokers similar to those referred to in Recommendations 2.7 and 2.8 for financial advisers; and
- take the same steps in response to detecting misconduct of a mortgage broker as those referred to in Recommendation 2.9 for financial advisers.'

Recommendation 2.9 of the Royal Commission Report titled Misconduct by financial advisers states

'All AFSL holders should be required, as a condition of their licence, to take the following steps when they detect that a financial adviser has engaged in misconduct in respect of financial advice given to a retail client (whether by giving inappropriate advice or otherwise):

- make whatever inquiries are reasonably necessary to determine the nature and full extent of the adviser's misconduct; and
- where there is sufficient information to suggest that an adviser has engaged in misconduct, tell affected clients and remediate those clients promptly.'

According to CP 335, the Financial Sector Reform (Hayne Royal Commission Report) Bill 2020 (FSRC 2020 Bill) implemented recommendations 1.6 and 2.9 of the Royal Commission Report.

The following sections of Schedule 11 of the FSRC 2020 Bill appear to be relevant (extracts from Schedule 11 of the FSRC 2020 Bill have been included in Annexure B of this letter):

- Section 5 which sets out the new requirements relating to reportable situations; and
- Section 6 which sets out the requirements relating to 'Notifying and remediating clients affected by reportable situations'

We note that in the Royal Commission Report the recommendations relating to a new disciplinary process is outlined in Recommendation 2.10 which states

'The law should be amended to establish a new disciplinary system for financial advisers that:

- requires all financial advisers who provide personal financial advice to retail clients to be registered;
- provides for a single, central, disciplinary body;
- requires AFSL holders to report 'serious compliance concerns' to the disciplinary body; and
- allows clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body.'

It is important that ASIC not lose sight of the purpose of a remediation program which is to remediate clients who have suffered loss resulting from a wrongdoing, being a reportable situation as prescribed by Section 912D of the Corporations Act 2001 (Cth) and Section 912EB of the Corporations Act 2001 (Cth). Anything above and beyond this should not be represented as a primary objective which takes precedent over the purpose of a remediation program.

It should be noted that imposing standards in situations which are not prescribed by law can potentially increase associated costs relating to implementing a remediation program, thus directly impacting a licensee's ability to remediate clients or reduce the amount of remediation being offered due to funds being redirected to paying for associated legal costs and ASIC fees.

Instead of wasting time and energy implementing an additional framework for the remediation of clients which works separate to the framework outlined in Recommendation 2.10 of the Royal Commission Report, why not have a framework which works alongside the breach reporting framework and compensation requirements. Utilise the systems currently in place to ensure that reportable situations are being identified and reported and where warranted remediation is being provided.

It is our understanding that clients seeking compensation or remediation for wrongdoing normally need to go through AFCA or a civil court. By entering into a remediation program this is effectively bypassing AFCA or civil proceedings in a court of law (as applicable), thus potentially reducing expenses and making more funds available to remediate clients.

ASIC's proposal to:

- be heavily involved in all types of remediation programs through the use of reporting structures, monitoring and supervision;
- classify a failure to enter into a remediation program under any circumstance may constitute a breach of Section 912A(1)(a) of the Corporations Act 200 (Cth); and
- expand the legal requirement to enter into a remediation program (through a regulatory guide) to capture any wrongdoing rather than limiting it to those prescribed by law;

may have the opposite effect as costs will increase because licensees will need to allocate more human and financial resources into conducting formal investigations and remediation programs (which will most likely require some form of legal advice) to the detriment of clients as under a remediation program the costs of remediation are paid first, clients are paid last.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email [brad@asdaa.com.au](mailto:brad@asdaa.com.au).

Yours Sincerely

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## ANNEXURE A: RESPONSE TO ASIC QUESTIONS

### B. WHEN TO INITIATE A REMEDIATION

Two-tiered approach to initiating a remediation

B1 proposal: ASIC proposes to provide guidance on a two-tiered approach to initiating a remediation:

- (a) Tier 1—a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and
- (b) Tier 2—given the broad nature of the obligations on them, licensees should also turn their mind to whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values.

ASIC Question		Response
B1Q1	Do you agree with our proposed two-tiered approach to initiating remediation? If not, why not?	We agree that a two-tiered approach is required however the approach should be subject to the legal requirements prescribed under Section 912EB of the Corporations Act as documented in the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020.
B1Q2	Are there any practical problems associated with this approach? Please give details.	Tier 1 should be specific to reportable situations under Section 912EB of the Corporations Act whilst Tier 2 should be for circumstances where an AFS Licensee voluntarily enters into a remediation program.
B1Q3	What is your current policy and procedure for initiating a remediation? How do you describe the standard of conduct required in your organisation for initiating a remediation?	ASDAA is not an AFS Licensee so it does not have a current policy and procedure for initiating a remediation. However, in simple terms most licensees that representatives of ASDAA work with have adopted the following logical standards: <ul style="list-style-type: none"><li>• if it is an isolated incident (ie. relates to one client) then the matter will be dealt with on a one to one basis with the affected party; and</li><li>• if it is an incident that is known to have affected more than one person or it is unknown as to how many people have been affected (if any at all) then the matter would be investigated by an independent party who would then report on their findings and if warranted a process would be adopted to remediate clients.</li></ul>

### C. THE REVIEW PERIOD FOR A REMEDIATION

Review period to start from when a failure first caused loss to a consumer

C1 proposal: 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.

ASIC Question		Response
C1Q1	Do you agree with this proposal? If not, why not?	No. There is a thing in law called the statute of limitations which is generally defined as a law that sets the maximum amount of time that parties involved in a dispute have to initiate legal proceedings from the date of an alleged offense, whether civil or criminal.
C1Q2	Are there any practical problems associated with this proposal? Please give details.	We refer to Section 1317K of the Corporations Act which states: 'Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.'
C1Q3	Are there any other matters that we should consider to help us provide appropriately scalable guidance?	We appreciate and understand where ASIC is coming from in relation to its guidance however the law exists for a reason and nothing in any regulatory guide should put an obligation on an AFS Licensee which circumvents the law. One can strongly argue that ASIC is imposing guidance upon industry which is in breach of Section 1317K of the Corporations Act as it is threatening licensees that they will be in breach of Section 912A(1)(a) of the Corporations Act if they do not remediate clients in relation to cases which our outside the statute of limitations. Any guidance provided by ASIC should be bound by the current laws including any statute of limitation currently in place under law.

## D. USING BENEFICIAL ASSUMPTIONS

Defining a beneficial assumption and the consideration when using assumptions

D1 proposal: ASIC proposes to provide guidance that, overall, licensees should only use assumptions in a remediation if they are beneficial assumptions. In particular, this guidance would cover what a beneficial assumption is and set out what should be considered when using assumptions, including for specific types of assumptions.

ASIC Question		Response
D1Q1	Do you agree with our proposal for assumptions to be beneficial and that they should satisfy certain considerations? If not, why not?	We are of the view that as part of a remediation program assumptions will be made as a remediation program is based on the assumption that the records retained are a true and accurate record of the events that are subject to the remediation. Furthermore, there is the assumption that the independent third party investigating the matter would have made the same decisions and recommendations at the time of the incident as they made with the benefit of hindsight.
D1Q2	Is it appropriate to use assumptions that result in a partial refund for some affected consumers or that involve a discount for a consumer's 'use' of the product? If not, why not?	Under a remediation program there is no court of law involved and no independent third party required to pass judgement on the basis of evidence provided as to whether or not a breach has arisen which requires the licensee to remediate clients. Instead it involves a licensee engaging in a remediation program with no formal admission of liability.
D1Q3	Is it appropriate to use an assumption based on an average (e.g. in calculating loss, using the average premium or the average fees charged over a relevant period)? If not, why not?	In some cases the circumstances that remediation is engaged under is the fact that the legal costs involved in remediating a client or group of clients are far cheaper than the legal costs involved in defending the case. The law states that financial services are to be provided efficiently, honestly and fairly. So does that mean that where assumptions are to be made which will cause detriment to clients under a remediation program then those assumptions should be disregarded.
D1Q4	Have you used an assumptions-based approach in remediations? Please provide details, including evidence of how the assumptions benefited the consumer and if you have used an average that resulted in a good consumer outcome.	That in itself is not an application of the law which results in financial services being provided efficiently, honestly and fairly. If a licensee is able to make assumptions as part of the process as long as those assumptions are fair and reasonable (regardless of the benefit or detriment that they may cause to clients in the end) taking into consideration that they have the benefit of hindsight then a licensee should be able to make such assumption. Assumptions should not be limited to just those that benefit clients, that in itself may give clients the idea that in receiving financial services they are not required to act in an efficient, honest and fair manner as remediation is an entitlement.

## Using beneficial assumptions to account for absent records

D2 proposal: ASIC proposes that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.

ASIC Question		Response
D2Q1	Do you agree with our proposal that beneficial assumptions should be used to make up for absent records? If not, why not?	<p>We appreciate and understand that an AFS Licensee has an obligation to maintain records however, it's time that a duty of care be placed on consumers to have a responsibility to keep records too.</p> <p>We note that clients, pursuant to relevant tax laws, have a requirement to maintain financial records relating to the financial services they receive. Therefore, ASIC should not be promoting standards that will entitle clients to remediation which may lead to a breach of tax laws.</p>
D2Q2	Are there any practical problems associated with this proposal? Please give details.	<p>The requirement to make a positive assumption should be based on the consumer being able to evidence that they were adversely effected by the circumstances that are subject of the remediation program.</p>
D2Q3	Are there any other matters that we should consider to help us provide appropriately scalable guidance?	<p>It is not unreasonable that the law require consumers to maintain records to evidence that they actually received a service, a financial product, paid fees, lost money due to negligence, etc.</p> <p>The law of evidence requires all parties to produce evidence and in the case of a remediation these basic laws should not be circumvented as a result of making assumptions. We draw your attention to the comment in the Royal Commission Report:</p> <p style="padding-left: 40px;">'As I said in the Interim Report, advice licensees may well regard their undertaking remediation programs for clients who had been charged fees for no service as their public acknowledgment of wrongdoing.'</p> <p>So if the intent behind entering into a remediation program is a public acknowledgement by the AFS Licensee that they have engaged in wrongdoing then the program itself should not be subject to one-sided assumptions thus giving opportunistic clients the ability to claim funds from a licensee which they are not entitled to.</p> <p>We acknowledge that, as mentioned in CP 335 that:</p> <p style="padding-left: 40px;">'Poor or incomplete records is rarely a justification for a failure to remediate consumers or to limit the scope of a remediation.'</p> <p>However, note that poor or incomplete records are not justification for a licensee to expand the scope of a remediation program in order to offer compensation to clients who are not entitled to compensation and are themselves unable to evidence that they received the services or suffered losses as a result of the circumstances which are the subject of the remediation program.</p> <p>At the end of the day if assumptions are to be used then ASIC needs to acknowledge that at law such assumptions are used in good faith and that a licensee will not be penalised as a result of making any reasonable assumptions.</p>

When it may be appropriate to use assumptions to increase efficiency

D3 proposal: ASIC proposes that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation.

ASIC Question		Response
D3Q1	Do you agree with this proposal? If not, why not?	We appreciate where ASIC is coming from in relation to its guidance however do not feel that ASIC's approach is within the bounds of the law.
D3Q2	In what circumstances do you think it is appropriate to use assumptions to increase the efficiency of a remediation? Please give reasons.	ASIC needs to take into consideration the requirement for all parties to produce evidence in relation to a particular matter before compensation can be awarded (especially considering that clients have a legal obligation under the tax laws to maintain records and compensation payments may have tax implications for clients. We understand that the claim for compensation by a client may increase as a result of legal costs they incur whilst making a claim against a licensee however every client should be required to substantiate their claim and whether or not the relevant circumstances applied to them.
D3Q3	Have you applied beneficial assumptions to increase the efficiency of a remediation? Please provide details, including any relevant data and documentation.	We understand that a licensee has a duty of care to monitor and supervise the activities of its representative however so does ASIC and if the system being implemented by Treasury and ASIC to meet the requirements of Recommendation 2.10 of the Royal Commission Report functions as intended then beneficial assumptions would not be relevant. After all, the duty to regulate the activities of financial service providers falls on ASIC and hence why ASIC has implemented reporting frameworks upon licensees which require it to report directly to ASIC. The assumptions that are made should not be made to commercially benefit the licensee or the client they should be made on the basis that there are reasonable grounds for making such assumptions taking into consideration the circumstances at hand even if it is detrimental to some clients.

## E. CALCULATING FOREGOING RETURNS OR INTEREST

Three-step framework for calculating foregone returns or interest

E1 proposal: ASIC proposes to revise its current guidance on calculating foregone returns or interest by setting out a three-step framework that involves:

- (a) Step 1—licensees should attempt to calculate actual foregone returns or interest rates, without the use of any assumptions, if it is appropriate to do so in the circumstances;
- (b) Step 2—if it is not appropriate, possible or reasonably practical to find out the actual rates, licensees should consider whether beneficial refund assumptions can be made if an evidence-base supports it; and
- (c) Step 3—if there is no evidence base to support a beneficial assumption, licensees should apply a fair and reasonable rate that compounds daily and is:
  - (i) reasonably high;
  - (ii) relatively stable; and
  - (iii) objectively set by an independent body.

ASIC Question		Response
E1Q1	Do you agree with this proposal to set out a three-step framework for calculating returns or interest? If not, why not?	No. It should be a two-step process whereby the proposed Step 2 is removed and the only options available are Step 1 and Step 3. Step 3 should be reworded to the effect of 'if it is not appropriate, licensees should apply:
E1Q2	Are there any practical problems associated with this proposal? Please give details.	(i) a fair and reasonable rate that compounds daily (if applicable) and is relatively stable and objectively set by an independent internal department or external body; or (ii) a fair and reasonable rate based on fair and reasonable documented assumptions.
E1Q3	Should our guidance clarify whether the rate compounds (and at what interval) or whether it should be based on simple interest? Please give reasons.	The refunds paid to clients should be based on actual rates or fair and reasonable calculations of refunds and if any assumptions are made they should be fair and reasonable.

## F. HOW TO APPROACH FINDING AND AUTOMATICALLY PAYING CONSUMERS

Applying best endeavours to find and automatically pay all consumers

F1 proposal: ASIC proposes to provide guidance that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort.

ASIC Question		Response
F1Q1	Do you agree with our proposal? If not, why not?	We have no objections with the underlying intent and principles however do not feel that guidance to this degree is required. Instead the guidance should tackle the fact that payments under a remediation program should be made as soon as practicable to all clients and that licensees should use best endeavours to contact all affected clients and receive payment instructions within a reasonable timeframe.
F1Q2	What has been your experience in finding and contacting consumers? What challenges have you faced?	ASDAA has no direct experience in conducting a remediation program but are of the view that in the event that a licensee is required to commence a remediation program it should have no issue contacting current clients, the issue would arise in relation to historical clients as the licensee may not have their current contact details and may need to rely on various internet searches to locate clients. A reasonable solution could be for licensees to pay money under the remediation program to uncontactable clients into the unclaimed monies register. Clients need to take some responsibility for their own actions or inactions. We appreciate the commentary provided by ASIC in paragraphs 82 to 92 of CP 335 however we feel ASIC has failed to take into consideration the implications of potential breaches of the Privacy Act as a result of actions of a licensee in locating client information using third party sources and the implications of potential breaches of the AMLCTF Act and/ or tax implications resulting from making payments to third parties which were not the original account holder.
F1Q3	What strategies have you employed to successfully reach all affected consumers? Please give examples of your experiences, including what has and has not worked and any lessons learnt.	
F1Q4	Do you agree that cheques should be paid as a last resort? If not, why not?	
F1Q5	What has been your experience in finding a consumer's bank account details and making a direct payment? Please give details.	
F1Q6	If you are a third-party licensee for a superannuation fund or RSA, what challenges do you have in remediating members of that fund? Please give details	
F1Q7	If you are a superannuation trustee, what challenges do you have in accepting and/or facilitating remediation payments from third-party licensees? Please give details.	

Removing the low-value compensation threshold

F2 proposal: ASIC proposes to remove the low-value compensation threshold in current RG256 and instead provide guidance that:

- (a) the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value;
- (b) it is up to licensees to decide how they will treat their unresponsive or lost consumers, and if applying a compensation threshold, what low value is fair and appropriate in line with their obligations; and
- (c) if applicable, the reasons for the decision to apply a low value threshold should be well documented and appropriately justified.

ASIC Question		Response
F2Q1	Do you agree with our proposal? If not, why not?	We agree that the low value threshold should be removed and instead be at the licensees discretion taking into consideration the circumstances at hand.
F2Q2	Do you think that any licensee using a low-value compensation threshold should have to disclose it? If not, why not?	

## G. REMEDIATION MONEY THAT CANNOT BE RETURNED TO CONSUMERS

Clarifying our guidance for remediation money that cannot be returned

G1 proposal: ASIC proposes to clarify current guidance for when remediation money cannot be returned to consumers. That is, if a licensee cannot, despite best endeavours, find consumers to pay them compensation (including when cheques remain uncashed):

- (a) the licensee must not profit from the failure (see the current RG 256 at RG 256.135);
- (b) the residual funds should be sent to a relevant state or federal unclaimed money regime if available; and
- (c) if the licensee is unable to lodge money with an unclaimed money regime, as a last resort, the money should be paid as a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for Profits Commission.

ASIC Question		Response
G1Q1	Do you agree with our proposal? If not, why not?	We agree with points (a) and (b) however disagree with point (c) as there are too many unknown implications arising from this requirement (see response to G1Q4 & G1Q5).
G1Q2	Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not?	We agree with this requirement however are unable to comment regarding the process involved or clients knowledge of the unclaimed money register and the ease with which clients can claim moneys from the relevant regulatory body.
G1Q3	What challenges are there in lodging unclaimed money? Please give details.	To accommodate the requirements of RG256 and to act in the best interest of clients ASIC has a duty of care to make relevant changes to the ASIC-administered regime for unclaimed moneys by removing the minimum payment amount of \$500. After all ASIC has a duty under the ASIC Act to administer the law and in administering the law if it is required to maintain an unclaimed money register it should be acting in the best interest of consumers by removing all restrictions.
G1Q4	Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not?	We are unable to comment in relation to this point however it does raise concerns as once a payment is made to a charity by the licensee on behalf of a client then there are implications for both the licensee (if client claims remediation at a later date) and the client (tax implications).
G1Q5	Do licensees have evidence of consumers requesting that they be remediated after the finalisation of the remediation? How common is this?	The requirement for a licensee to pay remediation to a consumer twice on the basis that they have paid residual amounts to a charity instead, as required by law is unreasonable and technically double jeopardy as the licensee has already paid its penalty pursuant to legal requirements and ASIC guidance.

## H. SETTLEMENT DEEDS

### Settlement deeds and fair consumer outcomes

H1 proposal: ASIC proposes to clarify our guidance about if and when using settlement deeds and relying on implied consent may or may not be appropriate as part of a remediation.

ASIC Question		Response
H1Q1	In what circumstances, if any, are settlement deeds essential to protect your legitimate interests? Please provide examples or other supporting evidence.	<p>Settlement deeds should be compulsory on the basis that if the consumer is to accept a payment then the matter should be deemed settled and as a licensee is required, under law, to maintain records then it is obliged to maintain records evidencing that the client has accepted the remediation amount as final settlement of the matter at hand.</p> <p>The procedure adopted by a licensee should never be such that a refund is paid automatically without the clients knowledge. This in itself is not remediation as there has been no acknowledgement by the licensee of any wrong doing.</p> <p>On this basis remediation under law should only apply where there is a legal requirement to report the matter to ASIC and consequently remediate clients. Such remediation should be subject to requirements where communication is sent to clients prior to any remediation payment being made and hence clients will be in a position to accept the amount as final payment or reject the amount and take further action under IDR, AFCA or legal proceedings.</p> <p>Where a licensee has identified an error and is merely rectifying the error these types of remediation should not be subject to any requirements under RG256 and then it should be at the discretion of the licensee as to whether a settlement deed is warranted.</p>

## ANNEXURE B: EXTRACT FROM SCHEDULE 11 OF THE FSRC 2020 BILL

### 5 Section 912D

Repeal the section, substitute:

912D What are reportable situations?

(1) There is a reportable situation in relation to a financial services licensee if one of the following paragraphs is satisfied:

- (a) the financial services licensee or a representative of the financial services licensee has breached a core obligation and the breach is significant;
- (b) the financial services licensee or a representative of the financial services licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant;
- (c) the financial services licensee or a representative of the financial services licensee conducts an investigation into whether there is a reportable situation of the kind mentioned in paragraph (a) or (b) and the investigation continues for more than 30 days;
- (d) an investigation described in paragraph (c) discloses that there is no reportable situation of the kind mentioned in paragraph (a) or (b).

(2) There is also a reportable situation in relation to a financial services licensee if:

- (a) in the course of providing a financial service, the financial services licensee or a representative of the financial services licensee has engaged in conduct constituting gross negligence; or
- (b) the financial services licensee or a representative of the financial services licensee has committed serious fraud; or
- (c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(3) Each of the following is a core obligation:

- (a) an obligation under section 912A or 912B, other than the obligation under paragraph 912A(1)(c);
- (b) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b), (ba) and (c) of the definition of financial services law in section 761A;
- (c) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this paragraph;
- (d) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth, State or Territory legislation, or a rule of common law or equity, that is covered by paragraph (d) or (e) of that definition.

(4) For the purposes of this section, a breach of a core obligation is taken to be significant if:

- (a) the breach is constituted by the commission of an offence under any law and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for a maximum period of:
    - (i) if the offence involves dishonesty—3 months or more; or
    - (ii) in any other case—12 months or more; or
  - (b) the breach is constituted by the contravention of a civil penalty provision under any law, other than a civil penalty provision prescribed by the regulations for the purposes of this paragraph; or
  - (c) the breach is constituted by a contravention of subsection 1041H(1) of this Act or subsection 12DA(1) of the ASIC Act (misleading or deceptive conduct in relation to a financial product or a financial service); or
  - (d) the breach results, or is likely to result, in material loss or damage to:
    - (i) in the case of a managed investment scheme—a member or members of the scheme; or
    - (ii) in the case of a superannuation entity—a member or members of the entity; or
    - (iii) in all cases—a person or persons to whom the financial services licensee or a representative of the financial services licensee provides a financial product or a financial service as a wholesale or retail client; or
  - (e) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.
- (5) Otherwise, for the purposes of this section, a breach of a core obligation is significant having regard to the following:
- (a) the number or frequency of similar breaches;
  - (b) the impact of the breach on the financial services licensee's ability to provide financial services covered by the licence;
  - (c) the extent to which the breach indicates that the financial services licensee's arrangements to ensure compliance with those obligations are inadequate;
  - (d) any other matters prescribed by regulations made for the purposes of this paragraph.

912DAA Obligation to lodge a report—reportable situations in relation to the financial services licensee

Reporting a reportable situation to ASIC

- (1) If there are reasonable grounds to believe that a reportable situation has arisen in relation to a financial services licensee:
  - (a) the financial services licensee must lodge a report in relation to the reportable situation with ASIC; and
  - (b) the report must be lodged in accordance with this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Report must be in the prescribed form

- (2) The report must be lodged with ASIC in writing in the prescribed form.

Period within which report must be lodged

- (3) The report must be lodged with ASIC within 30 days after the financial services licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe the reportable situation has arisen.

Strict liability applies in relation to paragraphs (1)(a) and (b)

- (4) Strict liability applies in relation to paragraphs (1)(a) and (b).

If report is received by APRA

- (5) A report that a financial services licensee is required to lodge under this section in relation to a reportable situation is taken to have been lodged with ASIC if:

- (a) the licensee is a body regulated by APRA; and
- (b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

- (6) Subsection (1) does not apply to a financial services licensee in relation to a reportable situation if:

- (a) the licensee is a body regulated by APRA; and
- (b) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and
- (c) the report is given before, or within 10 business days after, the licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe that the reportable situation has arisen.

Civil penalty provision

- (7) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAB Obligation to lodge a report—reportable situations in relation to other financial services licensees

Reporting a reportable situation to ASIC

- (1) A financial services licensee (the reporting licensee) must lodge a report with ASIC in accordance with this section if there are reasonable grounds to believe that:

- (a) a reportable situation has arisen in relation to another financial services licensee of the kind mentioned in:
  - (i) paragraph 912D(1)(a) or (b) (significant breach or likely breach of a core obligation); or
  - (ii) subsection 912D(2) (gross negligence or serious fraud); and
- (b) one of the following is an individual who has engaged in conduct that forms part of the reportable situation:
  - (i) the other financial services licensee;
  - (ii) an employee of the other financial services licensee or of a related body corporate of the other financial services licensee, acting within the scope of the employee's employment;

- (iii) a director of the other financial services licensee or of a related body corporate of the other financial services licensee, acting within the scope of the director's duties as director;
- (iv) another representative of the other financial services licensee acting within the scope of the representative's authority given by the licensee; and
- (c) the individual provides personal advice to retail clients in relation to relevant financial products.

Report must be in the prescribed form

- (2) The report must be lodged with ASIC in writing in the prescribed form.

Period within which report must be lodged

- (3) The report must be lodged with ASIC within 30 days after the reporting licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).

If the reportable situation already reported to ASIC

- (4) Subsection (1) does not apply in relation to a reportable situation if there are reasonable grounds to believe that ASIC is aware of:
  - (a) the existence of the reportable situation; and
  - (b) all of the information that is required in a report under this section in relation to the reportable situation.

A copy of the report must be given to the other financial services licensee

- (5) The reporting licensee must give a copy of any report that the reporting licensee is required to lodge with ASIC under subsection (1) to the other financial services licensee within 30 days after the reporting licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).
- (6) A financial services licensee has qualified privilege in relation to a copy of a report given under subsection (5).
- (7) A financial services licensee who has qualified privilege under subsection (6) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Civil penalty provision

- (8) A person contravenes this subsection if the person contravenes subsection (1) or (5).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAC Obligation to give notice—participants in licensed market or licensed CS facility

- (1) If a financial services licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant:

- (a) the financial services licensee must lodge written notice of that fact with ASIC;  
and
- (b) the notice must be lodged in accordance with this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The notice must say when the event happened and identify the market or facility.
- (3) The notice must be given as soon as practicable after the event happened.
- (4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

#### 912DAD ASIC must publish details of certain reports

- (1) ASIC must, for each financial year, publish information about:

- (a) reports lodged with ASIC during the financial year under section 912DAA in relation to reportable situations of the kind mentioned in paragraphs 912D(1)(a) and (b) (breaches and likely breaches of core obligations); and
- (b) reports lodged with APRA during the financial year, as described in subsections 912DAA(5) and (6), in relation to reportable situations of the kind mentioned in paragraphs 912D(1)(a) and (b) (breaches and likely breaches of core obligations); and
- (c) the entities in relation to which those reports are lodged with ASIC or APRA.

- (2) The information must:

- (a) be published within 4 months after the end of the financial year; and
- (b) be published on ASIC's website; and
- (c) include the information (if any) prescribed by the regulations, which may include personal information (within the meaning of the Privacy Act 1988) in relation to a financial services licensee who is an individual; and
- (d) if the regulations prescribe how the information is to be organised—be organised in accordance with the regulations.

- (3) The regulations may prescribe circumstances in which information need not be included in the information published by ASIC under this section.

- (4) ASIC may correct any error in, or omission from, information published under this section.

## 6 Before section 912F

Insert:

Subdivision C—Notifying and remediating clients affected by reportable situations

912EA Reporting to clients affected by a reportable situation

Notifying an affected client of a reportable situation

- (1) A financial services licensee must take reasonable steps to notify a person (the affected client) of a reportable situation in accordance with this section if:
  - (a) the licensee, or a representative of the licensee, provides or has provided personal advice to the affected client as a retail client in relation to a relevant financial product; and
  - (b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:
    - (i) paragraph 912D(1)(a) (significant breach of a core obligation); or
    - (ii) subsection 912D(2) (gross negligence or serious fraud); and
  - (c) there are reasonable grounds to suspect that:
    - (i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
    - (ii) the affected client has a legally enforceable right to recover the loss or damage from the licensee.

Form and period for giving notice

- (2) A notice under this section must:
  - (a) be given in writing within 30 days after the financial services licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c); and
  - (b) if ASIC has approved the form in which the notice must be given:
    - (i) be in the approved form; and
    - (ii) include the information, statements, explanations or other matters required by the form; and
    - (iii) be accompanied by any other material required by the form.

Qualified privilege

- (3) A financial services licensee has qualified privilege in relation to a notice given under this section.
- (4) A financial services licensee who has qualified privilege under subsection (3) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Civil penalty provision

- (5) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

## 912EB Obligation to investigate reportable situations that may affect clients

### Obligation to investigate

- (1) A financial services licensee must conduct an investigation into a reportable situation in accordance with this section if:
  - (a) the licensee, or a representative of the licensee, provides or has provided personal advice to a person as a retail client (the affected client) in relation to a relevant financial product; and
  - (b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:
    - (i) paragraph 912D(1)(a) (significant breach of a core obligation); or
    - (ii) subsection 912D(2) (gross negligence or serious fraud); and
  - (c) there are reasonable grounds to suspect that:
    - (i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
    - (ii) the affected client has a legally enforceable right to recover the loss or damage from the licensee.

### Period within which investigation must be commenced

- (2) The investigation must be commenced within 30 days after the financial services licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).

### Matters to be considered in the investigation

- (3) In conducting the investigation, the financial services licensee must:
  - (a) identify the conduct that gave rise to the reportable situation; and
  - (b) quantify the loss or damage that there are reasonable grounds to believe:
    - (i) the affected client has suffered or will suffer as a result of the reportable situation; and
    - (ii) the affected client has a legally enforceable right to recover from the licensee; and
  - (c) do anything else prescribed by the regulations for the purposes of this paragraph.

### Completing the investigation

- (4) The investigation must be completed as soon as is reasonably practicable after it is commenced.

### Notifying affected client

- (5) The financial services licensee must take reasonable steps to give the affected client a notice of the outcome of the investigation:
  - (a) in writing within 10 days after the completion of the investigation; and
  - (b) if ASIC has approved the form in which the notice must be given:
    - (i) in the approved form; and
    - (ii) that includes the information, statements, explanations or other matters required by the form; and

(iii) that is accompanied by any other material required by the form.

- (6) A financial services licensee has qualified privilege in relation to a notice given under subsection (5).
- (7) A financial services licensee who has qualified privilege under subsection (6) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

#### Compensating the affected client for loss or damage

- (8) If, after the investigation is completed, there are reasonable grounds to believe that:
- (a) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
  - (b) the affected client has a legally enforceable right to recover the loss or damage from the financial services licensee;
- the licensee must take reasonable steps to pay the affected client an amount equal to the loss or damage within 30 days after the investigation is completed.

#### Civil penalty provision

- (9) A person contravenes this subsection if the person contravenes subsection (1), (5) or (8).

Note: This subsection is a civil penalty provision (see section 1317E).

#### Nothing affects right of affected client to pursue legally enforceable rights

- (10) Nothing in this section affects any legally enforceable right of the affected client to recover loss or damage that the affected client suffers, or will suffer, as a result of a reportable situation.
- (11) However, a court may take into account the amount paid by the financial services licensee under this section when quantifying the amount of compensation (if any) to be paid by the licensee in relation to that loss or damage.

#### 912EC Obligation to keep records of compliance

- (1) A financial services licensee must keep records sufficient to enable the licensee's compliance with this Subdivision to be readily ascertained.

Note 1: For preservation of records, see section 1101C.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) The regulations may specify records that the financial services licensee must keep as part of the obligation in subsection (1).