

17 April 2016

By email: xenia.quinn@asic.gov.au

Xenia Quinn
Lawyer, Financial Advisers
Australian Securities & Investments Commission
Level 7, 120 Collins Street
MELBOURNE VIC 3000

Dear Ms Quinn

CP247: Client review and remediation programs and update to record-keeping requirements

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on ASIC's *Consultation Paper 247: Client review and remediation programs and update to record-keeping requirements*.

We generally support the proposed regulatory guide on review and remediation programs. Briefly, this submission recommends:

- that the scope of the regulatory guide should be broadened beyond financial advice;
- that ASIC regulatory outcomes should align with the principle that programs should proactively remediate all clients that have experienced loss;
- that the regulatory guide encourage licensees to consider utilising the services, skills and resources of their EDR scheme as part of any review or remediation program;
- that review and remediation programs be required to 'go back' a minimum of 7 years;
- that the decision-making criteria of programs prioritise what is fair in all the circumstances;
- that oversight of programs be truly independent, and that the views of independent overseers be binding on the licensee;
- that the regulatory guide clearly require public reporting on program outcomes, and set standards in terms of progress reporting; and
- that the regulatory guide append a sample fair settlement deed.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national

Consumer Action Law Centre

Level 6, 179 Queen Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Scope of regulatory guideline

It is proposed that the regulatory guide applies to financial advice. We note that ASIC is increasingly requiring review and remediation programs in areas other than financial advice, including consumer credit and insurance. We consider that the guideline should be broadened to apply to these other review and remediation programs.

Nature of complaints subject to review and remediation program

We support the proposed definition of systemic issue, that is, an issue that may have implications beyond the immediate rights to a complaint or dispute, or have implications for more than one client. As stated by the consultation paper, this aligns with ASIC's policies on dispute resolution.

We also support the statement at paragraph 41 of the consultation paper that review and remediation programs are not solely driven by individual complaints; such programs require the licensee to seek out all clients that may have suffered loss as a result of the misconduct that has been identified. This misconduct may have been identified through avenues other than customer complaints.

This appears, however, to be inconsistent with some of the enforcement outcomes ASIC has negotiated. For example, in July 2015 ASIC entered into an enforceable undertaking with payday lender Money3 following concerns raised that it breached consumer credit laws and engaged in misleading conduct.¹ However, the outcome achieved only required remediation for current Money3 customers, not prior customers. For prior customers, ASIC recommended they approach the Credit and Investment Ombudsman and request a refund similar to what was being offered to current customers. Our concern with this arrangement is that many, if not the vast majority, of past Money3 clients will not be alert to taking such a step. It may also be time-consuming and where the client does not take action, the provider banks a windfall gain. We note that more recent enforcement action appears to adopt the approach suggested in paragraph 41.²

Interaction with dispute resolution policies and timeframes

Paragraph 51 of the consultation paper notes that licensees may be subject to a systemic issue investigation by an EDR scheme seeking remediation for affected clients. In our view, remediation obtained through an EDR scheme and through a licensee's own review and remediation program should be consistent. For this reason, we recommend that the final regulatory guide encourage licensees to either use the services of an EDR scheme as part of any program, or draw upon their expertise in setting up such a scheme.

¹ ASIC media release, 'Money3 provides over \$100,000 in refunds to customers', 1 July 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-168mr-money3-provides-over-100-000-in-refunds-to-consumers-as-asic-s-payday-lending-crackdown-continues/>.

² ASIC media release, 'Payday lender Nimble to refund \$1.5m following ASIC probe' 23 March 2016, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-089mr-payday-lender-nimble-to-refund-15-million-following-asic-probe/>.

We support the position expressed at paragraphs 54-56 of the consultation paper that the IDR timeframes should continue to apply to complaints made where the complaint is within the scope of a review and remediation program. Concerns have been expressed about the timeliness of some review and remediation programs. While we recognise that some programs are very large and resource intensive, we suggest that, as far as possible, program timeframes should be consistent with general dispute resolution timeframes. The final regulatory guide might deal with this issue by, for example, expressing specific time limits to apply.

Scope of review and remediation program

At paragraph 86, the consultation paper states that licensees should review as far back as a licensee has retained records. We strongly support this position. We are aware that some programs have proposed a very limited timeframe for review; we support the requirement that the minimum period for programs to review past conduct be 7 years.

We support the other proposed guidance about determining the scope of a review and remediation program, and in particular the following aspects;

- that licensees should identify the group of clients within the scope of a program and not rely on inviting clients to express interest to be part of the review program;
- that licensees should be required to review the scope of the program where new information becomes available.

Design and implementation

We support the proposed design and implementation regulatory guidance outlined in the consultation paper. In particular, we support the requirement that programs be operated efficiently, honestly and fairly.

In this respect, we point to dispute resolution decision-making criteria that consider not only the law, but good industry practice as well as what is fair in the circumstances.³ Similarly, outcomes of review and remediation programs should not be determined by the licensee's view of what is lawful; it should be guided by decision-making criteria that prioritise what is fair in all the circumstances.

We encourage the use of peer and independent reviewing as part of review and remediation programs. In our view, peer reviews should be independent of initial reviews to ensure confidence in outcomes of review processes.

Independent oversight of review and remediation is also essential. To be effective, this oversight needs to be truly independent. We understand that some review and remediation programs establish independent appeals or review committees. Clients dissatisfied with the outcome of reviews can take their matter to such committees. We do not believe that membership of such committees should include senior management of licensees; members should be truly independent of the licensee. The decisions of such committees should also be binding on licensees, and not just be taken into consideration by the licensee.

³ Financial Ombudsman Service Australia, Terms of Reference, clause 8.2.

We strongly support the regulatory guideline requiring licensees to report publicly on outcomes of the review and remediation. It should be recognised that, in conducting such a program, licensees are essentially bringing 'inside' matters that would otherwise be determined by an EDR scheme or courts. In this light, transparency about outcomes is essential. To quote the oft-quoted aphorism, "not only must justice be done; it must also be seen to be done". We encourage the final regulatory guide to clearly require public reporting on outcomes, and set standards in terms of progress reporting.

Communication with clients

We support strong guidance about how licensees should communicate with clients, and welcome the proposed key principles noted at paragraph 154. The regulatory guide should also set standards about effective communication for those with communication difficulties, including non-English speakers, people with disabilities and those experiencing other barriers. In particular, we think that communication materials should be translated into common community languages.

We agree that licensees should be flexible when requesting a response from clients. In particular, we submit that if a client does not respond to an initial request, the licensee should communicate through other channels (i.e. telephone, email, SMS etc).

External review of decisions

We strongly support the requirement that clients must have free access to external dispute resolution processes to review a licensee's decision. EDR scheme monetary and time limits should be waived where they would otherwise limit access to external review.

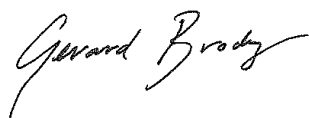
In our view, the final regulatory guide should also require licensees to assist clients (both financially and practically) access external advice about licensee's decisions. The consultation paper states that referral to free services should be considered. It is our view that if such referrals create burdens on such free services, licensees should contribute funds to offset those burdens. We also consider that the final regulatory guide should mention financial counsellors as an appropriate advice source, particularly where the licensee's decision contributes to financial difficulty.

In relation to settlement deeds, we consider it would be appropriate for ASIC to append a sample deed to the regulatory guide, so it is clear what a fair deed entails and so that clients are not unfairly restricted from speaking about their matter. We would welcome commenting on any draft of such a sample deed.

Please contact me on 03 9670 5088 or at gerard@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer