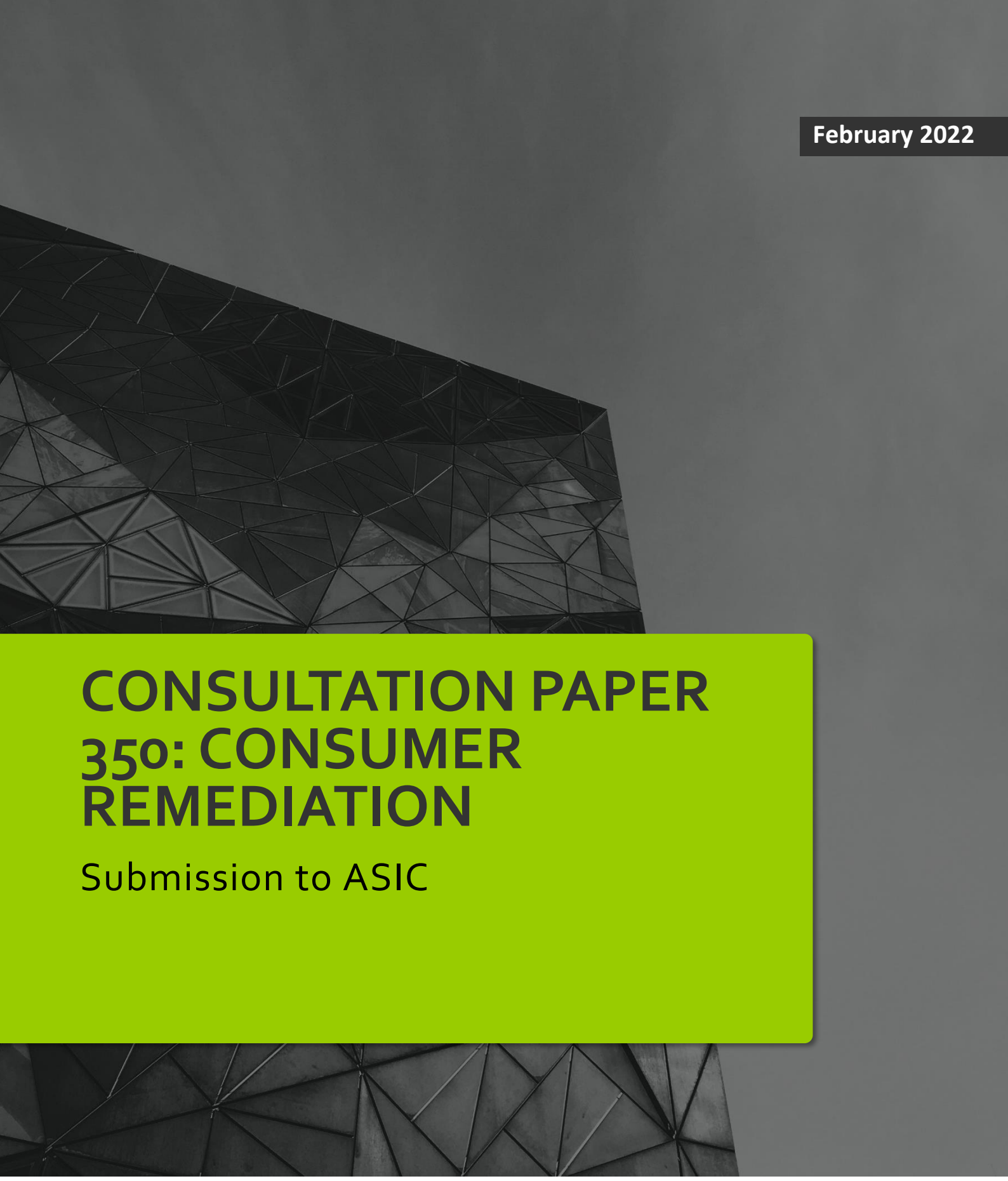

February 2022

CONSULTATION PAPER 350: CONSUMER REMEDIATION

Submission to ASIC

consumer action law centre

Financial Rights LEGAL CENTRE

Super Consumers Australia

CONSULTATION PAPER 350: CONSUMER REMEDIATION

Submission to ASIC

Thank you for the opportunity to comment on ASIC Consultation Paper 350, *Consumer remediation: Further consultation*, November 2021 including a draft regulatory guide (**Draft RG**). The following organisations have contributed to and endorsed this submission:

- Consumer Action Law Centre
- Financial Rights Legal Centre
- Super Consumers Australia

We support a continuing focus on consumer remediation by ASIC in its enforcement. Effective remediation programs are an essential part of the financial services system, enabling timely and efficient compensation for people impacted by the misconduct. Importantly, remediations are a learning opportunity for firms, enabling the firm to understand the causes and impacts of the misconduct and take corrective action to prevent any repetition.

Generally, the Draft RG is excellent and provides useful guidance and practical examples on how to undertake best practice remediation. We commend ASIC for undertaking this important work, and look forward to its promotion and enforcement across the financial sector. It will also be a useful resource for companies and regulators in other sectors seeking to undertake best practice remediation.

We have two serious concerns that require redrafting in the Draft RG:

- **Public reporting**: All firms should be required to publicly report on all remediation programs (including its scope and its outcomes) in the interests of transparency and accountability. Public reporting, if done well, can bring much needed transparency about the outcomes for consumers, and the systems fixes undertaken by the firm. Without this, poor outcomes for consumers will be hidden or white-washed in claims about "successful" remediations. If ASIC requires anything less than full and transparent public reporting on *all* remediation programs, this regulatory guide will be highly inconsistent with the internal dispute resolution data reporting requirements, and the general trend towards naming firms in recent years, including named determinations at AFCA.
- **Money unable to be returned to consumers**: The draft position that community benefit (or 'residual remediation') payments only be made when an unclaimed money regime is not available will be a win for industry. Community benefit payments have a proven track record of being used to benefit the class of consumers who were affected by the misconduct. Allowing firms to utilise unclaimed monies regimes will disincentivise firms from finding all eligible consumers – who will then be denied the opportunity to make timely complaints to AFCA if the amount of compensation is unfair. Most money will end up in the Government's Consolidated Revenue, rather than benefitting the group of consumers impacted by the misconduct, as currently occurs with community benefit payments. At the bare minimum, the final RG must give guidance on *how* firms are to make residual remediation payments, to prevent firms making payments to their own charities, or deriving benefit from their misconduct by promoting its "charitable payment".

The submission makes 12 recommendations on improvements and clarifications to the Draft RG, summarised below.

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About the Contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Super Consumers Australia

Super Consumers Australia (Super Consumers), formerly known as the Superannuation Consumers' Centre , is an independent, not-for-profit consumer organisation formed in 2013. Super Consumers was first funded in 2018. We work to advance and protect the interests of low and middle income people in the Australian superannuation system. During its start up phase Super Consumers has partnered with CHOICE to deliver support services. Set up by consumers for consumers, CHOICE is the leading consumer advocate that provides Australians with information and advice, free from commercial bias.

Summary of Recommendations

RECOMMENDATION 1. Amend the Draft RG to provide tailored guidance and examples on debt management firms.

RECOMMENDATION 2. Amend Example 17 and Table 1 to consistently remind firms to consider compensation for indirect financial loss and non-financial loss.

RECOMMENDATION 3. Amend Table 1 to include our suggested additions to the table of remedies and considerations.

RECOMMENDATION 4. ASIC should reconsider its position on the use of unclaimed money regimes as the default outcome for money that cannot be returned to consumers.

RECOMMENDATION 5. Include a new section on how residual remediation payments are to be made, including key principles from current work on the community benefit payment scheme under the General Insurance Code of Practice.

RECOMMENDATION 6. Amend the RG to require (rather than suggest) that licensees always provide access to free, independent legal, taxation or financial advice in the following circumstances: when the firm is offering a choice of remedies; where the consumer is bankrupt; or when using a settlement deed.

RECOMMENDATION 7. Amend the Draft RG to permit consumers to directly complain to AFCA following a remediation outcome.

RECOMMENDATION 8. ASIC should ensure it receives the information it needs to ensure superannuation trustee decision-making, including weighing the best financial interests duty against any proposed remediation action, is appropriate.

RECOMMENDATION 9. Add compensation for indirect financial loss and non-financial loss to the list of possible remedies for breach of the design and distribution obligations at RG000.299.

RECOMMENDATION 10. Amend the Draft RG to set expectations that licensees should not outsource remediation programs.

RECOMMENDATION 11. Amend Draft RG000.242 specifically refer to ASIC RG271, as it is critical remediation staff understand the trigger for, and obligations, of internal dispute resolution.

RECOMMENDATION 12. Draft RG000.256-7 should be redrafted to specifically require transparent, public reporting on all remediation programs.

Proposal A1

A1Q1: Do you agree with our proposed updates and/or clarifications in draft RG 000?

Who this guide applies to

We recommend that ASIC clarify that this Regulatory Guide applies to newly licensed industries, including debt management and credit repair firms, and insurance claims handling and settling services, providing examples of remediation programs in the context of these services. An example from a case study or enforceable undertaking would be helpful to step out available remedies for misconduct by these firms.

We commonly see breaches of the ASIC Act protections against misleading and deceptive conduct, unconscionable conduct, failure to provide debt management services with due care and skill, and that are fit for the consumer's disclosed purpose. We have seen firms engaging in unconscionable conduct by, for example, charging fees for credit repair services that will not assist in achieving the customer's aim of trying to save the family home or access credit because factors other than the credit report will get in the way of approval.

Redress in our experience will often require more than a mere refund of fees, because the consumer's overall financial position is worse for having relied on the defective advice or misleading representation of the firm. For example, a firm offering services to apply for a postponement of enforcement proceedings, if performed without due care and skill, can cause the enforcement to continue, leading to the loss of the family home, car, or a judgment debt to be entered against the person or bankruptcy. These consequences of the misconduct are often permanent, cause consequential emotional distress. Even those that can be changed can involve significant costs, such as the legal costs to re-open a court judgment which accrues significant cost to re-open, and impacts creditworthiness for many years.

RECOMMENDATION 1. Amend the Draft RG to provide tailored guidance and examples on debt management firms.

When to initiate a remediation

This section of the Draft RG is very useful.

Some of the easier, simpler remediations involve fee errors. Generally, firms appear to understand that a miscalculated or misapplied fee should result in remediation of those fees to the consumer. By comparison, smaller firms and those in sectors that are newly licensed, tend to have a very poor understanding of the ASIC Act consumer protections and rarely initiate remediations for systemic breaches of these critical protections.

We suggest that the example in this section of the Draft RG would be a more helpful prompt if it focussed on a harder case, where firms often avoid establishing remediation programs until pushed. This could be an example involve misconduct in the sales process (based on funeral insurance or CCI remediations) or in misleading consumers about the service (such as credit repair).

The key principles for conducting remediations

The nine principles for remediation in the Draft RG are excellent. When applied by firms, these principles should ensure fair, fast, efficient remediation of consumers. These principles will also benefit firms – mistakes will be understood and not repeated, costs of running remediation programs will be lower, and the program will be an opportunity to rebuild trust with their customers.

The key principles are very helpful, and should be actively promoted by ASIC in its engagement and materials to firms.

The remediation review period

We support the guidance on how firms should determine the review remediation period. There should be no time limit on remediation programs.

There have been many improvements in our financial services laws over the last few years. These changes should mean that firms identify and act on misconduct and systemic issues much quicker than in the past, preventing issues where remediations occur after record-retention periods. It is in everyone's interest that remediations happen quicky. If a firm waits to take action on known problems – as was the case with the scandalous mis-selling of junk insurance over decades – then it should be no excuse that 7 years has passed and documents have been destroyed.

Removing the hard time limit on remediations is important because certain forms of misconduct, such as irresponsible lending, only become apparent years later. The mis-selling of insurance and extended warranties is another example – consumers may only find out about the problematic exclusion at claim time. With funeral and life insurance policies, this can be years or even decades later.

We agree that selecting the appropriate timeframe is critical to a successful remediation. Our biggest complaint about defective consumer remediation programs is typically where the scope is too narrow. We often have clients who fall outside the scope because their contract was entered the year after or before the remediation period, despite suffering the exact same misconduct. This is a particularly disappointing outcome where it is our clients, who chose to share their story and make regulator complaints that lead to the problems being revealed but receive no remedy.

Determining appropriate remedies

We strongly support the guiding principle that firms should 'return affected consumers to the position they would have otherwise been in'. In our experience, an appropriate remedy will often require more than just a refund of fees. Remediation must look to the direct and indirect impacts that flowed from the misconduct. This can include:

- distress;
- physical and mental ill health;
- relationship strain and breakdown;
- defaulting on other payments, such as falling behind on utility bills, school fees or struggling to put food on the table to prioritise, for example, payments on an irresponsible car loan;
- taking out, or incurring interest on, other forms of credit;
- loss of assets, including cars and homes; and
- bankruptcy, resulting in loss of property, work restrictions and a lifetime listing on a publicly searchable database that can impact future borrowing, insurance, and even ability to secure a rental property.

While Example 17 at RG000.131-133 provides some useful alternative remedies where a person can't be returned to the situation they would have otherwise been in, it fails to clearly state the need for compensation for the above impacts, such as consequential stress, and the lifetime impacts of bankruptcy. In these cases, compensation is likely to be the only available remedy. This is not a new concept – AFCA will award compensation for direct and indirect financial loss were the consumer to pursue redress through AFCA rather than the remediation scheme.

Table 1 on 'Remedies to consider when determining and delivering appropriate outcomes' at RG000.147 is a useful resource. However, we recommend the following changes to ensure that remedies are fair and appropriate.

Misconduct relating to insurance contracts

- Expand the consideration "whether it was likely that the consumer knew about and wanted the product, and relied on being able to make a claim" to include "**whether it was likely that that the consumer understood the product**". This was a clear problem in the mis-selling of junk consumer credit insurance, and in the funeral and life insurance case studies at the Financial Services Royal Commission. We see many issues with grossly inappropriate sales conduct (by banks, car dealers and other intermediations and in direct sales by insurers), which, combined with the complexity and lack of standardisation in insurance policies, means consumers are often unable to understand the product being foisted upon them.
- Add the remedies **indirect financial loss** (for example, interest on credit cards used to pay premiums) and **compensation for non-financial loss**, in line with AFCA's approach.
- We have seen remediation program offers that look more like an opportunity to upsell products than compensate for their misconduct. This is a particular issue for remedies on mis-sold life or funeral insurance, where we have seen offers to stay in the policy, change to a different policy or receive a refund of fees. For example, one of the bases for remediation in the Freedom Insurance Remediation Program is that the salesperson did not "properly disclose the life insurance policy/plan's key features and limitations at point of sale". An option to remain in the product unchanged does not remedy the mis-selling because disadvantaged claimants are asked to decide whether to remain in the product without any further explanation of the product. If the purpose of the program is remedy poor sales conduct and release affected consumers who did not understand the unsuitable product they were signed up, this "remedy" does not achieve that purpose. It risks consumers remaining in unsuitable products and does not remediate the misconduct. Where a consumer elects to stay in a product, firms should still provide **a refund the portion of premiums paid that represent its profit**. Otherwise, it is breaching the key principle that firms must not profit from the misconduct or other failure.
- At the bottom, which reads:
    - "For policies where claims have been made that were declined based on the offending eligibility requirements, licensees should reopen and reassess the claim. Where a payment is made for open policies, it may be acceptable that the claim payment be reduced with reference to outstanding premiums."
- Add a summary of the requirements under section 57 of the *Insurance Contracts Act 1984*, including that interest should be **awarded from date that the claim should have been accepted**.
- Add the word '**independent**' to 'remedial financial advice' and ensure that the remedy is not a consumer being flogged another unsuitable product (and make the same amendment in the financial advice section of the table on page 39 for the same reasons).

Systems failures or errors related to banking products

- In the brackets of final sentence, clarify that the reference to **overdraft or late fees** applies whether charged by the bank, or any other creditor (i.e. not just in the account where the error occurred, but any other fees incurred due to financial impact). We frequently see misconduct led to a chain on financial consequences for the consumer – these forms of indirect financial loss should be captured.

Misconduct related to consumer lease or credit contracts

- The **remedies listed here appear restrictive**, especially when considering the available remedies for claims including unjust transaction under section 76 of the National Credit Code. When a consumer is in hardship, the misconduct can be often be traced back to the initial transaction being unsuitable, unjust or unconscionable contrary to the Code. For example, "reducing the principal, or in certain circumstances

waiving the total debt where a consumer cannot reasonably make ongoing loan repayments without hardship" should be amended to "reducing the principal, waiving the total debt and/or providing a refund".

- We do not support discounts for **the purported 'benefit' or use of the product**, particularly for responsible lending breaches. Such discounts can produce incredibly unfair results and even lead to windfall gains for the lender. Irresponsible car loans on lemon cars, and the entire industry of consumer leases, is based on grossly inflated "value" of the underlying asset. Instead, remediations should look at what is fair in all the circumstances, considering the consumer's resulting financial and non-financial loss. At a bare minimum, any discount for use must only apply where there was a real and tangible benefit to the consumer, and the resulting calculation is fair.
- For our views on appropriate remedies for responsible lending breaches, please refer to our earlier submission to ASIC CP 256.[1]

Table 1 should also include a new section on remedies in relation to debt management services.

RECOMMENDATION 2. Amend Example 17 and Table 1 to consistently remind firms to consider compensation for indirect financial loss and non-financial loss.

RECOMMENDATION 3. Amend Table 1 to include our suggested additions to the table of remedies and considerations.

Money that cannot be returned to consumers

Unclaimed money regimes

We are disappointed by the position in the Draft RG on money that unclaimed money regimes be the primary use of money that cannot be returned to customers, and that community benefit (or residual remediation) payments only be made when an unclaimed money regime is not available.

Indeed, the Draft RG will incentivise firms to simply give up on contacting consumers altogether, knowing that sending (what the firm decides is a fair) payment to unclaimed monies register will ultimately suffice. This will have the following negative outcomes.

Firstly, where people have not been found via the remediation, it seems highly unlikely that people will be found via unclaimed monies registers. With the ongoing failure of active remediations to effectively find and remediate all customers, a significant amount of money will end up in the Government's consolidated revenue,[2] rather than benefitting the individual consumer, or the cohort of consumers impacted by the misconduct via a community benefit fund payment.

Secondly, effort needs to be put into finding people at the time of the remediation program, so that they can challenge the decision via IDR or AFCA if required, and so that the full impacts of the misconduct on the individual can be understood and remedies. The need to do review the outcome will be greater in poorly-run remediations, which may be linked to failures to locate consumers. We have seen unfair remediation outcomes that required escalation to AFCA. It will be very, very hard for consumers to successfully contest the remediation outcomes seven or more years after the remediation program winds up. This barrier may create perverse incentives for recalcitrant firms, particularly those who don't support the notion of remediation in the first place.

Thirdly, some of the people hardest to reach are often those experiencing very difficult circumstances – fleeing family violence, or without access to stable accommodation to receive mail or continuous phone service due to poverty. For people experiencing these situations of vulnerability, their remediation payments are more likely to

[1] Available at: https://consumeraction.org.au/consumer-remediation-update-to-regulatory-guide-256/.
[2] We acknowledge that the money is always claimable by the consumer even if it has been transferred to Consolidated Revenue (with interest): https://asic.gov.au/regulatory-resources/financial-services/unclaimed-money/changes-to-the-commonwealth-unclaimed-money-laws/. However, the same issues may arise where people are not aware a payment is claimable.

end up unclaimed and in consolidated revenue, rather than going to the provision of much-needed services that can offer assistance and support – including to retrospectively claim any owed remediation payments. This is a highly inequitable and unfair outcome. This decision in the Draft RG fundamentally shifts the onus from the party responsible for the harm and misconduct firm to vulnerable consumers, and may have the effect of compounding the harm by requiring action from the consumer, rather than the firm. We appreciate that it can be time-consuming and costly for the firm to find all eligible consumers, particularly those who are impacted by vulnerabilities contributing to transiency – but that is as a result of the firm's actions, not the consumer's, and can be best avoided by complying with the laws and regulations in the first place.

By comparison, community benefit payments have, as the name implies, benefitted people across Australia for many years. ASIC does not need to be a grant-making organisation – there are many established organisations that perform this role, including ECSTRA, Australian Communities Foundation, the Consumer Advocacy Trust or the Financial Counselling Foundation. However, there does need to be some ASIC oversight about how and where money is spent.

ASIC's position is also deeply at odds with analogous schemes, such as community benefit payments established under the General Insurance Code of Practice 2020.

Retaining community benefit payments as the default outcome need not prevent individual consumers from accessing their own payment down the track. As recommended in the joint prior submission on ASIC CP335,[3] any consumer who later discovers they were entitled to compensation should have that compensation paid by the firm, even after a community benefit payment is made. The potential for 'double payment' in rare cases should incentivise firms to not to engage is misconduct in the first place, to keep relevant records, and put resources into finding consumers during the remediation program – key aims of the Draft RG. Double payment is also offset by the huge efficiencies from which firms benefit when compensating through remediation programs rather that defending individual (or class) legal actions from every affected consumer.

Our recommendation would mean that there is always a positive outcome for consumers impacted by the misconduct, whether as a group or as an individual, and occasionally both. ASIC's position is a win for industry that will see money ultimately disappear into the Government's consolidated revenue and areas that bear no relationship to addressing the systemic harms and misconduct.

RECOMMENDATION 4. ASIC should reconsider its position on the use of unclaimed money regimes as the default outcome for money that cannot be returned to consumers.

Residual remediation payments

Regardless of ASIC's final position on unclaimed money regimes, the Draft RG000.205-9 must be significantly amended to provide guidance and principles on *how* residual remediation payments be made, including where an unclaimed money regime is not available due to the amount of compensation.

Without further guidance, we may see firms making such payments to their own (or an aligned) charity, and deriving benefits by promoting its "charitable donation". In particular, key principles should include:

- Rather than the licensee, an appropriate grant-making organisation selects the charity/grant recipient.
- Appropriate grant-making organisations include those with expertise in funding projects linked to financial services in Australia, such as ECSTRA, Australian Communities Foundation, the Consumer Advocacy Trust or the Financial Counselling Foundation.
- The payment should benefit the cohorts of consumers impacted by the misconduct as a whole, and be linked to the nature of the misconduct.

[3] Available at: https://consumeraction.org.au/wp-content/uploads/2021/04/210331_CP335Remediation_Final.pdf.

- The licensee be prevented from advertising or promoting or deriving goodwill from the payment.
- Transparency, with public reporting on the amount and reason for the payment.

RECOMMENDATION 5. Include a new section on how residual remediation payments are to be made, including key principles from current work on the community benefit payment scheme under the General Insurance Code of Practice.

Communications

We continue to see problems with licensees directly contacting legally represented clients, including to make settlement offers. This is highly inappropriate and creates unnecessary confusion and inefficiency. The guidance should specifically mention this norm in the section on communications.

Other remediation outcomes to consider

We agree that licensees should consider providing non-monetary remedies, including financial or legal advice, ceasing enforcement action, and waiving limitation periods.

Any advice offered or funded by the firm must be genuinely independent. We are concerned in particular with financial advice being independent and free of conflicted remuneration.

In our view, free and independent legal, taxation and/or financial advice should *always* be offered to consumers as a non-monetary remedy in the following circumstances.

<u>When the firm is offering a choice of remedies</u>

We support consumers being offered a choice of appropriate remedies, where appropriate. However, the choice must be meaningful – and that will often require independent advice on their options.

This is particularly so with life insurance or other ongoing products, where the remedies involve retaining or changing to a different policy. We have seen problems with remediation programs offering a confusing selection of remedies, with little meaningful information about the differences between them, or even the alternative policy on offer, and instructing consumers to seek their own legal or financial advice.

Such advice is beyond the financial means of many of our clients, and an unfair impost when it was the firm's own misconduct that necessitates it. Where the original product was essentially junk insurance, or the misconduct was linked to misleading statements about what the product will do or achieve for the consumer (for example, the mis-selling of insurance), independent advice is even more important, as the consumer may not at that point understand how they were misled and what the existing product will fail to do for them.

<u>Where the consumer is currently bankrupt</u>

Much like the tax implications of a payment at RG000.213-5, consumers who are bankrupt need advice on the treatment of that payment if they are bankrupt. There are instances of people ending up in voluntary or involuntary bankruptcy due to financial difficulty caused by the firm's misconduct, for example where the bankruptcy would never have happened but-for a responsible lending breach (because it was the cause of the most significant debt or clearly the straw that broke the camel's back).

Ideally, all remediation payments would be protected income in bankruptcy, but this is not currently the case. The treatment of remediation payments in bankruptcy is very unclear to consumers, as well as the obligations and offence provisions in the *Bankruptcy Act 1966*, and the practice of trustees can vary. Indeed, the bankruptcy regulator's website has no information about how remediation payments are treated.[4] The Bankruptcy Act is

[4] Australian Financial Security Authority, *What if I receive money during my bankruptcy?*: https://www.afsa.gov.au/insolvency/currently-bankrupt/what-if-i-receive-money-during-my-bankruptcy (accessed 23 February 2022).

arcane, outdated, and often harsh in its operation, and requires urgent modernisation. Bankruptcy trustees vary in quality and approach to communication with people who are bankrupt.

As a result, it is important that remediation programs enable free advice to bankrupt consumers on the treatment of the remediation payment in bankruptcy and any obligations they may have, for example, to report the payment to their trustee. Otherwise, the program will be setting up these consumers to fail, compounding the impacts of the misconduct – a particularly egregious outcome when the firm's misconduct contributed to the insolvency.

Where using a settlement deed

As noted below, we are strongly opposed to the use of any settlement deeds in remediation programs in the interests of transparency and fairness. However, if in rare circumstances settlement deeds are to be used, all consumers must be offered free independent legal advice on the terms of that deed. Settlement deeds can impose onerous terms on consumers, including foregoing the balance of their claim and gagging public comments on their experience.

RECOMMENDATION 6. Amend the RG to require (rather than suggest) that licensees always provide access to free, independent legal, taxation or financial advice in the following circumstances: when the firm is offering a choice of remedies; where the consumer is bankrupt; or when using a settlement deed.

Interaction with Internal dispute resolution and AFCA

We have two concerns about the guidance on when Internal Dispute Resolution (**IDR**) requirements under section 271 commence.

In our experience, some people administering remediation programs appear to have a poor understanding of ASIC RG271 on and do not always identify that a complaint – including an expression of dissatisfaction – before or during a remediation process triggers the requirements of RG271.

The second, and greater concern, is the requirement for those who are unhappy with their remediation outcome (without an earlier complaint triggering IDR) to proceed through IDR before accessing AFCA. This two-stage process is highly likely to cause confusion and complaint fatigue. If people have been contacted by a firm that they are eligible for remediation, but then receive low or poor offer, many will be sceptical that any review by the firm (via IDR) will change anything, and not bother. The risks and impacts of complaint fatigue underpins the reason we do not permit two-stage review processes in IDR (other than with insurance claims). The same principles risks and impacts apply to remediation.

This is not a theoretical concern – we have seen inappropriate initial outcomes across many remediation programs that necessitated our intervention and ultimately escalation to AFCA to achieve a fair outcome.

Freedom Insurance Remediation Program

Consumer Action has seen confusing communications or poor outcomes from the Freedom Insurance Remediation Program (administered by Genus Life Insurance Services Pty Ltd, an Authorised Representative of NobleOak Services Ltd) (**FIRP**)[5]. In one matter, based on our review of the call recordings and correspondence, it was clear to us that our client was subjected to the same mis-selling that prompted the remediation program. It is unclear to us how the FIRP twice concluded there was 'no disadvantage' to our client, as no reasons were provided, before finally accepting the claim. In another matter, FIRP initially concluded there had been 'no detriment' despite the client having paid nearly $15,000 in premiums for inherently low value insurance policies (funeral cover and accidental death/injury cover) in circumstances where they could not afford the ever-increasing premiums, meaning the cover would need to be cancelled and all money lost. Other concerns from this matter include:

[5] https://freedominsuranceremediation.com.au/.

- difficulty getting hold of someone on the hotline;
- no details of reasons for a decision; and
- change of decision upon involvement of a lawyer.

Other issues we have seen include FIRP directly contacting our client, and mis-stated timeframes once escalated to AFCA.

As a result, we remain concerned about the process and outcomes for unrepresented consumers dealing with the Freedom Insurance Remediation Program.

These concerns are another reason to stop outsourcing of remediation (discussed below), and ensure ASIC retains an active role in the oversight of remediation programs.

Whilst remediation programs may group particular cohorts for efficiency, this approach should always be tempered with a review of an individual's file. Otherwise, the impacts on the consumer – and the appropriate remedy – may not be clear, and lessons will not be learned. It is no answer for a licensee to say 'we didn't really look at this one, can we have another shot'. Remediations should be aiming to deliver appropriate and fair remedies from the outset.

RECOMMENDATION 7. Amend the Draft RG to permit consumers to directly complain to AFCA following a remediation outcome.

Interaction with superannuation laws

Superannuation funds have to consider their obligations relating to their trust deed, general law duties and statutory obligations. The obligations to act efficiently, honestly and fairly and in the best financial interests of members are fundamental to remediation. In considering what action to take, superannuation trustees need to read these obligations in line with ASIC's guidance on consumer remediation. We understand that some funds are concerned that the implementation of a remediation program may come into conflict with these obligations and that the guidance should contemplate this scenario in greater detail. As the guidance states, complying with acting efficiently, honestly and fairly, includes funds taking responsibility for the consequences of their misconduct or other failures, and remediating consumers who have suffered loss as a result. It is also hard to see how a trustee could land in a position where it is not in the best financial interests of all members to remediate them for misconduct when they have breached the law or its agreements with members. If such a position were maintained by a trustee, this would warrant significant attention and potentially strong action from ASIC. The best financial interests obligation cannot be a 'get out of gaol' card to avoid appropriately remediating misconduct.

We note that a breach that has resulted in material loss or damage must already be reported to ASIC as a reportable situation. The final regulatory guidance could make clearer that this report to ASIC should also outline any reasons for decisions about remediation, particularly where the proposed approach deviates from ASIC's expectations in the Regulatory Guide. Trustee decision making in weighing the best financial interests duty against any proposed remediation action should be transparent, public and make the affected members aware of the decision and why the fund decided in the way it did.

RECOMMENDATION 8. ASIC should ensure it receives the information it needs to ensure superannuation trustee decision-making, including weighing the best financial interests duty against any proposed remediation action, is appropriate.

Interaction with the design and distribution obligations

We strongly support the inclusion of a section on the Design and Distribution Obligations, as there is low awareness at present of how these obligations interact with consumer redress. Draft RG000.299 helpfully sets out the potential remedies that may be appropriate for a breach of these obligations. Compensation for indirect

financial loss and non-financial loss should be added to this list. These are standard remedies awarded at AFCA, and will be available in the event that a consumer pursues a complaint to AFCA about the conduct giving rise to the remediation, or complains to AFCA following an unsatisfactory remediation outcome. Therefore, it is appropriate and efficient for firms to be considering these remedies when designing and administering programs.

RECOMMENDATION 9. Add compensation for indirect financial loss and non-financial loss to the list of possible remedies for breach of the design and distribution obligations at RG000.299.

Outsourcing

We do not support outsourcing of remediation. The learning process, and the systems changes that should accompany it, is a critical feature of successful remediation programs. When a firm outsources remediation, it misses the opportunity to learn from the mistakes and prevent any reoccurrence. The licensee's board and senior management may become disengaged, which may then impede the structural and systems changes necessary to prevent any reoccurrence.

Who designs and administers remediation programs is also critical to their success. We do not support management consultants running remediation schemes. Management consultants may have useful skills that can assist the remediation, such as data analytics skills, however these can be provided on limited basis. The skillset of management consultants is very different to the skillset of analogous roles, like IDR staff, AFCA decision-makers, and caseworkers. It is essential that consumer-facing remediation staff, and those designing and overseeing the program, understand the lived experience of consumers, including those experiencing any of the myriad and intersecting forms of vulnerability. Remediation staff must be able to communicate in an accessible and sensitive way, translating the complex legal and financial concepts into meaningful information for consumers. They must also understand the laws and regulations that apply beyond the scope of the program, including IDR requirements and as well as typical legal claims raised in dispute resolution. Rarely are management consultants present in the forums in which we and other stakeholders discuss current issues and best practice. It is little wonder we see problems with confusing communications, unfair outcomes that failure to examine and understand the consequential ono-monetary impacts, and a failure to understand valid legal claims beyond the terms of the remediation program (i.e. where there is an overlap with IDR).

Of course, many licensees fail on this front too. At present, many licensees do not have adequate skills to identify and respond to people experience vulnerability, or use accessible language, or design inclusive services and systems. However, ASIC should be encouraging licensees to develop these skills. The UK financial services regulator has already moved in this direction, publishing guidance for firms on the fair treatment of vulnerable customers.[6]

We recommend that Draft RG000.241 be redrafted to set an expectation that licensees will not outsource remediation. If licensees do not have sufficient staffing or expertise to run the entire remediation program, they should hire new staff or consultants to assist, rather than outsourcing the entire program.

RECOMMENDATION 10. Amend the Draft RG to set expectations that licensees should not outsource remediation programs.

RECOMMENDATION 11. Amend Draft RG000.242 specifically refer to ASIC RG271, as it is critical remediation staff understand the trigger for, and obligations, of internal dispute resolution.

Public reporting

The biggest failing in the Draft RG is that is does not require public, transparent reporting on all remediation programs and their outcomes.

[6] https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers.

Public reporting is critical to ensuring accountability and trust in remediation programs. We routinely pick up problems via publicly available information, including where firms have not successfully remediated a large number of eligible consumers. Reviewing compliance reports – when well-drafted – enables us to compare the licensees claims about their outcomes and improvements against our current casework and the experiences of consumers to identify ongoing failings.

At a more fundamental level, public reporting is necessary for impacted consumers and their advocates to understand the scope of the remediation, whether or not they are eligible, and to pursue that matter with the firm or AFCA where they have not been contacted.

This is not a hypothetical concern – the publicly available compliance reports suggest many eligible consumers are not found and remediated. For example, under an Enforceable Undertaking in relation to ASIC's action against credit repair business Malouf Group Enterprises, the respondents were to refund a total of $1.1 million to consumers who did not have any negative listings on their credit files when they entered into contracts with Malouf Group during the 2014-2015.[7] However, the CEU interim compliance report stated that:

> The Malouf Entities have identified and contacted **936 Entitled Consumers**. As at 29 March 2019, **310 Entitled Consumers** had accepted the refund and the Malouf Entities **had refunded 213 consumers** a total of $232,805 in accordance with the Refund Process.[8]

In some cases, eligible consumers report that they were not contacted by despite being an active client.

Our concerns are consistent with academic research which has found that "reports published by ASIC on compliance with enforceable undertakings (EUs) contain very little substantive detail on the implementation or revision of compliance programs required by EUs, making it difficult to assess why a compliance program was or was not deemed adequate to comply with the EU".[9] Our observation is that compliance reports can similarly provide scant detail about the outcomes of remediation required through EUs. An example is that of GoGetta Equipment Funding Pty Ltd – the media release announcing EU stated that a provision of $5m had been made for consumer remediation, on top of $1.9m of 'automatic' remediation. However, the final compliance report has little detail stating only that the firm has "materially completed remediation payments" and "is finalising remediation to remaining eligible customers".[10] The report does not say how much has been remediated and to whom.

The position in the Draft RG is entirely inconsistent with the shift towards named reporting in recent years. The new internal dispute resolution data reporting will be on a named basis. AFCA now names firms in its determinations.

In any event, it is futile these programs cannot remain hidden, as consumers will be contacted, and will know about the misconduct. Failing to report publicly will only breed further mistrust, when it could be a moment to rebuild lost trust.

> **RECOMMENDATION 12.** Draft RG000.256-7 should be redrafted to specifically require transparent, public reporting on all remediation programs.

A1Q2 Are there any practical challenges associated with applying the draft RG 000?

As described above, our main concern is a lack of transparency on the scope and outcomes of remediation programs unless ASIC requires public reporting on all remediations.

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[7] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-114mr-credit-repair-business-malouf-group-enterprises-and-its-director-pay-1-7-million-for-misleading-and-unconscionable-conduct/.

[8] https://download.asic.gov.au/media/5117389/ceu-interim-compliance-report-vantage.pdf (emphasis added).

[9] Ian Ramsay and Mihika Upadhyaya, Compliance Programs Introduced in Response to Enforcement by the Australian Securities and Investments, *Journal of Banking and Finance Law and Practice*, Vol. 32, No. 3, 2021, pp. 194-209.

[10] https://download.asic.gov.au/media/qhzn3s25/final-ceu-compliance-report-siv-capital-and-gogetta-5-nov-2021.pdf.

Proposal A2

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

The examples in the Draft RG are very helpful.

We recommend adding or substituting the examples suggested below. In drafting new, de-identified examples where remediations may not have occurred, we encourage ASIC to base the examples on the experience of consumers, and on the detailed complaints and reports of misconduct made by consumer organisations, including those on the ASIC Consumer Consultative Panel, and on any ASIC enforcement action.

Debt collection practices

In our experience, licensees (and their debt collection agents) have a very poor understanding of the ASIC Act prohibitions against misleading and deceptive conduct, undue harassment and coercion, and of ASIC RG96 on Debt Collection Guideline for Collectors and Creditors.[11] Where there are failures in debt collection practices, these may often be systemic and cause high harm to the consumers on the receiving end of this poor behaviour, and demonstrated by Elena's story, below.

The final RG could helpfully include an example of debt collection breaches and appropriate remedies, which may include compensation for non-financial loss, indirect financial loss (e.g. from new borrowing or interest paid to prioritise payment to the debt collector to stop the harassment) and removing default listings on credit reports. The conduct alleged in ASIC's current action against A&M Group, trading as Debt Negotiators, could inform the drafting of a new example.[12]

Credit repair and debt management firms

As discussed above, ASIC has a new licensed population in credit repair and debt management firms. In our experience, most firms in this industry have a nascent to non-existent understanding of the relevant financial services laws and regulations, including the general consumer protections in the ASIC Act and the requirements to remediate consumers. This industry will need tailored guidance on how to undertake appropriate remediation activities relevant to their diverse business offerings.

A clear and easy example could be crafted around a credit repair business model, based on the remediation in the Malouf Group litigations. Other useful examples of misconduct by debt management firms are detailed in our joint submission to Treasury on the exposure draft regulations[13] and in AFCA Determination 661320.[14]

Elena's story

The partner of our client, Elena (name changed) forced her to enter into credit and telecommunications contracts for his benefit. In approximately October 2016 an online inquiry was made in Elena's name for a "consolidation loan" – Elena thinks that her then-partner made that application. Internet-loans.com.au then passed on Elena's contact details to Debt Negotiators, who contacted her and immediately advised her to enter into a part IX debt agreement, but consistently referred to their product as a "debt consolidation".

Elena was not sure that a debt agreement was the right option for her and so delayed in providing documents to Debt Negotiators. Debt Negotiators actively pursued Elena to enter into a debt agreement and Elena relented.

The first debt agreement proposal in July 2017 records that Elena had no income and was solely reliant on her partner's income ($720 per week) and that her partner was also entering a debt agreement. Elena was not eligible

[11] https://download.asic.gov.au/media/hw4nf11g/rg96-published-13-april-2021.pdf.
[12] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-306mr-asic-sues-a-m-group-for-false-and-misleading-threatening-and-coercive-conduct-against-debtors/.
[13] https://consumeraction.org.au/licensing-debt-management-firms-exposure-draft-regulations/.
[14] https://service02.afca.org.au/CaseFiles/FOSSIC/661320.pdf.

for social security payments. The July 2017 debt agreement proposal (under which Elena would have paid $55 per week for 5 years) was rejected.

Debt Negotiators submitted a further proposal for Elena to pay $65 per week for 5 years that was accepted in October 2017. The total amount payable under the debt agreement was $16,900 with $4,647.50 of this being for Debt Negotiators' administration fees (27.5% of her repayments) in addition to the $1,400 set-up fee. Due to fees to Debt Negotiators and AFSA, the total repayments were more than her total unsecured debts of $15,586 – 108% of her initial unsecured debts.

Concerningly, Elena's accepted proposal again states that her expected income for the next 12 months was $0, with all income support coming from her partner. The proposal also notes that her partner used her car to get to work.

Elena's understanding of the debt agreement was that the $65 per week was to pay all of her debts -including her car loan. In fact, Debt Negotiators were not paying any money towards her car loan (as it was a secured debt) and she subsequently lost the car in March 2019.

The debt agreement was unaffordable from the beginning. Elena often missed payments and in fact missed the first 4 payments. In October 2017, Elena's son was born and there was greater financial strain on her and her partner. Her partner became increasingly violent. From March 2018 until the agreement was terminated on 2 October 2020 (for 6 months of non-payment), Debt Negotiators repeatedly sent Elena messages to shock her into prioritising the payment to Debt Negotiators. For example:

"My manager is pushing me to contact your family, friends, Neighbours and landlord, however i believe we can come to a resolution without going to that extent."

"…your creditors are looking to force you into bankruptcy. If they are successful your trustee will closely examine all of your financial situation and if they feel that you in actual fact had the ability to service your debt, then you could be charged with fraud, facing up to 12 months imprisonment."

"When you entered the Debt Agreement you disclosed vehicle with a value of $8,000. As you have failed to return calls and are currently in arrears your Debt Agreement is in danger of being terminated. Termination can lead to the creditors commencing Bankruptcy action. If Bankruptcy action were to be taken against you this would result in the vehicle potentially be taken by the trustee and sold to the pay the creditors."

In fact, none of Elena's unsecured debts (mostly to payday lenders, telcos, and Debt Negotiators for its set-up fee) were over $5,000 and therefore were ineligible for a creditor's petition.

During this time, Elena's partner was very violent toward her, and she was looking after her infant child who had serious medical issues. Elena says that Debt Negotiators conduct accelerated her depression and darkened her thoughts.

Case study provided by Consumer Action Law Centre

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

No. There is a diversity of businesses and of misconduct in the financial services sector. The Draft RG helpfully provides practical examples in a number of scenarios.

If examples need to be removed to make space for the new examples we recommend above, then we suggest ASIC remove 1-2 of the financial advice examples, as remediations in this area are now well-understood. Alternatively, ASIC could remove one of the examples on overcharged fees and beneficial assumptions.

A2Q3 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.

We agree with Draft RG000.162 that:

> 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.

Contact Details

We would welcome the opportunity to discuss the issues in the submission further. Please contact Senior Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.