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Dear Ms Fairbairn

## CONSUMER REMEDIATION: FURTHER CONSULTATION

The Australian Finance Industry Association (AFIA) appreciates the opportunity to provide this submission on *Consultation Paper 350 – Consumer Remediation: Further Consultation* ([CP 350](#)).

AFIA is a leading advocate for the Australian financial services industry. We support<sup>1</sup> our members to finance Australia's future. We believe that our industry can best support Australia's economy by promoting choice in and access to consumer and business finance, driving competition and innovation in financial services, and supporting greater financial, and therefore social, participation across our community.

AFIA represents over 115 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial and technology innovation in consumer finance.

## OUR SUBMISSION

This submission provides additional feedback, noting our submission made on 2 March 2021<sup>2</sup>.

AFIA agrees with ASIC's nine principles about adopting a remediation process that is efficient, honest and fair and that:

1. Returns all affected consumers as closely as possible to the position they would have otherwise been in had the misconduct or other failure not occurred.
2. Understands the nature, extent and impact of the misconduct or other failure.

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<sup>1</sup> [Australian Finance Industry Association \(afia.asn.au\)](http://www.afia.asn.au)

<sup>2</sup> [020321 AFIA SUB Consultation Paper 335 Consumer Remediation Update to Regulatory Guide 256-0001.pdf](#)

3. Gives consumers the benefit of any doubt and minimise the risk of under-compensation.
4. Ensures key decisions are justified and documented.
5. Applies reasonable endeavours when making remediation payments.
6. Is timely without sacrificing quality consumer outcomes.
7. Makes the process easy for consumers by minimising complexity and, where possible, limiting their involvement in the process.
8. Does not profit from the misconduct or other failure.
9. Ensures the remediation has adequate resourcing, governance and accountability.

Consistent with our prior feedback, AFIA also supports the policy approach being adopted by ASIC in that remediation needs to be scalable. This approach will ensure that our regulatory framework is proportionate, targeted, and fit for the future.

### **RECOMMENDATION 1 – COMPENSATION THRESHOLD**

**AFIA does not support reducing the low compensation threshold from \$20 to \$5 and recommends including a clause that where a financial services provider does not have a customer’s bank account details that a charitable donation for amounts below \$20 per customer be permitted.**

AFIA agrees that licensees should apply reasonable endeavours in making remediation payments to affected consumers, or when providing remedies<sup>3</sup>. However, we do not believe there is a need to reduce the threshold to \$5 unless there is data to support that this policy change would have material benefits that outweigh the additional operational costs.

Specifically, the operational impost of contacting the customer and/or potentially issuing cheques for small amounts where a customer bank account is not maintained is not cost effective and will likely create significant unclaimed cheque and/or unclaimed monies across the financial services industry.

AFIA believes that the existing low compensation threshold of \$20 is practical. It balances the needs of customers and financial services providers in returning customers, as near as possible, to the position they would have otherwise been in had the misconduct or other failure not occurred.

In addition, AFIA recommends that where a financial services provider does not have the customer’s bank account details, that a charitable donation for amounts below \$20 per customer be permitted. This approach ensures the financial services provider does not derive any benefit from the error and there is a relevant community benefit.

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<sup>3</sup> RG000.50

## RECOMMENDATION 2 – EXAMPLES OF SCALABLE REMEDIATIONS

**AFIA recommends that ASIC provide more credit contract examples to assist financial services providers understand how to operationalise scalability, in particular for smaller financial services providers and/or for simpler, lower dollar value remediations.**

A new regulatory guide will replace current *Regulatory Guide 256 – Client review and remediation conducted by advice licensees (RG 256)*<sup>4</sup> and will apply to all AFSL holders, ACL holders, and retirement savings account providers.

AFIA notes that ASIC has included in CP 350 examples to help all parties, now in scope, better understand their obligations. However, while the concept of scalable and scalability is understood, recent changes to breach reporting and potential changes to the financial accountability regime (FAR) have amplified the consequence of misinterpreting how ASIC might expect simpler remediations and remediations by smaller financial services providers to be conducted.

ASIC gives some excellent credit contract examples in CP 350, in particular, sections RG000.147 and RG000.197.<sup>5</sup> These examples will assist AFIA members in their understanding and ability to operationalise the changes to their policies, procedures, and systems.

AFIA believes providing more examples, focusing on, for example, responsible lending and broker best interest duty, would further:

- Assist understanding of if remediation is required
- Increase certainty regarding compliance settings
- Drive more consistent practices across the industry
- Maximise industry understanding and minimise regulatory risk and different interpretations.

AFIA members worked closely with ASIC and provided examples which ASIC included in its updated guide on Responsible Lending. We would welcome the opportunity to do so again.

**Attachment A** provides further details of clauses in CP 350 where examples for smaller financial services provider and/or simpler remediations would be beneficial.

## RECOMMENDATION 3 – SEVEN YEAR LIMIT

**AFIA does not support changing remediations to include incidents that go back more than seven years.**

Clause RG000.72 in CP 350 states that ‘licensees should consider if it is possible or reasonable to apply assumptions to identify and remediate consumers who suffered loss beyond [such period] (such as seven years): see RG 000.113 for more information.’

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<sup>4</sup> RG 256 only applies to AFSL holders who provide personal advice to retail clients.

<sup>5</sup> A table on possible remedies and considerations related to consumer lease or credit contracts and use of cheques.

Clause RG000.113 states that 'If licensees are maintaining adequate systems and processes to identify and remediate problems when they arise, rarely will a remediation review period extend beyond record-retention requirements (which is generally seven years). This means that there will rarely be a need to consider the use of assumptions to account for absent records beyond seven years.'

AFIA highlights this potential ambiguity is confusing and poses operational and reputational risks as well as has breach reporting implications if AFIA members misinterpret how ASIC or Australian Financial Complaints Authority (AFCA) expect the remediation to occur.

AFAI believes that having a 'fixed' seven-year threshold will increase certainty around compliance settings and drive more consistency across the industry and aligns with various corporate record keeping requirements. It will also be useful and bring objectivity where a complaint is referred to the AFCA and they consider whether the remediation has been undertaken in a way that is 'fair'.<sup>6</sup>

## RECOMMENDATION 4 – RISK INDICATORS

**AFIA recommends review of clause RG000.68 to improve its practical applicability.**

As mentioned earlier, CP 350 will apply to all AFSL holders, ACL holders and retirement savings account providers. Given the breadth of the audience it now covers, we believe that the drafting of CP 350 is clear and useful. However, we recommend a review of clause RG000.68<sup>7</sup> to allow risk indicators to be scalable tools that can assist define the extent of the misconduct or other failure. As currently drafted, it appears that this is not the case.

## CLOSING COMMENTS

AFIA and our members were involved in a significant regulatory change program in 2021, all of which were designed to ensure that:

1. the right products were sold to the right consumer (design and distribution obligations)
2. if there was a complaint by a consumer, it was identified and dealt with promptly, and that systemic issues were identified (internal dispute resolution)
3. when things went wrong, significant breaches were investigated and reported as required (breach reporting).

ASIC's expectations about when and how to remediate customers (as outlined in CP 350) is another important step in continuing to ensure a whole of financial services approach to customer centricity.

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<sup>6</sup> The concept of fairness is one that is subjective. Fairness has different meanings for different people, for consumers and for financial services providers.

<sup>7</sup> When using risk indicators, it is important to keep in mind that they might not pick up all potentially affected consumers. For example, if 'missed payments' is used as a risk indicator to identify potential misconduct or other failure, then affected consumers who made financial sacrifices and managed to make repayments would not be picked up. In these situations, it is important to not let these consumers slip through the cracks.

AFIA members have a strong track record on ensuring this centrality is at the heart of their business models and AFIA looks forward to working closely with ASIC on implementing our recommendations.

Should you wish to discuss our submission or require additional information, please contact me or Anna Fitzgerald, Executive Director, Communication & Strategy at [anna.fitzgerald@afia.asn.au](mailto:anna.fitzgerald@afia.asn.au) or 02 9231 5877.

Yours sincerely

Diane Tate  
**Chief Executive Officer**

**ATTACHMENT A – CLAUSES WHERE EXAMPLES FOR SMALLER FINANCIAL SERVICES PROVIDERS AND/OR SIMPLIER REMEDIATION WOULD BE BENEFICIAL**

Section
RG000.11 This guide is not intended to apply to all remediations in its entirety. If the misconduct or other failure only affects one or a small number of consumers and the cause is isolated in nature, the process a licensee follows will likely use existing resources, be simple and prompt and not require a full 'program' to be initiated. While it is still necessary to return those consumers to the position they would have otherwise been in, parts of this guidance are likely to not apply or will not be relevant (e.g. using assumptions and finding lost consumers).
RG000.35 The processes a licensee should apply to any remediation will depend on the scale, age and complexity of the underlying misconduct or other failure, and therefore what steps need to be taken to make it right. If the misconduct or other failure only affects one or a small number of consumers and the cause is isolated in nature, the process is likely to be simple and prompt and not require a full remediation 'program' to be initiated.
RG000.37 While the remediation should be documented, what should be recorded for a small-scale remediation may differ from the types of records necessary for a large-scale complex remediation.
RG 000.98 - Overall, licensees should only use assumptions in a remediation if they are beneficial to consumers and will result in an outcome that: (a) returns affected consumers as closely as possible to the position they would have otherwise been in had the misconduct or other failure not occurred (b) is evidence based and well documented, and (c) is monitored to ensure the assumption continues to achieve the goal of returning consumers as closely as possible to the position they would have otherwise been in throughout the remediation.
RG000.170 – note that Making it Right outlines that Communication plans will also need to include information about what to do if consumers do not respond. This includes consumers who haven't responded to a call to action and those who are sent cheques and do not cash them. Plan which actions to take when a consumer does not respond, including sending different kinds of follow-up communications and further investigating how to reach them. Critically, you cannot assume that no response means that the consumer does not wish to participate or is happy with their situation.