



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

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11 February 2022

Dear Ms Fairbairn

CP350 – Consumer remediation- Further consultation: Update to RG 256

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to ASIC on its proposals to update Regulatory Guide 256: Consumer Remediation (Updated RG256).

The FPA would welcome the opportunity to discuss with ASIC the issues raised in our submission. Please contact me on 02 9220 4500 or ben.marshan@fpa.com.au if you have any questions.

Yours sincerely

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¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 10,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC ‘gifted’ this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.



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ASIC CONSULTATION PAPER 350: CONSUMER REMEDIATION: FURTHER CONSULTATION

Prepared for the Australian Securities and Investments Commission

11 February 2022

A1Q1. General feedback

The FPA supports measures to enhance the compensation of consumers who have suffered loss or detriment due to misconduct, and welcomes the development of an updated Regulatory Guide (Updated RG256) that aims to provide clarity and assistance to licensees in understanding how and when to undertake investigations and identify appropriate and efficient compensation for affected consumers.

Key terms

Updated RG256 includes key terms that duplicate detailed definitions contained in the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (FSRC 2020 Act), which specifically apply to the breach reporting for all AFS licensees, and investigations and consumer compensation obligations for personal financial advice providers.

Applying additional definitions in the Updated RG256 risks creating a dual remediation framework and will unnecessarily complicate these obligations, drive up the cost, and reduce the efficiency of personal advice remediation programs with no additional benefits to financial advice consumers.

For example:

Definition of remediation

The current RG256 requires the licensee to remediate clients (monetary or non-monetary compensation) who have suffered loss or detriment where a systemic issue has been identified and to remediate those clients for any loss or detriment suffered (RG256.46).

We previously recommended a review of the following proposed definition of “remediation”:

A process to investigate the full extent of a failure, and where appropriate, return all consumers that have suffered loss as a result of the failure to the position they would have otherwise been in, as closely as possible.

Identifying the “position the consumer would have otherwise been in” is a subjective measure as it would be dependent on multiple unknown variables that could result in a different outcome. This measure of remediation will create uncertainty for industry and consumers as it is open to interpretation and is not time-bound – that is, the “position the consumer would have otherwise been in” when; at what point in time and on what legislative rules and products available at that time?

In relation to an advice remediation, the ‘position a consumer would have otherwise been in’ would be dependent on the options available to the consumer at the time the failure occurred and many potential financial decisions the consumer may have decided to take at that time based on their circumstances.

Section 912EB(8) of the FSRC 2020 Act states that the licensee “take reasonable steps to pay the affected client an amount equal to the loss or damage within 30 days after the investigation is completed”. The requirement set in primary legislation provides a clear legal definition of the remediation amount - that is it should be “equal to the loss or damage”.

The FPA understands ASIC’s need to quantify the definition in the FSRC 2020 Act and recommends the definition of remediation to include “equal to the loss or damage to compensate the consumer as if the reportable situation/failure never occurred”. This definition should apply to all relevant sections of the Updated RG246, such as beneficial assumptions.

CP350 currently refers to ‘remediation’ and ‘initiating remediation’ in many sections of the consultation paper. This does not make it clear for readers that, as defined in the key terms of CP350, ‘remediation’ is “a process to investigate the full extent of a failure”.

To ensure an accurate and consistent understanding of the ASIC guidance in line with the FSRC 2020 Act, the FPA recommends the updated RG256 use the terminology 'investigation and compensation'.

General feedback on proposed updates

Application of Updated RG256

The FPA supports the remediation of consumers who have suffered loss as a result of misconduct and breaches of the law. This consumer right should apply to all participants of the financial services sector.

We note that Updated RG256 (paragraph 6) is intended for:

- “(a) Australian financial services (AFS) licensees, including limited AFS licence holders;
- (b) Australian credit licensees (credit licensees); and
- (c) retirement savings account (RSA) providers.”

We note the original Consultation Paper 335 included broader ‘trustees of regulated superannuation funds’ in the target for the updated RG 256, but was removed in Updated RG256. The current proposed wording only covering RSAs, of which are there only nine² of these funds in existence at the current time and not that popular given the evolution of the superannuation industry and other options available in the market place.

As a government mandated investment, there are over 20 million superannuation accounts owned in Australia, and hence it is essential that the consumer-focused remediation principals apply to this class of products. The table below shows the size of the superannuation industry and the number of individual superannuation accounts (excluding small superannuation funds and RSAs):

Type of fund	Total assets (\$ billion)	Number of accounts (June 2020)
Corporate	62	0.3 million
Industry	939	11.3 million
Retail	697	8.1 million
Public sector	789	3.5 million

Source: APRA Statistics – September quarter 2021 and APRA annual statistics for no. of accounts

The FPA recommends the Updated RG256 applies also to trustees of regulated superannuation funds (but not SMSFs), approved deposit funds and pooled superannuation trusts.

Scalability

The FPA supports the introduction of clear and flexible guidance that specifically permits the scalability of an investigation once initiated, as outlined in paragraphs 35 - 39 of Updated RG256.

The FPA recommends ASIC monitor licensees’ interpretation of this guidance to ensure:

- *investigations and compensation in relation to significant misconduct including conduct constituting gross negligence or serious fraud, as per s 912D(2) of the FSRC 2020 Act, are not being inappropriately scaled, and*

² <https://www.apra.gov.au/list-of-institutions-offering-retirement-savings-accounts>

- *licensees are confident about the ability to scale investigations and remediations, and do not unnecessarily over-engineer simple investigations and remediations that could and should be scaled to deliver efficient and effective consumer outcomes.*

Consistency with the Financial Sector Reform (Hayne Royal Commission Response) Act 2020

The FSRC 2020 Act received Royal Assent on 17 December 2020. Schedule 11 of this FSRC 2020 Act introduced a new legal framework for breach reporting, investigations, and consumer remediation for financial services licensees, which commenced on 1 October 2021. The new obligations include definitions, timeframes for conducting advice investigations, identifying and communicating with affected consumers, and compensation requirements, for example.

The FPA appreciates that ASIC proposes to extend the application of the obligations in RG256 to other financial services licensees and product providers who are not subject to the investigation and compensation provisions in the FSRC 2020 Act.

However, many of the requirements and definitions in RG256 do not appear to clearly fit under the new provisions in the primary legislation. The FPA is concerned that this may create a parallel set of investigation and compensation requirements for personal financial advice providers, which will only serve to confuse licensees and complicate remediation programs for consumers. This has the potential to drive up the cost and timeframes of personal advice remediations, while providing no additional compensation benefit for affected consumers.

The FPA recommends the related guidance from the Regulator clearly cite and integrate the obligations in the FSRC 2020 Act throughout the Updated RG256: Consumer remediation guidance, to help licensees understand and embed the new legal requirements in their business, rather than create a dual process that advice providers would need to comply with.

Remediation flexibility

The FPA acknowledges the expectation that ‘reasonable endeavours’ are to be taken to make remediation payments in the Updated RG256.

However, the requirement to pay a significant remediation bill over a 30-day period, as contained within the FSCR 2020 Act in relation to ‘reportable situations’ has the potential to bankrupt a small business, impacting its ability to pay the compensation owed. Depending on the type and severity of the breach related to the remediation, the continued operation of a small business could ensure compensation funds are available, benefiting affected consumers.

The FPA supports the rights of consumers to be remediated appropriately and in a timely manner. However, we recommend flexibility be given for the payment of compensation by small licensees, to be considered and approved by ASIC on a case-by-case basis where a licensee is obligated to meet the requirements of the FSCR 2020 Act.

A licensee who has gained ASIC approval as meeting the strict criteria would be required to make a written offer of compensation to affected clients within 30 days of the completion of the investigation (as per the timeframe in the FSRC 2020 Act) that includes the ASIC approved payment plan (see following example)

For example, a small financial planning licensee of five financial planners identified an administrative error that had been in place for a five-year period. The licensee fixed the error as soon as it was detected. As the investigation was inconclusive as to which clients were or were not affected, the licensee decided to remediate all 2,000 clients of the practice. The investigation found the maximum loss or damage any client suffered as a result of the administrative error was \$150. With compensation totalling \$300,000, the licensee agreed to remediate each client \$150 in three \$50 payments over consecutive months. The remediation payment plan was set out in the offer of compensation provided to each client within 30 days

of the completion of the investigation. The first payment was made via bank transfer within five days of providing the offer of compensation to clients.

Tiered approach to initiating remediation

The FPA agrees with the removal of the two-tiered model in the Updated RG256 to initiate remediation, offering simplicity and more clarity. This assists with the scalability of undertaking remediation and objectivity.

Product failures

The FPA welcomes the removal of the notion that it may not be appropriate to remediate product failures. This was contradictory to the intent of the Product Design and Distribution Obligations (DDO) in RG274. As recommended in our previous submission, consumers must have confidence when purchasing a financial product. We note the inclusion of references to both products and services throughout the Updated RG 256, which addresses this concern also. For example, paragraph 25.

Definition of misconduct or other failure

The FPA welcomes the updated terminology to provide greater clarity to define 'misconduct or other failure', covering a broad, non-exhaustive list of possible sources of misconduct or other failure, not just limited to 'reportable situations'.

However, we note the inclusion of industry codes of conduct in paragraph 26 of the Updated RG256.

Industry and professional codes play a vital role in setting and documenting consumers' standards and expectations specific to a financial services sub sector to complement obligations in the law and regulations in protecting consumers. In relation to financial advice, the large majority of personal advice providers are members of a professional or industry code, even though many of the codes are voluntary. Applying Regulator imposed remediation obligations to a voluntary code has the potential to alienate signatories to professional and industry codes, which will significantly undermine the consumer protection role such codes play in the regulatory environment.

Tying the remediation obligations in the law and industry codes of conduct together presents practical implementation issues. For example (but not limited to):

- If ASIC includes in RG256 a mandatory requirement to consider industry codes in remediation, it is natural to assume that there must be some regulatory oversight to ensure licensees are meeting this requirement. However, professional and industry bodies do not enforce or have the authority to enforce the law – this is the role and responsibility of the Regulator; and a Regulator does not have the legal authority to have oversight of an industry code. If the Regulatory Guidance obliged licensees to remediate affected consumers for loss or damage caused by a breach of an industry code of conduct, who would be responsible for monitoring compliance with the code to ensure that there were no breaches of the remediation requirements? To ensure there are no breaches of the remediation requirements in relation to an industry code, the same body would need to ensure that no breaches of the industry code were missed by the licensee.
- This in turn may impose the investigation requirements in the law on the code of conduct provisions. However, the investigation requirements in the law apply to licensees. Not all industry codes apply to the licensee that is subject to ASIC's oversight of the provisions in the law. For example, the FPA Code of Professional Practice applies to practitioner members of the FPA, who are individuals, not licensees.
- The contract binding industry participants to the industry code obligations is usually between the participant and the industry body, not the Regulator.

- Commonly industry and professional codes do not specifically provide for consumer compensation or redress. For example, sanctions for breaches of the FPA Code include that the member provides the services again at no cost or at reduced cost; and that the member provides an undertaking that may provide for corrective action or rectification of a matter or circumstance relating to the breach, including complying with the directions of the Conduct Review Commission within a reasonable period.
- As industry and professional codes are predominately voluntary, requiring licensees to consider codes in remediations will not be applied consistently across licensees as not all businesses or individuals are signatories to such codes.

While industry codes of conduct serve to codify and document consumers' standards and expectations at an industry sub sector level, it is the FPA's experience that where a breach of the FPA Code has caused consumer detriment it is commonly also a 'reportable situation' under the Corporations Act to which RG256 would likely apply. When a breach of the law is suspected, the investigation of the suspected breach is referred to the Regulator to action. Applying remediation obligations to industry codes may duplicate the investigative process and increase compliance and remediation costs in situations where consumers who have suffered detriment because of a breach of the law are already required to be remediated.

The FPA recommends the removal of reference to industry codes in paragraph 26 of the Updated RG256, or specific clarification provided that this is relevant for enforceable code provisions and legislated codes only.

In addition to the above, the FPA recommends the definition of "loss" align to that contained within section 912EB of FSRC 2020 Act, that the consumer has a "legally enforceable right to recover the loss or damage" be an expectation in the initiation of remediation. This would impact a number of paragraphs, including 21, 26 and 28 in the Updated RG256, as well as impact on beneficial assumptions.

Legally enforceable right

Section 912EB of the FSRC 2020 Act requires licensees to investigate and compensate consumers where "the affected client has a legally enforceable right to recover the loss or damage from the licensee".

It may be unclear to licensees when a consumer has a legally enforceable right to recover loss.

The FPA recommends ASIC include reference in the updated RG256 on what constitutes a consumer's 'legally enforceable right to recover loss', by reference to ASIC Information Sheet 259- Complying with the notify, investigate and remediate obligations.

Remediation review period

The FPA notes that the starting point for the remediation review period be "when they [the licensee] reasonably suspect the misconduct or other failure first caused loss to a consumer" (paragraph 70 of Updated RG256), as was contained in Consultation 335.

The FPA agrees with ASIC's statement that "If licensees have adequate systems and processes in place to identify misconduct or other failures promptly, the review period for any remediation should rarely exceed any record retention requirements, and licensees will not have to consider using assumptions to account for absent records." (Paragraph 71 of Updated RG256). Industry practices have changed to stamp out such misconduct and embrace the new regulatory requirements. Breach reporting and penalties have been significantly strengthened, as have ASIC's enforcement powers.

However, the FPA is concerned that the proposal that "...licensees should be able to determine, based on available information, of when they reasonably suspect the misconduct or other failure first caused loss to a consumer. This should always be a licensee's starting point for the remediation review period." (paragraph 70 of Updated RG256) requires the licensee 'look back' as far as possible, with no end date, with a view of 'finding' something that may not exist. In many cases, this may unnecessarily drive up the

cost of the remediation program with no benefit to the consumer, is against the principles of natural justice and procedural fairness, and may exceed the statutes of limitations for negligence within the law.

Significant complications have arisen in recent remediation programs when the look back period extended beyond the seven-year record keeping requirements. This has led to the need to use assumptions in the investigation and remediation process.

This proposal must balance a consumer's right to compensation and the principles of natural justice and procedural fairness. However, look back periods beyond the current seven years can result in issues with professional indemnity insurance time limitations, particularly if different licensees are involved in the investigation and the remediation requires negotiation on the liability of each party. As this proposal effectively removes the statute of limitations in relation to remediation, it may give rise to firms phoenixing themselves for the purpose of mitigating risk.

The FPA believes there may be merit and justification for a look back period to extend beyond the current seven-year period depending on the type, severity and scale of the 'misconduct or other failure'.

The FPA recommends further consultation and consideration be given to a scaled implementation of the starting point of the remediation review period. For example:

- 1. the relevant period for a remediation should begin on the date a licensee reasonably suspects the 'misconduct or other failure' first caused loss to a consumer, with a cap of a look back period of seven years,*
- 2. in the case of a 'reportable situation' that involves, or is suspected to involve, conduct constituting gross negligence or serious fraud, as per s 912D(2), the seven-year cap should not apply,*
- 3. the investigation must be against the advice standards in place at the time that 'reportable situation' or error occurred.*

The impact of this suggested proposal on PI insurance, current record keeping practices and regulatory requirements should be investigated through extensive and broad consultation to understand and address any issues this may create, including the need for a clear and appropriate transition.

Extensive consultation on the impact of this suggested scaled proposal on record keeping requirements is necessary given the 5-year penalty for breaching s912EC(1) of the FSRC 2020 Act, and the current record keeping requirements currently set at 5, 6 and 7 years in various Commonwealth laws.

Scoping assumptions

ASIC proposes that in determining which consumers should be included in the remediation (scoping assumptions), beneficial scoping assumptions should benefit consumers by preferencing inclusivity rather than exclusivity (i.e., the assumptions widen the net to capture more consumers rather than less).

Section 912EB(1)(c) of the FSRC 2020 Act requires licensees to investigate when:

- (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.

The FPA recommends ASIC's guidance on beneficial scoping assumptions should include the requirement in the FSRC 2020 Act to determine that the client has a legally enforceable right to

recover the loss or damage, which is in line with the recommendations to the definition of 'misconduct or failure' outlined earlier in the FPA's response.

A1Q2. PRACTICAL CHALLENGES ASSOCIATED WITH APPLYING UPDATED RG256

Timeliness of information for remediation calculations

As noted in our previous submission, a recurring issue highlighted by our FPA members is that of timeliness of receiving a response to requests for information from fund managers and product providers to enable the advice provider to determine the actual loss.

The FPA recommends ASIC consider guidance to require financial services providers to cooperate with remediation programs and investigations undertaken by other licensees, and provide timely responses to requests for information, particularly in relation to fund / product performance.

Interaction with other requirements

Product Design and Distribution Obligations (DDO)

The FPA notes the Product Design and Distribution Obligations (DDO) in RG274 in relation to consumer redress and compensation include the following:

RG 274.245 If a consumer suffers loss or damage due to an entity's breach of the design and distribution obligations in s994B, 994C, 994D, 994E(1) or (3), they can seek to recover that loss or damage in court by taking action against the entity.

RG 274.246 The court may award compensation for loss or damage.

RG 274.247 We can apply to the court seeking orders to redress, prevent or reduce the loss or damage suffered by non-party consumers when there has been a breach of the design and distribution obligations set out in s994B, 994C, 994D, or 994E(1) or (3) that has caused, or is likely to cause, non-party consumers to suffer loss or damage.

Note: Non-party consumers are persons who have not been a party to proceedings under the Corporations Act in relation to the contravening conduct: see s994P.

RG 274.248 When a consumer has suffered loss or damage—whether monetary or non-monetary or both—as a result of an entity's breach of the design and distribution obligations, we expect that the entity will remediate the consumer.

Note: See also Regulatory Guide 256 Client review and remediation conducted by advice licensees (RG 256), which sets out our guidance on client review and remediation.

It is currently unclear how RG256, RG274 and the requirements in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019, interact to provide clear and appropriate avenues and outcomes for consumer remediation and compensation against product provider failures.

The FPA recommends ASIC address the interaction between this Updated RG256 and the Product Design and Distribution Obligations more clearly.

ASIC's Financial Services and Credit Panel (FSCP)

The Financial Services and Credit Panel (FSCP), the single disciplinary body can impose sanctions on relevant providers found to have breached the Financial Planners and Advisers Code of Ethics, including sanctions include requiring the relevant provider to 'provide the services to the retail client again at no cost, or to reduce or waive fees', and 'require specified corrective action'. It also states: "Under s1324 of the Corporations Act, any person may recover damages for a contravention of the Corporations Act, including

a contravention of s921E through a breach of the Code” (paragraph 14). These requirements coupled with the requirements of the Updated RG256 create duplication and inconsistency and require clarification on what should apply when multiple requirements apply. This invertedly puts the industry at risk as too many requirements could fall into any category, with a fine line between when this is required, increasing further risk of breach of the requirements

The FPA recommends:

- *including in the Updated RG256, details of the interaction of the licensee remediation obligations, and the enforcement of the FASEA Code by the FSCP, or the rights of the consumer to recover damages for a contravention of s921E under s1324 of the Corporations Act.*

Timeframes

The current RG256 and Updated RG256 details interactions between investigations and remediation, and a licensee’s IDR processes and EDR scheme, including a requirement that complaints received through IDR and transferred to a remediation investigation must still meet the IDR timeframes.

Regulatory Guide 271: *Internal Dispute Resolution*, released July 2020, states that an ‘IDR response’ - a written communication from a financial firm to the complainant, informing them of the final outcome of their complaint at IDR (either confirmation of actions taken by the firm to fully resolve the complaint or reasons for rejection or partial rejection of the complaint) (RG 271.53) – must be provided to a complainant no later than 30 calendar days after receiving the complaint (RG 271.56).

In addition, the new requirements in sections 912EA and 912EB of the FSRC 2020 Act set detailed and specific timeframes for investigations and compensation, which are different to ASIC’s IDR timeframes. For example, s912EB of the FSRC 2020 Act requires that:

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

(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;

Under s912EB of the FSRC 2020 Act, a financial services licensee must conduct an investigation if there are reasonable grounds to believe that a ‘reportable situation’ has arisen and that the affected client has suffered or will likely suffer loss or damage as a result of the reportable situation. Civil penalties apply to a breach of this obligation, including a breach of the timeframes set in s912EB(5).

The FPA suggest consideration must be given to the appropriateness of applying IDR requirements and timeframes to consumer complaints that are also captured under the investigation and compensation requirements introduced by the FSRC 2020 Act.

The FPA recommends RG256 be updated:

- *in line with the new legislated requirements for investigations and compensation of ‘reportable situations’, and*
- *to provide guidance to licensees on the process for transferring any IDR complaints that are found to meet the new definition of a ‘reportable situation’, and the new investigations and compensation obligations in s912EA and s912EB of the FSRC 2020 Act, to the appropriate licensee remediation process or program. The guidance should be clear that such complaints must comply with the investigation and compensation requirements and timeframes in the FSRC 2020 Act, not the IDR timeframes.*

A2. FEEDBACK ON EXAMPLES

Generally, the examples demonstrate the practical application of the Updated RG256 and do not recommend fewer examples.

Specific comments are below:

Example No.	Titled feedback	FPA comments
2	Small scale remediation	<p>The interaction was only with one client, who went through the IDR process. The remaining impacted clients would be dealt with under the remediation process, not the IDR process, as the other clients hadn't complained. This contradicts the paragraphs immediately preceding the examples</p> <p>This example should include the expected timeframes to comply with the relevant requirements.</p> <p>Implications for the adequacy of monitoring and supervision arrangements should be mentioned.</p>
3	Investigating the underlying drivers of misconduct or other failures	Interaction with the breach reporting framework would be useful here, such as commentary that this investigation would also be required to determine if a reportable situation exists.

Additional useful examples:

- Determining the remediation review period (paragraphs 69-73)
- Remediation beyond record keeping requirements that relates to financial product advice (additional example to 10)
- Assumptions – including an example where whole client files are missing in relation to financial product advice
- 'Reasonable endeavours' to make remediation payments (paragraphs 177 – 184)