

11 February 2022

Ms Amanda Fairbain
Policy Lawyer
The Behavioural Research and Policy Unit
Australian Securities and Investments Commission (ASIC)

By email: remediation@asic.gov.au

Dear Ms Fairbain

Feedback on Consultation Paper 350 – Consumer remediation: Further consultation

Legal Aid NSW welcomes the opportunity to provide ASIC comments on Consultation Paper 350 *Consumer remediation: Further consultation*, and the proposed draft Regulatory Guide on consumer remediation (**draft Regulatory Guide**).

Legal Aid NSW generally supports the draft Regulatory Guide. We provide below some comments about how the draft Regulatory Guide could be improved in respect of:

1. the interaction between the remediation process and the internal dispute resolution (**IDR**) process
2. the need for remediation schemes to have systems in place to manage working with a consumer advocate or representative, and
3. the process for identifying affected consumers.

Interaction between the remediation process and IDR

Legal Aid NSW has observed the following issues when advising and advocating for consumers participating in remediation schemes:

- When a consumer or consumer advocate requests information from the financial service provider (**FSP**) that is the subject of a remediation scheme, there is inconsistency as to when the FSP will refer the consumer to the remediation scheme.
- When a consumer is referred to the remediation scheme by the FSP, limited information is provided to the consumer about what happens next.

- When a consumer has made an IDR complaint and then is referred to the scheme, limited information is provided to the consumer about what happens to their IDR complaint.
- When a consumer is referred to the scheme after making a request for documents or IDR complaint, there are some delays before the consumer or consumer advocate is contacted by the scheme.

The following case studies from our experience with a current remediation scheme illustrate the above issues.

Dan's story¹

Legal Aid NSW wrote to the FSP (the subject of the remediation scheme) requesting the recording of the sale of the policy to our client, Dan. We received a response that Dan was being referred to the remediation program.

Four weeks later, the remediation program advised us that Dan would receive a refund. This was the first and only contact that we had received from the remediation program.

This matter resolved favourably with Dan receiving a refund. Our solicitor said that the process "was a fairly good experience".

Martha's story

Legal Aid NSW wrote to the FSP (the subject of the remediation scheme) requesting documents and information about our client Martha's policies. The FSP would not accept our standard Legal Aid NSW authority and requested a copy of Martha's identification (**ID**). This delayed the matter by around three months as we attempted to obtain certified ID from Martha. There were significant barriers to obtaining certified ID as she lived in a rural area, and access to services were limited because of health restrictions.

After we provided the FSP the relevant ID, the FSP sent us a large volume of documents and phone recordings. The FSP did not mention the remediation program or refer Martha to the program.

Three months later, Legal Aid NSW requested that Martha's matter be referred to the remediation program. The FSP advised that it would do so and that the program would be in touch to discuss next steps.

Legal Aid NSW later received an email from the FSP advising that the FSP will provide a response within 45 days to our IDR complaint. It is unclear why the FSP sent this

¹ All case studies in this document have been de-identified.

email as we had requested that the matter be referred to the remediation program, rather than go through the FSP's IDR process. When we raised this issue, the matter was referred to the remediation scheme by the FSP.

Paragraphs 000.312 – 000.316 of the draft Regulatory Guide provide some guidance about the interaction between remediation, internal dispute resolution and the Australian Financial Complaints Authority (**AFCA**). Paragraph 000.313 notes that:

...where a complaint is made to a licensee about a matter that is within the scope of an existing or finalised remediation, the IDR requirements set out in RG 271 (including maximum IDR timeframes) apply to that matter. The inclusion of a complaint in the remediation does not exempt a licensee from its IDR obligations.

We submit that the guidance at Paragraphs 000.312 – 000.316 does not go far enough to address the issues raised in our comments above. It may be confusing for consumers and inefficient for FSPs and the remediation scheme if a remediation process and IDR process are run at the same time about the same issue.

Paragraph 000.313 should be expanded to clarify what should happen procedurally where a consumer with an IDR complaint is referred to the remediation scheme to address their complaint.

The draft Regulatory Guide should provide an example or case study to outline ASIC's expectations of how remediation, the IDR process and requests for information or documents interact.

The draft Regulatory Guide should also provide some guidance about when the FSP should notify the consumer about the existence of the scheme where the consumer has made an IDR complaint or requested documents, and what information should be provided to the consumer about the scheme. It should encourage FSPs to look for possible referrals to the remediation scheme via their IDR complaints channel. FSPs should not require a consumer to comply with onerous authority requirements if they are aware that the consumer's complaint is best dealt with by a referral to the remediation scheme.

Remediation schemes should be aware of the role of consumer advocates

We have received feedback from one remediation scheme that they are not aware of the role of consumer advocates, and that their processes are not set up to manage circumstances where a consumer is represented by an advocate.

Caroline's story

Legal Aid NSW wrote to a remediation scheme noting that we were representing Caroline in respect of her claim to the scheme. We did not receive a response from the scheme.

After more than a month, we contacted the scheme to ask for an update about the matter. The scheme advised us that they had been corresponding directly with Caroline, rather than us as her representative. The scheme said it was very uncommon to have a representative, and most consumers managed their own claims to the scheme.

The scheme has since directed correspondence to our office, however the template letters that are sent to us are often addressed to Caroline rather than us.

We submit that the draft Regulatory Guide should provide guidance that remediation schemes should:

- be aware of the role of consumer advocates or representatives
- have systems in place to allow for a consumer to choose to be represented, and for the representative to be automatically contacted rather than the consumer, and
- have systems in place to allow for correspondence to be addressed to the representative where appropriate, rather than the consumer.

Process for identifying affected consumers

Legal Aid NSW has advised clients who have been excluded from remediation schemes based on high level and rigid criteria. If our clients' individual circumstances had been considered, it is likely that they would have received a remedy from the remediation scheme.

The impact of being incorrectly excluded from a scheme can be significant for a consumer. In one case, the consumer was excluded from the scheme and the debt was sold to a debt collector. The debt collector commenced proceedings in the Local Court, which caused our client distress.

While we recognise that remediation schemes may need to rely on set criteria as one factor when identifying a class of affected consumers, it is critical that schemes are flexible enough to include a broad range of consumers who might be affected by a FSP's misconduct.

The draft Regulatory Guide notes at paragraph 000.68 that:

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.

We submit that the draft Regulatory Guide should provide specific guidance about how remediation schemes can ensure that they do “not let these consumers slip through the cracks.” For example, it should suggest what further factors remediation schemes could consider in addition to risk factors when identifying affected consumers. It should also suggest a process for resolving a consumer’s dispute where a consumer has been incorrectly excluded from the scheme, but the scheme is no longer operating, such as a referral back to the relevant FSP for an appropriate remedy.

Thank you again for the opportunity to provide feedback to this consultation. If you have any questions or would like to discuss this matter further, please contact [REDACTED], [REDACTED], [REDACTED] on [REDACTED] or at [REDACTED].

Yours sincerely

Monique Hitter
Acting Chief Executive Officer