

# ASIC CONSULTATION PAPER ON ADVICE REMEDIATION RELEASED

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Legal Briefings

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## OVERVIEW AND ESTABLISHMENT OF A REMEDIATION PROGRAM

ASIC has now released its awaited Consultation Paper on advice remediation which provides valuable guidance on ASIC's regulatory expectations.

This note does not purport to traverse the Consultation Paper exhaustively but rather provides a key point summary.

The Consultation Paper focusses on systemic issues arising from the provision of personal advice. A systemic issue is generally viewed as a problem affecting more than one client.

Not all systemic issues will require a remediation program, but loss to clients is a relevant factor.

Examples of systemic issues include misconduct by one adviser that may affect several clients.

Where a systemic issue only affects a small number of clients who have all complained, a remediation program may not be required.

A key thrust of the paper relates to the legal requirement imposed on advice providers to conduct their businesses, efficiently, honestly and fairly. This underpins ASIC's stance on the conduct of the remediation program and the resources expected of a licensee to carry out such an exercise.

## **Timeframe**

ASIC states that it expects licensees to adopt a time period for review which reflects the availability of relevant records for a minimum of 7 years but also states that it expects the review to go back further if the licensee has retained records for a longer period.

## **Compensation**

Again the compensation obligation is said to reside in the Corporations Act (section 912B, viz arrangements for compensating clients for loss resulting from breaches).

## **Regulatory issues**

Clearly whether the incidents giving rise to the exercise need to be breach reported is an important threshold issue – ASIC’s view is that systemic issues are likely to be required to be breach reported (see paragraph 68 and ASIC’s Regulatory Guide 78 relating to breach reporting (at page 8)).

ASIC may or may not play a role in the exercise. ASIC notes that this will depend on five factors being:

- the size of the program,
- the licensee’s past conduct and its response to the incidents,
- the nature of any misconduct. ASIC indicates elsewhere that it may provide feedback to, or direct licensees on, the appropriateness of the review,
- the licensee’s experience in remediation exercises; and
- ASIC’s available resources.

# **DETERMINING THE SCOPE OF A PROGRAM**

The link between clients who have potentially suffered loss and advisors who have advised them is a logical link recognised by ASIC (see paragraph 80, viz “An advice licensee will then need to assess which clients may have received advice from those advisors and may have suffered a loss”).

It is acknowledged (see paragraph 82) that a triage process may be considered to identify affected clients by a series of filters such as:

- complaints received,
- a review of a broad selection of advice provided (which indicates a sampling methodology), and
- identifying trends or risk factors – such as advice which generated higher commissions.

### **Ascertaining clients affected**

ASIC makes the point that the exercise cannot be restricted, understandably, to clients who have complained. Rather, the exercise must be aimed at identifying clients who are likely to have suffered loss.

The paper does not state comprehensively how potentially affected clients would be identified but the following observations in the paper provide some guidance.

- There will be a role for selection of clients by the licensee – (viz paragraph 54, “this is because many of the clients that have their advice reviewed as part of the program will have been selected by the advice licensee and will not have made a complaint about the potential misconduct”).
- Similarly, using sampling methodology is recognised, such as a sample review of advice given (viz paragraph 88).
- A proactive responsibility to positively identify affected clients is required by ASIC. This is said to flow from the previously mentioned obligation to act efficiently, honestly and fairly (viz paragraph 60, “complying with this obligation includes taking responsibility for the consequences of the licensee’s actions, such as by remediating clients who have suffered loss as a result of the actions of the licensee or its representatives”).

It is assumed that some testing of the determination of the affected client-base flows from the required scoping (see paragraph 77 viz ‘testing whether the scope is appropriate’).

### **Role of opt-in**

ASIC sees client engagement as playing a role when the scope of the advice problem is not clear (see paragraph 91).

This suggests the use of client engagement to clarify the scope rather than to narrow the scope per se. The example it gives is where the licensee cannot determine the class and size of clients affected, such as which clients actually were advised by a problematic adviser.

ASIC says: “We expect licensees to take reasonable steps to determine the group of clients that may have suffered loss as a result of misconduct. Inviting clients to participate in a review and remediation program should only be necessary in limited circumstances” (see paragraph 92).

ASIC does note that engaging with clients will be appropriate where additional information is needed from the client because the licensee’s records are incomplete (see paragraph 120).

### **Revising the scope of the program**

ASIC notes that it will be necessary for the program to be flexible enough to allow the licensee to check and revisit the original formulated scope of the exercise.

## **DESIGN AND IMPLEMENTATION OF THE PROGRAM**

ASIC notes that the design and implementation are shaped by several key principles, namely:

- consumer focussed approach,
- free of charge to clients,
- objective, unbiased and equitable (elsewhere ASIC notes that the remediation should be efficient and timely),
- commitment from senior management, and
- be operated efficiently, honestly and fairly.

### **Resources**

The obligation to have adequate resources to provide the relevant financial services (section 912A(1)(d)) is said to underpin the obligation to bring to bear appropriate resources to the exercise.

ASIC sets out its expectations on the resourcing side (paragraphs 107-111) which are unremarkable. What is particularly important is ASIC's expectation that there will be some level of independent oversight of the exercise (see paragraphs 132 onwards).

This is not seen as necessarily translating to the appointment of an independent expert. Rather an independent review could be provided by a sufficiently independent neutral person (eg a licensee's independent internal audit team).

ASIC does note several examples of when the appointment of an independent person may be appropriate, including in large exercises, in complex exercises, where it is undertaken as part of an enforceable undertaking, where the licensee does not have substantial experience in designing or implementing remediation programs, and where reporting to the public would be appropriate (see paragraph 138).

The activities of an independent reviewer are said to potentially include:

- assistance in the design and testing of the program,
- general oversight of the program and checking effectiveness, and
- reviewing a selection of advice to ensure assessments are being undertaken consistently and fairly.

## **Reviewing advice**

Again, the principles here are not remarkable. Importantly ASIC notes that priority should be given to reviewing clients who suffer from hardship or are nearing retirement.

ASIC notes that peer (or secondary) review of advice may be required in certain circumstances, including where:

- the advice involves complex investment strategies or unusual circumstances,
- a large number of clients, and

- the program is in its early stages in order to ensure consistency of review.

It further notes that if only a small number of reviewers are in place, managers/decision-makers should be involved in further reviewing the original review.

In addition, ASIC notes that advice should be reviewed by persons that meet the training and competence requirements to provide personal advice on the relevant type of advice in the relevant product area that is being reviewed (eg superannuation, insurance, investments).

ASIC has also stated that controls should be in place to ensure there are no conflicts of interest and there is no influence from the advisers who are the subject of the review on the reviewers and the decision makers.

### **Remediation/Compensation**

There is not a lot of detail provided about compensation. Issues which are not canvassed include:

- whether the compensation can be made directly to the client or be paid into the relevant investment vehicle (i.e. a client's superannuation fund),
- what interest component is appropriate, and
- when additional compensation is appropriate.

However, ASIC does make it clear that a review and remediation program operates alongside the advice licensee's dispute resolution obligations, rather than under external dispute resolution or internal dispute resolution (IDR). Including a complaint in a review and remediation program will not exempt a licensee from its IDR obligations, including the obligation to provide a client with a final response within 45 days.

## **CLIENT COMMUNICATION**

ASIC notes that impacted clients should be informed of the program and that they are included within its ambit. Communication at other intervals include when the client's advice has been reviewed and the results of the review.

Importantly, ASIC states that "as a guide, advice licensees should make a decision about whether to remediate an affected client within 90 days of notifying the client that they are within the scope of the program" (paragraph 116).

In addition to the initial communication, ASIC notes that clients should be informed of:

- the potential misconduct,
- the review and the relevant steps,
- what the review means for the client,
- the client's rights,
- a central contact point, and
- next steps.

In relation to the final communication, ASIC notes that clients should be informed of:

- the final decision,
- the reasons,
- factors taken into account,
- remediation details,
- rights to complain, and
- contact details should the client wish to discuss further.

There is much discussion about optimisation of the client communication to ensure clarity and effectiveness. This latter criterion may involve the licensee testing the effectiveness of the communication with experts.

### Governance requirements

ASIC sets out a few principles relating to governance. A key aspect is that the decision-maker or decision-makers should be a person/s holding a senior position within the licensee's business. Senior management should oversee the program and receive regular and direct reporting on the progress of the program.

## Reporting publicly

ASIC notes that licensees should consider whether it would be in the public interest to report publicly on the program and its processes.

ASIC:

- may make public statements in relation to a program, and
- will make a public statement where an enforceable undertaking is involved.

## Timeframe for client response

When licensees request a response from clients the timeframe should be prominently disclosed and as a minimum licensees should give clients 30 days to respond. Where the client does not respond within the specified timeframe, the licensee should make reasonable efforts to contact the client which may include:

- searching licensee records for other contact details, and
- searching publicly available information.

Where clients do not respond within the timeframe:

- clients should be given additional time,
- clients should not be excluded, and
- a process should exist for advice review even after the review is concluded.

# PROPOSED AMENDMENTS TO THE RECORD-KEEPING REQUIREMENTS

ASIC proposes to amend Class Order [14/923] to clarify that licensees must have access to records in the period during which they are required to be retained, even if the records are retained by another person and the person is no longer authorised by, or related to, the licensee. If this amendment is implemented, licensees will need to reconsider their arrangements with advisers, particularly where advisers move licensee and take client records with them.

## CONSULTATION PROCESS

The Consultation Paper sets out a series of points on which consultation is invited. In particular, comments are sought on:

- the likely compliance costs,
- the likely effect on competition,
- other impacts, and
- costs and benefits.

The process provides for comments to be sent by 26 February 2016.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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