

QoN 010-20 – Impact of ASIC look back reviews on industry response to regulatory risk

It seems that these lookback projects have gone back as far as 2008, and been assessed on the basis of standards that did not exist at that time. Does ASIC acknowledge that these circumstances heavily influence how the financial advice sector responds to regulatory risk?

Answer:

Current fee for no service remediations

Between 2013 and 2015 ASIC received breach reports from the banks and AMP on “fee for no service” misconduct. As a result, the reporting licensees were required to undertake a review and remediation program.

In addition to, and in light of, the breach reports from the banks and AMP on “fee for no service” misconduct, in 2015 and 2016 ASIC asked the banks and AMP to each conduct a review to assess whether there was any further “fee for no service” misconduct. This review is still ongoing with approximately \$882 million in compensation paid or offered as at 30 June 2020.

General principles in relation to remediation

ASIC’s current guidance relating to remediation is found in [Regulatory Guide 256: Client review and remediation conduct by advice licensees](#) (RG 256). This guidance is currently subject to consultation, including on the issue of how far back a remediation should go: see CP 335 *Consumer remediation: Update to RG 256* (CP 335).

All AFS licensees have an obligation to provide their financial services efficiently, honestly and fairly: s912A(1)(a) of the Corporations Act. Complying with this obligation includes taking responsibility for the consequences of a licensee’s actions if things go wrong when providing financial services and clients suffer loss or detriment. This includes remediating clients who have suffered loss or detriment as a result of misconduct or other compliance failure by a licensee or its current or former representatives (RG 256.13 – RG 256.14).

ASIC’s starting point is that where the misconduct or failure of a licensee has caused loss, then all affected consumers should be returned to the position they would otherwise have been in. The time it takes a licensee to identify and respond to their own misconduct or failures directly affects the age and complexity of a remediation. These are matters within the licensees’ control.

In CP 335 we are clarifying that that RG 256 applies to all financial services licensees, credit licensees and superannuation trustees and we are seeking feedback about whether our guidance in RG 256 should be revised so that the review period commences on the date a licensee reasonably suspects the failure first caused loss to a consumer. Currently RG 256, which was drafted primarily to apply to financial advice reviews, states that ASIC will *generally not expect* licensees to review advice going back more than seven years, although this will depend on the context and circumstances of the advice relationship.

If licensees have proper governance and risk management frameworks in place, then review periods for remediations should rarely exceed seven years. If a licensee’s poor systems and governance frameworks result in delays to the identification of failures, it may not be efficient, honest and fair to rely on the late identification to limit the scope of consumers in a remediation.

We do not expect licensees to assess and remediate conduct by reference to standards that did not exist at the time. This is a matter for the licensee to consider when turning their mind to whether a remediation is warranted.