ASIC

Australian Securities & Investments Commission

Review of the financial system external dispute resolution framework

Submission by the Australian Securities and Investments Commission

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Contents

Overview

1 Having a fair, efficient and effective dispute resolution framework is integral to ASIC's strategic priority of promoting consumer trust and confidence in the Australian financial services system.

2 In ASIC's view, mandating membership of an ASIC-approved EDR scheme was one of the most successful of the recommendations of the Wallis inquiry that preceded the implementation of the Financial services reforms in 2003. It has provided very large numbers of consumers and financial investors with access to justice and redress.

3 Australia's financial services dispute resolution framework is made up of two ASIC approved industry-based Ombudsman schemes, the Credit and Investments Ombudsman (CIO) and the Financial Services Ombudsman (FOS), and the statutory Superannuation Complaints Tribunal (SCT).

4 The dispute resolution framework has not been reviewed since the SCT commenced operations in 1994 and ASIC first obtained powers to approve industry-based schemes in 1999. As the sector has undergone significant changes in the intervening period, it is opportune to independently review its overall operation and effectiveness.

5 ASIC has played a key role in establishing and shaping the financial services dispute resolution system. In taking account of the strengths and weaknesses of the current framework, it is also timely to consider a preferred state for a sustainable dispute resolution framework that delivers good outcomes for current and future users.

6 In this submission, a reference to EDR is a reference to the two industry-based schemes the CIO and FOS. A reference to the 'dispute resolution framework' is a reference to the CIO, FOS and the SCT. The format of this submission follows the structure and headings of the Issues Paper.

7 ASIC welcomes the opportunity to contribute to this Review.

Retail participation in financial services

8 Retail financial products and services support the financial well-being of millions of Australians and their families. The dispute resolution framework exists to help consumers of these products and services when things go wrong.

9 Most financial products and services are a form of "credence good" meaning that their true value or utility to a consumer is not known or cannot be calculated at the point of purchase. For example, you generally won't know if your life insurance policy is "worth the money" until the time you seek to

make a claim and have it paid. In order to promote consumer confidence in such a market, access to remedies is of paramount importance. This is why EDR has been and remains a policy and operational priority for ASIC.

10 What follows is a snapshot of current retail financial services participation in Australia. This highlights the breadth of consumer participation and therefore the scope of matters that are covered by the EDR sector:

(a) 3.2 million households have a mortgage over their primary residence; [1]

(b) 24% of households have credit card debt; [2]

(c) $944 billion in deposits is held on behalf of the household sector;[3]

(d) 7% of Australians have a consumer lease or hire purchase agreement; [4]

(e) approximately $200 million per year is deducted via Centrelink's Centrepay system for the leasing of household goods; [5]

(f) 3.69 million insurance claims relating to personal general insurance policies (e.g. motor vehicle, household building and contents, consumer credit, travel and sickness) were lodged in 2015/16; [6]

(g) 13.9 million working age Australians have some life insurance; [7]

(h) superannuation assets totalled $2.1 trillion[8] with 14.8 million Australians having at least one superannuation account; [9]

(i) there are 577,236 self-managed superannuation funds (SMSFs), which represent 1.088 million members and hold 29.5% of total superannuation assets;[10] and

(j) 36% of Australians either directly or indirectly own shares and other listed securities.[11]

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[1] The University of Melbourne, The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 14, 2016, p. 59. 6 Australian Bureau of Statistics, Catalogue 3236.0 – Household and Family Projections, Australia, 2011 to 2036, March 2015, Table 1.1. See also RBA statistical table E07 Household Debt - Distribution (figures for September 2014).Note that this data is only collected every 4 years (HILDA).

[2] RBA statistical table E07 Household Debt - Distribution (figures for September 2014).

3 RBA, Statistical Tables, E1 Household and Business Balance Sheets, June 2015, released 25 September 2015.

4 ANZ, ANZ Survey of Adult Financial Literacy in Australia, 2015.

5 Credit Suisse, Risks in payday lending and goods rental, March 2015.

[6] See FOS Annual Review 2015-2016, p.117.

[7] Financial Services Inquiry, Financial Services Inquiry Interim Report, July 2014, p. 3-78. Australian Bureau of Statistics, Catalogue 3235.0 – Population by Age and Sex, Regions of Australia, 2013.

8 APRA, Quarterly Superannuation Performance, June 2016 (issued 23 August 2016). Accessible http://www.apra.gov.au/Super/Publications/Documents/2016QSP201606.pdf

[9] Australian Tax Office, https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/

[10] ATO, ibid.

11 Data is based on a study conducted in September to November 2014 of 6,409 adult Australians. Ownership figures do not take into account investment through superannuation funds. ASX Limited, The Australian Share Ownership Study, 2014, June 2015, http://www.asx.com.au/documents/resources/australian-share-ownership-study-2014.pdf, pp. 10-11.

A Principles guiding the review

Key points

We support the suggested principles and outcomes guiding this review.

These principles are similar to the statutory principles reflected in ASIC's EDR approval policy (RG 139) which include principles of independence, accessibility, efficiency, accountability and fairness.

We suggest the proposed principle of equity should explicitly include the concept of fairness.

We suggest that the Review also consider the role and range of agents that are increasingly representing consumers in dispute resolution as 'users' of dispute resolution.

Principles of financial services dispute resolution

11 In August 2016, the Government released the Terms of Reference for the the independent review into the financial system's external dispute resolution and complaints framework.[12] In September 2016 the independent panel (the Panel) conducting the review published an issues paper (the issues paper) which proposed that the review be guided by the following principles and outcomes:

(a) efficiency;

(b) equity;

(c) complexity;

(d) transparency;

(e) accountability;

(f) comparability of outcomes; and

(g) regulatory costs.

12 These are similar to the statutory matters that ASIC must take into account when considering whether to approve an external dispute resolution scheme, which are:

(a) accessibility;

(b) independence;

(c) fairness;

(d) accountability;

[12] http://kmo.ministers.treasury.gov.au/media-release/072-2016/

(e) efficiency;

(f) effectiveness; and

(g) any other matter ASIC considers relevant.[13]

13 These statutory requirements were based on the principles in the Benchmarks for industry-based customer dispute resolution schemes (DIST Benchmarks), first published by the then Department of Industry Science and Tourism in 1997.[14]

14 The Independence criteria provided the basis for some of the most important early reforms that ASIC made in the dispute resolution sector.

15 Pre-existing industry schemes were set up by, and to varying degrees remained under the operational and financial control of, the relevant sponsoring industry association. As a condition of becoming approved, ASIC required structural and operational separation of the dispute resolution schemes from their industry sponsors.

16 While these changes are now longstanding, real and perceived independence remains a key performance measure for each of the CIO, FOS and SCT.

17 We agree that the other common principles identified by the Panel remain important, and note that the principle of equity should explicitly include the concept of fairness and how that is in practice afforded to all users through scheme procedures and decisions. We will additionally focus in this submission on the other factors of complexity, comparability of outcomes and regulatory costs.

18 We note that in 2014, the Commonwealth Consumer Affairs Advisory Council (CCAAC) issued their final report on a public review of the DIST benchmarks. The review found strong and continuing support for the benchmarks among stakeholders, concluding that they "are an important set of standards for customer dispute resolution, and have achieved their original objectives. CCAAC is convinced of their ongoing relevance."[15]

Users of dispute resolution

19 The Issues Paper states that it considers the *primary users* (of dispute resolution) *to be consumers who make complaints and the financial service providers, including superannuation funds … that are the respondents to complaints.*[16]

[13] Corporations Regulations 7.6.02(3) and 7.9.77(3) and National Credit Regulation 10(3)
[14] The DIST benchmarks are set out in the Appendix on p.48 of this submission.
[15] Commonwealth Consumer Affairs Advisory Council Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes, Final report 2014, vii. http://ccaac.gov.au/files/2013/04/CCAAC_FINAL_Benchmarks_Report.pdf
[16] Issues paper, par 10.

20 ASIC agrees with this characterisation of the primary users of dispute resolution, but suggests that the Panel should also consider the role and range of agents who are representing consumers at the schemes to understand both what is driving their participation – and consumer demand for their services – and whether particular agents are assisting or hindering effective outcomes. This could also include consideration of whether there are real barriers to self-directed consumer participation in dispute resolution that need to be addressed.

B Internal dispute resolution

Key points

This section sets out the statutory requirements for internal dispute resolution (IDR) and ASIC's IDR policy in RG 165.

IDR is a firm's first opportunity to resolve consumer complaints and a mandatory first step a consumer must take before they go to external dispute resolution.

Complaints at IDR as reported under industry codes shows that many more complaints are made to IDR than are received and dealt with at EDR.

Many consumers try to lodge disputes at EDR before IDR.

It is a requirement of approved EDR schemes that they monitor member compliance with IDR timeframes and performance.

IDR also features in the systemic issues work of the approved schemes.

21 Australian financial services (AFS) licensees, unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees (credit licensees) and credit representatives are required to have in place a dispute resolution system that consists of:

(a) **internal dispute resolution (IDR)** procedures that meet the standards or requirements made or approved by ASIC, and cover complaints made by retail clients in connection with all financial services covered by the licence; and

(b) membership of one or more ASIC-approved **external dispute resolution (EDR)** schemes that cover complaints made by retail clients in connection with all financial services covered by the licence. This is not required if these complaints can be dealt with by the SCT.[17]

22 Within this framework, ASIC is responsible for:

(a) setting or approving standards for IDR procedures; and

(b) approving and overseeing the effective operation of EDR schemes.

23 ASIC's detailed guidance on the IDR requirements is set out in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165). This guide together with ASIC Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139) set out ASIC's dispute resolution requirements.[18]

[17] S912(A)(2)
[18] See s912A (2) and 1017G(2) of the *Corporations Act 2001* (Corporations Act) and s47 of the *National Consumer Credit Protection Act 2009* (National Credit Act) and National Consumer Credit Protection Regulations 2010 (National Credit Regulations. RG 139 is attached to this submission.

IDR requirements: ASIC policy

24 The key purpose of the IDR requirements is to ensure that financial services firms identify and respond to complaints in a timely, effective way. IDR is the mandatory first step a consumer must go through before they are able to access independent dispute resolution.

25 Firms own and control the IDR process. ASIC's guidance provides significant scope for firms to tailor their IDR procedures according to the size and nature of their business, the range of products or services on offer, the profile of their customer base and the likely volume or complexity of complaints they may receive. IDR also provides an opportunity to resolve complaints before incurring the direct costs of external dispute resolution.

26 Retail consumers who are not satisfied with the resolution of their complaint at IDR are able to pursue their complaint at the relevant EDR scheme, but only after a decision has been made or a relevant time-period has elapsed.

IDR time limits

27 In ASIC's view, timeliness in IDR is essential for effective complaints handling. For most complaints firms must give a 'final response' to the complainant within 45 days.[19] We consider that 'best practice' IDR procedures would result in most complaints being resolved in shorter timeframes than 45 days. This is reflected in the statistics reported under some industry codes of conduct. For example, under the:

(a) Code of Banking Practice: 93% of complaints were closed within 5 days;

(b) Customer Owned Banking Code of Practice: 64% of complaints were either resolved on the spot or within 5 days;

(c) Insurance Brokers Code of Practice: 41% of complaints were resolved on the spot or within 5 days; and

(d) General Insurance Code of Practice: subscribers are required to respond to complaints within 15 days where no further information or investigation is needed.[20]

28 A '*final response*' requires firms to write to the complainant within 45 days, informing them of:

(a) the final outcome of their complaint or dispute at IDR;

(b) their right to take their complaint or dispute to EDR; and

[19] Different timelines apply for certain credit disputes and to traditional services complaints. See RG 165, Figure 1.
[20] See Code Compliance Monitoring Report in FOS Annual Report 2015-2016, p. 112-114.

(c) the name and contact details of the relevant EDR scheme to which they can take their complaint or dispute.[21]

29 While ASIC's IDR guidance applies to superannuation funds, different time limits and access rules apply by virtue of the operation of s101 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and s19 of the *Superannuation (Resolution of Complaints) Act 1993* (SRC Act). An inquiry or complaint must be properly considered and dealt with within 90 days after it was made. The SCT does not have jurisdiction to deal with complaints lodged with it before having been lodged with the fund or retirement savings account (RSA) provider.

Volume of complaints at IDR

30 ASIC does not have the power to collect recurring data about financial services IDR. Firms are not required to report this information externally unless they are a member of a Code of Practice, under which they must annually report IDR statistics to the relevant Code Compliance Committee. This is the case for firms who subscribe to the:

- Code of Banking Practice;
- General Insurance Code of Practice;
- Customer Owned Banking Code of Practice; and
- Insurance Brokers Code of Practice.

31 Table 1 provides a summary of the numbers of complaints self-reported as being made to IDR in 2015-16 for the participating code subscribers.

Table 1: Complaints at IDR as reported under industry codes

Code	Number of complaints received at IDR	Code subscribers
Banking	1.2 million	13 banking groups
General insurance	21,719	158 code subscribers (50 general insurers and 108 Lloyds Australia cover holders and claims administrators)
Customer owned banking	16,709	76 institutions
Insurance brokers	1,023	324 insurance brokers

Source: Code Compliance Monitoring Report in FOS Annual Report 2015-2016, p. 112-114.

[21] See RG 165.91.

32 There is no public reporting of complaints dealt with by superannuation trustees at IDR.

Progression of complaints from IDR to CIO, FOS and SCT

33 The CIO, FOS and SCT all report annually on the disputes lodged with them. In the most recent annual reports, the financial services schemes dealt collectively with more than 40,000 retail disputes.[22]

Table 2: Complaints received and closed

Scheme	Complaints received	Complaints closed
CIO (2014-2015)	4,848 complaints received	4,979 complaints closed
FOS (2015-2016)	34,095 disputes received	32,871 disputes closed
SCT (2014-2015)	2,688 received	2903 disputes closed

Source: Most recently published Annual reports.

34 Whilst not directly comparable given the smaller population of firms captured as reporting to codes under Table 1, together Table 1–Table 2 provide an indication of the significantly greater number of complaints that are made to and dealt with at IDR. Complaints lodged at EDR are often referred to as the "*tip of the iceberg*" and, in an effectively operating framework, we would expect the vast majority of complaints to be resolved at the firm-level in IDR.

35 It is important to note, however, that not only is there no comprehensive public reporting about how many financial services related complaints are made at IDR, there is also no public reporting about how these matters are resolved and therefore how many complainants who had their complaint rejected at IDR actually go on to pursue a complaint at an external scheme.

36 Behavioural factors and barriers that may be relevant to why and whether or not consumers make complaints are considered in Part G of this submission.

37 The 2016 Australian Consumer Survey[23] (which reported on consumer access to remedies in consumer transactions (including financial services)) found that of those consumers who did not take steps to resolve a consumer problem:

- 32% reported that it was 'not worth the effort';

[22] We rely on data from the most recent annual reports published by the schemes. FOS 2015-2016 annual report is FOS's first report after the introduction of new scheme processes on 1 July 2015. For this reason, FOS most recent report cannot be directly compared against statistics from the 2014-15 report..

[23] EY Sweeney, *Australian Consumer Survey 2016*, The Treasury, on behalf of Consumer Affairs Australia and New Zealand, May 2016. http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf

- 31% reported that it was 'not worth the time';
- 30% reported that 'action won't solve the problem'; and
- 17% reported they did not have enough time.[24]

Complaints referred back to IDR from EDR

38 Data from each of the three schemes shows that significant numbers of consumers try to lodge disputes at EDR *before* they have been to or finalised their matter within their firm's IDR. Each of the CIO, FOS and SCT report this data slightly differently due to differences in scheme processes.

(a) In 2015-2016, the FOS received 34,095 disputes and 45.4% of these disputes were received by FOS before the firm had an opportunity to complete its IDR process;

(b) In 2014-2015, the CIO received 4,848 complaints, of which 30.6% of had not been through IDR; and

(c) In 2014-2015, the SCT received 2,688 written complaints and 25.4% were closed because the consumer had not been through IDR.[25]

39 While each scheme has different processes, in simple terms, if a consumer attempts to lodge a dispute without having gone to IDR:

(a) FOS will register the dispute and send it back to IDR; and

(b) CIO and SCT will refer the dispute back to IDR.

40 There is no research into what drives consumers to lodge directly with EDR. Potential reasons, which may vary across consumers and firms, include that:

(a) the complainant did not know they had to go directly to the firm first;

(b) the firm did not identify the complaint as a "complaint" and failed to direct it their IDR area;

(c) the firm did not respond to the consumer;

(d) the complainant did not want to go back to the firm they were in dispute with and wanted to go straight to, or fast track to, the "independent umpire"; or

(e) the firm's IDR processes or time limits were complex, confusing, frustrating or difficult to navigate and the complainant wanted to opt-out.

[24] EY Sweeney, p. 45.
[25] Figures taken from each of the most recent published annual reports. See http://www.austlii.edu.au/au/legis/cth/consol_act/soca1993464/s19.html

41 In order to understand why so many financial services complainants go to EDR before IDR, it would be necessary to augment anecdotal reports and case studies with a survey of a proportion of those complainants to understand why they did what they did. This would provide evidence necessary to understand the nature of the problem and inform an appropriate response. ASIC acknowledges that this current problem not only creates delays for consumers but also imposes direct additional costs on the schemes in registering, referring and/or closing these complaints.

Systemic issues and IDR

42 Under ASIC's policy settings, approved EDR schemes must monitor members' compliance with IDR timeframes.[26] Poor or ineffective IDR also features in the systemic issues work of the schemes (See Part C for more detail about systemic issues handling and reporting. Of the definite systemic issues resolved and reported to ASIC by the CIO and the FOS in 2015-2016, approximately 10% related to IDR. Issues included

(a) failing to recognise complaints or refusing to deal with complaints;

(b) failing to provide appropriate access to IDR or imposing barriers to IDR; and

(c) providing inaccurate information about time-frames or imposing additional steps in the process.

[26] RG 139.162

C Regulatory oversight of the EDR framework

Key points

This section sets out the statutory basis for ASIC's EDR approval power and the requirement to belong to an ASIC approved EDR scheme.

It also sets out the EDR scheme approval criteria in RG 139 and the changes made to the policy settings over time which include

- expanding scheme jurisdcition to cater to new members;
- replacing fixed monetary limit/s with a combination of monetary limit and compensation cap; and
- harmonising scheme procedures.

We cover ASIC's policy and operational oversight of the approved schemes and highlight the

- systemic issues role of the schemes in compensating consumers who may not have made an individual complaint and in lifting industry standards; and
- role of Independent Reviews in identifying and delivering improvments to the schemes.

EDR approval power

43 Under the Corporations Regulations and the National Credit Regulations, ASIC has the power to approve an EDR scheme, and to vary or revoke that scheme's approval.

44 ASIC's EDR approval policy is set out in RG 139. These requirements apply only to the approved EDR schemes: the FOS and the CIO. They do not apply to the SCT, whose jurisdiction; powers and procedures are set out under the SRC Act and related superannuation legislation.

'Licensing hook'

45 Membership of an ASIC approved EDR scheme is a licence condition for firms who wish to provide financial or credit services to retail clients.[27]

46 Authorised representatives of an Australian Financial Services Licensee (AFSL) are caught by the licensee's EDR membership and do not have a separate requirement to hold EDR membership.

47 The *National Consumer Credit Protection Act 2009* (National Credit Act) extended the EDR obligation to apply to credit representatives. This means that each credit representative must be a member of an ASIC-approved EDR scheme; in addition to the membership of the credit licensee they represent.[28]

48 Together, these requirements create a 'licensing hook' which:

(a) acts as a lever to increase the likelihood that firms belong to an EDR scheme and comply with its decisions; and

(b) gives ASIC the ability to take administrative action such as cancelling an Australian financial services licence (AFSL) or Australian credit licence (ACL) where a licensee fails to belong to an ASIC approved EDR scheme or commence a banning action in relation to a credit representative.

Key EDR scheme approval criteria: Regulatory Guide 139

49 In 1999 ASIC issued its first policy statement on how EDR schemes could obtain approval and, thereafter, how they maintained their approval. This became RG 139 which is structured around, and elaborates on, the principles mentioned in paragraph 12. Under this policy, ASIC introduced the following compulsory requirements for all approved EDR schemes:

(a) independent governance – that scheme boards must have an equal number of industry and consumer directors and an independent chair;

(b) that access to an approved schemes is free to consumers whose dispute falls within its jurisdiction;

(c) that scheme determinations are final and binding on members where the complainant accepts the determination (see below for further discussion);

(d) that approved schemes must collect and report dispute information to ASIC on at least a quarterly basis and that they report information publicly;

(e) that approved schemes must identify and address systemic issues and report systemic issues and serious misconduct to ASIC; and

(f) that approved schemes must commission independent reviews of the scheme's operations and performance at appropriate intervals (initially every three years, but more recently every 5 years – with capacity for ASIC to require more timely reviews if the need arises).

[28] (ss64 and 65, National Credit Act).

Reviewing scheme decisions

50 A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules.[29] EDR scheme decisions are binding on scheme members and on consumers and small businesses where they accept the decision of the scheme. Complainants retain their rights of private action where they do not accept a scheme decision, however, in practice they rarely take this step given the cost and time involved.

51 Binding members to scheme decisions brings finality to the dispute resolution process, and ensures that EDR remains a timely and cost effective alternative to the courts for all users. While EDR scheme decisions are generally not considered to be subject to judicial review, there are some review mechanisms that are available both within the schemes and through the courts. For example:

(a) Schemes can, on application, review and correct an error in the calculation of a loss, or consider further submissions from the parties on certain aspects of a dispute;

(b) RG 139 requires that an approved EDR scheme must provide a 'test case' procedure under which a member can commence legal proceedings where a complaint or dispute raises a novel point of law. Members bear the costs of these matters; and

(c) Schemes can also introduce additional review mechanisms on their own initiative. For example, the FOS allows a firm, industry body or consumer organisation to raise any significant concerns about the FOS approach to resolving a particular type of dispute, although this process does not revisit the original decision.[30]

52 In practice, scheme members and complainants have sought to challenge EDR scheme decisions in the courts. As courts have allowed and considered a number of these matters, there is a growing body of case law about the role, functions and powers of the EDR schemes. These appeals have generally related to how a scheme exercised its

(a) decision making powers in an individual dispute; or

(b) powers under its terms of reference, including its discretion to exclude a particular dispute (jurisdictional decision).

53 The litigation experience of the FOS (and predecessor schemes) has largely supported the scheme's exercise of its decision making role and powers

[29] See RG 139.217.
[30] See Section 19A of the FPS Operational Guidelines to the Terms of Reference,1 January 2015, p. 171.

including in relation to jurisdictional decisions. It has also confirmed the parameters within which FOS exercises its powers.[31]

54 ASIC's view is that establishing an additional and broad appeal mechanism for individual disputes would significantly increase the cost of the EDR schemes and the time taken to deal with complaints. This has the potential to undermine one of the principle objective of EDR which is to provide a low cost alternative to the courts, not to duplicate court processes and costs.

ASIC oversight of the EDR framework and schemes

55 ASIC's oversight of the EDR framework and the approved schemes has two key elements: policy oversight and operational oversight. These are discussed in turn below.

Changes to policy settings over time

56 ASIC oversees the policy framework under which the approved EDR schemes operate. Policy changes are subject to public consultation and final ASIC approval, and typically involve weighing competing stakeholder interests. The policy settings have changed over time reflecting law reform, market conditions and events, and public expectations of adequate dispute handling in a financial services sector that is itself rapidly changing. Some of the key changes to the policy settings since RG 139 was first published include:

(a) expanding scheme jurisdiction to cater for new members in response to law reform (for example, including. credit providers and intermediaries, margin lenders, traditional trustee companies and, most recently accountants);

(b) dealing with financial hardship applications;

(c) amending the definition of a complaint consistent with the updated Australian Standard on complaints handling (AS ISO 10002–2006);

(d) clarifying that scheme jurisdiction must be sufficient to deal with the vast majority of consumer complaints in the relevant industry or industries;

(e) replacing a fixed monetary limit/s with a combination of monetary limit and compensation cap;

(f) harmonising and indexing the compensation caps;

[31] See https://www.fos.org.au/custom/files/docs/corporate_governance_litigation_overview_legal_cases_involving_fos_and_its_predecessors.pdf

(g) harmonising EDR scheme procedures

(i) where a member ceases to carry on business;

(ii) in relation to circumstances where a scheme member may commence legal proceedings related to a complaint;

(iii) applying to the time limits for making complaints;

(iv) relating to scheme jurisdiction over complaints that have been dealt with in another forum; and

(v) for changes to scheme rules or terms of reference;

(h) limiting debt recovery legal proceedings by firms after a complaint has been lodged.

Key consultation processes relating to these changes include *Dispute resolution: Review of RG 139 and RG 165* (CP 102); *Review of EDR jurisdiction (debt recovery legal proceedings)* (CP 172) and *Small business lending complaints: Update to RG 139* (CP 190).

57 These policy reforms occurred alongside market events including product and advice failures resulting in uncompensated loss, the impact of the Global Financial Crisis which saw significant increases in consumer complaints and the continued experience of legal challenges by consumers and members.

58 This summary highlights not only the dynamic nature of retail financial services markets, but also the need for broad based EDR schemes to be able to respond promptly and effectively to ensure that consumers retain real access to remedies.

Operational oversight of EDR schemes

Board oversight

59 Approved schemes are independent companies limited by guarantee with their own independent governance arrangements as set out under their respective constitutions. The boards comprise an independent chair and equal numbers of consumer and industry directors. ASIC believes that the operational contribution of consumer representatives on scheme boards has been one of the particular strengths of the EDR sector.

60 Primary oversight of an approved EDR scheme, including that it meet and continue to meet approval requirements under RG 139, is the responsibility of the board. Scheme boards are also responsible for:

(a) appointment of key staff including Chief Ombudsman and other decision makers;

(b) ensuring independent decision-making by scheme staff and decision makers;

(c) managing and deliberating on effective consultation about any changes to the scheme's jurisdiction; and

(d) ensuring that the scheme has adequate resources to perform its functions (this includes monitoring how the scheme manages its caseload over time).

ASIC oversight

61 ASIC's operational oversight of the EDR schemes focuses on ensuring the schemes meet the approval criteria. That is, that they operate in accordance with the principles of independence, fairness, efficiency, effectiveness, accountability. ASIC's oversight does not extend to reviewing individual cases or scheme decisions or dealing with appeals from scheme decisions.

62 At an operational level, ASIC holds quarterly meetings with the approved schemes, and receives quarterly statistical and systemic issues reports. These reports are anonymised, however ASIC can, and does, use its statutory notice powers to obtain more information about specific reports or cases files where this is necessary. This information supports ASIC's regulatory efforts to help identify industry trends or potential red-flags across firms or industry sectors. ASIC staff across stakeholder and internal complaints teams will also liaise with scheme staff about particular matters on an as needs basis.

63 ASIC also meets regularly with the SCT, although there is no ongoing requirement that the Tribunal provide regular operational and disputes data to ASIC. Further information about the statutory reports that the SCT is required to make to ASIC is set out in paragraph 99 below.

64 ASIC also monitors and registers complaints made to ASIC by consumers and industry members about the schemes. The following tables summarise the number and types of complaints made to ASIC about the FOS and CIO going back to 2010.

65 Dissatisfaction with a scheme decision is typically the most common type of complaint made to ASIC and, while ASIC does not intervene in or review independent decision making of EDR schemes, the intelligence in these complaints can be a useful barometer of broader scheme performance, including about delays.

Table 3: Complaints to ASIC about FOS including top 3 reasons

Year	Decision	Delay	Jurisdiction/ TOR	Total
2010-2011	29	12	4	62
2011-2012	23	18	9	72
2012-2013	26	26	12	89
2013-2014	38	16	14	91
2014- 2015	39	8	16	104
2015-2016	34	9	11	100
TOTAL	N/A	N/A	N/A	518

Source: ASIC

Table 4: Complaints to ASIC about CIO (COSL) including top 3 reasons

Year	Decision	Delay	Process	Total
2010-2011	13	1	2	22
2011-2012	3	4	3	18
2012-2013	2	6	1	17
2013-2014	5	8	6	30
2014- 2015	4	7	2	25
2015-2016	3	3	3	14
TOTAL	N/A	N/A	N/A	126

Source: ASIC (CIO was previously named the Credit Ombudsman Service Ltd (COSL)

66 In addition to these complaints, ASIC Commissioners also directly receive correspondence in relation to the EDR schemes. This includes correspondence from Parliamentarians and Government. Between 2010 and 2016 ASIC received 61 pieces of such correspondence about EDR schemes.

Monitoring scheme membership

67 Ensuring that licensees meet their dispute resolution obligations by retaining scheme membership is another operational focus for ASIC. Failure to do so can leave consumers without access to remedies where they have suffered a loss.

68 Approved schemes must report to ASIC where a member (licensee or credit representative) withdraws from a scheme, switches between schemes or is expelled from membership of a scheme. In processing these notifications, ASIC may issue statutory notices on the schemes seeking further information, or take licensing action or update public registers.

69 Approved schemes must tell ASIC of any proposal to terminate a licensee or credit representative's membership of an EDR scheme and this is reflected in the constitutions of both schemes.[32]

70 FOS and CIO provide periodic notifications (timing is subject to each scheme's procedures) of Australian financial service licensees (AFS), Australian credit licensees (ACL) and credit representatives that are no longer members of the scheme. These notifications may include entities who have ceased membership because they no longer require membership (may have ceased holding a licence); have switched scheme, failed to pay their membership fees, or been expelled by the scheme for failure to comply with a scheme Constitution, TOR or Rules.

71 Administering these notifications includes licensing checks against ASIC's registers to identify if the entity still requires EDR membership. In some cases licensees renew their membership after contact from ASIC while in other cases, licensees or credit representatives may be referred to an ASIC delegate for administrative action (licence cancellation or banning orders).

72 Depending on the nature of any non-compliance, administering these processes will involve the following ASIC teams: licensing, misconduct and breach reporting, stakeholder teams (Financial Advisers, Deposit-takers, Creditors and Insurers and Investment Managers and Superannuation) and ASIC delegates.

73 In financial year 2015-16, ASIC received 2786 member notifications from CIO of which 343 related to licensees and 2443 to credit representatives

74 In 2015-2016, ASIC received 526 member notifications from FOS relating to both licensees and credit representatives.[33]

Independent Reviews

75 Independent and in-depth examination of the performance of EDR schemes is done by way of the Independent Review. Approved schemes must commission an independent review three years after initial approval and every five years thereafter, unless ASIC specifies a shorter timeframe.

[32] See RG 139.221 and the Part 3.13 of the FOS constitution and Part 33.2 of the CIO constitution.
[33] There are differences in how schemes make notifications to ASIC and in how ASIC captures and reports this data. For example, FOS may separately report a member expulsion and a member re-instatement which means the FOS figures may include multiple notifications in relation to some members.

76 Independent Reviews are transparent, public processes. ASIC approves the Terms of Reference of these reviews and the selection of the reviewer. Recommendations are public, and schemes also report publicly on their response to and implementation of review recommendations.

77 ASIC's experience is that the Independent Reviews have been extremely important in identifying and delivering real improvements to the schemes. These have included changes to scheme jurisdiction (which are subject to ASIC approval), and changes to scheme procedures and processes to better meet the needs of all scheme users.

> Note: Between 2001 and 2008, ASIC approved seven EDR schemes. Over the years, there have been a number of independent reviews including of the predecessor schemes (previously approved schemes that subsequently merged into the FOS). This includes the Independent Review of the Financial Industry Complaints Service (FICS) in 2002, the Independent review of the Banking and Financial services Ombudsman (BFSO) in 2004 and the Independent Review of the Credit Union Disputes Resolution Centre (CUDRC) in 2005. The first Independent Review of the merged FOS reported in March 2014. CIO had an Independent Review in 2011. In consultation with the CIO Board, ASIC has agreed to defer the 2016 Independent Review in light of this broader review of the framework.

Systemic issues

78 ASIC approved EDR schemes must identify, resolve and report on systemic issues and cases of serious misconduct. In RG 139, systemic issues are defined broadly as *relating to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute*.[34]

79 The systemic issues role of the schemes has proven to be a powerful and effective mechanism to compensate many thousands of consumers who may not otherwise have made an individual complaint to a scheme. It is one of the key reforms implemented by ASIC in its EDR approval role and also, for a time, one of the most contentious.

80 In 2015–16:

(a) FOS reported 58 systemic issues and 5 cases of serious misconduct to ASIC; and

(b) CIO reported 38 definite systemic issues and 6 cases of serious misconduct to ASIC.

81 The effect of systemic conduct (which by definition would be felt by more than one person) might include financial loss and loss of consumer confidence in the relevant financial service provider or intermediary, credit licensee or credit representative, or in the relevant financial or credit product or service.

[34] See RG139.119.

82 Approved schemes are required to identify potential systemic issues arising out of disputes and first raise these directly with licensees. Where a systemic issue is confirmed, the relevant licensee must work with the scheme to remedy the problem, which could include compensating consumers or refunding fees or money paid.

83 Not all matters will be confirmed as definite systemic issues. However, they may nevertheless result in other positive outcomes for licensees and consumers. For example, a systemic issues investigation may help a licensee identify training gaps or opportunities for improvements to processes or consumer communications.

84 Under ASIC's current policy settings, systemic issues reports are anonymous. Schemes will generally only identify the licensee where there is non-compliance or in cases of serious misconduct. ASIC must issue statutory notices for further information from the schemes.

85 Serious misconduct may involve fraudulent conduct, grossly negligent or inefficient conduct, or wilful or flagrant breaches of relevant laws. In practice, the majority of serious misconduct reports to ASIC have been about non-compliance with scheme decisions (mainly where the member is insolvent or unable to pay a scheme determination) or scheme decision making processes including non-compliance with systemic issues investigations.

86 ASIC assesses these reports and, where appropriate, uses the information to inform current or new investigations.

87 In 2015-2016, the FOS reported on the following systemic outcomes:

(a) monetary refunds following direct FOS involvement (or in some cases the issues identified from FOS disputes may have already been remediated by the firm or been subject to ASIC involvement) – more than $12.75 million;

(b) credit listings – more than 4,500 amended or removed;

(c) declined claims reconsidered by an insurer following concerns about reliance on incorrect policy wording;

(d) client investment portfolios reviewed to ensure that authorised representatives gave advice in accordance with obligations under the Corporations Act 2001; and

(e) improvements to online banking processes and platforms.[35]

88 In 2014 – 2015, the CIO reported on the following systemic issues outcomes:

[35] See FOS Annual Review 2015-2016, p, 107.

(a) Refunds of approximately $400,000 for consumers for fees and charges paid as a result of poor compliance with the responsible lending obligations;

(b) Identifying and requiring an FSP to remedy poor, multi-stage IDR processes which meant consumers were not receiving an IDR response within 45 days.[36]

Systemic approach and role in improving industry standards

89 EDR schemes can be uniquely placed to identify opportunities to improve standards within an individual firm or across an industry sector. This includes, for example identifying and referring potential code breaches to code administration bodies and addressing conduct issues that may not meet the threshold for a statutory breach.

90 Schemes also provide a range of 'ancillary services' to their members which support efforts to improve conduct and industry practice amongst members. This includes

(a) direct and active engagement with members on how a scheme will interpret or apply the law and principles of fairness to different types of disputes;

(b) training and support to members on how to improve IDR processes;

(c) support for new members through the EDR process; and

(d) Identifying gaps in the law or opportunities to improve industry codes of practice and thereby contributing to the development of law reform and public policy in financial services.

Superannuation Complaints Tribunal

91 The SCT is an independent statutory tribunal, established under the SRC Act. Commencing operations in 1994, the SCT pre-dated the co-regulatory framework for the industry based schemes. The SCT is not subject to ASIC's approval and so RG 139 does not apply to it.

Jurisdiction and time limits

92 As a statutory tribunal the SCT's jurisdiction, powers and time limits are set in statute. The Corporations Act dispute resolution requirements carve out complaints that may be dealt with by the SCT. This means that where the SCT can deal with *all* retail client complaints about the financial products

[36] See CIO Annual report on operations, p.69.

and services a licensee provides, there is no need to join an ASIC-approved EDR scheme.[37]

93 However, if the SCT cannot deal with complaints about all the financial products and services a licensee provides, they must also belong to an ASIC-approved EDR scheme that can deal with those complaints that fall outside the SCT's jurisdiction.

94 There are strict statutory time limits for certain complaints to the SCT including complaints about a total and permanent disability (TPD) benefit or the distribution of a death benefit. The approved EDR schemes have 'exceptional circumstances' discretions in how they apply their time limits.[38]

95 Other reasons a complaint may fall out of the SCT's jurisdiction or be withdrawn by the Tribunal, include where the complaint "relates to the management of a fund as a whole,"[39] where the Tribunal thinks that a complaint is 'misconceived' or 'lacking in substance' or is vexatious, or in circumstances where the Tribunal has already dealt with a previous complaint with the same subject matter.[40]

Statutory appointments and funding

96 The Chair person and Deputy Chairperson are appointed by the Governor-General and remaining SCT members are appointed by the Minister. The chairperson is the executive officer of the Tribunal and is responsible for the overall operation and administration of the Tribunal's powers and functions in accordance with its statutory objectives.

97 The SCT's budget is cost recovered from the regulated superannuation industry via the annual financial sector levies administered by the Australian Prudential Regulation Authority (APRA). In accordance with subsection 62(2) of the SRC Act, ASIC, on behalf of the SCT, manages the SCT's finances within the designated appropriation, consistent with the *Public Governance and Accountability Act 2013.* [41]

98 The Government announced additional funding for the SCT of $5.2 million in April 2016.[42]

[37] See s912A(2)(b)(ii) and 1017G(2)(b)(ii), Corporations Act
[38] See FOS TOR 7.5 and CIO Rule 35.1.
[39] See s14(3)(4) and s14(6) of the SRC Act.
[40] See s22(3)(b) and s22(3)(d).
[41] These arrangements are set out in Issues Paper, p.35.
42 See to ss 64, 64A, 65 and 31(2) of the SRC Act.

Reporting and Appeals

99 Under the SRC Act, the Tribunal is legislatively required to report to ASIC and/or APRA on certain issues arising from complaints. Over the past ten years, the SCT has made 69 statutory reports to ASIC.[43] These reports related to issues such as:

(a) trustee compliance with superannuation choice obligations; and

(b) trustee non-compliance with requirements to provide written reasons for decisions.

100 A party can appeal a Tribunal determination to the Federal Court of Australia (FCA) on a question of law.[44] Over the past ten years, there have been 88 appeals to the FCA, 69 of which have been appeals of Tribunal determinations.[45]

[43] SCT Annual Reports from 2005-6 to 2014-15.
[44] S 46 of the SRC Act.
[45] SCT Annual Reports from 2005-6 to 2014-15.

D Existing EDR schemes and complaints arrangements

Key points

In this section we set out the strengths of the current framework including fundamental principles that the schemes and SCT

- are free to consumers to access;
- promote fairness in decision making; and
- ensure independent decision making.

The strengths of the co-regulatory model of EDR include

- the ability of scheme jurisdictions to evolve and expand over time, including in response to law reform, market and policy reform;
- identification and resolution of systemic issues;
- requirment to commission Independent reviews of scheme operations;
- goverance model with both industry and consumer representation.

We identify limitations in the overall framework that warrant further consideration including a lack of comparability of outcomes; duplication and inefficiency; and adequacy of coverage for small business.

Other relevant factors for this review include the transparency and adequacy of funding; timeliness; regulatory costs and monetary limits.

Strengths of the current framework

101 ASIC has more than 16 years direct oversight experience of the current and predecessor EDR schemes. Both the approved EDR schemes and the statutory SCT operate in accordance with fundamental principles which remain relevant and have supported the effective resolution of consumer disputes over time. These principles include that the schemes and SCT:

(a) are free to consumers to access;

(b) promote fairness in decision making; and

(c) ensure independent decision making.

Strengths of the co-regulatory model of EDR

102 ASIC considers the particular strengths of the current co-regulatory model of EDR to be the:

(a) effectiveness of the 'licensing hook' to require firms to join EDR and to continue to comply with scheme decisions and requirements including paying membership fees;

(b) responsiveness of the schemes in taking on new members as a result of law reform or entry of new product and service providers;

(c) ability of scheme jurisdictions to evolve and expand over time including as a consequence of law reform;

(d) ability of the schemes to adjust their resourcing in response to increases in the volume of disputes received;

(e) a decision making approach with includes having regard to the law, relevant industry codes or standards, good industry practice and what is fair in all the circumstances;

(f) publication of dispute information about scheme members which can help consumers choose which firm they deal with on the basis of the number of disputes they receive and resolve;

(g) public guidance on how a scheme will approach particular types of disputes or fact scenarios to guide industry on good practice and make decision making more predictable;

(h) that decisions are binding on members if accepted by a consumer;

(i) identification and resolution of systemic issues which can compensate many more consumers after a single complaint;

(j) role in lifting industry standards by incorporating the standards in industry based codes of conduct into assessment of disputes and resolution of systemic issues;

(k) processes which support the parties to achieve quick, earlier resolutions of disputes;

(l) no risk of a costs order against a consumer where their complaint is unsuccessful;

(m) requirement to commission Independent Reviews of scheme operations and performance at appropriate intervals; and

(n) governance model which provides for both industry and consumer representation which ensures a diversity of perspectives on scheme boards.

Limitations of the current framework

103 In ASIC's view, the key limitations of the overall framework that warrant further consideration include

(a) comparability of outcomes;

(b) duplication and inefficiency; and

(c) adequacy of coverage for small businesses (see 174-176).

Comparability of outcomes

104 A key limitation of the current framework with multiple EDR schemes and the SCT, each with different underlying process and decision making models, is the difficulty in being able to effectively compare user outcomes.

105 In particular, as all schemes increasingly work to resolve disputes more quickly by agreement or conciliation between the parties, it can be difficult to ensure consistency or compare actual consumer outcomes and approaches to decisions. This is not to say that it is not in the individual complainant or firm's interests to resolve a dispute as soon as possible.

106 Under RG 139, approved schemes must publish information about complaints and disputes received and closed, with an indication of the outcome, against each scheme member in their annual report.[46]

107 There are differences in how the two EDR schemes report this data which limits the comparisons that can be made. The FOS reports data online and in a searchable format in comparative tables which include an indication of what stage in the process a complaint resolves while the CIO report and publish this data in their annual report.[47]

108 The SCT reports on the number of written complaints received relating to each fund type, the SCT does not report on outcomes against an individual trustee or insurer.

109 It is difficult to make a material comparison of the fairness of an outcome for the same type of dispute between the schemes where different processes apply. The Independent Review remains the key mechanism for qualitatively assessing how a scheme is operating (e.g. by directly assessing case management systems and consumer outcomes through actual file reviews).

110 Absent independent reviews, there is limited opportunity for qualitative assessment or comparison by ASIC to ensure the consistent treatment of consumers with the same type of complaint within a multi-scheme framework.

111 In ASIC's view, quality assurance processes are particularly important in the context of early resolution of complaints. We note the comments of one independent reviewer on the need for schemes to balance often competing objectives including efficiency and the quality of outcomes:

> EDR schemes are all about balancing objectives. At the highest levels, they must balance the interests of members, of individual consumers and the public interest …

[46] See RG139.152
[47] See FOS Comparative Tables

These include the care taken to ensure that a complaint is not too narrowly construed and is not prematurely closed, the care taken to ensure that a settlement offer is fair and the willingness to properly investigate complaints where shuttle negotiation is not producing results.[48]

112 It is a policy requirement that approved EDR schemes publish final scheme decisions. The SCT also publishes all determinations. Table 5 shows the number of complaints resolved between the parties by each of the two approved schemes and the SCT and the number of final decisions published by each of the CIO, FOS and SCT in their last reporting year. While published decisions turn on the facts of each individual complaint, they do provide some insight into how decisions are made, along with scheme guidance about how they approach specific matters.

Table 5: Complaints resolved between the parties and published decisions at CIO, FOS and SCT

Scheme	Resolved between the parties	Written decisions
CIO (2014-2015)	2,351 complaints were resolved by agreement between the parties. This represents 69.6% of complaints which were within jurisdiction (not discontinued).	CIO published 12 determinations and 6 recommendations.
FOS (2015-16)	20,110 (61%) complaints resolved by agreement between parties. Of these 51% were resolved by the FSP; 8% through negotiation; 2% at conciliation). 16% were resolved by FOS decision or assessment	FOS published 2,359 determinations
SCT (2014-2015)	695 complaints withdrawn by the complainant with resolution	286 resolved by the Tribunal at review

Source: Annual Reviews. See page 57 of FOS 2015-2016 Annual Review. FOS provided the figures for the number of FOS determinations. CIO figures published on CIO website.

Duplication and inefficiency

113 Another limitation of the current multi-scheme framework is the inherent duplication involved, which imposes direct costs on industry members. These costs are incurred because of the duplication of:

(a) governance arrangements comprising separate boards;

(b) case management systems and support infrastructure;

(c) administration of multiple sets of terms of reference and rules;

(d) administration and regulatory reporting arrangements for licensees and representatives including members switching schemes;

[48] the navigator company – COSL Review – Final Report (2012), p.15 http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf

(e) membership services, stakeholder management, communication and consumer engagement;

(f) statistical, systemic issues and serious misconduct processes and reporting requirements; and

(g) independent reviews.

114 It will be up to the Panel to consider whether the benefits of maintaining multiple schemes outweigh these costs now and into the future.

Other relevant factors

115 In the following paragraphs we discuss a number of other factors that ASIC believes the Panel should consider in this review. These include:

(a) transparency and adequacy of funding;

(b) timeliness of scheme decision making;

(c) regulatory costs; and

(d) monetary limits.

Transparency and adequacy of funding

116 The industry based schemes are funded through a mix of membership and case fees which are set by each scheme's independent board. Detailed costings and fee structures are not reported to, or reviewed by ASIC. Fee structures clearly play an important role in ensuring schemes have adequate resources to carry out their business and also can be used to incentivise early resolution and/or 'reward' good behaviour by members.

117 The SCT's funding is by Federal Government appropriation and levied against regulated superannuation entities. The SCT's funding is not appropriated against any forecasting of the number of disputes. The Government announced additional funding for the SCT of $5.2 million in April 2016.[49]

118 By way of comparison, in the UK the Financial Ombudsman Service publicly consults on its budget and the budget is subject to approval by the financial services regulator.

Timeliness of scheme decision making

119 Timeliness is a key measure of the efficiency and effectiveness of dispute resolution and it can also be a key indicator of funding adequacy. Delays

49 See to s64, 64A, 65 and 31(2) of the SRC Act.

affect confidence in the schemes and potentially the ability to achieve just outcomes. Concern about timeliness in complaints handling is the second most common issue raised with ASIC about the performance of the schemes.

120 The Productivity Commission (PC) in their Report on *Access to Justice Arrangements* observed that "while ombudsmen appear to resolve matters quickly, there is less evidence to support the notion that tribunals offer timely resolution of disputes."[50]

121 The PC went on to consider the impact of delays in the justice system on users and found that delays can undermine the ability for just outcomes to be achieved because people may avoid acting on legal problems; and parties may be forced to settle or withdraw.[51]

122 Timeliness in complaints handling and delays caused by dispute backlogs has also been a focus in Independent Reviews of the industry based schemes. For example, the Terms of Reference for the last Independent Review of FOS prioritised a review of FOS's efforts to ensure the efficient and timely dealing of disputes given the significant increase in dispute volumes."[52] The 2013 Independent Reviewer subsequently found that FOS met all the benchmarks for industry based EDR schemes, except for timeliness.

123 Responding to the recommendations of the Independent Review, the FOS board initiated a significant consultation process and investment in changes to the FOS jurisdiction, case management and dispute processes. FOS reports that it has since eliminated its dispute backlog and significantly improved the timeliness of complaints handling across its business.[53]

124 FOS reported that in 2015-2016, their new dispute process enabled FOS to reduce the average time taken to close disputes from 95 days in the previous year to 62 days.[54]

125 Delays and dispute backlogs have also been an issue at the SCT. Over the ten year period to 2014-15, the SCT reported 72 formal enquiries from the Commonwealth Ombudsman. Most of these formal enquiries related to undue delays in complaints handing. The SCT currently advises complainants that

> If your complaint cannot be resolved before review, you can expect that a complaint received at the Tribunal today will take at least 12 months to get

[50] PC report Access to Justice, p.113.
[51] See PC pp.127-128.
[52] See Cameron Ralph Navigator, 2013, Independent Review, p.149.
[53] See FOS 2015-2016 Annual Review.
[54] See FOS 2015-2016 Annual Review, p. 9.

to review, at which time the Tribunal will make a formal decision in relation to the complaint. The Tribunal is working to reduce this period.[55]

Regulatory costs

126 We have described ASIC's oversight role in relation to the overall policy settings and each of the approved schemes (56 - 58 above). Having multiple EDR schemes creates additional regulatory costs in relation to:

(a) Duplication in the ongoing oversight of two schemes' statistical and systemic issues reporting and processes;

(b) Approval and oversight of changes to two sets of Terms of Reference (TOR) / Rules;

(c) Oversight of two independent reviews;

(d) Managing the risks of regulatory arbitrage in the two-scheme environment; and

(e) Overseeing the movement of members between schemes which requires scheme notification to ASIC and changes to ASIC registers.

127 On the last point, most financial firms (excluding superannuation trustees) can choose which of the two approved EDR schemes to join. The CIO and FOS operate under a Memorandum of Understanding for the exchange of information about members, especially where members apply to move from one scheme to another. The primary purpose of this is to minimise risks to consumers including non-compliance with decisions and gaps in access to EDR.

128 From time to time, risks have emerged in these arrangements where a licensee has held dual membership of the two schemes. This reduces the effectiveness of the licensing hook as a mechanism to ensure a firm belongs to EDR and complies with scheme decisions and procedures.

Monetary limits and compensation caps

129 Monetary limits and compensation caps create thresholds to a scheme's jurisdiction.

130 The overarching monetary limit of $500,000 that applies to FOS and CIO is based on the value of the retail client test under s761G of the Corporations Act.[56] The monetary limit sets a ceiling on the value of a claim that can be made to an approved EDR scheme.

[55] http://www.sct.gov.au/faqs/frequently-asked-questions
[56] See CA s761G 7 (a) and Regulation 7.1.19(2).

131 The compensation cap sets a ceiling on the amount of compensation that an approved scheme can award. The compensation cap is intended to be consistent with *the nature, extent and value of consumer transactions in the relevant industry.* Currently, a compensation cap of $309,000 applies to all claims except for those about:

(a) general insurance brokers ($166,000);

(b) income stream risk, including advice ($8,300 per month); and

(c) third party claim on motor vehicle insurance policies ($5,000)

132 Efforts to increase monetary limits (and compensation caps) have always been controversial. They involve a series of trade-offs, including consideration of:

(a) the current statutory definitions that prescribe who must be able to access an EDR scheme;

(b) current views and evidence about what constitutes a "consumer" and "small business" transaction in practice; and

(c) the impact that payment of a determination may have on smaller licensees relying on professional indemnity insurance versus a prudentially regulated institution that can self-insure.

133 In 2008, ASIC led a substantial consultation process to increase and harmonise the monetary limits for ASIC approved EDR schemes.

134 The outcome of this process was the harmonisation of monetary limits and introduction of compensation caps and the indexation of those caps every three years.[57] These changes addressed inconsistencies in monetary limits that had grown over time across the predecessor schemes.

135 In 2014, the FOS consulted on the adequacy of its monetary limits and compensation caps.[58] FOS noted that the current jurisdictional limit of $500,000 was linked to the retail client definition and had not increased since it was introduced in 2002.

136 Most submissions to the FOS consultation did not support change to the monetary limit or compensation cap (the latter of which is already subject to indexation). Submissions that did support an increase did so on the basis that the monetary limit had not increased for a long period of time.

137 FOS observed at that time there was a lack of evidence to suggest that the current retail client threshold - to which the monetary limits of the approved

[57] See ASIC Report 156: Report on submissions to CP 102 Dispute resolution – review of RG 139 and RG 165.
[58] Recommendation 6 from the Senate Economics References Committee Inquiry into the performance of ASIC related to FOS' compensation caps and jurisdictional limit. See http://fos.org.au/custom/files/docs/terms-of-reference-issues-for-consideration-july-2014.pdf

EDR schemes are linked - was operating to exclude a class of retail clients from accessing EDR.

138 In the absence of a broader review of the retail client threshold, the FOS Board determined that they would not proceed with any change to their jurisdiction to increase the monetary limits or compensation caps beyond the existing indexation of the caps.

139 Ensuring monetary limits and compensation caps are set at an appropriate level remain an important issue for policy makers and scheme stakeholders due to increases in superannuation balances, funds under advice, the value of an insured life in life insurance disputes, increases in the size of mortgages and increasing expectations about access to EDR.

140 In comparison, the SCT has no monetary limit (including for disputes about life insurance income stream products). This has implications for equal access to dispute resolution about life insurance inside and outside of super.

141 One measure of the adequacy of monetary limits is the number of disputes that are excluded by the schemes on this basis. This information is reported to ASIC on a quarterly basis and by the schemes in their Annual Report.

142 In 2014/15 there were 565 disputes at the CIO that could not be considered as they were outside of jurisdiction (OJ). This represented 11.4% of all complaints which were closed. Three complaints or 0.1% of complaints closed at the CIO as out of jurisdiction related to complaints in excess of the scheme's monetary limits.[59]

143 In 2015/16 there were 5,692 disputes at the FOS which were classified as Outside Terms of Reference (OTR). This represents a proportion of 17% of all disputes closed. Seventy nine disputes or 1% of matters were closed because the claim exceed the scheme's monetary limits, five disputes (less than 1% of small business disputes) were closed where the credit facility exceeds $2 million and three disputes were closed because the complainant was not a retail client.[60]

> There may be some complainants who do not purse a complaint because they are aware that the value of their claim is above the monetary limits of the scheme. These complaints would not be reflected in the statistics reported above.

144 We also note that firms can agree to waive monetary limits, and this has happened recently in the context of firm remediation programs which involve referral to EDR.

[59] CIO Annual Report on Operations 2014 -2015, p, 55.
[60] FOS 2015-16 Annual Report, p.58. FOS note that some disputes may have more than one OTR reason.

E Gaps and overlaps in existing EDR schemes and complaints arrangements

Key points

The jurisdiction of a dispute resolution body is defined by reference to the

- types of complainants that can access it;
- types of complaints it can deal with; and
- monetary limits that apply.

In this section, we cover gaps in the framework and areas of overlapping jurisdiction between the CIO, FOS and the SCT. The main areas of overlap relate to credit, life insurance and financial advice.

Jurisdiction

145 An approved EDR scheme's jurisdiction is essentially defined having regard to the

(a) types of complainants that can access the scheme;

(b) types of complaints or disputes that the scheme can deal with; and

(c) the scheme's monetary limit/s.

146 The minimum jurisdiction for the ASIC approved EDR schemes is set out in the Corporations Act and ASIC policy. This includes being able to deal with complaints from 'retail clients' as defined in s761G, and incorporates the definitions of a small business (as defined).

147 ASIC also approves appropriate exclusions to a scheme's jurisdiction which can include disputes that:

(a) have been already been dealt with in another forum;

(b) relate solely to a firms commercial policy;

(c) relate solely to the underlying performance of an investment; or

(d) are frivolous and/or vexatious.

148 While ASIC will approve a scheme that meets the minimum jurisdiction, we encourage schemes to take a broader approach to their coverage For example, FOS' maladministration in lending jurisdiction and current consultation on small business lending.

149 The FOS and CIO each take a different drafting approach to their jurisdiction as reflected in the FOS terms of reference and CIO rules. This is a legacy issue reflecting how the schemes were initially established and

developed over time within the approved scheme framework. For example, the FOS TOR defines financial services more broadly than the underlying Corporations Act definition, to include "a product or service that is financial in nature."[61] The CIO rules follow the statutory definitions of financial services. These differences in drafting approach add to the complexity of the framework and the effective scope of each scheme's jurisdiction. They can be difficult for consumers or industry participants to understand or to compare.

150 The SCT's jurisdiction is set out in the SRC Act (see 92 – 95 above). In contrast to the CIO and FOS, the SCT's jurisdiction is determined by reference to the identity of the decision maker. On this basis, the SRC Act relies on the concept of a "decision" by the trustee of a regulated superannuation fund.

151 In 2014-2015, the top three categories of complaints that the SCT received related to: administration 49.2%, death benefit distribution 28.7% and disability 22.1%.[62]

Gaps in coverage

152 There are a number of ways that we can conceive of potential and actual gaps in EDR coverage. These can include:

(a) where a product issuer is a member of one scheme and a related distributor or intermediary - who is relevant to the complaint - is a member of another scheme. For example, schemes can generally only join a party to a dispute where the other party is an existing member of the scheme;

(b) where consumers are excluded from the scheme's jurisdiction because they are a small business that falls outside the retail client definition or because of the value of their complaint or because they are out of time. This raises issues about what is an appropriate minimum coverage; and

(c) where the firm is not regulated and therefore not required to be a member e.g. credit repair and debt management firms, as well as some extended warranty providers. This raises issues about products and services on the regulatory perimeter.

153 The first example of a gap arises solely because there is more than one approved EDR scheme that a firm can choose to join. The second example raises issues about adequacy of scheme coverage – which includes the adequacy of the statutory definition of a retail client. The third example

[61] See FOS TOR at 20.1.
[62] See SCT Annual Report, 2014-2015, pl. 21.

raises issues about the statutory scope of mandatory EDR membership, although this can be addressed in an ad hoc way by firms agreeing to become a scheme member.

Areas of overlapping jurisdiction

154 The three main areas of overlap within the current dispute resolution framework relate to

(a) life insurance disputes (which are dealt with both by FOS and the SCT);

(b) credit disputes (dealt with by both CIO and FOS); and

(c) financial advice disputes which may be dealt with by the CIO, FOS or the SCT, depending on who is providing the advice.

155 These overlaps extend to life insurance product issuers and intermediaries advising on life insurance and superannuation and to issuers and intermediaries distributing credit products.

156 Credit and life insurance are important areas of regulatory focus for ASIC. In terms of disputes lodged with the schemes:

(a) credit disputes represented 47% of accepted disputes at FOS and 88% of these were consumer credit disputes;

(b) credit and debt disputes represented more than 95% of disputes at CIO.[63]

(c) FOS had 1,227 life insurance disputes in 2014-2015 of which nearly half were about non-income stream risk products and just over one third related to TPD insurance;[64] and

(d) SCT had 351 disability insurance related complaints (typically TPD) which were 22.1 % of disputes in 2014-2015.

157 CIO and FOS operate common monetary limits and offer similar remedies and review rights to consumers. The SCT has no monetary limit and a statutory right of appeal on questions of law. All three schemes operate different decision making models which range from single Ombudsman, Adjudicators, and determinative Panels, depending on the nature of the dispute.

[63] See CIO Annual report on operations 2014-2015, p.37.
[64] See https://www.fos.org.au/custom/files/docs/fos-submission-inquiry-into-the-scrutiny-of-financial-advice-life-insurance-matters-april-2016.pdf

158 ASIC has recently released Report 498 *Life insurance claims: An industry review* which raises some particular issues that arise in relation to the handling of life insurance disputes.

Competition and multiple schemes

159 Some arguments have been made in support of competition in the EDR sector, on the basis that it delivers choice for members and that competition in dispute resolution will drive improved standards and performance and therefore improve outcomes for consumers.

160 ASIC does not consider that competition between EDR schemes enhances consumer outcomes. Dispute resolution is not a competitive market, and access to EDR does not drive consumer choice of financial product or service. The potential for firms to seek to switch to a lower cost scheme, on the basis that fees and costs are likely to be one of the most salient features of dispute resolution, is undesirable from a policy perspective and can inhibit innovation or efforts of schemes to extend beyond the minimum jurisdiction.

161 As stated in our submission to the recent Financial Systems Inquiry, ASIC worked with industry over many years to reduce the number of approved EDR schemes, with resulting improvements in economies of scale and efficiency, the removal of uncertainty for consumers and financial investors, and the reduction in jurisdictional boundary issues.[65]

[65] FSI, ASIC second submission, August 2014, p.48.

F Alternative models of dispute resolution

Key points

Over the past 16 years, ASIC has overseen the transition from a fragmented multi-sector EDR model to a significantly more harmonised model.

This section addresses the case for change and the consultation questions about the need for a triage service and/or an additional forum for dispute resolution.

Case for change

162 In the last 16 years, ASIC has overseen the transition from a fragmented multi-sector EDR model with diverse jurisdictional limits to a significantly more harmonised model. This rationalisation has been beneficial for:

(a) consumers (including though reducing confusion about scheme access, raising and harmonising compensation caps and introducing enhanced accountability measures including publication of comparative tables);

(b) members (including through reduced costs of supporting multiple schemes, greater efficiencies in scheme process and case management systems); and

(c) the EDR schemes themselves (through reduced jurisdictional overlaps and increased scale economies).

163 ASIC believes that it has resulted in a framework that is more resilient and less complex for consumers, however there is potential through this Review to further reduce industry and regulatory costs and create a more sustainable dispute resolution framework that improves user outcomes into the future.

164 This acknowledges the reality of increasing complexity in product design and distribution, continued product convergence and intermediation and the speed of technological change. It is critical that a future dispute resolution model is well funded and can respond to events that may lead to increased dispute volumes. It should also be designed with users in mind and remove frictions in accessibility and participation.

165 ASIC broadly supports reforms to the dispute resolution framework that are:

(a) consistent with the principles outlined in paragraph 11 and the benchmarks for ASIC approval; and

(b) build on the strengths of the current EDR system as outlined in paragraphs 101-102 of this submission. These include that a future scheme or schemes are free to consumers, can effectively deal with

> systemic issues, are responsive to market and policy reforms and are subject to independent reviews.

166 Any changes to the existing framework will need careful consideration of transitional arrangements and, depending on the preferred model, of potential legal or Constitutional barriers.

167 We now turn to some of the specific questions raised in the Issues Paper about the need for a triage model and/or additional forums for dispute resolution.

Triage service

168 Triage processes sort and allocate matters according to a set of priorities to maximise certain outcomes. In the context of dispute resolution, this would exist between IDR and EDR to ensure the consumer finds their way to the right forum as quickly as possible. The need for triage in financial services EDR presupposes that there is a sizeable group of consumers who either get shopped around the schemes or potentially never get to the scheme that can help them.

169 The evidence does not point to problems of this nature being of such a scale to warrant establishment of a new triage function. Schemes already have existing referral processes for complaints that fall outside their jurisdiction, and we do not believe that an additional triage process will add value to existing arrangements and we expect it would introduce additional complexity and cost.

170 In addition jurisdictional assessments of financial services disputes can be complex and a 'call centre' triage model is not capable of making those assessments and effectively managing the expectations of complainants without significant investment of time and resources.

171 The PC report into *Access to Justice Arrangements* noted that:

> The provision of advice and triage services requires knowledgeable and experienced practitioners who understand the needs of clients, can quickly evaluate the dispute, and recommend an appropriate source of action.[66]

172 We note that there have been various trials of triage or joint call centre initiatives since the Wallis Inquiry recommendations were implemented, and that these were all discontinued. In ASIC's view the better response in each case in the past was to promote scheme rationalisation.

[66] Productivity Commission, Access to Justice p.304.

An additional forum for dispute resolution

173 The Issues paper queries the merit of establishing an additional forum for dispute resolution, and whether this would improve user outcomes. The context for this discussion includes a recent Parliamentary report and concerns that the jurisdiction of current EDR schemes is too limited for small business complaints.[67]

174 FOS's current consultation on extending its small business jurisdiction canvasses whether access to EDR should be extended for small businesses with disputes that are currently excluded on the basis of monetary limits. FOS has noted some of the challenges in extending this jurisdiction including limits on its ability to compel third parties to participate in FOS's dispute resolution processes given that small business credit facility disputes can be complex, involve multiple issues, facilities, parties and other entities.[68]

175 We expect this consultation process to identify and elaborate on a number of other relevant issues including the issue of representatives and potential questions of cost or appeal.

176 In ASIC's view, any extension of FOS' jurisdiction to include larger business complainants should not compromise the settings that are already adapted and proven for consumer and small dispute resolution. We note that FOS propose in their consultation to set up a dedicated specialist small business unit to deal with these disputes.

177 In relation to other questions posed in the Issues Paper, ASIC does not support a new forum set up as an avenue for appeal of EDR decisions if it would increase costs and exacerbate delays in finalisation of disputes. We have set out above some of the existing review and appeal processes which operate in practice for users of the approved EDR schemes and of the SCT.

178 The Issues Paper also contemplates extending jurisdiction to a greater range of small businesses and/or shifting the existing retail EDR jurisdiction to a specialist forum. If this is done, it should build on the strengths of the existing EDR framework and avoid creating a sectoral model that could compromise the achievements made over the last 16 years through rationalisation and harmonisation.

[67] See Parliamentary Joint Committee on Corporations and Financial Services' report on the Impairment of Customer Loan
[68] Expansion of FOS's Small Business Jurisdiction - consultation paper, August 2016, p. 4.

G Other issues

Key points

This section addresses the

- absence of a compensation mechanism in circumstances of last resort where a financial services firm has failed or is insolvent;
- opportunites to improve on both the data that is collected and the format and reporting of dispute data at both IDR and EDR; and
- interaction of consumer remediation processes and the IDR and EDR framework as clients must have access to an EDR scheme if they are not satisfied with the remediation decision made.

We suggest that it may also be appropriate for this review to consider the

- role and range of agents/advocates increasingly representing consumers at EDR; and
- insights from behavioural research in developing recommendations about a preferred future framework.

Uncompensated consumer losses

179 Consumer trust and confidence in the financial services sector relies on effective dispute resolution and supporting compensation mechanisms. Ensuring determinations are complied with goes to the heart of that confidence.

180 The reason that uncompensated losses have arisen in the financial services dispute resolution sector is not merely because some licensees refuse to comply with scheme decisions. They have resulted from either a product failure or insolvency, where a firm has no financial resources available to meet claims and typically where any professional indemnity policy (PII) also fails to meet claims.

181 ASIC has publicly raised our concerns about uncompensated losses in a number of Government enquiries and reviews.[69] The limitations of PII have been canvassed in these submissions, so we do not repeat that analysis here.

182 In Australia, there is no comprehensive compensation mechanism in circumstances of last resort where a financial services firm has failed or is insolvent.

[69] See for example, Financial System Inquiry: Submission by the Australian Securities and Investments Commission, April 2014, pp. 186 – 187. Financial System Inquiry interim report: Submission by the Australian Securities and Investments Commission, August 2014, pp.47-49; Senate inquiry into the scrutiny of financial advice: Submission by the Australian Securities and Investments Commission, December 2014.

183 Public reports of uncompensated losses by the FOS and CIO should be treated as a minimum. The schemes are unable to quantify losses suffered by investors or consumers who did not lodge disputes, or whose disputes were closed early in the process because there was no reasonable prospect of any order for compensation being met.

184 The current concentration of unpaid determinations is in the small to medium sized advisory services sector. Consumers and investors may not generally appreciate that, in the event of a product failure or insolvency, there are fundamental differences in their access to compensation depending on the nature and size of the entity with whom they deal.

185 The whole financial services system bears the risk of adverse consumer outcomes and a lack of trust and confidence in the event of a significant product or licensee failure. In the absence of a last resort compensation scheme, uncompensated losses within the EDR framework will continue to occur.

Improvements to data and reporting

186 As each of the CIO, FOS and the SCT collect and report data differently under the current framework; it is difficult to meaningfully compare data obtained from different schemes.

187 From a regulatory perspective, we consider that there are significant opportunities to improve on both the data that is collected and the format and reporting of dispute data at both IDR and EDR. This information can assist:

(a) ASIC to inform regulatory priorities;

(b) firms to benchmark their performance against peers; and

(c) consumers to compare firm's performance.

188 We note that in the UK, firms (with a few exceptions) must report information directly to the FCA twice yearly on the number, type and outcome of complaints they have received in the reporting period.

189 This information is reported publicly on by the FCA on a complaints data webpage and includes firm level data and aggregate data on all complaints that regulated firms report. This data is captured by product (e.g. mortgages), type of firm and the nature of the complaint (e.g. advice or customer service).[70]

[70] https://www.fca.org.uk/firms/complaints-data

190 In considering options to improve IDR and the effectiveness of the external dispute resolution framework, it may be appropriate for this Review to consider the merits of such initiatives in the Australian context.

Remediation

191 The oversight of consumer remediation processes is increasingly common in the course of ASIC's regulatory supervision. For example, in the 2015-16 financial year ASIC secured over $200 million in compensation and remediation for financial consumers and investors across the areas it regulates.[71]

192 In September 2016, ASIC released Regulatory Guide 256: *Client review and remediation conducted by advice licensees* (RG 256) which establishes key principles for advice licensees about setting up and running consumer remediation programs.

193 Remediation processes interact closely with the IDR and EDR framework as clients must have access to an EDR scheme if they are not satisfied with the remediation decision made. EDR schemes such as the FOS encourage firms to engage early with them on issues such as arrangements for documentation, timelines and jurisdictional issues, as appropriate.

Representatives

194 EDR scheme processes are intended to be easy to navigate so consumers can represent themselves. While in the vast number of cases consumers do self-represent, growing numbers of agents/ advocates are representing consumers in complaints at IDR and EDR.

195 These firms charge fees for services including taking a complaint to an EDR scheme. These consumers could access free financial counselling and ombudsman services for assistance and pursue remedies at no cost.

196 The dominant type of agent at both the CIO and the FOS are debt management firms providing 'credit repair' services.

197 In January 2016, ASIC released *Report 465: Paying to get out of debt or clear your record: The promise of debt management firms* (REP 465).

[71] See ASIC Media Release 16-311MR ASIC releases guidance on review and remediation, 15 September 2016. http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-311mr-asic-releases-guidance-on-review-and-remediation/

198 In conducting this research, ASIC surveyed both financial services and non-financial services Ombudsman schemes and found that:

(a) a growing number of firms are representing consumers at external dispute resolution (EDR) schemes;

(b) disputes brought to EDR schemes by debt management firms relate almost exclusively to arguments about the removal of default listings on consumer credit reports (despite the breadth of other issues that can arise for indebted consumers); and

(c) while an increasing number of consumers are being represented at EDR by debt management firms, this is not leading to better outcomes, that is more 'wins' in credit reporting related disputes.

199 ASIC does not regulate the debt management industry although some firms may hold credit licenses for other parts of their business and these areas of the business will fall under ASIC regulation.

200 In response to concerns about the conduct of these firms, both the CIO and FOS amended their scheme procedures to enable them to exclude third party agents who fail to comply with scheme directions. Such initiatives are designed to support strong consumer outcomes and to disrupt the business models of claims agents who provide services of marginal utility which in some cases may be predatory.

201 As noted at paragraph 20, we consider it timely to consider the increasing prevalence of representatives at EDR and appropriate for the Panel to consider the role and range of agents/advocates representing consumers at EDR more broadly.

Behavioural insights and financial services complaints

202 Decision making about financial products and services is inherently complex and typically doesn't permit ready learning or feedback to inform future decisions. Although retail consumers may have repeat experience of purchasing products such as motor vehicle insurance, mortgages, personal loans or credit cards, the features and costs often vary significantly in form and presentation.

203 Among many other findings, insights from behavioural research show that consumers are subject to biases in decision making that can impact on:

(a) product purchase decisions (themselves influenced by the way that information, choices and processes are framed and presented); and

(b) help seeking behaviours including pursuing a complaints process when a product has failed or failed to meet expectations.

204 The process of IDR followed by independent EDR can be lengthy and complex to navigate and for most consumers pursuing a complaint will be an unfamiliar or novel process.

205 Complex processes can cause 'cognitive load' in the same way that complex information, choices and concepts can. Cognitive load slows down people's ability to process choices and act appropriately. Reducing 'friction' in processes (i.e. making it easier for people to do the thing they need to do) can be a way of alleviating cognitive load.

Designing a future dispute resolution model

206 Identifying barriers or frictions in processes, and where possible removing or mitigating them, is critical in designing effective and user centric IDR and EDR processes.

207 In the presence of barriers or frictions, people may fail to act (inertia), give up part way through the process, or make mistakes. These barriers can range from perceptions (e.g. 'nothing I do will make a difference') to cognitive constraints (e.g. too much information, lengthy/unclear forms, overly legalistic processes or too many steps) to structural barriers (e.g. IT or accessibility issues).

208 Recent research also shows that process frictions can be particularly overwhelming for those experiencing, or even *feeling*, financial stress. Financial stress has been found to limit people's cognitive 'bandwidth'. This 'scarcity' of financial and cognitive resources in turn affects people's capacity to seek help, compounding the effects of financial stress[72], and potentially raises the likelihood that consumers fall prey to unrealistic or predatory sales pitches by dispute resolution representatives.

209 We encourage the Panel to consider these insights in developing recommendations about a preferred future framework.

[72] Scarcity: Why Having Too Little Means So Much (2013), Sendhil Mullainathan, and Eldar Shafir.

Appendix: DIST Benchmarks

DIST Benchmarks and their underlying principles

Accessibility	The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
Independence	The decision-making process and administration of the scheme are independent from scheme members.
Fairness	The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
Accountability	The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
Efficiency	The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
Effectiveness	The scheme is effective by having appropriate and comprehensive terms of reference and periods independent reviews of its performance.

Source: Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in 1997.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australia financial services licence under s913B of the Corporations Act. Note: This is a definition contained in s761A of the Corporations Act.
AS ISO 10002-2006	Australian Standard AS ISO 10002-2006 *Customer satisfaction – Guidelines for complaints handling in organizations* (ISO 10002:2004, MOD)
complainant	A person or company who at any time has: • made a complaint to an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary, seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or • lodged a complaints with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
complaint	Has the meaning given in AS ISO 10002-2006
Corporations Act	*Corporations Act 2011,* including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit	Credit to which the National Credit Code applies Note: See s3 and 5-6 of the National Credit Code
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or s65(2) of the National Credit Act

Term	Meaning in this document
credit service provider	A person who provides credit
dispute	Has the same meaning as complaint
DIST Benchmarks	The Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in August 1997
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
final response	A response in writing required to be given to the complainant under RG 165, setting out the final outcome offered to the complainant at IDR, the right to complain to an ASIC-approved EDR scheme and the relevant name and contact details of the scheme
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
hardship notice	Means: • for credit contracts entered into before 1 March 2013, to which the National Credit Code applies, an application for a change to the terms of the contract for hardship; and • for credit contracts or leases entered into on or after 1 March 2013, to which the National Credit Code applies, a hardship notice under s72 or 177B (as modified by the *National Consumer Credit Protection Amendment (Enhancements) Act 2012)*.
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirement and approved standards of ASIC under RG 165
licensee	An AFS licensee or a credit licensee
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Regulations	National Consumer Credit Protection Regulations 2010
retail client	A client as defined in s716G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
RG 126 (for example)	An ASIC regulatory guide (in the example numbered 126)

Term	Meaning in this document
s64 (for example)	A section of an Act or Code as specified (in this example numbered 64)
SCT	Superannuation Complaints Tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*
SIS Act	*Superannuation Industry (Supervision) Act 1993*
SRC Act	*Superannuation (Resolution of Complaints) Act 1993*
small business	A small business as defined in s71G of the Corporations Act
Terms of Reference	The document that sets out an EDR scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'Rules'
Unlicensed product issuer	An issuer of a financial product who is not an AFS licensee
Unlicensed secondary seller	A person who offers the secondary sale of a financial product under s1012C(5), (6), or (8) of the Corporations Act and who is not an AFS licensee

ASIC
Australian Securities & Investments Commission

REGULATORY GUIDE 139

Approval and oversight of external dispute resolution schemes

June 2013

About this guide

This guide explains how external dispute resolution (EDR) schemes can obtain initial approval from ASIC to operate in the Australian financial system and/or Australian credit system and, once approved, their ongoing requirements to maintain approval.

This guide should be read in conjunction with Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued in June 2013 and is based on legislation and regulations as at that date.

Previous versions:

- Superseded Regulatory Guide 139, issued 18 May 2009, reissued 7 May 2010, 6 July 2010, 16 February 2011 and 20 April 2011
- Superseded Policy Statement 139, issued 8 July 1999 and rebadged as a regulatory guide on 5 July 2007

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act, credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration, they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A Overview: ASIC oversight of EDR schemes

Key points

Under the Corporations Act, Australian financial services (AFS) licensees, unlicensed product issuers and unlicensed secondary sellers are required to have a dispute resolution system that consists of:

- internal dispute resolution (IDR) processes that meet standards or requirements made or approved by ASIC; and
- membership of one or more ASIC-approved external dispute resolution (EDR) schemes.

Persons registered to engage in credit activities are required to be members of an ASIC-approved EDR scheme.

Under the National Credit Act, credit licensees are required to have a dispute resolution system that consists of:

- IDR processes that meet the standards and requirements made or approved by ASIC and that cover disputes relating to the credit activities they and their credit representatives engage in; and
- membership of one or more ASIC-approved EDR schemes.

Credit representatives of credit licensees are also required to be separate members of an ASIC-approved EDR scheme in order to be credit representatives.

Under the Corporations Regulations and National Credit Regulations, ASIC has the power to approve an EDR scheme and vary or revoke that scheme's approval. This regulatory guide outlines the process for applying for approval and the matters that ASIC will take into account when considering whether to:

- approve a scheme; and
- vary or revoke a scheme's approval.

Dispute resolution in the Australian financial system

Dispute resolution under the Corporations Act

RG 139.1 Under s912A(2) and 1017G(2) of the *Corporations Act 2001* (Corporations Act), AFS licensees, unlicensed product issuers and unlicensed secondary sellers must have a dispute resolution system that consists of:

(a) IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover complaints made by retail clients in relation to the financial services provided; and

(b) membership of one or more ASIC-approved EDR schemes that covers—or together cover—complaints made by retail clients in relation to the financial services provided (other than complaints that may be dealt with by the Superannuation Complaints Tribunal (SCT)).

Note: See Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) for further guidance on the requirement to have a compliant dispute resolution system.

RG 139.2 Margin lenders and those who give advice on margin lending financial services must also have an AFS licence and a dispute resolution system available for their retail clients.

RG 139.3 Trustee companies providing traditional trustee company services (traditional services) must also have a dispute resolution system available for their retail clients: see Class Order [CO 11/261] *Trustee companies providing traditional trustee company services—deferral of start date for dispute resolution requirements*.

Note: Trustee companies will be providing traditional services if they are a trustee company listed in the Corporations Regulations 2001 (Corporations Regulations) and they perform a range of services, including preparing wills, trust instruments, powers of attorney or agency arrangements, perform estate management functions (including as agent, attorney, executor, administrator or nominee) or operate a common fund: see s601RAC of the Corporations Act.

RG 139.4 Some complaints relating to traditional services provided to individuals who cannot make their own decisions about financial matters because of mental incapacity will continue to be addressed under existing state and territory guardianship law complaint mechanisms (i.e. state or territory courts, tribunals and guardianship boards).

Note: See reg 7.6.02(6) and Sch 8AC of the Corporations Regulations, and item 4 of the Explanatory Statement to the Corporations Regulations (No. 3) (Amendment Regulations).

RG 139.5 The SCT is a statutory tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*. It operates differently to ASIC-approved EDR schemes in that:

(a) the SCT is not subject to ASIC's approval and this regulatory guide does not apply to it; and

(b) the SCT only deals with complaints against trustees and certain insurers by virtue of the relevant provisions under the *Superannuation (Resolution of Complaints) Act 1993*.

Note: An AFS licensee, unlicensed product issuer or unlicensed secondary seller must be a member of an ASIC-approved EDR scheme to be able to refer a complaint to that scheme.

RG 139.6 AFS licensees, unlicensed product issuers and unlicensed secondary sellers must notify consumers and investors of their right to complain to an EDR

scheme when a complaint is addressed at IDR. This includes notifying of the right to complain to EDR when:

(a) a final response at IDR is given within 45 days (or 90 days for traditional services complaints); or

(b) a final response at IDR cannot be provided within 45 days (or 90 days for traditional services complaints) of the receipt of the complaint.

Note: See RG 165.87–RG 165.102 for further information on this requirement.

Dispute resolution under the National Credit Act

Credit licensees and credit representatives

RG 139.7 Under s47 of the *National Consumer Credit Protection Act 2009* (National Credit Act), credit licensees must have a dispute resolution system that consists of:

(a) IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover disputes in relation to the credit activities engaged in by them or their credit representatives; and

(b) membership of one or more ASIC-approved EDR schemes.

Note: RG 165 provides that 'dispute' for the purposes of the National Credit Act, and National Consumer Credit Protection Regulations 2010 (National Credit Regulations) has the same meaning as 'complaint' in the Corporations Act and Corporations Regulations.

RG 139.8 A credit representative, who is authorised by a credit licensee, must also separately be a member of an ASIC-approved EDR scheme: s64 and 65, National Credit Act (as modified by reg 16, National Credit Regulations). However, credit representatives do not need to have separate IDR procedures that meet our requirements and approved standards. This is because a credit licensee's IDR procedures must cover disputes relating to its credit representatives.

RG 139.9 Credit licensees and credit representatives must notify consumers, borrowers, lessees and guarantors of their right to complain to an EDR scheme when a dispute is addressed at IDR. This includes notifying of the right to complain to EDR:

(a) when a final response at IDR is given within 45 days (or within 21 days for disputes involving default notices);

(b) when a final response at IDR cannot be provided within 45 days of the receipt of the dispute (or for disputes involving default notices, where a final response at IDR cannot be provided within 21 days of the receipt of the dispute); or

(c) where the dispute involves a hardship notice or request for postponement of enforcement proceedings under the National Credit Code:

(i) when the disputant is advised whether they have been granted a change in the terms of their credit contract or lease for hardship, or their request for postponement of enforcement proceedings has been agreed to, either within the 21 days under the National Credit Code or within the additional time allowed for credit contracts or leases entered into on or after 1 March 2013 under the Code, if further information is required to assess the hardship notice (up to 28 days from the date the information is requested, but not received, or 21 days from when the information is considered to be received under s72 and 177B of the National Credit Code); or

(ii) if agreement is reached (within the 21 days or the additional time allowed for credit contracts entered into on or after 1 March 2013 under the National Credit Code, if further information is required to assess the hardship notice), when the disputant is notified in writing of the terms of the change to the credit contract or lease or conditions of postponement within the further 30 days under the National Credit Code.

Note 1: See RG 165.103–RG 165.121 for further information on these requirements.

Note 2: From 4 April 2013 to 1 March 2014, the maximum timeframes in RG 139.9(c) will apply even though credit providers and lessors are exempt from having to confirm in writing:

(a) until 30 days after the agreement is made, that they have agreed to a change in the terms of the credit contract or lease for hardship either within 21 days or, if further information is requested, within the additional time allowed for credit contracts or leases entered into on or after 1 March 2013, under s72 and 177B of the National Credit Code; and

(b) the particulars of the change to the terms of the credit contract or lease when the agreement is a simple arrangement. A simple arrangement is an agreement that defers or reduces the obligations of a debtor or a period of no more than 90 days.

See regs 69A and 69B, National Credit Amendment Regulations.

RG 139.10 We expect credit providers and lessors will still consider and respond to requests for a change to the terms of the credit contract or lease for hardship and advise the terms of an agreement for simple arrangements within the timeframes under the National Credit Code. We also expect credit providers and lessors will comply with RG 139.9(c)(ii), and for simple arrangements will verbally inform disputants of the right to complain to EDR and the name and contact details of the relevant EDR scheme when a simple arrangement is agreed to.If you are a credit licensee who acts on behalf of a securitisation body, additional obligations may apply to you under the National Credit Act: see RG 139.15–RG 139.20.

Unlicensed COI lenders

RG 139.11 The National Credit Act applies differently to those who ceased to offer new credit contracts or consumer leases before 1 July 2010, but who continued to be a credit provider or lessor in relation to credit contracts or consumer leases entered into before 1 July 2010. Persons in this category are carried over instrument lenders (COI lenders) and specific rules apply.

> Note: A 'carried over instrument' is a contract or other instrument that was made and in force, and to which an old Credit Code applied, immediately before 1 July 2010: see s4(1), *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act).

RG 139.12 COI lenders may either elect to:

(a) be regulated as a credit licensee; or

(b) not be licensed under the National Credit Act and instead be regulated as an unlicensed COI lender, in which case a modified statutory regime applies.

> Note: The modified statutory regime, as set out in Ch 2 of the National Credit Act (as modified by Sch 2 of the National Credit Regulations), applies to unlicensed COI lenders from 1 July 2010. Schedule 2 of the National Credit Regulations was inserted by item 32 of Sch 1 of the National Consumer Credit Protection Amendment Regulations 2010 (No. 2).

RG 139.13 Unlicensed COI lenders:

(a) must have IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover disputes in relation to the credit activities they engage in with respect to their carried over instruments; and

(b) may choose to join an ASIC-approved EDR scheme.

> Note: Unless otherwise mentioned, references to unlicensed COI lenders also include reference to prescribed unlicensed COI lenders.

RG 139.14 Unlicensed COI lenders who choose not to join an EDR scheme must keep a register of each of the following:

(a) disputes relating to their carried over instruments;

(b) hardship notices made under s72 of the National Credit Code; and

(c) requests for postponement of enforcement proceedings under s94 of the National Credit Code.

> Note: See Sch 2 of the National Credit Regulations, as inserted by item 32 of Sch 1 of the National Consumer Credit Protection Amendment Regulations 2010 (No. 2), for the detailed information the registers must include.

Credit licensees and securitisation bodies

RG 139.15 If you make (or buy) loans or leases and repackage them as investment products to sell to investors, you are a securitisation body and a modified regulatory regime applies to you under the National Credit Act.

Note: See s10(1)(a), National Credit Act and Regulatory Guide 203 *Do I need a credit licence?* (RG 203) at RG 203.53–RG 203.56.

RG 139.16 Securitisation bodies may elect to be:

(a) regulated as a credit licensee; or

(b) exempt from having to be licensed, and instead be regulated as an unlicensed special purpose funding entity (credit) if the conditions in RG 139.17 are satisfied.

Note: The modified statutory regime, as set out in regs 23B and 23C of the National Credit Regulations, and the National Credit Act (as modified by reg 25G and Sch 3 of the National Credit Regulations) applies to securitisation bodies who choose not to be licensed.

RG 139.17 The exemption at RG 139.16(b) only applies as long as:

(a) the securitisation body enters into a servicing agreement with a credit licensee who acts on their behalf (the credit licensee); and

(b) the securitisation body is a member of an EDR scheme.

Note: See regs 23B and 23C of the National Credit Regulations and Class Order [CO 10/907] *Exempted special purpose funding entities—deferral of start date for EDR scheme membership*.

RG 139.18 A process for how disputes at EDR should be handled between the credit licensee and the securitisation body (if members of different schemes) is set out at RG 139.203–RG 139.207.

RG 139.19 Credit licensees who act on behalf of a securitisation body must notify us:

(a) when they enter into a servicing agreement (including the details of the securitisation body they act for and the name of the EDR scheme the securitisation body belongs to); and

(b) when they cease to be a party to the servicing agreement.

Note: See s45(7), National Credit Act, reg 9A, National Credit Regulations and Form CL13 *Notice in relation to special purpose funding entity.*

RG 139.20 The IDR procedures of a licensee must cover the activities of the securitisation body: see RG 165.27.

Initial and ongoing approval of EDR schemes

RG 139.21 Under the Corporations Regulations and National Credit Regulations, we have the power to approve an EDR scheme:

(a) for a specified period of time; and

(b) subject to conditions, including conditions in relation to the independent review of the operation of the scheme: see regs 7.6.02(4) and 7.9.77(4), Corporations Regulations and regs 10(4)(a) and 10(4)(b), National Credit Regulations.

RG 139.22 Under the regulations, we also have the power to vary or revoke approval of an EDR scheme: see regs 7.6.02(4) and 7.9.77(4), Corporations Regulations and reg 10(4)(c), National Credit Regulations.

RG 139.23 The Corporations Regulations and National Credit Regulations state that we must take the following into account when considering whether to approve an EDR scheme:

(a) accessibility;

(b) independence;

(c) fairness;

(d) accountability;

(e) efficiency;

(f) effectiveness; and

(g) any other matter we consider relevant.

Note: See regs 7.6.02(3) and 7.9.77(3), Corporations Regulations and reg 10(3), National Credit Regulations.

RG 139.24 The considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness are based on the principles in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes (DIST Benchmarks), published by the then Department of Industry, Science and Tourism in 1997. See the Appendix for further information on the DIST Benchmarks.

RG 139.25 Currently, there are no ‘other matters’ we consider relevant when considering whether to approve an EDR scheme. However, we reserve the discretion to introduce additional guidelines for assessing a scheme for approval—for example, where the features of a product from a particular industry make additional considerations relevant. We will consult with stakeholders about the introduction or reliance on any additional guidelines not currently contained in the Corporations Regulations or the National Credit Regulations.

RG 139.26 This regulatory guide also explains the ongoing requirements of an EDR scheme to maintain our approval.

RG 139.27 We will review the approval guidelines contained within this regulatory guide in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.

RG 139.28 We will update this regulatory guide to reflect any further changes to the National Credit Act or National Credit Regulations that may be required as part of Phase 2 of the national consumer credit reforms, and remove obsolete requirements and references.

ASIC's role

RG 139.29 The objectives of Ch 7 of the Corporations Act are to promote:

(a) the confident and informed participation of consumers and investors in the Australian financial system (also an objective of ASIC under s1 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act));

(b) fairness, honesty and professionalism by those who provide financial services;

(c) fair, orderly and transparent markets; and

(d) the reduction of systemic risks.

Note: See s760A, Corporations Act.

RG 139.30 One of the reasons the Australian Government decided to extend the dispute resolution framework to cover credit and margin lending financial services was to ensure access to timely, independent and cost-effective dispute resolution when things go wrong for consumers of these types of products and services.

Note: See Press Release No. 051 of the Minister for Superannuation and Corporate Law, the Hon Nick Sherry, *Details of major overhaul of margin lending announced* (7 May 2009); and Explanatory Memorandum to the National Consumer Credit Protection Bill 2009, page 5.

RG 139.31 Within this framework, we are responsible for overseeing the effective operation of EDR schemes, and approving these schemes as required.

RG 139.32 We consider that our responsibility derives from a number of sources, including our licensing of industry participants and our powers to approve industry codes of practice.

RG 139.33 We believe that industry-supported EDR schemes play a vital role in the broader financial services and credit regulatory systems. These schemes provide:

(a) a forum for consumers and investors to resolve complaints or disputes that is quicker and cheaper than the formal legal system; and

(b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.

RG 139.34 As a result of continuing law reforms, an increasing number of industry participants will be, or are likely to be, required to join an ASIC-approved EDR scheme as a condition of carrying on their business.

RG 139.35 In light of this, we wish to ensure that complaints and disputes handling procedures treat consumers and investors fairly and consistently across the different industry sectors of the Australian financial services and credit system. We therefore consider it necessary to approve schemes with reference to a common set of approval guidelines. The approval guidelines contained within this regulatory guide are intended to:

(a) give guidance about the characteristics a scheme that applies for approval should have; and

(b) promote minimum standards across EDR schemes to achieve parity of schemes and equal treatment of complaints.

RG 139.36 The application of these guidelines will nevertheless recognise legitimate differences between industries or between schemes. We believe that a consistent approach to regulation does not necessarily imply identical standards in all cases.

RG 139.37 We acknowledge and support the schemes' core business of resolving consumer complaints or disputes, and intend this regulatory guide to contribute to the strength of the complaints resolution sector.

How we will liaise with schemes and other stakeholders

RG 139.38 We will liaise with each of the EDR schemes operating in the financial and credit sectors on an ongoing basis. This will take place through a number of formal and informal channels.

Applying for initial approval

RG 139.39 If you wish to apply to become an ASIC-approved EDR scheme, the steps you can take include:

(a) assessing whether you satisfy the requirements set out in this regulatory guide at Section B; and

(b) submitting an application for approval in the form required by Section C.

Ensuring ongoing approval

RG 139.40 If you are already an ASIC-approved EDR scheme, you must continue to satisfy the requirements set out in your approval letter and this regulatory guide: see Section C for information on the approval letter.

B Guidelines for initial and ongoing approval

Key points

We must take the following into account when considering whether to approve an EDR scheme under the Corporations Act or National Credit Act:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency;
- effectiveness; and
- any other matter we consider relevant.

Interpreting these guidelines

RG 139.41 We have structured our requirements in this regulatory guide according to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. As one principle may overlap with another, a requirement for approval may relate to more than just one principle. For example, the requirement of 'scheme decision-making', discussed under the principle of 'fairness', may also relate to 'effectiveness' and 'efficiency'.

RG 139.42 Table 1 summarises the principles and the requirements discussed in this regulatory guide, and highlights whether a particular requirement or aspect of a requirement applies to EDR schemes approved under the Corporations Act or National Credit Act.

Table 1: The principles and requirements in this guide

Principle	Requirements	Reference in this regulatory guide	Who the requirement applies to
Accessibility	Cost to the complainant and disputant	RG 139.47–RG 139.52	EDR schemes approved under the Corporations Act and National Credit Act
	Promotion of the scheme	RG 139.53–RG 139.58	
	Scheme communication	RG 139.59–RG 139.63	
	Referral of complaints or disputes by members to EDR	RG 139.64–RG 139.66	
	Legal proceedings and EDR	RG 139.67–RG 139.74 RG 139.78–RG 139.79	
	Types of complainants or disputants who can access the scheme	RG 139.80–RG 139.87	

Principle	Requirements	Reference in this regulatory guide	Who the requirement applies to
Independence	Independence from industry	RG 139.89–RG 139.92	EDR schemes approved under the Corporations Act and National Credit Act
	The overseeing body	RG 139.93–RG 139.99	
	Resources available to the scheme	RG 139.100–RG 139.101	
	Scheme members' powers of veto	RG 139.102–RG 139.104	
	Changes to the Terms of Reference	RG 139.105–RG 139.109	
Fairness	Scheme decision-making	RG 139.111–RG 139.115	EDR schemes approved under the Corporations Act and National Credit Act
Accountability	Reporting to ASIC: Systemic issues and serious misconduct	RG 139.117–RG 139.140	EDR schemes approved under the Corporations Act and National Credit Act
	General reporting guidelines	RG 139.141–RG 139.146	
	Complaints and disputes information	RG 139.147–RG 139.155	
	Independent reviews	RG 139.156–RG 139.161	
Efficiency and effectiveness	Coverage of the scheme	RG 139.163–RG 139.197	EDR schemes approved under the Corporations Act and National Credit Act
	Reducing consumer confusion about where to complain: • Multi-licensee complaints or disputes	RG 139.198–RG 139.200	EDR schemes approved under the Corporations Act and National Credit Act
	• Disputes involving credit representatives	RG 139.201–RG 139.202	EDR schemes approved under National Credit Act only
	• Disputes involving credit licensees and securitisation bodies	RG 139.203–RG 139.207	EDR schemes approved under National Credit Act only
	Where a scheme member ceases to carry on business	RG 139.208–RG 139.212	EDR schemes approved under the Corporations Act and National Credit Act
	Time limits for bringing complaints or disputes to EDR	RG 139.213–RG 139.216	EDR schemes approved under the Corporations Act and National Credit Act
	Compliance with scheme decisions	RG 139.217–RG 139.222	EDR schemes approved under the Corporations Act and National Credit Act
	Available remedies	RG 139.223–RG 139.227	EDR schemes approved under the Corporations Act and National Credit Act
	Working collaboratively with the ACCC and state and territory Offices of Fair Trading	RG 139.228–RG 139.229	EDR schemes approved under National Credit Act only

Principle	Requirements	Reference in this regulatory guide	Who the requirement applies to
	IDR timeframes	RG 139.230–RG 139.233	EDR schemes approved under the Corporations Act and National Credit Act
	Publishing scheme members' contact details for hardship applications	RG 139.234–RG 139.236	EDR schemes approved under National Credit Act only

RG 139.43 In adopting the definition of 'complaint' in Australian Standard AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* in RG 165, we clarify that for credit licensees and unlicensed COI lenders, where the National Credit Act and National Credit Regulations refer to a 'dispute', we consider this to have the same meaning as 'complaint' under the Corporations Act and Corporations Regulations.

RG 139.44 Given the current difference in terminology, throughout this regulatory guide we generally refer to a 'complaint' and 'complainant' where our EDR requirements apply to a scheme approved under the Corporations Act and 'dispute' and 'disputant' where our EDR requirements apply to a scheme approved under the National Credit Act.

RG 139.45 Where an EDR scheme is approved under both the Corporations Act and National Credit Act, it will be required to handle both 'complaints' and 'disputes'.

Accessibility

RG 139.46 Requirements that relate to the principle of accessibility include that a scheme must:

(a) promote equitable access by providing its services free of charge;

(b) actively promote itself so consumers and investors become aware of the existence of the scheme, thereby improving accessibility of the scheme;

(c) develop a communications strategy to improve consumer and investor knowledge of the EDR process and the role of the scheme;

(d) be capable of accepting complaints from a financial service provider, or disputes from a credit provider or credit service provider where there is an intractable complaint or dispute;

(e) specify in its Terms of Reference how legal proceedings can be brought where a complaint or dispute has been lodged with an EDR scheme; and

(f) in its Terms of Reference, set out the types of complainants or disputants who can access the scheme.

Cost to the complainant or disputant

RG 139.47 To promote equitable access, a scheme must provide its EDR procedures free of charge to any complainant or disputant whose complaint or dispute falls within the scheme's jurisdiction.

RG 139.48 We consider it a fundamental principle that consumers and investors of financial and credit products and services have free access to the complaint or dispute handling procedures offered by a scheme.

RG 139.49 We understand, however, that charging may be appropriate in some limited cases or special circumstances—for example, where the scheme seeks to extend its jurisdiction to provide its services for a complaint or dispute that is clearly outside the scheme's jurisdiction (e.g. beyond the consideration of 'consumer' or appropriate 'small business' complaints or disputes).

> Note: See RG 139.80–RG 139.87 for a further discussion of the types of complainants or disputants who can access the scheme.

RG 139.50 Charging for access to a scheme's complaints or disputes handling procedures will be inappropriate if it is applied as a barrier to entry, or otherwise intended as an unreasonable disincentive to the complainant or disputant.

RG 139.51 If a scheme does introduce a limited charging policy, then it must collect and record information about:

(a) the number of complainants or disputants who lodge a complaint or dispute with the scheme who are unwilling to proceed when notified of the charge;

(b) the number of complainants or disputants that request a waiver of the charge;

(c) the terms and application of any waiver policy; and

(d) some assessment of the level of charges as against the cost incurred by the scheme in processing relevant complaints or disputes.

RG 139.52 A scheme must consult publicly with industry and consumer organisations, and with us, about any proposal to introduce charges before the proposal is implemented.

Promotion of the scheme

RG 139.53 The effective promotion of a scheme through a wide range of channels, including the media, is an integral part of making sure that an EDR scheme is widely accessible.

RG 139.54 A scheme should be conscious, when preparing its promotions strategy, that there may be some classes of complainants or disputants who, for

geographic, economic or other reasons, are not accessing the scheme in proportion to their use of financial or credit products and services. The scheme should actively promote its existence, particularly to those complainants or disputants that are under-represented in the breakdown of people who access the scheme: see RG 139.147–RG 139.155.

RG 139.55 A scheme must publish and promote details about its complaints resolution procedures, including:

(a) how a complaint or dispute can be lodged with the scheme;

(b) the assistance available to complainants or disputants; and

(c) the timeframes imposed under the procedures.

RG 139.56 Scheme members must advise consumers and investors of their right to:

(a) take their complaint or dispute to an EDR scheme when they provide a final response at IDR within 45 days (or 21 days for disputes involving default notices or 90 days for traditional services complaints);

(b) take their complaint or dispute to an EDR scheme if they are not able to provide a final response to a complaint or dispute at IDR within 45 days (or 21 days for disputes involving default notices or 90 days for traditional services complaints); or

(c) take their dispute directly to an EDR scheme where the dispute involves a hardship notice or request for postponement of enforcement proceedings and the relevant 21 days (or the additional time allowed to assess a hardship notice if further information is required, for credit contracts and leases entered into on or after 1 March 2013 under the National Credit Code), or further 30 days under the National Credit Code have passed (for scheme members of an EDR scheme approved under the National Credit Act).

Note: See RG 165.87–RG 165.121 for further information on these requirements.

RG 139.57 We believe that this will improve scheme accessibility as more complainants and disputants become aware of the right to complain to EDR and the relevant EDR scheme with which to lodge their complaint or dispute.

RG 139.58 There are also some regulatory requirements that scheme members must comply with to promote the availability of EDR schemes. For example, AFS licensees who provide a Financial Services Guide to their retail clients must include details of their scheme membership in that document: see s942B(2)(h), Corporations Act. Similar disclosure requirements also apply to Credit Guides given to consumers by credit licensees and credit representatives: see s113(2)(h), 126(2)(e), 127(2)(e), 136(2)(h), 149(2)(e), 150(2)(e) and 158(2)(h), National Credit Act.

Scheme communication

RG 139.59 In addition to effectively promoting the scheme, schemes should develop communications strategies to improve their communication with complainants or disputants about their processes, decisions and role so that consumer and investor expectations are realistic. These strategies should be reviewed periodically.

RG 139.60 Our experience indicates that not all consumers and investors who access EDR schemes understand the EDR process or the role of the scheme.

RG 139.61 When developing communications strategies, schemes should have regard to plain language principles, ensuring that information is easy to access, user-friendly, practically relevant and disseminated at key stages of the complaint or dispute resolution process.

RG 139.62 It may also be appropriate to ensure that scheme communications are made available in different languages, in Braille or large font, and in audio format, depending on the demographics and special needs of complainants or disputants.

RG 139.63 We reserve our discretion to request further information about a scheme's communications strategies and to review whether those strategies and our guideline are working effectively. We will consult with EDR schemes, industry and consumer stakeholders before amending this guideline.

Referral of complaints or disputes by members to EDR

RG 139.64 One benefit for members of belonging to an EDR scheme is that it provides an independent alternative to the courts for dispute resolution. Where a scheme member has provided a final response to a complainant or disputant at IDR (see RG 165) and the complaint or dispute has not been able to be resolved by IDR, nor by EDR because the complainant or disputant has not progressed their complaint or dispute to an EDR scheme, the Terms of Reference must allow scheme members to refer complaints or disputes to an EDR scheme for resolution.

RG 139.65 We recognise that a direct referral of a complaint or dispute to an EDR scheme by a member will only be possible if the consumer or investor consents to the financial service provider, credit provider or credit service provider forwarding the complaint or dispute, including the complainant's personal information, to the scheme.

RG 139.66 We consider that for disputes involving hardship notices or requests for postponement of enforcement proceedings, there may be an increased need for members to directly refer disputes to the schemes, if the disputant has not already progressed their dispute to EDR, because interest and other default charges may continue to accrue.

Legal proceedings and EDR

RG 139.67 The Terms of Reference of an EDR scheme must require that legal proceedings by scheme members should not be commenced where a complaint or dispute has been lodged with the scheme unless:

(a) the legal limitations period is about to expire; or

(b) there is a test case situation.

RG 139.68 By test case situation, we mean complaints or disputes involving a novel point of law or circumstance requiring clarification.

RG 139.69 Commencing legal proceedings in relation to a complaint or dispute lodged at EDR creates the potential for scheme members to undermine the EDR process. There is also the possibility that the same complaint or dispute will be dealt with in two competing forums, wasting time and resources.

RG 139.70 However, we recognise the importance of allowing scheme members to preserve their legal rights where the legal limitations period is about to expire, and in test case situations.

RG 139.71 The Terms of Reference should provide that, where a scheme member commences legal proceedings in a test case situation, the scheme member should pay the complainant's or disputant's legal costs.

RG 139.72 Where legal proceedings that relate to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the Terms of Reference must require the member not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.

RG 139.73 Such complaints or disputes should be accepted by the scheme at least up until the point where the complainant or disputant has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from the scheme's jurisdiction under the Terms of Reference.

RG 139.74 For the avoidance of doubt, the complainant or disputant will not be considered to have taken a 'step' if they attend a directions hearing or agree to consent orders of a procedural nature only being filed in those legal proceedings.

RG 139.75 From 1 January 2014, the Terms of Reference of an EDR scheme must exclude small business lending disputes, where the credit limit of the credit contract that is the subject of the dispute exceeds$2 million, from its debt recovery legal proceedings jurisdiction. We encourage EDR schemes to introduce this change earlier where possible.

Note: The 'credit contract' is a contract under which the credit is or may be provided.

RG 139.76 In determining whether the limit at RG 139.75 is reached, the EDR scheme must apply the limit to the small business credit contract that is the subject of the small business lending dispute. This means that the value of linked credit contracts cannot be taken into account when applying the limit.

RG 139.77 We will review the adequacy of this limit, in the context of a scheme's debt recovery legal proceedings jurisdiction more generally, in two years time.

RG 139.78 Where a person has commenced legal proceedings to be included as a beneficiary under an estate, an EDR scheme that handles traditional services complaints must put on hold all related traditional services complaints that may depend on the outcome of the legal proceedings until the court hands down its decision. We expect the scheme's Constitution or Terms of Reference to reflect this.

RG 139.79 The scheme should also have in place processes by which its trustee company members can notify the scheme as soon as they become aware that a person has commenced legal proceedings to be included as a beneficiary.

Types of complainants or disputants who can access the scheme

RG 139.80 The Terms of Reference of an ASIC-approved EDR scheme must set out what types of complainants or disputants can access its complaints handling procedures.

RG 139.81 A scheme must, as a minimum, under the Corporations Act, be able to deal with complaints from 'retail clients', as defined in s761G and related regulations.

RG 139.82 The definition of retail client varies depending on whether the relevant financial product is a general insurance product, a superannuation product, a retirement savings account product (within the meaning of the *Retirement Savings Accounts Act 1997*), or any other type of financial product.

RG 139.83 A small business may be a retail client. A 'small business' is defined in s761G as a business employing fewer than:

(a) 100 people (if the business manufactures goods or includes the manufacture of goods); or

(b) 20 people (otherwise).

RG 139.84 A person who has been *directly* provided the traditional services and others such as beneficiaries (i.e. persons who may request an 'information return') are also considered to be retail clients for traditional services complaints: see s601RAV of the Corporations Act and regs 7.1.28A and 5D.2.01 of the Corporations Regulations.

Note: An 'information return' must include certain information about the trust, including information about income earned on the trust's assets, expenses and the net value of the trust's assets: see s601RAC(1)(e) of the Corporations Act and regs 5D.2.01, 5D.2.02 and 7.1.28A of the Corporations Regulations.

RG 139.85 For the purposes of the National Credit Act, a scheme must, as a minimum, be able to handle disputes from persons who have been provided with credit or credit services, and guarantors under the National Credit Act.

RG 139.86 Each EDR scheme must make sure that its Terms of Reference enables retail clients (including small businesses that are retail clients) and/or persons who have been provided with credit or credit services and guarantors under the National Credit Act to access the scheme.

RG 139.87 Where appropriate, we encourage EDR schemes to accept complaints or disputes from a broader range of complainants or disputants than set out in the retail client definition or those who are provided with credit or credit services and guarantors under the National Credit Act.

Independence

RG 139.88 Requirements that relate to the principle of independence include that a scheme must:

(a) have an overseeing body that meets certain requirements and ensures that the scheme has sufficient resources to carry out its functions;

(b) not allow members a power of veto where changing the Constitution or Terms of Reference of a scheme is involved; and

(c) consult with relevant stakeholders about the development of its Terms of Reference and any proposed amendments before their implementation.

Independence from industry

RG 139.89 A scheme must be independent of the industry or industries that provide its funding and constitute its membership. In practice, this means that the decision-maker(s) and/or the staff of the scheme are:

(a) entirely responsible for the handling and determination of complaints or disputes;

(b) accountable only to the scheme's overseeing body; and

(c) adequately resourced to carry out their respective functions.

RG 139.90 The principle of independence means that a scheme must be a legal entity in its own right—that is, it should be an incorporated entity.

RG 139.91 If a scheme is not separately incorporated, there may be a perception that it is not independent of the industry members with which it is affiliated. This perception may arise, for example, in circumstances where the membership base of a scheme expands, but the scheme remains legally affiliated with a particular industry association or with a subset of industry.

RG 139.92 The decision-making processes and the administration of a scheme must be independent of those sectors of industry that fall within its jurisdiction and that provide its funding.

The overseeing body

RG 139.93 Our requirements for the membership and functions of the scheme's overseeing body focus on ensuring:

(a) independent decision-making by scheme staff and the decision-maker(s);

(b) effective consultation about any changes to the scheme's Terms of Reference;

(c) an appropriate balance of representation on the overseeing body; and

(d) the maintenance of adequate resources for the scheme to perform its functions in a timely manner without undue delay.

RG 139.94 A scheme must have an overseeing body with responsibility to oversee the operations of the scheme, and to preserve the independence of the scheme and of the dispute resolution processes. To ensure that a scheme is clearly perceived to be independent, the membership of the overseeing body should comprise:

(a) equal numbers of consumer and industry representatives; and

(b) an independent Chair.

RG 139.95 A scheme's Constitution or Terms of Reference must include details about how consumer representatives will be appointed, including any requirements for consultation with appropriate individuals and/or organisations.

RG 139.96 One option is that responsibility for appointing consumer representatives could be given to the scheme, or to another organisation or individual.

RG 139.97 We have decided, after consultation with stakeholders, that it is not appropriate for a representative to be appointed from or by ASIC to the overseeing body. This reflects our consideration of the appropriate balance of membership on the overseeing body, and of the potential for a conflict of interest to arise with such an appointment.

RG 139.98 The minimum functions of a scheme's overseeing body must include:

(a) appointing the scheme's decision-maker(s);

(b) agreeing the scheme's budget with relevant industry representatives;

(c) recommending and promoting consultation about proposed changes to the scheme's Terms of Reference;

(d) receiving and considering complaints about the operation of the scheme;

(e) monitoring general trends and issues arising from the complaints or disputes that are lodged with the scheme, including those that fall outside the Terms of Reference;

(f) monitoring the reporting of systemic issues and/or serious misconduct by the scheme; and

(g) monitoring the scheme's ability to manage its caseload and to perform other promoted functions.

RG 139.99 Where the overseeing body appoints a person to manage the scheme's day-to-day operations, that person should be responsible for appointing, supervising and dismissing the scheme's staff.

Resources available to the scheme

RG 139.100 A scheme's overseeing body must monitor whether the scheme is adequately resourced to carry out its promoted functions. This should include monitoring how the scheme manages its caseload over time.

RG 139.101 A consideration of resourcing should include provision to assist complainants or disputants to draft and lodge their complaints or disputes. This does not amount to scheme staff advocating for complainants or disputants, and should not jeopardise the impartiality of the complaints resolution process.

Scheme members' powers of veto

RG 139.102 We require that a scheme must not give its members a right of veto over changes to the Constitution or Terms of Reference.

RG 139.103 We believe that if members were to have a right of veto, it may undermine the independence of the EDR scheme because industry provides its funding and constitutes its membership.

RG 139.104 We are also concerned that a power of veto would give scheme members a disproportionate level of influence over the evolution of the EDR scheme compared with the influence of other stakeholders—for example, consumers and investors.

Changes to the Terms of Reference

RG 139.105 A new scheme must consult with stakeholders about its Terms of Reference before implementing them.

RG 139.106 A scheme that already exists must consult with industry and consumer organisations, and other relevant stakeholders, prior to implementing any proposed changes to its Terms of Reference or introducing a new Terms of Reference, unless RG 139.108 applies. A scheme should not rely on consulting only with its overseeing body prior to implementing any changes.

RG 139.107 We consider it important that a scheme publicly consults about proposed changes to its Terms of Reference because it can result in a greater degree of understanding and acceptance about the scheme's operations.

RG 139.108 We recognise, however, that there may be some proposed changes to a scheme's rules or procedures that are 'minor' in nature. It may be unnecessary for a scheme to consult publicly about such changes.

RG 139.109 A scheme must consult with us about all proposed changes to its Terms of Reference, and should identify those changes that it considers to be 'minor' in nature and that will not be the subject of broader consultation.

Fairness

RG 139.110 We believe a scheme's complaints/disputes handling and other procedures must accord with the principles of natural justice.

Scheme decision-making

RG 139.111 In reaching a decision about a complaint or dispute, a scheme should not be entitled to rely on information that is not available to all parties.

RG 139.112 We believe, however, that the effective and timely resolution of a complaint or dispute does not necessarily depend on the physical exchange of all relevant documents or information between the parties. This is the case, for example, when:

(a) written reasons about a scheme's decisions clearly identify the documents or information relied on; and

(b) the identified documents or information can be provided to the parties on request.

RG 139.113 There is a general presumption that a scheme member does not have the discretion to withhold documents or information from a complainant or disputant of the scheme. We recognise, however, that there may be some

limited circumstances where the scheme member might appeal to the scheme to withhold certain information.

RG 139.114 These circumstances might include where the release of information would endanger a third party or where it would compromise a scheme member's general security measures.

RG 139.115 In the interests of ensuring that parties to a complaint or dispute are treated fairly, a scheme should provide written reasons for any decision made about the merits of a complaint or dispute, including when a complaint or dispute is judged to be outside the scheme's Terms of Reference. We understand, however, that there may be some circumstances in which a complaint or dispute may be resolved without providing reasons in writing.

Accountability

RG 139.116 Requirements that relate to the principle of accountability include that a scheme must:

(a) report to us any systemic issues and matters involving serious misconduct by a scheme member;

(b) collect and report information to us about complaints and disputes it receives on a quarterly basis and in its annual report; and

(c) conduct independent reviews of its operations.

Reporting to ASIC: Systemic issues and serious misconduct

RG 139.117 A scheme must report any systemic, persistent or deliberate conduct to us. For the purposes of this guide we have classified the types of conduct or issues that might be reported to us into two broad categories:

(a) systemic issues; and

(b) serious misconduct.

RG 139.118 The broad application of this regulatory guide precludes us from providing an exhaustive list of examples about what might constitute reportable conduct in each of these areas within our jurisdiction. However, working definitions are contained at RG 139.119–RG 139.123 for 'systemic issues' and at RG 139.124–RG 139.126 for 'serious misconduct'.

Systemic issues

RG 139.119 At a broad level, systemic issues relate to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute.

RG 139.120 While several complaints or disputes of the same type may indicate a systemic problem, we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints or disputes a scheme may have received.

RG 139.121 A systemic issue may be identified out of the consideration of a single complaint or dispute. This is because the effect of the particular issue will clearly extend beyond the parties to the complaint or dispute. Some examples of a systemic issue include where there is a mistake in how interest is calculated or there is a mistake in how a fee is applied. Alternatively, a systemic issue may only become evident after the scheme has received multiple complaints or disputes that are similar in nature—for example, where a particular intermediary has mis-sold financial or credit products to a number of consumers.

RG 139.122 Factors causing systemic conduct or problems in the financial or credit system might include poor disclosure or communication, administrative or technical errors, and improper interpretation or application of standard terms.

RG 139.123 The effects of systemic conduct (which by definition would be felt by more than one person) might include financial loss and loss of consumer confidence in the relevant financial service provider or intermediary, credit licensee, or credit representative, or in the relevant financial or credit product or service.

Serious misconduct

RG 139.124 Serious misconduct may include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws.

RG 139.125 Under the Corporations Act and the National Credit Act, AFS licensees and credit licensees are required to do all things necessary to ensure that the financial services or credit activities covered by the licence or registration are provided honestly, efficiently and fairly at all times. Other legislation that we administer provides information about what constitutes proper behaviour in the financial services and credit marketplace—for example, by prohibiting misleading and deceptive conduct.

RG 139.126 We believe that there will be cases of misconduct that, by their nature, require us to take further action. This might include the general category of misconduct referred to in RG 139.124. There is, however, a considerable ‘grey area’, including cases of misconduct in which the need for referral to us is not so straightforward. Schemes should consult with us if they are unsure about whether they should refer a matter to us.

Responsibilities of the scheme

RG 139.127 It is the responsibility of a scheme to:

(a) *identify* systemic issues and cases of serious misconduct that arise from the consideration of consumer complaints and disputes;

(b) *refer* these matters to the relevant scheme member or members for response and action; and

(c) *report* information about the systemic issue or serious misconduct to us, in accordance with these guidelines.

RG 139.128 While EDR schemes are not required to identify the scheme member or members in reports to us, we would strongly encourage them to consider doing so in appropriate cases. In any event, we reserve our right to compel a scheme to provide information identifying a scheme member by using our powers under s33 of the ASIC Act.

RG 139.129 Under s33 of the ASIC Act, we can give a person, such as an EDR scheme, written notice (s33 notice) requiring the production of books—being at a specified time and place, books and records in that person's possession that relate to the financial or credit product or service. We also have similar powers under s267 of the National Credit Act (s267 notice).

RG 139.130 We understand that there will be some systemic issues that relate to general industry practices or trends, which do not permit or warrant referral to a particular scheme member or members. These issues should still be reported to us.

Identification of reportable issues

RG 139.131 In order to effectively identify systemic issues arising from complaints, disputes or inquiries, a scheme should have an appropriate 'systemic focus'. In particular, a scheme must collect and record information in a manner that enables:

(a) the identification of trends and patterns in complaints and disputes; and

(b) the simple retrieval of sorted data.

RG 139.132 A scheme should also have the infrastructure to support effective case management and information collection.

RG 139.133 A scheme must identify who is responsible for reporting systemic issues and serious misconduct to us. This responsibility should not be left only to the scheme's overseeing body.

RG 139.134 Scheme staff who deal with complaints or disputes should be alert to conduct or issues that should be referred to scheme members and/or reported to us. Staff should also be made aware of the terms of any reporting guidelines that are agreed with us.

Reporting of systemic issues involving a single member

RG 139.135 Some systemic issues will arise in relation to the conduct of an individual scheme member. In these circumstances, the scheme should refer the matter to the scheme member for appropriate remedial action, in accordance with the procedures set out in the scheme's Terms of Reference. Within a reasonable period, the scheme member should provide a concise report or 'audit' to the scheme that details the member's response to the referral.

RG 139.136 A copy of the report must be made available to us as soon as practicable after the report is received by the scheme. There will be some circumstances in which a scheme should advise us that it has identified and referred a particular matter to a scheme member, prior to the member's report being made available.

Reporting systemic issues involving multiple scheme members

RG 139.137 Some systemic issues will involve the conduct of multiple scheme members. This may include general trends that might not implicate individual scheme members, but might reflect, for example, the need for a change in our regulatory guidance.

RG 139.138 The scheme should generally follow the same referral and reporting procedures described for systemic issues involving a single member at RG 139.135–RG 139.136.

Dealing with inter-scheme systemic issues

RG 139.139 Some systemic issues may involve the conduct of multiple industry participants who are not members of the same scheme.

RG 139.140 In some circumstances, these issues may only be identified by us through the information provided by different schemes about particular intra-scheme conduct and/or by us issuing a s33 notice or s267 notice. These issues might also be identified through informal discussions with schemes either individually or at joint consultative forums.

General reporting guidelines

RG 139.141 Reports made should focus on one or more of the following objectives:

(a) improving industry practice and communication;

(b) remedying financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);

(c) preventing foreseeable loss to consumers and, more generally, ensuring that 'high-risk' issues might be effectively dealt with before problems develop;

(d) minimising the risk of the conduct or problem recurring;

(e) efficiently dealing with multiple complaints or disputes about a single incident or problem;

(f) reviewing the circumstances in which a particular scheme member (licensee) should continue to conduct their business; and

(g) sending a signal to the market about what constitutes acceptable market behaviour.

RG 139.142 While EDR schemes are not required to identify the scheme member or members in reports to us, we would strongly encourage them to consider doing so in appropriate cases. In any event, based on the report provided to us, and any further information we may require from the schemes, we will consider whether we will compel a scheme to provide information identifying a scheme member by issuing a s33 or s267 notice. To assist us in making this decision, reports should provide information relating to whether the scheme member or members have been uncooperative or otherwise failed to take appropriate remedial action.

RG 139.143 Early and effective action by a scheme member or members in response to reportable conduct should reduce the costs of dealing with multiple complaints or disputes. There can be no general disadvantage to industry where such issues are addressed in a timely and comprehensive manner.

Further review and communication of our reporting guidelines

RG 139.144 This regulatory guide provides a basic framework within which a scheme should operate to satisfy the reporting guidelines: see RG 139.117–RG 139.143. This framework will be subject to periodic review in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.

RG 139.145 We will hold regular meetings between scheme staff and our staff to discuss the operation of the reporting guidelines and other relevant issues.

RG 139.146 We may establish more detailed reporting guidelines with each scheme that is approved. These guidelines will be tailored to the membership and complaints or disputes profile relevant to the scheme, and will be developed and agreed with the assistance of the relevant scheme staff.

Complaints and disputes information

RG 139.147 To comply with our requirements for reporting, a scheme must collect and record information about:

(a) the number of complaints (or disputes) and inquiries received;

(b) the demographics of complainants or disputes (where practicable) who have lodged a complaint or dispute with the scheme;

(c) the number of complaints or disputes received that fall outside the scheme's Terms of Reference (with reasons);

(d) the scheme's current caseload, including the age and status of open cases;

(e) the time taken to resolve complaints or disputes;

(f) the profile of complaints or disputes to enable identification of:

(i) the type of financial or credit product or service involved;

(ii) the product or service provider;

(iii) the purpose for which the financial or credit product or service was obtained;

(iv) the underlying cause(s) of the complaint or dispute; and

(v) any systemic issues or other trends; and

(g) the number of complaints or disputes closed, and an indication of the outcome of each closed complaint or dispute.

Note: An EDR scheme approved under the Corporations Act must collect and record the information at RG 139.147 for 'complaints', an EDR scheme approved under the National Credit Act must collect and record the information at RG 139.147 for 'disputes' and a scheme approved under both the Corporations Act and National Credit Act must collect and record the information at RG 139.147 for both 'complaints' and 'disputes'.

RG 139.148 Where a scheme handles traditional services complaints, it must collect and record the following information:

(a) the types of information listed at RG 139.147(a)–RG 139.147(f), for persons who have been ***directly*** provided the traditional services and for persons who may request an information return;

(b) the number of traditional services complaints put on hold (and for how long) because a person commenced legal proceedings to be included as a beneficiary; and

(c) the number of traditional services complaints received that fell outside of the scheme's Terms of Reference for the legitimate exclusions listed at RG 139.178 and RG 139.179.

RG 139.149 We understand that schemes may encounter practical difficulties in obtaining some information about complaints and disputes, particularly demographic information about complainants. However, we expect that a scheme will have a case management system that enables this information to be recorded where available because demographic information provides an invaluable indication of a scheme's accessibility.

RG 139.150 A scheme must provide us with updated complaints or disputes information, as described above, on a quarterly basis.

RG 139.151 A comprehensive summary and analysis of this information must also be contained in each annual report published by a scheme.

RG 139.152 Schemes must also publish information about complaints and disputes received and closed, with an indication of the outcome, against each scheme member in their annual report.

RG 139.153 The number of complaints and disputes received and closed by an EDR scheme, and an indication of outcome, are an important measure for consumers and investors in choosing a financial service provider, credit provider or credit service provider. It is also useful information for financial service providers, credit providers and credit service providers to compare their complaints experience against those who operate similar businesses.

RG 139.154 We expect that EDR schemes will:

(a) ensure that information is accurate;

(b) present the information in the appropriate context—for example, by categorising member information according to industry sector and/or size of business, or the number of credit representatives a credit licensee has; and

(c) if considered necessary, caution that complaints and disputes history may vary from time to time and be affected by various influences—for example, the occurrence of natural disasters may give rise to more insurance claims and, therefore, complaints.

RG 139.155 We also encourage schemes to publish 'practice notes' or 'guidelines', which identify any problems or issues of interest as they arise during a reporting year.

Independent reviews

RG 139.156 An EDR scheme must commission an independent review of its operations and procedures:

(a) three years after its initial approval by us; and

(b) every five years thereafter, unless we specify a shorter timeframe of less than five years.

RG 139.157 These timeframes should not preclude a review occurring sooner if appropriate.

RG 139.158 We believe that regular, independent reviews of an EDR scheme's performance and procedures provide valuable feedback about how the scheme should evolve and about any areas that should be changed or improved.

RG 139.159 The overseeing body of a scheme must consult with us about:

(a) the terms of the independent review; and

(b) the appointment of the independent reviewer.

RG 139.160 The review should include some form of qualitative assessment of the scheme's performance in addition to quantitative measures of a scheme's performance.

RG 139.161 The results of the review must be made available to us and to other stakeholders.

Efficiency and effectiveness

RG 139.162 Requirements that relate to the principles of efficiency and effectiveness include:

(a) the adequacy of a scheme's coverage;

(b) reducing consumer confusion where a complaint or dispute involves multi-party multi-licensees and/or credit representatives;

(c) the handling of complaints and disputes where a financial service provider, credit provider or credit service provider ceases to carry on business;

(d) adopting the time limits specified in this regulatory guide for bringing complaints or disputes to EDR;

(e) having procedures in place to ensure that a scheme member complies with scheme decisions;

(f) offering remedies that are consistent with the remedies available under the relevant laws;

(g) working collaboratively with the Australian Competition and Consumer Commission (ACCC) and state and territory Offices of Fair Trading (OFTs) when the scheme is approved for credit;

(h) monitoring members' compliance with IDR timeframes; and

(i) publishing members' contact details for hardship applications where the scheme is approved for credit.

Coverage of the scheme

RG 139.163 Schemes must operate a compensation cap approach. Under a compensation cap approach, a scheme has jurisdiction to hear a complaint or dispute involving more than the amount of the compensation cap, but is only able to award compensation up to the value of the compensation cap amount.

RG 139.164 A scheme's coverage under the Corporations Act and National Credit Act must be sufficient to deal with:

(a) the vast majority of types of consumer complaints or disputes in the relevant industry (or industries); and

(b) for consumer complaints involving monetary amounts up to the value of the retail client test under s761G of the Corporations Act (currently $500,000) or credit disputes involving monetary amounts up to the value of $500,000, the EDR scheme must be able to award compensation up to a capped amount that is consistent with the nature, extent and value of consumer transactions in the relevant industry (or industries):

(i) between 1 January 2010 and 31 December 2011 we require EDR schemes to operate a compensation cap amount that is at least equal to or greater than the existing differential monetary limit the EDR scheme operated before 1 January 2010; and

(ii) from 1 January 2012 we require EDR schemes to operate a compensation cap of at least $280,000, unless the EDR scheme covers complaints concerning general insurance brokers, for which a compensation cap of at least $150,000 will apply.

Note 1: We encourage schemes to award compensation at a higher amount where appropriate and relevant to improve the effectiveness of the schemes.

Note 2: Where a traditional services complaint involves other persons who may request an information return (e.g. other beneficiaries), the scheme must assess whether the individual beneficiary's complaint is within the scheme's monetary compensation award (regardless of the total value of the trust or estate).

RG 139.165 As a starting point, we take the view that a scheme must be able to consider any complaint or dispute where the complainant or disputant has suffered a direct financial loss.

RG 139.166 We understand that consideration of an appropriate compensation cap for a particular scheme has implications for scheme members who require professional indemnity insurance to meet any claims.

RG 139.167 We note that:

(a) Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) requires that AFS licensees who provide services to retail clients have adequate arrangements for compensating clients for losses suffered and that these arrangements must be approved by us; and

(b) Regulatory Guide 210 *Compensation and insurance arrangements for credit licensees* (RG 210) requires that credit licensees have adequate arrangements for compensating their clients and their credit representative's clients for losses (unless their credit representative's compensation arrangements indemnify them).

RG 139.168 We may review the coverage of EDR schemes approved under the Corporations Act and National Credit Act in consultation with the schemes, industry, consumer representatives and other interested stakeholders.

Types of complaints or disputes

RG 139.169 An EDR scheme's coverage is set out in its Terms of Reference. When a scheme lodges an application for approval, we will assess the adequacy of its coverage in relation to dealing with the vast majority of consumer complaints or disputes by having regard to:

(a) the types of complainants or disputants that can access the scheme;

(b) the types of complaints or disputes that the scheme can deal with; and

(c) the scheme's compensation cap.

RG 139.170 This part of the regulatory guide contains guidance about the minimum level of coverage that an EDR scheme should provide in order to be approved. We encourage schemes to maintain a broad coverage that is consistent with the business of its members and the participation of consumers in the relevant industries.

RG 139.171 The Terms of Reference of an EDR scheme must set out what types of complaints or disputes a scheme can deal with—that is, what is an 'eligible' complaint or dispute.

RG 139.172 When we assess an EDR scheme for approval, we will review its Terms of Reference to make sure that it offers adequate coverage to deal with a 'complaint' or 'dispute', as defined in RG 165.

RG 139.173 In order to gain approval, EDR schemes must deal with the vast majority of types of consumer complaints or disputes about the financial or credit products and services in the relevant industry or industries they cover.

RG 139.174 The Terms of Reference of EDR schemes approved under the National Credit Act must be able to handle disputes involving the types of matters listed at s199 of the National Credit Act, up to the value of the monetary amounts and compensation caps specified at RG 139.164.

RG 139.175 An approved EDR scheme does not have to deal with all complaints or disputes that a retail client or consumer may make about a particular financial or credit product or service, or the conduct of a financial service provider, credit provider, credit service provider or credit representative. There are some types of complaints or disputes that a scheme may legitimately exclude from its Terms of Reference, such as a complaint or dispute that is solely about a member's commercial policy, unless the complaint or dispute relates to a statutory obligation (e.g. responsible lending requirements for credit or margin lending financial services).

RG 139.176 When we approve an EDR scheme, we also effectively approve any exclusions from that scheme's coverage. These exclusions may vary across schemes, depending on the nature of the financial or credit products or

services covered—however, we will take a consistent approach in assessing what are reasonable exclusions from that scheme's coverage.

RG 139.177 We recognise that all EDR schemes apply legitimate exclusions in their Terms of Reference that act to limit the coverage that the scheme provides.

RG 139.178 Examples of the types of complaints or disputes that may typically be excluded from the Terms of Reference of an ASIC-approved EDR scheme include complaints or disputes that:

(a) have already been 'dealt with' in another forum (i.e. a ***decision on the merits having been made*** has already been made or given, or should have been made or given, by a court, tribunal or another ASIC-approved EDR scheme);

(b) relate solely to the member's commercial policy, unless they relate to a statutory obligation (e.g. the responsible lending requirements for credit and margin lending financial services);

(c) relate solely to the underlying performance of an investment; or

(d) are frivolous and vexatious**.**

RG 139.179 The following types of traditional services complaints may ***also*** be typically excluded from the Terms of Reference of an EDR scheme:

(a) complaints relating to the management of a common fund or management of a managed investment scheme as a whole;

(b) complaints relating to the level of a fee or charge—unless they relate to non-disclosure, misrepresentation or incorrect application of the fee or charge; or where the complaint concerns a breach of any legal obligation or duty on the part of the trustee company;

(c) complaints that a court would not normally consider or resolve (e.g. review of a trustee's exercise of discretion, except where there is bad faith, failure to give fair and proper consideration to the exercise of the discretion or failure to exercise the discretion in accordance for which it was conferred);

(d) complaints or aspects of the complaint that a state or territory court, tribunal or board would be able to handle under relevant state and territory guardianship laws;

(e) complaints that would be more appropriately dealt with by a court (e.g. where a complainant or an interested beneficiary is a minor or lacks mental capacity);

(f) complaints involving more than one beneficiary where all beneficiaries do not first agree to the scheme's jurisdiction and any outcome that the scheme may be able to achieve at RG 139.188 (including where all affected parties cannot be contacted or identified); and

(g) complaints where the substance of the complaint has been resolved by a legal direction given by a court to the trustee and the complaint does not raise any post-court directions issues.

RG 139.180 We will also take into account the scheme's capacity and expertise to deal with the full range of financial or credit products and services it intends to cover.

RG 139.181 EDR schemes seeking approval under the National Credit Act should also handle disputes involving default judgments in the following way:

(a) EDR schemes should not overturn, or be perceived to overturn, default judgment orders. This is because there are relevant court processes to set aside or vary a default judgment order. We expect that EDR schemes will generally assist disputants to find relevant information and be cross-referred to other agencies that can assist in providing legal representation or advice in setting aside a default judgment; and

(b) we expect that, where there has been a default judgment order, the EDR scheme should still handle the dispute provided that in so doing the scheme would not overturn, or be perceived to overturn, the default judgment order (e.g. where a post default judgment dispute is involved—for example, harassment).

RG 139.182 EDR schemes that handle traditional services complaints must be able to handle traditional services complaints where a trustee company acts jointly with a personal co-appointee, including where the complaint relates:

(a) solely to the trustee company's acts; or

(b) to the conduct of both the trustee company and the personal co-appointee, and the personal co-appointee consents to the scheme's jurisdiction.

RG 139.183 We will continue to monitor the types of complaints or disputes that are both included and excluded from the jurisdiction of each EDR scheme.

Compensation caps

RG 139.184 Before approving a particular scheme, we will need to make an assessment about whether the scheme's compensation cap satisfies the objectives mentioned at RG 139.164. We will also review the compensation a scheme is able to award having regard to these objectives.

RG 139.185 Compensation caps apply on a 'per claim' basis. This means that separate claims by the same complainant or disputant must not be aggregated by the scheme for the purpose of determining a maximum claim. Further, the adequacy of a scheme's compensation cap will be subject to review by us.

RG 139.186 We reserve the discretion:

(a) as part of our approval process, to require an increase to the compensation cap applied by a particular EDR scheme; or

(b) to stipulate a minimum compensation cap that is higher than $280,000, and in the case of general insurance brokers, higher than $150,000.

Before we do either, we will consult with the schemes and the relevant industry and consumer representatives about the relative costs and benefits of doing so.

RG 139.187 We may also review the efficiency and effectiveness of the compensation cap for:

(a) schemes approved under the National Credit Act after the schemes have had a sufficient time in operation; and

(b) schemes handling traditional services complaints after the schemes have had a sufficient experience with such complaints.

We will consult with the schemes and relevant industry and consumer representatives as part of any review.

Minimum compensation caps, waiver and the binding nature of the scheme decision

RG 139.188 In operating a minimum compensation cap:

(a) the scheme should handle the complaint or dispute and make an award up to its compensation cap (or higher if the scheme member agrees);

(b) a consumer or investor with a complaint or dispute involving an amount that is higher than the EDR scheme's compensation cap may be required to waive the excess at the end of the EDR process; and

(c) the EDR scheme outcome should not bind the consumer or investor if they do not choose to accept it.

Note: If the complainant or disputant accepts the EDR outcome, the scheme or member may require the complainant or disputant to accept the EDR outcome as full and final satisfaction of their claim and it will be binding on both parties (i.e. the balance of the claim cannot be pursued in court).

RG 139.189 We consider that waiver at the end of the EDR process will act as an incentive for financial service providers, credit providers and credit service providers to resolve the complaint or dispute genuinely and in good faith, and in a timely and appropriate manner.

RG 139.190 This approach preserves a complainant's or disputant's legal right to reject the EDR outcome and pursue their entire complaint or dispute in a court of competent jurisdiction.

Indexation of the compensation cap

RG 139.191 From 1 January 2012, schemes must adjust the compensation cap every three years using the higher of the increase in the Consumer Price Index (CPI) or the increase in Male Total Average Weekly Earnings (MTAWE).

Interest on awards

RG 139.192 To provide an outcome that is fair and reasonable in all the circumstances, schemes must be able to award interest or earnings in addition to the amount awarded by a compensation cap.

RG 139.193 We are of this view because an award of interest in addition to a compensation cap may also act as an incentive for parties to resolve the complaint or dispute more expeditiously and in good faith.

RG 139.194 If interest is awarded, the Terms of Reference of the scheme must require that interest be calculated from the date of the cause of action or matter giving rise to the claim.

RG 139.195 A scheme's Terms of Reference may prescribe that, when calculating an award of interest, the scheme may have regard to any factors it considers relevant, including, but not limited to, the extent to which the conduct of either party contributed to the delay.

Traditional services complaints involving multiple beneficiaries

RG 139.196 For traditional services complaints involving more than one person who may request an information return (e.g. other beneficiaries), including where the complaint also involves a person who has been ***directly*** provided the traditional services, the scheme's Terms of Reference must state that:

(a) the scheme may only handle the complaint if all persons with a reasonable interest in the outcome of the complaint first agree to the scheme having jurisdiction and being bound by any scheme outcome that may be achieved. This would result in waiver and deed of release at the beginning of the EDR process; and

(b) after a complaint is assessed as being within the scheme's jurisdiction, the scheme may have an ongoing discretion to discontinue handling the traditional services complaint if at any stage the scheme forms the view that a court would be the more appropriate forum in the circumstances.

RG 139.197 To enable all beneficiaries to make a fully informed decision about whether to agree to the scheme's jurisdiction and give a waiver and deed of release at the beginning of the EDR process, the scheme must:

(a) inform each beneficiary of their right to obtain independent legal advice so they properly understand what they are agreeing to; and

(b) allow each beneficiary a reasonable time to obtain independent legal advice if they wish to do so.

Reducing consumer confusion about where to complain

Multi-licensee complaints or disputes

RG 139.198 Where a complaint or dispute involves:

(a) two or more credit licensees (e.g. a lender and mortgage manager/broker, or a lender and debt collector), whether or not a credit representative is involved; or

(b) an AFS licensee and a credit licensee (e.g. a financial adviser and a lender), whether or not a credit representative is involved,

we expect that EDR schemes will continue to have processes to assess the complaint or dispute and refer part or the whole of the complaint or dispute to another relevant EDR scheme where appropriate, depending on the nature of the complaint or dispute (i.e. the subject matter in dispute) and which licensee has responsibility.

RG 139.199 For complaints or disputes that are referred, the relevant date for determining whether the matter is within the time limit for bringing a complaint or dispute under RG 139.213–RG 139.216 is the date the complaint or dispute was first lodged with an EDR scheme.

RG 139.200 We will review this approach in consultation with the schemes, industry, consumer representatives and other interested stakeholders.

Disputes involving credit representatives

RG 139.201 A scheme seeking approval under the National Credit Act must ensure that its Constitution and/or Terms of Reference provides that where a dispute involves a credit representative:

(a) the EDR scheme of the credit licensee (if different) will handle the dispute in the first instance; and

(b) where the credit licensee ceases to carry on business and the credit licensee's EDR scheme does not exercise its discretion to continue to handle the dispute in accordance with RG 139.208–RG 139.212, the dispute may then be referred to the EDR scheme of the credit representative (if different).

RG 139.202 Where the credit representative's EDR scheme receives the dispute, the relevant date for determining whether the matter is within the time limit for bringing a complaint under RG 139.213–RG 139.216 is the date the dispute was first lodged at EDR.

Disputes involving credit licensees and securitisation bodies

RG 139.203 A scheme seeking approval under the National Credit Act must ensure that its Constitution and/or Terms of Reference (or an alternative arrangement agreed to by ASIC—for example, a Memorandum of Understanding) provides that where a dispute involves a securitisation body:

(a) the EDR scheme of credit licensee who acts on behalf of the securitisation body handles the dispute where the consumer claim relates to compensation; and

(b) the EDR scheme of the securitisation body handles the dispute where a potential change to the credit contract or consumer lease is involved. This may include where the consumer seeks to vary or set aside the credit contract on hardship grounds, for unjust fees and other charges, where a request for postponement of enforcement proceedings is made, or where the contract is 'unsuitable'.

RG 139.204 As it may not always be clear at the outset of the handling of the dispute how the dispute should be characterised and therefore which scheme should handle it, a dispute may need to be transferred part-way. We expect that the schemes will have appropriate procedures in place to refer disputes to another scheme in a timely manner. We also expect that the schemes, securitisation bodies and credit licensees will make best efforts to do so.

RG 139.205 Where a dispute is transferred between schemes, the relevant date for determining whether the matter is within the time limit for bringing a dispute to the subsequent scheme under RG 139.213–RG 139.216 is the date the dispute was first lodged at EDR.

RG 139.206 To ensure that this arrangement does not compromise the longstanding principle that disputants can always go to court instead of EDR, we expect that securitisation bodies will not attempt to use a statute of limitations defence against a client in any subsequent court proceeding brought by the client, where:

(a) the client has followed these processes and successfully brought a claim against the credit licensee at EDR;

(b) the credit licensee has failed to pay the compensation because they ceased to carry on business; and

(c) the limitations period has expired subsequent to the matter going to EDR.

RG 139.207 So that EDR procedures are effective, we expect credit licensees and securitisation bodies will refrain from commencing or continuing any legal action or other enforcement action (i.e. debt collection activity) while a dispute is being handled by any EDR scheme. This is so the client is not disadvantaged by having to respond to disputes in two different forums. We

expect the servicing agreement between the credit licensee and securitisation body will provide for this. It may also be dealt with in the schemes' documents as set out in RG 139.203.

Where a scheme member ceases to carry on business

RG 139.208 A scheme must ensure that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion about whether to cancel a scheme member's membership and/or to handle complaints or disputes in respect of the scheme member where the scheme member:

(a) ceases to carry on business. Examples of ceasing to carry on business include where a scheme member closes its doors to consumers and investors but still has an AFS licence or credit licence, or where a financial service provider, credit provider or credit service provider sells its business;

(b) ceases to have a licence; and/or

(c) becomes insolvent under administration.

RG 139.209 In exercising this discretion, the scheme must consider the complainant's or disputant's interests.

RG 139.210 The scheme may also have regard to whether:

(a) the general exclusions to scheme jurisdiction apply (see RG 139.175–RG 139.178);

(b) time limits apply (see RG 139.213–RG 139.216); and

(c) the coverage of the scheme precludes the scheme from handling the complaint or dispute.

RG 139.211 Examples of where it is in the complainant's or disputant's interests not to cancel the scheme member's membership, and/or to handle the complaint or dispute, include:

(a) where the complainant or disputant will be able to obtain redress; and

(b) in insolvency situations, where a scheme decision may assist in showing that a complainant or disputant is a creditor and has a 'proof of debt'.

RG 139.212 The scheme must also require that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion to bypass IDR, if it is in the complainant's or disputant's interests to do so. This may include where there is no handling of complaints or disputes at IDR.

Time limit for bringing complaints or disputes to EDR

RG 139.213 We believe that schemes should have a consistent approach to time limits for bringing a complaint or dispute to a scheme. This will ensure consistency of

treatment of complaints and disputes in the Australian financial and credit system, and create a more level playing field for industry participants.

RG 139.214 Schemes must ensure that their Terms of Reference require that the time limits for bringing a complaint or dispute to a scheme are:

(a) for those aspects of credit disputes that relate to hardship applications, unjust transactions and unconscionable interest and other charges under the National Credit Code, the later of either:

(i) two years from when the credit contract is rescinded, discharged or otherwise comes to an end (or in the case of a consumer lease entered into on or after 1 March 2013, two years from when the lease is terminated, discharged or otherwise comes to an end); or

(ii) two years from when a final response is given at IDR (see RG 165.87–RG 165.121); and

(b) for all other complaints or disputes, the earlier of either:

(i) six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or

(ii) two years from when a final response is given at IDR (see RG 165.87–RG 165.121).

RG 139.215 The time limits at RG 139.214 apply unless the scheme considers that exceptional circumstances apply or the scheme member and scheme agree to the scheme having jurisdiction.

RG 139.216 Where a disputant seeks more than one, or several, changes to the terms of the credit contract or lease for hardship during the life of the contract or lease, each dispute relating to a hardship notice must be treated as a new dispute to allow the disputant access to EDR.

Compliance with scheme decisions

RG 139.217 A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. It should be noted that scheme decisions are not binding on complainants or disputants unless they choose to accept the scheme's decision at the end of the EDR process and (when a compensation cap applies) waive the excess of their claim: see RG 139.188(b) and RG 139.188(c).

RG 139.218 A scheme must establish its own procedures for dealing with the non-compliance by a scheme member with a decision or rule of the scheme. These procedures should be detailed in the scheme's Terms of Reference.

RG 139.219 We view non-compliance by a scheme member with a decision or rule of a scheme to be a serious breach of the terms of membership. However,

because it is in the interests of consumers and industry that industry participants remain within the schemes, a scheme should not terminate the membership of a non-compliant member without first allowing them the opportunity to comply.

RG 139.220 We suggest that, in the event of non-compliance, a scheme might issue a 'notice to comply', which:

(a) describes the act of the non-compliance;

(b) allows the scheme member a reasonable time, say five working days, to comply; and

(c) notifies the scheme member of the implications of failing to comply.

RG 139.221 Where a scheme member is required, by virtue of a licence or registration granted by us, to join an ASIC-approved EDR scheme, then the scheme should inform us of any proposal to terminate that licensee's or registrant's membership. The scheme should also inform us of any proposal to terminate a credit representative's membership. The scheme should not unilaterally terminate the membership of a licensee because doing so would place the licensee in breach of a licence condition.

RG 139.222 There are a number of administrative responses available to us following a referral of non-compliance by a licensee or credit representative with a decision or rule of a scheme. Subject to holding a hearing we might, for example:

(a) impose or vary the licence conditions, including imposing a condition that requires ongoing compliance with an approved scheme's rules and decisions;

(b) make other orders, such as allowing sufficient time for the non-compliant licensee to join another approved scheme; and

(c) suspend or revoke the licence for the failure of the licensee to conduct business efficiently, honestly and fairly.

Note: See Regulatory Guide 8 *Hearings practice manual* (RG 8) for more information about hearing procedures.

Available remedies

RG 139.223 The remedies offered by a scheme must be consistent with the remedies available under the relevant laws that apply to the arrangements between the scheme member and its customers.

RG 139.224 By this we mean that a scheme must, as a minimum, compensate a complainant or disputant for any direct loss or damage caused by a breach of any obligation owed in relation to the provision of a financial or credit product or service. This excludes an award for punitive or exemplary damages.

RG 139.225 In determining the extent of loss or damage suffered by a complainant or disputant, the scheme should have regard not only to the relevant legal principles, but also to the concept of fairness and to relevant industry best practice.

RG 139.226 A scheme must also be able, under its Terms of Reference, to make appropriate non-monetary orders obliging a scheme member to take (or not take) a particular course of action in order to resolve a complaint or dispute. Examples of non-monetary orders that a scheme might make following the consideration of a complaint or dispute are:

(a) releasing the complainant or disputant from a contract and refunding any money paid plus interest;

(b) varying the terms of the contract with the customer, provided any third party rights are not affected; and

(c) releasing documents and/or information relating to the customer that are under the control of the financial or credit product or service provider.

RG 139.227 This framework anticipates the consideration of claims for opportunity costs and for non-financial loss where appropriate. It does not require the decision-maker(s) of a scheme to adopt a particular approach to the determination of remedies.

Working collaboratively with the ACCC and state and territory Offices of Fair Trading

RG 139.228 We expect that EDR schemes seeking approval under the National Credit Act will work collaboratively with the ACCC and state and territory OFTs to develop disputes handling and referral processes where disputes involve linked credit provider and fair trading issues.

RG 139.229 We expect that these disputes handling processes will assist in efficient and effective disputes handling, and will clarify referral processes.

IDR timeframes

RG 139.230 We emphasise the importance of timeliness in handling complaints or disputes at IDR.

RG 139.231 A scheme member's obligations to respond to a complaint or dispute within certain timeframes are explained further in RG 165. If a scheme member is unable to respond to the complaint or dispute within the timeframe, the scheme member should inform the complainant or disputant of the reasons for the delay.

RG 139.232 A scheme should establish its own reasonable procedures about the circumstances in which an extension of time for resolving a complaint or

dispute by a member at IDR is warranted. The scheme should also have procedures addressing the ability of a complainant or disputant to appeal any extension of time. A scheme must monitor its members' compliance with timeframes relating to IDR.

RG 139.233 Where a dispute involves a hardship notice or request for postponement of enforcement proceedings and the 21 days to consider the notice or application (or additional time allowed for credit contracts or leases entered into on or after 1 March 2013, if further information is required to assess the hardship notice) has passed without agreement being reached (see RG 165), the EDR scheme may allow, where appropriate, a further maximum of 14 days for the dispute to be handled at IDR.

Publishing scheme members' contact details for hardship applications

RG 139.234 Scheme members must have a dedicated telephone number and, where possible, a fax number and postal and email address to accept and handle hardship applications: see RG 165.

RG 139.235 EDR schemes seeking approval under the National Credit Act should also make available and maintain on their websites their members' names, telephone numbers, and, where possible, other contact details (i.e. fax numbers, postal and email addresses) so that disputants can make hardship applications to a scheme's members.

RG 139.236 We expect that this information will be posted in an easy-to-find webpage and will be kept updated to remain current.

C The approval process

Key points

You will need to lodge a written application with ASIC for your scheme to be considered for approval by us.

The written application must contain certain information.

We will provide a formal letter of approval if your scheme is approved and publish information about the schemes we have approved on our website.

How to lodge an application for approval

RG 139.237 A scheme that requires or seeks our approval should lodge a written application addressing each of the guidelines contained in Section B of this guide. Applicants should read the information contained in Section B before completing their application.

RG 139.238 A scheme that seeks our approval should send a written application to:

Senior Executive Leader
Consumers, Advisers and Retail Investors
ASIC
GPO Box 9827
Canberra City ACT 2601

RG 139.239 The application should include the information described in RG 139.240 and RG 139.241.

Information that should be included in an application

RG 139.240 An application for approval should include the following information:

(a) why the scheme is seeking approval;

(b) how the scheme meets the guidelines set out in our policy;

(c) the current and projected membership details;

(d) the current Terms of Reference (and details of any proposals to amend these);

(e) the articles of association (or equivalent) of the overseeing body;

(f) details of the membership of, and appointment to, the overseeing body;

(g) details of contracts with the scheme members; and

(h) a summary of the complaints or disputes information the scheme collects and records.

RG 139.241 An applicant must provide us with any other information we consider necessary to complete our assessment of the application.

The approval letter and class orders [CO 09/340] and [CO 10/249]

RG 139.242 We will provide a formal approval letter to each scheme that is approved under this guide.

RG 139.243 Class Order [CO 09/340] *External dispute resolution schemes* for approvals under the Corporations Act and Class Order [CO 10/249] *External dispute resolution schemes (credit)* for approvals under the National Credit Act will also be updated to reflect that a scheme has been approved.

RG 139.244 The approval letter will be a public document and will contain details of any conditions under which the approval is granted. The approval letter will also contain information about the agreed guidelines under which the scheme will report information about systemic issues and serious misconduct to us.

RG 139.245 In order for an approval to remain in force, a scheme must continue to comply with the guidelines contained in this guide, and with any new or additional guidelines that are introduced in accordance with our regulatory objectives.

Appendix: DIST Benchmarks

DIST Benchmarks and their underlying principles

Accessibility	The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
Independence	The decision-making process and administration of the scheme are independent from scheme members.
Fairness	The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
Accountability	The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
Efficiency	The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
Effectiveness	The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Note: Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in 1997.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
AS ISO 10002–2006	Australian Standard AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004, MOD)
ASIC Act	*Australian Securities and Investments Commission Act 2001*
beneficiary	Means: • a beneficiary under a deceased's will; • where a person has died without a will, a person who has an entitlement or interest in the deceased's estate under a state or territory law; • a person who has commenced a proceeding in a court under a state or territory law to be included as a beneficiary of a deceased's estate; and • a beneficiary of a trust (excluding charitable trusts) Note: See regs 7.1.28A and 5D.2.01 of the Corporations Regulations.
carried over instrument	Has the meaning given in s4 of the Transitional Act
[CO 10/907] (for example)	An ASIC class order (in this example numbered 10/907)
COI lender	A credit provider or lessor who only has a closed pool of carried over instruments as at 1 July 2010 and will not offer new credit contracts or consumer leases from 1 July 2010

Term	Meaning in this document
complainant	A person or company who at any time has: • made a complaint to an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or • lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
complaint	Has the meaning given in AS ISO 10002–2006
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit contract	Has the meaning in s4 of the National Credit Code
Credit Guide	A document that must be provided to a consumer by a credit provider, credit service provider, credit representative or debt collector under the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or 65(2) of the National Credit Act
credit service	Has the meaning given in s7 of the National Credit Act
credit service provider	A person who provides credit services

Term	Meaning in this document
default judgment order	A verdict, handed down by a state, territory, or federal court, made in favour of the applicant (the industry participant) against the defendant (the disputant) and not on consideration of the merits of the case. Depending on the relevant court or civil procedure rules applicable, such a verdict may be handed down where the disputant fails to lodge a defence, whether within a specific timeframe or fails to appear in court
disputant	A person or small business who at any time has: • a dispute with an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or • lodged a dispute with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
dispute	Has the same meaning as complaint
DIST Benchmarks	The Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in August 1997
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
final response	A response in writing required to be given to the complainant under RG 165, setting out the final outcome offered to the complainant at IDR, the right to complain to an ASIC-approved EDR scheme and the relevant name and contact details of the scheme
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
Financial Services Guide	A document required by s941A or 941B to be given in accordance with Div 2 of Pt 7.7 Note: This is a definition contained in s761A of the Corporations Act.
guardianship laws	Means the state and territory guardianship laws listed at Sch 8AC of the Corporations Regulations

Term	Meaning in this document
hardship notice	Means: • for credit contracts entered into before 1 March 2013, to which the National Credit Code applies, an application for a change to the terms of the contract for hardship; and • for credit contracts or leases entered into on or after 1 March 2013, to which the National Credit Code applies, a hardship notice under s72 or 177B (as modified by the *National Consumer Credit Protection Amendment (Enhancements) Act 2012*).
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165
information return	A trustee company providing traditional services must give certain information to beneficiaries, settlors of trusts, and certain other parties within 30 days of a request. Such information must include: • the income earned on the trust's assets; • the expenses of the trust, including remuneration, commission or other benefits received by the trustee company; and • the net value of the trust's assets Note: See s601RAC(1)(e) of the Corporations Act and regs 5D.2.01, 5D.2.02 and 7.1.28A of the Corporations Regulations.
licensee	An AFS licensee or a credit licensee
margin lending financial service	A margin lending financial service is: • a dealing in a margin lending facility; or • the provision of financial product advice in relation to a margin lending facility
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 of the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
National Credit Amendment Regulations	National Consumer Credit Protection Amendment Regulation 2013 No 1
old Credit Code	Has the meaning given in s4 of the Transitional Act

Term	Meaning in this document
prescribed unlicensed COI lender	Has the meaning given in modified s5A of the National Credit Act, as inserted by item 2.5 of Sch 2 of the National Credit Regulations Note: In general terms, a prescribed unlicensed COI lender is an unlicensed COI lender who fails to meet certain probity requirements and who has restrictions placed on their conduct in relation to their carried over instruments. A prescribed unlicensed COI lender must not engage in credit activities with respect to their carried over instruments. They must instead appoint a credit licensee as 'representative' to engage in credit activities on their behalf with respect to their carried over instruments.
reg 16 (for example)	A regulation of a set of regulations as specified (in this example numbered 16)
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
RG 126 (for example)	An ASIC regulatory guide (in this example numbered 126)
s64 (for example)	A section of an Act or Code as specified (in this example numbered 64)
s33 notice	A notice issued by ASIC exercising its powers to compel production of documents under s33 of the ASIC Act
s267 notice	A notice issued by ASIC exercising its powers to compel production of documents under s267 of the National Credit Act
scheme member (or member)	An industry participant who is a member of an ASIC-approved EDR scheme
SCT	Superannuation Complaints Tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*
securitisation body	Means a special purpose funding entity (credit), including both: • a securitisation entity; and • a fundraising special purpose entity, as defined by s5 of the National Credit Act
servicing agreement	An agreement between a securitisation body and a credit licensee, as defined in s5 of the National Credit Act
small business	A small business as defined in s761G of the Corporations Act
sole beneficiary	Means the only beneficiary under a will, the only person who has an entitlement or interest in the deceased's estate under a state or territory law or the only beneficiary of a trust (excluding charitable trusts)

Term	Meaning in this document
Terms of Reference	The document that sets out an EDR scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'Rules'
traditional services	Means traditional trustee company services, as defined by s601RAC of the Corporations Act
Transitional Act	*National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*
unlicensed COI lender	Has the meaning given in s5 of the National Credit Act, as modified by item 2.4 of Sch 2 of the National Credit Regulations
unlicensed product issuer	An issuer of a financial product who is not an AFS licensee
unlicensed secondary seller	A person who offers the secondary sale of a financial product under s1012C(5), (6) or (8) of the Corporations Act and who is not an AFS licensee

Related information

Headnotes

AFS licensees, beneficiaries, carried over instrument, compensation caps, credit licensees, credit representatives, dispute resolution requirements, DIST Benchmarks, EDR scheme, EDR scheme membership, external dispute resolution, IDR processes, information return, internal dispute resolution, lender, margin lending financial services, monetary limits, person who may request an information return, securitisation body, servicing agreement, special purpose funding entities, traditional services, trustee company, unlicensed COI lender, unlicensed product issuers, unlicensed secondary sellers

Class orders

[CO 09/339] *Internal dispute resolution procedures*

[CO 09/340] *External dispute resolution schemes*

[CO 10/249] *External dispute resolution schemes (credit)*

[CO 10/250] *Internal dispute resolution procedures (credit)*

[CO 10/517] *Internal dispute resolution (credit—unlicensed COI lenders)*

[CO 10/907] *Exempted special purpose funding entities—deferral of start date for EDR scheme membership*

[CO 11/261] *Trustee companies providing traditional trustee company services—deferral of start date for dispute resolution requirements*

Regulatory guides

RG 8 *Hearings practice manual*

RG 126 *Compensation and insurance arrangements for AFS licensees*

RG 165 *Licensing: Internal and external dispute resolution*

RG 203 *Do I need a credit licence?*

RG 210 *Compensation and insurance arrangements for credit licensees*

Legislation

ASIC Act, s1, 33

Corporations Act, Ch 7, s601RAC, 601RAV, s760A, 761G, 766A(1A), 912A, 942B(2)(h), 1017G(2); Corporations Regulations, regs 5D.2.01, 5D.2.02, 7.1.28A, 7.6.02, 7.9.77 and Sch 8AC

National Credit Act, Ch 2, s10(1)(a), 45, 47, 64, 65, 113, 126, 127, 136, 149, 150, 158, 199 and 267; National Credit Code, s72, 94, 177B; National Credit Regulations, regs 9A, 10(3), 10(4)(a), 10(4)(b), 10(4)(c), 16, 23B, 23C, 25G and Schs 2 and 3; National Credit Amendment Regulations, regs 69A and 69B; National Consumer Credit Protection Amendment Regulations 2010 (No. 2), item 32 of Sch 1; Transitional Act, s4(1)

Retirement Savings Accounts Act 1997

Superannuation (Resolution of Complaints) Act 1993

Cases

Australian Timeshare and Holiday Ownership Council Limited v Australian Securities and Investments Commission [2008] AATA 62 (23 January 2008)

Consultation papers and reports

CP 102 *Dispute resolution—Review of RG 139 and RG 165*

CP 112 *Dispute resolution requirements for consumer credit and margin lending*

CP 138 *Dispute resolution requirements for trustee companies providing traditional services*

CP 172 *Review of EDR jurisdiction over complaints when members commence debt recovery legal proceedings*

CP 190 *Small business lending complaints: Update to RG 139*

REP 156 *Report on submissions to CP 102 Dispute resolution—Review of RG 139 and 165*

REP 182 *Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference*

REP 195 *Response to submissions on CP 112 Dispute resolution requirements for credit and margin lending*

REP 236 *Response to submissions on CP 138 Dispute resolution requirements for trustee companies providing traditional services*

REP 308 *Response to submissions on CP 172 Review of EDR jurisdiction (debt recovery legal proceedings)*

REP 348 *Response to submissions on CP 190 Small business lending complaints: Update to RG 139*

Media and information releases

08-05AD *ASIC proposes new financial services EDR claim limit of $280,000* (8 September 2008)

09-263AD *ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference* (18 December 2009)

10-95AD *Access to dispute resolution for consumers of credit and margin lending financial services* (7 May 2010)

10-150AD *ASIC sets dispute resolution standards for unlicensed lenders with carried over instruments* (6 July 2010)

11-23AD *Revised internal dispute resolution procedures for financial institutions* (16 February 2011)

11-279AD *ASIC review: EDR schemes handling of complaints when members commence debt recovery legal proceedings* (2 December 2011)

12-254MR *ASIC releases findings of review into EDR scheme jurisdiction over debt recovery legal proceedings complaints* (19 October 2012)