



**ASIC**

Australian Securities & Investments Commission

## REGULATION IMPACT STATEMENT

# Early termination fees for residential loans

November 2010

### **About this Regulation Impact Statement**

This Regulation Impact Statement (RIS) addresses ASIC's proposals to assist lenders in understanding their obligations in relation to charging and explaining early termination fees for residential loans.

## What this Regulation Impact Statement is about

- 1 This Regulation Impact Statement (RIS) addresses ASIC's proposals to assist lenders in understanding their obligations in relation to charging and explaining early termination fees so that they are not unconscionable under the National Credit Code, which is part of the *National Consumer Credit Protection Act 2009* (National Credit Act), or unfair under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- 2 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:
  - on a general level:
    - maintaining, facilitating and improving the performance of the financial system and entities in it;
    - promoting confident and informed participation by investors and consumers in the financial system; and
    - administering the law effectively and with minimal procedural requirements; and
  - more specifically:
    - consumers' interests in not having early termination fees that are unreasonably high or that pose an unnecessary barrier to switching; and
    - lenders' interests in recovering reasonable costs and being flexible with charging.
- 3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:
  - the likely compliance costs;
  - the likely effect on competition; and
  - other impacts, costs and benefits.

# Contents

<b>A</b>	<b>Introduction</b> .....	<b>4</b>
	Background.....	4
	Assessing the problem .....	6
	Objectives of government action .....	9
<b>B</b>	<b>Options and impact analysis</b> .....	<b>10</b>
	Option 1: ASIC provides indicative guidance to lenders on imposing early termination fees (preferred option) .....	10
	Option 2: ASIC takes no action (status quo) .....	13
<b>C</b>	<b>Consultation</b> .....	<b>15</b>
	CP 135 .....	15
	Overview of responses to CP 135 .....	15
	Feedback to CP 135 and ASIC's response .....	16
<b>D</b>	<b>Conclusion and recommended option</b> .....	<b>18</b>
<b>E</b>	<b>Implementation</b> .....	<b>19</b>

## A Introduction

### Background

4 Most home loans and loans for residential investment properties (collectively ‘residential loans’) have early termination fees, which are payable if a customer terminates a loan within a specified time (e.g. three to five years). Early termination fees can be a barrier to consumers switching loans by ‘locking’ them into loans with unfavourable interest rates if the early termination fee is also high.

Note: An early termination fee does not include any fee or charge that is payable regardless of whether the loan is repaid early or not (e.g. standard discharge fees and charges).

5 There are two national laws administered by ASIC that are relevant to early termination fees for residential loans:

- (a) the National Credit Code, which is part of the *National Consumer Credit Protection Act 2009* (National Credit Act); and
- (b) the *Australian Securities and Investments Commission Act 2001* (ASIC Act), particularly the unfair contract terms provisions in Subdiv BA of Div 2 of Pt 2.

6 The National Credit Code and unfair contract term provisions both commenced on 1 July 2010. Administering these laws is a new regulatory responsibility for ASIC. The provisions of these laws that are relevant to how early termination fees are charged and explained are described in more detail below.

#### **When an early termination fee is unconscionable**

7 Under the National Credit Code, a borrower or ASIC can challenge the validity of an early termination fee that is unconscionable for the purposes of that Code: s78 and 79.

8 Section 78(4) provides that a fee payable on early termination is unconscionable ‘if and only if it appears to the court that it exceeds a reasonable estimate of the credit provider’s loss arising from the early termination or prepayment, including the credit provider’s average reasonable administrative costs in respect of such a termination or prepayment.’ We will administer the law on the basis that an early termination fee, including a deferred establishment fee, is a fee payable on early termination that is assessable under the test in s78(4) of the National Credit Code.

Note: A deferred establishment fee is a type of fee that is said by lenders to reflect establishment costs not charged at the start of the loan. Typically, it is charged if the consumer repays the loan in the first three to five years (although, in some cases, it can be longer). A deferred establishment fee can be charged for both fixed rate and variable rate loans.

- 9 If a court finds a term is unconscionable under the National Credit Code, it can annul or reduce the fee or charge and may make ancillary or consequential orders.

### **When an early termination fee is unfair**

- 10 Section 12BG(1) of the ASIC Act provides that a contractual term is unfair if it:

- (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

- 11 If the court finds that a contractual term is unfair, then that term is void. However, the contract continues to bind the parties if it is capable of operating without the unfair term: s12BF of the ASIC Act.

- 12 In addition, if the court finds a term unfair, a variety of remedies may be sought. For example, ASIC may apply to the court to seek certain orders for the benefit of people that are not parties to proceedings (non-party consumers). Some orders that the court may be able to make include:

- (a) an order declaring all or part of a contract to be void;
- (b) an order varying a contract or arrangement as the court sees fit;
- (c) an order refusing to enforce any or all of the terms of a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party consumer; and/or
- (e) an order directing the respondent to provide services to the non-party consumer at their expense: see s12GNB–GND of the ASIC Act.

### **Explaining early termination fees**

- 13 In determining whether a term of a consumer contract is unfair under the ASIC Act, a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent: s12BG(2)(a). For early termination fees, this means a court must consider

the extent to which the term providing for the early termination fee is transparent.

- 14 Lenders must also comply with the requirements of the National Credit Code when explaining early termination fees. Under the Code, a credit contract and pre-contractual statement must state:
- (a) the amount of any credit fees and charges payable under the contract (if the amount of the fee is not ascertainable, the method of calculation must be explained, if that is ascertainable). When the fee or charge is payable must also be stated, if that is ascertainable; and
  - (b) if applicable, any fees that may be changed and how the debtor will be told about such changes: s16 and 17 of the National Credit Code.

### Action by consumers

- 15 Under the National Credit Code and the ASIC Act, consumers can take action against a lender if they think an early termination fee they have been charged is unconscionable or unfair. They can:
- (a) complain to their lender and, if needed, take the dispute to the lender's external dispute resolution scheme;
  - (b) complain to ASIC; and/or
  - (c) challenge the fee in court proceedings.

## Assessing the problem

### ASIC Report 125

- 16 ASIC's report *Review of mortgage entry and exit fees* (REP 125) released in April 2008 noted that there is data to suggest that Australian mortgage fees have increased over the past 20 years. REP 125 stated:
- over the period from 1995 to 2007, the total annual fee take against the aggregate Australian 'mortgage book' has increased from 0.67% to 1.39% annually. The early termination fee take as a proportion of the overall fees has increased from 19.31% to 41.83%. (paragraph 13)
- 17 REP 125 also found that over 65% of loans had early termination fees.
- 18 For variable rate mortgages, REP 125 noted that the average fees charged by the four groups of lenders (large banks, other banks, credit unions and building societies, and non-ADI lenders) over a three-year period were as follows:

**Table 1: Average fees by lender type: \$250,000 variable rate loan terminated within three years**

Type of lender	Entry fees	Annual Service fees (over 3 years)	Discharge fees	Early termination fees	Total fees
Large bank	\$453.75	\$310.13	\$113.75	\$1081.25	\$2,255.81
Other bank	\$423.67	\$355.00	\$227.50	\$703.33	\$1,977.96
Credit union / building society	\$582.28	\$111.51	\$92.08	\$400.91	\$1,388.11
Non-ADI	\$732.15	\$216.07	\$230.22	\$1944.62	\$3,267.83

Note: The early termination fees in column 5 do not include break fees charged for fixed rate loans.

- 19 While the data from REP 125 shows the quantum of early termination fees charged by lenders, the lack of guidance to assist lenders in understanding their legal obligations means that it is not possible to determine from the quantum alone whether these fees could be unfair or unconscionable.

### Consumer complaints about early termination fees

- 20 In June 2010, ASIC released Consultation Paper 135 *Mortgage early exit fees: Unconscionable fees and unfair contract terms* (CP 135) to consult on how ASIC proposes to regulate early termination fees. The Financial Ombudsman Service (FOS) noted in its submission to CP 135 that as a consequence of the global financial crisis it has received an unprecedented number of complaints, including complaints about break fees. From 1 September 2008 to 31 December 2009, FOS received 1,131 complaints regarding break fees. Over half of these complaints related to allegations of misleading conduct by financial services providers.<sup>1</sup>

Note: A break fee is a type of fee that is said by lenders to be charged to recover the economic cost to the lender of a customer terminating a fixed rate loan before the end of the fixed rate term. It is not charged for variable rate loans.

- 21 Of the disputes classified as being related to misleading conduct, FOS noted that a substantial number of these concerned allegations regarding:
1. Their explanation of the circumstances in which an ETIA [early termination interest adjustments or break fee] would be incurred;
  2. their estimate of the amount of any anticipated ETIA; and/or

<sup>1</sup> Financial Ombudsman Service, *ASIC Consultation Paper 135 Submission by Financial Ombudsman Service ("FOS")*, 13 August 2010.

3. failure by the FSP's [financial service provider's] staff to disclose the potential of an ETIA being incurred if a customer repaid their fixed rate loan before the fixed rate period expired.

22 The Consumer Credit Legal Centre of New South Wales in its submission to CP 135 also stated, based on its experience in providing legal advice, representation and financial counselling to consumers who have had problems with early termination fees, 'we contend that exit fees, whether they be Deferred Establishment Fees (DEF), a fee for early termination... or a break fee can have the effect of trapping borrowers in unsuitable loan products causing serious detriment'. The Consumer Action Law Centre also expressed similar concerns in its submission to CP 135.

23 The submissions we received to CP 135, including those outlined above, highlighted that consumers are experiencing problems in understanding how early termination fees are charged and explained by lenders.

### **Compliance with obligations under the law**

24 Administering the unconscionable fee provision in the National Credit Code and the unfair contract terms provisions in the ASIC Act is a new regulatory responsibility for ASIC. These provisions affect a lender's ability to charge unnecessarily high early termination fees. For example:

- (a) under the National Credit Code, an early termination fee should not exceed a reasonable estimate of the lender's loss arising from the early termination; and
- (b) under the ASIC Act, a term requiring an early termination fee to be paid should not go beyond what is reasonably necessary to protect the lender's legitimate interests, among other things.

25 The unfair contract terms provisions are very broad in their application. They apply to all standard form consumer contracts that are financial products or are for the supply or possible supply of financial services. The unconscionable fee provision in the National Credit Code is also broad in scope. It applies to all credit contracts, not just those for residential loans.

26 The lack of specific guidance on how these new laws apply to early termination fees could potentially lead to inconsistent approaches in charging early termination fees. It also has the potential to cause confusion for industry in determining the behaviour required in order to comply with the law.

27 There is also inconsistency in understanding by lenders of how early termination fees, including break fees, can be accurately and more transparently explained. Concerns were expressed in submissions to CP 135 from consumer groups and FOS about misleading explanations of early



termination fees and a lack of understanding by some consumers about the early termination fees that apply to their loan.

- 28        Transparent explanations of early termination fees will help consumers better understand that they may have to pay an early termination fee if they terminate their loan within a particular time and also the amount of that fee.

## **Objectives of government action**

- 29        The objective of our proposal is to assist lenders in understanding what their obligations are when imposing early termination fees, both in relation to setting the amount of the fee and explaining it.

## B Options and impact analysis

- 30 Possible options for ASIC to assist lenders in understanding their obligations relating to how early termination fees for residential loans are charged and explained are:
- (a) **Option 1:** ASIC provides indicative guidance on when an early termination fee may be unconscionable or unfair and when we are likely to take action against a lender under the unconscionable fee provision in the National Credit Code or the unfair contract terms provisions in the ASIC Act in relation to an early termination fee (preferred option); and
  - (b) **Option 2:** ASIC does not provide any guidance on the unconscionable fee provision in the National Credit Code or the unfair contract terms provisions in the ASIC Act (status quo).
- 31 Option 1 (our preferred option) sets out general guidance on when an early termination fee may be unconscionable or unfair and the factors ASIC will consider in deciding whether to take action.
- 32 In our recommended approach, we are merely providing indicative guidance about how a lender can meet the requirements in the National Credit Act and ASIC Act relating to how early termination fees are charged and explained.

### Option 1: ASIC provides indicative guidance to lenders on imposing early termination fees (preferred option)

#### Description of option

- 33 Under this option, we would provide indicative guidance on when an early termination fee may be unconscionable or unfair and when we are likely to take action under the unconscionable fee provision in the National Credit Code or the unfair contract terms provisions in relation to a lender's early termination fee.
- 34 For example, this guidance could include:
- (a) for the unconscionable fee provision in the National Credit Code, details of the types of loss for which we are more or less likely to take action against if a lender sought to recover these in an early termination fee. Our guidance would not be exhaustive and it may be permissible (or impermissible) for a lender to seek to recover in an early termination fee types of loss which we have not listed in our guidance;
  - (b) for the unfair contract terms provisions in the ASIC Act, information on when each element of the test of unfairness is likely to be satisfied. In particular, our guidance would focus on when a term imposing an early

termination fee is likely or unlikely to be reasonably necessary to protect the legitimate interests of the lender and on what these interests might be. Our guidance would also consider when a right to vary an early termination fee could be unfair; and

- (c) suggestions on how early termination fees can be transparently explained. In deciding whether an early termination fee is unfair, a court must consider the extent to which a term is transparent.

35 The factors and considerations set out in our guidance on imposing early termination fees would be aimed at providing assistance to lenders in formulating their own compliance measures for the relevant provisions in the National Credit Code and ASIC Act.

### **Impact on industry**

36 The impact on industry of this option will vary from one lender to another. Entities that charge early termination fees in a manner that is consistent with our guidance, or do not seek to recover all of the loss they suffer when a loan is terminated early, will need to make minimal, if any, changes to comply with the relevant requirements in the National Credit Code and ASIC Act.

37 Under this option there is flexibility for lenders, as they can decide for themselves:

- (a) what would be an appropriate amount to charge in an early termination fee;
- (b) what type of cost or loss they can seek to recover through these fees; and
- (c) how they should be explained.

38 Costs that are unique to a lender's business model or product offering or which are not expressly referred to in our guidance may still be able to be recovered in an early termination fee without infringing the law or resulting in ASIC taking action for possible breaches.

39 Whether a term is unfair is likely to depend on the circumstances of each case, and adopting this option provides scope to recognise that what may be unfair or unconscionable in one situation may not be unfair or unconscionable in another.

40 This option does not restrict a lender's ability to use flexible pricing, nor does it involve putting a cap on the amount of early termination fees a lender can charge or when lenders can charge them. Instead it explains the types of costs that are permissible to recover through an early termination fee. As we are not imposing a cap on early termination fees, we believe it is unlikely our guidance will lead to other fees and charges or the interest rate of loans increasing. In any case, to the extent that lenders are currently breaking the

law by using early termination fees to recover other costs or as a profit source, restricting what can be recovered in an early termination fee is a requirement of the law and not our guidance.

41 Flexibility for lenders in how they comply with the laws relating to charging and explaining early termination fees will minimise any resulting cost of compliance. Lenders will not be specifically required to alter their systems to comply with our guidance.

42 There was general support for the non-exhaustive approach to our guidance in CP 135. While some respondents, mainly consumer groups, agreed with the type of costs and loss we thought could and could not be recovered in an early termination fee, others, mainly lenders and their industry bodies, thought that a broader range of costs and loss could be recovered in an early termination fee. However, most lenders and their industry bodies did not disagree with our approach to providing guidance, which focused on factors we would consider in deciding whether to take action in relation to an early termination fee.

43 Compliance costs may be incurred in meeting the requirements of the:

- (a) unfair contract terms legislation for all lenders; and
- (b) unconscionable fee provision in the National Credit Code for new lenders.

Note: As mentioned in the note to paragraph 4, the unconscionable fee provision in the National Credit Code is not a new requirement for lenders. A substantially similar provision was included in the Uniform Consumer Credit Code, which applied before the National Credit Code commenced. This is why sub-paragraph (b) above only mentions new lenders.

44 However, these are compliance costs resulting from lenders' obligations under the ASIC Act or National Credit Code, rather than as a result of this option.

### **Impact on consumers**

45 By setting out when we are likely to take action against an early termination fee charged by a lender, our guidance makes clear what type of costs we think are unlikely to be permissible under the law. This has a positive impact on consumers, as it means that they are more likely not to be charged for these potentially impermissible costs in an early termination fee.

46 Our guidance on how early termination fees can be transparently explained will also have a positive impact on consumers. Transparent explanations about early termination fees will help improve consumer understanding about:

- (a) when an early termination fee may need to be paid;
- (b) the amount of that fee, and how the amount may vary over time; and
- (c) for fixed rate loans, the break fees they may have to pay and how this amount could be quite significant (e.g. tens of thousands of dollars).

47 The National Credit Code and unfair contract terms provisions in the ASIC Act commenced on 1 July 2010. Between July and October 2010 we received 16 complaints about mortgage early termination fees. Consumer complaints about early termination fees may initially increase shortly after our guidance is released. This is because some consumers may be more aware about when an early termination fee may not comply with the law. However, in the long term we expect complaints to decrease as lenders who currently charge early termination fees that do not comply with law bring their fees into compliance.

### **Impact on government**

48 This option will require ASIC to monitor compliance with the requirements in the National Credit Code and ASIC Act relating to imposing early termination fees. Unlike Option 2, it will provide a framework for ASIC to monitor compliance by industry. This will improve consistency in how the law is administered.

## **Option 2: ASIC takes no action (status quo)**

### **Description of option**

49 Under this option, we would not provide any guidance on how lenders can comply with the requirements in the National Credit Code or ASIC Act in charging and explaining early termination fees. We would rely on industry to decide for themselves how to comply with these laws.

### **Impact on industry**

50 In the short-term, ASIC maintaining the status quo by not providing any specific guidance on imposing early termination fees avoids new direct costs on industry, as there are no changes to how early termination fees are regulated. The exception to this is any compliance costs that are incurred in complying with the new unfair contracts terms provisions in the ASIC Act, which reflects a change to how lenders are regulated. (Although, such compliance costs are not as a result of ASIC regulation.) However, there are no *incremental* benefits of maintaining the status quo.

51 Lenders, except for those with contracts based on the law in Victoria, have not had to comply with legislation dealing with unfair contracts before. (In any case, the federal legislation is worded on slightly different terms than the legislation in Victoria.) Providing no guidance would place a heavy burden on industry in determining the behaviour required to comply with the unfair contract provisions as they affect how early termination fees are charged and explained.

### **Impact on consumers**

52 This option would arguably lead to a lower level of consumer protection than if ASIC provided any level of guidance. The interpretation of what is required to meet the unconscionable fee provision in the National Credit Code and the unfair contract term provisions in the ASIC Act is likely to vary considerably between lenders. For example, there were some differences of opinion in the submissions provided to CP 135 from consumer groups and lenders and their industry bodies on what type of costs could and could not be recovered in an early termination fee.

53 The absence of guidance could have detrimental effects on consumers, as it may lead some lenders to adopt procedures that do not adequately meet the requirements of the National Credit Code and ASIC Act.

### **Impact on government**

54 ASIC would not be required to issue a new regulatory guide but would still need to have an internal policy on meeting the requirements of the unconscionable fee provision in the National Credit Code and the unfair contract terms provisions in the ASIC Act. As industry will have minimal guidance, there is a greater risk that some lenders may not be imposing early termination fees in a manner that complies with the law.

55 We do not believe that this option would provide significant savings to ASIC when compared to Option 1. In fact, it would be likely to lead to increased costs due to the complexity of determining whether a lender has charged and/or explained an early termination fee in a manner that complies with the law.

## C Consultation

### CP 135

- 56 On 27 June 2010, ASIC issued Consultation Paper 135 *Mortgage early exit fees: Unconscionable fees and unfair contract terms* (CP 135) to consult on when ASIC is likely to take action because an early termination fee may infringe the unconscionable fee provision in the National Credit Code or the unfair contract terms provisions in the ASIC Act. We asked for feedback on whether respondents agreed with our proposed approach to regulating early termination fees. In particular, we asked whether respondents agreed with our proposed guidance on what cost components could and could not be included in an early termination fee and how lenders could consider explaining these fees to consumers.
- 57 Prior to releasing CP 135 we also spoke to a number of authorised deposit-taking institutions (ADIs) and non-ADI lenders to better understand market practice in relation to imposing early termination fees.

### Overview of responses to CP 135

- 58 We received 19 responses to CP 135 from a variety of stakeholders, including responses from industry bodies, consumer groups, lenders, including ADI and non-ADI lenders, a mortgage broker, an individual and FOS.
- 59 A number of submissions to CP 135, particularly those from consumer groups, were supportive of our overall approach in providing guidance. They noted the anti-competitive effect of early termination fees in that they have the potential to lock borrowers into unfavourable loans, e.g. loans with high interest rates. To this end, these submissions were supportive of guidance that would help prevent lenders charging unnecessarily high early termination fees. There was also general support for our proposals on how lenders can consider explaining early termination fees.
- 60 However, a number of lenders and industry bodies argued that aspects of our guidance were too restrictive in how they interpreted when an early termination fee may be unconscionable or unfair. In particular, they submitted that a broader range of costs should be able to be recovered.
- 61 The submissions provided valuable feedback and suggestions, and the proposed guidance in CP 135 was amended to take into account this feedback where appropriate.

## Feedback to CP 135 and ASIC's response

- 62 Feedback to CP 135 focused on three main areas, which are considered in more detail below:
- (a) our proposed guidance on unconscionable early termination fees;
  - (b) our proposed guidance on unfair terms imposing early termination fees; and
  - (c) our proposed guidance on explanations of early termination fees.
- 63 We have set out below a brief summary of ASIC's response to the feedback received in submissions to CP 135. For further detail, please see our report *Response to submissions on CP 135 Mortgage exit fees: Unconscionable fees and unfair contract terms* (REP 216).

### Guidance on unconscionable early termination fees

- 64 In CP 135, we proposed that whether a deferred establishment fee, which we consider a type of early termination fee, is unconscionable should be considered under the provision in the National Credit Code that applies to fees payable on early termination (s78(4)). We also listed the types of loss we thought could and could not be recovered in an early termination fee.
- 65 We received mixed responses to our proposals. While some submissions agreed with how we had characterised deferred establishment fees, e.g. those from consumer groups, others, particularly lenders and their industry bodies, thought these fees should be considered under the test in the National Credit Code that applies to establishment fees.
- 66 Similarly, some submissions, mainly those from consumer groups, were supportive of the types of loss we thought were likely to be able to be recovered. However submissions from lenders and their industry bodies thought that there were other types of loss than those listed in CP 135 which could be recovered in an early termination fee.

### ASIC's response

- 67 We have reviewed and considered the submissions we received and have made some refinements to our guidance. This includes expanding, where we thought it was appropriate, the range of costs we think are likely to be able to be recovered in an early termination fee.

### Guidance on unfair early termination fees

- 68 CP 135 contained general guidance on when we are likely to take action because a term providing for an early termination fee may be unfair.



69 Responses to our proposed guidance were diverse. Consumer groups broadly agreed with our proposals and approach to providing guidance. Many lenders and their industry bodies, on the other hand, thought that CP 135 was too narrow in its view on when an early termination fee may be unfair. In particular, these respondents thought that an early termination fee could recover more costs than what we specified in our guidance without being unfair. A number of respondents, from both consumer and lender organisations, also sought clarification on particular aspects of our proposed guidance.

#### **ASIC's response**

70 We have modified and clarified our guidance in light of the feedback we received. Examples of where we have done this are set out in REP 216. This includes, to the extent we thought appropriate, expanding the types of costs we thought could be recovered in an early termination fee.

#### **Guidance on explaining early termination fees**

71 In CP 135, we proposed that early termination fees, including break fees which can be payable when a fixed rate loan is terminated early, should be explained as transparently as possible.

72 Most submissions, including those from consumer groups and lenders and their industry bodies, were supportive of our proposed guidance—although, some questioned whether warnings about early termination fees should be included at the front of a contract.

#### **ASIC's response**

73 Transparent explanations of early termination fees are not a specific requirement of the law. Accordingly, our guidance merely suggests things lenders can consider doing in transparently explaining their early termination fees. Respondents to CP 135 from all sectors were in general support of this approach. We have not proposed to impose prescriptive disclosure requirements in our guidance.

74 We have also clarified aspects of our guidance in light of the feedback we received.

## **D Conclusion and recommended option**

75 We recommend Option 1. The requirements set out in the regulatory guide under this option will help lenders better understand how to charge and explain early termination fees in a manner that complies with the relevant requirements in the National Credit Code and the ASIC Act. Option 1 achieves our regulatory objectives without imposing an unreasonable burden on lenders and is flexible enough to take in account the differences in the various business models of lenders. We believe that Option 2 is not supportable because it presents an unsatisfactory risk to consumers and does not address the problem which we identified, discussed in Section A.

## E Implementation

- 76 Our recommendation will be implemented by the publication of a new regulatory guide providing industry with guidance on our expectations on how early termination fees should be charged and explained and when we are likely to take action if we believe an early termination fee is unconscionable or unfair. This includes general guidance on what cost components could be recovered in an early termination fee and how these fees may be able to be explained.
- 77 As the unfair contract terms regime is new, and we have only recently taken over responsibility for regulating consumer credit, we plan to learn from the feedback given to us during the first few years after our guidance is released. We also will monitor any case law that develops on the unfair contract terms provisions in the ASIC Act and the unconscionable fee provision in the National Credit Code.
- 78 Accordingly, we will continue to monitor our guidance on imposing early termination fees and revise our guidance as appropriate.