ASIC
Australian Securities & Investments Commission

CONSULTATION PAPER 102

Dispute resolution—review of RG 139 and RG 165

Issue date: 8 September 2008

About this paper

This consultation paper sets out ASIC's proposals for updating our policy on the dispute resolution requirements that apply to Australian financial services (AFS) licensees, unlicensed issuers and secondary sellers (financial services providers).

The proposals cover our requirements for internal dispute resolution (IDR) procedures and our approval guidelines for external dispute resolution (EDR) schemes.

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 (primarily the Corporations Act)
- 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 paper was issued on 8 September 2008 and is based on the Corporations Act as at 2008.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

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

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on dispute resolution requirements. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section H Regulatory and Financial Impact, page 54.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 7 November 2008 to:

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Consumers and Retail Investors
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
email: disputeresolutionreview@asic.gov.au

What will happen next?

Stage 1	8 September 2008	ASIC consultation paper released
Stage 2	7 November 2008	Comments due on the consultation paper Revising regulatory guides
Stage 3	Mid-2009	Revised regulatory guides released

A Background to the proposals

Key points

Financial services providers must have a dispute resolution system that covers complaints by retail clients.

ASIC is proposing to review our dispute resolution policy. The objectives of the review are to:

- reflect the introduction of a new Australian Standard on complaints handling (AS ISO 10002);
- refine our requirements for IDR procedures; and
- refine and harmonise the approaches taken by external dispute resolution (EDR) schemes in some key areas.

Our existing dispute resolution policy will remain in effect until the review is finalised.

Dispute resolution requirements

1 The dispute resolution requirements for Australian financial services licensees, unlicensed issuers and secondary sellers (financial services providers) are set out in Ch 7 of the *Corporations Act 2001* (Corporations Act) and the *Corporations Regulations 2001* (Corporations Regulations). Table 1 summarises these requirements.

Table 1: Summary of Corporations Act requirements

Requirements	Details	Reference
General	Financial services providers must have a dispute resolution system that covers complaints by retail clients. The dispute resolution system must consist of: • an IDR procedure that complies with standards and requirements made or approved by ASIC; and • membership of one or more EDR schemes approved by ASIC.	s912A(1)(g), 912A(2) and 1017G of the Corporations Act
IDR procedures	When considering whether to make or approve standards or requirements relating to IDR procedures, ASIC must take into account Australian Standard on Complaints Handling AS 4269–1995.	reg 7.6.02(1) and 7.9.77(1)(a) of the Corporations Regulations
EDR schemes	When deciding whether to approve an EDR scheme, ASIC must take into account the following matters: • the accessibility of the scheme; • the independence of the scheme;	reg 7.6.02(3) and 7.9.77(3) of the Corporations Regulations

Requirements	Details	Reference
	• the fairness of the scheme; • the accountability of the scheme; • the efficiency of the scheme; • the effectiveness of the scheme; and • any other matter ASIC considers relevant.	

ASIC's policy

2 Our policy on dispute resolution is set out in:

(a) Regulatory Guide 139 *Approval of external dispute resolution schemes* (RG 139); and

(b) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

Table 2 summarises these standards and requirements.

3 The proposals in this paper relate to specific aspects of our dispute resolution policy rather than being a general review of the underlying policy. We have presented our proposals in a single consultation paper because there are considerable links between IDR procedures and EDR schemes.

4 Our existing policy in RG 139 and RG 165 will remain in effect until the review is finalised.

Table 2: Summary of ASIC policy on dispute resolution

Requirements	Details	Reference
IDR procedures	Licensees must: • have IDR procedures that satisfy the Essential Elements of Effective Complaints Handling in Section 2 of AS 4269–1995; and • appropriately document their IDR procedures.	Section A of RG 165
EDR schemes	Licensees must: • belong to one or more EDR schemes; and • have appropriate links between their IDR procedures and EDR scheme (including a system for informing complainants about the availability of EDR and how to access it).	Section B of RG 165
	An EDR scheme must satisfy us that it meets the requirements that ASIC must take into account when approving a scheme: see Table 1 in this paper.	RG 139

Objectives of this review

5 The key objectives of the review are to:

(a) revise RG 165 in line with the new Australian Standard on complaints handling (i.e. replacement of AS 4269–1995 with AS ISO 10002);

(b) refine our requirements for IDR procedures in some key areas; and

(c) refine and harmonise the approaches taken by EDR schemes in light of our experience in administering the current policy.

6 We will also update RG 139 and RG 165 to remove obsolete and superseded references, including removing redundant references in RG 165 that deal with transitional arrangements under the *Financial Services Reform Act 2001*.

Related issues

7 In line with this review, we are:

(a) proposing to require subscribers to the Electronic Funds Transfer Code of Conduct (EFT Code) to comply with AS ISO 10002 (in an upcoming review of the EFT Code); and

(b) reviewing other ASIC publications that refer to AS 4269–1995 and where necessary updating these references to refer to AS ISO 10002 (see Table 3).

Table 3: Other ASIC publications that refer to AS 4269–1995

Regulatory guides	RG 2 *AFS Licensing Kit Part 2—Preparing your AFS licence application (eLicensing sample application)* RG 96 *Debt collection guideline: for collectors and creditors* RG 117 *Commentary on compliance plans: Financial asset schemes* RG 118 *Commentary on compliance plans: Contributory mortgage schemes* RG 119 *Commentary on compliance plans: Pooled mortgage schemes* RG 120 *Commentary on compliance plans: Property schemes* RG 130 *Managed investments: Licensing* RG 134 *Managed investments: Constitutions* RG 148 *Investor directed portfolio services* RG 180 *Auditor registration* RG 185 *Non-cash payment facilities*
Class orders, pro formas and forms	CO 04/239 Factoring arrangements—licensing, hawking and disclosure relief CO 05/736 Low value non-cash payment facilities PF 189 *Responsible entity authorisation and licence conditions* PF 215 *Company auditor registration conditions* PF 216 *Authorised audit company registration conditions* Form FS53 *PDS in-use notice*

B Why dispute resolution matters

Key points

Effective IDR procedures and EDR schemes provide significant benefits for consumers and investors as well as for financial services providers.

As part of our review, ASIC commissioned research into consumer and investor experiences of IDR and EDR processes.

The fundamental principles for approving EDR schemes are accessibility, independence, fairness, accountability, efficiency and effectiveness.

Each EDR scheme has Rules or Terms of Reference that set out the jurisdiction and operation of the EDR scheme.

Importance of effective dispute resolution

IDR procedures

8 Wherever possible, financial services providers should seek to resolve complaints directly with clients through IDR procedures. It is better for all parties that a complaint is resolved at the earliest possible stage.

9 The benefits of effective IDR procedures with broad coverage include:

(a) the opportunity to resolve complaints quickly and directly;

(b) the ability to identify and address recurring or systemic problems;

(c) the capacity to provide solutions to problems rather than have remedies imposed by an external body; and

(d) improved levels of consumer and investor confidence and satisfaction.

EDR schemes

10 Access to an EDR scheme also offers significant benefits for consumers and investors as well as for financial services providers. EDR schemes provide an independent mechanism for resolving complaints in situations where a consumer or investor has a complaint about a financial services product or service that the financial services provider is not able to resolve.

11 Because there is no cost to consumers and investors for access to an EDR scheme, it is a more accessible mechanism for resolving disputes than alternatives that involve costs, such as legal proceedings.

12 The independence and accessibility of EDR schemes also increase consumer and investor confidence in the financial services sector more generally. Increasing and maintaining consumer and investor confidence benefits financial services providers and the industry as a whole.

13 A consumer or investor with a claim against a financial services provider has a right to take legal action, subject to the economic disincentives in doing so (i.e. the potential exposure to both parties' costs if unsuccessful). EDR is the alternative to such court proceedings for consumers and investors and, while removing those economic disincentives, does not create any substantive new legal rights or obligations. Therefore, any restriction on the right to access EDR must be justifiable by reference to the value of removing the economic disincentives for consumers and investors and not to limiting the exposure of financial services providers to legal liability that already exists.

14 An ineffective EDR process will also lead to consumers and investors seeking to exercise their legal rights by resorting to more costly alternatives such as class actions.

Research into dispute resolution

15 To inform this review, ASIC commissioned two pieces of empirical research into consumer and investor experiences of IDR and EDR processes.

(a) In June 2008, Newspoll Market Research conducted broad based quantitative research into consumer and investor satisfaction with financial products and services and experiences of and satisfaction with the IDR process. This was done by including specific questions about these issues in Newspoll's regular omnibus survey of the general population.[1]

(b) In January 2008, Ipsos-Eureka Social Research Institute conducted qualitative and quantitative research about consumer and investor perceptions of and experiences with dispute resolution in the financial services industry. The research mainly focused on consumer and investor experiences with EDR schemes, but also asked a small number of incidental questions about the IDR process.

Findings about internal dispute resolution

16 The Newspoll research found that:

(a) 52% of consumers and investors had experienced some dissatisfaction with a financial product or service in the last two years;

(b) 29% of consumers and investors actually made a complaint;

[1] This Newspoll study was conducted by phone among n=1200 adults aged 18+ nationally.

(c) 60% of consumers and investors who made a complaint found it very easy or somewhat easy to do so;

(d) 56% of all complaints were resolved within a week and 81% all of complaints were resolved within a month;

(e) 64% of consumers and investors who complained were very satisfied or somewhat satisfied with the outcome; and

(f) 53% of consumers and investors who complained were very satisfied or somewhat satisfied with the IDR process.

17 The Ipsos-Eureka research also asked consumers and investors some incidental questions about their experiences of the IDR process. Importantly, these findings are not representative of all consumers and investors because every consumer and investor who participated in the Ipsos-Eureka research had taken their complaint to an EDR scheme. This contrasts with the Newspoll research.

18 The Ipsos-Eureka research found that most of these consumers and investors disagreed that it was easy to access an IDR process and were dissatisfied with the IDR process.

19 Only 14% of consumers and investors who participated in the Ipsos-Eureka research reported that the IDR process was completed in less than one month, while 31% said the IDR process took between two and six months. 29% reported that no decision was made after the IDR process was completed. By the end of both the IDR and EDR processes, over half of participants in the Ipsos-Eureka research (57%) were no longer doing business with the financial services provider they complained about.

20 These findings strongly reinforce the value of an effective and timely IDR process. The research strongly indicates that the longer a complaint remains unresolved, the more dissatisfied consumers and investors become.

Findings about external dispute resolution

21 The main purpose of the Ipsos-Eureka research was to collect subjective feedback about consumer and investor experiences and satisfaction with the EDR process. These were the key findings:

(a) The principles of accessibility, independence, fairness, accountability, efficiency and effectiveness all remain fundamental drivers of consumer and investor satisfaction with the EDR process.

(b) Consumers and investors who were satisfied with the outcome of their complaint were more likely to be satisfied with the EDR process.

(c) Consumers and investors who reported that they did not receive a final outcome or that their complaint was still unresolved were the least satisfied group—even less satisfied than those whose complaint was resolved in favour of the provider.

(d) Complainants were more positive about the early stages of the EDR process. Satisfaction levels fell as complaints reached the determination stage.

Fundamental EDR principles

22 The role of EDR schemes in resolving disputes between investors and consumers of financial products and services and financial services providers is part of the statutory framework ASIC administers under Ch 7 of the Corporations Act.

23 When deciding whether to approve an EDR scheme, ASIC must consider the fundamental principles of accessibility, independence, fairness, accountability, efficiency and effectiveness: reg 7.6.02(3) and 7.9.77(3) of the Corporations Regulations. These are longstanding principles, which originated in the Benchmarks for Industry-based Customer Dispute Resolution Schemes published by the Commonwealth Department of Industry, Science and Tourism in 1997.

24 These fundamental principles are consistent with the principles that underpin similar tribunals and alternative dispute resolution schemes both in Australia and overseas.

25 For example, in Australia, the structure of the Superannuation Complaints Tribunal established under the *Superannuation (Resolution of Complaints) Act 1993* reflects similar principles. Similarly, the United Kingdom Financial Ombudsman Service is structured to meet these principles.

26 We do not propose to reconsider these fundamental principles as part of this review.

27 ASIC requires that access to an approved EDR scheme should be free of charge for consumers and investors (albeit allowing the possibility of a limited charging policy in special circumstances: RG 139.44). This requirement facilitates access to the scheme: see RG 139.43. We do not propose to reconsider this requirement as part of this review.

Approved EDR schemes

28 ASIC has approved the following EDR schemes under RG 139:

(a) the Banking and Financial Services Ombudsman Limited (BFSO);

(b) the Credit Ombudsman Service Limited (COSL);

(c) the Credit Union Dispute Resolution Centre Pty Limited (CUDRC);

(d) the Financial Co-operative Dispute Resolution Scheme (FCDRC);

(e) the Financial Industry Complaints Service Limited (FICS);

(f) Insurance Brokers Disputes Limited (IBDL);

(g) the Insurance Ombudsman Service Limited (IOS); and

(h) the Financial Ombudsman Service (FOS).

29 Each EDR scheme has Rules or Terms of Reference that set out the jurisdiction and operation of the EDR scheme.[2]

Financial Ombudsman Service

30 FOS was formed by the merger of the BFSO, FICS and IOS. FOS commenced operations on 1 July 2008 and provides dispute resolution services for up to 80% of Australian banking, insurance and investment disputes.[3] In the first instance, FOS will continue to operate the rules and procedures of the BFSO, FICS and IOS. The intention is that a single set of FOS Terms of Reference will be in place by 1 January 2010 and that the BFSO, FICS and IOS will be wound down in due course.

31 On 18 August 2008 FOS released an Issues Paper about the development of a new, single set of Terms of Reference.[4]

32 The FOS Terms of Reference will need to comply with ASIC's approval guidelines. We will therefore monitor the progress of the merger during this review to ensure that the review process takes account of developments during the implementation of the merger and vice versa.

FICS monetary limits

33 FICS monetary limits were first set in 1991. The limits were $250,000 for complaints about lump sum life insurance, $6,000 for complaints about income stream risk products and $100,000 for all other complaints.

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[2] References to the Rules or Terms of Reference in this consultation paper are to the versions in force as at 1 July 2008.
[3] Minister for Superannuation & Corporate Law Press Release No 45, 10 July 2008.
[4] The Issues Paper is available from the FOS website at http://www.fos.org.au/centric/home_page/about_us/terms_of_reference/terms_of_reference_consultation.jsp.

34 The 2002 independent review of FICS recommended that FICS should work towards increasing the FICS monetary limits to match those of the Australian Banking Industry Ombudsman (which subsequently became the BFSO).[5] In May 2007, FICS released a discussion paper on the levels of FICS monetary limits. The discussion paper argued that it was necessary to increase the monetary limits for all categories of complaints.

35 ASIC's submission to the review agreed it was necessary to increase the monetary limits for all categories of complaints. ASIC supported increasing the monetary limits to $280,000 for complaints about lump sum life insurance, $7,500 for complaints about income stream risk products and $280,000 for all other complaints, including complaints about investment advice.

36 In November 2007, FICS announced increases in its monetary limits for complaints about lump sum life insurance and investment complaints effective from 1 July 2008. The new limits are $280,000 for complaints about lump sum life insurance and $150,000 for investment complaints. The limit of $6,000 for complaints about income stream risk products was not increased. The new limits apply to complaints received on or after 1 July 2008 where the complainant did not know or could not reasonably have known all the relevant facts before that date.

37 The FICS Board stipulated that another review of the FICS monetary limits should commence on 1 July 2009 and that the objective of the next and subsequent reviews should be to bring the FICS monetary limits in line with those of other major EDR schemes.

38 In November 2007, FICS also announced that it would apply CPI increases for all of its monetary limits, every three years, commencing on 1 July 2011.

39 ASIC has taken the recent increase to FICS monetary limits into account in the development of this consultation paper.

40 Section E of this consultation paper sets out ASIC's proposals about the coverage of EDR schemes, including proposals to provide guidance on the amount of monetary limits.

[5] Community Solutions, Latrobe University, University of Western Sydney, *Review of the Financial Industry Complaints Service 2002—Final Report* Recommendation 4.10.

C New Australian Standard on complaints handling (AS ISO 10002)

Key points

AS 4269–1995 has been superseded by AS ISO 10002.

We propose to:

- adopt the definition of complaint in AS ISO 10002; and
- require IDR procedures to satisfy the Guiding Principles in Section 4 of AS ISO 10002 and other specific elements of the new standard.

About the new Standard

41 ASIC must take AS 4269–1995 into account when considering whether to make or approve standards or requirements relating to internal dispute resolution: reg 7.6.02(1) and 7.9.77(1)(a).

42 RG 165 reflects this requirement. Under RG 165.10, an IDR procedure must satisfy the Essential Elements of Effective Complaints Handling in AS 4269–1995.

43 AS 4269–1995 has been superseded by AS ISO 10002, published on 5 April 2006.[6] AS ISO 10002 is an adoption, with national modifications, of the international standard ISO 10002:2004 *Quality management—Customer satisfaction—Guidelines for complaints handling in organisations*. Our view is that there is no inconsistency between these new requirements and the Essential Elements.

44 We understand that the Government intends to update the Corporations Regulations to reflect the introduction of AS ISO 10002. As a result, RG 165 also requires updating to reflect the introduction of the new Standard.

45 We therefore propose to update RG 165 to:

(a) adopt the definition of complaint under AS ISO 10002 (see proposal C1); and

(b) require financial services providers to comply with certain aspects of AS ISO 10002 that we believe are equivalent to the Essential Elements of AS 4269–1995 (see proposal C2).

[6] AS ISO 10002 may be purchased from Standards Australia.

Definition of 'complaint'

Proposal

C1 We propose to update RG 165 to adopt the definition of 'complaint' in AS ISO 10002.

Your feedback

C1Q1 Do you agree with this proposal? Please give reasons.

Rationale

46 IDR procedures must cover complaints made by retail clients: Corporations Act s912A(1)(g), 912A(2) and 1017G.

47 In RG 165, the term 'complaint' refers to any enquiry, complaint or dispute, however defined, that may be dealt with under a given IDR procedure or by a particular EDR scheme: see RG 165.7.

48 RG 165 was issued in November 2001. At that time, there was no consistent definition of complaint across the financial services sector: see RG 165.7. RG 165.7 flags that we will consult further about developing a standard definition of 'complaint' for the finance sector.

49 Based on feedback from consumer representatives, as well as our own regulatory experience, it appears that in some instances, complaints are not being identified as complaints early enough in the process, which delays speedy resolution.

50 AS ISO 10002 2006 adopts the following definition of complaint:

> *An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.*

51 This definition removes the onus on investors and consumers to explicitly state that something is a complaint, promotes more consistent treatment of complaints and helps prevent complaints from falling through the cracks.

52 Prompt identification of complaints facilitates earlier resolution, which benefits both consumers, and financial services providers. The Newspoll research conducted for ASIC as part of this review demonstrates that IDR that is easy to access and resolves complaints promptly generally leads to more satisfied consumers and investors.

Guiding Principles

Proposal

C2 We propose to update RG 165 to require IDR procedures to satisfy the following aspects of AS ISO 10002:

(a) the Guiding Principles in Section 4;

(b) the following sections in the main body of AS ISO 10002:

(i) Section 5.1—Commitment;

(ii) Section 6.4—Resources;

(iii) Section 8.1—Collection of information;

(iv) Section 8.2—Analysis and evaluation of complaints.

Your feedback

C2Q1 Should RG 165 require IDR procedures to satisfy the Guiding Principles in Section 4 and the sections of AS ISO 10002 in proposal C2(b)? Please give reasons.

C3 We propose to update the Schedule to RG 165 to reflect the Guiding Principles and other specific aspects of AS ISO 10002 that IDR procedures will need to comply with.

Your feedback

C3Q1 Is the Schedule to RG 165 useful? Should we update it?

Rationale

53 RG 165 presently requires that IDR procedures must satisfy the Essential Elements of Complaints Handling in Section 2 of AS 4269–1995. The Schedule to RG 165 provides guidance on how we consider these Essential Elements to apply to the financial services industry.

54 In AS ISO 10002, the Essential Elements of Complaints Handling have been replaced with Guiding Principles. Although the Guiding Principles are similar to the Essential Elements, they are not identical. In particular, AS ISO 10002 incorporates four of the Essential Elements from the former standard into the main body of the new standard, rather than in the Guiding Principles. They are:

(a) Section 5.1—Commitment;

(b) Section 6.4—Resources;

(c) Section 8.1—Collection of information;

(d) Section 8.2—Analysis and evaluation of complaints.

Note: For a comparison of the Essential Elements of Complaints Handling in AS 4269–1995 with AS ISO 10002, see Appendix 1.

55 Our proposal will:

(a) achieve the objective of amending RG 165 to reflect the introduction of AS ISO 10002;

(b) give financial services providers flexibility to tailor their IDR procedures to suit their specific circumstances; and

(c) avoid imposing additional compliance costs.

56 An alternative approach would be to require IDR procedures to comply with AS ISO 10002 in full. This would be more prescriptive and less flexible than requiring IDR schemes to comply with the Guiding Principles and specific sections of AS ISO 10002, and may involve significant compliance costs for financial services providers. For this reason, we do not prefer this approach.

57 While we do not propose to require IDR procedures to comply with AS ISO 10002 in full, we consider that the new Standard provides a useful benchmark for establishing and maintaining IDR procedures. We strongly encourage financial services providers to consider the entire standard. We propose to state this in RG 165.

58 Licensees that belong to the Investments, life insurance and superannuation division of FOS (formerly FICS) are already required to have IDR procedures that comply with AS ISO 10002: see FOS Terms of Reference, Investments, Life Insurance and Superannuation clause 8.2(a).

59 Subscribers to the Banking Code of Practice are required to meet the standards set out in AS 4269–1995 or any other industry dispute standard or guideline which ASIC declares to apply to the Banking Code.[7]

60 The Banking Code of Practice is currently under review. An Issues Paper released in May 2008 as part of this review recommends that the Banking Code be amended to reflect the introduction of AS ISO 10002 when ASIC announces that this is the current standard.[8]

61 A Draft Mutual Code of Practice was released in April 2008. The Draft code requires subscribers to comply with AS ISO 10002.[9]

62 The EFT Code is a voluntary code of practice regulating electronic payments. ASIC is responsible for administering the EFT Code. Under the current EFT Code, subscribers must comply with AS 4269–1995 or any other dispute resolution standard or guideline which ASIC declares to apply.[10]

[7] Banking Code of Practice cl 35.1(b).
[8] Review of Code of Banking Practice, Issues Paper (May 2008) cl 8.14.9.
[9] Abacus Draft code of Practice cl 28.1.
[10] EFT Code cl 10.1.

63 The EFT Code is currently under review. As part of this review, we are proposing to update the EFT Code to require subscribers to comply with AS ISO 10002.

64 The Schedule to RG 165 provides guidance on how ASIC applies the Essential Elements of AS 4269–1995 to the financial services industry. We propose to update the Schedule to cover the Guiding Principles and other specific aspects of AS ISO 10002 that IDR procedures will need to comply with under our proposal.

65 Our view is that financial services providers will be able to comply with both the Essential Elements of AS 4269–1995 and the aspects of AS ISO 10002 that we are proposing to make compulsory under this proposal.

D Other IDR requirements

Key points

We propose to:

- require financial services providers to provide a final response to complaints within a maximum of 45 days, but within 30 days if possible
- clarify how the right to access EDR applies to complainants with a complaint in a multi-tiered IDR procedure
- clarify how the requirements for IDR procedures apply to financial services providers that outsource the delivery of the IDR process.

Time limits

Proposal

D1 We propose to require financial services providers to provide a final response to complaints within a maximum of 45 days, but within 30 days if possible.

Your feedback

D1Q1 Do you agree with this proposal? Please give reasons.

Rationale

66 Timeliness is an important aspect of good complaints handling and is recognised as an Essential Element under AS 4269–1995 and a Guiding Principle under AS ISO 10002.

67 IDR procedures must include clear response times for dealing with complaints and the complainant should be informed of response times. Under RG 165, generally, a financial services provider should substantially respond to complaints within a maximum of 45 days, but within a shorter period if possible. If the financial services provider cannot respond within 45 days, it should inform the complainant of the reasons for the delay and their right to refer the complaint to the EDR scheme: see the Schedule of RG 165, 'IDR procedures and AS 4269–1995'.

68 The timeframe of 45 days does not apply where either s101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) or s47 of the *Retirement Savings Accounts Act 1997* (Cth) applies. These provisions allow a maximum time limit of 90 days for responding to a complaint or inquiry: see the Schedule of RG 165.

69 It may be reasonable for a financial services provider to achieve shorter timeframes for different complaints, for example administrative complaints, complaints about performance and advice depending on the size and client base of the provider and the type of product involved: see the Schedule of RG 165.

70 A number of industry codes of conduct already impose time frames for responding to complaints. For example, the Code of Banking Practice provides that members will complete investigations into complaints and inform customers of the outcome within 21 days, unless there are exceptional circumstances.[11]

71 The draft Mutuals Code of Practice provides that subscribers will try to resolve complaints on the spot if possible. If that is not possible, subscribers will do their best to resolve the complaint within 21 days.[12]

72 The General Insurance Code of Practice states that insurers will respond to complaints within 15 business days.[13] The General Insurance Brokers Code of Practice provides for a time frame of 20 business days.[14]

73 Under RG 165, financial services providers are required to take timeframes under industry codes into account: see the Schedule of RG 165.

74 Newspoll's research found that 56% of all complaints to IDR were resolved within a week and 81% all of complaints were resolved within one month. 64% of consumers and investors who complained were very satisfied or somewhat satisfied with the outcome. Of consumers and investors who complained, 53% were very satisfied or somewhat satisfied with the IDR process.

75 In contrast, only 14% of consumers and investors who participated in the research undertaken by Ipsos-Eureka reported that the IDR process took less than one month. 31% reported that IDR took between two and six months and 7% reported that IDR took more than six months. 29% of these consumers and investors reported that no decision about their complaint was made at IDR. While these timeframes may reflect the complexity of the complaints, these complainants, who all took their complaints to an EDR scheme, were generally dissatisfied with the IDR process.

76 These findings clearly reflect the importance of timely resolution of complaints at IDR to consumer and investor satisfaction with the IDR process.

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[11] Code of Banking Practice, cl 35.
[12] Draft Mutuals Code of Practice, cl 28.1 and 28.3.
[13] General Insurance Code of Practice cl 6.2.
[14] General Insurance Brokers Code of Practice cl 16.2.

77 We propose to make two changes to this aspect of our policy. First, we propose to replace the words 'substantially respond' with the words 'provide a final response'. We propose to make this change to clarify that financial services providers must complete their response to complaints within 45 days. Given that the industry codes discussed above do not use the language 'substantially respond', we do not expect complying with this requirement will be unduly onerous.

What is a final response?

78 We will require financial services providers to write to complainants within 45 days informing them of:

(a) the outcome of their complaint;

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

(c) the name and contact details of the relevant EDR scheme.

79 This builds on the existing requirement under RG 165.18 that financial services providers must establish links between IDR and EDR processes.

What if there is no final response within 45 days?

80 We recognise that in some circumstances, it will not be possible to provide a final response within 45 days. Our view is that the proviso in RG 165 that if the financial services provider cannot respond within 45 days, it should inform the complainant of the reasons for the delay and their right to refer the complaint to the EDR scheme, adequately deals with this. We will retain this proviso.

Complaints that can be resolved in less than 45 days

81 Secondly, we propose to retain the 45-day time frame, but replace the requirement for a response 'within a shorter timeframe if possible' with a target requirement for a response within 30 days if possible.

82 This will give financial services providers a clearer understanding of our expectations for complaints that can be dealt with in less than 45 days. Given that the industry codes of practice discussed above impose shorter time frames, we do not expect complying with this proposed requirement will be unduly onerous.

83 For complaints about superannuation where either s101 of the *Superannuation Industry (Supervision) Act 1993* or s47 of the *Retirement Savings Accounts Act 1997* applies, a maximum time limit of 90 days applies. This proposal will not affect the 90-day time limit for these complaints.

Multi-tiered IDR procedures

Proposal

D2 We propose to clarify that the timeframes for providing a final response to complaints apply to financial services providers that operate multi-tiered IDR procedures.

Your feedback

D2Q1 Do you agree with this proposal? Please give reasons.

Rationale

84 Under RG 165, where a complaint has been through an IDR procedure but remains unresolved, or is not resolved within the time limit, the complainant must be informed that they can pursue their complaint with an EDR scheme and given information about how to access the EDR scheme: see RG 165.18.

85 Some financial services providers have established multi-tiered IDR procedures that include internal appeals or escalation processes.

86 Stakeholder feedback suggests that the existence of multiple tiers can increase the time taken to resolve complaints and deter complainants from pursuing complaints.

87 The Ipsos-Eureka research found that consumers and investors who had experienced more than three stages of the IDR process were less satisfied than consumers and investors who had experienced three or less stages.

88 We do not seek to prevent the use of multi-tiered IDR procedures. However, consumers and investors with a complaint should have the same rights to access EDR whether or not the provider they are complaining to uses a multi-tiered complaints procedure.

89 We propose to clarify in our policy that the requirement to provide a final response to complaints within a maximum of 45 days, but within 30 days if possible (or, if the matter remains unresolved, a response that informs the complainant of their right to refer the complaint to EDR), still applies to financial services providers that use multi-tiered IDR procedures.

Outsourcing

Proposal

D3 We propose to clarify that a financial services provider that outsources its IDR procedures to a third party service provider remains responsible for ensuring that the IDR procedure complies with RG 165.

Your feedback

D3Q1 Do you agree with this proposal? Please give reasons.

Rationale

90 In practice, some financial services providers do not provide IDR procedures themselves but instead outsource this function to an external provider.

91 A financial services provider that adopts this approach remains responsible for ensuring that the IDR procedure meets our requirements under RG 165.

92 The Financial Services Authority (FSA) in the United Kingdom has clarified that where a firm outsources activities to a third party, it takes responsibility for the acts and omissions of the third party in respect of the outsourced activity: see FSA Handbook/DISP/1.1.1A.

E Coverage of EDR schemes

Key points

We propose to:

- clarify our guidance in RG 139.34(a) on what complaints an EDR scheme must cover;
- replace monetary limits with compensation caps, which will allow consumers and investors to waive part of their claim to access an EDR scheme;
- reformulate our guidance in RG 139.34(b) to specify an amount for compensation caps and clarify that consumers and investors should be entitled to claim interest in addition to compensation up to a scheme's compensation cap. In other words, an award of interest by a scheme can lead to the amount of compensation being over the cap; and
- specify that compensation caps should be adjusted every three years using the higher of the increase in the CPI or MTAWE (male total average weekly earnings).

The current approach

93 ASIC currently assesses the adequacy of each EDR scheme's coverage having regard to:

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

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

(c) the scheme's monetary limits.

94 Both RG 165 and RG 139 contain guidance about the coverage of an approved EDR scheme: see RG 139.34–RG 139.38 and RG 165.44–RG 165.54.

95 RG 139.34 provides that scheme's coverage must be sufficient to deal with:

(a) the majority of consumer complaints in the relevant industry (or industries), and the whole of each complaint; and

(b) consumer complaints involving monetary amounts up to a maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries.

96 All approved EDR schemes except COSL impose monetary limits on complaints that relate to the maximum *value of a claim* that can be made by a complainant. COSL does not impose a monetary limit on value of claims, but caps the amount of compensation a consumer or investor can claim. The

amount of the monetary limits varies between schemes. Each scheme's rules are set out in Table 4.

Table 4: EDR scheme monetary limits

EDR scheme	Monetary limits
FOS	Banking and finance: $280,000 (see Banking and finance division Terms of Reference clause 5.1) Investments, life insurance and superannuation (see Investments, life insurance and superannuation Terms of Reference clause 12.2 and 12.3) • Complaints about lump sum life insurance products, including advice about these products: $280,000 • Complaints about income stream life insurance products, including advice about these products: $6,000 per month • Complaints about investment advice: $150,000 General insurance (see General insurance division Terms of Reference clause 4.1) • Third party claims: $3,000 • Other claims: $280,000
COSL	No monetary limits on claims. Complainants can be compensated up to $250,000 (see COSL Rules clause 31)
CUDRC	$280,000 (see CUDRC Terms of Reference clause 5.2)
IBDL	$100,000 for individual and small business complaints (see IBDL Terms of Reference clause 1.1)
FCDRS	$280,000 (see FCDRS Terms of Reference clause 4.1)

Need for a revised approach

97 As noted in Section B of this paper, access to an EDR scheme offers significant benefits for consumers and investors and for financial services providers, including:

(a) an independent mechanism for resolving complaints in situations where the consumer or investor and their financial services provider have not been able to resolve the complaint; and

(b) an accessible and cost-effective forum for consumers or investors to pursue complaints, compared with court proceedings; and

(c) increased consumer and investor confidence in the financial services sector.

98 As also noted, a consumer or investor who has a claim against a financial services provider has an existing right to take legal action. Therefore, any restriction on the right to access EDR must be justifiable by reference to the

value of removing the economic disincentives for consumers and investors in pursuing court proceedings and not to limiting the exposure of financial services providers to legal liability.

99 We have identified the following issues with the way that coverage, including monetary limits, currently operates:

(a) uncertainty about what RG 139.34(a) means;

(b) lack of flexibility. A consumer or investor with a complaint that is higher than an EDR scheme's monetary limit cannot waive the excess to access the scheme. We think waiving the excess should be permitted. We propose to replace monetary limits with caps on the amount of compensation an EDR scheme can award;

(c) the amount of compensation caps, including treatment of interest; and

(d) the need for regular reviews of the amount of compensation caps.

100 We propose to reformulate our policy guidance on coverage to address these issues.

What an EDR scheme must cover: RG 139.34(a)

Proposal

E1 We propose to clarify RG 139.34(a) to make it clear that it refers to types of complaints.

Your feedback

E1Q1 Do you agree with this proposal? Please give reasons.

Rationale

101 RG 139.34(a) currently says that a scheme's coverage must be sufficient to deal with:

> *the majority of consumer complaints in the relevant industry (or industries), and the whole of each complaint*

102 During the 2007 review of FICS monetary limits, it became clear that different stakeholders interpreted RG 139.34(a) as referring to monetary limits and had vastly differing views about what 'the majority' was.

103 Our view is that the intention of RG 139.34(a) is to provide guidance that an EDR scheme's coverage must be sufficient to deal with the majority of different types of complaints in the relevant industry or industries.

104 We propose to clarify our policy on coverage in the revised RG 139.

105 We propose that consumers and investors with a complaint that exceeds a scheme's compensation cap should be able to waive the excess to access the scheme: see Proposal E2. We therefore propose to remove the words 'and the whole of each complaint' because they are not consistent with this approach.

Replacing monetary limits with compensation caps

Proposal

E2 We propose that monetary limits should be replaced with caps on the amount of compensation each EDR scheme can award. A consumer or investor with a complaint involving an amount that is higher than an EDR scheme's compensation cap should be permitted to waive the excess to access the scheme.

Your feedback

E2Q1 Should EDR schemes and members allow complainants with a claim that exceeds an EDR scheme's compensation cap to waive their right to pursue the balance of their claim elsewhere?

Rationale

106 The Productivity Commission's report into Australia's Consumer Policy Framework recommended that consumers and investors accessing all ASIC-approved EDR schemes whose complaint exceeds the scheme's monetary limit should be able to waive the excess to access the scheme.[15]

107 We agree with this more flexible approach because it is more consistent with fulfilling the role of EDR, as outlined in paragraphs 10 – 14 above. We propose that monetary limits should be replaced with caps on the amount of compensation each EDR scheme can require be awarded. Under this approach:

(a) A consumer or investor with a complaint involving an amount that is higher than an EDR scheme's compensation cap would be permitted to waive the excess and have the complaint heard by the EDR scheme.

(b) The EDR scheme would be able to make an award up to its compensation cap (or higher if the member agreed to this happening).

(c) The EDR outcome would not bind the consumer or investor if they chose **not** to accept it. However, if the consumer or investor accepted the EDR outcome, the scheme or member could require the consumer or investor to accept it as full and final satisfaction of their claim and it

[15] Australia, Productivity Commission, Recommendation 9.2 (April 2008).

would be binding on both parties (i.e. the consumer could not go on to pursue the balance in another forum).

108 There is a precedent for this among the current approved EDR schemes. As noted above, where COSL awards compensation, the consumer or investor is required to accept it as full and final discharge of their claim and is required to sign a release releasing the scheme member in respect of the complaint: see the Guidelines to the COSL Rules at paragraph 6.5.

109 We understand that at present, EDR schemes can spend significant time and resources determining whether a complaint falls within the EDR scheme's monetary limits before they consider the actual merits of the complaint. An advantage of replacing monetary limits with compensation caps is that this will no longer be necessary.

110 It has been put to us that it is possible that where a consumer or investor has a claim in excess of the monetary limit, they might complain to an EDR scheme in order to conduct a 'dry run' and then refuse to accept the EDR scheme's decision, preferring to litigate the whole claim in court.

111 Allowing schemes to require that complainants who accept a determination must waive their right to pursue the balance of their claim elsewhere would partly address this concern. Also, such a process might facilitate commercial settlements where there is a valid claim.

Other possible approaches

112 An alternative would be to enable a consumer or investor with a complaint that exceeds an EDR scheme's compensation cap to waive the excess to access the scheme, but prohibit schemes from requiring consumers to waive their right to pursue the balance of their claim elsewhere.

113 The Financial Ombudsman Service of the United Kingdom (the UK Ombudsman) provides a precedent for this approach. The maximum amount of compensation it can award is capped at £100,000 (approximately A$250,000): see FSA Handbook/DISP/3.7.4. Complainants in the UK are not required to waive their right to recover the balance of their claim elsewhere. In fact, if the UK Ombudsman considers that fair compensation requires payment of a larger amount, he or she may recommend that the respondent pays the complainant the balance: see FSA Handbook/DISP/3.7.6.

114 Another option would be to allow EDR schemes to deal with complaints that exceed their compensation cap where the member agrees. The rules of several EDR schemes provide that the EDR scheme can deal with complaints that exceed the scheme's monetary limits if the scheme member and the consumer or investor agree.

115 We understand that this option is rarely, if ever exercised because members are not prepared to agree to submit to jurisdiction in this situation. Therefore, we do not recommend this option.

Setting compensation caps: RG 139.34(b)

Proposal

E3 We propose to reformulate our guidance in RG 139.34(b) on setting the amount for compensation caps to ensure they are adequate. We propose to require EDR schemes to operate compensation caps that reflect the value of the vast majority of consumer transactions in the relevant industry or industries. At this time, with some limited exceptions, (see paragraphs 138 and 139) this should be a minimum of $280,000.

E4 We propose to clarify that consumers and investors should be entitled to claim interest in addition to compensation up to an EDR scheme's compensation cap. In other words, an award of interest by a scheme can lead to the amount of compensation being over the cap.

Your feedback

E4Q1 We are seeking views on our proposed reformulation of RG 139.34(b).

E4Q2 We are also seeking views on the adequacy of $280,000 as the minimum compensation cap.

E4Q3 We are also interested in feedback on other options identified in this paper, and other suggestions.

E4Q4 Do you agree with our proposal on interest? Please give reasons.

Rationale

116 We are concerned to ensure that the EDR scheme compensation caps are set at an adequate level and that our guidance supports this objective.

117 As noted in Section B, ASIC's submission to the 2007 review of FICS monetary limits stated that it was necessary to increase the monetary limits for all categories of complaints to FICS. ASIC supported increasing the monetary limits to $280,000 for complaints about lump sum life insurance, $7,500 for complaints about income stream risk products and $280,000 for all other complaints, including complaints about investment advice.

118 ASIC's view was based on the following factors:

(a) parity with the limit operated by EDR schemes with a comparable jurisdiction (ie the BFSO);

(b) the increase in the number of complaints outside FICS' jurisdiction because they exceeded the monetary limits;

(c) a range of economic indicators which showed significant increases in the value of superannuation and other investments held by retail clients since the limits were set, particularly in the area of self-managed superannuation.

119 FICS achieved increases to $280,000 for complaints about lump sum life insurance and $150,000 for other complaints, including complaints about investment advice. Some members of FICS indicated they would to veto any further increases in the monetary limit for investment complaints.

120 The Chairman of ASIC noted in November 2007 that the FICS monetary limit for investment complaints should be lifted and that ASIC would consult further on this issue.[16]

121 As noted, we accept that certain complaints are not appropriate for an EDR scheme including those that would be better dealt with through legal proceedings. The EDR scheme Rules and Terms of Reference provide that where a scheme decision maker thinks there is a more appropriate forum to deal with a complaint, the scheme can refer the complaint to the appropriate forum: see, for example, FOS Banking and finance division Terms of Reference Rule 5.1(d).

122 The recent Productivity Commission Report into Australia's consumer policy framework recommended that the monetary limits imposed by ASIC-approved EDR schemes should be subject to timely and coordinated review. The Productivity Commission noted that 'excessively staggered and untimely changes may undermine the adequacy of dispute resolution'.[17]

123 ASIC recognises that some financial services providers rely on professional indemnity insurance to meet EDR scheme awards. The Productivity Commission also noted that availability of insurance might be a practical obstacle to setting monetary limits. It observed:

> *Reasonable notice of threshold changes should help in most cases. But just as safety standards are not waived for those facing a high cost in meeting them, ongoing difficulties in securing insurance should not be a basis for setting a lower standard of consumer protection. Rather, the appropriate responses are better supply-side risk management and rationalisation of any excessively risky suppliers.*[18]

[16] Tony D'Aloisio, 'Regulating financial advice—current opportunities and challenges' Speech to the Financial Planners Association Conference, 28 November 2007 available at www.asic.gov.au.
[17] Australia, Productivity Commission, Recommendation 9.2 (April 2008).
[18] Australia, Productivity Commission at 208 (April 2008).

124 ASIC agrees that compensation caps should be reviewed regularly and in a co-ordinated way to ensure that they remain adequate. We propose to reformulate our guidance on the adequacy of compensation caps to achieve this.

Reformulating RG 139.34(b)

125 RG 139.34(b) currently says that an approved EDR scheme's coverage must be sufficient to deal with:

> *consumer complaints involving monetary amounts up to a maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries.*

126 We propose to reformulate RG 139.34(b) to make it clear that an EDR scheme must be able to hear complaints and award the following:

> *compensation up to a cap set at a level that reflect the value of the vast majority of consumer transactions in the relevant industry or industries.*
>
> *Note: At this time, our view is that, subject to very limited exceptions, compensation caps must be a minimum of $280,000 to meet this test.*

127 We have developed this new test on the basis that most ASIC-approved EDR schemes currently operate monetary limits of $280,000, including the Banking and finance division of FOS (formerly BFSO) which deals with the greatest number of complaints.

128 In addition, a range of economic indicators shows that the value of investments and assets held by consumers and retail investors has increased significantly in recent years. For example, as at June 2007 the average self-managed superannuation fun (SMSF) had assets valued at $800,561[19], with the average balance per member of $417,694. Given that advice to SMSFs tends to be on a per fund basis (rather than to individual members) and nearly 700,000 Australians have their superannuation savings in SMSFs, we believe a minimum compensation cap of $280,000 represents a reasonable trade off between EDR and court action.

129 The only exceptions to the $280,000 monetary limit currently are the Investments, superannuation and life insurance division of FOS (formerly the investment complaints jurisdiction of FICS), IBDL and COSL.

130 COSL currently operates a compensation cap of $250,000. Increasing this to $280,000 should not, therefore, be significant.

131 As regards the Investments, superannuation and life insurance division of FOS and IBDL, we acknowledge that introducing a compensation cap of $280,000 will represent a significant increase over current limits, $150,000 and $100,000 respectively. The providers covered by both these schemes

[19] ATO statistical report as at 30 June 2007.

include financial planners and life insurance brokers (as well as general insurance brokers in the case of IBDL and stockbrokers in the case of FOS).

132 We think that it is important that all approved EDR schemes operate a consistent minimum compensation cap to ensure that there is an equal minimum level of protection for consumers and investors and to prevent forum shopping. For example, a consumer or investor should have access to the same compensation cap whether or not they buy an insurance product through a broker or directly from an insurer.

133 We recognise adequate transitional arrangements will be required to achieve these increases (see paragraphs 148 – 152 below). Proposal E6 seeks feedback on what those transitional arrangements should look like.

134 EDR schemes may choose to set their compensation cap at a level beyond this minimum amount. Further, we expect that EDR schemes will keep the amount of the cap under review and increase it as required to ensure that compensation caps continue to meet the test set out at paragraph 126. We are also proposing that compensation caps should be indexed to the higher of the increase in the CPI or MTAWE (male total average weekly earnings). This is the formula used for the quarterly indexation of Commonwealth pensions: see proposal E5. The requirement that EDR schemes must keep the amount of compensation caps under review and increase them if necessary applies in addition to the proposal to index compensation caps every three years.

135 ASIC may also update its guidance on the minimum compensation cap required to meet the test set out at paragraph 126 from time to time.

136 This approach provides some flexibility and allows EDR schemes to tailor the compensation cap for different industry sectors where appropriate (so long as each scheme meets the minimum requirement of $280,000).

137 The Productivity Commission also recognised the scope for tailored limits, observing that:

> *The ceilings set for any particular scheme should reflect the underlying distribution of risks facing consumers for the relevant financial services (which means that ceilings do not necessarily have to be equal across schemes).*[20]

138 The Investments, superannuation and life insurance division of FOS operates a monetary limit of $6,000 for income stream risk products. Under our proposals, this would become a compensation cap. We will have regard to the feedback on the FOS Terms of Reference consultation in forming a view as to the where this limit should be set – although there is no intention that it

[20] Australia, Productivity Commission at 208 (April 2008).

should match the $280,000 limit. As with other caps, we expect it to be kept under review.

139 The General insurance division of FOS operates a monetary limit of $3,000 for complaints about third party general insurance claims. Under our proposals, this would also become a compensation cap. Again, we will have regard to the feedback on the FOS Terms of Reference consultation in forming a view on where this cap should be set and, as with other caps, we expect it to be kept under review.

Other possible approaches

140 Table 5 sets out other potential ways we could reformulate our guidance on monetary limits. We have considered these options, but do not propose adopting them in this paper.

Table 5: Alternative options for monetary limits

Option	Advantages	Disadvantages
Set compensation caps based on value of all *complaints* in industry sectors.	Targeted.	Would require financial services providers to collect complaints data that is not currently required. This would impose a new compliance burden.
Set the level of the compensation cap in accordance with the retail client test for investment-based financial products: s761G(7)(a) and reg 7.1.19. This is currently set at $500,000.	Simple. Certain.	A significant increase from existing limits. This amount is not indexed and can only be changed by amending the regulations.
Retain current approach	Gives EDR schemes flexibility to determine limits.	Open to interpretation.

Approach not considered

141 Monetary limits could also be set as a proportion of the value of complaints made to EDR schemes about specific industry sectors. This approach was suggested during the review of FICS monetary limits.

142 An advantage of this approach is said to be that it is targeted to the value of complaints in specific industries. However, ASIC does not accept this as we expect that many people with complaints worth more than the current monetary limit never complain to FICS so it is an imperfect database.

143 As FICS noted in its review, setting monetary limits based on a fraction of the value of all complaints to EDR schemes would lead to continually

decreasing monetary limits. For this reason, we do not propose to give this approach further consideration.

Interest

144 ASIC's view is that consumers and investors should be entitled to claim interest or earnings in addition to a claim for compensation up to an EDR scheme's compensation cap. In other words, an award of interest by a scheme can lead to the amount of compensation awarded being over the cap.

Indexing compensation caps

Proposal

E5 We propose that compensation caps should be adjusted every three years using the higher of the increase in the CPI or MTAWE (male total average weekly earnings) (this is the formula used for quarterly indexation of Commonwealth pensions).

Your feedback

E5Q1 Do you agree with our proposal for indexing compensation caps? Please give reasons.

145 We propose that caps on the maximum amount of compensation that can be awarded should be reviewed regularly. As the Productivity Commission noted in its recent report, timely and coordinated review of monetary limits is necessary to ensure that dispute resolution remains adequate.

146 We propose that amount of the compensation caps should be adjusted every three years using the higher of the increase in the CPI or MTAWE (male total average weekly earnings). This is the formula used for the quarterly indexation of Commonwealth pensions, and in the long term, is most closely aligned to increases in wealth.

147 We think requiring indexation every three years is sufficient to ensure that monetary limits remain adequate and that requiring more frequent indexation would impose an unreasonable burden on financial services providers and EDR schemes.

Relationship with compensation and insurance arrangements

148 The Corporations Regulations require many financial services providers to hold professional indemnity (PI) insurance that is adequate having regard to their liability for claims brought through their EDR scheme: see reg 7.6.02AAA(1)(a) of the Corporations Regulations.

149 Our policy on the compensation arrangements is set out in Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126). RG 126 provides that PI insurance covering liability under EDR scheme awards is a minimum requirement for licenses subject to this requirement: see Table 4 in RG 126. This requirement has applied to existing licensees from 1 July 2008 and to all new licensees from 1 January 2008.

150 Our policy recognises that it will take time to develop PI insurance policies that meet our policy objectives. One reason is that PI insurance policies that meet our policy objective might not be commercially available to all licensees. We recognise that it will take time for PI insurers to develop and price new products that are tailored to our new guidance on the amount of compensation caps.

151 While we are proposing a minimum compensation cap of $280,000 for all approved EDR schemes, we recognise that in practice, the value of complaints will differ for different sectors of the financial services industry. We expect that over time, the pricing of PI insurance policies will come to reflect these differences.

152 Irrespective of the option adopted for EDR scheme coverage, we recognise the need for adequate transitional arrangements for the proposals in this paper. We seek your feedback on the impact on PI insurance and the implementation period that would be appropriate depending on which option was adopted.

Issue

E6 We recognise the need for an adequate transitional arrangements when we reformulate our guidance on EDR scheme coverage.

Your feedback

E6Q1 What transition period would be appropriate?

Access to EDR schemes for financial services providers

153 Stakeholder feedback suggests that occasionally a financial services provider is involved in an intractable dispute that might be resolved if the financial services provider were able to access EDR as well as the complainant. In such circumstances, it may be useful for the provider, rather than the complainant, to be able to refer the matter to an EDR scheme for independent resolution.

Issue

E7 We are interested in your feedback about whether dual access to EDR would be beneficial.

Your feedback

E7Q1 Should we require EDR schemes to accept complaints referred by financial services providers, provided the relevant time limits have expired?

F Harmonising EDR schemes

Key points

We propose to harmonise the approach of all approved EDR schemes in relation to:

- complaints where the member ceases to carry on business;
- the ability of scheme members to commence legal proceedings that are the related to complaints;
- time limits for making complaints;
- jurisdiction over complaints that have been dealt with in another forum; and
- changing the Rules or Terms of Reference of an EDR scheme.

In our view, harmonisation of these key areas will deliver consistent treatment for complainants, and create a more level playing field for licensees operating in different industries.

Complaints where a member ceases to carry on business

Proposal

F1 We propose requiring all EDR schemes to have jurisdiction to deal with complaints about a financial services provider that was a scheme member when the complaint was made, but that subsequently ceases to carry on business.

Your feedback

F1Q1 Do you agree with this proposal? Please give reasons.

Rationale

154 Sometimes an EDR scheme receives a complaint about a scheme member that subsequently ceases to carry on business. For example, a scheme member may be placed in administration or liquidation or close or sell their business after a complaint is received.

155 At present, the EDR schemes have different rules for this situation. The FOS General insurance division cannot deal with a complaint about a member that is in liquidation or provisional liquidation: see General insurance division Terms of Reference, clause 5.3.

156 The FOS Investments, life insurance and superannuation division cannot deal with a complaint where the financial services provider was not a

member when the complaint was made: see Investments, life insurance and superannuation division Terms of Reference, rule 14.1. COSL cannot deal with a complaint about a member that was not a member when the conduct occurred or when the complaint was made: see COSL Rules, rule 34(b).

157 The Rules and Terms of Reference for the other EDR schemes provide that the scheme can deal with complaints against members. These Rules and Terms of Reference do not expressly deal with the situation where a member ceases to carry on business after the complaint is made. Table 6 sets out each EDR scheme's approach.

Table 6: Approaches to complaints where a member ceases to carry on business

Scheme	Approach
FOS Investments, life insurance and superannuation division	Deals with complaints about an entity that was a scheme member when the complaint was made. (See Investments, life insurance and superannuation division Terms of Reference rule 14.1 and definition of 'member' in rule 1.)
FOS Banking and finance division	Deals with complaints about members. Does not expressly deal with complaints about a member that ceases to carry on business after the complaint is made. (See Banking and finance division Terms of Reference clause 3.1 and definition of 'financial services provider' in clause 15.1.)
FOS General insurance division	Deals with complaints about an entity that was a scheme member when the complaint was made. IOS does not have jurisdiction over members that are in liquidation or provisional liquidation. (See General insurance division Terms of Reference: clause 4.1 and clause 5.3.)
COSL	Deals with complaints about scheme members except those that:· • Were not members when the conduct occurred or • Were not members when the complaint was made. (See COSL Rules rule 34(b).)
CUDRC	Deals with complaints against members except complaints that relate to an event that occurred before the entity became a member. Does not expressly deal with complaints about a member that ceases to carry on business after the complaint is made. (See CUDRC Terms of Reference paragraph 5.2(g).)
IBDL	Deals with complaints that relate to the conduct of a member, including conduct that occurred before and after the member joined IBDL. Does not expressly deal with complaints about a member that ceases to carry on business after the complaint is made. (See IBDL Rules paragraph 1.1(a).)
FCDRS	Deals with complaints about members. Does not expressly deal with complaints about a member that ceases to carry on business after the complaint is made. (See FCDRS Terms of Reference sections 3.1and 3.2.)

158 We propose requiring all EDR schemes to have jurisdiction over complaints about a financial services provider that was a scheme member when the complaint was made, but that subsequently ceases to carry on business.

159 This proposal raises the practical problem that, in some cases, it would require EDR schemes to make a decision without the involvement of the financial services provider.

160 Where an EDR scheme upholds a complaint about a scheme member that has ceased to carry on business, in practice the consumer or investor may not receive any compensation, for example if there is no entity against which the consumer or investor can enforce the compensation award.

161 In practice, an EDR decision about a scheme member that is in liquidation may not increase the complainant's entitlement to return under the liquidation process. Liquidators are not bound by the decisions of EDR schemes.

162 Nevertheless, the ability to have a complaint resolved may still benefit the consumer or investor in some situations, for example if a scheme member was placed in administration and subsequently recovered and resumed trading, the complainant would be able to enforce the decision.

163 We think that harmonising the approach taken by all EDR schemes in this situation will deliver consistency for complainants and financial services providers. This will also create a more level playing field for financial services providers.

164 We acknowledge that this proposal will require EDR schemes to change their Rules and Terms of Reference.

Commencement of legal proceedings by scheme members

Proposal

F2 We propose requiring all EDR schemes to prohibit scheme members from commencing legal proceedings that are related to a complaint that has been lodged with the EDR scheme, except:

(a) where the limitations period for legal proceedings will shortly expire; and

(b) in test case situations.

Your feedback

F2Q1 Do you agree with this proposal? Please give reasons.

Rationale

165 The FOS Investments, life insurance and superannuation division Terms of Reference provide that where a complaint has been lodged, the scheme member must not instigate legal proceedings relating to the complaint: see Terms of Reference, rule 23.1.

166 However, where the limitation period for legal proceedings will shortly expire, the scheme member may issue proceedings, subject to the following conditions:

(a) while the Investments, life insurance and superannuation division is dealing with the complaint, the scheme member will not pursue the legal proceedings beyond the minimum necessary to preserve its rights, and

(b) if the complaint is resolved, whether by agreement or determination, the scheme member will discontinue any aspect of the legal proceedings that is inconsistent with the agreement or determination.

167 Members of the other divisions of FOS and members of COSL and CUDRC can commence legal proceedings where a complaint involves an important issue for their business, or the financial services industry in general, or a novel legal issue: see FOS Banking and finance division Terms of Reference clause 8.1, FOS General insurance division Terms of Reference clause 8.13, COSL Rules rule 34(p) and 97-105 and CUDRC Terms of Reference paragraph 10. On the other hand, FCDRS members cannot commence legal proceedings in any circumstances: see FCDRS Terms of Reference section 5.12.3.

168 IBDL does not expressly address this issue in their rules.

169 Allowing a scheme member to commence legal proceedings in relation to a complaint creates the potential for a scheme member to disrupt the EDR process by initiating legal proceedings. There is also a risk that the same complaint will be dealt with by two different forums.

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

171 We propose to require all EDR schemes to prohibit scheme members from commencing legal proceedings that are related to a complaint that has been lodged with the EDR scheme, except:

(a) to preserve their legal rights where a limitations period is about to expire subject to the following conditions:

(i) while the EDR scheme is dealing with the complaint, the scheme member will not pursue the legal proceedings beyond the minimum necessary to preserve its rights; and

(ii) if the complaint is resolved, whether by agreement or determination, the scheme member will discontinue any aspect of the legal proceedings that is inconsistent with the agreement or determination; and

(b) in test case situations.

172 Where a financial services provider commences legal proceedings in a test case situation, we think the provider should pay the consumer or investor's legal costs. We will state this in RG 165.

173 Members of FOS, COSL or CUDRC who commence legal proceedings after a complaint has been lodged will be required to pay legal costs incurred by the complainant in the proceedings at the first instance and in any subsequent appeal or proceedings commenced by the member: see FOS, Investments, life insurance and superannuation division Terms of Reference rule 18.3; FOS banking and finance division Terms of Reference clause 8.1(b); FOS General insurance division Terms of Reference clause 8.13; COSL Rules rule 100; CUDRC Terms of Reference paragraph 10.2(c). We believe this is a reasonable approach and we seek to extend it to all EDR schemes.

174 IBDL does not expressly address this issue in their rules.

175 We think that harmonising the approach taken by all EDR schemes in this situation will deliver consistency for complainants and financial services providers. This will also create a more level playing field for financial services providers.

176 We acknowledge that this proposal will require EDR schemes to change their Rules and Terms of Reference.

177 Table 7 sets out each EDR scheme's approach to this issue.

Table 7: Approaches to complaints and legal proceedings

Scheme	Can a scheme member commence legal proceedings where a complaint has been lodged?	Who will pay for the costs incurred by the complainant in legal proceedings relating to the complaint?
FOS Investments, life insurance and superannuation division	No, except to preserve their rights when the limitation period is about to expire. (See Investments, life insurance and superannuation division Terms of Reference Rules rule 23.1.)	The member will pay all reasonable solicitor/client legal costs in the first instance and any subsequent appeal by the member. This applies to complaints involving significant matters only. (See Terms of Reference rule 18.3.)
FOS Banking and finance division	Yes, a member can commence legal proceedings for complaints that involve an important issue for their business, or the financial services industry generally, or a novel legal issue. (See Banking and finance division Terms of Reference clause 8.)	The member will pay the complainant's solicitor/client legal costs (unless otherwise agreed) in the first instance and any subsequent proceedings commenced by the member. This applies if the proceeding is instituted within 6 months after the Ombudsman receives a written notice from the member that the dispute involves important or novel issues. (See BFSO Terms of Reference clause 8.1(b).)

Scheme	Can a scheme member commence legal proceedings where a complaint has been lodged?	Who will pay for the costs incurred by the complainant in legal proceedings relating to the complaint?
FOS General insurance division	Yes, a member can request IOS not to determine a dispute on the ground that that the dispute should be referred to a court as a 'test case'. (See General insurance division Terms of Reference clause 8.13.)	The member will pay the complainant's legal costs on a party/party basis in the first instance and any subsequent appeal by the member. This applies to 'test cases' only. (See IOS Terms of Reference clause 8.13.)
COSL	Yes, a member can commence legal proceedings for complaints that involve an important issue for their business, or the finance industry generally, or a novel legal issue. (See COSL Rules rule 34(p) and 97–105.)	The member will pay the complainant's legal costs on a solicitor/client basis in the first instance and any subsequent appeal by the member. (See COSL Rules rule 100.)
CUDRC	Yes, a member can commence legal proceedings for complaints that involve an important issue for their business, or the credit industry generally, or a novel legal issue. (See CUDRC Terms of Reference paragraph 10.)	The member will pay the complainant's legal costs in the fist instance and any appeal by the member either on an agreed basis or, if no agreement is reached, on a solicitor/client basis. This applies if the proceeding is instituted within 6 months after CUDRC receives a written notice from the member that the dispute involves important or novel issues. (See CUDRC Terms of Reference paragraph 10.2.)
IBDL	The IBDL Terms of Reference do not deal with this issue.	
FCDRS	No. (See FCDRS Terms of Reference section 5.12.3.)	

Time limit for complaints

Proposal

F3 We propose:

(a) to require all EDR schemes to introduce a six year time limit for bringing complaints; and

(b) that the time limit should run from the date that the consumer or investor first became aware, or should reasonably have become aware, that they suffered the loss the complaint is about.

Your feedback

F3Q1 Do you agree with these proposals? Please give reasons.

Rationale

178 The approach to time limits for complaints varies between the different EDR schemes. All the EDR schemes except IBDL impose a limitations period. The FOS General insurance division does not accept complaints that would be statute barred. The other five EDR schemes impose a six-year time limit for complaints.

179 The point when the time limit starts to run also differs between the EDR schemes. The FOS Investments, superannuation and life insurance division Rules provide that time starts to run when the consumer or investor knew or should reasonably have known all the relevant facts. The rules of the other EDR schemes that address this provide that time starts to run when the act, omission or event that the complaint relates to occurred. Table 8 sets out the approach of each EDR scheme to time limits.

Table 8: Approaches to time limits

Scheme	Time limit	Trigger mechanism
FOS Investments, life insurance and superannuation division	6 years	Time starts to run when the complainant knew or should reasonably have known of all the relevant facts. (See Investments, life insurance and superannuation division Terms of Reference rule 14.1(p).)
FOS Banking and finance division	6 years	Time starts to run when the event to which the dispute relates occurred. (See Banking and Finance division Terms of Reference clause 5.5.)
FOS General insurance division	Statute of limitations	Statue of limitations. (See General insurance division Terms of Reference clause 8.12.)
COSL	6 years	Time starts to run when the earliest act or omission complained of occurred. (See COSL Rules rule 34(m).)
CUDRC	6 years	Time starts to run when the act or omission to which the dispute relates occurred. (See CUDRC Terms of Reference paragraph 5.2(f).)
IBDL	Does not provide time limit	Does not address trigger mechanism
FCDRS	6 years	Time starts to run when the act or omission to which the dispute relates took place. (See FCDRS Terms of Reference section 5.10.)

180 We propose requiring all schemes to introduce a six-year time limit that runs from the date that the consumer or investor first became aware, or should reasonably have become aware, that they suffered the loss the complaint is about. This is consistent with the approach taken by courts in comparable situations: see, for example, *Limitation of Actions Act 1958* (Vic) s5 (breach of contract), s5(1A) (personal injury).

181 We think that harmonising the approach taken by all EDR schemes in this situation will deliver consistency for complainants and financial services providers. This will also create a more level playing field for financial services providers.

182 We acknowledge that this proposal requires EDR schemes to change their Rules and Terms of Reference.

Complaints that have been dealt with in another forum

Proposal

F4 RG 165.87 states that EDR schemes can exclude complaints that have already been, or should be dealt with in another forum. We propose to clarify that this applies to complaints that have been dealt with in a court or tribunal or another EDR scheme approved by ASIC.

Your feedback

F4Q1 Do you agree with this proposal? Please give reasons.

Rationale

183 The purpose of the allowing schemes to exclude complaints that have been dealt with in another forum was to address the possibility of consumers and investors taking a complaint to more than one decision maker. This would cause duplication of resources and the risk of forum shopping.

184 Feedback from consumer representatives suggests that in some cases, EDR schemes may be excluding complaints on the basis that they have been dealt with by an industry code monitoring committee or a State or Territory fair trading agency.

185 Code compliance monitoring is a different function to dispute resolution. And while some State and Territory fair trading agencies conciliate individual disputes in addition to performing their regulatory functions, consumers and investors should not be precluded from accessing an EDR scheme unless the conciliation has resulted in a resolution of the complaint which has been accepted by the parties.

186 Our view is that these complaints should not be excluded from EDR schemes. We propose to clarify that schemes are permitted to exclude complaints that have been dealt with in an equivalent forum. Our view is that the FOS Investments, life insurance and superannuation division Terms of Reference rule 14.1 provides a sound model for this.

Changes to Rules or Terms of Reference

Proposal

F5 We propose to prohibit EDR schemes from conferring a power on scheme members to veto proposed amendments to their Rules or Terms of Reference.

Your feedback

F5Q1 Do you agree with this proposal? Please give reasons.

Rationale

187 The Constitutions of the FOS Investments, life insurance and superannuation division, IBDL and COSL confer on members a power to veto a proposed amendment to the scheme's Rules or Terms of Reference.

188 ASIC is concerned that under this structure, scheme members hold a disproportionate level of influence over the evolution of the EDR scheme compared with other stakeholders, particularly consumers and investors.

189 We are concerned that this may undermine the independence of the EDR scheme from the industry that provides its funding and constitutes its membership. Independence is required under reg 7.6.02(3)(b) of the Corporations Regulations and RG 139.24.

190 We think that harmonising the approach taken by all EDR schemes in this situation will deliver consistency for complainants and financial services providers. This will also create a more level playing field for financial services providers.

191 We acknowledge that this proposal will require relevant EDR schemes to change their Rules and Terms of Reference.

Communication by EDR schemes

Issue

F6 We are interested in your feedback about whether communication by EDR schemes should be addressed as part of ASIC's policy.

Your feedback

F6Q1 Should we require EDR schemes to communicate clearly with complainants and members about their role, process and decisions? If so, how should this be done?

192 The consumer research conducted by Ipsos-Eureka identified a number of areas where some respondents did not appear to have understood the EDR

process or the role of the EDR schemes, or there was a gap between what they expected and what happened in practice. As noted in Section B, this research was based on the subjective perceptions of consumers and investors.

193 The research found that some respondents who reported that their complaint was still unresolved or had no final outcome were more dissatisfied than respondents who reported that their complaint was resolved in favour of the business they complained about.

194 These findings reflect respondents' perceptions and subjective experiences rather than systemic inadequacies with the performance of EDR schemes. For example, most respondents reported that one month or less was a reasonable time frame for an EDR scheme to resolve a complaint. Given the complexity of many complaints that are referred to EDR and the need to provide procedural fairness to all parties and conduct a thorough investigation, this expectation may not be realistic for all types of complaints.

195 However, these findings do suggest that there may room for EDR schemes to improve their communications with complainants about their processes, decisions and role so that consumers' and investors' expectations are realistic.

196 While these findings should be addressed by the EDR schemes at an operational level, it is not clear whether this issue should also be addressed as part of ASIC's policy or how.

G Outcomes, reviews and reporting

Key points

We propose to:

- clarify that decisions of EDR schemes do not generally bind complainants;
- amend the frequency of regular independent reviews of EDR schemes;
- update the requirements for EDR schemes to report systemic issues and serious misconduct by scheme members to ASIC; and
- require EDR schemes to publish an annual report of statistical information about the number of complaints received and upheld for each scheme member.

Decisions of EDR schemes do not bind consumers and investors

Proposal

G1 We propose to clarify that a decision by an EDR scheme must not bind the consumer or investor who made the complaint, except where the consumer waives the amount in excess of an EDR scheme's compensation cap in order to have their complaint heard by the EDR scheme and the consumer accepts the EDR scheme's decision.

Your feedback

G1Q1 Do you agree with this proposal? Please give reasons.

Rationale

197 It is accepted as an underlying and important principle of ASIC's EDR policy and alternative dispute resolution generally that a decision by an EDR scheme must not bind the consumer or investor who made the complaint.

198 It is also accepted that decisions by EDR schemes bind the members of the scheme. RG 139.50 states:

> *A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. Typically, scheme members will contract to be bound by the scheme's Terms of Reference as a condition of their membership.*

We do not propose to reconsider this principle as part of this review.

199 RG 139.51–RG 139.54 set out ASIC's guidance on how an EDR scheme should deal with non-compliance by a scheme member with a decision of the scheme.

200 It is important that the principle that a decision by an EDR scheme does not bind complainants is also clearly stated in RG 139 to clarify this for scheme members.

201 To put the matter beyond doubt, we propose amending RG 139 to specifically state that this is a requirement for approval.

202 If a consumer waives excess of their claim to bring it within an EDR scheme's compensation cap and have the complaint heard by the EDR scheme and the consumer subsequently accepts the EDR scheme's decision, EDR schemes could require the consumer to forfeit their right to take further action in relation to the claim. This could be done by way of a Deed of Settlement between the consumer and the member.

Independent reviews

Proposal

G2 We propose to require an EDR scheme to commission an independent review of its operations and procedures:

(a) three years after the scheme is initially approved by ASIC, and

(b) thereafter, every five years from the date that the EDR scheme's last independent review commenced, or sooner if required by ASIC.

Your feedback

G2Q1 Do you agree with this proposal? Please give reasons.

Rationale

203 EDR schemes are required to commission an independent review of their operations and procedures every three years. This requirement does not preclude a scheme from undertaking a review sooner or more frequently if appropriate: see RG 139.92.

204 A regular, independent review of a scheme's performance provides valuable feedback about how the scheme is working and any areas of its operations and procedures that should be changed or improved.

205 However, ASIC recognises that substantial time and resources are required to undertake an independent review every three years.

206 We also appreciate that several EDR schemes already conduct ongoing internal reviews and continuous improvement initiatives.

207 We propose to require EDR schemes to commission an independent review of their operations and procedures:

(a) three years after the scheme is initially approved by ASIC; and

(b) thereafter, every five years, or sooner if required by ASIC.

208 As with the current requirement, under this proposal, EDR schemes would not be precluded from undertaking an independent review sooner if appropriate.

209 ASIC is also moving towards five yearly reviews for approved industry codes of conduct. We will update Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183) to reflect this.

210 An alternative approach would be to require EDR schemes to commission an independent review every five years from the date of approval. However, our view is that there is significant benefit in requiring an EDR scheme to commission a independent review three years after approval. This would enable the EDR scheme to identify and address any important operational and procedural issues at an early stage in the evolution of the scheme.

211 We have also considered requiring EDR schemes to conduct a full review every six years and a less comprehensive, targeted review, every three years. However, we are not convinced that this option would achieve significant time and resources savings for EDR schemes. Approved EDR schemes are already required to consult with ASIC about the terms of each independent review: see RG 139.93. This gives ASIC the power to direct an approved EDR scheme to confine an independent review to particular issues or to focus on specific issues where appropriate.

Scheme reporting

Proposal

G3 We propose to update RG 139 to:

(a) reflect the fact that EDR scheme reports to ASIC about systemic issues and serious misconduct generally do not identify the scheme member or members involved; and

(b) state that, where necessary, ASIC can compel EDR schemes to provide information identifying the scheme member that is the subject of a systemic issue or serious misconduct report.

Your feedback

G3Q1 Do you agree with this proposal? Please give reasons.

G4 We propose to require EDR schemes to publish an annual report of statistical information about the number of complaints received and upheld for each scheme member.

Your feedback

G4Q1 Do you agree with this proposal? Please give reasons.

G4Q2 How should this information be presented?

Rationale

Reporting to ASIC

212 EDR schemes are required to report any systemic, persistent or deliberate misconduct to ASIC: see RG 139.152(b).

213 RG 139.59–RG 139.77 provides guidance on the application of this requirement. There is a general presumption that reports to ASIC should identify the financial services provider: see RG 139.63. RG 139.69–RG 139.72, which sets out the procedure for reporting systemic issues, contemplate that the EDR scheme's report to ASIC will identify the scheme member or members involved.

214 It is not always appropriate for reports of systemic issues or serious misconduct to identify the scheme member or members involved. Some systemic issues relate to general industry practice or trends that do not warrant identifying individual financial services providers. These should be reported to ASIC without doing so: see RG 139.64.

215 Where an EDR scheme is uncertain about whether to report conduct to ASIC, we encourage the EDR scheme to discuss the situation with us without identifying the scheme member or members involved: see RG 139.77.

216 When RG 139 was published in 1999, industry stakeholders expressed concern that an EDR scheme may be liable to an action in defamation if it reported information about an alleged systemic issue or serious misconduct to ASIC that identified an individual financial services provider.

217 We agree that an EDR scheme should not be exposed to legal action for defamation by scheme members because it complies with ASIC reporting requirements. When RG 139 was issued, ASIC was discussing with the government the possibility of legislative amendments to protect schemes: see RG 139.78–RG 139.79. No law reform to address this occurred.

218 As a result of changes to defamation laws introduced on 1 January 2006, corporations can no longer bring actions for defamation: see *Defamation Act 2005* (Cth). These changes partly address concerns about exposure to defamation.

219 The requirements relating to reporting systemic and serious misconduct to ASIC have now been operating for over eight years. In practice, EDR schemes generally do not identify individual scheme members in systemic issues reports. However, we are able to obtain this information in other ways.

220 Licensees operate in a self-reporting environment where they are required to report significant breaches of their obligations as licensees to ASIC under s912D of the Corporations Act.

221 ASIC also has powers to compel companies to produce information and documents under s33 of the *Australian Securities and Investments Commission Act (2001)* (Cth). If necessary, we can use this power to compel an EDR scheme to produce information identifying a scheme member that is the subject of a systemic issues report to ASIC.

222 Our view is that these arrangements adequately deal with the concerns referred to above about the exposure of the EDR scheme to a claim by a member alleging that the member has been improperly identified in a report to ASIC.

223 Also, our regulatory experience is that this approach works well in practice. We propose to redraft RG 139.59–RG 139.82 to reflect this approach.

Public reporting

224 The number of complaints received by an EDR scheme about a financial services provider and the number of complaints upheld are an important measure for consumers and investors in choosing a financial services provider.

225 It is also useful information for financial services providers to compare their complaints experience against that of like businesses.

226 In the interests of transparency, we therefore propose that EDR schemes should publish an annual report containing statistical information about the number of complaints received and the number of complaints upheld for each scheme member. This could be done in an online format.

227 We recognise that larger providers experience a greater number of complaints due to their larger numbers of customers. We would expect, therefore, EDR schemes to report information using relevant categorisation (e.g. size of business or industry sector).

H Regulatory and financial impact

228 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

(a) the aim of the legislation of delivering an effective dispute resolution system that covers complaints by retail clients, and

(b) facilitating activity in the financial services industry, including not unreasonably burdening financial services providers.

229 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:

(a) considering all feasible options;

(b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;

(c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and

(d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).

230 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

231 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about the impact of our proposals or any alternative approaches including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

Appendix: Comparison of AS 4269–1995 and AS ISO 10002

Principle	AS 4269–1995	AS ISO 10002–2006
Commitment	Essential Element: s3.2 There needs to be commitment to complaints-handling at all levels of organisation, particularly at the highest level. The commitment should cover both internal and external complaints, and be reflected in the adoption and dissemination of documented complaints-handling policies and procedures. Policy development and review shall be an organisational priority and be adequately and appropriately resourced. Training provisions demonstrate management commitment.	Provision in the main body: s5.1 It is important that commitment is shown by, and promoted from, the organisation's top management. The commitment should be reflected in the definition, adoption and dissemination of complaints-handling policy and procedures. Management commitment should be shown by the provision of adequate resources, including training.
Fairness	Essential Element: s3.3 The IDR process shall be fair to both the complainant and the person against whom the complaint is made.	The fairness principle is not addressed in the new standard either as a Guiding Principle or a provision in the main body. However the new standard includes a new requirement for objectivity: Guiding Principle s4.5
Resources	Essential Element: s3.4 The IDR staff shall be provided with training in product or services knowledge, interpersonal and communication skills, and policies and procedures. Staff handling complaints should have resources that will enable them to perform their duty efficiently and effectively. Measures for stress minimisation should also be considered.	Provision in the main body: s6.4 Top management should assess the needs for resources in the organisation and provide them. The selection, support and training of personnel involved in the complaints-handling process are particularly important.

Principle	AS 4269–1995	AS ISO 10002–2006
Visibility	Essential Element: s3.5 It is crucial that an organisation promotes its IDR system internally to its staff as well as externally to consumers and the community. This could be promoted by providing the details on the product labels, website and/or other forms of advertising. The system should be promoted as widely as possible and according to the special needs of consumers.	Guiding Principle: s4.2 Information about how and where to complain should be well publicised to customers, personnel and other interested parties.
Access	Essential Element: s3.6 The complaints-handling procedures should be made simple and flexible to allow greater accessibility to customers. Consumers should be able to submit complaints without charge. Special arrangements should be made for people with disabilities or specific needs.	Guiding Principle: s4.3 An accessible complaint-handling procedures will include: • readily accessible information about the process; • process should be easy to understand and use and in clear language; • information be made in alternative formats (e.g. Braille, audiotape); • flexibility in the methods of making complaints; • toll free or local call fee facilities for making complaints; • special arrangements for complainants with specific needs.
Assistance	Essential Element: s3.7 You should provide resources to assist complainants with making their complaint where necessary, eg assistance with filling in forms for people with limited literacy skills.	This principle is not addressed in the new standard as a Guiding Principle or a provision in the main body. However the principle has arguably been subsumed by the principle of accessibility: Guiding Principle s4.3
Responsiveness	Essential Element: s3.8 You should set reasonable time limits for each of the stages in the complaints-handling procedures. You should inform the complainants of how long the complaints-handling will take, and of the progress of their complaint.	Guiding Principle: s4.4 You should acknowledge the receipt of each complaint immediately. Complaints should be addressed promptly according to their urgency. For example, significant health and safety issues should be processed immediately. Complainants should be treated courteously and be kept informed of the progress of their complaint.

Principle	AS 4269–1995	AS ISO 10002–2006
Charges	Essential Element: s3.9 Complaints-handling process should be provided free of charge (subject to relevant statutory requirements).	Guiding Principle: s4.6 Access to complaints-handling process should be free of charge to the complainant.
Remedies	Essential Element: s3.10 Remedies should be fair and reasonable, and in compliance with legal obligations, relevant codes of conduct and good industry practice. Remedies may be financial or non-financial. Issues to be considered include: • addressing all aspects of the complaint; • following-up where appropriate; and • whether it is appropriate to offer remedies to others who may have suffered in the same way as the complainant but did not make a formal complaint.	This principle is not addressed in the new standard as a Guiding Principle or a provision in the main body.
Data collection	Essential Element: s3.11 Your complaints-handling procedures should include a recording system to monitor complaints, to identify repetitive complaints and to identify a fault in the product or system which can be rectified.	Provision in the main body: s8.1 You should establish a recording system for managing complaints, while protecting any personal information and ensuring complainant's confidentiality. The system should specify the steps for identifying, gathering, maintaining, storing and disposing of records. You should record your complaints-handling and take utmost care in maintaining and preserving such items as electronic files and magnetic recording media.

Principle	AS 4269–1995	AS ISO 10002–2006
Systemic and recurring problems	Essential Element: s3.12 The complaints-handling procedures should enable the organisation to identify and rectify systemic and recurring problems. The aggregated data can be used to redesign product and services, change organisational practices and procedures, retrain staff and reassess consumer needs.	This principle is not directly addressed in the new standard. It has been arguably been subsumed by section 8.1 ('collection of information') and 8.2 ('analysis and evaluation of complaints') in the main body of the new standard.
Accountability	Essential Element: s3.13 The organisations should have a culture of accountability which includes: • all levels in an organisation accepting responsibility; • managers having responsibility for maintaining effective complaints handling procedures.	Guiding Principle: s4.9 The organisation should ensure that accountability for and reporting on actions and decisions of the organisation in complaints-handling is clearly established.
Reviews	Essential Element: s3.14 Complaints-handling process should be reviewed on a regular basis. The actual depth and frequency of such reviews would vary with the nature of the organisation and its policy.	Provision in the main body: s8.6 Top management of the organisation should review the complaints-handling process on a regular basis. The output from the management review should include: • decisions and actions related to improvement of the effectiveness and efficiency of the process; • proposals on product improvement; and • decisions and actions related to identified resource needs (eg training programmes). Records from management review should be maintained and used to identify opportunities for improvement.
Objectivity	This principle is not directly addressed in the old standard. It is perhaps best reflected in Essential Element of fairness: s3.3.	Guiding Principle: s4.5 Each complaint should be addressed in an equitable, objective and unbiased manner.

Principle	AS 4269–1995	AS ISO 10002–2006
Confidentiality	This principle is not addressed in the old standard.	Guiding Principle: s4.7 Personally identifiable information about the complainant should be available only for the purposes of addressing the complaint within the organisation and be actively protected from disclosure, unless the customer or complainant expressly consents to its disclosure.
Customer-focused approach	This principle is not addressed in the old standard. However it is similar to the principle of commitment: Essential Element s3.2.	Guiding Principle: s4.8 Your organisation should adopt a customer-focused approach, be open to feedback and committed to resolving complaints by its actions.
Continual improvement	This principle is not addressed in the old standard. However it is similar to the principle of review: Essential Element s3.14.	Guiding Principle: s4.10 Continual improvement of the complaints-handling process and the quality of products should be a permanent objective of the organisation.
Analysis and evaluation of complaints	This principle is not directly addressed in the old standard. However it is similar to Essential Element 3.12 (‘systemic and recurring problems’).	Provision in the main body: s8.2 All complaints should be classified, then analysed to identify systematic, recurring and single incident problems and trends, and to help eliminate the underlying causes of complaints.

Key terms

Term	Meaning in this document
Financial services providers	Australian Financial Services Licensees, unlicensed issuers and secondary sellers
RG 139	ASIC Regulatory Guide 139, Approval of external complaints resolution schemes
RG 165	ASIC Regulatory Guide165, Licensing: internal and external dispute resolution
IDR procedures	Internal dispute resolution procedures
EDR schemes	External dispute resolution schemes
Corporations Act	Corporations Act 2001
AS 4269–1995	Australian Standard on Complaints Handling AS 4269–1995
Corporations Regulations	Corporations Regulations 2001
AS ISO 10002	Australian Standard AS ISO 10002 Customer satisfaction—Guidelines for complaints handling in organisations
BFSO	Banking and Financial Services Ombudsman
COSL	Credit Ombudsman Service Limited
CUDRC	Credit Union Dispute Resolution Centre Pty Limited
FCDRS	Financial Co-operative Dispute Resolution Scheme
FICS	Financial Industry Complaints Service
IBDL	Insurance Brokers Disputes Limited
FOS	Financial Ombudsman Service
IOS	Insurance Ombudsman Service Limited
IDR	Internal dispute resolution
EDR	External dispute resolution