ASIC
Australian Securities & Investments Commission

CONSULTATION PAPER 112

Dispute resolution requirements for consumer credit and margin lending

July 2009

About this paper

This consultation paper sets out ASIC's proposals on administering the new dispute resolution requirements for credit licensees and representatives, margin lenders and those who give advice on margin loans.

We seek the views of potential credit licensees and representatives, margin lenders and their advisers, consumers, insurers, ASIC-approved external dispute resolution (EDR) schemes and other interested parties on our proposals.

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 27 July 2009 and is based on the Corporations Act as at 27 July 2009.

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 update our policy on dispute resolution for credit licensees and representatives, margin lenders and their advisers and trustee companies. 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 G, 'Regulatory and financial impact'.

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 Friday, 11 September 2009 to:

Ai-Lin Lee
Policy Guidance Officer
Consumers and Retail Investors
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
facsimile: (03) 9280 3392
email: disputeresolutionreview@asic.gov.au

What will happen next?

Stage 1	27 July 2009	ASIC consultation paper released
Stage 2	11 September 2009	Comments due on the consultation paper
	Late September to early October 2009	Drafting of updated regulatory guides—RG 139 and RG 165
Stage 3	Mid to late October 2009	Updated regulatory guides released

A Background to the proposals

Key points

Under the National Consumer Credit Protection Bill 2009 (National Credit Bill) and proposed amendments to the Corporations Act, credit licensees (i.e. lenders, and non-lenders such as brokers and other intermediaries) and margin lenders and their advisers will be required to have a dispute resolution system which comprises:

- internal dispute resolution (IDR) processes that meet ASIC's requirements and approved standards; and
- membership of an ASIC-approved external dispute resolution (EDR) scheme.

Credit representatives will also be required to be a member of an ASIC-approved EDR scheme in order to be 'authorised'.

These new arrangements have implications for ASIC's two regulatory guides on dispute resolution:

- Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139); and
- Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

Regulation of consumer credit and margin lending

Regulation of consumer credit

1 The Council of Australian Governments (COAG) agreed on 3 July 2008 that the Commonwealth would assume responsibility for the regulation of consumer credit. The Australian Government introduced the following consumer credit Bills into Parliament on 25 June 2009, the:

(a) National Consumer Credit Protection Bill 2009 (National Credit Bill);

(b) National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill); and

(c) National Consumer Credit Protection (Fees) Bill 2009.

2 Regulation of consumer credit in the new regime will be the responsibility of ASIC. A key component of the new regime is that businesses that provide credit services or who are engaged in other 'credit activities' will be subject to the dispute resolution requirements in the legislation.

Note: This is one of a number of consultation papers we will be publishing this year on the implementation of the credit licensing regime: see www.asic.gov.au/cp.

Regulation of margin lending

3 COAG agreed on 3 July 2008 that the Commonwealth would assume responsibility for the regulation of margin loans.

4 The Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Modernisation Bill) was introduced into Parliament on 25 June 2009.

5 The Modernisation Bill inserts new provisions into the *Corporations Act 2001* (Corporations Act) to regulate margin lending facilities as financial products under Chapter 7 of the Corporations Act. This requires margin lenders and those who provide advice on margin loans to hold an Australian financial services (AFS) licence and be subject to the dispute resolution requirements.

> Note: This is one of a number of consultation papers we will be publishing this year on the implementation of the licensing regime for margin lenders: see www.asic.gov.au/cp.

Monitoring the developments in regulation

6 It should be noted that this consultation paper is based on the National Credit Bill and the Modernisation Bill as introduced into Parliament.

7 We will monitor the progress of the Bills, and will revise our proposals if the requirements materially change before they are finally enacted. Our final position will be published in updated regulatory guides later this year and will be based on the final legislation passed by the Australian Parliament.

> Note: A copy of the National Credit Bill and the Modernisation Bill may be downloaded from the Australian Parliament website at www.aph.gov.au/bills/index.htm.

What are the legislative requirements?

Legislative requirements for consumer credit

8 From 1 January 2010, all credit licensees, including lenders and non-lenders (e.g. finance brokers, mortgage brokers, credit advisers and loan advisers) and their representatives will be required to comply with the dispute resolution requirements.

> Note: A credit representative is a third party, authorised by one or more credit licensees to engage in credit activities on behalf of the credit licensee(s). The employees and directors of the credit licensee, do not need to be formally authorised, they are covered by the credit licence.

9 So businesses that currently provide credit services or currently engage in other ‘credit activities’ may transition towards the new requirements under the national credit regime, including licensing, these businesses will be required to register with ASIC and become a member of an ASIC-approved EDR scheme. Registration commences on 1 November 2009 and closes on 31 December 2009.

10 Table 1 summarises the dispute resolution requirements that apply to credit registrants, credit licensees and credit representatives under the proposed laws.

11 It should be noted that the exposure draft National Consumer Credit Protection Regulations 2009 (draft Regulations) also sets out the matters that ASIC must consider when making or approving IDR procedures and approving EDR schemes: see draft reg 2.3. These matters are also summarised in Table 1.

Table 1: Dispute resolution requirements under the National Credit Bill

Requirements	Details	Reference
General	**Registrants:**	
	Registrants (those currently engaging in credit activities) will be required to be a member of an EDR scheme approved by ASIC. Registrants will also be required to apply for a credit licence if they are a lender/non-lender.	See draft reg 11(2), Transitional Bill
	Lenders and non-lenders:	
	Credit licensees (i.e. lenders and non-lenders) must have a dispute resolution system that consists of: • an IDR procedure that complies with standards and requirements made or approved by ASIC in accordance with the draft Regulations that cover disputes relating to credit activities engaged in by the credit licensee or its representatives; and • membership of an EDR scheme approved by ASIC.	See cl 47, National Credit Bill
	Representatives:	
	A representative, while not required to be a credit licensee, must be a member of an EDR scheme approved by ASIC in order to remain an 'authorised representative' of their respective credit licensee(s). Note: There is no requirement that credit representatives have IDR procedures that comply with standards and requirements made or approved by ASIC.	See cls 64 and 65, National Credit Bill
IDR procedures	When considering whether to make or approve standards or requirements relating to IDR procedures, ASIC must take into account: • Complaints Handling Standard AS ISO 10002-2006; and • any other matter ASIC considers relevant.	See draft reg 2.3(1), draft 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; • 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.	See draft reg 2.3(3), draft Regulations

Legislative requirements for margin lenders and those who give advice on margin loans

12 After the enactment and commencement of the Modernisation Bill, margin lenders and those who give advice on margin loans will be required to hold an AFS licence and be subject to the dispute resolution requirements. Table 2 summarises these dispute resolution requirements.

13 It should be noted that unlike the proposed regulation of consumer credit, representatives of margin lenders will not be separately required to be a member of an EDR scheme. The dispute resolution arrangements of the AFS licensee will cover the AFS licensee's representatives.

14 The Corporations Regulations also set out the matters that ASIC may consider when making or approving IDR procedures and approving EDR schemes. These matters are also summarised in Table 2.

Table 2: Dispute resolution requirements under the Corporations Act

Requirements	Details	Reference
General	Financial service 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, where the Superannuation Complaints Tribunal does not cover complaints about the products/services provided.	See s912A(1)(g), 912A(2) and 1017G, 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; and • any other matter ASIC considers relevant. Note: We understand that the Australian Government will update the reference to AS 4269–1995 in the Corporations Act to Complaints Handling Standard AS ISO 10002-2006 by 1 January 2010.	See regs 7.6.02(1) and 7.9.77(1)(a), 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; • 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.	See regs 7.6.02(3) and 7.9.77(3), Corporations Regulations

ASIC's policy on dispute resolution

15 ASIC has two current policies on dispute resolution:

(a) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165); and

(b) Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139).

16 Table 3 summarises the key dispute resolution standards and requirements in RG 139 and RG 165 that currently apply to financial service providers.

Note: RG 139 and RG 165 are available from the ASIC website at www.asic.gov.au/rg.

Table 3: Summary of ASIC's current policy on dispute resolution

Requirements	Details	Reference
IDR procedures	From 1 January 2010, financial service providers must have IDR procedures that: • cover the majority of complaints clients make; • adopt the definition of 'complaint' in Complaints Handling Standard AS ISO 10002-2006; • satisfy the Guiding Principles of Section 4 of AS ISO 10002-2006 and the following sections of AS ISO 10002-2006: – Section 5.1—Commitment; – Section 6.4—Resources; – Section 8.1—Collection of information (which requires financial service providers to record complaints data); and – Section 8.2—Analysis and evaluation of complaints; • provide a final response within 45 days; and • appropriately document IDR procedures.	RG 165
EDR schemes	Financial service providers must: • belong to one or more EDR schemes approved by ASIC; 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).	RG 165

Requirements	Details	Reference
	An ASIC-approved EDR scheme must satisfy us that it meets the initial and ongoing requirements that ASIC must take into account when approving a scheme. These requirements include: • that the EDR scheme reports: – systemic issues and serious misconduct; – general complaints information; and – information about complaints received and closed with an indication of the outcome against each scheme member in their annual report; • that the scheme covers the vast majority of types of complaints in the relevant industry (or industries); and • that the scheme operates a minimum compensation cap that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries. From 1 January 2012, a minimum compensation cap of at least $280,000 for complaints (or $150,000 for general insurance broker complaints) involving monetary values of up to $500,000 will apply.	RG 139

Objectives of this review

17 This consultation paper addresses how we propose to update RG 165 and RG 139 to adequately cover credit licensees and their representatives, margin lenders and those who give advice on margin loans.

Note: We will address how we propose to update RG 165 and RG 139 to adequately cover trustee companies in a separate consultation paper in due course.

18 The key objectives of this review are to:

(a) update RG 165 so credit licensees and their representatives, and margin lenders and their advisers, have IDR procedures that are in line with the new Australian Standard on complaints handling (AS ISO 10002-2006);

(b) refine our IDR requirements in key areas to accommodate changes under the National Credit Bill and Modernisation Bill; and

(c) refine and harmonise approaches taken by EDR schemes in light of schemes being required to cover consumer credit and margin lending.

19 The proposals in this paper:

(a) anticipate that the policy settings in RG 165 and RG 139 will broadly apply to credit licensees and their representatives, and margin lenders and those who advise on margin loans. However, special requirements or modifications may be required to ensure that:

(i) the link between IDR and EDR works efficiently and effectively for consumer credit and margin lending complaints; and

(ii) the coverage of EDR schemes is sufficiently broad to cover the vast majority of consumer credit and margin lending complaints; and

(b) assume that the terms of reference and rules of the EDR schemes will continue to allow the schemes to handle complaints relating to events that predate the date of membership with the scheme (subject to time limits for bringing a complaint to EDR in RG 139).

20 In developing the proposals in this paper, we have drawn on our experience in administering the dispute resolution requirements in RG 165 and RG 139.

ASIC-approved EDR schemes

21 Credit licensees and their representatives, and margin lenders and those who advise on margin loans, will be required to be a member of one of two current ASIC-approved EDR schemes: the Financial Ombudsman Service (FOS) or the Credit Ombudsman Service Limited (COSL).

Note: It is possible that a new EDR scheme may seek ASIC approval. The process for seeking ASIC approval is set out in RG 139.

22 Concurrently with this review, we are reviewing FOS's Terms of Reference, which is their new single set of rules and guidance submitted to ASIC for approval on 3 June 2009.

A copy of FOS's submitted Terms of Reference is available from the FOS website, www.fos.org.au.

23 Our approval of FOS's Terms of Reference is a condition of our approval of FOS. It is anticipated that the FOS Terms of Reference will come into effect from 1 January 2010, replacing the five different Terms of Reference of each of FOS's predecessor schemes:

(a) the Insurance Ombudsman Service (IOS);

(b) the Banking and Financial Services Ombudsman (BFSO);

(c) the Financial Industry Complaints Services Limited (FICS);

(d) the Insurance Brokers Disputes Limited (IBDL); and

(e) the Credit Union Dispute Resolution Centre (CUDRC).

B IDR—Making dispute resolution work

Key points

Our proposals relating to IDR and how to make dispute resolution work relate to three key issues:

- that credit registrants (prior to obtaining a credit licence) should have the flexibility to maintain existing IDR processes for consumer credit complaints, and if they do not already have existing IDR processes, that EDR schemes be able to handle the complaint directly, even if the complaint has not first been through IDR;
- to clarify how IDR links with EDR for certain categories of urgent credit complaints—that is, complaints relating to default notices, hardship variations and postponement of enforcement proceedings; and
- that the dispute resolution requirements in RG 165 will otherwise generally apply to credit licensees and their representatives, and margin lenders and their advisers.

Transitional arrangements for credit registrants

24 Those who currently engage in credit activities will be required to register with ASIC. Registration commences on 1 November 2009. Licence applications must then be made in the period from 1 January 2010 to 30 June 2010. Applicants for an Australian credit licence (credit licence) must have a compliant dispute resolution system.

25 We note that the period covered by registration is relatively short—extending up to eight months (from when registration commences on 1 November 2009 until 30 June 2010, when the period for registrants to apply for a credit licence ends).

26 EDR is predicated on IDR being a necessary first step in the dispute resolution process. This is so the financial service provider, or in the case of credit, the lender or non-lender, has an opportunity to resolve the complaint and improve their business systems and practices in the process, including where complaints relate to the conduct of their representatives.

27 RG 165 provides regulatory guidance on the necessary features of a financial service provider's IDR processes, in particular that the following definition of 'complaint' be adopted:

> ...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.

28 RG 165 also sets timeframes for financial service providers to provide a final response at IDR and general recording of complaint requirements: see Table 3.

29 There is no legislative requirement in the proposed National Credit Bill for persons currently engaging in credit activities to have IDR processes that comply with ASIC's requirements or approved standards for IDR on registration.

30 We understand that the rationale for the Australian Government's conscious decision not to impose IDR requirements was to reduce compliance costs for registrants. IDR only attaches as an obligation to the credit licence.

31 It should be noted that some EDR schemes, like FOS, generally refer complaints back to the member where it has not gone through IDR. This gives the scheme member an opportunity to resolve the complaint directly with the consumer. This is to ensure that the link between IDR and EDR works effectively.

32 We note that most persons currently engaging in credit activities are already highly likely to have IDR processes that meet RG 165 requirements, especially if they:

(a) already provide a product or service that requires compliance with RG 139 and RG 165 as a condition of an AFS licence; or

(b) subscribe to any of the following industry codes of conduct:

(i) the Code of Banking Practice;

(ii) the Mortgage & Finance Association of Australia Code of Practice; or

(iii) the ABACUS Mutual Code of Practice; or

(c) already are a member of FOS or COSL, because the Terms of Reference or Rules of FOS and COSL require it.

Proposal

B1 We propose that registrants should have the flexibility to maintain existing IDR processes for consumer credit complaints until they obtain a credit licence, and if they do not already have existing IDR processes, that EDR schemes be able to handle the complaint directly, even if the complaint has not first been through IDR.

Your feedback

B1Q1 Do you agree with Proposal B1? If not, why not? If you disagree with Proposal B1, please provide your preferred alternative option.

Rationale

33 Proposal B1 seeks to ensure that dispute resolution works, while also minimising compliance costs for registrants. We note though that the best way to reduce compliance costs may be to have IDR processes in place, given that there is a cost associated with going to EDR.

Urgent matters and IDR

34 RG 165 (at RG 165.65 and RG 165.66) currently provides that a financial service provider must give a 'final response' in writing within 45 days of receipt of a complaint, advising the complainant of:

(a) either the outcome of the complaint, or where there is delay, the reasons for the delay;

(b) the right to complain to EDR; and

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

Default notices

35 Under cl 88 of the National Credit Code (the National Credit Code will be enacted as Schedule 1 of what will be the National Credit Act), a lender is required to give a default notice before commencing enforcement proceedings.

36 The default notice must include certain information, including:

(a) the debtor's rights to make a hardship application under cl 72 or to negotiate with a lender for postponement of enforcement proceedings under cl 94; and

(b) the EDR scheme to which the lender belongs and the debtor's rights under that scheme.

37 The inclusion of these requirements suggests that IDR is not envisaged for complaints relating to default notices. However, we recognise that it may be appropriate for a complainant to first seek a resolution at IDR. If IDR were to apply, we seek feedback on whether the maximum 45-day time frame for handling a complaint at IDR should apply, and if not, what shorter time frame should apply.

38 If IDR processes were to apply, we would want to make sure that the lender does not institute legal proceedings while the complaint is being handled at IDR and for a reasonable time thereafter so the complainant may lodge their complaint with an EDR scheme if IDR is unsuccessful.

Proposal

B2 We seek feedback on whether IDR procedures should apply to complaints involving default notices and, if so, whether a shorter timeframe than the maximum 45 days should apply.

Your feedback

B2Q1 Do you agree that IDR procedures should apply to complaints involving default notices? If not, why not?

B2Q2 If you think that IDR procedures should apply to complaints involving default notices, do you think a shorter than 45-day time frame should apply before a final response is given at IDR? If so, what do you consider to be a more appropriate time frame and why?

B2Q3 Do you agree that, if IDR procedures apply, the lender should not institute legal proceedings while the complaint is being handled at IDR and for a reasonable time thereafter so that the complainant can lodge their complaint with an EDR scheme if IDR is unsuccessful? If not, why not?

B2Q4 Do you think there should be any other modifications to the IDR requirements in RG 165? If so, please identify what these modifications should be and why?

Hardship variations and postponement of enforcement proceedings

39 Under cls 72(3) and 94(2) of the National Credit Code the lender must give the consumer a written notice confirming whether they agree to change the credit contract on hardship grounds or postpone enforcement proceedings within 21 days of receiving the consumer's application. Such written notice must direct the consumer to the lender's relevant EDR scheme and set out the consumer's rights under the scheme.

40 The inclusion of these requirements indicates that IDR is not envisaged for these types of matters. We think that IDR should not apply in these circumstances as the lender has already had an opportunity to consider the complainant's application within the 21-day period under the National Credit Code.

41 We also note that under cls 73 and 95(3) of the National Credit Code, the lender must confirm, by way of written notice to the consumer, the changes to the contract on hardship grounds or the conditions of postponement of enforcement within 30 days of agreement. We think that IDR should not apply in these circumstances given the urgent nature of these types of complaints.

42 We propose to update RG 165 to clarify that IDR procedures do not apply to complaints relating to hardship variations or postponements of enforcement proceedings (regardless of whether the complaint is about the application or

confirmation of changes or conditions) and that the complaint should be handled directly by the EDR scheme.

Proposal

B3 We propose to update RG 165 to clarify that IDR procedures do not apply where the complaint relates to hardship or postponement of enforcement proceedings.

Your feedback

B3Q1 Do you agree? If not, why not?

B3Q2 Do you think there are other types of credit complaints that should not be subjected to IDR or should have different IDR requirements (e.g. the timeframe for providing a final response is shortened)? If so, please identify these other types of credit complaints and explain why they should be exempt from IDR or why the IDR requirements in RG 165 should be varied.

Application of RG 165 to credit licensees and their representatives, and margin lenders and those who give advice on margin loans

43 Other than Proposals B1and B2, we propose that RG 165 should be updated to otherwise generally apply to credit licensees and their representatives, and margin lenders and their advisers.

44 We recognise that some credit licensees may be micro or small businesses. RG 165 (at RG 165.45) currently recognises that IDR procedures may need to be tailored to fit a financial service provider's business, to take into account:

(a) the size of their business;

(b) the range of financial services offered;

(c) the nature of their customer base; and

(d) the likely number and complexity of complaints.

45 We believe that these considerations will also apply to credit licensees when they establish and update their IDR procedures. Appendix 1 to RG 165 sets out in further detail how IDR procedures can be tailored to different sized businesses. See Table 5 in Appendix 1 of this paper for a summary of IDR requirements in Appendix 1 of RG 165.

Proposal

B4 We propose to update RG 165 so that RG 165 generally applies to credit licensees and their representatives, and margin lenders and their advisers.

Your feedback

B4Q1 Do you agree with Proposal B3? If not, why not? For example, please identify where you consider RG 165 should not generally apply and provide your reasons.

B4Q2 Do you think Appendix 1 to RG 165 (summarised in Table 5 of this paper) sufficiently provides guidance to small and micro lenders and non-lenders. If not, why not?

C Reducing consumer confusion about where to direct consumer credit complaints

Key points

We propose to update RG 139 to facilitate dispute resolution and reduce the risk of consumer confusion where complaints involve members of different EDR schemes, (for instance, where a complaint involves both a credit licensee and a credit representative of that licensee, or where the complaint involves a transaction involving more than one credit licensee (i.e. a lender and a non-lender)).

Reducing consumer confusion

46 Over the years, considerable work has been done to reduce consumer confusion over which EDR scheme a consumer can complain to.

47 This work includes setting up a central 1300 phone number so consumers can be directed to the relevant EDR scheme, whether this be FOS, COSL or the Superannuation Complaints Tribunal (a statutory scheme, not covered by RG 139).

How consumer confusion may arise

48 Under cl 47 of the National Credit Bill, credit licensees will be required to hold a credit licence. A general conduct obligation of the credit licence is that the lender/non-lender has:

(a) IDR procedures that:

(i) meet ASIC's requirements and approved standards, and

(ii) cover disputes relating to the credit activities engaged in by the lender/non-lender or its representatives; and

(b) membership with an ASIC-approved EDR scheme.

49 Credit representatives are not required to hold a credit licence when engaging in credit activities on behalf of the credit licensee. However, for a representative to be 'authorised' to engage in credit activities on behalf of the credit licensee, the representative must be a member of an ASIC-approved EDR scheme: see cls 64 and 65, National Credit Bill.

50 We understand that the Australian Government's rationale for credit representatives also being members of an EDR scheme is so that consumers have recourse where:

(a) the credit licensee becomes insolvent or goes into administration; or

(b) the credit representative acts outside the scope of its authority.

51 Where a credit representative acts outside the scope of its authority, cls 75 and 76 of the National Credit Bill clarify that the credit licensee (lender/non-lender) will be responsible for its representative(s). Furthermore, where there is more than one credit licensee involved in the conduct, the credit licensee is jointly and severally liable with the other credit licensees for the representative.

52 While a credit licensee will be responsible for compensating consumers where loss occurs because its credit representative acts outside the scope of its authority, monetary redress may not necessarily be available for consumers in these circumstances. This is because although credit licensees are required to have adequate compensation arrangements (i.e. professional indemnity (PI) insurance or an ASIC-approved alternative compensation arrangement) for their representatives, we understand that currently available PI insurance policies do not generally cover complaints where a representative acts outside the scope of its principal's authority.

53 There is a risk that some consumers who deal with a credit representative may find it confusing to work out where to go to make a complaint, and if IDR is unsuccessful, where to go to ensure they have recourse to monetary redress at EDR. This is because:

(a) while the credit representative's credit guide may refer the consumer to the credit licensee's IDR processes, it will refer the consumer directly to the representative's EDR scheme (cl 158(h), National Credit Bill);

(b) the credit licensee's (lender or non-lender's) credit guide will refer the consumer to the credit licensee's IDR processes and EDR scheme (which may be different to the credit representative's EDR scheme) (cls 126(2) and 136(2), National Credit Bill); and

(c) it is not yet clear whether credit licensees will be required to have PI insurance that covers the EDR scheme decisions of its credit representatives, as ASIC is consulting on this issue. If PI insurance only covers the decisions of the credit licensee's EDR scheme, complainants whose complaint is handled by the credit representative's scheme may be disadvantaged because they will not have the benefit of PI insurance coverage where the credit representative and the credit licensee belong to different EDR schemes. This problem may be exacerbated by the way in which EDR schemes currently operate, as a consumer who lodges a complaint with the EDR scheme of the credit representative may be precluded from accessing the credit licensee's scheme where the licensee and the representative belong to a different EDR scheme.[1]

Note: See Consultation Paper 111 *Compensation and financial resources arrangements for credit licensees* for ASIC's proposals on PI insurance.

[1] The Terms of Reference submitted by FOS for ASIC approval currently provide that complaints already lodged with, and being dealt with by, another EDR scheme are outside FOS's jurisdiction: see cl 5.1(n) of the FOS Terms of Reference. COSL's Rules also have a similar exclusion: see rule 34(o) of the COSL Rules. Both exclusions can be overcome if all parties consent to the scheme having jurisdiction.

54 We note that there are two key relationships that arise under the National Credit Bill involving credit licensees (lenders and non-lenders) and credit representatives:

(a) between a credit licensee (whether a lender or non-lender) and the credit representative that represents that credit licensee; and

(b) between two credit licensees who are both involved in a transaction with the one consumer.

Complaints involving credit representatives who belong to a different EDR scheme to the credit licensee they represent

Options to reduce consumer confusion

55 Our proposals here relate to where a credit representative represents a credit licensee (either a lender or a non-lender).

Option 1—Introduce a priority system for handling credit complaints

56 Our preferred option would be to introduce a priority system for the handling of consumer credit complaints.

57 Under this option, where a complaint potentially involves both a credit licensee and its representative, we propose that the following credit complaints handling priority system be adopted:

(a) the credit licensee's EDR scheme handles the complaint as the EDR scheme of first instance (the credit licensee may then separately pursue the credit representative and/or other credit licensees for concurrent liability);[2] and

(b) where the credit licensee is unable to provide compensation for loss because it becomes insolvent, goes into administration or because the credit representative has acted outside the scope of its authority, the complaint is transferred to the credit representative's EDR scheme.

58 We consider that this option will resolve the issue of a credit licensee's PI insurance policy potentially not covering decisions made by a credit representative's EDR scheme.

59 A key advantage of this option is that consumer confusion would be reduced and the onus would not be on the consumer to identify the best EDR scheme to complain to.

[2] The decision of *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* [2009] VSC 7 (22 January 2009) confirms that complainants at EDR do not have to separately pursue other related parties to recover their full loss. This contrasts with going to court, where a complainant will have to identify all parties against which they have a claim to be able to recover full loss.

60 If this option was adopted, we would want to ensure that if the complainant is subsequently transferred to the credit representative's EDR scheme, the complainant is not excluded from accessing the credit representative's scheme because of time limits for bringing a complaint to EDR being triggered.

61 Under RG 139 (at RG 139.173), the time limit for bringing a complaint to an EDR scheme is:

(a) six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or

(b) two years from when the financial service provider provides a final response at IDR.

62 We would ensure that the complainant is not excluded from EDR on these grounds by clarifying that the complaint would be considered as within the jurisdiction of the credit representative's scheme depending on when the complaint was first lodged with an EDR scheme.

Option 2—Allow the schemes of lenders, non-lenders and credit representatives to handle complaints

63 Under this option, the schemes of the credit licensee (either a lender or a non-lender) and of the credit representative would be equally able to handle complaints, even if the credit licensee had not become insolvent or gone into administration. However for monetary redress to be effective, we would want to ensure that the credit licensee's PI insurance or ASIC-approved alternative compensation arrangements cover decisions made by the credit representative's EDR scheme.

64 If this approach was adopted, we would want to ensure that, where necessary, the complainant would be able to have their complaint transferred to the credit licensee's EDR scheme, without time limits for bringing a complaint to EDR being triggered.

65 We would ensure that the complainant is not excluded from EDR on these grounds by clarifying that the complaint would be considered as within the jurisdiction of the credit licensee's scheme depending on when the complaint was first lodged with an EDR scheme.

66 This would ensure that the complainant is able to obtain redress should the credit representative discontinue their EDR scheme membership and assuming the credit licensee has not become insolvent or gone into administration.

Proposal

C1 We propose to update RG 139 to clarify complaints handling arrangements where complaints involve credit representatives.

Your feedback

C1Q1 Do you agree with Proposal C1? If not, why not?

C1Q2 Which of Option 1 (at paragraphs 56–62) or Option 2 (at paragraphs 63–66) do you consider would be the best way to reduce consumer confusion where complaints involve credit representatives? Please provide your reasons.

C1Q3 Do you have views on other ways to more appropriately reduce consumer confusion where complaints involve credit representatives?

Multi-licensee, multi-EDR scheme complaints

67 Our proposals here relate to where a complaint involves more than one credit licensee, for instance both a lender and a non-lender who are members of different ASIC-approved EDR schemes (i.e. there is a multi-licensee, multi-EDR scheme complaint).

68 We understand that FOS and COSL would, where the subject matter of the complaint made it appropriate, generally refer the whole or part of a complaint to another appropriate EDR scheme. Such a referral would be based on an assessment of which scheme's member has the closest link to the core issue of the complaint.

69 However, we have also received some anecdotal information to suggest that there may be occasions where a consumer may be unable to obtain appropriate redress because the complaint is a multi-licensee, multi-EDR scheme complaint, and that for these types of complaints it may be appropriate for different EDR schemes to jointly handle the complaint.

70 We are interested in gaining a better understanding of these issues and whether RG 139 should be updated to clarify arrangements for EDR schemes jointly handling a complaint.

Proposal

C2 We seek feedback on whether RG 139 should be updated to allow for joint-EDR scheme complaint handling where a multi-party, multi-EDR scheme complaint is involved.

Your feedback

C2Q1 Do you agree with Proposal C2? If not, why not? For example, are there circumstances which raise special issues for joint-EDR scheme handling of complaints that ASIC should be aware of?

C2Q2 What do you consider to be appropriate joint-handling requirements for EDR schemes and why?

D Coverage of EDR schemes for credit and margin lending

Key points

Our proposals on coverage relate to ensuring that EDR schemes can handle the breadth of complaints particular to credit and margin lending.

In particular:

- whether EDR schemes should be required to change their terms of reference or rules so they can handle 'small claims procedures' and, if so, whether a shorter time limit for bringing a complaint to EDR should apply to hardship applications, reopening unjust transactions and reviewing unconscionable interest and other charges;
- whether EDR schemes should be able to handle complaints relating to credit transactions where default judgements have already been obtained, and if so, how;
- how EDR schemes can work with the Australian Competition and Consumer Commission (ACCC) and state and territory Offices of Fair Trading to resolve complaints where the complaint involves a linked credit provider; and
- to clarify that EDR schemes should be able to handle complaints relating to responsible lending requirements for margin lenders, credit licensees and their representatives.

Small claims procedures—The overlap between courts and EDR schemes

EDR scheme coverage of small claims procedures

71 The National Credit Bill lists certain types of consumer credit complaints as 'small claims procedures'—for example, hardship applications, unjust transactions, postponement of enforcement proceedings and claims relating to compensation for loss.

72 Under cl 199 of the National Credit Bill, a complainant may institute legal proceedings in the Magistrates Court, Local Court or Federal Magistrates Court for a small claims procedure. We understand that the rationale for this was to continue to allow consumer access to state and territory courts.

73 We also note the Australian Government's apparent intention that EDR schemes also handle the types of complaints that are listed as 'small claims procedures', given state and territory tribunals will no longer be able to handle consumer credit complaints under the proposed laws. This intention is suggested by the requirement to give notice of the right to complain to

EDR for hardship variations and postponements of enforcement proceedings: cls 72 and 94, National Credit Code.

74 Table 4 summarises the key matters that can be brought as a small claims procedure.

Table 4: Small claims procedures under the National Credit Bill

Types of small claim procedure	Details	Reference
Hardship applications	The consumer can apply for a hardship variation (no limit on the value of the contract).	See cl 74, National Credit Code
Unjust transactions	The consumer can apply to have the credit contract mortgage, guarantee or consumer lease reopened where it is unconscionable, harsh or oppressive (where the credit contract, mortgage, guarantee or consumer lease is under $40,000—or a higher amount prescribed by the regulations).	See cl 76, National Credit Code
Unconscionable interest and other charges	The consumer can apply to have the credit contract, mortgage, guarantee or consumer lease reviewed where there are unconscionable interest and other charges (where the credit contract, mortgage, guarantee or consumer lease is under $40,000—or a higher amount prescribed by the regulations).	See cl 78, National Credit Code
Postponement of enforcement proceedings	The consumer can apply to have enforcement proceedings postponed (no limit on the value of the contract).	See cl 96, National Credit Code
Compensation for loss	The debtor/guarantor can apply for the lender to pay compensation for loss (where the order is for an amount under $40,000—or a higher amount prescribed by the regulations).	See cl 118, National Credit Code

75 We propose to update RG 139 to clarify that the types of complaints that constitute small claims procedures will be able to be handled by EDR schemes, regardless of the $40,000 monetary limitation imposed under the National Credit Bill.

Proposal

D1 We propose to update RG 139 to clarify that EDR schemes will be required to make clear in their terms of reference or rules that they will be able to handle complaints relating to small claims procedures within the monetary limits of the EDR scheme rather than those set out in the National Credit Bill.

Your feedback

D1Q1 Do you agree with Proposal D1? If not, why not?

Time limits for bringing a complaint to EDR

76 Clause 80 of the National Credit Code requires that:

(a) a court application under cl 74 (hardship applications) and cl 76 (unjust transactions) of the National Credit Code be no more than two years after the relevant credit contract is rescinded, discharged or otherwise comes to an end; and

(b) an application under cl 78 (unconscionable interest and other charges) of the National Credit Code may not be brought more than two years after the change to the annual percentage rate(s) takes effect or a fee/charge is charged under the credit contract, or the credit contract is rescinded, discharged or otherwise comes to an end.

77 RG 139 (at RG 139.173) currently imposes a time limit for bringing a complaint to EDR of:

(a) six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or

(b) two years from when the financial service provider provides a final response at IDR.

78 Given the timeframes under cl 80 of the National Credit Code, a shorter time limit than six years from when the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss may be appropriate for complaints relating to hardship applications, unjust transactions and unconscionable interests and other charges.

79 We propose that:

(a) where a complaint relates to a hardship application, the time limit for bringing a complaint to EDR should be two years from when the credit contract is rescinded, discharged or otherwise comes to an end. This follows from our proposal at B3 that IDR should not apply to complaints relating to hardship applications. If IDR were to apply, the time limit for bringing a complaint to EDR should be the later of:

(i) two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and

(ii) two years from when the credit licensee or its representative provides a final response at IDR; and

(b) where a complaint relates to unjust transactions or unconscionable interest or other charges, the time limit for bringing a complaint to EDR should be the later of:

(i) two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and

(ii) two years from when the credit licensee or its representative provides a final response at IDR.

Proposal

D2 We propose to update RG 139 to clarify that the time limit for bringing a complaint to EDR where a hardship variation is involved is two years from when the credit contract is rescinded, discharged or otherwise comes to an end. This follows from our proposal at B3 that IDR should not apply to complaints relating to hardship applications. If IDR were to apply, the time limit for bringing a complaint to EDR should be the later of:

- two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and
- two years from when the credit licensee or its representative provides a final response at IDR;

Your feedback

D2Q1 Do you agree with Proposal D2? If not, why not? For example, do you think that another time limit is more appropriate for bringing a complaint to EDR where the complaint involves a hardship application?

D3 We propose to update RG 139 to clarify that the time limit for bringing a complaint to EDR where unjust transactions or unconscionable interest and other charges are involved is the later of:

- two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and
- two years from when the credit licensee or its representative gives a final response at IDR.

Your feedback

D3Q1 Do you agree with Proposal D3? If not, why not? For example, do you think that another time limit is more appropriate for bringing a complaint to EDR where the complaint involves an unjust transaction or unconscionable interest and other charges?

EDR schemes and default judgments

80 Under the National Credit Code, before a lender can commence enforcement proceedings against a debtor (consumer), with respect to a debt owing under a credit contract or mortgage:

(a) the lender must give the debtor a default notice, specifying the default and the action necessary to remedy the default, unless there are certain special circumstances;[3] and

[3] Such special circumstances include where the lender believes on reasonable grounds that it was induced by fraud to enter into the credit contract or mortgage, where the lender has made reasonable attempts to locate the debtor or mortgagor without success, and where the court authorises the lender to commence enforcement proceedings.

(b) the debtor has not remedied the default within 30 days of the date of the default notice (cl 88, National Credit Code).

81 Subject to these requirements, a lender may initiate debt recovery proceedings in the relevant state or territory tribunals or courts, depending on the relevant jurisdictions and the estimated amount of money to be recovered.

82 Where the debtor fails to appear or plead a defence, the lender is able to have the defence struck out and a default judgement entered. Table 6 in Appendix 2 summarises the extent to which state and territory tribunals and courts are able to hand down default judgements and whether they can be set aside or varied.

83 We seek feedback on how RG 139 may be updated to clarify how EDR schemes can handle complaints involving default judgements.

84 For example, should EDR schemes be able to handle the complaint by negotiating with the lender to look at whether a hardship variation is possible or alternative arrangements can be made so as to be more appropriate to the debtor? This would involve the lender agreeing not to enforce the default judgement while the EDR scheme handles the complaint.

Proposal

D4 We seek your views on whether RG 139 should be updated to clarify how EDR schemes can handle complaints about credit transactions where a default judgement has been entered.

Your feedback

D4Q1 Do you think EDR schemes should be able to handle complaints involving default judgements? If not, why not?

D4Q2 If your response to D4Q1 is 'yes', please explain how you think the EDR scheme may be able to handle the complaint. Do you agree with our suggested example?

Linked credit providers—EDR and how complaints will be resolved with other agencies

85 Currently, under the Uniform Consumer Credit Code, where complaints involve linked credit providers, or point of sale providers (i.e. car yards or retail outlets), the relevant state or territory Office of Fair Trading is able to handle both the fair trading and credit aspects of a complaint where credit products and services have been used to purchase a consumer good or service.

Note: An example of this is where a car yard sells a used or 'second hand' car to a complainant with a credit contract and the car is not fit for purpose. As a result, the complainant wishes to return the car and cancel the credit contract.

86 Under the proposed National Credit Bill, EDR schemes will only be able to handle complaints in relation to financial service providers, credit licensees and their credit representatives, margin lenders and those who provide advice on margin loans. EDR schemes will not have jurisdiction to handle aspects of the complaint relating to the goods or service for which the credit was obtained.

87 Jurisdiction for fair trading issues for the provision of consumer goods and services will remain with the state and territory Offices of Fair Trading and the ACCC. It may benefit these agencies if some guidelines or rules are established to clarify referral processes and how EDR schemes can work with these organisations to effectively resolve these types of complaints.

88 We propose to update RG 139 to include a requirement that we expect EDR schemes to work collaboratively with the ACCC and the state and territory Offices of Fair Trading to develop complaints handling processes where fair trading issues are tied to the consumer credit complaint.

89 We recognise that this issue may be addressed through the Australian Government's consideration of the issue of regulatory oversight for point of sale credit providers over the next 12 months.[4]

90 We believe that this approach will allow for greater flexibility than updating RG 139 to include more detailed requirements in RG 139.

Proposal

D5 We propose to update RG 139 to make clear that we expect EDR schemes to work collaboratively with the ACCC and the state and territory Offices of Fair Trading to develop complaints handling processes where complaints involve linked credit provider and fair trading type issues.

Your feedback

D5Q1 Do you agree with Proposal D5? If not, why not?

D5Q2 Do you think ASIC should provide more detailed requirements in RG 139 for linked credit provider/fair trading issue type complaints?

[4] The Hon Chris Bowen MP, Minister for Financial Services, Superannuation & Corporate Law & Minister for Human Services, Media Release No. 002, *National Consumer Credit Protection Reform Package*, 25 June 2009.

Complaints relating to responsible lending

91 RG 139 (at RG 139.151) currently permits EDR schemes to legitimately exclude complaints from jurisdiction that relate solely to the member's commercial policy.

92 Under the Modernisation Bill, margin lenders will be required to comply with certain responsible lending requirements, including:

(a) assessing whether the margin loan is suitable for the investor (proposed s985E to be inserted into the Corporations Act); and

(b) notifying the consumer of margin calls (proposed s985M to be inserted into the Corporations Act).

93 Under Chapter 3 of the National Credit Bill, from 1 January 2011, credit licensees will be required to comply with certain responsible lending requirements, including by:

(a) making reasonable inquiries about the consumer's personal needs and objectives and financial circumstances before providing a loan or credit contract (cl 117, National Credit Bill); and

(b) assessing whether it is unsuitable for a consumer to enter into a credit contract, have a credit limit increased or remain in a credit contract (cls 118 and 119, National Credit Bill).

94 We propose to update RG 139 to clarify that EDR schemes will be required to amend their Terms of Reference and Rules to enable them to handle complaints involving responsible lending requirements.

Proposal

D6 We propose to update RG 139 to clarify that EDR schemes will not be able to exclude complaints relating to responsible lending.

Your feedback

D6Q1 Do you agree with Proposal D6? If not, why not?

E Contact details for hardship applications

Key points

We propose to update RG 165 to clarify that we expect credit licensees to have a dedicated telephone number for consumers to call to make hardship applications.

We also propose to update RG 139 to clarify that we require EDR schemes to make public on their websites a list of their members' dedicated telephone numbers for hardship applications.

Credit licensees having a contact telephone number for hardship applications

95 We consider that credit licensees should have clear and effective arrangements to assist borrowers who are facing financial hardship. This includes having a dedicated telephone number for consumers to make hardship applications.

96 For larger lenders, we expect that the dedicated telephone number will be a toll-free number.

97 We note that retail banks, building societies and credit unions may already have these procedures in place because they have committed to and implemented the Australian Government's 'Principles to assist borrowers who are experiencing financial difficulty as a result of the global recession'.[5]

98 We propose to update RG 165 to require credit licensees to have a dedicated telephone number for hardship applications. This phone number may or may not be the same as the credit licensee's contact telephone number for IDR procedures.

Proposal

E1 We propose to update RG 165 to clarify that credit licensees should have a dedicated telephone number to accept and handle hardship applications.

Your feedback

E1Q1 Do you agree with our proposal in E1? If not, why not?

[5] The Hon Wayne Swan MP, Treasurer, Media Release No. 077, *Building societies, credit unions and retail banks sign up to help borrowers in distress*, 21 June 2009.

EDR schemes publishing and maintaining a list of members' telephone number for hardship applications

99 Feedback from financial counsellors indicates that it is not always easy and, on occasion, not possible to find a lender's contact telephone number to make a hardship application.

100 For this reason, we propose to update RG 139 to require EDR schemes to publish and maintain a list of their members' telephone numbers for hardship applications.

Proposal

E2 We also propose to update RG 139 to clarify that EDR schemes should make available and maintain on their websites the name and telephone contact details of their members so that consumers can make hardship applications.

Your feedback

E2Q1 Do you agree with our proposal in E2? If not, why not?

F Adequate resourcing

Key points

We propose to update RG 139 so that it includes commentary that ASIC expects EDR schemes to have sufficient resources (including staff) to handle the anticipated influx of new members and therefore complaints.

Adequate resourcing

101 RG 139 (at RG 139.73–RG 139.74) on 'resources available to the scheme' currently touches on whether the scheme is adequately resourced to carry out its promoted functions and whether there is adequate resourcing to assist complainants to draft and lodge their complaints.

102 We have concerns about whether EDR schemes will have sufficient resources (i.e. staff) to handle the anticipated influx of new members and new types of complaints.

103 We propose to update RG 139 so it provides that we expect EDR schemes to have adequate resources to be able to handle the likely influx of new members and therefore complaints as a result of credit licensees and their representatives, and margin lenders and those who provide advice on margin loans, being subject to the dispute resolution requirements under the National Credit Bill and the Modernisation Bill.

104 We will continue to monitor EDR scheme timeframes for handling complaints.

Proposal

F1 We propose to update RG 139 so that it includes our expectation that EDR schemes have adequate resources to handle the likely influx of new members and therefore complaints for consumer credit.

Your feedback

F1Q1 Do you agree with Proposal F1? If not, why not?

F1Q2 Do you think other regulatory guidance is required to ensure that schemes have sufficient resources to handle the anticipated influx of new members and therefore complaints for consumer credit and margin lending? If so, what guidance would be appropriate and why?

G Regulatory and financial impact

105 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) ensuring that consumers of credit licensees and their credit representatives, margin lenders and trustee companies have access to accessible, independent, fair, accountable, efficient and effective dispute resolution processes; and

(b) not causing credit licensees and their credit representatives, margin lenders and trustee companies, and their EDR schemes, to incur unreasonable costs in complying with the dispute resolution requirements.

106 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, by completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).

107 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.

108 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:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits,

of our proposals or any alternative approaches: see ‘The consultation process’, p. 4.

Appendix 1: Summary of IDR requirements

Table 5: Summary of AS ISO 10002-2006 IDR requirements from Appendix 1 to RG 165

Commitment	**AS ISO 10002-2006, section 5.1** The organisation should be actively committed to effective and efficient complaints handling. It is particularly important that commitment be shown by, and promoted from, the organisation's top management. Such commitment should be reflected in the definition, adoption and dissemination of complaints handling policies and procedures. Management commitment should be shown by the provision of adequate resources, including training. This commitment can be demonstrated by: • ensuring all relevant staff are aware of, and educated about, IDR procedures; • ensuring that adequate resources are allocated to IDR (see Resources below); and • implementing management systems and reporting procedures to ensure timely and effective complaints handling and monitoring.
Objectivity	**AS ISO 10002-2006, Guiding Principle 4.5** Each complaint should be addressed in an equitable, objective and unbiased manner through the complaints handling process. This requires that: • IDR procedures should allow adequate opportunity for both parties to make their case. • Wherever possible, a complaint should be investigated by staff not involved in the subject matter of the complaint. In responding to complaints, you should give reasons for reaching a decision on the complaint and adequately address the issues that were raised in the initial complaint. ASIC considers that, where practicable, reasons for a decision should be in writing and should refer to applicable provisions in legislation, codes, standards or procedures.
Resources	**AS ISO 10002-2006, section 6.4** Top management should ensure that the complaints handling process operates effectively and efficiently. Top management should also assess the need for resources and provide them without undue delay. This assessment should include having sufficient resources to offer some complainants assistance to make their complaint if needed. The selection, support and training of personnel involved in the complaints handling process is particularly important. The adequacy of resources also relates to documentation, specialist support, materials and equipment, computer hardware and software, and finances. ASIC considers that, at a minimum, when implementing IDR procedures you should:· • establish a contact point for complainants;· • nominate staff to handle complaints who have sufficient training and competence to deal with those complaints, including the authority to settle complaints or ready access to someone who has the necessary authority; and· • ensure adequate systems are in place to handle complaints promptly, fairly and consistently. For larger organisations with a large retail client base, ensuring adequate resources might include such matters as providing a toll-free/local call facility where complaints can

	be logged and appointing sufficient staff to deal with complaints. For smaller organisations, adequate resources might include ensuring a senior staff member is available to deal with complaints.
Visibility	**AS ISO 10002-2006, Guiding Principle 4.2** You should take reasonable steps to ensure that consumers, investors and other interested parties (i.e. consumer representatives) know about the existence of your IDR procedures and how to make a complaint. This information should be readily available, not just at the time a consumer or investor wishes to make a complaint. It is a requirement to include information about IDR procedures in Financial Services Guides and Product Disclosure Statements, including how the procedures can be accessed. You should make details about your IDR procedures available in a convenient and accessible form. The details could be on your website or in a short document that is handed to customers when a complaint is made or on request. The document could set out what a complainant must do to lodge a complaint and how you undertake to deal with the complaint. All staff who deal with customers, not just complaints handling staff, should also have an understanding of the IDR procedures.
Accessibility	**AS ISO 10002-2006, Guiding Principle 4.3** You should have simple and accessible arrangements for making complaints. Complaints do not need to be in writing and, in some cases, insisting that complaints are in writing can be a disincentive to the complainant, for example if the complainant has poor writing skills. Where a complainant has limited literacy skills, the complainant should be assisted with filling in forms or given help in expressing their complaint more clearly. The IDR procedure should enable complainants to make a complaint by any reasonable means, for example letter, telephone, in person or email. To enable complaints to also be made orally, a toll-free or local call fee facility could be made available. Where complainants have special needs, the availability of interpreters and staff who are cross-culturally trained or trained to cater for special needs should be provided. Information about making and resolving complaints should be easy to understand and in plain English. So as not to disadvantage complainants, the information should also be made available in alternative formats, such as translated into other languages, printed in large print, Braille or made available on audiotape.
Responsiveness	**AS ISO 10002-2006, Guiding Principle 4.4** Your IDR procedures should include clear response times for dealing with a complaint and the complainant should be made aware of these response times. As a general rule, you should aim to acknowledge receipt of a complaint immediately. Where immediately acknowledging receipt of a complaint is not possible, acknowledgement should be made as soon as possible. You should respond to complaints promptly in accordance with the urgency of the complaint. This involves prioritising complaints. ASIC considers that you should provide a final response to a complaint within a maximum of 45 days.* If you cannot provide a final response to the complainant within 45 days, you should inform the complainant of the status of the complaint, the reasons for the delay, the right

	to complain to an ASIC-approved EDR scheme and provide the name and contact details of the relevant scheme. By providing a final response to a complaint, ASIC means that you should accept the complaint and, where appropriate, offer redress. It is important that consumers are kept informed of the progress of their complaints. It may be reasonable for you to consider shorter timeframes for different types of complaints (e.g. administrative complaints, performance-related complaints and advice-related complaints) depending on the size of the organisation, the client base and the types of products and services offered under the AFS licence. You should also take into account any timeframes for responding to complaints as set out in relevant industry codes of conduct. Where the complaint is resolved by the end of the next business day on which the complaint was received, you will not be required to apply the full IDR process (i.e. in terms of capturing and recording complaints). However, ASIC encourages you to apply the full IDR process where possible. * The time limit of 45 days will not apply in those instances where either s101 of the *Superannuation Industry (Supervision) Act 1993* or s47 of the *Retirement Savings Accounts Act 1997* applies. Each of these provisions allows a maximum time limit of 90 days for responding to a complaint or inquiry.
Charges	**AS ISO 10002-2006, Guiding Principle 4.6** ASIC considers that: • material explaining IDR procedures should be provided free of charge to complainants; and • complainants should not have to pay to access the complaints handling process.
Collection of information and confidentiality	**AS ISO 10002-2006, section 8.1 (Collection of information)** You should establish a recording system for managing complaints, while protecting and personal information and ensuring complainant 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. Complaints handling data is a useful means of tracking compliance issues or risks. ASIC may require you to produce complaints data in certain circumstances. You should, therefore, keep this data in an accessible form. Your recording system should at least be able to identify the number of complaints which were resolved by the end of the next business day after the day on which the complaint was received. **AS ISO 10002-2006, Guiding Principle 4.7 (Confidentiality)** Personally identifiable information concerning the complaint should not be disclosed, unless it is needed for the purposes of addressing the complaint. This type of information should be actively protected from disclosure. Disclosure can only otherwise be made if the customer or complainant expressly consents.
Analysis and evaluation of complaints	**AS ISO 10002-2006, section 8.2** All complaints should be classified and then analysed to identify systemic, recurring and single incident problems and trends. This will help eliminate the underlying causes of complaints. To do this, it will be important to be able to analyse complaints according to categories, such as type of complainant, subject of complaint, outcome of complaint, and timeliness of response.

Accountability	**AS ISO 10002-2006, Guiding Principle 4.9** Reports about complaints should be prepared for the top management of your organisation. These reports should also include the actions taken and decisions made in respect of complaints. Data about your complaints, including the actions taken and decisions made, should also be available for inspection by ASIC in certain situations, for example during surveillance.
Continual improvement	**AS ISO 10002-2006, Guiding Principle 4.10** The continual improvement of the complaints handling process and the quality of products and services should be an ongoing objective of the organisation. This involves conducting regular reviews of IDR procedures to identify areas for improvement. The frequency of reviews may vary according to the size of the organisation and their complaints volume. We consider that reviews should be conducted at least every 2–3 years to ensure that the complaints system is operating effectively. We consider that a larger organisation might benefit from an independent review.
Customer-focused approach	**AS ISO 10002-2006, Guiding Principle 4.8** The organisation should adopt a customer-focused approach (including being helpful, user-friendly and communicating in plain English), be open to feedback and show commitment to resolving complaints by its actions.

Appendix 2: State/territory tribunals and courts and their approach to default judgments

Table 6: State/territory tribunals and courts and their approach to default judgments

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Australian Capital Territory		
ACT Civil and Administrative Tribunal (ACAT) Where there are appeals within ACAT, if the respondent fails to comply with a direction, ACAT can hand down a default judgment in favour of the appellant (Rule 18, ACT Civil and Administrative Tribunal Procedure Rules 2009).	Does not appear to be the case.	Under $10,000—small claims
Magistrates Court The debtor (defendant) is in default if they do not file a notice of intention to respond within time (Rule 1117, Court Procedure Rules 2006). The plaintiff must apply to the court for a default judgment to be entered into (Rule 1118, Court Procedure Rules 2006).	Yes. The default judgement can by order, be amended or set aside, including any enforcement of it (Rule 1128, Court Procedures Rules 2006).	Up to $50,000 Up to $10,000—small claims
Supreme Court As above for the Magistrates Court.	Yes. As above for the Magistrates Court.	Unlimited
New South Wales		
Consumer, Trader and Tenancy Tribunal (CTTT) Unable to verify. The CTTT does not appear to handle debt recovery matters.	-	Up to $30,000
Local Court A default judgment can be handed down if the debtor fails to file a defence within 28 days. The plaintiff must apply for a default judgment (Rule 16.2, 16.3, Uniform Civil Procedure Rules 2005).	Does not appear to be the case.	Up to $10,000—small claims
District Court As above for the Local Court.	Does not appear to be the case.	Over $60,000
Supreme Court As above for the Local Court.	Does not appear to be the case	Unlimited

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Northern Territory		
Local Court A default judgment can be applied for if: • the debtor fails to file a notice of defence within 28 days of being served with a statement of claim; • the debtor fails within 28 days of being served with an originating application, to file a notice of intention to appear; • where the court makes an order permitting the plaintiff to proceed as if a notice of defence has not been filed; or • no later than 28 days after the court orders a notice of defence to be struck out (Rule 11.01, Local Court Rules 2007). An affidavit and application is required before a default judgment can be handed down (Rule 11.02, Local Court Rules 2007).	Yes. A debtor may apply for the default judgment to be set aside and the proceeding to be reheard (Rule 11.04, Local Court Rules 2007).	Up to $100,000 Up to $10,000—small claims jurisdiction (not bound by rules of evidence)
Magistrates Court Unable to verify	Unable to verify.	Appears unlimited
Supreme Court The court can hand down a default judgment where: • the debtor fails to file an appearance within time (so long as the plaintiff files an affidavit proving service of the writ on the debtor and the plaintiff applies for a judgment debt) (Order 21 r 1, Supreme Court Rules 2008); or • the debtor fails to serve a defence within the required time (so long as the plaintiff files an affidavit proving the default is filed) (Order 21 r 2, Supreme Court Rules 2008). For recovery of a debt, final judgment can be entered into under a default judgment (Order 21, r 3, Supreme Court Rules 2008).	Yes. The court can set aside or vary the default judgment (Order 21, r 7, Supreme Court Rules 2008).	Unlimited

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Queensland		
Small Claims Tribunal (will amalgamate into the Qld Civil and Administrative Tribunal from 1 Dec 2009)—unable to verify	Unable to verify.	Up to $7,500
Magistrates Court A default judgment can be issued by the court if the defendant fails to file a notice of intention to defend within the required timeframe (Rule 281, Uniform Civil Procedure Rules 1999). The plaintiff must prove service of claim on a defendant (Rule 282, Uniform Civil Procedure Rules 1999) and file for a default judgment before the court can give one (Rule 283, Uniform Civil Procedure Rules 1999).	Yes. The court may set aside or amend a default judgment and any enforcement of it on terms about costs and the giving of security as the court considers appropriate (Rule 290, Uniform Civil Procedure Rules 1999).	Up to $50,000
District Court As above for the Magistrates Court.	Yes. As above for the Magistrates Court.	$50,000–$250,000
Supreme Court As above for the Magistrates Court.	Yes. As above for the Magistrates Court.	Up to $250,000
South Australia		
District Court The Court's permission is required to enter a default judgment where the debtor fails to file particulars of case, or some other procedural irregularity (Rule 228, District Court Civil Rules 2006). Court permission is not required (i.e. default judgment is entered into immediately) if the debtor does not file a defence within 28 days after service of the statement of claim (Rule 229, District Court Civil Rules 2006).	Yes. The court can set aside default judgments, on conditions it considers just or vary a default judgment (Rule 230, District Court Civil Rules 2006).	Appears unlimited

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Supreme Court (*Has mirror provisions to the District Court.*) The Court's permission is required to enter a default judgment where the debtor fails to file particulars of case, or some other procedural irregularity (Rule 228, Supreme Court Civil Rules 2006). Court permission is not required (i.e. default judgment is entered into immediately) if the debtor does not file a defence within 28 days after service of the statement of claim (Rule 229, Supreme Court Civil Rules 2006).	Yes. The court can set aside default judgments, on conditions it consider just or vary a default judgment (Rule 230, Supreme Court Civil Rules 2006).	Unlimited
Tasmania		
Magistrates Court If the debtor does not file a defence within 21 days of date of service of the complaint, a default judgment can be entered into (Rule 116, Magistrates Court (Civil Division) Rules 1998).	Does not appear to be the case.	Up to $50,000 Greater than $50,000 if all parties agree Minor claims—under $5,000
Supreme Court If the debtor fails to appear, a default judgment can be made, so long as the plaintiff provides an affidavit of service to the debtor, etc (Rule 346, Supreme Court Rules 2000).	Yes. A default judgment can be set aside or varied by the court or a judge either unconditionally or on any terms the court or judge considers appropriate (Rule 355, Supreme Court Rules 2000).	Unlimited
Victoria		
The Victorian Civil and Administrative Tribunal (VCAT) VCAT can make an order requiring the payment of money by a person who was not present/represented at the proceeding, so long as VCAT sends that party a copy of the order (s 116, VCAT Act). The VCAT order can be enforced by filing at the Magistrates Court.	Does not appear to be the case.	Unlimited

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Supreme Court If the debtor fails to appear, a default judgment can be made as long as the plaintiff: • files a notice; • an affidavit proving service of the writ on the debtor; and • a statement of claim (in certain circumstances) (Rule 21.01, Supreme Court (General Civil Procedure) Rules 2005). A debtor is in default if they do not serve a defence on time. The plaintiff must file an affidavit proving the default (Rule 21.02, Supreme Court (General Civil Procedure) Rules 2005). For claims made for the recovery of a debt, a plaintiff may enter final judgment against the defendant for the amount not exceeding the amount claimed in the writ or statement of claim with interest from the commencement of the proceeding to the date of the judgment (Rule 21.03, Supreme Court (General Civil Procedure) Rules 2005).	Yes. The Court may set aside or vary any default judgment (Rule 21.07, Supreme Court (General Civil Procedure) Rules 2005).	Unlimited
Magistrates Court If the defendant does not give notice of defence within 21 days of service of the complaint, the plaintiff can apply for an order in default (O 10 r 1, Magistrates Court Civil Procedure Rules 2009).	Does not appear to be the case.	Up to $100,000 and in some cases unlimited
County Court Default judgment can be entered where the claimant: • does not appear, so long as certain requirements are satisfied (i.e. giving notice to the Registrar to search for the appearance of the debtor, providing affidavit of service to the debtor) (O 21 r 1, County Court Civil Procedure Rules 2008); or • does not give notice of defence on time (O 21 r 2, County Court Civil Procedure Rules 2008).	Yes. The court may set aside or vary any default judgment (O 21, r 7, County Court Civil Procedure Rules 2008).	Unlimited

Tribunal/court and their approach to default judgments	Can the default judgment be set aside/varied?	Jurisdictional limit
Western Australia		
State Administrative Tribunal (WA) (SAT) The SAT may make a decision in a person's absence, however the absent/ unrepresented person can seek review of the decision by SAT if the person had a good reason for being absent/unrepresented (s 84, *State Administrative Tribunal Act 2004* (WA). The SAT order for payment of monies can be enforced by filing in the Supreme Court (s 85, *State Administrative Tribunal Act 2004* (WA).	Does not appear to be the case.	Appears unlimited
Magistrates Court The court can give a default judgment for a specified/unspecified amount (Rules 21 and 22, Magistrates Court (Civil Proceedings) Rules 2005).	Yes. Application to set aside the default judgment must be made within 21 days after the date of the default judgment (Rule 79, Magistrates Court (Civil Proceedings) Rules 2005).	Minor claims for debt—up to $10,000 Claims for debt—up to $75,000
District Court Unable to verify.	Unable to verify.	Unlimited—but usually handles claims up to $750,000
Supreme Court Unable to verify.	Unable to verify.	Unlimited, but usually greater than $750,000

Key terms

Term	Meaning in this document
ABACUS Mutual Code	The ABACUS Mutual Banking Code of Practice to which credit unions and mutual building societies subscribe
AS ISO 10002-2006	Complaints Handling Standard AS ISO 10002-2006
ASIC	Australian Securities and Investments Commission
ASIC-approved EDR scheme, EDR scheme or scheme	An external dispute resolution scheme approved by ASIC under RG 139
AFS licensee	A person who holds an Australian financial services licence under s913B of the *Corporations Act 2001* that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act 2001.
Code of Banking Practice	The Australian Banking Association's Banking Code of Practice to which banks subscribe
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
COSL	Credit Ombudsman Service Limited—an ASIC-approved EDR scheme
credit licence	An Australian credit licence under cl 35 of the National Credit Bill that authorises a licensee to engage in particular credit activities
credit licensees	A person who will be required to hold an Australian credit licence
credit representatives or representatives	Representatives of credit licensees under the National Credit Bill
draft Regulations	The exposure draft National Consumer Credit Protection Regulations 2009 , released as part of the exposure draft of proposed National Credit legislation on 27 April 2009
FOS	Financial Ombudsman Service—an ASIC-approved EDR scheme
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes, that meet the requirements and approved standards of ASIC under RG 165
lender	A credit provider as defined in s204 of the National Credit Code
margin lender	A person who provides a margin loan

Term	Meaning in this document
margin loan	A margin loan meeting the definition of proposed s761EA of the Corporations Act (to be inserted by the Modernisation Bill)
MFAA Code of Practice	The Mortgage & Finance Association of Australia's Code of Practice
Modernisation Bill	Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009, tabled in Parliament on 25 June 2009
National Credit Bill	National Credit Protection Bill 2009, tabled in Parliament on 25 June 2009
National Credit Code	National Credit Code at Schedule 1, National Credit Bill
non-lender	All credit licensees that are not lenders. This category includes persons who provide credit assistance under cl 9 of the National Credit Bill and persons who act as intermediaries under cl 8 of the National Credit Bill
PI insurance	Professional indemnity insurance
RG 139	Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*
RG 165	Regulatory Guide 165 *Licensing: Internal and external dispute resolution*
Transitional Bill	National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, tabled in Parliament on 25 June 2009