ASIC
Australian Securities & Investments Commission

REPORT 195

Response to submissions on CP 112 Dispute resolution requirements for credit and margin lending

May 2010

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 112 *Dispute resolution requirements for consumer credit and margin lending* (CP 112) and details our responses to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

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

This report does not contain ASIC policy. Please see Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) and Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139).

Contents

A Overview and consultation process

About our consultation

Dispute resolution requirements for credit

1 Under the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act), persons who currently engage in credit activities must register with ASIC between 1 April and 30 June 2010 (i.e. become 'registered persons') and, before registering with ASIC, must become a member of an external dispute resolution (EDR) scheme approved by ASIC.

> Note: We clarify in Regulatory Guide 202 *Credit registrations and transition* that persons who currently engage in credit activities and expect to be Australian credit licensees (credit licensees) must register with ASIC. Registered persons may, during the registration period, authorise a person to be their credit representative, but that credit representative's obligation to be a member of an ASIC-approved EDR scheme will only commence from 1 July 2010.

2 Under the *National Consumer Credit Protection Act 2009* (National Credit Act), from 1 July 2010, credit licensees (i.e. lenders, and non-lenders such as brokers and other intermediaries must have a dispute resolution system which consists of:

(a) internal dispute resolution (IDR) procedures that meet ASIC's requirements and approved standards; and

(b) membership of an EDR scheme approved by ASIC.

> Note 1: Debt collectors and others who take credit contracts on assignment must be a credit licensee and have a dispute resolution system under the National Credit Act from 1 July 2010: see Regulatory Guide 203 *Do I need a credit licence?* (RG 203) at RG 203.34–RG 203.35.
>
> Note 2: Debt collectors who are licensed under state or territory law, and collect a debt as a lender's agent, are, on the whole, exempt from the new regulatory regime until 1 April 2011. Until then, the Australian Government will consult further with state and territory governments, industry and other stakeholders: see RG 203.54.

3 From 1 July 2010, credit representatives must also separately be members of an ASIC-approved EDR scheme in addition to credit licensees, but do not need to have IDR procedures that meet ASIC's requirements and approved standards. This is because a credit licensee's IDR procedures must cover disputes relating to their credit representatives.

> Note: See Appendix 1 for a summary of these requirements.

Dispute resolution requirements for margin lending

4 Under the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Modernisation Act), from 1 January 2011, providers

or margin lending financial services must also have a dispute resolution system which consists of:

(a) IDR procedures that meet ASIC's requirements and approved standards; and

(b) membership of an EDR scheme approved by ASIC.

Note: See Appendix 1 for a summary of these requirements.

Consultation Paper 112

5 In Consultation Paper 112 *Dispute resolution requirements for consumer credit and margin lending* (CP 112), we set out our proposals to update and refine for consumer credit and margin lending, our dispute resolution requirements in:

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

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

Note: See Appendix 2 for a summary of the key requirements in RG 165 and RG 139.

6 In particular, CP 112 proposed to:

(a) update and refine our standards for IDR processes so that dispute resolution works for credit and margin lending financial services;

(b) reduce consumer confusion about where to direct credit disputes when a credit representative is involved, by introducing a priority system for disputes handling; and

(c) clarify the coverage of EDR schemes for complaints or disputes relating to credit and margin lending financial services, including clarifying the overlap between courts and EDR schemes and the time limits for bringing a complaint or dispute to EDR.

7 The consultation period for CP 112 closed on 11 September 2009. For a list of all non-confidential responses to CP 112, see Appendix 3.

Note: Copies of all non-confidential submissions are available at www.asic.gov.au/cp under CP 112.

8 This report highlights the key issues that arose out of the submissions received on CP 112 and our response to those issues.

9 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question posed for feedback in CP 112.

FOS merger and development of its new Terms of Reference

10 In March 2008, the Financial Ombudsman Service Limited (FOS) applied to ASIC for approval in accordance with the requirements in RG 139. At that time, FOS was a new entity, formed by the merger of:

(a) the Banking and Financial Services Ombudsman Limited;

(b) the Financial Industry Complaints Service Limited; and

(c) the Insurance Ombudsman Service Limited.

11 Each of these EDR schemes had previously been approved by ASIC and each had its own terms of reference.

12 On 16 May 2008, ASIC approved the FOS Constitution and FOS as an EDR scheme, subject to certain conditions of approval, including that FOS submit its single set of rules and guidance, or Terms of Reference (TOR), to us by 1 July 2009, so that the new TOR could be approved and commence by 1 January 2010.

13 On 1 January 2009, two more ASIC-approved EDR schemes joined FOS: the Insurance Brokers Disputes Limited and the Credit Union Dispute Resolution Centre Pty Limited.

14 On 3 June 2009, the draft TOR, consolidating the five separate sets of rules and procedures of the pre-existing five EDR schemes, were submitted to ASIC for approval.

15 After consulting with key stakeholders, ASIC approved the new TOR on 18 December 2009, for commencement on 1 January 2010, subject to a number of conditions.

> Note: See our letter of approval of the FOS TOR for our conditions of approval. A copy is available at www.asic.gov.au under Media Release 09-263AD.

16 A key condition on which we approved the FOS TOR related to how ASIC requires FOS to handle and collect data about complaints relating to debt recovery proceedings where legal proceedings have already commenced by a scheme member before a complaint is lodged at FOS.

> Note: For more information about our conditions, the FOS TOR approval process and a copy of the approved TOR, see Media Release 09-263AD *ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference* and Report 182 *Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference* (REP 182) at www.asic.gov.au.

17 The merger of FOS and the development of its new TOR consolidates the EDR scheme landscape to two ASIC-approved EDR schemes in the Australian financial services industry:

(a) FOS; and

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

> Note: See ASIC Class Order [CO 09/339].

18 Both FOS and COSL have also been approved by ASIC to handle consumer credit disputes under the National Credit Act.

Note: See ASIC Class Order [CO 10/249].

Trustee companies providing traditional trustee company services

19 The Australian Government's update of the Corporations Act so the dispute resolution requirements extend to cover trustee companies providing traditional trustee company services (traditional services) may raise new issues for dispute resolution in the Australian financial services industry.

20 We intend to release a consultation paper shortly on our proposals to update and refine the dispute resolution requirements for trustee companies providing traditional services.

21 Our approval of the new FOS TOR also requires as a condition of approval that FOS make any necessary changes to its Constitution and/or TOR that may arise out of our consultation on trustee companies providing traditional services.

Responses to our consultation

22 A total of 24 written submissions (two of which were confidential) were received from a diverse range of stakeholders, including consumer representatives, businesses, industry associations and EDR schemes.

23 Table 1 provides a breakdown of the stakeholders from whom the 22 non-confidential written submissions were received.

Table 1: Stakeholders that made submissions to CP 112

Stakeholder	Number
Industry representatives (including 6 businesses and 9 industry associations)	15
Consumer representative organisations	12 (not including where an organisation made an additional submission to the joint consumer submission)
EDR schemes	2

24 By way of general observation, some submissions from business revealed general confusion or misunderstanding about the current policy settings for dispute resolution and how we proposed to update and refine these settings for credit. To assist industry understanding, we have gone to extra lengths in

this report, where relevant, to explain the current dispute resolution requirements and how we propose to update and refine them for credit.

25 Submissions were often polarised on the key issues, predominantly relating to our proposals around EDR scheme coverage—namely, our proposals about:

(a) reducing consumer confusion where complaints or disputes involve multi-licensee, multi-EDR scheme matters and/or credit representatives;

(b) EDR scheme handling of the types of disputes considered to be 'small claims procedures' under the National Credit Act;

(c) the time limits for bringing a dispute to EDR for disputes involving hardship variations, unjust transactions or unconscionable interest and other charges; and

(d) EDR scheme handling of disputes involving default judgments.

26 Submissions generally agreed with and supported our proposals in relation to IDR and publishing contact details for hardship applications.

27 In this report, we have grouped comments from the submissions and our response to them based on the main issues raised by respondents—Sections B and C relate to IDR and Sections D to I relate to EDR scheme coverage.

B IDR: IDR processes for disputes involving default notices

Key points

Most submissions generally agreed that IDR processes should apply to disputes involving default notices.

However, views differed on the most appropriate timeframe for handling disputes—appropriate timeframes ranged from 21 to 30 or 45 days.

Most submissions also generally agreed that credit licensees and their credit representatives should not commence legal action while a dispute is being handled at IDR/EDR.

We have updated RG 165 to clarify that:

- IDR procedures apply to disputes involving default notices;
- the maximum timeframe at IDR for disputes involving default notices is 21 days. This timeframe aligns with IDR timeframes currently in voluntary industry codes of conduct for banks, credit unions and building societies;
- lenders should not institute legal proceedings (including debt collection activity) while the dispute is handled at IDR and for a reasonable time thereafter so the disputant may go to EDR (unless the statute of limitations is about to expire); and
- we expect that a reasonable time thereafter for a disputant to complain to EDR will be at least 14 days from giving a final response at IDR, but may be longer depending on the particular circumstances of the case.

Our proposal

28 We sought feedback on:

(a) whether IDR procedures should apply to disputes involving default notices, and if so, whether a shorter than 45-day timeframe should apply for giving a final response; and

(b) if IDR procedures apply, whether the lender should be required to refrain from instituting legal proceedings while the dispute is being handled at IDR (and for a reasonable time thereafter) so the disputant can lodge their dispute with an EDR scheme if IDR is unsuccessful.

29 We sought feedback on these issues because currently, under RG 165, a financial service provider is expected to give a final response in writing within 45 days of receipt of a complaint advising the complainant of:

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

(b) the right to complain to EDR; and

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

30 Where a final response is unable to be given within the 45 days, the financial service provider should inform the complainant of the reasons for delay, the right to complain to EDR and the name and contact details of the relevant EDR scheme: see RG 165.82.

31 Under s88 of the National Credit Code:

(a) a lender is required to give a default notice before commencing enforcement proceedings to recover money or take possession or sell property; and

(b) the debtor is given at least 30 days to remedy the default.

32 The default notice must include certain information, including:

(a) the debtor's right to make a hardship application under s72 of the National Credit Code, or to negotiate with a lender for postponement of enforcement proceedings under s94 of the National Credit Code; and

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

Note: See Form 12 of the National Consumer Credit Protection Regulations 2010 (National Credit Regulations), also provides a pro forma default notice that must be substantially complied with for s88 of the National Credit Code. The information in the pro forma default notice includes information:

- that a disputant has the right to seek a hardship variation and the lender's contact details to apply for such a hardship variation;
- the 21-day timeframe for a lender to agree to a hardship variation; and
- that if the lender does not respond or agree to the hardship variation within the 21 days, the disputant can complain to EDR.

33 In CP 112, we considered that the inclusion of these requirements in the National Credit Act and National Credit Regulations suggested that a further 45 days at IDR was not envisaged for disputes involving default notices. However, we recognised that it may be appropriate for a disputant to first seek a resolution at IDR.

IDR and disputes involving default notices

Whether IDR processes should apply and their maximum duration

34 Most submissions generally agreed that IDR should apply to disputes involving default notices because:

(a) IDR is a necessary first step in the dispute resolution process and this ensures efficiency in disputes handling; and

(b) it is appropriate that IDR procedures apply as disputes involving default notices may include:

(i) an allegation that the default notice was not served;

(ii) a dispute about the amount specified in the default notice;

(iii) a dispute about the lender's communications leading up to the issue of the default notice; and

(iv) disputes about the lender's decision to serve the default notice (e.g. the lender previously did not consider or rejected a financial hardship application, or did not consider or rejected an application for a stay of proceedings (or a request for time to sell the secured property or to refinance)).

35 While submissions agreed that IDR should apply, submissions were polarised on the most appropriate maximum timeframe for handling a dispute involving default notices at IDR.

36 Industry submissions were almost unanimously in favour of IDR timeframes being consistent with existing IDR timeframes under RG 165—that is, the maximum 45-day timeframe for handling a dispute at IDR should apply to disputes involving a default notice.

37 In comparison, consumer representatives and COSL supported a shorter than 45-day timeframe given the urgent nature of disputes involving default notices. However, submissions differed on what would be a more appropriate shorter timeframe for handling a dispute involving a default notice at IDR:

(a) one consumer submission suggested 21 days to align with the timeframe for a lender to respond to a hardship application under s94 of the National Credit Code; and

(b) most other consumer submissions were of the view that a maximum 30 days at IDR is appropriate (as this is the duration a consumer has to remedy a default under a default notice).

Whether a lender should be required to refrain from commencing legal proceedings while a dispute is being handled at IDR

38 Almost all submissions agreed that a lender should not institute legal proceedings while a dispute is being handled at IDR. Some submissions were also of the view that non-legal proceeding enforcement action of a default notice should also be put on hold (i.e. debt collection activity) while the dispute is being handled at IDR. This would enable IDR processes to operate effectively because the lender could genuinely consider the dispute.

39 Some industry submissions cautioned that the requirement to refrain from instituting legal proceedings should not apply where legal action is necessary for a lender to protect their legitimate interests (e.g. where the statute of limitations is about to expire or where a credit provider reasonably believes that its security is at risk).

40 Very few submissions commented on what would be a 'reasonable time' thereafter for a lender to refrain from commencing legal proceedings (including debt collection activity) so a disputant can lodge their dispute at EDR. Of the submissions that did comment:

(a) one consumer submission and one industry submission were of the view that lenders should be restrained from commencing legal proceedings for 14 days after the lender has given a final response at IDR;

(b) one industry submission was of the view that 15 days after a final response would be appropriate; and

(c) one consumer submission was of the view that 45 days after a final response is given at IDR is appropriate.

ASIC's response

We have updated RG 165 to clarify that IDR procedures apply to disputes involving default notices.

We are of the view that a shorter than maximum 45 days for handling a dispute involving a default notice is appropriate, given default notices commence the process whereby a lender can initiate recovery action (unless the default is rectified within 30 days).

We consider that a maximum 21 days at IDR for disputes involving default notices is appropriate because 21 days aligns with timeframes for handling disputes at IDR under certain industry codes of conduct, e.g. the Australian Bankers' Association's (ABA) Code of Banking Practice and the ABACUS Mutual Banking Code of Practice.

We also consider a maximum 30 days at IDR for disputes involving a default notice is too long as this is the same duration a disputant has to remedy a default.

We are of the view that lenders should refrain from commencing or continuing with legal proceedings (including other enforcement activity, i.e. debt collection) while the dispute involving a default notice is being handled at IDR and for a reasonable time thereafter so the disputant may go to EDR (unless the statute of limitations is about to expire). We consider this necessary for the dispute to be genuinely handled at IDR. This approach also aligns with the requirements in FOS's new TOR and COSL's updated 6th edition Rules.

We expect that a reasonable time thereafter for a disputant to complain to EDR will be at least 14 days from giving a final response at IDR, but may be longer depending on the particular circumstances of the case. We encourage the giving of a longer time for a disputant to complain to EDR than 14 days wherever possible.

We also clarify that where a dispute involves a default notice, and also involves a previously rejected application for hardship variation or previously rejected request for postponement of enforcement proceedings (as identified at paragraph 34(b)(iv)), a maximum 21 days at IDR will not apply and the dispute will be able to be handled directly at EDR (i.e. the approach in Section C will apply).

C IDR: Whether IDR procedures apply to disputes involving hardship or postponement of enforcement proceedings

Key points

We proposed that IDR procedures should not apply where the dispute relates to a hardship variation or a postponement of enforcement proceedings, as the dispute should be handled directly by an EDR scheme.

Submissions were polarised on this issue.

We have updated RG 165 to clarify that a further 45 days at IDR will not apply in addition to either:

- the 21 days under the National Credit Code a lender has to consider and agree to an application for hardship variation or request a postponement of enforcement proceedings (whether the lender has done so or not); or
- the further 30 days under the National Credit Code, from when agreement is reached (if reached within 21 days), a lender has to confirm in writing the grounds of variation or the conditions of postponement (whether the lender has done so or not) (i.e. a maximum 51 consecutive days).

Once the 21 days or further 30 days from when agreement is reached (if reached within 21 days) have passed, the disputant will be able to go straight to EDR.

RG 139 has also been updated to clarify that EDR schemes, in their Terms of Reference, may allow a further maximum 14 days for the dispute to be handled at IDR if appropriate, where no agreement has been reached and the 21 days to consider the application or request under the National Credit Code have passed.

Our proposal

41 In CP 112, we proposed that IDR procedures should not apply where the dispute relates to an application for hardship variation or request for postponement of enforcement proceedings, and the dispute should be handled directly by an EDR scheme.

42 Table 2 summarises the timeframes that apply under the National Credit Code for a lender to handle hardship variations and postponement of enforcement proceedings.

Table 2: Timeframes under the National Credit Code

Timeframe	Hardship applications	Postponement of enforcement proceedings
21 days	For a lender to consider a hardship application and confirm in writing that they agree to the hardship application.	For a lender to consider a postponement of enforcement proceedings and confirm in writing that they agree to the application.
additional 30 days (total 51 days)	For a lender to confirm in writing the changes to the contract on hardship grounds (as agreed within the 21 days).	For a lender to confirm in writing the conditions of postponement of enforcement proceedings (as agreed within the 21 days).

43 Given the urgent nature of applications for hardship variation and requests for postponement of enforcement proceedings, we proposed that a further maximum 45 days at IDR should not apply in addition to the 21 days or further 30 days from when agreement is reached (if reached within 21 days), and the dispute should be able to be handled directly at EDR without having to first go through IDR.

IDR procedures and hardship applications and postponement of enforcement proceedings

44 Submissions were polarised on this issue.

45 Industry strongly opposed this proposal as IDR should be the necessary first step in the dispute resolution process before EDR. To bypass IDR would also undermine the integrity of IDR processes and add to delays at EDR.

46 FOS and the Financial and Consumer Rights Council (FCRC) were of the view that IDR should apply to hardship disputes and that 21 days would be appropriate for handling such disputes at IDR.

47 Consumer representatives, COSL and some industry submissions, on the other hand, strongly supported this proposal as consumers are particularly vulnerable in cases of hardship variation and postponement of enforcement proceedings. Additionally, a lender's default notice, if meeting the requirements of the National Credit Act, directs the consumer to make a hardship application. It is not appropriate for the lender to consider the application a second time.

48 The Australian Financial Counselling and Credit Reform Association (AFCCRA) noted that financial counsellors experience great difficulty in getting financial institutions to recognise a matter as 'hardship' so as to gain access to a lender's specialised hardship team. To assist with this problem, we should require a flexible definition of 'hardship' so that it includes when a consumer wants to pay what they owe but for some reason they cannot.

49 Submissions also noted that while a dispute is being handled, whether at IDR or EDR, interest and possible default fees will accrue, so it is important that the dispute is handled as expeditiously as possible.

ASIC's response

We have updated RG 165 to clarify that a further maximum 45 days at IDR will not apply where either:

- a lender has received an application for hardship variation, or a request for postponement of enforcement proceedings, and the lender has had 21 days to consider the application or request and respond in writing to confirm whether the application or request is agreed to under the National Credit Code (whether the lender has done so or not); or
- the lender has agreed to an application for hardship variation or a request for postponement of enforcement proceedings and has had a further 30 days from when agreement is reached (if reached within 21 days), (i.e. a maximum 51 consecutive days), to confirm in writing the grounds of variation or the conditions of postponement under the National Credit Code (whether the lender has done so or not).

We have decided to adopt this approach because of the urgent nature of these types of disputes and because we consider that the lender has already had an opportunity to consider the application or request and, if agreed to, an opportunity to confirm in writing the variation or conditions, so a further 45 days at IDR should not apply.

We have also updated RG 139 to clarify our expectation that these types of disputes should be considered 'urgent' and that EDR schemes should have appropriate procedures to identify and prioritise these disputes, along with other types of 'urgent' complaints.

In adopting this approach, we have considered industry's concerns and have also updated RG 165 and RG 139 to allow an EDR scheme the discretion, in its Terms of Reference, to refer the dispute to IDR for a further maximum 14 days at IDR if appropriate, where no agreement has been reached and the 21 days under the National Credit Code to consider the application or request have passed.

D EDR: Reducing consumer confusion—EDR scheme joint handling of credit disputes

Key points

Submissions were closely split on whether EDR schemes should be able to jointly handle multi-licensee, multi-EDR scheme complaints and disputes.

We have decided to clarify that, where a complaint or dispute involves more than one licensee, who are members of different EDR schemes (whether the dispute involves a credit representative or not), the EDR scheme that receives the complaint or dispute may continue to assess the complaint or dispute and refer the part or the whole of the complaint or dispute to the other EDR scheme where relevant.

The issue on which we sought feedback

50 In CP 112, we sought feedback on whether RG 139 should be updated to allow joint EDR scheme handling of multi-party, multi-EDR scheme complaints and disputes

51 Currently, EDR schemes do not jointly handle a complaint or dispute where the complaint or dispute involves members of a different EDR scheme. Instead, the scheme that receives the complaint or dispute assesses the complaint or dispute and refers the part or the whole of the complaint or dispute to the other EDR scheme, where relevant, to be separately dealt with.

52 We envisage that multi-party, multi-EDR scheme complaints or disputes may arise where a complaint or dispute involves:

(a) two or more credit licensees (e.g. a lender and a mortgage manager/broker, or a lender and a debt collector); or

(b) an Australian financial services (AFS) licensee and a credit licensee (e.g. a financial adviser and a lender).

Joint handling of multi-licensee, multi-EDR scheme complaints or disputes

53 Submissions were closely split on whether EDR schemes should be able to jointly handle complaints or disputes.

54 The majority of consumer organisations, COSL and one business submission agreed with that EDR scheme should be able to jointly handle a complaint or dispute on the basis that:

(a) there are no blowouts in complaint or dispute handling timeframes;

(b) both schemes are clear and consistent in their approach to monetary redress; and

(c) there are more effective protocols for information exchange (e.g. by Memoranda of Understanding).

55 Some industry submissions and FOS disagreed that EDR schemes should be able to jointly handle a multi-licensee, multi-EDR scheme complaint or dispute because to allow joint EDR scheme handling of complaints or disputes would:

(a) create unnecessary costs and consumer confusion, and would be a waste of time; and

(b) be practically difficult because:

(i) the complaint or dispute would be unable to be managed without one scheme taking control;

(ii) confidentiality requirements might mean that the complainant or disputant has to provide the same information to two different schemes; and

(iii) there might be different approaches taken to the facts and the law.

56 A number of industry submissions also held 'middle ground' views because they considered that EDR schemes would be best placed to decide on this issue.

ASIC's response

We have updated RG 139 to clarify that, where a complaint or dispute involves more than one licensee, who are members of different EDR schemes (whether the dispute involves a credit representative or not), the EDR scheme that receives the complaint or dispute may continue to assess it and refer the part or the whole of the complaint or dispute to another EDR scheme, where appropriate, depending on the nature of the complaint or dispute (i.e. the subject matter in dispute) and which member has responsibility.

We have adopted this approach because it is the process currently adopted by schemes, and best addresses all stakeholder concerns raised about joint EDR scheme handling of complaints or disputes.

While we have adopted this approach, we consider that there may be benefits, in terms of the efficiency and effectiveness of the dispute resolution system, if schemes are able to jointly handle complaints or disputes in the future. We encourage schemes to further explore this issue, noting the concerns expressed in submissions. We may also review our approach if we become aware of significant delays in complaint or dispute handling, or barriers to complainants or disputants obtaining redress at EDR.

Our update of RG 139 will also clarify that the time limit for bringing a complaint or dispute to the referred EDR scheme applies from when the complaint or dispute was first lodged with an EDR scheme.

E EDR: Reducing consumer confusion—Priority system where disputes involve credit representatives

Key points

We proposed the introduction of a priority system for disputes handling to reduce consumer confusion about where to complain when the dispute involves a credit representative.

Submissions strongly agreed that a process is needed to reduce consumer confusion when disputes involve credit representatives.

However, respondents had different views on the best way to reduce consumer confusion.

We have decided to adopt our proposal to introduce a priority system, with slight modification.

Our proposal

57 In CP 112, we proposed the introduction of a priority system for disputes handling to reduce consumer confusion about where to complain when a dispute involves a credit representative.

58 We considered that consumer confusion may arise under the National Credit Act because:

(a) the IDR processes of the credit licensee will cover disputes relating to the credit activities of the credit licensee and its credit representatives;

(b) unlike IDR, a credit representative is separately required to be a member of an EDR scheme, in addition to the credit licensee it represents. This is so the credit representative may remain 'authorised' to engage in credit activities on behalf of the credit licensee. The requirement that a credit representative must separately be a member of an EDR scheme is in addition to the National Credit Act specifying that a credit licensee will be responsible for its credit representatives even if they act outside the scope of their authority; and

(c) where a credit representative and a credit licensee belong to different EDR schemes, the credit guide of the credit representative may refer the disputant to the credit representative's EDR scheme, while the credit licensee's credit guide may refer the disputant to the credit licensee's EDR scheme: see s126(2)(e), 136(2)(h) and 158(2)(h), National Credit Act.

59 In CP 112, we put forward two options to reduce consumer confusion about where to complain (summarised at Table 3).

Table 3: Proposed options to reduce confusion about where to complain when the dispute involves a credit representative

Option	Proposal under this option
Option 1 (*preferred option*)	Introduce a priority system whereby the EDR scheme of the credit licensee is the EDR scheme to use in the first instance. Where the credit licensee becomes insolvent or acts outside the scope of its authority, the dispute is referred to the EDR scheme of the credit representative (if different). The time limit for bringing a dispute to EDR would apply from when the dispute was first lodged at EDR.
Option 2	The EDR scheme of lenders, non-lenders and credit representatives are able to equally handle disputes.

Priority system where disputes involve credit representatives

60 There was strong agreement among respondents that a process is needed to reduce consumer confusion where disputes involve credit representatives.

61 Respondents, however, held divergent views on the best way to reduce consumer confusion:

(a) the majority of consumer representatives and FOS agreed with our preferred Option 1;

(b) COSL strongly opposed Option 1 and instead supported Option 2 on competition grounds. These grounds are summarised at paragraph 63; and

(c) some industry and consumer representatives supported neither Option 1 nor Option 2, as they preferred a system whereby the EDR scheme of the member that is the subject of the dispute handles the matter.

62 The FPA cautioned that, when deciding on the best way to reduce consumer confusion, ASIC should give proper consideration to when a financial adviser, who is both an authorised representative of an AFS licensee and a credit representative of a credit licensee, gives holistic advice about both financial products or services and credit products or services.

63 COSL's reasons for strongly opposing Option 1, and instead preferring Option 2, included:

(a) Option 1 is anticompetitive. There is potential for FOS to abuse its market power (s46, Trade Practices Act (TPA)) as FOS handles 90% of all financial services complaints and its divisions by industry sector operate similarly to vertical integration of the market; and

(b) Option 1 offends the principles of natural justice or procedural fairness as credit representatives belonging to one EDR scheme will not have the right to be heard in another EDR scheme to which the credit licensee belongs.

ASIC's response

We have updated RG 139 to clarify that, where disputes involve a credit representative, the EDR scheme of the credit licensee is the EDR scheme to be used in the first instance. This approach supports s75 and 76 of the National Credit Act, which clarifies that credit licensees are responsible for their credit representatives even if they act outside the scope of their authority.

The dispute may only then be referred to the EDR scheme of the credit representative (if a member of a different EDR scheme), when the credit licensee ceases to carry on business and the credit licensee's EDR scheme does not exercise its discretion to handle the dispute.

We clarify that, if the disputant is referred to the credit representative's EDR scheme, the time limit for bringing the dispute to EDR will apply from when the disputant first lodged their dispute at EDR.

We have adopted this approach because:

- it is more streamlined with IDR processes—given that a credit licensee's IDR procedures will cover disputes relating to its credit activities and those of its credit representatives;
- it better aligns with the dispute resolution requirements for AFS licensees and their authorised representatives, and will reduce compliance costs (i.e. reduce fees for disputes handling for a credit representative, but not fees for EDR scheme membership) where an authorised representative of a financial planner (AFS licensee) gives holistic advice about financial products and credit products and is a credit representative of a credit licensee (whether the AFS licensee and the credit licensee are the same or different parties);
- the onus is on the credit licensee to separately pursue the credit representative for proportionate or full liability under contractual arrangements; and
- it better aligns with compensation arrangements (see Regulatory Guide 210 *Compensation and insurance arrangements for credit licensees* (RG 210).

We do not consider that the TPA has application to the present circumstances.

Credit licensees and their credit representatives will remain free to join whichever EDR scheme they choose.

The credit licensee is responsible under the law for its credit representative and can be held accountable for it. A credit licensee will need to consult with its credit representatives to properly address the dispute at EDR. This is the way in which financial service providers currently address complaints involving their authorised representatives at EDR.

F EDR: How 'small claims procedures' should be handled by EDR schemes

Key points

We proposed that RG 139 should be updated to clarify that an EDR scheme's Constitution and/or its Terms of Reference should make clear that EDR schemes can handle disputes relating to the types of matters listed at s199 of the National Credit Act. EDR scheme handling of these matters would be unrestricted by the value of the contract or amount of compensation sought, and would instead be determined according to the scheme's existing monetary jurisdictional limits.

Responses to this proposal were polarised: industry submissions almost unanimously opposed this proposal, while consumer representatives and EDR schemes unanimously supported this proposal.

We have updated RG 139, as proposed, and provide further explanation for our approach.

Our proposal

64 In CP 112, we proposed that RG 139 should be updated to clarify that an EDR scheme's Constitution and/or its Terms of Reference should make clear that EDR schemes can handle disputes relating to the types of matters listed at s199 of the National Credit Act, but within the monetary jurisdiction of the EDR scheme.

65 We proposed this because a key rationale for the transfer of regulation of consumer credit to the Commonwealth was so that:

> wherever possible, parties will be encouraged to resolve disputes without resorting to litigation. It is expected that courts would generally only be utilised where internal dispute resolution (IDR) and EDR processes have not resolved the matter, or where EDR is considered inappropriate.
>
> Note: See Revised Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Explanatory Memorandum), para 4.9.

66 Under s199 of the National Credit Act, a disputant may apply to the relevant state or territory Magistrates Court, Local Court or Federal Magistrates Court for their matter to be handled as a 'small claims procedure', if it is one of the types of matters listed in s199. We summarise at Table 4 the key matters that may be 'small claims procedures' under s199.

Table 4: Small claims procedures under the National Credit Act

No	Type of matter	Monetary limit/Value
1	Hardship applications	Unlimited.
2	Postponement of enforcement proceedings	
3	Unjust transactions	Limited to where the value of the credit contract, mortgage, guarantee or consumer lease is under $40,000 (or any higher amount specified by the Regulations).
4	Unconscionable interest and other charges	
5	Compensation for loss	Limited to where the order is for an amount under $40,000 (or any higher amount specified by the Regulations).

67 In taking a 'small claims procedure' to court, a disputant may benefit by:

(a) more informal and less legalistic court processes, as the court need not be bound by strict rules of evidence and procedure (s199(5), National Credit Act); and

(b) the court may even amend the papers commencing the legal proceedings if sufficient notice is given to any party adversely affected by the amendment: s199(6), National Credit Act. This is to ensure disputants are not subject to onerous procedural requirements and so the nature of the legal issues in dispute may be clarified (Explanatory Memorandum, para 4.175).

68 We note the Australian Government's rationale for 'small claims procedures' is to address concerns about the loss of access to state/territory tribunals currently available in certain states/territories under the Uniform Consumer Credit Code.

69 This is reflected by commentary in para 4.157 of the Explanatory Memorandum, that the small claims procedure:

> is designed to expedite proceedings for small claims matters and replicate some of the advantages that state tribunals offered. It addresses some of the concerns arising from the inability to continue to access state tribunals, where they were available. It also improves consumer access to dispute resolution in jurisdictions where tribunals are not utilised.

70 Where a matter relating to an unjust transaction or unconscionable interest and other charges involves a credit contract, mortgage or consumer lease, the value of which exceeds $40,000, or where a claim for compensation for loss exceeds $40,000, a disputant may:

(a) where the dispute involves compensation for loss, seek compensation for up to only $40,000 to come within the 'small claims procedure'; or

(b) still go to court (including the Federal Court or the Federal Magistrates Court), but be bound by stricter evidentiary and civil procedures (see s178 and Chapter 4, Part 4-3, National Credit Act).

71 The Australian Government's rationale for the $40,000 limit on some types of small claims procedures is that:

> matters over $40,000 are likely to be more complex and should attract more formal consideration of the Court. These include matters that relate to a person's residential property.
>
> Note: See Explanatory Memorandum, para 4.167.

EDR scheme handling of small claims procedures

72 Consumer representatives and EDR schemes unanimously supported this proposal.

73 In comparison, industry almost unanimously opposed this proposal:

(a) some industry submissions expressed the view that EDR schemes should not handle the types of matters that are 'small claims procedures', regardless of the value of the contract or the amount of compensation sought; and

(b) the majority of industry submissions expressed the view that EDR schemes can handle small claims procedures, but only up to the monetary limits or value of the contract in the National Credit Act.

74 The key reasons for industry opposition to this proposal included:

(a) EDR schemes should not have jurisdiction over civil procedures and should not be used to thwart valid legal processes;

(b) there would be consumer confusion if EDR schemes are able to handle small claims up to the EDR scheme's monetary jurisdiction rather than the amounts in the National Credit Act;

(c) the National Credit Act provides that these applications should go to court and not to EDR. The legislation should clarify that EDR schemes also have jurisdiction to handle these disputes, although the limits in the National Credit Act should also apply to EDR. To proceed with this proposal is jurisdictional 'scope creep' that is tantamount to moving legislative policy formation into the non-parliamentary framework, if EDR schemes were to handle small claims beyond the monetary limits provided in the National Credit Act; and

(d) there may be unintended consequences, particularly where a court finds in favour of a member—the court may impose an obligation on the consumer (e.g. to provide possession of security); an EDR scheme would not have such power.

ASIC's response

We consider that EDR schemes should be able to handle disputes involving the types of matters listed at s199 of the National Credit Act, but unrestricted by the $40,000 value of the contract or the $40,000 amount of compensation sought for certain types of disputes at s199, and instead within the monetary jurisdictions of the schemes.

We are of the view that this is appropriate because:

- EDR is intended to cover disputes in relation to the credit activities engaged in by credit licensees or their credit representatives (s11, National Credit Act);
- the small claims procedure under s199 was introduced as a consumer concession for disputes involving compensation for a limited amount or for credit contracts of a limited value and was not intended to remove access to EDR; and
- EDR is intended to be as broad as possible to be a quicker, simpler, cheaper and more accessible alternative to court.

We clarify at RG 139.163 that for an EDR scheme to be ASIC-approved and remain ASIC-approved, the EDR scheme must handle the vast majority of types of complaints or disputes in each industry or industries.

To not allow access to EDR for the types of matters that are listed at s199 of the National Credit Act, up to the monetary jurisdictions of the schemes, would depart from current practice and deny disputants access to EDR, so that their only avenue for redress would be court (particularly where the dispute involves unjust transactions or unconscionable interest and other charges and the value of the contract exceeds $40,000, or the dispute involves compensation for loss and the value of the claim exceeds $40,000).

We note industry's concern about the inability of an EDR scheme to require a consumer to provide possession of goods or property secured under the credit contract. It is open to a lender to seek possession of property through other means (e.g. by going to court). We note that FOS has advised that its view is that enforcement action should be put on hold while the dispute is being handled at EDR unless the property is going to be deliberately damaged, sold or dissipated. As such, FOS may consider an urgent application from a member where a member reasonably considers this to be the case and seeks that a court is the more appropriate forum to handle the dispute rather than at FOS. Should FOS agree, it may exercise a discretion to cease handling the dispute so the matter can be addressed in the more appropriate forum—that is, court: see para 5.2(a), FOS TOR.

G EDR: Time limits for bringing a complaint or dispute to EDR

Key points

There was little agreement among respondents as to the most appropriate time limit for bringing a complaint or dispute to EDR.

We have decided that the time limit for bringing a complaint or dispute to EDR should be:

- for those aspects of credit disputes that relate to hardship applications, unjust transactions and/or unconscionable interest and other charges, under the National Credit Code, the later of either:
  - two years from when the credit contract is rescinded, discharged or otherwise comes to an end; or
  - two years from when a final response is given at IDR.
- for all other complaints or disputes, the existing time limit will remain—that is, the earlier of either:
  - six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss; or
  - two years from when a final response is given at IDR.

These time limits may be overridden if *exceptional circumstances* apply.

Our proposal

75 Currently, under RG 139, from 1 January 2010, the time limit for bringing a complaint to EDR, is the earlier of either:

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

(b) two years from when a final response is given at IDR,

unless *exceptional circumstances* apply.

76 The two existing EDR schemes have adopted slightly different approaches to this timeframe:

(a) for COSL—the time limit for bringing a complaint to EDR is six years from when the complainant became aware, or should have reasonably become aware, that they suffered the loss. We are of the view that this approach satisfies the minimum requirements in RG 139 because COSL adopts a higher standard; and

(b) for FOS—the time limit for bringing a complaint to EDR is the earlier of either:

(i) six years from when the complainant became aware, or should have reasonably become aware, that they suffered the loss; or

(ii) two years from when the final response is given at IDR.

77 We proposed that RG 139 should be updated to clarify the time limit for bringing a dispute to EDR where hardship variations, unjust transactions and/or unconscionable interest and other charges are involved.

78 We proposed that the time limit should be the later of either:

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

(b) two years from when the credit licensee or credit representative gives a final response at IDR,

unless *exceptional circumstances* apply.

79 Section 80 of the National Credit Code requires that a court application for:

(a) hardship variations or unjust transactions should not be brought more than two years after the relevant credit contract is rescinded, discharged or otherwise comes to an end; and

(b) unconscionable interest and other charges should not be brought more than two years after the change to the annual percentage rate takes effect or a fee or charge is charged under the credit contract or the credit contract is rescinded, discharged or otherwise comes to an end (the latest being two years from when the contract ends).

80 Section 178 of the National Credit Act also provides that a court may order compensation for loss or damage suffered if a court application is made within six years of the date the cause of action accrues.

Timeframes for bringing a dispute to EDR

81 Respondents had different views about the most appropriate time limit for bringing a dispute to EDR where a dispute involves a hardship application, unjust transaction or unconscionable interest and other charges.

82 The majority of submissions disagreed with our proposal on timeframes for bringing a dispute involving a hardship variation to EDR, and instead suggested a diverse range of what they considered to be more appropriate timeframes. We have summarised the responses received at Table 5.

Table 5: Suggested timeframes for bringing a dispute involving a hardship variation to EDR

Timeframes that should apply	No. of submissions
There should be no timeframe.	1
Six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss (because case law indicates that a hardship application can be brought up until judgment).	1
Two years from when the credit licensee or its credit representative gives a final response at IDR.	5
The later of either: • 12 months from when the contract ends; or • 15 days from when a final response is given at IDR.	1
Two years from when the hardship variation is applied (because many contracts—i.e. mortgage-secured facilities—are long term).	1
If IDR applies, the later of either: • six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss; or • two years from when a final response is given at IDR.	1

83 AFCCRA also expressed concern that the two years from a final response at IDR is problematic as consumers are not aware of their rights, nor do they understand when a final response has been given.

84 The majority of submissions also disagreed with our proposal on timeframes for bringing a dispute to EDR, where the dispute involves unjust transactions or unconscionable interest and other charges. Submissions suggested a diverse range of alternative timeframes (summarised at Table 6).

Table 6: Suggested timeframes for bringing a dispute involving unjust transactions or unconscionable interest and other charges to EDR

Timeframes that should apply	No. of submissions
Six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss. (One consumer submission suggested this would be consistent with the time limit a credit provider has to pursue a residual debt; while the other submission suggested this would be consistent with the time limit for bringing claims involving misleading conduct, false and misleading representations under the ASIC Act.)	2
Two years from when the credit licensee or its credit representative gives a final response at IDR.	4
The later of either: • 12 months from when the contract ends; or • 15 days from when a final response is given at IDR.	1

Timeframes that should apply	No. of submissions
The later of either: • six years from when the consumer becomes aware, or should have reasonably become aware, that they suffered the loss; or • two years from when a final response is given at IDR. The timeframe may also be overridden where there are special circumstances.	1
The later of each of the following: • six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss; • two years from the date the contract is rescinded, discharged or otherwise comes to an end; or • two years from when a final response is given at IDR.	1

85 CCLC NSW also cited several case studies to support a six-year time limit also applying to certain credit disputes, including:

(a) where there are unsolicited credit card increases over time—over the past 10 years, CCLC NSW has seen cases where the lender offers a slight credit card increase each time the credit limit is reached until the minimum payment is beyond the debtor's means;

(b) unjust guarantees—where a credit provider tries to enforce an unjust guarantee; and

(c) refinances secured by a family loan—where the loan is refinanced a number of times until the equity in the property is exhausted.

ASIC's response

We have updated RG 139 to clarify that the time limits for bringing a complaint or dispute to EDR are as follows:

- for those aspects of consumer credit disputes that relate to hardship applications, unjust transactions and/or unconscionable interest and other charges under the National Credit Code, the later of either:
  - two years from when the credit contract is rescinded, discharged or otherwise comes to an end; or
  - two years from when a final response is given at IDR.
- for all other complaints or disputes, the earlier of either:
  - six years from when the consumer became aware, or should have reasonably become aware, that they suffered the loss; or
  - two years from when a final response is given at IDR.

The timeframes may be overridden in *exceptional circumstances* or where all parties agree to the EDR scheme handling the complaint or dispute.

We clarify that, where there are more than one or several hardship variations sought by a consumer during the life of a

credit contract, each hardship variation should be treated as a new dispute, so as to allow the disputant access to EDR.

We have adopted this approach because it maintains existing time limits, while also accommodating the shorter time limits set by s80 of the National Credit Code. This approach also ensures that disputes that raise issues under the consumer protection provisions of the ASIC Act, or relate to claims for compensation under s178 of the National Credit Act, will still be subject to the six-year time limit, unless a final response is given and the shorter two-year time limit applies.

We note the case studies put forward by CCLC NSW and consider that these scenarios may be cases that could involve exceptional circumstances. We also consider that these scenarios may be less likely, given the introduction of the new responsible lending requirements in the National Credit Act.

H EDR: EDR scheme handling of disputes involving default judgments

Key points

We sought feedback on whether RG 139 should be updated to clarify how EDR schemes should handle disputes about credit transactions where a default judgment has been entered; and, if so, how.

Responses to this issue were polarised: industry and FOS strongly opposed the proposal, while consumer representatives and COSL strongly supported it.

We have decided to adopt a principles-based approach so that EDR schemes retain flexibility in handling disputes.

As part of this principles-based approach, we consider that, where a dispute involves a default judgment order, EDR schemes should not overturn, or be perceived to overturn, the default judgment order. This is because there are relevant court processes to set aside or vary a default judgment order. We expect that EDR schemes will generally assist disputants to find relevant information and be cross-referred to other agencies who can assist in providing legal representation and/or advice in setting aside a default judgment order.

We recognise, however, that there may be certain types of disputes involving default judgment orders that would not involve overturning, or being perceived to overturn, a default judgment order if an EDR scheme were to handle the dispute—for example, where post default judgment disputes (e.g. harassment) are involved. We expect that schemes will handle these types of disputes.

We may review our policy on this issue in the future.

The issue on which we sought feedback

86 In CP 112, we sought views on whether RG 139 should be updated to clarify how EDR schemes should handle disputes about credit transactions where a default judgment has been entered; and, if so, how.

87 A lender may initiate debt recovery proceedings in a relevant state/territory court or tribunal. While each state/territory's court and tribunal's procedures may vary, the court may generally enter a default judgment (i.e. issue a court order in respect of the credit transaction) where the disputant fails to appear, fails to respond in time or fails to file a defence.

88 The court will also generally have a process for setting aside or varying a default judgment. For some courts, a default judgment may only be able to be set aside if the disputant lodges an application within a certain time.

89 We sought feedback on this issue following our May 2009 review of dispute resolution requirements in RG 139 and RG 165 where we sought feedback on the types of disputes that may be legitimately excluded from an EDR scheme's jurisdiction because they have been 'dealt with' in another forum. Feedback from consumer representatives to CP 102 *Dispute resolution—Review of RG 139 and RG 165* suggested that EDR schemes should be able to handle disputes involving default judgments, particularly where the debt has been on-sold to a debt collection agency.

90 Currently, FOS and COSL adopt slightly different approaches to how they will handle disputes involving default judgments under their Terms of Reference:

(a) FOS, under its new TOR (and as further explained by its Operational Guidelines), provides that, in deciding whether a dispute has already been 'dealt with' in another forum, it will consider whether a default judgment order has been made; and

Note: For a copy of FOS' Operational Guidelines, see: http://www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp

(b) COSL, under its updated 6th edition Rules, will be able to handle disputes involving default judgments, because the merits of the case will not have been determined.

EDR scheme handling of disputes involving default judgments

91 Almost all submissions from industry and FOS opposed, or strongly opposed, EDR schemes handling disputes involving default judgments because:

(a) it is not appropriate for EDR schemes to usurp the judicial process and set aside or vary default judgments as if the EDR scheme were a court of appeal;

(b) EDR schemes have no jurisdiction over civil judgments;

(c) default judgments should be treated as final and the court process to set aside or vary default judgments is more appropriate. It would be inappropriate, confusing and cause uncertainty to do otherwise; and

(d) lenders often have to pursue default judgments because of the difficulty in locating debtors when they do not own property, due to privacy legislation and the intransigent nature of the population.

92 Consumer representatives, on the other hand, were unanimous in joining COSL to strongly support EDR schemes handling disputes involving default judgments because:

(a) consumers do not often understand the court processes or are unable to access legal assistance (which is why the default judgment is entered into); and

(b) financial counsellors also find that their clients do not understand the nature of a default judgment due to their personal circumstances (mental health, literacy and language level) and the poor information provided by credit providers.

93 Some submissions also put forward views on how a scheme should handle disputes involving default judgments (summarised at Table 7).

Table 7: Summary of views on how EDR schemes should handle disputes involving default judgments

Suggestions	No. of submissions
Disputes handling should be limited to where the plaintiff has filed a notice and signed an affidavit providing service of the writ on the debtor. The disputant should then be referred to the lender's EDR scheme for consideration. If there are genuine reasons to defend the claim, the EDR scheme can handle the disputes and dismiss the claim.	1
Disputes handling should be possible where the default judgment has been entered into and could include: • allowing the EDR scheme to negotiate a hardship variation with the lender (two consumer submissions)—although this should only be possible when hardship issues are raised at EDR directly after the entry of the default judgment (one consumer submission); and • allowing consumers to raise issues that would form an application to set aside the default judgment. The EDR scheme could then make a determination directing the default judgment to be set aside (two consumer submissions); and • where there are genuine post judgment disputes, including debtor harassment, disputes over realisation of the property or a mortgagee's duty to account (one consumer submission).	7

ASIC's response

We consider that there are legitimate competing views about whether and how EDR schemes should handle disputes involving default judgments.

In seeking feedback on this issue, we did not intend to allow an EDR scheme decision to substitute or overturn a court decision. Instead, we intended to explore ways in which an EDR scheme can generally assist a disputant where a default judgment has been handed down.

We are of the view that a principles-based approach is appropriate to enable schemes to have flexibility in handling disputes involving default judgment orders.

As part of this principles-based approach, we consider that EDR schemes should not overturn, or be perceived to overturn, default judgment orders. The relevant court processes to set aside or vary a default judgment order should be pursued.

We note, however, that the onus generally rests with a disputant to apply to the court to seek to set aside or vary the default

judgment order and this can prove problematic if a disputant is not aware that a default judgment order has been handed down, is vulnerable or disadvantaged (due to their mental health, literacy and language level, etc) and/or has received poor information from the lender.

Feedback from consumer representatives also suggested that, consumers often do not understand court processes, nor do they appreciate the importance of timeliness in acting quickly to apply to the court to set aside or vary the default judgment order, particularly where time limits apply under the relevant state/territory laws.

We have decided to update RG 139 to include our expectation that at a minimum, EDR schemes should assist disputants to find relevant information and be cross-referred to appropriate agencies who can assist in providing legal advice and/or representation in setting aside a default judgment order. We also expect that, where a disputant has followed court processes to set aside the default judgment, EDR schemes may assist a disputant in accordance with its Terms of Reference.

As part of this principles-based approach, we also recognise, that there may be certain types of disputes involving default judgment orders that would not involve overturning, or being perceived to overturn, a default judgment order if an EDR scheme were to handle the dispute— where post default judgment disputes (e.g. harassment) are involved). We expect that schemes will handle these types of disputes.

We may review our policy on this issue in the future.

I EDR: EDR schemes working collaboratively with the ACCC and state/territory OFT

Key points

We proposed to update RG 139 to clarify our expectation that EDR schemes work collaboratively with the Australian Competition and Consumer Commission (ACCC) and state/territory Offices of Fair Trading (OFT) to develop disputes handling processes where disputes involve linked credit provider and fair trading issues.

While the majority of submissions agreed with this proposal, there were different views on how we should give guidance on this issue.

We have decided not to give detailed guidance on this issue. EDR schemes are best placed to establish how to work collaboratively with the ACCC and OFT.

Our proposal

94 In CP 112, we proposed that RG 139 should be updated to clarify that we expect EDR schemes to work collaboratively with the ACCC and state/territory OFT to develop disputes handling processes where disputes involve linked credit provider and fair trading issues.

95 Under current arrangements, relevant state/territory OFT are able to handle both fair trading and credit aspects of a dispute where credit products and services have been used to purchase a consumer good or service.

96 We consider that issues may arise at EDR where disputes involve linked credit providers or point-of-sale providers—for instance, where a car yard sells a car with linked credit and the consumer wishes to cancel the credit contract due to the car not being fit for purpose, etc.

97 Under National Credit Act arrangements, EDR schemes will only be able to handle disputes in relation to a financial product/service provider, credit licensees and their credit representatives, margin lending financial service providers. Jurisdiction for fair trading issues will remain with state/territory OFT and the ACCC.

EDR schemes working collaboratively with the ACCC and state/territory OFT

98 While the majority of submissions agreed with this proposal, views differed as to whether we should give detailed guidance on how the schemes should interact with the ACCC and state/territory OFT.

99 Suggestions about the types of detailed guidance we should give included:

(a) putting in place Memoranda of Understanding between the schemes and the ACCC/OFT;

(b) giving guidance to address:

(i) where a general consumer matter is the subject of a dispute to a state/territory OFT;

(ii) where a general consumer matter is the subject of a dispute to a Federal regulator;

(iii) where a general consumer matter is in a state court or tribunal; and

(iv) where a supplier is insolvent, in administration or otherwise unavailable to respond to the dispute; and

(c) updating RG 139 to specify that disputes involving the provision of credit that directly facilitates the supply of goods/services should be referred to the ACCC or state/territory OFT.

ASIC's response

We have updated RG 139 to include our expectation that EDR schemes work collaboratively with the ACCC and state/territory OFT to develop disputes handling processes where disputes involve linked credit providers and fair trading issues.

We do not intend to give more detailed guidance on this issue as we consider that the schemes are best placed to establish how they will work collaboratively with the ACCC and state/territory OFT.

Appendix 1: Summary of dispute resolution requirements for credit and margin lending

Requirements	Details	Reference
General—Credit	**Registered persons** Registered persons (i.e. those currently engaging in credit activities who intend to be credit licensees from 1 July 2010) will be required to be a member of an ASIC-approved EDR scheme from 1 April 2010 to 30 June 2010 (registration period).	See s16, Transitional Act; and RG 202
	Lenders and non-lenders Credit licensees (i.e. lenders and non-lenders) must have a dispute resolution system that consists of: • IDR procedures that comply with standards and requirements made or approved by ASIC in accordance with the National Credit Regulations and cover disputes relating to credit activities engaged in by the credit licensee or its credit representatives; and • membership of an ASIC-approved EDR scheme.	See s47, National Credit Act; and RG 203
	Credit representatives Credit representatives must also separately be a member of an ASIC-approved EDR scheme in addition to credit licensees in order to remain 'authorised' to act on behalf of their credit licensees. However, where a credit representative is a body corporate that sub-authorises an employee or director, that employee or director does not need to be a separate member of an ASIC-approved EDR scheme. Note: There is no requirement that credit representatives have IDR procedures that comply with standards and requirements made or approved by ASIC. This is because a credit licensee's IDR procedures must cover its credit representatives.	See s64 and 65, National Credit Act; reg 16, National Credit Regulations; and RG 203
General—Margin lending financial services	Financial service providers must have a dispute resolution system that covers complaints by retail clients. The dispute resolution system must consist of: • IDR procedures that comply 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 AS ISO 10002-2006 *Customer Satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD); and • any other matter ASIC considers relevant. ASIC's minimum requirements for IDR procedures are set out in RG 165.	For credit: See reg 10(1), National Credit Regulations For margin lending: See regs 7.6.02(1) and 7.9.77(1)(a), Corporations Regulations

Requirements	Details	Reference
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. ASIC's minimum requirements for EDR schemes are set out in RG 139.	For credit: See reg 10(2), National Credit Regulations For margin lending: See regs 7.6.02(3) and 7.9.77(3), Corporations Regulations

Appendix 2: Summary of key dispute resolution requirements for financial service providers in RG 165 and RG 139

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: 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; • 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; 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
	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. Note: From 1 January 2012, a minimum compensation cap of at least $280,000 for complaints (or $150,000 for general insurance broker complaints) where the value of the claim is $500,000 or less will apply.	RG 139

Appendix 3: Parties who made a public submission to CP 112

Submission no.	Stakeholder name/s
	Industry organisations
1	Australasian Compliance Institute
2	Australian Bankers' Association (ABA)
3	Australian Collectors & Debt Buyers Association
4	Australian Finance Conference (AFC)
5	Australian Finance Group
6	Australian Institute of Credit Management
7	Bank of Queensland Limited
8	Challenger Financial Services Group
9	Dun & Bradstreet (Australia) Pty Ltd
10	Financial Planning Association
11	GE Capital Financial Australasia Pty Ltd t/as GE
12	Insurance Council of Australia
13	Joint submission from Min-It Software and Financiers Association of Australia (FAA)
14	Mortgage and Finance Association of Australia
	Consumer representatives
15	(Joint Consumer Submission) • Australian Financial Counselling and Credit Reform Association (AFCCRA) • Consumer Action Law Centre· • Consumer Credit Legal Centre (NSW)·(CCLC NSW) • Consumer Credit Legal Service WA·(CCLS WA) • Consumer Law Centre ACT • Illawarra Legal Centre Inc • Legal Aid NSW • Legal Aid Qld • National Information Centre on Retirement Investments (NICRI) • National Legal Aid
16	AFCCRA
17	CCLC NSW
18	CCLS WA
19	Financial and Consumer Rights Council (FCRC)
20	Legal Aid ACT
	EDR schemes
21	Credit Ombudsman Service Limited (COSL)
22	Financial Ombudsman Service Limited (FOS)

Note: The total number of submissions was 24—two submissions were confidential.

Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
AFS licence	An Australian financial services licence under s913B of the Corporations Act 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.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
AS ISO 10002-2006	Australian Standard AS ISO 10002-2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004, MOD)
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
complainant	A person or company that has lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of the Act
Corporations Regulations	Corporations Regulations 2001
COSL	Credit Ombudsman Service Limited—an ASIC-approved EDR scheme
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit assistance	Has the meaning given in s8 of the National Credit Act
credit contract	Has the meaning given in s4 of the National Credit Code
credit guide	A document that must be provided to a consumer by a credit provider, credit service provider, credit representative or debt collector under the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities

Term	Meaning in this document
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee or registered person under s64(2) or s65(2) of the National Credit Act Note: The employees and directors of the credit licensee do not need to be formally authorised, they are covered by the credit licence.
default judgment order	A verdict handed down by a state, territory or federal court, made in favour of the applicant (the industry participant) against the defendant (the disputant) and not on consideration of the merits of the case. Depending on the relevant court or civil procedure rules applicable, such a verdict may be handed down where the disputant fails to lodge a defence, whether within a specific timeframe or fails to appear in court
disputant	A person or company that has lodged a dispute with a scheme about a scheme member (who is a registered person, credit licensee or credit representative) that falls within the scheme's Terms of Reference or Rules
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
Explanatory Memorandum	Revised Explanatory Memorandum to the National Consumer Credit Protection Bill 2009
Financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: • Makes a financial investment (see s763B) • Manages financial risk (see s763C) • Makes non-cash payments (see s763D) Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition
FOS	Financial Ombudsman Service Limited—an ASIC-approved EDR scheme
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165
lender	A credit provider as defined in s204 of the National Credit Code

Term	Meaning in this document
margin lending financial services	A margin lending financial service is: • a dealing in a margin lending facility; or • The provision of financial product advice in relation to a margin lending facility
Modernisation Act	*Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Schedule 1 of the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
non-lender	All credit licensees that are not lenders. This category includes persons who provide credit assistance under s8 of the National Credit Act and persons who act as intermediaries under s9 of the National Credit Act
OFT	Office(s) of Fair Trading
reg 16 (for example)	A regulation of a set of Regulations as specified (in this example numbered 16)
registered	Registered to engage in credit activities under item 12 of Schedule 2 of the Transitional Act
registered person	A person who is registered with ASIC to engage in credit activities
registration	Registration to engage in credit activities granted under item 12 of Schedule 2 of the Transitional Act
registration period	The period in which an application may be made to ASIC to be registered to engage in credit activities, which starts on 1 April 2010 and ends at the end of 30 June 2010
RG 139 (for example)	An ASIC regulatory guide (in this example numbered 139)
s64 (for example)	A section of an Act or Code as specified (in this example numbered 64)
Terms of Reference	The document that sets out an EDR scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'Rules'
traditional services	Traditional trustee company services—has the meaning given in s601RAC(1) of the Corporations Act
Transitional Act	*National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

Related information

Headnotes

AFS licensees, credit licensee, credit representative, dispute resolution requirements, EDR scheme, external dispute resolution, IDR processes, internal dispute resolution

Class orders

[CO 09/339] *Internal dispute resolution procedures*

[CO 09/340] *External dispute resolution schemes*

[CO 10/250] *Internal dispute resolution procedures (credit)*

[CO 10/249] *External dispute resolution schemes (credit)*

Regulatory guides

RG 126 *Compensation and insurance arrangements for AFS licensees*

RG 139 *Approval and oversight of external dispute resolution schemes*

RG 165 *Licensing: Internal and external dispute resolution*

RG 202 *Credit registrations and transition*

RG 203 *Do I need a credit licence?*

RG 210 *Compensation and insurance arrangements for credit licensees*

Legislation

ASIC Act s1, 33

Corporations Act, Ch 7, 760A, s761G, 912A, 985B, 1017G

Modernisation Act, Sch 1

National Credit Act, s11, 47, 64, 65, 113, 126, 127, 136, 149, 150, 158, 199 and 267; National Credit Code; National Credit Regulations, reg 10(3), 10(4)(a), 10(4)(b), 10(4)(c) and 16, Transitional Act, item 12 of Sch 2 and item 16 of Sch 2

Cases

Australian Timeshare and Holiday Ownership Council Limited v. Australian Securities and Investments Commission [2008] AATA 62 (23 January 2008)

Consultation papers and reports

CP 102 *Dispute Resolution—Review of RG 139 and RG 165*

CP 112 *Dispute resolution requirements for consumer credit and margin lending*

REP 156 *Report on submissions to CP 102 Dispute Resolution—Review of RG 139 and RG 165*

REP 182 *Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference*

Media and information releases

08-05AD *ASIC proposes new financial services EDR claim limit of $280,000* (Monday, 8 September 2008)

09-265AD *ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference* (Friday, 18 December 2009)

10-93 AD *Improved access to dispute resolution for consumers of credit and margin lending financial services*