



ASIC

Australian Securities & Investments Commission

REPORT 236

Response to submissions on CP 138 Dispute resolution requirements and traditional services

April 2011

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 138 *Dispute resolution requirements for trustee companies providing traditional services* (CP 138) 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 (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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations 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/Consultation process	4
	Responses to consultation.....	5
B	The maximum timeframe for handling traditional services complaints at IDR	6
C	Setting an appropriate compensation cap for traditional services complaints at EDR.....	8
D	The binding nature of EDR scheme decisions for traditional services complaints (waiver and deed of release).....	10
E	Extending the transitional timeframe for dispute resolution requirements	12
	Appendix: List of non-confidential respondents	13

A Overview/Consultation process

- 1 Trustee companies providing traditional trustee company services (traditional services) must hold an Australian financial services (AFS) licence and meet the conduct obligations in Ch 7 of the *Corporations Act 2001* (Corporations Act), including having a compliant dispute resolution system.
- 2 From 1 May 2011, a trustee company's dispute resolution system must cover traditional service complaints made by retail clients and consist of:
 - (a) internal dispute resolution (IDR) procedures that meet ASIC's approved standards and requirements; and
 - (b) membership of an external dispute resolution (EDR) scheme approved by ASIC.
- 3 Given the unique nature of traditional services, 'retail clients' include:
 - (a) individuals and small businesses that have been directly provided with traditional services; and
 - (b) individuals and small businesses who have not directly engaged the services of a trustee company, but who may request an 'information return' (including beneficiaries under a will, a person who has commenced legal proceedings to be included as a beneficiary of a deceased's estate, and a settlor of a charitable trust).
- 4 Some complaints relating to traditional services provided to individuals who cannot make their own life decisions about financial matters (e.g. because of intellectual disability, brain injury, dementia or mental illness) will continue to be addressed under existing state and territory guardianship law complaint mechanisms (i.e. state or territory courts, tribunals and guardianship boards).
- 5 In Consultation Paper 138 *Dispute resolution requirements for trustee companies providing traditional services* (CP 138), we consulted on proposals to update and refine our existing dispute resolution requirements for traditional services. Our requirements are set out 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).
- 6 In particular, CP 138 sought feedback on our proposals to:
 - (a) refine RG 165 so that our standards for IDR procedures apply to all types of traditional services complaints, especially those involving multiple beneficiaries; and

- (b) refine RG 139 to clarify the scope and coverage of EDR for all types of traditional services complaints, including setting an appropriate compensation cap, clarifying legitimate exclusions from EDR scheme coverage and ensuring the binding nature of EDR scheme decisions, especially where multiple beneficiaries are involved in the complaint.
- 7 This report highlights the key issues that arose out of the five submissions we received on CP 138 and our responses to those issues.
- 8 For a list of all five non-confidential respondents to CP 138, see the appendix to this report. Copies of these submissions are available on our website at www.asic.gov.au/cp under CP 138.

Responses to consultation

- 9 Of the five responses received to CP 138, three were from the statutory or ASIC-approved EDR schemes who handle financial services complaints and two were from industry.
- 10 The industry association, the Trustee Corporations Association of Australia (TCAA), and the EDR scheme it's members intends to join, the Financial Ombudsman Service Limited (FOS), commented on most proposals, while other submissions focused on certain proposals, or discrete issues.
- 11 This report is not meant to be a comprehensive summary of all responses received. Nor is it meant to be a detailed report on every proposal we consulted on in CP 138.
- 12 We have focused on the following four key issues in this report:
- (a) the maximum timeframe for handling traditional services complaints at IDR;
 - (b) setting an appropriate compensation cap for traditional services complaints at EDR;
 - (c) the binding nature of EDR scheme decisions for traditional services complaints (waiver and deed of release); and
 - (d) extending the transitional timeframe for the dispute resolution requirements.

B The maximum timeframe for handling traditional services complaints at IDR

Key points

Timely resolution of complaints is an important feature of a financial service provider's IDR procedure.

In CP 138, we sought feedback on whether the current 45-day maximum timeframe for IDR should apply to traditional services complaints.

Most submissions supported a longer timeframe.

- 13 In CP 138, we sought feedback on our proposals to update RG 165 so that trustee companies would be required to:
- (a) address all types of traditional services complaints within a maximum of 45 days at IDR, and give a final response or notification of delay within this time; and
 - (b) give written notice when a complaint is received and at other key stages of the IDR process to all reasonably identifiable interested parties (e.g. other beneficiaries) who may have an interest in the outcome of the complaint at IDR.
- 14 Where submissions commented on this proposal, there was concern that complaints involving multiple beneficiaries could take longer than 45 days to address so a longer timeframe would be needed.
- 15 The TCAA expressed a preference for allowing trustee companies a maximum of 90 days for handling all types of traditional services complaints at IDR, because 45 days would be too short for complaints involving more than one beneficiary. Ninety days at IDR would:
- (a) ensure that trustee companies have sufficient time to allow for estates and trusts to be completed efficiently within the usual statutory procedures; and
 - (b) enable the handling of traditional services complaints in a procedurally fair manner, particularly where other affected beneficiaries need to be notified.
- 16 Both ASIC-approved EDR schemes—FOS and the Credit Ombudsman Service Limited (COSL)—were of the view that an extension to the maximum of 45 days for handling traditional services complaints would be necessary in certain circumstances—for example, where:

- (a) multiple beneficiaries are involved in the complaint and the trustee company:
- (i) needs to identify and contact those with an interest in the outcome of the complaint and consider their views (where relevant to the efficient and fair handling of the complaint); or
 - (ii) needs to verify whether there is genuine consensus among beneficiaries; or
- (b) the trustee is waiting on a court direction.

ASIC's response

We have decided that trustee companies must address traditional services complaints within a maximum of 90 days at IDR, and give the complainant either a final response or notification of delay within this time.

We consider this longer period will give trustee companies sufficient time to:

- identify and notify others who may request an information return (e.g. beneficiaries) and who may have an interest in the outcome of the complaint;
- consider the views of these other beneficiaries, where relevant to the efficient and fair handling of the complaint at IDR; and
- keep these other parties informed of the progress of the complaint at key stages of the IDR process (including when a final response or notification of delay is given).

To enable traditional services complaints to be uniformly handled, RG 165 states that under the 90-day deadline for handling a complaint at IDR, time stops running when:

- another person commences legal proceedings to be included as a beneficiary and the court outcome would affect the handling of the complaint at IDR; or
- the trustee company first needs to obtain a court opinion, advice or direction to reasonably handle the complaint at IDR. This may be common where the trustee company is acting as manager or administrator of trust property.

Time under the 90 days starts to run again, once the court determines whether the other person should be included as a beneficiary, or provides its opinion, advice or otherwise gives a direction, and the time to lodge an appeal (if relevant) has passed.

C Setting an appropriate compensation cap for traditional services complaints at EDR

Key points

A scheme must be 'effective' in terms of the amount of compensation it can award.

In CP 138, we sought feedback on whether a higher compensation cap should apply to traditional services complaints.

Most submissions disagreed with a higher cap.

- 17 A scheme must be 'effective' in the amount of compensation it can award. It must be able to handle the vast majority of types of complaints in the financial industries it covers, and award compensation up to an amount that is consistent with the nature, extent and value of client transactions in those industries.
- 18 In CP 138, we sought feedback on our proposals to update RG 139, including whether:
- (a) the current compensation cap of up to \$280,000 per claim for claims valuing \$500,000 or less should apply to traditional services complaints;
 - (b) a higher compensation cap of up to \$1 million per claim for claims valuing \$10 million or less should apply to traditional services complaints involving multiple beneficiaries; and
 - (c) the value of the compensation cap should be reviewed in two years from the start of the dispute resolution requirements for traditional services.
- 19 We received submissions from both the TCAA and COSL on this issue. The TCAA expressed the strong view that the existing compensation cap should apply to all types of traditional services complaints.
- 20 Both the TCAA and COSL considered that a higher cap of \$1 million per claim for claims valuing \$10 million or less would be unjustified for traditional services complaints involving multiple beneficiaries.
- 21 The TCAA's and COSL's main reasons for applying the current compensation cap amount included that:
- (a) TCAA member data shows that no individual claim for loss (whether brought by a person who has been provided with the traditional services or a beneficiary) has exceeded \$20,000 in recent years;

- (b) there is nothing to suggest that the existing cap would not be adequate for complaints brought by a beneficiary or settlor;
- (c) there is no logic in a compensation cap being up to \$1 million for claims brought by a beneficiary (where other beneficiaries have an interest in the outcome of the complaint) because the executor's mismanagement would almost need to eradicate the entire estate before such a high cap would be relevant;
- (d) claims up to \$1 million are more appropriately addressed by a court, because courts have powers to freeze or trace trust assets and EDR schemes do not; and
- (e) having two caps may be problematic, particularly where a complaint raises overlapping or intermingling issues.

22 The TCAA agreed that the adequacy of the compensation cap should be reviewed in two years from the start of the dispute resolution requirements for traditional services.

ASIC's response

We have decided that an ASIC-approved EDR scheme that handles traditional services complaints must, at a minimum, be able to award compensation of up to \$280,000 per claim for claims valuing \$500,000 or less.

This cap will apply to all types of traditional services complaints, whether the complaint is brought by a person who is a beneficiary, settlor, or a person who has been directly provided with the traditional services.

We consider this cap to be appropriate at this time because:

- it is consistent with the value of other EDR compensation awards for complaints against other financial and credit industry participants. This will assist in reducing the compliance burden for trustee companies who may already have complaints-handling information technology systems and procedures in place for existing EDR scheme compensation awards as superannuation providers or operators of managed investment schemes; and
- it best aligns with the already updated Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126).

The adequacy of this cap will be reviewed once the schemes have had some experience with handling traditional services complaints.

For the review to be effective, we expect that industry and EDR schemes will collect and make available complaints data on the approximate value of traditional services claims falling outside either one or both of the \$500,000 and \$280,000 limits, and whether the claim was brought by a beneficiary or a person who was directly provided with the traditional services.

D The binding nature of EDR scheme decisions for traditional services complaints (waiver and deed of release)

Key points

The binding nature of scheme decisions is important in ensuring the effectiveness of scheme outcomes.

In CP 138, we sought feedback on our proposals to modify the waiver and deed of release approach where complaints involve multiple beneficiaries.

Most submissions supported this approach.

- 23 The binding nature of scheme decisions is important in ensuring the effectiveness of scheme outcomes.
- 24 In CP 138, we sought feedback on our proposals to modify the waiver and deed of release approach where complaints involve multiple beneficiaries. Under this approach:
- (a) where a traditional services complaint involves more than one beneficiary, the EDR scheme should only handle the complaint if all beneficiaries *first agree* to be bound by the ultimate outcome or decision of the scheme (if any); and
 - (b) after the complaint has been assessed as being within the scheme's jurisdiction, the scheme has a discretion to discontinue the handling of the complaint if at any stage the scheme forms the view that a court would be the more appropriate forum in the circumstances.
- 25 FOS strongly agreed that the proposed modified approach should be adopted for complaints involving multiple beneficiaries.
- 26 Industry also generally agreed with this proposal and cited circumstances where a scheme should generally consider that a court would be the more appropriate forum for handling the complaint—for example:
- (a) where the beneficiary does not have decision-making capacity and has no valid representation by an enduring attorney or financial manager;
 - (b) where the beneficiary cannot be located with reasonable effort by the trustee company, particularly if they are a major beneficiary and the complaint will potentially affect their share; and

- (c) the class of beneficiaries is not yet closed or a condition for a gift to a beneficiary has not yet been met.

ASIC's response

We have decided to adopt the proposal.

For traditional services complaints involving more than one beneficiary, EDR schemes that handle traditional services complaints must:

- only handle the complaint if all beneficiaries first agree to the scheme's jurisdiction and being bound by the ultimate outcome able to be achieved at EDR (if any) at the beginning of the EDR process; and
- retain a discretion to discontinue handling the complaint if, at any later stage in the EDR process, it forms the view that a court would be the more appropriate forum for handling the complaint.

To enable all beneficiaries to make a fully informed decision about whether to agree to the scheme's jurisdiction and to be bound by the ultimate outcome at EDR, schemes must:

- inform each beneficiary of their right to obtain independent legal advice so they may properly understand what they are agreeing to; and
- allow each beneficiary a reasonable time to obtain independent legal advice.

For all other traditional services complaints (including where the complainant is the person that has been provided with the traditional services or the complainant is the sole beneficiary), schemes must continue with a waiver and deed of release at the end of the EDR process.

Where a complaint involves both multiple beneficiaries and a person to whom the traditional services were provided, a waiver and deed of release at the beginning of the EDR process should apply.

We have decided to adopt this approach because, in our view, it provides the best balance between ensuring the effectiveness of scheme outcomes and fulfilling the Australian Government's intention that beneficiaries have access to EDR.

E Extending the transitional timeframe for dispute resolution requirements

Key points

In CP 138, we proposed that the obligation to have compliant dispute resolution arrangements should commence on 1 May 2011.

One submission suggested that the commencement date be deferred until at least 1 January 2012.

- 27 In CP 138, we proposed that from 1 May 2011 trustee companies providing traditional services should have a compliant dispute resolution system.
- 28 In its submission to CP 138, FOS expressed concern that a start date of 1 May 2011 would leave insufficient time to properly prepare for the start of the traditional services regime.
- 29 FOS requested that the start date be deferred until at least 1 January 2012 to allow sufficient time to:
- (a) properly consult and put in place a new Terms of Reference;
 - (b) establish and recruit a specialist team to handle traditional services complaints; and
 - (c) introduce new IT systems and procedures for handling traditional services complaints.

ASIC's response

We have decided to further defer the start of the dispute resolution requirements for traditional services until 1 January 2012 to allow sufficient time for FOS to properly prepare for the start of the traditional services regime.

We confirm this deferred start date by Class Order [CO 11/261] *Trustee companies providing traditional trustee company services—deferral of start date for dispute resolution requirements*.

While we consider that retail clients of trustee companies providing traditional services will not be unduly disadvantaged by an extended transitional period, we would encourage trustee companies providing traditional services to:

- where possible, adopt simple IDR procedures to handle complaints until 31 December 2011; and
- inform complainants that they may complain to EDR from 1 January 2012 in respect of conduct arising during the extended transitional period.

Appendix: List of non-confidential respondents

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- Credit Ombudsman Service Limited (COSL)
 - Financial Ombudsman Service Limited (FOS)
 - State Trustees Limited
 - Superannuation Complaints Tribunal
 - Trustee Corporations Association of Australia (TCAA)
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