ASIC
Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

Dispute resolution requirements for consumer credit and margin lending

May 2010

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposals for the new dispute resolution requirements for:

- registered persons, credit licensees and their authorised credit representatives under the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*; and
- margin lenders and those who provide advice on margin lending financial services under the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

What this Regulation Impact Statement is about

1 This Regulation Impact Statement (RIS) addresses how ASIC proposes to, for the new credit and margin lending financial services legislative requirements, update and refine its dispute resolution policies, as set out in:

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

2 We aim to encourage the confident and informed participation of consumers and investors in the Australian financial and credit system, promote fairness, honesty and professionalism among those who provide financial or credit products and services, and reduce systemic risks by ensuring that the dispute resolution system is working efficiently and effectively.

3 We published Consultation Paper 112 *Dispute resolution requirements for consumer credit and margin lending* (CP 112) on 27 July 2009 to consult on how we proposed to update and refine RG 139 and RG 165 for credit and margin lending. We received 24 submissions (two of which were confidential) from stakeholders on the various policy proposals set out in CP 112. We have taken these submissions into account in preparing this RIS.

4 In developing our final position, we need to consider the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:

- ensuring that consumers and investors are sufficiently protected by the efficient and effective operation of internal dispute resolution (IDR) processes and external dispute resolution (EDR) processes for credit and margin lending financial services; and
- facilitating activity in the financial services and credit industries, including not unreasonably burdening financial service providers, registered persons, credit providers, credit service providers, credit representatives and EDR schemes.

5 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:

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

Contents

A Introduction

Background

New national regulation of credit

6 The *National Consumer Credit Protection Act 2009* (National Credit Act), the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act), the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act), the National Consumer Credit Protection Regulations 2010 (National Credit Regulations) and the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010 (Transitional Regulations)—collectively the Consumer Credit Protection Reform Package—outline a new national consumer credit regime. The new regime:

(a) gives effect to the Council of Australian Governments' (COAG) agreements of 26 March and 3 July 2008 to transfer responsibility for the regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth; and

(b) implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth, endorsed by COAG on 2 October 2008.

7 The Consumer Credit Protection Reform Package establishes the key components of the proposed national credit regime, which include:

(a) a comprehensive licensing regime for those engaging in credit activities through an Australian credit licence (credit licence) to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;

(b) industry-wide responsible lending conduct requirements for credit licensees;

(c) improved sanctions and enhanced enforcement powers for ASIC; and

(d) enhanced consumer protection through internal dispute resolution (IDR) and external dispute resolution (EDR) mechanisms, court arrangements and remedies.

8 The reforms introduce a comprehensive national licensing regime, distinguishable from the current regulation of financial services under the *Corporations Act 2001* (Corporations Act).

The new dispute resolution requirements for credit

9 Under item 12, Sch 2 of the Transitional Act, a person who applies to ASIC to be registered to engage in credit activities during the registration period (1 April 2010 – 30 June 2010) must be a member of an ASIC-approved EDR scheme at the time of their application.

10 Under item 16, Sch 2 of the Transitional Act, a registered person then has an ongoing obligation to be a member of an ASIC-approved EDR scheme.

11 Under s47 of the National Credit Act, from 1 July 2010, as an obligation of a credit licence, credit licensees (i.e. lenders and non-lenders, including brokers, other intermediaries and debt collectors who are authorised on behalf of a lender to collect repayments for a credit contract) must have a dispute resolution system consisting of:

(a) internal dispute resolution (IDR) procedures that meet our requirements and approved standards; and

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

12 The IDR procedures must cover 'disputes' relating to the credit activities engaged in by the credit licensee or its credit representatives.

13 From 1 July 2010, to be authorised to act on behalf of a registered person or a credit licensee, credit representatives must, in addition to the registered person or credit licensee they represent, also be a separate member of an ASIC-approved EDR scheme. However, when a credit representative is a body corporate and that body corporate sub-authorises an employee or director to be a credit representative of the body corporate, that employee or director will not need to be a separate member of an ASIC-approved EDR scheme: s65(1) of the National Credit Act and reg 16 of the National Credit Regulations.

14 Credit representatives (including sub-authorised persons) will not need to have IDR procedures that meet our requirements and approved standards. This is because a credit licensee's IDR procedures must cover disputes relating to its credit representatives.

New regulation of margin lending financial services

15 The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Modernisation Act) inserts new provisions into the Corporations Act to regulate margin lending facilities as financial products under Ch 7 of the Corporations Act. These provisions require margin lenders and those who provide advice on margin loans (collectively those who provide margin lending financial services) to hold an Australian financial services (AFS) licence and be subject to the dispute resolution requirements.

The new dispute resolution requirements for margin lending financial services

16 Under the Modernisation Act, from 1 January 2011, as an obligation of an AFS licence, those who provide margin lending financial services must have a dispute resolution system consisting of:

(a) IDR procedures that meet our requirements and approved standards; and

(b) membership of an ASIC-approved EDR scheme (to the extent the Superannuation Complaints Tribunal (SCT) established under the *Superannuation (Resolution of Complaints) Act 1993* is unable to handle complaints).

17 The dispute resolution system must cover complaints made by a financial service provider's 'retail clients', as defined by the Corporations Act.

Our role in administering the dispute resolution requirements

IDR standards and requirements

18 Under both the National Credit Regulations and the *Corporations Regulations 2001* (Corporations Regulations), when considering whether to make approved standards and requirements relating to IDR procedures, we must take into account:

(a) Australian Standard AS ISO 10002–2006 *Customer satisfaction: guidelines for complaints handling in organisations* (ISO 10002:2004 MOD) (AS ISO 10002–2006); and

(b) any other matter we consider relevant.

19 We may also vary or revoke:

(a) a standard or requirement that we have made relating to IDR procedures; and

(b) the operation of a standard or requirement that we have approved in its application to an IDR procedure.

Approval of EDR schemes

20 Under both the National Credit Regulations and the Corporations Regulations, when considering whether to approve an EDR scheme, we must take into account the EDR scheme's:

(a) accessibility;

(b) independence;

(c) fairness;

(d) accountability;

(e) efficiency; and

(f) effectiveness.

21 When approving an EDR scheme, we must also take into account any other matter we consider relevant.

22 We may also specify a period of approval, impose conditions of approval and vary or revoke the approval of the EDR scheme, and the conditions of approval.

23 Our current standards and requirements for IDR and how a financial service provider should meet its obligation to be a member of an ASIC-approved EDR scheme are set out in RG 165.

24 RG 139 covers how we approve and oversight EDR schemes. The minimum standards and requirements in RG 139 must be reflected in a scheme's Constitution and/or Terms of Reference or Rules. The Constitution and/or Terms of Reference or Rules are binding on each scheme member and form a 'special contract' between the scheme and each scheme member.

25 Failure to comply with a scheme's Constitution and/or Terms of Reference or Rules, or failure to comply with a scheme's determination, may result in a scheme member being expelled, and, in the case of failure to comply with a scheme's determination, being reported to ASIC for serious misconduct or systemic issues before expulsion. In this way, our regulatory guidance in RG 139 applies to EDR schemes and its members.

The ASIC-approved EDR schemes

26 The merger that formed the Financial Ombudsman Service Limited (FOS) and the development of its new Terms of Reference (TOR) consolidates the EDR scheme landscape to two ASIC-approved EDR schemes in the Australian financial services industry:

(a) the Financial Ombudsman Service Limited (FOS); and

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

27 The membership of the five pre-existing EDR schemes that merged to form FOS included banks, credit unions and building societies, general insurers, life insurers, superannuation funds, stockbrokers, financial planners, and general and life insurance brokers.

28 When FOS was first formed in March 2008, it provided dispute resolution services for up to 80% of Australian banking, insurance and investment

complaints.[1] It is now likely that FOS provides dispute resolution services for closer to 90% of all Australian financial service industry complaints.[2]

29 Both FOS and COSL have also been approved by ASIC to handle disputes under the National Credit Act and Transitional Act.

30 While both FOS and COSL will handle credit disputes, only members of certain streams of FOS, primarily members of the General Banking stream, the Mutuals stream and some members of the Investments, Life Insurance and Superannuation (ILIS) stream, will be regulated under the new national credit regime. In comparison, almost all members of COSL will be regulated under the new national credit regime.

Regulatory impact of the National Credit Act and Modernisation Act

31 The regulatory impact of the credit licence obligations established under the new national consumer credit regime and the impact of the AFS licence obligations for margin lending financial services was assessed in the RIS attached to the Revised Explanatory Memorandum to the National Credit Bill (Explanatory Memorandum).[3]

Regulatory impact of the National Credit Act

32 In summary, the RIS found in relation to dispute resolution for credit that:

(a) the legislation in Western Australia already requires all finance brokers to be licensed and be members of an EDR scheme;

(b) the legislation in Victoria (effective March 2009) already requires all credit providers to be members of an EDR scheme; and

(c) the draft Finance Brokers Bill (NSW) proposed to license all brokers and require membership of an EDR scheme.

33 Certain industry sectors (i.e. banks, credit unions and mortgage brokers) may already have IDR procedures that meet our requirements in RG 165 and be members of an EDR scheme if they voluntarily subscribe to an industry code of conduct (i.e. the ABA's Banking Code of Conduct, the ABACUS Mutuals Banking Code of Conduct or the Mortgage & Finance Association of Australia's (MFAA) Code of Conduct).

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[1] Minister for Superannuation and Corporate Law, press release No. 45, 10 July 2008.
[2] FOS media release, *EDR scheme merger*, 30 August 2007, and Productivity Commission, *Review of Australia's consumer policy frameworks*, transcript of 18 February 2008 (Sydney), p. 813.
[3] See www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bynumber/17E270AABB7A78D5CA2575E1001FBF71?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1

34 The size of the affected population was also addressed in the RIS attached to the Explanatory Memorandum. However, there is some degree of uncertainty about the size and structure of the credit market, as there is no nationally consistent registration or licensing framework to provide that information.

35 In terms of industry participants, the licensing system in Western Australia provides some guidance as to the regulatory population. Western Australia has reported that there are approximately 190 credit providers registered in that jurisdiction, with approximately 100 of these operating nationally. These figures do not include authorised deposit-taking institutions (ADIs) registered under the *Banking Act 1959* (approximately 500 nationally) that may operate in Western Australia, as ADIs are not required to be licensed under the WA legislation.

36 In addition to credit providers, the proposed regulatory framework also covers persons whose business involves suggesting consumers enter into credit contracts, and assisting them to enter into credit contracts. Such participants would primarily (though not exclusively) be finance brokers. There are approximately 3,000 licensed finance brokers in Western Australia and, of these, around 200 have addresses outside Western Australia.

37 Persons other than brokers who are part of the credit supply chain and may be covered by aspects of the proposed regulatory framework include aggregators and mortgage managers. It is estimated that between 100 and 200 persons would fall into these groups. Persons whose business is the collection of debts (either as assignee or as agent of a credit provider) will also be subject to aspects of the proposed regime, including licensing.

38 Based on the above, it is estimated that the affected population, in terms of industry participants, could be as high as 10,000 nationally.

39 There are some overlaps between the new credit licence regime and the existing AFS licence regime administered by ASIC. It is likely that some of the affected parties are already subject to regulation by ASIC in some way, including, for example, existing holders of an AFS licence.

Regulatory impact of the Modernisation Act

40 For margin lending financial services, the RIS found that if ADIs already provide margin lending financial services, they may already have IDR procedures and be a member of an EDR scheme if they voluntarily subscribe to the ABA's Banking Code of Conduct.

41 However, as non-banks are increasingly providing margin lending financial services, consumers and investors of these providers would not have access to IDR and EDR.

What are the issues/problems being addressed?

42 As stated in RG 139, the specific functions of EDR schemes within the broader financial services and new national credit regulatory system are to provide:

(a) a forum for consumers and investors to resolve complaints (or disputes) that is quicker and cheaper than the formal legal system; and

(b) an opportunity to improve industry standards or industry conduct and to improve relations between industry participants and consumers/investors.

43 Where margin lending financial service providers, registered persons, credit licensees and credit representatives have already voluntarily subscribed to the EDR schemes, the usefulness of the services in resolving complaints or disputes is evidenced by regular reports from the schemes about the high volume of complaints (or disputes) that are received and resolved at no cost to the consumer/investor and less cost to the scheme member than if the matter had been litigated.

44 Currently, both FOS and COSL already handle credit disputes under their existing Constitutions and Terms of Reference or Rules where certain industry sectors have voluntarily subscribed to the scheme's jurisdiction. This is particularly the case for FOS members who are banks, credit unions or building societies, and for COSL members who are credit unions, building societies or mortgage managers or advisers. Table 1 summarises the membership of FOS and COSL and dispute volumes for credit.

Table 1: EDR scheme handling of complaints in the financial year 2008–09

EDR scheme	Membership	Complaint volumes	Source
COSL	8700 members including: • non-bank lenders (non-ADIs); • building societies, credit unions; • aggregators; • finance brokers; • financial planners; • mortgage insurers; and • mortgage managers/originators.	1,064 new complaints	Credit Ombudsman Service Limited *Annual Report On Operations* 2008–09, pp. 2 and 9
FOS	3835 members across all streams of FOS. FOS members include: • ADIs, building societies and credit unions; • general insurers; • financial planners, stockbrokers and superannuation funds; • life insurers; and • general and life insurance brokers.	6,731 new credit complaints	Financial Ombudsman Service *Annual Review* 2008–09, p. 19

45 It should be noted that while COSL's membership will be predominantly credit-regulated, FOS' membership is predominantly made up of non-credit regulated members. As at October 2009, according to FOS' then current membership list, FOS' credit-regulated membership was approximately 475 (i.e. 353 members in the General Banking stream and 122 members in the Mutuals stream).

46 The current voluntary membership of banks, financial planners and stockbrokers also results in the General Banking stream of FOS and the Investments, Life Insurance and Superannuation (ILIS) stream of FOS already handling margin lending financial service complaints. Table 2 summarises the membership and complaint volumes for margin lending financial services.

Table 2: EDR scheme handling of margin lending financial service complaints in the financial year 2008–09

EDR scheme	Membership	Complaint volumes	Source
FOS	3835 members across all streams of FOS FOS reports that complaints relating to margin loan providers are split across distribution channels: • financial planners (37%); • banks (33%); • stockbrokers (20%); and • other (10%).	181 new margin loan complaints	Financial Ombudsman Service *Annual Review* 2008–09, pp. 32 and 33

47 It is currently unclear what proportion of all registered persons, credit licensees, credit representatives and margin lending financial service providers, subject to the new dispute resolution requirements, are currently already voluntary subscribers to the EDR schemes and have compliant IDR procedures.

48 While this proportion is largely unknown, it is likely that new EDR scheme membership will be mainly credit representatives, non-ADI lenders (i.e. lenders who are not a bank, credit union or building society), finance brokers and debt collectors who are legally assigned a debt.

49 It also remains to be seen how industry will respond to the new consumer credit regime, including whether there will be increased consolidation or mergers of credit providers and credit service providers, or whether businesses will instead opt to restructure their businesses (e.g. increase the number of credit representatives they authorise).

50 Regardless of the precise number of industry participants who will ultimately join as new members of EDR schemes under the new dispute resolution requirements, it is clear that in the absence of the schemes, many

consumers and investors would lack a cost-effective method to deal with their complaints. ASIC is neither empowered nor resourced to perform a dispute resolution function, and instituting legal proceedings would be neither a practical nor affordable option for consumers in the vast majority of cases (in light of the fees and costs of legal representation and the intimidating nature of legal proceedings, even while access to state or territory Tribunals is currently available).

51 The issues discussed at Sections B–F relate to ensuring the dispute resolution system works efficiently and effectively for credit and margin lending financial services. In particular, the issues relate to how our current approved standards and requirements for IDR procedures and our approval of EDR schemes in RG 165 and RG 139 should be updated to apply to credit and margin lending financial services.

The need for government action

52 RG 165 and RG 139 currently apply to financial services generally, and do not address specific issues resulting from the new dispute resolution requirements for credit and margin lending financial services.

53 We foreshadowed in our May 2009 update of RG 165 and RG 139 that a further review of the dispute resolution regulatory guides may be necessary in light of the Australian Government's proposed national regulation of credit and margin lending financial services.

54 Government action is warranted to cure ambiguity about how the dispute resolution requirements in RG 165 and RG 139 apply and are modified to meet the new dispute resolution requirements for credit in the context of the National Credit Act and Transitional Act, and the new dispute resolution requirements for margin lending financial services in the context of the Modernisation Act.

55 A clarification of minimum obligations for credit and margin lending financial services in the dispute resolution regulatory guides will:

(a) ensure minimum standards so there is consistency of treatment at IDR for all credit disputants and margin lending financial services complainants;

(b) reduce industry and consumer confusion about where to complain when the dispute involves a credit representative and the credit licensee and credit representative are members of different EDR schemes;

(c) clarify access to and jurisdiction of the schemes in the context of the National Credit Act; and

(d) ensure consistency of complaints and disputes handling at EDR by setting minimum requirements for how credit licensees comply with their dispute resolution requirements and how EDR schemes will be approved and continue to be approved by ASIC.

56 It should be noted that providers of margin lending financial services, credit providers and credit service providers are still free to operate to higher standards than those prescribed by ASIC, and EDR schemes are still free to set their own detailed rules and operate to higher standards than the broad, minimum settings. Where possible, in RG 165 and RG 139, we encourage industry participants and EDR schemes to adopt higher standards.

Objectives of government action

57 Compensation for loss suffered by a consumer or investor (or some other form of redress) and access to quick, affordable, efficient and effective dispute resolution is an important consumer protection mechanism.

58 The main objective of updating and refining the dispute resolution requirements for credit and margin lending financial services is to ensure that the dispute resolution framework in the Australian financial and credit systems adequately covers new entrants under the new legislation, remains robust, accessible and fair, and works efficiently and effectively. For both IDR and EDR processes, our concerns are to:

(a) encourage the confident and informed participation of consumers and investors in the Australian financial and credit systems;

(b) provide consumers and investors with a low-cost, accessible and effective means of obtaining redress;

(c) establish clear rules for complaints and disputes handling in accordance with best practice so there is parity of treatment of consumers and investors across all sectors of the financial services and credit industries, regardless of whether a financial product or service provider, credit provider or credit service provider is a small, medium or large business;

(d) raise standards of industry best practice across all sectors of the Australian financial and credit systems, including promoting fairness, honesty and professionalism among those who provide financial and/or credit products and services; and

(e) reduce systemic risks and deter any bad behaviour of financial product or service providers, credit providers and credit service providers.

59 In considering the ways in which we should update and refine how we administer the dispute resolution requirements for consumer credit and margin lending financial services, we seek in this RIS to balance:

- the aim of ensuring that consumers and investors are sufficiently protected by having recourse to efficient and effective IDR procedures and EDR schemes for credit disputes and margin lending financial service complaints; and
- the desirability of facilitating activity in the financial services and credit industries, including not unreasonably burdening financial service providers, registered persons, credit licensees, credit representatives and EDR schemes.

60 The need to strike an appropriate balance between stakeholders is part of our aim to ensure that regulatory guidance meets the highest standards of usefulness and effectiveness.

Issues

61 In this RIS we consider alternative ways of updating and refining our existing dispute resolution requirements in RG 165 and RG 139 for credit and margin lending financial services, in respect of four main issues, as well as a number of minor issues.

62 The issues addressed in this RIS include:

(a) Issue 1: Refinements to IDR requirements for credit;

(b) Issue 2: Resolving consumer confusion—priority system for complaints or disputes involving credit representatives;

(c) Issue 3: Coverage of EDR schemes—the types of disputes that are 'small claims procedures';

(d) Issue 4: Time limits for bringing a dispute to EDR for certain types of credit matters; and

(e) other issues relating to EDR.

63 It should be noted that this RIS only addresses those issues that may have a cost impact on stakeholders. There are some issues which do not involve a cost, as they clarify:

(a) existing approaches for complaints handling if the complaint or dispute involving more than one licensee belonging to different EDR schemes will continue to apply;

(b) the term 'dispute' under the National Credit Act and the Transitional Act has the same meaning as the term 'complaint' under the Corporations Act for the purposes of the dispute resolution requirements; and

(c) transitional arrangements for IDR during the registration period.

Affected parties

64 In this RIS, our impact analysis includes an analysis of the costs and benefits of each of the options available, and a consideration of how each proposed option will affect the following key stakeholders:

(a) financial service providers (i.e. margin lending financial service providers who are subject to the dispute resolution requirements), lenders, non-lenders and their authorised credit representatives;

(b) consumers (including borrowers and guarantors) and investors;

(c) professional indemnity (PI) insurers;

(d) ASIC-approved EDR schemes;

(e) Australian courts; and

(f) ASIC and the Australian Government.

Consultation

65 In response to CP 112, we received 24 written submissions (two confidential) from a range of stakeholders, including consumer representatives, businesses, industry associations and EDR schemes.

66 We also informally consulted with the schemes at our regular EDR scheme roundtable meetings and with consumer representatives on ASIC's Consumer Advisory Panel at our November 2009 meeting.

67 By way of general observation, written submissions from business revealed general confusion or misunderstanding about the current policy settings for credit.

68 Written submissions were also polarised on the key issues discussed at Sections B–E of this RIS, with businesses and industry associations generally supporting longer timeframes at IDR and more limited EDR scheme coverage or access to EDR, compared with EDR schemes and consumer representatives who generally supported shorter timeframes at IDR and broader coverage and access to EDR.

69 In CP 112, we sought feedback, in particular qualitative and quantitative data, on the likely compliance costs and the other impacts, costs and benefits of this and other proposals. In response to CP 112, we received very little quantitative data.

70 While we recognise that it may be costly and commercially sensitive for industry to obtain and provide data of this nature, the lack of meaningful data has made it difficult to fully assess the costs and benefits of our proposals.

B Issue 1: Refinements to IDR requirements for credit

71 This section considers options to ensure that IDR works for certain types of credit disputes, particularly disputes that are considered 'urgent' because they involve:

(a) default notices; or

(b) applications for hardship variations or requests for postponement of enforcement proceedings.

Assessing the problem

Current approach

72 Before the new national consumer credit regime, credit providers and credit service providers were not required to have IDR procedures that met our approved standards and requirements under state or territory consumer credit laws. However, some credit providers and credit service providers may have had compliant IDR procedures because they provide:

(a) financial products or services and they applied the minimum requirements in RG 165 and RG 139 to all aspects of their business; or

(b) credit products or services and they voluntarily introduced IDR procedures that comply with RG 165 standards and they joined EDR schemes because they subscribe to a particular industry code of conduct (e.g. the ABA's Banking Code of Conduct, the ABACUS Mutuals Banking Code of Conduct or the MFAA's Code of Conduct).

73 Under the new national consumer credit regime, credit licensees will be required to have IDR processes that meet our approved standards and requirements in order to hold a credit licence, administered by ASIC.

74 Credit licensees will also need to ensure that their IDR procedures cover disputes involving their credit representatives.

75 Currently, the dispute resolution system is predicated on IDR being a necessary first step in the dispute resolution process before EDR. This is so a financial service provider has the opportunity to first hear client concerns and expressions of dissatisfaction, and address them genuinely, efficiently and effectively.

76 Our regulatory guidance in RG 165 sets a maximum 45 days for handling a complaint at IDR by requiring a financial service provider to give a 'final

response' within 45 days of receipt of the complaint, notifying the complainant in writing of the final outcome at IDR, the right to complain to EDR, and the name and contact details of the relevant EDR scheme.

77 If a final outcome at IDR is unable to be given within the 45 days, the financial service provider should advise the complainant in writing of the reasons for the delay, the right to complain to an EDR scheme, and the name and contact details of the relevant EDR scheme.

78 Notification of the right to complain to EDR is intended to improve the link between IDR and EDR, as complainants must generally lodge their complaint with an EDR scheme before the EDR scheme can begin handling the complaint.

79 It is recognised, however, that it may not always be appropriate for IDR to be a necessary first step in the dispute resolution process (e.g. when a scheme member ceases to carry on business and the scheme member no longer has IDR procedures, or for certain types of urgent matters).

80 Our regulatory guidance in RG 139 currently enables the schemes to have flexibility to extend or shorten IDR timeframes under its Terms of Reference or Rules if appropriate. Both FOS and COSL under their current Terms of Reference or Rules are able to directly handle complaints involving hardship, even if a complainant has not first been through the maximum 45 days at IDR.

> Note 1: See para 6.4 of the FOS TOR—FOS may shorten the maximum 45-day IDR timeframe for handling a complaint if any delay may cause or exacerbate financial hardship for the complainant: see *Operational Guidelines to the FOS Terms of Reference*, p. 42.
>
> Note 2: See Rule 13 of the COSL's 6th edition Rules—COSL may shorten or not require that the complaint first be handled at IDR for a maximum 45 days if the complaint should be dealt with urgently (e.g. because the complaint or an aspect of the complaint is about a financial hardship application).

81 When we updated RG 165 in May 2009, to give a final response within a maximum 45 days and not a 'substantial response' within this timeframe, the underlying rationale was to ensure the timely and efficient resolution of complaints in-house across the many sectors of the Australian financial services industry to improve customer satisfaction. This was because the results of research we commissioned indicated that complainants are most satisfied when their complaint is handled expeditiously and effectively.

Problems

82 A strict application of our IDR requirements in RG 165 and RG 139 to credit licensees and credit representatives under the new national credit regime may be inappropriate and further compound consumer hardship for certain types of credit disputes, as our regulatory guidance does not currently specify that disputes involving default notices, or applications for hardship

variation or requests for postponement of enforcement proceedings, should be treated urgently at IDR. It is left to the schemes to determine this when handling a dispute received at EDR.

83 A shorter timeframe than 45 days at IDR may be warranted, as disputants with these types of disputes tend to be vulnerable and/or under significant stress because they face losing their home.

84 A maximum 45 days at IDR for these types of disputes may also be inappropriate and cause further consumer detriment, given other legislative timeframes and requirements under the new national credit regime.

85 Regulatory guidance is required to ensure a consistent approach among credit licensees, to clarify how IDR requirements interact with other requirements under the new national credit regime and to minimise consumer detriment.

Disputes involving default notices

86 Under s88 of the National Credit Code (enacted as Sch 1 of the National Credit Act), a lender must give a borrower a 'default notice' before commencing enforcement proceedings to recover money or take possession or sell property. The default notice must inform the disputant that they must remedy the default within 30 days and must also substantially meet the pro forma notice requirements in Form 12 of the National Credit Regulations.

87 A dispute involving a default notice may arise if the dispute relates to, among other things:

(a) an allegation that a default notice was not served;

(b) a dispute about the amount specified as owing in the default notice; or

(c) a dispute about the lender's communications leading up to the issue of a default notice.

88 When a dispute involving a default notice also involves a prior failure of the lender to respond or a rejection of a hardship application or request for postponement of enforcement proceedings, the dispute should be treated as involving a hardship application or request for postponement of enforcement proceedings.

Disputes involving applications for hardship variations and requests for postponement of enforcement proceedings

89 A dispute involving an application for hardship variation or request for postponement of enforcement proceedings may arise if:

(a) the lender rejects the application or request, or fails to respond to the application or request within the 21 days a lender has to confirm in writing

an agreement to a hardship variation or postponement of enforcement proceedings under s72 and 94 of the National Credit Code; or

(b) the lender agrees to the application or request, but fails to properly document or provide the disputant with written confirmation as to the grounds of the variation or the conditions of postponement within the further 30 days under s73 and 95 of the National Credit Code (i.e. a maximum 51 consecutive days from the date the application or request is made).

Objectives

90 In addition to the objectives outlined at paragraphs 57–60, the more specific aims of this proposal are to ensure that IDR works efficiently and effectively for certain types of disputes considered to be urgent, and that overly long maximum IDR timeframes do not further compound consumer hardship.

Options

Disputes involving default notices

91 The options are:

Option 1: Update RG 165 to require a shorter maximum timeframe at IDR of 21 days for disputes involving default notices; or

Option 2: The existing maximum 45 days at IDR applies to disputes involving default notices.

Disputes involving applications for hardship variation and requests for postponement of enforcement proceedings

92 The options are:

Option 1: Update RG 165 and RG 139 to require that any period for IDR consideration of a dispute involving an application or request must not extend beyond the maximum timeframes allowed under the National Credit Code to agree to and reflect in writing the application for hardship variation or request for postponement of enforcement proceedings; or

Option 2: The existing maximum 45 days at IDR applies to disputes involving an application for hardship variation or request for postponement of enforcement proceedings.

Impact analysis: Disputes involving default notices

Option 1: Update RG 165 to require a shorter maximum timeframe at IDR of 21 days for disputes involving default notices

Description of option

93 Under this Option, RG 165 would be updated to:

(a) require credit licensees to handle disputes involving default notices within a maximum 21 days at IDR instead of the maximum 45 days currently allowed under RG 165; and

(b) require credit licensees to refrain from commencing or continuing with legal proceedings (including enforcement activity (i.e. debt collection)), for a reasonable time after the dispute is handled at IDR within the 21 days, unless commencing or continuing with legal proceedings is necessary because the statute of limitations is about to expire. A reasonable time thereafter would be at least 14 days from giving a final response at IDR within the 21 days.

94 In developing this Option, 30 days instead of 21 days was also considered as a more appropriate shorter timeframe at IDR for disputes involving default notices, rather than the current maximum 45 days at IDR.

95 This was because more written submissions from consumer representatives to CP 112 considered 30 days to be more appropriate than 21 days at IDR because 30 days is the same amount of time a disputant has under the National Credit Code to remedy a default under a default notice.

96 In developing this Option, 21 days was considered more appropriate because it:

(a) matches current industry practice under the ABA's Banking Code of Conduct or the ABACUS Mutuals Banking Code of Conduct; and

(b) allows time for a consumer to decide whether to complain before the time to rectify the default expires.

Impact on credit licensees

97 Compared with Option 2, the effect of this Option would be to:

(a) shorten the maximum timeframe a credit licensee has to make a final decision at IDR for disputes involving default notices; and

(b) require credit licensees to refrain from taking enforcement action while a dispute is being considered at IDR and for a reasonable time thereafter, so the disputant has a reasonable opportunity to lodge their dispute with an EDR scheme.

98 Shortening the maximum timeframe to make a final decision at IDR from 45 days to 21 days may result in credit licensees having to hire new staff, or train current staff, so these types of disputes can be identified and resolved within the shorter maximum 21-day timeframe. This could result in businesses needing to have a larger pool of trained disputes handling staff and/or updated computer software or case management systems.

99 The shorter timeframe for handling a dispute at IDR may also result in the credit licensee not making a final decision within time, so the lender would incur the costs of the EDR scheme handling the dispute, unless the EDR scheme agrees to extend the timeframe for handling the dispute at IDR in accordance with its Terms of Reference or Rules. Where the EDR scheme handles these disputes directly, over time, the lender would have a monetary incentive to handle these types of disputes more expeditiously and within the 21 days so as to reduce the cost of dispute handling at EDR compared with at IDR.

100 These impacts will not apply to all credit licensees because:

(a) lenders who already voluntarily subscribe to the ABA's Banking Code of Conduct or the ABACUS Mutuals Banking Code of Conduct may not need to change their current practices, as both Codes currently commit to members of the Codes resolving disputes at IDR within 21 days; and

(b) the ABACUS Mutuals Banking Code of Conduct also currently commits to giving the customer a reasonable opportunity to rectify a default under a default notice before commencing enforcement action. This commitment should also apply while a dispute relating to a default notice is being handled at IDR.

101 Those lenders who do not currently have IDR procedures will need to establish them, but the obligation to have IDR procedures arises from the dispute resolution obligations attaching to a credit licence under the National Credit Act, rather than from ASIC regulation.

102 Those credit licensees who do not already have IDR procedures would need to introduce systems and procedures to adopt our requirements under this Option. This would involve developing and documenting IDR procedures, training staff about the IDR procedures, having processes to identify disputes relating to default notices (as distinct from other credit disputes or financial services complaints), and having processes and systems to capture and record disputes received (i.e. relevant computer software or case management systems).

103 As part of this systems and procedures development, credit licensees would also need to:

(a) ensure a final response in writing is given within 21 days, informing the disputant of the final outcome at IDR, the right to complain to EDR,

and the name and contact details of the relevant EDR scheme, or if the dispute is unable to be completely resolved at IDR within the 21 days, inform the disputant in writing of the reasons for the delay, the right to complain to EDR, and the name and contact details of the relevant EDR scheme; and

(b) develop systems and procedures to allow the disputant at least 14 days to lodge their dispute at EDR.

104 For credit licensees who have already adopted procedures under RG 165 to give 'final responses' within 45 days or written notification of delay if the dispute is unable to be fully resolved at IDR within 45 days, the cost of introducing these systems and procedures to comply with a shorter timeframe would be limited to distinguishing disputes involving default notices, so these disputes can be addressed within a maximum 21 days instead of a maximum 45 days, and having sufficient staff and resources to handle these types of disputes within the shorter timeframe.

105 Requiring credit licensees to refrain from commencing or continuing with legal proceedings, including enforcement action, while the dispute is being handled at IDR would result in credit licensees having to ensure that they have sufficient processes and procedures and adequately trained staff to identify when a dispute involving a default notice is received and to cease legal proceedings and enforcement action already commenced.

106 There would also be a cost for lenders from the delay in getting repayment of the loan and the possibility of secured property losing value, particularly if the secured property is damaged by the owner in possession. This cost can be minimised if a shorter maximum timeframe at IDR is required, compared with under Option 2.

Impact on consumers, borrowers and guarantors

107 Under this Option, shortening the maximum timeframe at IDR to 21 days was considered more appropriate than 30 days because a maximum timeframe that is longer than the timeframe currently in place under the ABA's Code of Conduct and ABACUS Mutuals Banking Code of Conduct would be set by our regulatory guidance. If the banks, credit unions and building societies retain their higher standard (i.e. 21 days for handling a complaint at IDR), there is a risk that consumers of non-banks/mutuals will be subject to a longer timeframe at IDR (i.e. 30 days), resulting in inconsistency of treatment of disputants across the Australian credit system.

108 Compared with Option 2, under this Option these types of disputes will be resolved at IDR more quickly, or if the dispute is not resolved at IDR, the dispute will be able to be handled at EDR more quickly.

109 A quicker resolution within 21 days, instead of 30 or 45 days, would also benefit a disputant because the resolution of the dispute within 21 days, particularly if it involves a dispute about the amount allegedly owing, or whether the default had already been rectified before the default notice was issued, could be achieved before the disputant must remedy the default.

110 A requirement to more quickly resolve disputes at IDR for disputes involving default notices would also reduce stress for disputants who may already be in financial hardship. A maximum 21 days at IDR would reduce the timeframe for handling a dispute involving a default notice at IDR, but still enable an application for hardship variation to be agreed to, within the timeframe required under the National Credit Code, which could also resolve the dispute.

111 Disputants would also benefit by processes which allow the dispute to be genuinely handled at IDR, as the lender must put on hold concurrent commencement of legal proceedings, or other enforcement activity, including debt collection activity.

112 If legal proceedings or other enforcement activity are allowed to continue while the dispute is being handled at IDR, the IDR process would not be genuine because the disputant would be faced with the stress and cost of having to defend legal proceedings or fend off debt collection activity, and such legal proceedings or enforcement activity would interfere with any resolution that could be reached at IDR.

113 Allowing legal proceedings or enforcement activity to continue at IDR could also result in more disputants lodging their dispute with an EDR scheme, instead of first attempting to resolve their dispute at IDR. This may arise because already commenced legal proceedings or enforcement activity in relation to debt recovery must cease when a complaint is brought to EDR under para 13.1 of the FOS TOR and Rule 16.2 of COSL's 6th edition Rules. More astute consumers, or consumers who are represented by consumer credit legal services or consumer advocates, may be more likely to lodge their dispute directly at EDR, rather than trying to obtain a resolution through IDR if legal proceedings or enforcement activity has already commenced.

114 Under this Option, the disputant would also have a reasonable opportunity to lodge their dispute with the relevant EDR scheme, which would enable more disputants to lodge disputes at EDR if IDR was unable to resolve the dispute.

Impact on EDR schemes

115 Under this Option, compared with Option 2, the EDR schemes would need to update their existing Terms of Reference or Rules to reflect the shorter timeframe at IDR for handling disputes involving default notices and their relevant processes and procedures for handling these types of disputes.

116 There may be some cost involved, although not significant, in engaging in a consultation process with members to make these changes and implementing new processes and procedures for dispute handling.

117 The impact on EDR schemes in terms of dispute volumes as a result of a shorter IDR timeframe for disputes involving default notices is likely to be nil in the long term, although there may be a small increase in dispute volumes in the short to medium term while industry finetunes its IDR procedures.

118 It may not necessarily be the case that a shorter timeframe at IDR for the credit licensee to handle disputes involving default notices would result in increased dispute volumes to EDR schemes. However, if this does occur in the short to medium term while industry finetunes its IDR systems and procedures, the schemes would be required to have sufficient staff and resources to handle the increase in disputes.

Option 2: The existing maximum 45 days at IDR applies to disputes involving default notices

Description of option

119 Under this Option, the current timeframes under RG 165 would continue to apply, so the current maximum 45-day timeframe would apply to all credit disputes, including disputes involving default notices.

Impact on credit licensees

120 A credit licensee's obligation to have IDR procedures that meet our requirements and approved standards arises under s47 of the National Credit Act.

121 Under this Option, compared with Option 1, credit licensees who already voluntarily comply with RG 165 would be able to continue to handle disputes involving default notices within a maximum 45 days at IDR.

122 The maximum 45 days at IDR would not affect shorter timeframes for handling credit disputes at IDR under voluntary industry Codes of Conduct (i.e. the ABA's Banking Code of Conduct and the ABACUS Mutuals Banking Code of Conduct).

123 This would result in no compliance costs to industry with existing IDR procedures that meet current RG 165 requirements. Establishing and operating IDR systems and procedures would be simpler and easier for industry participants who do not already have IDR procedures, because all types of credit disputes, whether they involve a default notice or not, and all types of complaints relating to financial products and services (if the industry participant's business provides both financial and credit products or services), would be subject to the same maximum complaint handling timeframe at IDR. This would reduce the cost and time involved in training

staff, developing and documenting IDR procedures, and establishing and maintaining sufficient database systems or case management systems for complaints and disputes handling.

124 Under this Option, compared with Option 1, those credit licensees who do not subscribe to the ABACUS Mutuals Banking Code of Conduct may benefit from being able to more quickly recover outstanding amounts owing by borrowers by commencing or continuing with legal proceedings (including enforcement action) while a dispute is being handled at IDR.

Impact on consumers, borrowers and guarantors

125 Unlike Option 1, under this Option, a maximum 45 days at IDR may result in disputes not being genuinely handled at IDR because the credit licensee would be able to evade responding to the consumer until after the period for rectifying the default has passed. This would cause significant emotional and financial stress to disputants, particularly if their issue in dispute relates to whether there is a default, or the amount alleged to be in default.

126 If the regulatory guidance in RG 165 is not updated to require credit licensees to refrain from continuing or commencing legal proceedings (including enforcement activity) while the dispute is being handled at IDR, disputants may be further disadvantaged by having to also defend legal action or enforcement activity, which may not flow if the dispute is first able to be efficiently and effectively addressed at IDR. This may cause not only emotional distress, but also further compound financial hardship as disputants will also need to defend any such legal or enforcement action.

127 If RG 165 is not updated to require credit licensees to give disputants a reasonable time (at least 14 days) to lodge their dispute relating to default notices with an EDR scheme, disputants may be further subject to emotional and financial stress, by having to defend legal proceedings or enforcement action before they have had a reasonable opportunity to lodge their dispute with an EDR scheme.

Impact on EDR schemes

128 Under this Option, compared with Option 1, there would be no foreseeable impact on EDR schemes in terms of having to change their Terms of Reference or Rules, complaints handling processes or systems, or the volume of disputes likely to be received.

Impact analysis: Disputes involving applications for hardship variation and requests for postponement of enforcement proceedings

Option 1: Update RG 165 and RG 139 to require that any period for IDR consideration of a dispute must not extend beyond the maximum timeframes allowed under the National Credit Code to agree to and reflect in writing the application for hardship variation or request for postponement of enforcement proceedings

Description of option

129 Under the National Credit Code, a lender has a maximum 21 days to consider and agree to an application for hardship variation or request for postponement of enforcement proceedings. In addition to this time, a lender has a further maximum 30 days to reflect the terms of the agreement (i.e. the grounds of hardship or the conditions of postponement) in writing (i.e. a maximum 51 days from when the application or request is received)..

130 Under this Option, the maximum timeframe for handling a dispute involving an application for hardship variation or request for postponement of enforcement proceedings at IDR must not extend past the expiry of the time allowed for consideration of the application or request.

131 After the maximum 21 or 51 days have passed, a consumer may complain directly to an EDR scheme. However, if a dispute involves a credit licensee who has rejected or not considered an application or request within the maximum 21 days, the EDR scheme, under its Terms of Reference or Rules, may refer the dispute back to IDR for a further maximum 14 days, if appropriate.

Impact on credit licensees

132 Under this Option, compared with Option 2, credit licensees would not have any further time at IDR to handle a dispute involving an application for hardship variation or request for postponement of enforcement proceedings if the time allowed under the National Credit Code has passed. The credit licensee would also not be given a further opportunity to handle the dispute at IDR under the EDR scheme's Terms of Reference or Rules, nor would the timeframe to handle the dispute at IDR be able to be extended by the EDR scheme.

133 Compared with Option 2, this Option would require credit licensees to have appropriately trained staff, computer systems and, if hardship assessment teams are separate to complaints handling staff, appropriate processes and procedures to link disputes to the relevant application or request, so the credit licensee can consider and assess applications for hardship and requests

for postponement of enforcement proceedings efficiently and effectively in order to minimise the number of disputes that proceed to EDR.

134 Although the timeframe for consideration of a hardship application is set under the National Credit Code, our proposal to allow consumers to complain directly to EDR following the expiry of this time period may provide an incentive for some lenders to process hardship applications more quickly than they currently do. According to the results of our mid-2008 survey of 15 lenders (including seven banks, four credit unions and friendly societies, and four non-banks) published in our Report 152 *Helping home borrowers in financial hardship* (REP 152), the majority of lenders surveyed take between two and seven days to assess a hardship application, but some lenders can take between one and two months to assess a hardship application.

135 This Option would require lenders to assess and agree to hardship applications within the 21 days under the National Credit Code; otherwise, disputants can complain directly to EDR. This in turn would cause credit licensees to handle hardship applications within the timeframes set by the National Credit Code; otherwise, the cost of handling these types of disputes would be higher at EDR than if the application was properly assessed in-house.

136 If credit licensees have hardship teams to consider and agree to hardship applications that are separate to their in-house disputes handling team (which may be more prevalent if lenders are banks or credit unions and building societies, compared with other non-ADI lenders), these requirements would require businesses to either restructure their organisation's handling of hardship applications so hardship teams sit next to or within the disputes handling team, or require the development of systems and procedures so staff from the separate hardship and disputes teams work closely to identify hardship or postponement of enforcement proceedings disputes.

137 All credit licensees would need to update their IDR systems and procedures and train their staff to adopt this requirement.

138 Credit licensees would also need to inform the disputant in writing of their right to complain to EDR and the relevant name and contact details of the EDR scheme when:

(a) the credit licensee informs the disputant whether their application or request has been agreed to or rejected within the 21 days under the National Credit Code; or

(b) the application or request is agreed to within the maximum 21 days and the credit licensee confirms in writing the grounds of hardship or conditions of postponement of enforcement proceedings within the further maximum 30 days under the National Credit Code.

139 Credit licensees would need to put in place processes and procedures so this notification can be given.

140 It is anticipated that in the long term, direct handling of these disputes at EDR would act as an incentive for credit licensees to further improve their assessment of applications and requests, and thereby reduce disputes involving hardship variations or postponement of enforcement proceedings being handled at EDR.

Impact on consumers, borrowers and guarantors

141 Over time, disputants would benefit by applications for hardship variation or requests for postponement of enforcement proceedings being handled more efficiently and effectively by a credit licensee within the timeframe allowed under the National Credit Code.

142 This should reduce prolonged assessments of hardship applications, which REP 152 found results in certain consumer detriment—namely, that arrears accruing while the financial hardship application is being assessed potentially make it more difficult for the application to be accepted: p. 22.

Impact on EDR schemes

143 Under this Option, compared with Option 2, the EDR schemes would need to update their existing Terms of Reference or Rules to reflect the different timeframe at IDR for handling disputes involving applications for hardship variation or requests for postponement of enforcement proceedings.

144 There may be some cost, although not significant, in engaging in a consultation process with members to make these changes and implementing new processes and procedures for complaints handling.

145 EDR schemes may experience medium-term to short-term increases in dispute volumes compared with current dispute handling processes, as disputes would be unable to be referred back to IDR if the application/request has been agreed to and the maximum 51 days under the National Credit Code has passed. Over time, it is expected that EDR schemes will not need to refer the dispute back to IDR for a further maximum 14 days at IDR if the credit licensee has considered the application or request within 21 days under the National Credit Code.

Option 2: The existing maximum 45 days at IDR applies to disputes involving an application for hardship variation or request for postponement of enforcement proceedings

Description of option

146 Under this Option, the current timeframes under RG 165 would apply, so the maximum 45 days for handling a dispute at IDR would apply to all credit disputes, including disputes involving an application for hardship variation or request for postponement of enforcement proceedings.

147 This 45-day period would be in addition to the time allowed under the National Credit Code for the lender to consider the consumer's original application for hardship variation or request for postponement of enforcement proceedings. In practice, this option would require the consumer to make a separate complaint to the lender following rejection (or expiry of time) of the original hardship application.

Impact on credit licensees

148 Under this Option, compared with Option 1, credit licensees who already voluntarily comply with RG 165 requirements would not have to change their IDR procedures. This would result in reduced compliance costs for industry participants who already voluntarily subscribe to RG 165 requirements. This may be banks, credit unions and building societies.

149 For those credit licensees who have not already adopted RG 165 requirements, establishing IDR systems and procedures would be simpler and easier, because all types of credit disputes, whether they involve an application for hardship variation or request for postponement of enforcement proceedings, would be subject to the same maximum 45-day timeframe at IDR.

150 Credit licensees would have a longer time to handle urgent disputes at IDR, compared with Option 1.

Impact on consumers, borrowers and guarantors

151 Compared with Option 1, under this Option disputants in financial hardship would be even further disadvantaged by the credit licensee having a further 45 days in addition to the time allowed for consideration of the original hardship application.

152 The nature of the consumer detriment would be the same as for Option 1—namely, arrears accruing while the financial hardship application is being assessed potentially make it even more difficult for the application to be accepted.

Impact on EDR schemes

153 There could be a minor impact on EDR schemes when disputes are received directly from consumers because they do not understand that they also need to express dissatisfaction once the hardship application has been rejected or not responded to. Under the current Terms of Reference or Rules of the schemes, these disputes would not necessarily be referred back to IDR.

Recommendation

154 Our recommendation is Option 1 for disputes involving default notices and Option 1 for disputes involving applications for hardship variation or requests for postponement of enforcement proceedings. While Option 1 in both cases will have some cost for credit licensees and EDR schemes, we consider this to be outweighed by the benefits to consumers who have these types of disputes.

155 For disputes involving default notices and disputes involving applications for hardship variations or requests for postponement of enforcement proceedings, we consider Option 2 would not effectively address the detriment currently being experienced by consumers.

C Issue 2: Resolving consumer confusion—priority system for disputes involving credit representatives

156 This section considers options to ensure the efficient and effective operation of the dispute resolution system for credit if disputes involve credit representatives (who belong to a different EDR scheme to their credit licensees).

Assessing the problem

Current approach

157 Before the introduction of the National Credit Act, under state and territory licensing or registration regimes, credit representatives were not required to be separate members of an EDR scheme in order to remain authorised to act on behalf of their principals.

158 If members of certain industry sectors have already voluntarily subscribed to EDR schemes (i.e. banks, credit unions, building societies and MFAA members), or state and territory legislation required membership of an EDR scheme, the membership of the EDR scheme included the member's relevant representatives.

159 After the new national credit licensing regime commences, from 1 July 2010, credit representatives must also be separate members of an ASIC-approved EDR scheme in addition to registered persons and credit licensees.

160 Under the new national credit regime, those who engage in credit activities (i.e. lenders, non-lenders, including brokers, other intermediaries and debt collectors who are authorised on behalf of a lender to collect repayments for a credit contract) must be registered and obtain a credit licence. An obligation of both registration and the credit licence is to be a member of an ASIC-approved EDR scheme.

161 Credit representatives are not required to be registered or hold a credit licence, but to be authorised to engage in specified credit activities on behalf of a registered person or credit licensee, the credit representative must be a separate member of an ASIC-approved EDR scheme in addition to the registered person or credit licensee.

> Note: The employees and directors of a credit licensee do not need to be formally authorised. They can act as representatives of the credit licensee without a specific authorisation. A credit representative can also be authorised by more than one registered person or more than one credit licensee.

162 The exception to the requirement that credit representatives be a separate member of an ASIC-approved EDR scheme applies to credit representatives who are a body corporate, and that body corporate sub-authorises an employee or director of the company. That sub-authorised employee or director will not also need to be a separate member of an ASIC-approved EDR scheme: s65 of the National Credit Act and reg 16 of the National Credit Regulations.

163 Credit disputes involving both a credit representative and registered person/credit licensee may arise if proportionate liability is involved (i.e. both the actions or non-action of a credit licensee and its representative contribute to the disputant's loss), if a dispute relates to the conduct of the credit representative (whether acting within the scope of their authority), or if a credit representative or registered/person ceases to carry on business.

164 It is likely that disputes of this nature will arise under the new national credit regime if a credit licensee and a credit representative are members of different EDR schemes because, unlike financial service providers, the EDR scheme membership of a financial service provider covers its authorised representatives.

165 Our regulatory guidance in RG 165 and RG 139 does not address this issue because an authorised representative of an AFS licensee does not need to be a separate member of an ASIC-approved EDR scheme in addition to the AFS licensee it represents. The AFS licensee's EDR scheme membership covers complaints involving its authorised representatives.

Problems

166 We anticipate that when the new credit regime commences, disputants may become confused about where to complain when a dispute involves a credit representative. This is because under the National Credit Act:

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

(b) unlike at IDR, a credit representative must be a separate member of an EDR scheme, in addition to the credit licensee it represents. This is so the credit representative may remain 'authorised' by the credit licensee to engage in credit activities on behalf of the credit licensee. The legislative requirement that a credit representative be a separate member of an EDR scheme is in addition to the National Credit Act specifying that a credit licensee must be responsible for its credit representatives, even if they act outside the scope of their authority (s75 and 76 of the National Credit Act); and

(c) when a credit representative and a credit licensee belong to different EDR schemes, the credit guide of the credit representative must refer

the disputant to the credit representative's EDR scheme, while the credit licensee's credit guide must refer the disputant to the credit licensee's EDR scheme: s126(2)(e), 136(2)(h) and 158(2)(h) of the National Credit Act. In some cases, these may be different EDR schemes.

167 EDR schemes may also adopt different approaches to referring disputes involving credit representatives, which could result in different compensation outcomes, particularly if issues of proportionate liability are involved. There is also the risk that there could be some delay while the schemes determine which scheme should first appropriately handle all or part of the dispute, which could be complicated if a credit licensee or a credit representative ceases to carry on business.

168 There may also be further confusion for complainants and disputants, given an AFS licensee's membership with an EDR scheme covers its authorised representatives. This may be particularly relevant if a complaint or dispute involves a credit representative who is a representative of both a credit licensee and an AFS licensee because they give holistic advice about financial and credit products and services.

Objectives

169 In addition to the objectives outlined at paragraphs 57–60, the more specific aims of this proposal are to ensure there is no confusion about where to complain when a dispute involves a credit representative (i.e. a member of a different EDR scheme to their credit licensees) and there is a consistent approach to disputes handling when complaints or disputes involve credit representatives.

Options

170 The options are:

Option 1: Update RG 139 to adopt a priority system for complaints and disputes handling when complaints or disputes involve a credit representative; or

Option 2: Update RG 139 to allow the EDR schemes of the credit licensee and credit representative (if different) to equally handle the dispute.

Impact analysis

Option 1: Update RG 139 to adopt a priority system for complaints and disputes handling when complaints or disputes involve a credit representative

Description of option

171 Under this Option, we would update RG 139 to require EDR schemes to update their Terms of Reference or Rules so when the dispute involves a credit representative who is a member of a different ASIC-approved EDR scheme to its credit licensee, the EDR scheme:

(a) must handle the dispute if its member is the credit licensee to which the dispute relates, even when the dispute involves the credit licensee's credit representative acting outside the scope of its credit licensee's authority, and even when the credit representative is a separate member of an ASIC-approved EDR scheme; and

(b) may, when its member is the credit licensee, and the credit licensee ceases to carry on business, exercise its discretion to continue to handle the dispute. If the EDR scheme exercises its jurisdiction not to handle the dispute, the EDR scheme must refer the dispute to the EDR scheme of the credit representative.

172 The EDR scheme of the credit representative to which the dispute is referred must handle the dispute and the time limit for determining jurisdiction applies from when the dispute was first lodged with an EDR scheme.

Impact on credit licensees

173 This Option would require credit licensees to be responsible for their credit representatives (as required by s75 and 76 of the National Credit Act) not only at IDR, but also at EDR.

174 Under this Option, credit licensees and credit representatives would be able to streamline their complaints handling systems throughout IDR and EDR, and where to complain would be able to be simply disclosed in the credit licensee's and credit representative's relevant disclosure documents (including its credit guide), as the EDR scheme of the credit licensee would be the EDR scheme of first instance for all credit disputes, even if the dispute relates to the conduct of the credit representative (whether acting within the scope of its authority).

175 Credit licensees would be fully accountable to the consumer in terms of responding to the dispute and complying with the EDR scheme determination, whether this involves paying compensation or doing or refraining from some type of action. This is because of the special contract between the credit licensee (as scheme member) and the EDR scheme.

176 If the credit licensee considers the credit representative to be fully or partially liable for the loss or the issues in dispute because of its conduct, the credit licensee would have to separately pursue its credit representative, through contractual arrangements for proportionate or full liability. This is because the EDR scheme only has jurisdiction over its member—the credit licensee. For this to occur, the credit licensee (or its professional indemnity (PI) insurer) would have to separately pursue the credit representative to recover all or some of the compensation paid to the consumer if the credit licensee considered the conduct of the credit representative to have fully or partially contributed to the consumer's loss.

177 In order for a credit licensee to properly respond to a dispute involving its credit representative at EDR, the credit licensee would have to establish proper systems and procedures with its credit representatives to ensure that:

(a) their credit representatives have a reasonable opportunity to provide information, make comment and respond to any allegations involving misconduct, or conduct which resulted in loss for the consumer against the credit representative; and

(b) their credit representatives quickly respond to any questions or requests for information a credit licensee may have and fully cooperate with the credit licensee's investigation so it may appropriately address the dispute at EDR. It should be noted that the EDR schemes, under their Terms of Reference or Rules, may make adverse inferences if parties unduly delay responding to requests for information by the EDR schemes.

178 This is the approach that currently applies to financial service providers when the conduct of an authorised representative contributes to or is completely responsible for the consumer or investor's loss. Under this Option, compared with Option 2, when a credit licensee is also an AFS licensee, the dispute resolution systems for both financial services and credit could be reasonably aligned. This would reduce compliance costs for credit licensees who are also financial service providers.

179 This Option also aligns with our requirements to have adequate compensation arrangements in Regulatory Guide 210 *Compensation arrangements for credit licensees* (RG 210), as credit licensees must obtain PI insurance cover that also covers disputes involving its credit representatives—unless a credit representative's PI insurance arrangements indemnify its credit licensees.

Impact on credit representatives

180 This Option aligns with the dispute resolution requirements for AFS licensees, so representatives of both an AFS licensee and credit licensee

would not need to do anything different (except for being a separate member of an EDR scheme as required by the National Credit Act).

181 Compared with Option 2, under this Option there would be reduced costs for credit representatives, as they would need to pay the joining fee to become a member of an ASIC-approved EDR scheme, but would have smaller disputes handling fees payable to the schemes, as dispute handling fees would only need to be paid if the dispute is transferred from the credit licensee's EDR scheme to the credit representative's EDR scheme when the credit licensee ceases to carry on business.

182 It should be noted, however, that any reduced costs in terms of disputes handling fees payable to the credit representative's EDR scheme could be counterbalanced by the credit licensee, as part of its contractual arrangements with its credit representatives, requiring its credit representatives to pay a proportion of disputes handling costs payable to the credit licensee's EDR scheme. Such a payment could be proportionate to the number of disputes brought to the credit licensee's EDR scheme, relating to its credit representative.

183 Under this Option, compared with Option 2, credit representatives would be required to:

(a) have sufficient resources, trained staff and systems and procedures in place to quickly respond to a credit licensee's questions or request to provide further information in relation to the dispute handled by the credit licensee's EDR scheme; and

(b) when the dispute is handled by the credit representative's EDR scheme, have sufficient resources, trained staff and systems and procedures in place to address the dispute.

184 When the credit licensee has ceased to carry on business and the dispute is being handled by the credit representative's EDR scheme, the credit representative would need to have adequate compensation arrangements to be able to handle the dispute. In some circumstances, the PI insurance policy of the credit licensee may need to be called upon, or when this is not the case, the credit representative's PI insurance policy must cover the dispute.

185 Under this Option, credit representatives would remain free to join a different EDR scheme to their credit licensees, thereby allowing competition between the schemes.

Impact on consumers, borrowers and guarantors

186 A streamlined and consistent approach to complaints handling across the Australian credit system, throughout IDR and EDR, would not only assist disputants, but would also assist consumer organisations and representatives of disputants to find where to complain and quickly identify the relevant

EDR scheme for a complaint. This in turn would assist in reducing consumer confusion about where to complain. It may also save the disputant time and expense from having to lodge disputes with both the EDR scheme of the credit licensee and the EDR scheme of the credit representative (if different).

187 Under this Option, compared with Option 2, there would be greater consistency of referrals between the schemes, which would not only assist disputants to have their dispute more quickly and effectively addressed, but would also result in improved compensation outcomes for disputants. This is because the EDR scheme of the credit licensee would be able to determine the dispute in relation to the full extent of the loss and not in relation to the part of the loss which may be attributed to the credit licensee, as distinct from the credit representative.

188 When the dispute is first lodged with the credit licensee's EDR scheme and the credit licensee ceases to carry on business, or incorrectly with the credit representative's EDR scheme first, the disputant would not lose access to EDR, because the time limit for bringing a dispute to EDR would apply from the time the dispute is first lodged with an EDR scheme.

189 Under this Option, disputants would also be protected when the credit licensee becomes insolvent or ceases to carry on business because the disputant would be able to access the EDR scheme of the credit representative to obtain redress, so long as the credit representative continues their EDR scheme membership.

Impact on EDR schemes

190 COSL has raised strong competition concerns regarding this Option compared with Option 2. COSL alleges that this Option would significantly affect competition because FOS handles 90% of all financial services complaints and its divisions by industry sector operate in a similar way to vertical integration of the market.

191 While FOS' five streams (or divisions) evolved along industry sector lines (with the five pre-existing EDR schemes merging to form FOS being largely industry-sector-based), it is not necessarily the case that this would operate to restrict competition in the Australian credit industry. This is reflected by the membership of ABACUS Mutuals, the peak industry body for credit unions and building societies—some of whose members have joined the Mutuals stream of FOS and some of whose members have joined COSL.

192 EDR schemes currently obtain income to handle disputes and complaints from their members, primarily from three sources:

(a) an initial membership or joining fee;

(b) an annual membership or base fee; and

(c) fees for the EDR scheme to handle the complaint or dispute (dispute handling fees).

193 According to FOS' website, FOS currently charges:

(a) for all credit licensees and AFS licensees, an initial joining fee of $220 for credit licensees and AFS licensees, and a base levy, a user charge and a dispute handling fee for cases handled; and

(b) for credit representatives, a $55 joining fee for membership with FOS until 30 June 2011.[4]

194 According to COSL's website, COSL currently charges an initial joining fee of $165, an annual membership fee depending on the size and nature of the member's business, and dispute handling fees depending on the number of disputes and stage at which COSL handles the dispute.[5] There appears to be no reduced joining fee for credit representatives.

195 Under this Option:

(a) FOS would retain the membership of banks, credit unions and building societies, and finance brokers who are already financial planners, and may attract new members in these industry sectors. These members would generate reasonably high dispute handling fees due to their larger client base; and

(b) COSL would retain the membership of credit unions and building societies, non-ADI lenders, including small and micro-lenders, finance brokers or mortgage managers and advisers, aggregators and new members in these industry sectors.

196 Given current EDR scheme fee structures, it is likely that FOS would attract more credit representatives as new members, given the lower cost to become a member, and given there does not appear to be any dispute handling fees for credit representatives where FOS would handle a dispute in relation to a credit representative when the credit licensee has ceased to carry on business.

197 Over time, this could have an impact on COSL, who would lose out on annual membership fees for credit representatives and some disputes handling fees where the dispute is handled in relation to the credit representative because the credit licensee has ceased to carry on business.

198 It remains to be seen, however, whether FOS would have a higher distribution of members who are credit representatives once the new credit regime commences.

[4] See http://www.fos.org.au/centric/home_page/members/apply_for_membership.jsp
[5] See http://www.creditombudsman.com.au/4543,01,1-0-Fees+&++Billing.php

199 In some circumstances, some credit licensees, as part of their contractual relationship with their credit representatives, may require their credit representative to belong to the same EDR scheme they joined, for practical reasons (e.g. so the dispute does not need to be transferred to another EDR scheme when the credit licensee ceases to carry on business).

200 Alternatively, some PI insurers may require, as a condition of granting the PI insurance policy, that a credit licensee's credit representative also join the same EDR scheme as its credit licensee, given the slightly different Constitutions and Terms of Reference or Rules of FOS and COSL.

201 While this could result in some reduced competition between the EDR schemes, the impact on EDR schemes would be small, given both schemes would have a proportion of credit representatives as members who are representatives of credit licensees who are also members of the scheme.

Impact on ASIC

202 Under this Option, it would be easier for ASIC to assess disputes under investigation to quickly ascertain which EDR scheme has handled or is handling the dispute.

203 There may also be a reduced number of disputants calling our telephone hotline for assistance to establish where they can complain, as where to complain would be more clearly disclosed in credit guides.

Option 2: Update RG 139 to allow the EDR schemes of the credit licensee and credit representative (if different) to equally handle the dispute

Description of option

204 Under this Option, the EDR schemes of both the credit licensee or credit representative (if different) would both have jurisdiction to handle the dispute involving a credit representative.

205 In practice, this would be achieved by the EDR scheme who first receives the dispute referring the whole or part of the dispute to the other EDR scheme depending on the subject matter of the dispute.

Impact

206 Under this Option, compared with Option 1, the scheme that handles the dispute would be the scheme which first receives and processes the dispute, unless the EDR scheme refers part or whole of the dispute to the other EDR scheme depending on the subject matter in dispute. This could be complicated when a disputant lodges a dispute with both schemes simultaneously.

207 Unlike Option 1, under this Option disputants, industry, consumer representative organisations and ASIC may become confused about which EDR scheme to complain to or which EDR scheme should handle the dispute. This would reduce the efficiency and effectiveness of the dispute resolution system in the Australian credit system and may undermine consumer confidence in the market.

208 Under this Option, compared with Option 1, disputants could receive reduced compensation as a result of the credit licensee and credit representative being members of different EDR schemes and both EDR schemes being able to equally handle the dispute. This would particularly be the case when the dispute involved issues of joint liability or the credit representative acted outside the scope of its authority. The disputant would have to ensure they properly characterised the amount of loss they sought from the credit representative or the credit licensee when applying to the relevant EDR scheme, or risk being compensated for a smaller amount. The schemes would only be able to consider the dispute in relation to their member.

209 There would also be a risk that different schemes could take different approaches to handling these types of disputes. There could also be the risk that each scheme separately decides that the non-member is responsible, leaving the disputant with no resolution, and the only other option of going to court.

Recommendation

210 We recommend Option 1 because it would most significantly reduce stakeholder confusion, align with current legislative requirements for authorised representatives of AFS licensees and offer access to EDR (assuming the credit representative continues to be a member of an EDR scheme) when a credit licensee ceases to carry on business.

211 Option 1 also aligns with the compensation requirements for credit and ensures that credit licensees and their credit representatives are free to join whichever scheme they prefer.

212 In recommending Option 1, we have taken into account COSL's concerns about potential competition effects. We note that while Option 2 would be preferable in terms of enhanced competition between the schemes for new members who are credit representatives, we consider that the cost of consumer confusion about where to complain and the cost of inconsistent dispute handling by different EDR schemes, which would arise under Option 2, would be more detrimental to the efficiency and effectiveness of the dispute resolution system in the Australian credit system than the effects of reduced competition under Option 1. We do not recommend Option 2 for this reason.

D Issue 3: Coverage of EDR schemes—the types of disputes that are 'small claims procedures'

213 This section considers options to ensure that the coverage of EDR schemes remains sufficiently broad to handle the vast majority of disputes in the Australian credit industry.

Assessing the problem

214 Under s199 of the National Credit Act, disputants can access the relevant state or territory Magistrates Court, Local Court or Federal Magistrates Court for certain types of matters classed as 'small claims procedures'. The types of matters that may be classed as 'small claims procedures' are summarised in Table 3.

Table 3: '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 such higher amount specified by the National Credit Regulations)
4	Unconscionable interest and other charges	
5	Compensation for loss	Limited to where the order is for an amount under $40,000 (or such higher amount specified by the National Credit Regulations)

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

(a) legal precedent;

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

(c) the court may amend the papers commencing the legal proceedings if sufficient notice is given to any party adversely affected by the amendment (s199(6) of the National Credit Act).

216 When an unjust transaction, unconscionable interest and other charges matter involves a credit contract, mortgage or consumer lease, the value of which exceeds $40,000, or the claim for compensation exceeds $40,000, a disputant may either:

(a) when the dispute involves a claim for compensation, seek compensation for only up to $40,000, so as to come within the 'small claims procedure' of the National Credit Act; or

(b) still go to court, including the Federal Court or Federal Magistrates Court, but not obtain the benefit of more consumer friendly court processes under s199 and instead be bound by stricter evidentiary and civil procedures: s178 and Ch 4, Part 4-3 of the National Credit Act.

217 Under the current jurisdictional limits of the schemes:

(a) FOS under its Terms of Reference can handle credit disputes involving claims of $500,000 or less, but award compensation for direct loss of up to $280,000, and, in addition, FOS can also award interest and up to $3000 for consequential loss; and

(b) COSL can, under its 6th edition Rules, until 31 December 2011, handle credit disputes involving claims of $500,000 or less, but award compensation of up to $250,000, and in addition award interest. From 1 January 2012, COSL will also be required to increase the amount of compensation it awards to at least $280,000.

218 This means that when a dispute is within the $500,000 value and the disputant seeks an amount higher than the amount the scheme can award, the disputant can still access the scheme, but receive compensation up to the amount the scheme can award, so long as the disputant waives the remainder of the amount sought in full and final settlement of the dispute.

219 Feedback from industry argued that EDR scheme jurisdiction should only be equivalent to the $40,000 compensation amount or $40,000 value of the credit contract under the National Credit Act, while feedback from consumer representatives and the schemes reflected that EDR scheme jurisdiction should be sufficiently broad to provide a relevant alternative to going to court.

220 The problem is that, through the EDR obligations and the small claims procedure, the Act establishes two overlapping mechanisms for resolving credit disputes.

Objectives

221 In addition to the objectives outlined at 57–60, the more specific aims of this proposal are to ensure that the breadth of the jurisdictions of the schemes are

consistent for the types of matters in s199 and that the EDR schemes remain a relevant, low-cost alternative to courts for the vast majority of types of credit disputes .

Options

222 The options are:

Option 1: Update RG 139 to require EDR schemes to handle s199 matters—unrestricted by the $40,000 compensation limit or value of the credit contract and up to the jurisdictional limits of the EDR scheme; or

Option 2: Allow RG 139 to remain silent on this issue.

Impact analysis

Option 1: Update RG 139 to require EDR schemes to handle s199 matters—unrestricted by the $40,000 compensation limit or value of the credit contract and up to the jurisdictional limits of the EDR scheme

Description of option

223 Under this Option, EDR schemes would be an alternative to court for:

(a) the types of matters that are small claims procedures listed in s199 of the National Credit Act; and

(b) when unjust transactions, unconscionable interest and other charges, and compensation for loss are involved, up to the limits of the EDR schemes.

224 That is, a disputant would be able to access FOS and COSL when the value of the claim is $500,000 or less, but FOS would be able to award up to $280,000 and COSL would be able to award $250,000 as compensation for loss (and both schemes will be able to award a minimum of $280,000 from 1 January 2012).

Impact on credit licensees

225 As this issue concerns the jurisdictional limit of EDR schemes, its impact is only likely to affect the number of claims made against a credit licensee or credit representative, but would not have any impact on compliance costs such as dispute handling procedures.

226 Access to EDR up to jurisdictional limits of the scheme would increase the number of claims made against a credit licensee and its credit

representatives, as disputants would be able to access EDR in addition to court when the compensation amount sought is greater than $40,000 and up to $250,000 for COSL until 31 December 2011 and thereafter at least $280,000 and $280,000 for FOS.

227 For disputes involving unjust transactions or unconscionable interest and other charges, when the value of the credit contract, mortgage or lease is greater than $40,000, disputants would also be able to access EDR.

228 Under this Option, compared with Option 2, credit licensees (or their PI insurers) may also be liable to pay out more compensation to complainants as complainants would be less likely to pursue legal action where the value of their claim exceeds $40,000 or the value of the contract is greater than $40,000 given the cost of going to court, obtaining legal representation, etc.

229 Credit licensees across the Australian credit industry would consistently understand that we require EDR schemes approved under the National Credit Act to cover s199 disputes not just up to the $40,000 limits in the National Credit Act, but within the jurisdictional limits of the EDR scheme. This would assist credit licensees when assessing whether they have adequate compensation arrangements, in accordance with RG 210.

Impact on consumers, borrowers and guarantors

230 Disputants would have access to EDR for the vast majority of types of credit disputes and up to the current monetary jurisdiction of the schemes. This would be a quicker, cheaper and more accessible alternative to going to court, particularly for disputants whose loss is greater than $40,000. These disputants would still benefit by more informal and less legalistic court procedures.

Impact on EDR schemes

231 EDR schemes would benefit by ASIC setting the minimum requirements so EDR schemes do not have to engage in a protracted and hotly contested consultation process to update their Terms of Reference or Rules on this issue with their members (industry). Feedback from submissions to CP 112 revealed that industry generally holds the view that access to EDR should be limited to the value of the contract or the value of the claim for ‘small claims procedures’.

Option 2: Allow RG 139 to remain silent on this issue

Description of option

232 Under this Option, unlike Option 1, our regulatory guidance would be silent on the minimum requirements a scheme would be required to meet in terms of coverage for the types of matters listed in s199, especially when the

dispute involves compensation for greater than $40,000, or the dispute involves a credit contract, mortgage or consumer lease of greater than $40,000 in value.

233 In practice, this would mean that EDR schemes would not have clear regulatory guidance from us on our minimum requirements for handling disputes involving s199 matters. So when the schemes consult with their members on proposed changes to the scheme's Terms of Reference or Rules, the schemes may (in accordance with feedback from their members during the consultation process) reduce their existing jurisdictional limits from $280,000 (FOS) and $250,000 (COSL) down to $40,000 for the types of matters that are small claims procedures under the Act.

Impact

234 Compared with Option 1, under this Option, without clear regulatory guidance from ASIC on how EDR schemes must cover s199 disputes, EDR schemes could update their Terms of Reference or Rules (in accordance with feedback from their members during the consultation process) to restrict access to EDR when certain types of s199 disputes involve credit contracts, mortgages or leases of greater than $40,000 in value and compensation amounts of greater than $40,000 in value.

235 If this were to happen, this would significantly reduce access to EDR for disputants seeking compensation between $40,000 and $250,000 (for COSL) and between $40,000 and $280,000 (for FOS), or where the value of the contract exceeds $40,000 for unjust transactions or unconscionable interest and other charges. If this were to occur, we would experience difficulty in persuading EDR schemes to change their Terms of Reference or Rules and the only recourse a disputant would have would be to go to court under stricter evidentiary and civil procedural requirements.

236 This may in turn reduce consumer confidence in the efficiency and effectiveness of EDR, as EDR schemes would not be seen as a viable alternative to court.

237 Disputes against credit licensees for unjust transactions, unconscionable interest and other charges, and compensation for loss for significant amounts, may continue to be litigated in court, but from our experience to date, it is highly likely that disputants would be able to afford the cost of going to court.

238 Credit licensees would require reduced PI insurance policy coverage for s199 type disputes exceeding the $40,000 value, as the likelihood of these types of matters going to court would be reduced.

239 This Option, unlike Option 1, could also result in more disputants seeking to waive the difference of the compensation amount sought to come within the

small claims procedures limits in s199 at court. This is because EDR schemes would not be able to have jurisdiction of the matter, unless all parties agreed to the EDR scheme having jurisdiction. We are not aware of any instance where a scheme member has agreed to an EDR scheme being able to handle a complaint when it is outside of the scheme's jurisdiction. This would also reduce the amount of compensation a credit licensee would need to pay out to disputants.

Recommendation

240 Our recommendation is Option 1.

241 We recommend updating RG 139 to introduce the requirement that EDR schemes update their Terms of Reference or Rules to clarify that the types of complaints that are small claims procedures can be handled within the monetary jurisdictions of the schemes.

242 We do not recommend Option 2 because it would reduce confidence in the efficiency and effectiveness of the schemes.

E Issue 4: Time limits for bringing a dispute to EDR for certain types of credit disputes

243 This section considers options to clarify the time limit for bringing a dispute to EDR.

Assessing the problem

244 Under RG 139, unless *exceptional circumstances* apply, the time limit for bringing a complaint to EDR is currently the earlier of :

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

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

245 Section 80 of the National Consumer Code imposes shorter time limits for bringing certain types of credit matters to court:

(a) two years from when the relevant credit contract is rescinded, discharged or otherwise comes to an end for hardship applications or unjust transactions; and

(b) 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) for unconscionable interest and other charges.

246 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.

247 The problem is that the application of the existing timeframes for bringing a dispute to EDR could give greater access to EDR than would be allowed at court, given the introduction of shorter time limits in s80 of the National Credit Code for certain types of credit matters.

248 The purpose of EDR is to provide a quick, low-cost alternative to going to court. It is not intended to give consumers additional rights or EDR schemes additional powers beyond those available to courts.

Objectives

249 In addition to the objectives outlined at 57–60, the more specific aim of this proposal is to ensure that EDR schemes adopt a consistent approach to the time limits within which disputants must bring their dispute to EDR, in order to access the scheme.

Options

250 The options are:

Option 1: Update RG 139 so the time limit for bringing a dispute to EDR reflects the shorter time limits under the National Credit Code; or

Option 2: The existing approach under RG 139 applies.

Impact analysis

Option 1: Update RG 139 so the time limit for bringing a dispute to EDR reflects the shorter time limits under the National Credit Code

Description of option

251 This Option accommodates the shorter timeframes under the National Credit Code, while still working with existing time limits. Under this Option, the time limit for bringing a dispute to EDR would be:

(a) for those aspects of credit disputes that relate to hardship applications, unjust transactions or unconscionable interest and other charges under the National Credit Code, the later of either:

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

(ii) two years from when a 'final response' is given at IDR; and

(b) for all other complaints or disputes, the earlier of:

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

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

252 The time limits may be overridden if *exceptional circumstances* apply.

Impact on credit licensees

253 Where certain industry sectors have voluntarily joined the EDR schemes (i.e. banks, credit unions/building societies and MFAA members), members would be subject to the current time limits for handling a complaint at EDR.

254 Credit licensees would receive the benefit of a generally shorter time limit for bringing a dispute to EDR when a final response is given at IDR within the relevant timeframes under our proposed changes at Section B.

255 This would avoid the need for credit licensees to have systems and procedures in place to keep records for longer in order to be able to respond to a dispute involving a hardship application, unjust transaction or unconscionable interest and other charges at EDR. There would otherwise be costs to the credit licensee in keeping this information readily available.

Impact on consumers, borrowers and guarantors

256 Disputants would generally have access to EDR for equivalent timeframes for bringing court action under the National Credit Code or National Credit Act.

257 However, under this Option, compared with Option 2, consumers would have a shorter time to bring a dispute to EDR for certain types of credit disputes.

Impact on EDR schemes

258 EDR schemes would not need to change their current approach to time limits, except for certain types of credit matters. The schemes would need to update their Terms of Reference or Rules to reflect this new requirement.

259 Having access to EDR that is not longer than the time limits for bringing a dispute in court would ensure that scheme members continue to regard the schemes as procedurally fair.

Option 2: The existing approach under RG 139 applies

Description of option

260 Compared with Option 1, under this Option the time limit for bringing a dispute to EDR would be potentially longer than allowed at court for disputes involving hardship applications, unjust transactions or unconscionable interest and other charges.

Impact

261 Compared with Option 1, this Option gives disputants a longer time to complain to EDR for certain types of credit disputes that would not be able

to be heard in court. This could affect the standing of EDR schemes among its members who could regard the scheme as no longer being procedurally fair.

Recommendation

262 We recommend Option 1. We do not recommend Option 2 because it does not reflect the time limits for bringing actions to court in the National Credit Code and National Credit Act. Option 1 also provides compliance cost savings for credit licensees.

F Other issues relating to EDR

263 This section considers options in respect of low or no impact proposals that seek to clarify existing IDR and EDR requirements so the dispute resolution system works efficiently and effectively for credit.

264 These proposals are considered low or no impact because they clarify existing requirements and/or there was broad agreement on these proposals in feedback to CP 112.

265 The following proposals are discussed in this section:

(a) default judgments;

(b) EDR schemes working collaboratively with the ACCC and state/territory Offices of Fair Trading; and

(c) credit licensees having contact details for hardship applications and EDR schemes making these details available on their website.

Default judgments

Analysis of the problem

266 The problem is that consumers who are uneducated, uncontactable, unfamiliar with court processes, disengaged or already stressed because they are in financial difficulty, may not be aware that a default judgment order has been made against them, so they do not take steps at the time to have the default judgment order varied or overturned in accordance with relevant court processes.

267 However, a consumer will often, on becoming aware they can make an application for hardship variation, seek the assistance of an EDR scheme to help resolve the dispute.

268 Our regulatory guidance is silent on how EDR schemes should handle disputes involving default judgment orders.

269 As a result, FOS and COSL have adopted slightly different approaches to handling disputes involving default judgments under their Terms of Reference or Rules:

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

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

270 We considered that our dispute resolution regulatory guidance may need to be updated to ensure a consistent minimum approach to handling disputes involving default judgments by the schemes under the new national credit regime.

Objectives

271 In addition to the objectives outlined at 57–60, the more specific aim of this proposal is to ensure that EDR schemes have a consistent approach to handling disputes involving default judgments.

Options and impact analysis

Option 1: Update RG 139 to require: (a) EDR schemes must not overturn or be perceived to overturn a default judgment court order; and (b) EDR schemes must be able to handle disputes when a default judgment order has been handed down, but the dispute relates to post-default judgment issues (i.e. harassment)

272 Under this Option, we would clarify our expectation in our regulatory guidance that EDR schemes must not overturn or be perceived to overturn default judgment orders. This is because there are relevant court processes available to set aside or vary a default judgment order.

273 We would also expect that EDR schemes 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.

274 When EDR scheme handling of the dispute would not involve overturning or being perceived to overturn a default judgment order (e.g. when post-default judgment issues are involved (i.e. harassment)), schemes would be required to handle these types of disputes.

Option 2: Allow RG 139 to remain silent on this issue

275 Each EDR scheme would continue with its current approach to handling disputes involving default judgments. This would result in the schemes adopting slightly different approaches.

Recommendation

276 We recommend Option 1 because it helps to clarify our expectations and assists industry, disputants and the schemes to understand how we consider EDR schemes can assist disputants when a default judgment order has been handed down.

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

Analysis of the problem

277 When a credit dispute involves linked goods or services, a consumer may find it more difficult to have their dispute resolved once the new consumer credit regime commences. This is because a consumer may have to go through two separate complaint processes to get a resolution.

278 Under previous state and territory arrangements, state and territory Offices of Fair Trading (OFT) were able to assist a disputant when a dispute involved linked credit and fair trading issues. This is because most state and territory OFT could conciliate or investigate a matter under both fair trading laws and Uniform Consumer Credit laws.

279 Examples of where a dispute may involve fair trading issues and consumer credit issues may be where a disputant purchases a good (e.g. a second-hand car with linked credit) and the disputant wishes to return the car and cancel the credit contract because the car is unfit for its purpose (i.e. it does not start) or the car's odometer has been tampered with. Often cancellation of the credit contract will only be possible once it is established that the good is faulty or unfit for purpose.

280 Under National Credit Act arrangements, responsibility for investigating fair trading complaints will remain with the ACCC and state/territory OFT, while EDR schemes will become responsible for resolving disputes involving credit.

Objectives

281 In addition to the objectives outlined at 57–60, the more specific aim of this proposal is to ensure that disputes involving linked credit providers and fair trading issues are resolved efficiently and effectively.

Options and impact analysis

Option 1: Update RG 139 to include an expectation that EDR schemes work collaboratively with the ACCC and state/territory OFT for disputes involving linked credit providers and fair trading issues

282 Under this Option, RG 139 would be updated to include our expectation that approved EDR schemes work collaboratively with the ACCC and state/territory OFT when disputes involve linked credit providers (who are members of the EDR scheme) and fair trading issues with a non-member of an EDR scheme.

283 This would involve EDR schemes meeting with the relevant representatives of the ACCC and state/territory OFT, establishing contact points for resolving these types of disputes or how to cross-refer, and interim systems and procedures for resolving these types of disputes.

284 The EDR schemes would also need to train their staff on how to identify and handle disputes involving linked credit issues.

Option 2: Allow RG 139 to remain silent on this issue

285 Under this Option, compared with Option 1, there would be no obligation for EDR schemes to work collaboratively with the ACCC and state/territory OFT. The schemes could voluntarily establish relevant links with the ACCC and state/territory OFT in the absence of our regulatory guidance clarifying our expectations on this issue.

Recommendation

286 We recommend Option 1 for the reasons mentioned above.

287 Under Option 1, complaint handling of linked credit provider disputes may be quicker and more efficient if contact points, liaison and general complaints handling procedures are established.

288 Under Option 2, not including an expectation may result in the schemes adopting a more ad hoc approach, which may only benefit complainants of linked credit provider complaints received later rather than earlier once the new national credit regime commences, as EDR schemes develop contact points and handling processes as more disputes involving point-of-sale credit providers are handled.

Credit licensees have contact details for hardship applications and EDR schemes make these details available on their website

Current approach and problems

289 The problem is that consumers have difficulty locating, at the time they need to make a hardship application, the relevant contact details of their credit provider. Currently, banks and larger credit providers (i.e. credit unions) under the Australian Government's hardship principles[6] must make available contact details for hardship applications. This approach does not currently apply to all credit providers, nor to EDR schemes.

Objectives

290 In addition to the objectives outlined at 57–60, the more specific aim of this proposal is to ensure that all credit consumers are able to contact their credit providers to make a hardship application.

Options and impact analysis

Option 1: Update RG 165 and RG 139 to require that credit licensees and EDR schemes must publish this information

291 Under this Option, credit licensees would be required to make available on their website, and to the EDR schemes, their telephone number so disputants can contact them to apply for a hardship variation and, if possible, also make available the fax, email and postal details to also make a hardship application, as telephone numbers are not always sufficient (e.g. the telephone may not be answered).

292 EDR schemes would be required to publish their member's phone number, and if possible the fax, email and postal details on their website so disputants, consumer representatives and financial counsellors are able to easily find this information to make an application for hardship variation.

293 Under Option 1, small and micro-lenders would need to make available a telephone number (and if possible fax, email and postal details) for consumers to call if they seek a hardship application. There would be a small compliance cost in ensuring that these details are kept up to date. Banks and larger lenders already provide a contact telephone number in accordance with the Australian Government's hardship principles, so they would only need to make available contact details for making an application by fax, email and post, if this is possible.

[6] The Hon Wayne Swan MP, media release 034, *Relieving mortgage stress—the principles: A common approach for borrowers facing financial hardship*: see http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/034.htm&pageID=&min=wms&Year=&DocType=0

294 EDR schemes would need to devote some resources to collecting, keeping and updating this information, and have processes in place to obtain their members' contact details and keep them updated on their website. The cost of doing this would be small, as the EDR schemes already have websites.

295 Consumers would benefit from more easily being able to find contact details so they can make a hardship application.

Option 2: Allow RG 165 and RG 139 to remain silent on this issue

296 Under this Option, disputants of small or micro-lenders who do not follow the Australian Government's hardship principles would be disadvantaged if they need to make a hardship application, as the relevant contact details to make a hardship application may not be easily accessible.

297 Compared with Option 1, under this Option small or micro-lenders would not need to make available a telephone number and other contact details for hardship applications.

298 EDR schemes would also not be required to do anything.

299 Unlike Option 1, under this Option consumers in financial hardship may find it more difficult to make a hardship application with small or micro-lenders.

Recommendation

300 We recommend Option 1 as the compliance costs for industry would be minimal and this Option would make it significantly easier for consumers and their advocates to locate the correct contact information.

G Implementation

301 Our recommendations at Sections B–F would be implemented by updating RG 165 and RG 139 to reflect our proposals.

302 Because the national credit regime and margin lending regime are new, we will continue to monitor the impact of our regulation on the industry, and will revise our approach if necessary.

303 The effective implementation date would be 1 July 2010 when the credit licensing period starts. This would give industry and the EDR schemes two months to prepare for these changes. EDR schemes have participated actively in consultation to CP 112, are already aware that changes will be necessary and have already begun gearing up for these changes.

Appendix 1: Parties who made a public submission to CP 112

Submission no.	Stakeholder name/s
Industry organisations	
1	Australasian Compliance Institute
2	Australian Bankers' Association
3	Australian Collectors & Debt Buyers Association
4	Australian Finance Conference
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
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 • National Legal Aid • National Information Centre on Retirement Investments (NICRI) • Legal Aid Qld • Legal Aid NSW • Illawarra Legal Centre Inc
16	AFCCRA

Submission no.	Stakeholder name/s
17	CCLC NSW
18	CCLS WA
19	Financial and Consumer Rights Council
20	Legal Aid ACT
EDR schemes	
21	Credit Ombudsman Service Limited
22	Financial Ombudsman Service Limited

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

Appendix 2: Report 195 responses to CP 112—dispute resolution requirements for consumer credit and margin lending

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