



ASIC Consultation Papers 288 and 289

Crowd sourced funding – Guidance

Submission by Financial Ombudsman Service Australia

August 2017



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Executive summary

The Financial Ombudsman Service (FOS) Australia¹ is an ASIC-approved independent external dispute resolution (EDR) scheme that covers disputes across the financial sector.²

As well as its role in dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC. We also provide secretariat services to code monitoring and compliance committees for five industry codes of practice.³

We welcome the opportunity to respond to ASIC's Consultation Paper 288 *Crowd sourced funding: Guide for public companies* (CP 288) and Consultation Paper 289 *Crowd sourced funding: Guide for intermediaries* (CP 289), released in June 2017.

This submission⁴ comments on the following issues:

Informing consumers about dispute resolution arrangements

FOS considers that ASIC's guidance should strengthen requirements to give consumers of crowd sourced funding services information about their rights to internal and external dispute resolution.

The guidance could for example recommend that intermediaries publish, on their online platforms, prominent explanations of internal and external dispute resolution services available and how they could be accessed.

Small business retail clients

FOS suggests an alteration to the draft guidance in Attachment 1 to CP 288 to reduce the risk of confusion about how section 761G of the Corporations Act defines 'small business'.

EDR reforms

Dispute resolution requirements explained in the draft guidance in Attachment 1 to CP 289 will change shortly, when EDR reforms commence. FOS suggests the guidance outlines the dispute resolution requirements that will apply after the reforms, as well as the existing requirements, to ensure the guidance explains requirements fully and does not need to be amended soon after its release.

¹ Information about FOS is set out in full on our website at www.fos.org.au.

² FOS is approved by ASIC under its [Regulatory Guide 139](#) *Approval and Oversight of External Dispute Resolution Schemes*.

³ See the Appendix for more detail.

⁴ This submission has been prepared by the office of the Chief Ombudsman and does not necessarily represent the views of the board of FOS. It draws on experience of FOS and its predecessors in the resolution of disputes about financial services.

A single EDR scheme – to be called the Australian Financial Complaints Authority (AFCA) – will soon be established to replace FOS and the other two dispute resolution schemes operating at present in the financial sector⁵. This change, recommended by the Ramsay Review⁶, is expected to take place on 1 July 2018.

Please contact FOS if you would like us to clarify any aspect of this submission or provide further information.

1 Informing consumers about dispute resolution arrangements

Consumers with complaints about crowd sourced funding (CSF) will have access to internal dispute resolution (IDR) and EDR services. FOS considers that ASIC's guidance should strengthen requirements to give consumers of CSF services information about their rights to IDR and EDR.

Paragraph 1013D(1)(g) of the *Corporations Act 2001* (Corporations Act) requires a product disclosure statement for a financial product to include information about the dispute resolution system that covers complaints about the product and how the system may be accessed. For a CSF offer document – the CSF equivalent of a product disclosure statement - no equivalent of paragraph 1013D(1)(g) applies however.

The result is that legislation only requires a CSF consumer to be informed about their dispute resolution rights through a financial services guide – not also through a CSF offer document. Reflecting the legislation, the proposed guidance discussed in CP 288 and 289 does not indicate that offer documents should provide information about dispute resolution arrangements.

To ensure that consumers are aware of their dispute resolution rights, FOS suggests ASIC's guidance recommends that CSF intermediaries give their clients additional information about those rights. The guidance could for example recommend that intermediaries publish, on their online platforms, prominent explanations of IDR and EDR services available and how they could be accessed.

2 Small business retail clients

In ASIC's Regulatory Guide 139 (RG 139), 139.86 requires an EDR scheme to ensure that its Terms of Reference enable retail clients, including small business retail clients, to access the scheme. RG 139.83 indicates that, in RG 139, the term 'small business' has the meaning stated in section 761G of the Corporations Act. In

⁵ The three schemes operating at present are FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

⁶ The Treasury website sets out information about the [Review into the Financial System's EDR and Complaints Framework](#) chaired by Professor Ian Ramsay.

accordance with RG 139, the FOS Terms of Reference allow small businesses as defined in section 761G to access our services.

The Ramsay Review recently conducted a comprehensive examination of arrangements for the resolution of financial services disputes. The review recommended a raft of EDR reforms⁷ but did not recommend any change to the definition of small business used to set the EDR jurisdiction for small business disputes.

A small business could be a retail client of a CSF intermediary. We note that, in a CSF offer, the intermediary has two types of clients:

- the investors who apply for the offer and
- the company making the offer.

Paragraph 56 of the draft guidance in Attachment 1 to CP 288 reads as follows:

RG 000.56 Your company may be a retail client of the CSF intermediary. If this is the case, you should make sure that your company receives a Financial Services Guide from the intermediary, which will include information about the intermediary's fees, compensation arrangements and the dispute resolution avenues available for complaints about the intermediary's services.

Note: Your company may be a retail client if it is a 'small business' (less than 20 employees), if its net assets are less than \$2.5 million or its gross income for the last two years is less than \$250,000 (s761G). See RG XXX for further information about the obligations of AFS licensees, including the obligation to provide a Financial Services Guide and to have adequate internal and external dispute resolution procedures in place.

The note to paragraph 56 could in our view create confusion about how section 761G defines small business. As small business is a key concept in current EDR arrangements and the EDR reforms are not expected to include any relevant changes, we suggest the wording of the note is altered to reduce the risk of confusion.

3 EDR reforms

When the EDR reforms are implemented:

- there will be one EDR scheme in the financial sector – not multiple schemes as at present and
- the single scheme will be authorised by the Minister for Revenue and Financial Services – not approved by ASIC as EDR schemes now are.

The draft guidance in Attachment 1 to CP 289 provides for dispute resolution in paragraphs 73 to 79. The explanation of requirements in paragraphs 74 and 79 will

⁷ The Ramsay Review made 11 recommendations, which have been accepted by the Government and are now being implemented. For details, see the Treasurer's [media release](#) on 9 May 2017.

go out of date when the EDR reforms commence because those provisions refer to **multiple** EDR schemes and **ASIC-approved** EDR schemes.

The guidance for CSF will need to be in place by September 2017 and at present the EDR reforms are expected to commence in July 2018.

The guidance will need to refer to the existing EDR arrangements. As the EDR reforms are expected to commence shortly after the guidance is released, the guidance would be more helpful if it also acknowledges the anticipated changes. If the guidance does not deal with the changes when it is first released, it will soon require amendment.

FOS suggests the guidance outlines the dispute resolution requirements that will apply after the EDR reforms commence, as well as the existing requirements, to ensure the guidance explains requirements fully and does not need to be amended soon after its release.