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FBAA Submission to CP311 – Internal dispute resolution: Update to RG 165

The FBAA as the leading professional industry association to finance and mortgage brokers welcomes the opportunity to make a submission against CP311 - Internal dispute resolution: Update to RG 165.

Our submission delivers some general points for consideration and then provides specific responses to the questions posed in the CP.

We recognise the very important role of IDR in providing a mechanism for consumers to raise genuine grievances with licensees and receive fair and transparent treatment in having their grievances resolved. By our experience, complaints to and about finance brokers represent a very small percentage of consumer complaints overall.

Members are reporting to the FBAA that they are seeing a rise in the cost of managing complaint handling. Consumers are more aware of their dispute resolution rights than ever before and there are more advocacy services and sources of information that further raise awareness or encourage consumer complaints. Consumer expectations of what constitutes a reasonable resolution to a dispute appears to also be changing towards consumers wanting and demanding more.

We cannot discuss IDR without also acknowledging EDR. Any prospect of EDR involvement immediately increases dispute resolution costs by significant amounts and AFCA is perceived by many as a consumer advocacy agency rather than a neutral umpire. Licensees are reporting that it is becoming uncommercial to defend some complaints even where there is no fault. This is not the outcome of a fair and balanced dispute resolution regime and we are committed to ensure that dispute resolution does not become so unbalanced that licensees have no way to defend a dispute.

It is important for ASIC to maintain perspective about the impact the proposed changes are likely to have on smaller businesses. Whilst the very detailed, prescriptive approach to complaints management may be possible to operationalise in a large licensee where there are dedicated staff and departments and software, many licensees impacted by these proposed changes will have lower levels of sophistication and fewer staff to carry the additional reporting and record keeping burdens.

When considering the guidance itself, one could ask whether it is completely necessary for a regulatory guide which is attempting to provide clear and concise guidance to industry needs to be 59 pages in length. Complaints handling is very important but is one of the more straightforward obligations a licensee must comply with. It does not need to be over-engineered.

A very high percentage of complaints can be resolved quickly and to the consumer's satisfaction by licensees. We are aiming to avoid a situation where licensees spend more time creating records to document the complaint than the time taken to resolve it.

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Modifying the Law

1. ASIC has explicitly identified in this CP that it intends to issue a legislative instrument to make the core IDR requirements set out in RG165 enforceable. ASIC is writing law.

2. We remain opposed to this approach as it supplants the role of Parliament. The FBAA has observed in other consultation papers that there must remain a separation between those who make the law and those who administer it.

3. ASIC is proposing to modify guidance, setting new rules and minimum compliance requirements for licensees in response to its observations of IDR outcomes compiled from samples of consumer experiences such as those documented in REP603. These modifications are in response to the analysis of targeted samples where the approach taken by parties involved and the interpretation of certain data is not clear and has not been subjected to any form of external oversight. Report 603 acknowledges some of the inherent limitations of the process including self-reporting of data (having to rely on what consumers said happened) and recall bias[1]. This is not a strong basis to justify such impactful reforms.

4. We have seen in past work, for example ASIC's REP516 Review of Mortgage Broker Remuneration, that data is capable of being interpreted in multiple different ways - none of which are necessarily incorrect but each which puts a fundamentally different spin on the results. In our view it is not reasonable for ASIC to be able to design a project, shape its findings, subsequently revise guidance based on what it says its findings are and then impose new standards on the entire licensee population by making its regulatory guidance law through issuing a separate instrument.

Proposals and FBAA Responses

Proposal	Your Feedback
B1 We propose to update RG 165 to require financial firms' IDR processes to apply to complaints as defined in AS/NZS 10002:2014. It sets out the following definition of 'complaint' at p. 6: [An expression] of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required. The AS/NZS 10002:2014 definition expands the concept of 'complaint' to include expressions of dissatisfaction made 'to or about' an organisation. We consider that this should capture complaints made by identifiable consumers on a firm's own social media platform(s).	B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain: (a) how you currently deal with complaints made through social media channels; and (b) whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.

FBAA Response

5. We do not support the proposal to impose formal IDR obligations on licensees for material posted to or on social media.

[1] Report 603: The consumer journey through the Internal Dispute Resolution process of financial service providers, p14

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6. We acknowledge the expanded definition of a complaint under AS/NZS 10002:2014 and support this. We do not concur that the expanded definition supports the rationale set out in the CP to include social media.

7. We agree with the statement at paragraph 28 of the CP that "the expansion of the definition [of complaint] is…… "unlikely to have significant impact on firms" however the subsequent paragraphs detailing how this should apply to social media fundamentally increases the potential impact on firms because it does not only introduce a new medium of contact, we say it fundamentally changes the definition of "complaint" and places a very weighty onus on licensees.

8. Complaints handling must still be approached from a position that a complaint has more than one limb and that they are cumulative.

9. **Limb 1** - There must be an expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint; and

10. **Limb 2** - The consumer must implicitly or explicitly expect a response or resolution (or be legally entitled to one).

11. The inclusion of the words "to *or about*" an organisation must still be read in context with the second limb which is that a response or resolution is required.

12. The current thinking expressed by ASIC and underpinning the revision of RG165 places excessive emphasis on the first limb only. It is pushing complaints handling from being a predominantly reactive obligation (which it should be) to a proactive obligation. It flows that once the expression of dissatisfaction is made, IDR obligations are being steered towards the licensee having to increase its efforts to define the complaint and determine whether the consumer expects a response or resolution.

13. An expression of dissatisfaction does not become a complaint until both limbs are met. It is at that point in time the licensee must deal with the complaint under their IDR processes. The social media proposal is pre-emptive.

14. This statement should not be confused with the position stated in draft paragraph RG165.31 (which FBAA supports) and where ASIC writes:
"We expect firms to take a proactive approach to identifying complaints. A consumer or small business is not required to expressly state the word 'complaint' or put their complaint in written form to trigger a financial firm's obligation to deal with the matter according to our IDR requirements".

15. The FBAA agrees that licensees should not attempt to mislabel a complaint as feedback or a comment to avoid dealing with it as a complaint. We maintain that most licensees do not do this. Those that do, including those identified by the Banking Code Compliance Monitoring Committee (CCMC) are already contravening their obligations[2]. The mooted changes to guidance are going further than merely providing clarification around a licensee's obligations. They risk making all expressions of dissatisfaction a complaint that triggers IDR treatment. It is most important the guidance makes it clear that it is not the medium used or whether specific keywords are used by a consumer but whether they have a) made an expression of dissatisfaction and b) whether a response is explicitly or implicitly expected. By expanding the scope under RG165 then passing an instrument to make it law, this has potential to take the last part of the second limb of the definition "or legally required" and make it a legal requirement to respond to all expressions of

[2] CP311, paragraph 37 at p16.

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dissatisfaction thus turning all expressions of dissatisfaction into a complaint under a licensee's IDR.

16. The current guidance does not contain any commentary around materiality, and we maintain that it should. Once licensees are dealing with a matter under IDR, they cannot resolve it without satisfying the consumer. If the consumer is unreasonable, the licensee can only provide its final IDR response then wait for AFCA to tell them if they were reasonable or not. It is entirely plausible a licensee could end up incurring EDR fees of more than $7,000 for a matter as small as a consumer being unhappy with the way a staff member spoke to them over the phone. The consumer merely needs to reject all settlement proposals and insist on having the matter proceed to a written Ombudsman determination.

17. Once initiated, a licensee has no mechanism to stop a dispute escalating to EDR other than by increasing its settlement offer to a consumer. We are hearing reports that consumers are threatening EDR for a wide range of reasons that we would consider inappropriate including:

    a) Extracting financial settlement on matters where non-financial settlement is the appropriate outcome;

    b) Demanding disproportionately high compensation amounts for trivial matters;

    c) Removing default listings;

    d) Waiving outstanding amounts on loans where the residual amount falls below an amount that is commercially viable to pursue;

    e) Merely seeking a second opinion on whether the licensee's initial offer was adequate (including where such offers are made under structured remediation programs developed in conjunction with ASIC and/or AFCA);

18. The cost of EDR runs into the thousands and can take months to resolve. The time and monetary cost to licensees is considerable even for the smallest of disputes.

19. Many people vent over things they are not completely satisfied about. To do so is their right. Merely venting or being critical of a service or person does not equate to an expectation of some resolution. Complaints handling obligations are being pushed towards a direction where every expression of dissatisfaction is deemed a complaint requiring treatment under IDR rules. This is very dangerous position to be heading towards because it can lead to consumers developing an expectation that they are entitled to compensation any time they complain, and licensees facing a situation where they are expected to resolve every complaint in favour of the consumer regardless of fault or merit. Naturally licensees are within their rights to defend their conduct and not offer settlement to unreasonable complainants however this becomes an expensive pyrrhic victory if the dispute is taken to EDR and the licensee incurs EDR costs.

20. The FBAA does not agree that licensees should face potential regulatory consequences for not dealing with complaints made through social media channels under IDR processes. It is crucial to maintain balance and fairness in dispute resolution that both parties be required to act reasonably.

21. There is distinct difference between encouraging licensees to remain aware of expressions of dissatisfaction made on social media and having to treat them under the IDR obligations which are anchored to their licence.

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22. Many licensees already invite individuals to contact them directly where they observe negative feedback. If consumers do not take up that invitation then the matter should end there. In our view this is the appropriate response.

23. Consumers already have multiple avenues for communicating a complaint to licensees in a proper fashion. These include contacting the licensee via telephone; email and in writing. Consumers are provided with information about a licensee's IDR processes through the credit guide and various information statements that are provided to them as they become consumers of financial services and credit products and services. Most licensees also make this information available through their website. If a consumer can access social media they can access a website and/or locate the contact details for the company.

24. It is reasonable to require a consumer who has a grievance and who seeks some resolution to have to bring it to licensee's attention with some degree of commitment on their part. Social media provides a readily accessible platform that allows anyone to say anything they want about another party. There are no quality controls over the information that is posted and nothing preventing social media from being used strategically to damage competitors, cause injury to reputation or being used by people who have never even been customers. Trolling is common and it would be a ludicrous outcome of a revision of RG165 to require licensees to try to chase down internet trolls to discharge their IDR obligations. Absent any requirement on the consumer to make a genuine effort to contact the licensee, there is no way for a licensee to determine the genuineness of a post on social media without reaching out to the poster.

25. We recognise that licensees should assist consumers with making a genuine complaint and that some poor practices in the past have been contrived to frustrate consumers out of making a complaint. Consumers do however need to make a reasonable effort to complain to a licensee about their issues. This should require active, direct contact with the licensee rather than the passive, indirect approach that would be supported by the social media proposal.

26. Social media is a platform best recognised as a medium that allows dissatisfied customers to post reviews or vent their disappointment or frustration however it is not a suitable medium for a customer to initiate a complaint where they seek a specific response from the licensee.

27. It is regarded as almost essential in this day and age for businesses to have social media accounts to legitimise themselves. Not all companies regularly monitor their social media accounts and to suggest they must do so to detect potential complaints is unreasonable.

28. With respect to Proposal B1 we say that reference to social media should remain as nothing more than guidance. ASIC may encourage licensees to consider their social media platforms as a potential source of complaints and to reach out to people who appear to be dissatisfied, however they should not have to take positive steps to elicit a complaint out of a post on social media and they absolutely should not be at risk of breaching any licence obligation for failing to monitor social media or engage with people using this medium.

Proposal	**Your Feedback**
B2 We propose to introduce additional guidance in draft updated RG 165 to clarify: (a) the factors a financial firm should, and should not, consider when determining whether a matter raised by a consumer is a complaint; and (b) the point at which a complaint must be dealt	B2Q1 Do you consider that the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints? B2Q2 Is any additional guidance required about the definition of 'complaint'? If yes, please provide:

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with under a financial firm's IDR process. See draft updated RG 165 at RG 165.32–RG 165.37 at Attachment 1 to this paper.	(a) details of any issues that require clarification; and (b) any other examples of 'what is' or 'what is not' a complaint that should be included in draft updated RG 165.

FBAA Response

29. The examples and commentary provided in RG165.32- 165.37 are not very helpful because they are not examples of conduct that could reasonably regarded as a complaint to begin with.

30. The guidance needs to provide stronger examples that demonstrate the thinking that underpins the assessment of information to determine whether to treat it as a complaint or not. The more examples that can be provided, the more effective the guidance will be. The guidance should also utilise difficult cases that sit on the threshold of whether ASIC believes a matter should or should not be treated as a complaint rather than utilising examples that most audiences would regard as clear cut one way or the other.

31. Our view, stated earlier, is that a valid complaint comprises two limbs and that each must be met. This appears to be consistent with the position in RG165.28 however the drafting of RG165.34 obscures it. The current wording of RG165.34 says:

> Regardless of a firm's structure, it is the complainant's expression of dissatisfaction (that meets the definition of 'complaint' in RG 165.28) that triggers a firm's obligation to deal with the matter according to our IDR requirements, *not* the referral of a complaint to a specialist complaints or IDR team.

32. The paraphrasing in RG165.34 puts the focus on the complainant's expression of dissatisfaction without mention of the second limb being the expectation of a response or resolution. It refers back to RG165.28 which includes the second part of the definition however this requires readers to refer back to RG165.28 and then also understand that the definition comprises more than one part. The guidance would be more helpful if it were to explicitly identify and then address each of the limbs.

33. If the guidance more clearly explains the elements of the complaint that triggers the IDR obligations, examples of what does not constitute a complaint such as the ones given at RG165.35(b) and (c) 'simple requests for information', 'survey responses' and 'factual information about product damage' would be unnecessary.

34. To highlight the difficulty faced by licensees, the example cited in RG165.35 (c)(ii) could be construed as a complaint. What if a consumer attempted to withdraw cash from a damaged ATM to buy a train ticket, was unable to and then spent $200 on a taxi to travel 100km home when the train ticket would have cost $15? If a consumer were to complain to the licensee that they suffered a $185 direct loss as a result of the ATM being defective, on what basis could the licensee refuse to address this under IDR? How could a licensee, having provided its final written response declining to compensate the consumer prevent the consumer taking the dispute to AFCA? How would the correct administration of IDR handling allow a licensee to dismiss this complaint without a consumer being able to test the licensee's final written response at EDR? Going to the extreme (but still entirely plausible), what if the consumer refused all offers of settlement and insisted on an Ombudsman's written determination? $7,420 is the fee AFCA levies against the licensee for an Ombudsman decision. This fee is charged regardless of the outcome.

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35. Our recommendation in response to B2Q2 is to modify the guidance to correctly identify the two limbs of a complaint (ASIC may identify more than two, but it is certainly more than one) and assist licensees understand how to identify both.

36. In conjunction with this we continue to advocate for a fee waiver provision with AFCA where fees are waived or capped for no fault or trivial complaints where the fee should be capped at the remediation amount.

Proposal	Your Feedback
B3 We propose to modify the definition of 'small business' in the Corporations Act to align it with the small business definition in the AFCA Rules: A Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.	B3Q1 Do you support the proposed modification to the small business definition in the Corporations Act, which applies for IDR purposes only? If not, you should provide evidence to show that this modification would have a materially negative impact.

FBAA Response

37. We do not support this modification to the Corporations Act.

38. There are very clear policy and legal reasons why the Corporations Act and NCCP Act cover retail clients and consumers and why small business is excluded.

39. Phase 2 of the NCCP reforms proposed to extend consideration of the credit laws to small business but the exercise proved too complex and intractable.

40. Small business can pursue their rights through the courts. The individuals behind the small business can represent themselves in minor disputes. This does not disadvantage small business.

41. There are numerous regimes that treat individuals and small business differently. Individuals choosing which structure to use before undertaking their activities undertake some assessment of the risks and benefits and their decisions are motivated by which structure they believe gives them the most favourable outcome. Australian Taxation Laws give individuals an income-tax free threshold of $18,200. A proprietary limited company pays tax at 27.5 cents in the dollar on every dollar earned from the first dollar. There are different rules for different entities. This does not equate to an unfair disadvantage. The extension of IDR to small business is too open to abuse by small business customers and there are already adequate protections in place.

42. There is already a schism whereby licensed entities are exposed to much greater EDR exposure on unregulated products than unlicensed entities. Currently, if an entity holds an AFSL or ACL because it deals with retail investors/consumers then its EDR is open to all customers, not just retail/consumer. If an entity does not deal with retail/consumers, it does not need to hold EDR membership.

43. Take the example below:

    Entity 1 only offers small business loans. It does not hold an ACL and is not required to be a member of an EDR scheme. A customer of Entity 1 makes a complaint to AFCA. AFCA will not entertain the complaint because Entity 1 is not a scheme member. The customer's only redress is legal action.

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Entity 2 offers consumer loans and small business loans. It holds an ACL. It is a condition of the ACL that they maintain EDR membership. If the small business loan customer of Entity 2 complains to AFCA, AFCA will hear it because the licensee is a member firm.

44. To be clear, we do not provide this example to advocate for businesses dealing with non-retail/non-consumer credit being required to hold EDR membership. The current system is manifestly unfair that licensees can have disputes over unregulated products being taken to EDR where a direct competitor offering the unregulated products and without EDR membership is not facing that same risk.

45. The appropriate question that EDR should ask is whether the product in dispute would ordinarily require the licensee to be a member. If they answer is "no", then the customers of the entity that acquire the unregulated services should be denied EDR access.

46. IDR/EDR is suitable for consumer level disputes. Already the financial thresholds imbued on AFCA are commensurate with the District Court but in a setting where rules of evidence do not apply, procedural fairness does not need to be recognised (preliminary decisions being made in a matter of weeks where court action could be the subject of numerous interlocutory arguments on procedural and evidential points over months or years) and only one party has a right of appeal while the other is bound by the decision.

47. Notwithstanding AFCA's limited jurisdiction to hear disputes over small business (i.e. compliance with NCCP Act obligations should not feature in the decisions) AFCA has made findings on extremely complex legal concepts of unconscionability and misleading and deceptive conduct which are frequently debated up to the High Court and without gaining unanimous support amongst sitting High Court judges[3].

Proposal	Your Feedback
B4 We propose to update RG 165 to require financial firms to record all complaints, including those that are resolved to a complainant's satisfaction at the first point of contact. Note: Firms will not, however, be required to provide an IDR response for complaints resolved to a complainant's satisfaction within five business days of receipt.	B4Q1 Do you agree that firms should record all complaints that they receive? If not, please provide reasons.

FBAA Response

48. We support this proposal in principle.

49. A materiality threshold still needs to be observed here and this can be achieved by recognising that licensees using 'reasonable endeavours' to record all complaints is sufficient to discharge their obligations. There also needs to be less detail recorded in a register for quickly resolved disputes. ASIC may give consideration to establishing a definition of a "material" complaint and a "recordable complaint" or similar where a recordable complaint is quickly resolved and needs to be noted where a material complaint needs to be fully documented.

[3] Refer the recent High Court judgment of ASIC v Kobelt and 19-136MR "High Court dismisses ASIC appeal in APY Lands book up case". The split was 4:3 where four judges ruled no unconscionable conduct. How can an EDR scheme possibly entertain such matters?

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50. We recognise that more comprehensive capturing of complaint data has potential to provide more meaningful data to ASIC, but we also recognise that the administrative burden of capturing and recording absolutely everything is likely to outweigh the potential benefit. The risk of this requirement is that it formalises something which is commonly informal and quickly addressed as part of BAU and where the consequences of not recording it are not material. Complaints that are able to be resolved very quickly to the satisfaction of the consumer are not complex and usually over relatively minor issues. If the consumer is dissatisfied with the way their complaint is addressed they can escalate it and proceed through more structured IDR.

51. Proposal B4 would see every complaint needing to be recorded in a structured database containing approximately 37 fields of data for each complaint (refer Table 1 of the CP). The additional burden this is likely to put on licensees includes training frontline staff to recognise a complaint and capture it in an IDR database, developing record keeping systems and the data entry itself. We ask that consideration be given to minimising the administrative burden of this requirement to ensure that complaints that are resolved quickly can be recorded just as quickly. Monitoring and enforcement around IDR record keeping should recognise that licensees may on occasion fail to record trivial issues without this being an issue of non-compliance.

Proposal	Your Feedback
B5 To facilitate the effective operation of the IDR data reporting regime, we propose to require all financial firms to: (a) record an identifier or case reference number for each complaint received. The identifier must be unique to each complaint and not be reused by the financial firm (see draft updated RG 165 at RG 165.58 at Attachment 1 to this paper); and (b) collect and record a prescribed data set for each complaint received (see draft updated RG 165 at RG 165.61–RG 165.62 at Attachment 1 and the IDR data dictionary at Attachment 2 to this paper).	B5Q1 Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received? If no, please provide reasons. B5Q2 Do you consider that the data set proposed in the data dictionary is appropriate? In particular: (a) Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers? (b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?

FBAA Response

52. As with our previous answer, we recognise the benefit of having a system that creates a unique identifier that cannot be reused, however these are typically associated with more costly software systems and are more suited to large licensee operations.

53. Small licensees may receive no complaints through to a handful of complaints each year. We cannot endorse an obligation that requires these licenses to source expensive software.

54. We propose that licensees that receive fewer than 50 complaints per annum should be able to meet this obligation through using low technology options such as a spreadsheet or similar. It would be sufficient to accord a complaint number starting with 1 plus the year in which it is received. For example complaint 1-19 or 19-1 would be the first complaint of 2019. This would not prevent a licensee from "reusing" the identifier but would be more than adequate for smaller licensees to manage their obligations.

55. ASIC must have regard to the fact that this guidance will impact single person licensees in the same way it will impact a large financial institution. The role of guidance is to assist licensees to understand what they need to do to meet the minimum expectations of the regulator. Guidance

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can provide examples of best practice or preferred practices however it must stop short of prescribing best practice at a level that only sizeable, well-resourced entities can attain.

Proposal	Your Feedback
B6 We will issue a legislative instrument setting out our IDR data reporting requirements. We propose that all financial firms that are required to report IDR data to ASIC must: (a) for each complaint received, report against a set of prescribed data variables (set out in the draft IDR data dictionary available in Attachment 2). This includes a unique identifier and a summary of the complaint; (b) provide IDR data reports to ASIC as unit record data (i.e. one row of data for each complaint); (c) report to ASIC at six monthly intervals by the end of the calendar month following each reporting period; and (d) lodge IDR data reports through the ASIC Regulatory Portal as comma-separated-value (CSV) files (25 MB maximum size).	B6Q1 Do you agree with our proposed requirements for IDR data reporting? In particular: (a) Are the proposed data variables set out in the draft IDR data dictionary appropriate? (b) Is the proposed maximum size of 25 MB for the CSV files adequate? (c) When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?

FBAA Response

56. The FBAA recognised that the establishment of a single EDR scheme was inevitable and supported the proposal of the Ramsay review recommending the creation of a single EDR scheme. What it did not anticipate was the enormous amount of unilateral power that would be conferred upon the single EDR scheme and the fact that licensees must now comply with any EDR direction no matter how inappropriate or poorly conceived or risk losing their licence on account of being ejected from the only existing EDR scheme (which in turn would be a breach of their licence condition to hold EDR membership).

57. Licensees are operating with a gun to their heads.

58. Consistent with the other parts of this submission, we recognise the intention behind the recommendation to have all licensees report consistent IDR data to ASIC, but the implementation fails to differentiate between the burden placed on SMEs and large, well-resourced licensees. It also fails to differentiate between valid, material complaints and trivial issues.

59. The proposed data variables set out in the draft IDR data dictionary make perfect sense for a large licensee recording detailed data about a material complaint that might be resolved at IDR or could escalate to EDR and which could result in the licensee paying thousands of dollars to resolve.

60. It does not make as much sense for an SME dealing with a trivial complaint where the appropriate resolution is a verbal apology or a token payment.

61. ASIC needs to provide a solution for resolving trivial complaints without the degree of formality underpinning the prosed reforms. It must also give consideration to providing relief to licensees from reporting data on trivial issues.

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62. We can see a genuine risk that licensees will spend more time creating records to satisfy ASIC than for the purpose of accurately tracking IDR outcomes. There's a directly related risk of ASIC becoming concerned with a licensee's inadequate IDR reporting where licensee are trying to produce detailed records for immaterial issues.

63. These priorities can be balanced out by introducing some recognition of the distinction between trivial and material complaints.

Proposal	Your Feedback
B7 We propose to publish IDR data at both aggregate and firm level, in accordance with ASIC's powers under s1 of Sch 2 to the AFCA Act.	B7Q1 What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?

FBAA Response

64. Balance, transparency and proportionality are key issues. We do not support publishing IDR data at a firm level at this point it time.

65. ASIC will need to obtain IDR data over a period of time and then explain how and why it needs to publish IDR data at a firm level. Delaying the decision to publish firm level data will assist ASIC to clearly identify the objectives behind publishing firm level data. This may in turn assist parties to identify more effective means of achieving similar outcomes without publishing firm level data.

66. At present it is difficult to understand what percentage of matters that come to dispute resolution are 'genuine'. Our submission details a range of reasons why complaints may be brought against licensees which are more strategic or opportunistic in nature rather than legitimate complaints. Reporting involvement of licensees with IDR without differentiating material from non-genuine complaints has potential to impugn the reputation of licensees.

Proposal	Your Feedback
B8 We propose to set out new minimum requirements for the content of IDR responses: see draft updated RG 165 at RG 165.74–RG 165.77 in Attachment 1. When a financial firm rejects or partially rejects the complaint, the IDR response must clearly set out the reasons for the decision by: (a) identifying and addressing all the issues raised in the complaint; (b) setting out the financial firms' finding on material questions of fact and referring to the information that supports those findings; and (c) providing enough detail for the complainant to understand the basis of the decision and to be fully informed when deciding whether to escalate the matter to AFCA or another forum.	B8Q1Do you agree with our minimum content requirements for IDR responses? If not, why not?

FBAA Response

67. Yes we support these measures noting the licensees should still not be required to provide written responses to complaints that are resolved within 5 business days.

68. Coupled with that we would like to see further support for fee reductions or waivers at EDR where a firm's IDR response is as good as, or superior to, the final award made at EDR.

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Proposal	Your Feedback
B9 We do not propose to issue a legislative instrument specifically addressing written reasons for complaint decisions made by superannuation trustees.	B9Q1 Do you agree with our proposed approach not to issue a separate legislative instrument about the provision of written reasons for complaint decisions made by superannuation trustees? If not, please provide reasons.

FBAA Response

69. We have no position with respect to proposal B9.

Proposal	Your Feedback
B10 We propose to include the content of IDR responses as a core requirement for all financial firms, including superannuation trustees, in the legislative instrument making parts of RG 165 enforceable: see paragraph 22	B10Q1 - Do you consider there is a need for any additional minimum content requirements for IDR responses provided by superannuation trustees? If yes, please explain why you consider additional requirements are necessary.

FBAA Response

70. We have no position with respect to proposal B10.

Proposal	Your Feedback
B11 - We propose to: (a) reduce the maximum IDR timeframe for superannuation complaints and complaints about trustees providing traditional services from 90 days to 45 days; (b) reduce the maximum IDR timeframe for all other complaints (excluding credit complaints involving hardship notices and/or requests to postpone enforcement proceedings and default notices where the maximum timeframe is generally 21 days) from 45 days to 30 days; and (c) introduce a requirement that financial firms can issue IDR delay notifications in exceptional circumstances only.	B11Q1 Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide: (a) reasons and any proposals for alternative maximum IDR timeframes; and (b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line.

FBAA Response

71. We do not support reducing timeframes from 45 days to 30 days. In many cases delays are caused by, or contributed to, by the complainants. Complainants can be quite demanding setting very limited acceptable times to contact them and can also take considerable time to provide documents.

72. Shortening timeframes for IDR will likely see an increased number of matters being escalated to EDR before they can be adequately investigated and addressed by the licensee. This will increase congestion at EDR and cause licensees to incur registration fees with AFCA. Reducing the timeframe in our view is unfair and unnecessary.

73. IDR rules already recognise shortened timeframes for disputes arising over time sensitive issues such as hardship, default and enforcement action. We cannot foresee any consumer detriment

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likely to be caused by allowing licensees 45 days to investigate and respond to complaints that might otherwise be averted by reducing the timeframe to 30 days.

74. We support leaving timeframes as they are currently set.

Proposal	Your Feedback
B12 We propose to require customer advocates to comply with RG 165 (including meeting the maximum IDR timeframes and minimum content requirements for IDR responses) if they: (a) act as an escalation point for unresolved consumer complaints; or (b) have a formal role in making decisions on individual complaints.	B12Q1 Do you agree with our approach to the treatment of customer advocates under RG 165? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR. B12Q2 Please consider the customer advocate model set out in paragraph 100. Is this model likely to improve consumer outcomes? Please provide evidence to support your position.

FBAA Position

75. We agree that any involvement by in-house / licensee retained customer advocates should fall within the existing IDR timeframes.

76. We have no views on how individual licensees structure their IDR processes or the merits of using a customer advocate to review IDR decisions.

Proposal	Your Feedback
B13 We propose to introduce new requirements on financial firms regarding systemic issue identification, escalation and analysis: (a) Boards and financial firm owners must set clear accountabilities for complaints handling functions, including setting thresholds for and processes around identifying systemic issues that arise from consumer complaints. (b) Reports to the board and executive committees must include metrics and analysis of consumer complaints including about any systemic issues that arise out of those complaints. (c) Financial firms must identify possible systemic issues from complaints by: (i) requiring staff who record new complaints and/or manage complaints to consider whether each complaint involves potentially systemic issues; (ii) regularly analysing complaint data sets; and (iii) conducting root-cause analysis on recurring complaints and complaints that raise concerns about systemic issues. (d) Financial firm staff who handle complaints must promptly escalate possible systemic issues they identify to appropriate areas for action.	B13Q1 Do you consider that our proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate? If not, why not? Please provide reasons.

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(e) Financial firms must have processes and systems in place to ensure that systemic issue escalations are followed up and reported on internally in a timely manner. See draft updated RG 165 at RG 165.128–RG 165.133 at Attachment 1 to this paper.	

FBAA Response

77. FBAA supports guidance to encourage licensees to monitor for systemic issues. This support is provided on condition that that practices by EDR schemes of declaring isolated incidents as potentially systemic and then demanding licensees prove they are not, be reined in.

78. The guidance should remain broad. Anecdotally we believe EDR schemes began to ramp up their systemic issues work since around 2015. Some outcomes reported to us sound heavy-handed. EDR schemes have launched 'potential systemic issue' investigations off the back of singular events – prosecuting licensees to prove that a one-off event is not systemic (as opposed to having credible evidence that a particular issue may be systemic such as multiple complaints about the same issue) and then charging the licensee for the investigation regardless of whether the outcome is the identification of a systemic issue or not). Often the only way a licensee can try to prove something is not systemic is by being unable to find other occurrences of the conduct they are being accused of.

79. EDR Schemes have also labelled issues *systemic* where they have happened more than once but are more appropriately defined as occasional errors or simply things that happen in the course of doing business (for example a customer service officer occasionally failing to action a consumer's request to defer a payment or update their contact details). Yet other conduct has been defined as a systemic issue where it is a recurring practice of the business (thus it is systemic) but it is not non-compliant (thus it is not "an issue"). EDR schemes often stop short of identifying conduct that constitutes a specific contravention of a legal obligation yet label the conduct as a systemic issue. This results in licensees having to change practices and potentially offer remediation. Licensees have no right of appeal or review of EDR systemic investigations.

80. Systemic investigations are costly to licensees and generate significant revenue to the EDR scheme[4] therefore there is little to discourage the EDR scheme from alleging a systemic issue and everything rewarding them for doing so.

Proposal	Your Feedback
B14 We propose to update our guidance to reflect the requirements for effective complaint management in AS/NZS 10002:2014: see Section F of draft updated RG 165.	B14Q1 Do you agree with our approach to the application of AS/NZS 10002:2014 in draft updated RG 165? If not, why not? Please provide reasons.

[4] AFCA Complaint Fee Guide September 2018, p11.

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FBAA Response

81. Broadly the principles set out in Section F of the RG are reasonable, however some go a little too far.

82. RG165.147 (also repeated at RG165.87) states that licensees should ensure IDR information is made available to people "in a range of languages and formats". This is unrealistic for SMEs. Every customer by law must receive reams of written disclosure documentation that is produced in English for it to comply with the relevant legislation. Everything given to a customer up to the point where they may have a dispute will have been provided in English and it is reasonable to expect licensees operating in Australia to conduct their business in English.

83. Licensees are encouraged to assist consumers from a non-English speaking background to seek assistance with translation and language services however this should not be equated to a positive obligation to produce IDR communication in any language other than English.

84. ASIC should release its consultation papers in languages other than English if it wishes to receive feedback from those who choose to communicate in languages other than the official language of this country. Perhaps our legislation should also be multilingual. Naturally such proposals sound noble but are unreasonable - just as any suggestion the licensees must provide IDR information in anything other than English.

Proposal	Your Feedback
B15 We propose that financial firms must comply with the requirements set out in the draft updated RG 165 and supporting legislative instruments immediately on the publication of the updated RG 165, except for the requirements listed in Table 2.	B15Q1 Do the transition periods in Table 2 provide appropriate time for financial firms to prepare their internal processes, staff and systems for the IDR reforms? If not, why not? Please provide specific detail in your response, including your proposals for alternative implementation periods. B15Q2 Should any further transitional periods be provided for other requirements in draft updated RG 165? If yes, please provide reasons.

FBAA Response

85. The transition periods in the Table appear reasonable. We reiterate our expectation that not all of the items listed in the Table may be retained in this guidance (for example the shortened response timeframes) after submissions have been properly considered.

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Conclusions

86. The proposed revisions to RG165 are significant and many have the potential to materially impact licensees and significantly increase compliance costs. Parts of CP311 state that the approaches detailed in the revised RG165 are scalable and technology neutral, however most of the material recommendations are modelled around the operational capacity of large, well-resourced licensees that have high numbers of staff, customers and high volumes of transactions (hence more likelihood of complaints) and it is difficult to see how the language of scalability and technological neutrality can sit alongside the requirements around record keeping, submitting regular data to ASIC, proactively identifying complaints, communicating in multiple languages and reducing timeframes.

We ask that ASIC remains truly committed to supporting SMEs through providing open, principles-based guidance and ensures that it does not apply a black-letter law enforcement approach to SMEs. We are also mindful that EDR schemes historically struggle to differentiate between law and guidance and we can expect to see the final ASIC guidance in RG165 enforced as immutable obligations by AFCA.

End.

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