



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

9 August 2019

Jacqueline Rush
Senior Policy Adviser
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

via email: IDRSubmissions@asic.gov.au

Dear Ms Rush

ASIC Draft Regulatory Guide RG165: Internal dispute resolution

We consider the proposed revisions to the internal dispute resolution (IDR) regulatory guideline, RG165, are a significant step to improve access to justice in the financial sector for small businesses. In particular, aligning definitions and timeframes with the Australian Financial Complaints Authority's (AFCA) rules and guidelines will afford additional protections to small businesses.

However, we raise the following critical issues for consideration:

1. RG 165 should be able to be enforced in non-licensed financial firms (such as financial firms exclusively providing commercial credit);
2. The maximum value of a small business facility covered by IDR to be increased to \$5 000 000 in line with AFCA's rules (currently \$500 000 under Corporations Act);
3. Acknowledging the role of Customer Advocates (where applicable) to undertake an impartial review of an IDR decision and identify and actioning systemic issues;
4. The consistent implementation timeframes and reporting requirements; and
5. Enforcement, not just monitoring, of compliance to RG165 (in particular, tracking that systemic issues are identified and addressed).

We provide our detailed responses to the questions posed at Appendix A.

Following the release of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, it is imperative that ASIC effectively monitor compliance with RG165 and, where appropriate, take enforcement action against financial firms that do not meet the implementation timeframe, fail to follow the guidelines or are yet to join AFCA.

If you would like to discuss this matter further, please contact Stephen Bolton on 02 6121 3639 or at [REDACTED]

Yours sincerely

Kate Carnell AO
Australian Small Business and Family Enterprise Ombudsman

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Appendix A

<p>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:</p> <p>(a) how you currently deal with complaints made through social media channels; and</p> <p>(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.</p>	<p>Yes – within the limitations outlined at RG 165.36 and 165.37. ASBFEO acknowledges that there may be difficulty in distinguishing between often emotive negative feedback and actual dissatisfaction regarding products or services and requiring a remedy. It is important the moderation of frivolous and vexatious claims remains outside the IDR process.</p> <p>However, we do support financial firms identifying legitimate complaints raised through its social media platforms and that these are passed through to the IDR process for recording even if solved immediately (as required under RG 165.57)</p>
<p>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?</p>	<p>Yes – noting the additional guidance recommended below.</p>
<p>B2Q2 Is any additional guidance required about the definition of 'complaint'? If yes, please provide:</p> <p>(a) details of any issues that require clarification; and</p> <p>(b) any other examples of 'what is' or 'what is not' a complaint that should be included in draft updated RG 165.</p>	<p>Yes. We considered the revised definition should also acknowledge that complaints may stem from a financial firms processes/procedures.</p> <p>For example, definition enhanced to read:</p> <p><i>[An expression] of dissatisfaction made to or about an organisation, related to its products, services, staff, procedures or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p>

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<p>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.</p>	<p>Yes and also increase the value of facilities the IDR framework will apply to. We recommend that the facility value, for IDR purposes only, be \$5 000 000 to also be consistent with AFCA's limit.</p> <p>Currently the Corporations Regulations 2001 7.1.18 limits the definition of a <i>Retail Client</i> to financial products valued at less than \$500 000. As <i>Retail Client</i> encompasses small businesses, this limit is unreasonably low.</p>
<p>B4Q1 Do you agree that firms should record all complaints that they receive? If not, please provide reasons.</p>	<p>Yes. In the interests of transparency, it is essential that all complaints are recorded and accurate records kept of how the complaint was dealt with.</p> <p>This will also assist in identifying trends and systemic issues that may require policy or procedural changes to rectify.</p>
<p>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.</p>	<p>Yes. This will enable the financial firm, the customer, AFCA and ASIC to track complaints and ensure accuracy in communications between parties.</p>
<p>B5Q2 Do you consider that the data set proposed in the data dictionary is appropriate? In particular:</p>	<p>(a) Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers?</p> <p>Not applicable</p> <p>(b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?</p> <p>Yes.</p>

<p>B6Q1 Do you agree with our proposed requirements for IDR data reporting?</p>	<p>(a) Mandating reporting requirements through a legislative instrument will serve to encourage best practice IDR processes by financial firms. Are the proposed data variables set out in the draft IDR data dictionary appropriate?</p> <p>Yes but not complete. The data required to be recorded for, and recommendations to address, systemic issues must also be reported to ASIC.</p> <p>(b) Is the proposed maximum size of 25 MB for the CSV files adequate?</p> <p>Not applicable</p> <p>(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?</p> <p>As reporting periods are 6 monthly, no complaint should be left open over multiple reporting periods.</p> <p>We recommend that for complaints that cannot be resolved in the maximum timeframes for IDR, the matter is flagged with AFCA by the provision of a copy of the delay notification sent to the customer. On provision of a delay notice to AFCA, this should be treated in the same manner as a referral and prevent ongoing billing and cease any adverse action that the financial firm can take against the customer whilst the complaint is being investigated.</p> <p>On completion of the extended IDR process, if the complainant is not satisfied with the response and chooses to progress the matter with AFCA, any additional refer back period would be reduced by the time taken in IDR.</p>
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<p>B7Q1 What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?</p>	<p>The core principles underpinning reporting and publication of IDR data should be:</p> <ul style="list-style-type: none"> • Public confidence – ensure that consumers are confident that issues will be dealt with appropriately, effectively and in a timely manner. • Fairness – complaints are dealt with fairly, recognising the rights and responsibilities of the consumer and the financial firm in resolving disputes. • Transparency – information on complaints is presented in a way that provides clear assurances that due process was followed, timeframes were adhered to and complaints were progressed beyond IDR where a resolution could not be reached.
<p>B8Q1 Do you agree with our minimum content requirements for IDR responses? If not, why not?</p>	<p>Yes.</p>
<p>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.</p>	<p>Yes. We support consistency of process and reporting requirements.</p>
<p>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.</p>	<p>No.</p>
<p>B11Q1 Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide:</p> <p>(a) reasons and any proposals for alternative maximum IDR timeframes; and</p> <p>(b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line.</p>	<p>Yes. We strongly support shorter timeframes. Small businesses are regularly under considerable financial stress stemming from the dispute.</p> <p>Mandated maximum timeframes will mitigate attempts by financial firms to "starve out" a small business complainant by delaying finalisation of an internal dispute resolution process in the hope that the small business will exhaust its financial ability to pursue the complaint.</p>

<p>B11Q2 We consider that there is merit in moving towards a single IDR maximum timeframe for all complaints (other than the exceptions noted at B11(b) above). Is there any evidence for not setting a 30-day maximum IDR timeframe for all complaints now?</p>	<p>Yes. Providing that the maximum timeframe is not more than 30 days.</p> <p>The only exclusion to the 30 day timeframe should be for credit related complaints involving default notices as detailed in the revised RG165.</p>
<p>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.</p>	<p>No. We understand the role of the Customer Advocate as an alternate, or in tandem, escalation point for customers. Accordingly, a review by a Customer Advocate should not be considered part of the IDR process but as a next step. However, there should be an expectation that, in most cases, review timeframes for Customer Advocates should reflect the refer back periods allowed by AFCA. If a complainant then escalates the matter to AFCA, AFCA immediately commences an investigation with no refer back to the financial firm.</p>
<p>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</p>	<p>Yes. The Customer Advocate role should form a separate, independent review function from the financial firm's IDR processes. The Customer Advocate should work across the organisation to:</p> <ul style="list-style-type: none"> • Review individual IDR matters when escalated to them. Recent consultations with the advocates in place indicate that the majority of reviews – approximately 66% - have resulted in an enhanced or overturned IDR outcome to the customers benefit; • Should ensure that key principles of natural justice (timeliness, transparency, fairness and right of reply) are adhered to; • Identify and address systemic issues made evident through IDR; • Promote best practice in complaints handling across business units within the organisation; • Moderate IDR responses to ensure consistency in approaches to dispute resolution.

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.	No. The framework only requires internal monitoring and reporting. ASIC must have oversight that systemic issues identified are actioned promptly and appropriately. Where remediation is required, it is done so comprehensively and expeditiously.
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.	Yes. Whilst the application of AS/NZS 10002:2014 is not necessary with strong regulatory requirements for IDR processes, the application of the Standards Australia <i>Guidelines for complaint management in organisation</i> does give an additional level of assurance to consumers regarding the efficacy of IDR processes employed by financial firms.
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.	No. The full 12 months for the first 6 monthly report is not required. To ensure consistent application of the new guidelines, a single date for full implementation should be determined for all requirements under the revised RG165. This should include reporting requirements commencing from that date.
B15Q2 Should any further transitional periods be provided for other requirements in draft updated RG 165? If yes, please provide reasons.	No. Past experience as highlighted by the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, indicates that the industry has historically delayed change as long as possible and only respond when required (i.e. regulated) to do so.

Additional Comments

Enforceability of RG165 on non-licensed financial firms (including Fintech lenders and business only providers).	<p>We regularly receive requests for assistance concerning issues and complaints with lenders who do not require an Australian Financial Services licence to operate. As these firms predominantly operate in the business only wholesale lending market, they claim that they are not required to have an IDR or EDR process and are therefore not members of AFCA. The result being there is no recourse for a customer beyond any resolution determined through negotiations with the financial firm. These complaints often stem from small businesses accessing finance from niche providers such as fintech lenders and small business equipment financiers and advice from commercial brokers that do not hold, and are not required to hold, an Australian Financial Services licence.</p> <p>There is an immediate need to ensure that small businesses, who are often unable to access affordable finance through ADI financial institutions, are afforded the same protections as other consumers when they obtain finance through non-AFS licensed financial firms. Consistency in definitions of small business with AFCA and redefining monetary limits for what constitutes a retail customer in the Corporations Regulations 2001 7.1.18 to \$5,000,000 as the maximum value (for IDR purposes) will provide small businesses with confidence that complaints will be handled fairly and in accordance with the regulatory guidelines.</p>
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