



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 139

# Approval and oversight of external dispute resolution schemes

April 2011

### **About this guide**

This guide explains how external dispute resolution (EDR) schemes can obtain initial approval from ASIC to operate in the Australian financial system and/or Australian credit system and, once approved, their ongoing requirements to maintain approval.

This guide should be read in conjunction with Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This version was issued on 20 April 2011 and is based on legislation and regulations as at 20 April 2011.

Previous versions:

- Superseded Regulatory Guide 139, issued 18 May 2009, reissued 7 May 2010, 6 July 2010 and 16 February 2011
- Superseded Policy Statement 139, issued 8 July 1999 and rebadged as a regulatory guide on 5 July 2007

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act, credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration, they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview: ASIC oversight of EDR schemes

### Key points

Under the Corporations Act, Australian financial services (AFS) licensees, unlicensed product issuers and unlicensed secondary sellers are required to have a dispute resolution system that consists of:

- internal dispute resolution (IDR) processes that meet standards or requirements made or approved by ASIC; and
- membership of one or more ASIC-approved external dispute resolution (EDR) schemes.

Persons registered to engage in credit activities are required to be members of an ASIC-approved EDR scheme.

Under the National Credit Act, credit licensees are required to have a dispute resolution system that consists of:

- IDR processes that meet the standards and requirements made or approved by ASIC and that cover disputes relating to the credit activities they and their credit representatives engage in; and
- membership of one or more ASIC-approved EDR schemes.

From 1 July 2010, credit representatives of registered persons and of credit licensees are also required to be separate members of an ASIC-approved EDR scheme in order to be credit representatives.

Under the Corporations Regulations and National Credit Regulations, ASIC has the power to approve an EDR scheme and vary or revoke that scheme's approval. This regulatory guide outlines the process for applying for approval and the matters that ASIC will take into account when considering whether to:

- approve a scheme; and
- vary or revoke a scheme's approval.

## Dispute resolution in the Australian financial system

### Dispute resolution under the Corporations Act

RG 139.1 Under s912A(2) and 1017G(2) of the *Corporations Act 2001* (Corporations Act), AFS licensees, unlicensed product issuers and unlicensed secondary sellers must have a dispute resolution system that consists of:

- (a) IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover complaints made by retail clients in relation to the financial services provided; and

- (b) membership of one or more ASIC-approved EDR schemes that covers—or together cover—complaints made by retail clients in relation to the financial services provided (other than complaints that may be dealt with by the Superannuation Complaints Tribunal (SCT)).

Note: See Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) for further guidance on the requirement to have a compliant dispute resolution system.

RG 139.2 Margin lenders and those who give advice on margin lending financial services must also have an AFS licence and a dispute resolution system available for their retail clients.

RG 139.3 Trustee companies providing traditional trustee company services (traditional services) must:

- (a) hold an AFS licence that covers the provision of traditional services; or
- (b) if operating under the transitional arrangements for companies that did not hold an AFS licence on 6 May 2010, apply to us for an AFS licence.

Note: Trustee companies will be providing traditional services if they are a trustee company listed in the Corporations Regulations 2001 (Corporations Regulations) and they perform a range of services, including preparing wills, trust instruments, powers of attorney or agency arrangements, perform estate management functions (including as agent, attorney, executor, administrator or nominee) or operate a common fund: see s601RAC of the Corporations Act.

RG 139.4 From 1 January 2012, all trustee companies providing traditional services must have a dispute resolution system available for their retail clients.

Note: See Class Order [CO 11/261] *Trustee companies providing traditional trustee company services—deferral of start date for dispute resolution requirements*.

RG 139.5 Some complaints relating to traditional services provided to individuals who cannot make their own decisions about financial matters because of mental incapacity will continue to be addressed under existing state and territory guardianship law complaint mechanisms (i.e. state or territory courts, tribunals and guardianship boards).

Note: See reg 7.6.02(6) and Sch 8AC of the Corporations Regulations, and item 4 of the Explanatory Statement to the Corporations Regulations (No. 3) (Amendment Regulations).

RG 139.6 The SCT is a statutory tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*. It operates differently to ASIC-approved EDR schemes in that:

- (a) the SCT is not subject to ASIC's approval and this regulatory guide does not apply to it; and
- (b) the SCT only deals with complaints against trustees and certain insurers by virtue of the relevant provisions under the *Superannuation (Resolution of Complaints) Act 1993*.

Note: An AFS licensee, unlicensed product issuer or unlicensed secondary seller must be a member of an ASIC-approved EDR scheme to be able to refer a complaint to that scheme.

- RG 139.7 AFS licensees, unlicensed product issuers and unlicensed secondary sellers must notify consumers and investors of their right to complain to an EDR scheme when a complaint is addressed at IDR. This includes notifying of the right to complain to EDR when:
- (a) a final response at IDR is given within 45 days (or 90 days for traditional services complaints); or
  - (b) a final response at IDR cannot be provided within 45 days (or 90 days for traditional services complaints) of the receipt of the complaint.

Note: See RG 165.98–RG 165.113 for further information on this requirement.

## Dispute resolution under the National Credit Act and Transitional Act

### Registered persons, credit licensees and credit representatives

- RG 139.8 Under item 16 of Sch 2 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act), registered persons have an ongoing obligation to be a member of an ASIC-approved EDR scheme.
- RG 139.9 Under s47 of the *National Consumer Credit Protection Act 2009* (National Credit Act), credit licensees must have a dispute resolution system that consists of:
- (a) IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover disputes in relation to the credit activities engaged in by them or their credit representatives; and
  - (b) membership of one or more ASIC-approved EDR schemes.
- Note: RG 165 provides that ‘dispute’ for the purposes of the National Credit Act, Transitional Act and National Consumer Credit Protection Regulations 2010 (National Credit Regulations) has the same meaning as ‘complaint’ in the Corporations Act and Corporations Regulations.
- RG 139.10 A credit representative, who is authorised by a registered person or credit licensee, must also separately be a member of an ASIC-approved EDR scheme: s64 and 65, National Credit Act (as modified by reg 16, National Credit Regulations). However, credit representatives do not need to have separate 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.

- RG 139.11 Credit licensees and credit representatives must notify consumers, borrowers and guarantors of their right to complain to an EDR scheme when a dispute is addressed at IDR. This includes notifying of the right to complain to EDR:
- (a) when a final response at IDR is given within 45 days (or within 21 days for disputes involving default notices);
  - (b) when a final response at IDR cannot be provided within 45 days of the receipt of the dispute (or for disputes involving default notices, where a final response at IDR cannot be provided within 21 days of the receipt of the dispute); or
  - (c) where the dispute involves an application for hardship variation or request for postponement of enforcement proceedings under the National Credit Code:
    - (i) when the disputant is advised within the 21 days under the National Credit Code whether their application for hardship variation or request for postponement of enforcement proceedings has been agreed to; or
    - (ii) if agreement is reached (within the 21 days), when the disputant is notified of the grounds of hardship variation or conditions of postponement within the further 30 days under the National Credit Code to agree to and confirm in writing the grounds of variation or the conditions of postponement (i.e. a maximum 51 consecutive days).

Note: See RG 165.114–RG 165.130 for further information on these requirements.

- RG 139.12 If you are a registered person or credit licensee who acts on behalf of a securitisation body, additional obligations may apply to you under the Transitional Act and National Credit Act: see RG 139.17–RG 139.22.

### **Unlicensed COI lenders**

- RG 139.13 The National Credit Act applies differently to those who ceased to offer new credit contracts or consumer leases before 1 July 2010, but who continued to be a credit provider or lessor in relation to credit contracts or consumer leases entered into before 1 July 2010. Persons in this category are carried over instrument lenders (COI lenders) and specific rules apply.

Note: A 'carried over instrument' is a contract or other instrument that was made and in force, and to which an old Credit Code applied, immediately before 1 July 2010: see s4(1), Transitional Act.

- RG 139.14 COI lenders may either elect to:
- (a) register with us and apply for a credit licence and be regulated as a credit licensee; or

- (b) not be licensed under the National Credit Act and instead be regulated as an unlicensed COI lender, in which case a modified statutory regime applies.

Note: The modified statutory regime, as set out in Ch 2 of the National Credit Act (as modified by Sch 2 of the National Credit Regulations), applies to unlicensed COI lenders from 1 July 2010. Schedule 2 of the National Credit Regulations was inserted by item 32 of Sch 1 of the National Consumer Credit Protection Amendment Regulations 2010 (No. 2).

RG 139.15 From 1 July 2010, unlicensed COI lenders:

- (a) must have IDR procedures that comply with the standards and requirements made or approved by ASIC and that cover disputes in relation to the credit activities they engage in with respect to their carried over instruments; and
- (b) may choose to join an ASIC-approved EDR scheme.

Note: Unless otherwise mentioned, references to unlicensed COI lenders also include reference to prescribed unlicensed COI lenders.

RG 139.16 Unlicensed COI lenders who choose not to join an EDR scheme must keep a register of each of the following:

- (a) disputes relating to their carried over instruments;
- (b) applications for hardship variations made under s72 of the National Credit Code; and
- (c) requests for postponement of enforcement proceedings under s94 of the National Credit Code.

Note: See Sch 2 of the National Credit Regulations, as inserted by item 32 of Sch 1 of the National Consumer Credit Protection Amendment Regulations 2010 (No. 2), for the detailed information the registers must include.

### **Registered persons, credit licensees and securitisation bodies**

RG 139.17 If you make (or buy) loans or leases and repackage them as investment products to sell to investors, you are a securitisation body and a modified regulatory regime applies to you under the Transitional Act and National Credit Act.

Note: See s10(1)(a), National Credit Act and Regulatory Guide 203 *Do I need a credit licence?* (RG 203) at RG 203.39–RG 203.40.

RG 139.18 Securitisation bodies may elect to be:

- (a) registered with us and apply for a credit licence and be regulated as a credit licensee; or
- (b) exempt from having to be licensed, and instead be regulated as an unlicensed special purpose funding entity (credit) if the conditions in RG 139.19 are satisfied.

Note: The modified statutory regime, as set out in regs 14B and 14C of the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010 (Transitional Regulations), regs 23B and 23C of the National Credit Regulations, and the National Credit Act (as modified by reg 25G and Sch 3 of the National Credit Regulations) applies to securitisation bodies who chose not to be registered and licensed.

- RG 139.19 The exemption at RG 139.18(b) only applies as long as:
- (a) the securitisation body enters into a servicing agreement with a registered person or credit licensee who acts on their behalf (the credit licensee); and
  - (b) the securitisation body is a member of an EDR scheme from 1 April 2011.

Note: See regs 14B and 14C of the Transitional Regulations, regs 23B and 23C of the National Credit Regulations and Class Order [CO 10/907] *Exempted special purpose funding entities—deferral of start date for EDR scheme membership*.

- RG 139.20 A process for how disputes at EDR should be handled between the credit licensee and the securitisation body (if members of different schemes) is set out at RG 139.206–RG 139.210.

- RG 139.21 Registered persons and credit licensees who act on behalf of a securitisation body must notify us:
- (a) when they enter into a servicing agreement (including the details of the securitisation body they act for and the name of the EDR scheme the securitisation body belongs to); and
  - (b) when they cease to be a party to the servicing agreement.

Note: See s45(7), National Credit Act, reg 9A, National Credit Regulations and Form CL13 *Notice in relation to special purpose funding entity*.

- RG 139.22 The IDR procedures of a licensee must cover the activities of the securitisation body: see RG 165.29.

## Initial and ongoing approval of EDR schemes

- RG 139.23 Under the Corporations Regulations and National Credit Regulations, we have the power to approve an EDR scheme:
- (a) for a specified period of time; and
  - (b) subject to conditions, including conditions in relation to the independent review of the operation of the scheme: see regs 7.6.02(4) and 7.9.77(4), Corporations Regulations and regs 10(4)(a) and 10(4)(b), National Credit Regulations.

RG 139.24 Under the regulations, we also have the power to vary or revoke approval of an EDR scheme: see regs 7.6.02(4) and 7.9.77(4), Corporations Regulations and reg 10(4)(c), National Credit Regulations.

RG 139.25 The Corporations Regulations and National Credit Regulations state that we must take the following into account when considering whether to approve an EDR scheme:

- (a) accessibility;
- (b) independence;
- (c) fairness;
- (d) accountability;
- (e) efficiency;
- (f) effectiveness; and
- (g) any other matter we consider relevant.

Note: See regs 7.6.02(3) and 7.9.77(3), Corporations Regulations and reg 10(3), National Credit Regulations.

RG 139.26 The considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness are based on the principles in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes (DIST Benchmarks), published by the then Department of Industry, Science and Tourism in 1997. See the Appendix for further information on the DIST Benchmarks.

RG 139.27 Currently, there are no ‘other matters’ we consider relevant when considering whether to approve an EDR scheme. However, we reserve the discretion to introduce additional guidelines for assessing a scheme for approval—for example, where the features of a product from a particular industry make additional considerations relevant. We will consult with stakeholders about the introduction or reliance on any additional guidelines not currently contained in the Corporations Regulations or the National Credit Regulations.

RG 139.28 This regulatory guide also explains the ongoing requirements of an EDR scheme to maintain our approval.

RG 139.29 We will review the approval guidelines contained within this regulatory guide in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.

RG 139.30 We will update this regulatory guide to reflect any further changes to the National Credit Act or National Credit Regulations that may be required as part of Phase 2 of the national consumer credit reforms, and remove obsolete requirements and references.

## ASIC's role

- RG 139.31 The objectives of Ch 7 of the Corporations Act are to promote:
- (a) the confident and informed participation of consumers and investors in the Australian financial system (also an objective of ASIC under s1 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act));
  - (b) fairness, honesty and professionalism by those who provide financial services;
  - (c) fair, orderly and transparent markets; and
  - (d) the reduction of systemic risks.

Note: See s760A, Corporations Act.

- RG 139.32 One of the reasons the Australian Government decided to extend the dispute resolution framework to cover credit and margin lending financial services was to ensure access to timely, independent and cost-effective dispute resolution when things go wrong for consumers of these types of products and services.

Note: See Press Release No. 051 of the Minister for Superannuation and Corporate Law, the Hon Nick Sherry, *Details of major overhaul of margin lending announced* (7 May 2009); and Explanatory Memorandum to the National Consumer Credit Protection Bill 2009, page 5.

- RG 139.33 Within this framework, we are responsible for overseeing the effective operation of EDR schemes, and approving these schemes as required.
- RG 139.34 We consider that our responsibility derives from a number of sources, including our licensing of industry participants and our powers to approve industry codes of practice.
- RG 139.35 We believe that industry-supported EDR schemes play a vital role in the broader financial services and credit regulatory systems. These schemes 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 of conduct and to improve relations between industry participants and consumers.
- RG 139.36 As a result of continuing law reforms, an increasing number of industry participants will be, or are likely to be, required to join an ASIC-approved EDR scheme as a condition of carrying on their business.
- RG 139.37 In light of this, we wish to ensure that complaints and disputes handling procedures treat consumers and investors fairly and consistently across the different industry sectors of the Australian financial services and credit system. We therefore consider it necessary to approve schemes with

reference to a common set of approval guidelines. The approval guidelines contained within this regulatory guide are intended to:

- (a) give guidance about the characteristics a scheme that applies for approval should have; and
- (b) promote minimum standards across EDR schemes to achieve parity of schemes and equal treatment of complaints.

RG 139.38 The application of these guidelines will nevertheless recognise legitimate differences between industries or between schemes. We believe that a consistent approach to regulation does not necessarily imply identical standards in all cases.

RG 139.39 We acknowledge and support the schemes' core business of resolving consumer complaints or disputes, and intend this regulatory guide to contribute to the strength of the complaints resolution sector.

## How we will liaise with schemes and other stakeholders

RG 139.40 We will liaise with each of the EDR schemes operating in the financial and credit sectors on an ongoing basis. This will take place through a number of formal and informal channels.

## Applying for initial approval

RG 139.41 If you wish to apply to become an ASIC-approved EDR scheme, the steps you can take include:

- (a) assessing whether you satisfy the requirements set out in this regulatory guide at Section B; and
- (b) submitting an application for approval in the form required by Section C.

## Ensuring ongoing approval

RG 139.42 If you are already an ASIC-approved EDR scheme, you must continue to satisfy the requirements set out in your approval letter and this regulatory guide: see Section C for information on the approval letter.

## B Guidelines for initial and ongoing approval

### Key points

We must take the following into account when considering whether to approve an EDR scheme under the Corporations Act or National Credit Act:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency;
- effectiveness; and
- any other matter we consider relevant.

### Interpreting these guidelines

RG 139.43 We have structured our requirements in this regulatory guide according to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. As one principle may overlap with another, a requirement for approval may relate to more than just one principle. For example, the requirement of ‘scheme decision-making’, discussed under the principle of ‘fairness’, may also relate to ‘effectiveness’ and ‘efficiency’.

RG 139.44 Table 1 summarises the principles and the requirements discussed in this regulatory guide, and highlights whether a particular requirement or aspect of a requirement applies to EDR schemes approved under the Corporations Act or National Credit Act, or is a new requirement for traditional services.

**Table 1: The principles and requirements in this guide**

Principle	Requirements	Reference in this regulatory guide	New requirement for traditional services	Who the requirement applies to
Accessibility	Cost to the complainant and disputant	RG 139.52–RG 139.57	–	EDR schemes approved under the Corporations Act and National Credit Act
	Promotion of the scheme	RG 139.58–RG 139.63	–	
	Scheme communication	RG 139.64–RG 139.68	–	
	Referral of complaints or disputes by members to EDR	RG 139.69–RG 139.71	–	

Principle	Requirements	Reference in this regulatory guide	New requirement for traditional services	Who the requirement applies to	
	Legal proceedings and EDR	RG 139.72–RG 139.79 RG 139.80–RG 139.81	– Yes		
	Types of complainants or disputants who can access the scheme	RG 139.82–RG 139.89	Yes		
Independence	Independence from industry	RG 139.91–RG 139.94	–	EDR schemes approved under the Corporations Act and National Credit Act	
	The overseeing body	RG 139.95–RG 139.101	–		
	Resources available to the scheme	RG 139.102–RG 139.103	–		
	Scheme members' powers of veto	RG 139.104–RG 139.106	–		
	Changes to the Terms of Reference	RG 139.107–RG 139.111	–		
Fairness	Scheme decision-making	RG 139.113–RG 139.117	–	EDR schemes approved under the Corporations Act and National Credit Act	
Accountability	Reporting to ASIC: Systemic issues and serious misconduct	RG 139.119–RG 139.142	–	EDR schemes approved under the Corporations Act and National Credit Act	
	General reporting guidelines	RG 139.143–RG 139.148	–		
	Complaints and disputes information	RG 139.149–RG 139.157	Yes		
	Independent reviews	RG 139.158–RG 139.163	–		
Efficiency and effectiveness	Coverage of the scheme	RG 139.165–RG 139.200	Yes	EDR schemes approved under the Corporations Act and National Credit Act	
	Reducing consumer confusion about where to complain:				
	• Multi-licensee complaints or disputes	RG 139.201–RG 139.203	–		EDR schemes approved under the Corporations Act and National Credit Act
	• Disputes involving credit representatives	RG 139.204–RG 139.205	–		EDR schemes approved under National Credit Act only
• Disputes involving registered persons or credit licensees and securitisation bodies	RG 139.206–RG 139.210	–	EDR schemes approved under National Credit Act only		

Principle	Requirements	Reference in this regulatory guide	New requirement for traditional services	Who the requirement applies to
	Where a scheme member ceases to carry on business	RG 139.211–RG 139.215	–	EDR schemes approved under the Corporations Act and National Credit Act
	Time limits for bringing complaints or disputes to EDR	RG 139.216–RG 139.219	–	EDR schemes approved under the Corporations Act and National Credit Act
	Compliance with scheme decisions	RG 139.220–RG 139.225	–	EDR schemes approved under the Corporations Act and National Credit Act
	Available remedies	RG 139.226–RG 139.230	–	EDR schemes approved under the Corporations Act and National Credit Act
	Working collaboratively with the ACCC and state and territory Offices of Fair Trading	RG 139.231–RG 139.232	–	EDR schemes approved under National Credit Act only
	IDR timeframes	RG 139.233–RG 139.237	–	EDR schemes approved under the Corporations Act and National Credit Act
	Publishing scheme members' contact details for hardship applications	RG 139.238–RG 139.240	–	EDR schemes approved under National Credit Act only

RG 139.45 In adopting the definition of ‘complaint’ in Australian Standard AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* in RG 165, we clarify that for credit licensees and unlicensed COI lenders, where the National Credit Act and National Credit Regulations refer to a ‘dispute’, we consider this to have the same meaning as ‘complaint’ under the Corporations Act and Corporations Regulations.

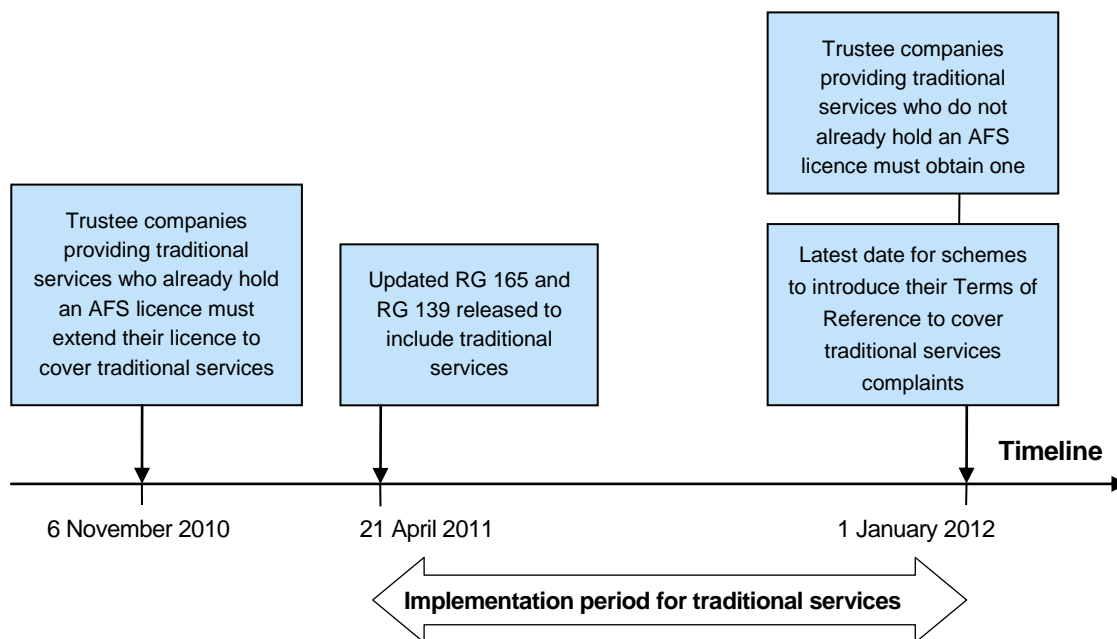
RG 139.46 Given the current difference in terminology, throughout this regulatory guide we generally refer to a ‘complaint’ and ‘complainant’ where our EDR requirements apply to a scheme approved under the Corporations Act and ‘dispute’ and ‘disputant’ where our EDR requirements apply to a scheme approved under the National Credit Act.

RG 139.47 Where an EDR scheme is approved under both the Corporations Act and National Credit Act, it will be required to handle both ‘complaints’ and ‘disputes’.

## Timeline for adopting the requirements for traditional services

RG 139.48 Figure 1 summarises the timeline for EDR schemes to adopt the new requirements referred to within this regulatory guide for traditional services.

**Figure 1: Timeline for schemes to adopt the requirements for traditional services**



### Transitional arrangements

RG 139.49 We anticipate that EDR schemes already approved under the Corporations Act that intend to handle traditional services complaints will need to either update their Constitutions and/or Terms of Reference (or introduce a new Terms of Reference) for traditional services complaints, in consultation with scheme members, consumer representatives and ASIC.

RG 139.50 Schemes must do this by no later than 1 January 2012. Where possible, we encourage schemes to do this earlier.

### Accessibility

RG 139.51 Requirements that relate to the principle of accessibility include that a scheme must:

- (a) promote equitable access by providing its services free of charge;
- (b) actively promote itself so consumers and investors become aware of the existence of the scheme, thereby improving accessibility of the scheme;

- (c) develop a communications strategy to improve consumer and investor knowledge of the EDR process and the role of the scheme;
- (d) be capable of accepting complaints from a financial service provider, or disputes from a credit provider or credit service provider where there is an intractable complaint or dispute;
- (e) specify in its Terms of Reference how legal proceedings can be brought where a complaint or dispute has been lodged with an EDR scheme; and
- (f) in its Terms of Reference, set out the types of complainants or disputants who can access the scheme.

### **Cost to the complainant or disputant**

- RG 139.52 To promote equitable access, a scheme must provide its EDR procedures free of charge to any complainant or disputant whose complaint or dispute falls within the scheme's jurisdiction.
- RG 139.53 We consider it a fundamental principle that consumers and investors of financial and credit products and services have free access to the complaint or dispute handling procedures offered by a scheme.
- RG 139.54 We understand, however, that charging may be appropriate in some limited cases or special circumstances—for example, where the scheme seeks to extend its jurisdiction to provide its services for a complaint or dispute that is clearly outside the scheme's jurisdiction (e.g. beyond the consideration of 'consumer' or appropriate 'small business' complaints or disputes).
- Note: See RG 139.82–RG 139.89 for a further discussion of the types of complainants or disputants who can access the scheme.
- RG 139.55 Charging for access to a scheme's complaints or disputes handling procedures will be inappropriate if it is applied as a barrier to entry, or otherwise intended as an unreasonable disincentive to the complainant or disputant.
- RG 139.56 If a scheme does introduce a limited charging policy, then it must collect and record information about:
- (a) the number of complainants or disputants who lodge a complaint or dispute with the scheme who are unwilling to proceed when notified of the charge;
  - (b) the number of complainants or disputants that request a waiver of the charge;
  - (c) the terms and application of any waiver policy; and
  - (d) some assessment of the level of charges as against the cost incurred by the scheme in processing relevant complaints or disputes.

RG 139.57 A scheme must consult publicly with industry and consumer organisations, and with us, about any proposal to introduce charges before the proposal is implemented.

### Promotion of the scheme

RG 139.58 The effective promotion of a scheme through a wide range of channels, including the media, is an integral part of making sure that an EDR scheme is widely accessible.

RG 139.59 A scheme should be conscious, when preparing its promotions strategy, that there may be some classes of complainants or disputants who, for geographic, economic or other reasons, are not accessing the scheme in proportion to their use of financial or credit products and services. The scheme should actively promote its existence, particularly to those complainants or disputants that are under-represented in the breakdown of people who access the scheme: see RG 139.149–RG 139.157.

RG 139.60 A scheme must publish and promote details about its complaints resolution procedures, including:

- (a) how a complaint or dispute can be lodged with the scheme;
- (b) the assistance available to complainants or disputants; and
- (c) the timeframes imposed under the procedures.

RG 139.61 Scheme members must advise consumers and investors of their right to:

- (a) take their complaint or dispute to an EDR scheme when they provide a final response at IDR within 45 days (or 21 days for disputes involving default notices or 90 days for traditional services complaints);
- (b) take their complaint or dispute to an EDR scheme if they are not able to provide a final response to a complaint or dispute at IDR within 45 days (or 21 days for disputes involving default notices or 90 days for traditional services complaints); or
- (c) take their dispute directly to an EDR scheme where the dispute involves an application for hardship variation or request for postponement of enforcement proceedings and the relevant 21 days or further 30 days under the National Credit Code have passed (for scheme members of an EDR scheme approved under the National Credit Act).

Note: See RG 165.98–RG 165.130 for further information on these requirements.

RG 139.62 We believe that this will improve scheme accessibility as more complainants and disputants become aware of the right to complain to EDR and the relevant EDR scheme with which to lodge their complaint or dispute.

RG 139.63 There are also some regulatory requirements that scheme members must comply with to promote the availability of EDR schemes. For example, AFS

licensees who provide a Financial Services Guide to their retail clients must include details of their scheme membership in that document: see s942B(2)(h), Corporations Act. Similar disclosure requirements also apply to Credit Guides given to consumers by credit licensees and credit representatives: see s113(2)(h), 126(2)(e), 127(2)(e), 136(2)(h), 149(2)(e), 150(2)(e) and 158(2)(h), National Credit Act.

### **Scheme communication**

- RG 139.64 In addition to effectively promoting the scheme, schemes should develop communications strategies to improve their communication with complainants or disputants about their processes, decisions and role so that consumer and investor expectations are realistic. These strategies should be reviewed periodically.
- RG 139.65 Our experience indicates that not all consumers and investors who access EDR schemes understand the EDR process or the role of the scheme.
- RG 139.66 When developing communications strategies, schemes should have regard to plain language principles, ensuring that information is easy to access, user-friendly, practically relevant and disseminated at key stages of the complaint or dispute resolution process.
- RG 139.67 It may also be appropriate to ensure that scheme communications are made available in different languages, in Braille or large font, and in audio format, depending on the demographics and special needs of complainants or disputants.
- RG 139.68 We reserve our discretion to request further information about a scheme's communications strategies and to review whether those strategies and our guideline are working effectively. We will consult with EDR schemes, industry and consumer stakeholders before amending this guideline.

### **Referral of complaints or disputes by members to EDR**

- RG 139.69 One benefit for members of belonging to an EDR scheme is that it provides an independent alternative to the courts for dispute resolution. Where a scheme member has provided a final response to a complainant or disputant at IDR (see RG 165) and the complaint or dispute has not been able to be resolved by IDR, nor by EDR because the complainant or disputant has not progressed their complaint or dispute to an EDR scheme, the Terms of Reference must allow scheme members to refer complaints or disputes to an EDR scheme for resolution.
- RG 139.70 We recognise that a direct referral of a complaint or dispute to an EDR scheme by a member will only be possible if the consumer or investor consents to the financial service provider, registered person, credit provider

or credit service provider forwarding the complaint or dispute, including the complainant's personal information, to the scheme.

- RG 139.71 We consider that for disputes involving applications for hardship variations or requests for postponement of enforcement proceedings, there may be an increased need for members to directly refer disputes to the schemes, if the disputant has not already progressed their dispute to EDR, because interest and other default charges may continue to accrue.

### **Legal proceedings and EDR**

- RG 139.72 The Terms of Reference of an EDR scheme must require that legal proceedings by scheme members should not be commenced where a complaint or dispute has been lodged with the scheme unless:
- (a) the legal limitations period is about to expire; or
  - (b) there is a test case situation.
- RG 139.73 By test case situation, we mean complaints or disputes involving a novel point of law or circumstance requiring clarification.
- RG 139.74 Commencing legal proceedings in relation to a complaint or dispute lodged at EDR creates the potential for scheme members to undermine the EDR process. There is also the possibility that the same complaint or dispute will be dealt with in two competing forums, wasting time and resources.
- RG 139.75 However, we recognise the importance of allowing scheme members to preserve their legal rights where the legal limitations period is about to expire, and in test case situations.
- RG 139.76 The Terms of Reference should provide that, where a scheme member commences legal proceedings in a test case situation, the scheme member should pay the complainant's or disputant's legal costs.
- RG 139.77 Where legal proceedings that relate to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the Terms of Reference must require the member not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.
- RG 139.78 Such complaints or disputes should be accepted by the scheme at least up until the point where the complainant or disputant has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from the scheme's jurisdiction under the Terms of Reference.
- RG 139.79 For the avoidance of doubt, the complainant or disputant will not be considered to have taken a 'step' if they attend a directions hearing or agree

to consent orders of a procedural nature only being filed in those legal proceedings.

- RG 139.80 Where a person has commenced legal proceedings to be included as a beneficiary under an estate, an EDR scheme that handles traditional services complaints must put on hold all related traditional services complaints that may depend on the outcome of the legal proceedings until the court hands down its decision. We expect the scheme's Constitution or Terms of Reference to reflect this.
- RG 139.81 The scheme should also have in place processes by which its trustee company members can notify the scheme as soon as they become aware that a person has commenced legal proceedings to be included as a beneficiary.

### **Types of complainants or disputants who can access the scheme**

- RG 139.82 The Terms of Reference of an ASIC-approved EDR scheme must set out what types of complainants or disputants can access its complaints handling procedures.
- RG 139.83 A scheme must, as a minimum, under the Corporations Act, be able to deal with complaints from 'retail clients', as defined in s761G and related regulations.
- RG 139.84 The definition of retail client varies depending on whether the relevant financial product is a general insurance product, a superannuation product, a retirement savings account product (within the meaning of the *Retirement Savings Accounts Act 1997*), or any other type of financial product.
- RG 139.85 A small business may be a retail client. A 'small business' is defined in s761G as a business employing fewer than:
- (a) 100 people (if the business manufactures goods or includes the manufacture of goods); or
  - (b) 20 people (otherwise).
- RG 139.86 A person who has been *directly* provided the traditional services and others such as beneficiaries (i.e. persons who may request an 'information return') are also considered to be retail clients for traditional services complaints: see s601RAV of the Corporations Act and regs 7.1.28A and 5D.2.01 of the Corporations Regulations.

Note: An 'information return' must include certain information about the trust, including information about income earned on the trust's assets, expenses and the net value of the trust's assets: see s601RAC(1)(e) of the Corporations Act and regs 5D.2.01, 5D.2.02 and 7.1.28A of the Corporations Regulations.

- RG 139.87 For the purposes of the National Credit Act, a scheme must, as a minimum, be able to handle disputes from persons who have been provided with credit or credit services, and guarantors under the National Credit Act.
- RG 139.88 Each EDR scheme must make sure that its Terms of Reference enables retail clients (including small businesses that are retail clients) and/or persons who have been provided with credit or credit services and guarantors under the National Credit Act to access the scheme.
- RG 139.89 Where appropriate, we encourage EDR schemes to accept complaints or disputes from a broader range of complainants or disputants than set out in the retail client definition or those who are provided with credit or credit services and guarantors under the National Credit Act.

## Independence

- RG 139.90 Requirements that relate to the principle of independence include that a scheme must:
- (a) have an overseeing body that meets certain requirements and ensures that the scheme has sufficient resources to carry out its functions;
  - (b) not allow members a power of veto where changing the Constitution or Terms of Reference of a scheme is involved; and
  - (c) consult with relevant stakeholders about the development of its Terms of Reference and any proposed amendments before their implementation.

### Independence from industry

- RG 139.91 A scheme must be independent of the industry or industries that provide its funding and constitute its membership. In practice, this means that the decision-maker(s) and/or the staff of the scheme are:
- (a) entirely responsible for the handling and determination of complaints or disputes;
  - (b) accountable only to the scheme's overseeing body; and
  - (c) adequately resourced to carry out their respective functions.
- RG 139.92 The principle of independence means that a scheme must be a legal entity in its own right—that is, it should be an incorporated entity.
- RG 139.93 If a scheme is not separately incorporated, there may be a perception that it is not independent of the industry members with which it is affiliated. This perception may arise, for example, in circumstances where the membership base of a scheme expands, but the scheme remains legally affiliated with a particular industry association or with a subset of industry.

RG 139.94 The decision-making processes and the administration of a scheme must be independent of those sectors of industry that fall within its jurisdiction and that provide its funding.

### **The overseeing body**

RG 139.95 Our requirements for the membership and functions of the scheme's overseeing body focus on ensuring:

- (a) independent decision-making by scheme staff and the decision-maker(s);
- (b) effective consultation about any changes to the scheme's Terms of Reference;
- (c) an appropriate balance of representation on the overseeing body; and
- (d) the maintenance of adequate resources for the scheme to perform its functions in a timely manner without undue delay.

RG 139.96 A scheme must have an overseeing body with responsibility to oversee the operations of the scheme, and to preserve the independence of the scheme and of the dispute resolution processes. To ensure that a scheme is clearly perceived to be independent, the membership of the overseeing body should comprise:

- (a) equal numbers of consumer and industry representatives; and
- (b) an independent Chair.

RG 139.97 A scheme's Constitution or Terms of Reference must include details about how consumer representatives will be appointed, including any requirements for consultation with appropriate individuals and/or organisations.

RG 139.98 One option is that responsibility for appointing consumer representatives could be given to the scheme, or to another organisation or individual.

RG 139.99 We have decided, after consultation with stakeholders, that it is not appropriate for a representative to be appointed from or by ASIC to the overseeing body. This reflects our consideration of the appropriate balance of membership on the overseeing body, and of the potential for a conflict of interest to arise with such an appointment.

RG 139.100 The minimum functions of a scheme's overseeing body must include:

- (a) appointing the scheme's decision-maker(s);
- (b) agreeing the scheme's budget with relevant industry representatives;
- (c) recommending and promoting consultation about proposed changes to the scheme's Terms of Reference;
- (d) receiving and considering complaints about the operation of the scheme;

- (e) monitoring general trends and issues arising from the complaints or disputes that are lodged with the scheme, including those that fall outside the Terms of Reference;
- (f) monitoring the reporting of systemic issues and/or serious misconduct by the scheme; and
- (g) monitoring the scheme's ability to manage its caseload and to perform other promoted functions.

RG 139.101 Where the overseeing body appoints a person to manage the scheme's day-to-day operations, that person should be responsible for appointing, supervising and dismissing the scheme's staff.

### **Resources available to the scheme**

RG 139.102 A scheme's overseeing body must monitor whether the scheme is adequately resourced to carry out its promoted functions. This should include monitoring how the scheme manages its caseload over time.

RG 139.103 A consideration of resourcing should include provision to assist complainants or disputants to draft and lodge their complaints or disputes. This does not amount to scheme staff advocating for complainants or disputants, and should not jeopardise the impartiality of the complaints resolution process.

### **Scheme members' powers of veto**

RG 139.104 We require that a scheme must not give its members a right of veto over changes to the Constitution or Terms of Reference.

RG 139.105 We believe that if members were to have a right of veto, it may undermine the independence of the EDR scheme because industry provides its funding and constitutes its membership.

RG 139.106 We are also concerned that a power of veto would give scheme members a disproportionate level of influence over the evolution of the EDR scheme compared with the influence of other stakeholders—for example, consumers and investors.

### **Changes to the Terms of Reference**

RG 139.107 A new scheme must consult with stakeholders about its Terms of Reference before implementing them.

RG 139.108 A scheme that already exists must consult with industry and consumer organisations, and other relevant stakeholders, prior to implementing any proposed changes to its Terms of Reference or introducing a new Terms of

Reference, unless RG 139.110 applies. A scheme should not rely on consulting only with its overseeing body prior to implementing any changes.

- RG 139.109 We consider it important that a scheme publicly consults about proposed changes to its Terms of Reference because it can result in a greater degree of understanding and acceptance about the scheme's operations.
- RG 139.110 We recognise, however, that there may be some proposed changes to a scheme's rules or procedures that are 'minor' in nature. It may be unnecessary for a scheme to consult publicly about such changes.
- RG 139.111 A scheme must consult with us about all proposed changes to its Terms of Reference, and should identify those changes that it considers to be 'minor' in nature and that will not be the subject of broader consultation.

## Fairness

- RG 139.112 We believe a scheme's complaints/disputes handling and other procedures must accord with the principles of natural justice.

### Scheme decision-making

- RG 139.113 In reaching a decision about a complaint or dispute, a scheme should not be entitled to rely on information that is not available to all parties.
- RG 139.114 We believe, however, that the effective and timely resolution of a complaint or dispute does not necessarily depend on the physical exchange of all relevant documents or information between the parties. This is the case, for example, when:
- (a) written reasons about a scheme's decisions clearly identify the documents or information relied on; and
  - (b) the identified documents or information can be provided to the parties on request.
- RG 139.115 There is a general presumption that a scheme member does not have the discretion to withhold documents or information from a complainant or disputant of the scheme. We recognise, however, that there may be some limited circumstances where the scheme member might appeal to the scheme to withhold certain information.
- RG 139.116 These circumstances might include where the release of information would endanger a third party or where it would compromise a scheme member's general security measures.
- RG 139.117 In the interests of ensuring that parties to a complaint or dispute are treated fairly, a scheme should provide written reasons for any decision made about

the merits of a complaint or dispute, including when a complaint or dispute is judged to be outside the scheme's Terms of Reference. We understand, however, that there may be some circumstances in which a complaint or dispute may be resolved without providing reasons in writing.

## Accountability

- RG 139.118 Requirements that relate to the principle of accountability include that a scheme must:
- (a) report to us any systemic issues and matters involving serious misconduct by a scheme member;
  - (b) collect and report information to us about complaints and disputes it receives on a quarterly basis and in its annual report; and
  - (c) conduct independent reviews of its operations.

### Reporting to ASIC: Systemic issues and serious misconduct

- RG 139.119 A scheme must report any systemic, persistent or deliberate conduct to us. For the purposes of this guide we have classified the types of conduct or issues that might be reported to us into two broad categories:
- (a) systemic issues; and
  - (b) serious misconduct.
- RG 139.120 The broad application of this regulatory guide precludes us from providing an exhaustive list of examples about what might constitute reportable conduct in each of these areas within our jurisdiction. However, working definitions are contained at RG 139.121–RG 139.125 for 'systemic issues' and at RG 139.126–RG 139.128 for 'serious misconduct'.

### Systemic issues

- RG 139.121 At a broad level, systemic issues relate to issues that have implications beyond the immediate actions and rights of the parties to the complaint or dispute.
- RG 139.122 While several complaints or disputes of the same type may indicate a systemic problem, we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints or disputes a scheme may have received.
- RG 139.123 A systemic issue may be identified out of the consideration of a single complaint or dispute. This is because the effect of the particular issue will clearly extend beyond the parties to the complaint or dispute. Some

examples of a systemic issue include where there is a mistake in how interest is calculated or there is a mistake in how a fee is applied. Alternatively, a systemic issue may only become evident after the scheme has received multiple complaints or disputes that are similar in nature—for example, where a particular intermediary has mis-sold financial or credit products to a number of consumers.

- RG 139.124 Factors causing systemic conduct or problems in the financial or credit system might include poor disclosure or communication, administrative or technical errors, and improper interpretation or application of standard terms.
- RG 139.125 The effects of systemic conduct (which by definition would be felt by more than one person) might include financial loss and loss of consumer confidence in the relevant financial service provider or intermediary, registered person, credit licensee, or credit representative, or in the relevant financial or credit product or service.

### **Serious misconduct**

- RG 139.126 Serious misconduct may include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws.
- RG 139.127 Under the Corporations Act, the National Credit Act and the Transitional Act, AFS licensees, credit licensees and registered persons are required to do all things necessary to ensure that the financial services or credit activities covered by the licence or registration are provided honestly, efficiently and fairly at all times. Other legislation that we administer provides information about what constitutes proper behaviour in the financial services and credit marketplace—for example, by prohibiting misleading and deceptive conduct.
- RG 139.128 We believe that there will be cases of misconduct that, by their nature, require us to take further action. This might include the general category of misconduct referred to in RG 139.126. There is, however, a considerable ‘grey area’, including cases of misconduct in which the need for referral to us is not so straightforward. Schemes should consult with us if they are unsure about whether they should refer a matter to us.

### **Responsibilities of the scheme**

- RG 139.129 It is the responsibility of a scheme to:
- (a) *identify* systemic issues and cases of serious misconduct that arise from the consideration of consumer complaints and disputes;
  - (b) *refer* these matters to the relevant scheme member or members for response and action; and
  - (c) *report* information about the systemic issue or serious misconduct to us, in accordance with these guidelines.

- RG 139.130 While EDR schemes are not required to identify the scheme member or members in reports to us, we would strongly encourage them to consider doing so in appropriate cases. In any event, we reserve our right to compel a scheme to provide information identifying a scheme member by using our powers under s33 of the ASIC Act.
- RG 139.131 Under s33 of the ASIC Act, we can give a person, such as an EDR scheme, written notice (s33 notice) requiring the production of books—being at a specified time and place, books and records in that person’s possession that relate to the financial or credit product or service. We also have similar powers under s267 of the National Credit Act (s267 notice).
- RG 139.132 We understand that there will be some systemic issues that relate to general industry practices or trends, which do not permit or warrant referral to a particular scheme member or members. These issues should still be reported to us.

#### **Identification of reportable issues**

- RG 139.133 In order to effectively identify systemic issues arising from complaints, disputes or inquiries, a scheme should have an appropriate ‘systemic focus’. In particular, a scheme must collect and record information in a manner that enables:
- (a) the identification of trends and patterns in complaints and disputes; and
  - (b) the simple retrieval of sorted data.
- RG 139.134 A scheme should also have the infrastructure to support effective case management and information collection.
- RG 139.135 A scheme must identify who is responsible for reporting systemic issues and serious misconduct to us. This responsibility should not be left only to the scheme’s overseeing body.
- RG 139.136 Scheme staff who deal with complaints or disputes should be alert to conduct or issues that should be referred to scheme members and/or reported to us. Staff should also be made aware of the terms of any reporting guidelines that are agreed with us.

#### **Reporting of systemic issues involving a single member**

- RG 139.137 Some systemic issues will arise in relation to the conduct of an individual scheme member. In these circumstances, the scheme should refer the matter to the scheme member for appropriate remedial action, in accordance with the procedures set out in the scheme’s Terms of Reference. Within a reasonable period, the scheme member should provide a concise report or ‘audit’ to the scheme that details the member’s response to the referral.

- RG 139.138 A copy of the report must be made available to us as soon as practicable after the report is received by the scheme. There will be some circumstances in which a scheme should advise us that it has identified and referred a particular matter to a scheme member, prior to the member's report being made available.

#### **Reporting systemic issues involving multiple scheme members**

- RG 139.139 Some systemic issues will involve the conduct of multiple scheme members. This may include general trends that might not implicate individual scheme members, but might reflect, for example, the need for a change in our regulatory guidance.
- RG 139.140 The scheme should generally follow the same referral and reporting procedures described for systemic issues involving a single member at RG 139.137–RG 139.138.

#### **Dealing with inter-scheme systemic issues**

- RG 139.141 Some systemic issues may involve the conduct of multiple industry participants who are not members of the same scheme.
- RG 139.142 In some circumstances, these issues may only be identified by us through the information provided by different schemes about particular intra-scheme conduct and/or by us issuing a s33 notice or s267 notice. These issues might also be identified through informal discussions with schemes either individually or at joint consultative forums.

#### **General reporting guidelines**

- RG 139.143 Reports made should focus on one or more of the following objectives:
- (a) improving industry practice and communication;
  - (b) remedying financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);
  - (c) preventing foreseeable loss to consumers and, more generally, ensuring that 'high-risk' issues might be effectively dealt with before problems develop;
  - (d) minimising the risk of the conduct or problem recurring;
  - (e) efficiently dealing with multiple complaints or disputes about a single incident or problem;
  - (f) reviewing the circumstances in which a particular scheme member (licensee) should continue to conduct their business; and
  - (g) sending a signal to the market about what constitutes acceptable market behaviour.

- RG 139.144 While EDR schemes are not required to identify the scheme member or members in reports to us, we would strongly encourage them to consider doing so in appropriate cases. In any event, based on the report provided to us, and any further information we may require from the schemes, we will consider whether we will compel a scheme to provide information identifying a scheme member by issuing a s33 or s267 notice. To assist us in making this decision, reports should provide information relating to whether the scheme member or members have been uncooperative or otherwise failed to take appropriate remedial action.
- RG 139.145 Early and effective action by a scheme member or members in response to reportable conduct should reduce the costs of dealing with multiple complaints or disputes. There can be no general disadvantage to industry where such issues are addressed in a timely and comprehensive manner.

#### **Further review and communication of our reporting guidelines**

- RG 139.146 This regulatory guide provides a basic framework within which a scheme should operate to satisfy the reporting guidelines: see RG 139.119–RG 139.145. This framework will be subject to periodic review in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.
- RG 139.147 We will hold regular meetings between scheme staff and our staff to discuss the operation of the reporting guidelines and other relevant issues.
- RG 139.148 We may establish more detailed reporting guidelines with each scheme that is approved. These guidelines will be tailored to the membership and complaints or disputes profile relevant to the scheme, and will be developed and agreed with the assistance of the relevant scheme staff.

#### **Complaints and disputes information**

- RG 139.149 To comply with our requirements for reporting, a scheme must collect and record information about:
- (a) the number of complaints (or disputes) and inquiries received;
  - (b) the demographics of complainants or disputes (where practicable) who have lodged a complaint or dispute with the scheme;
  - (c) the number of complaints or disputes received that fall outside the scheme's Terms of Reference (with reasons);
  - (d) the scheme's current caseload, including the age and status of open cases;
  - (e) the time taken to resolve complaints or disputes;
  - (f) the profile of complaints or disputes to enable identification of:
    - (i) the type of financial or credit product or service involved;

- (ii) the product or service provider;
  - (iii) the purpose for which the financial or credit product or service was obtained;
  - (iv) the underlying cause(s) of the complaint or dispute; and
  - (v) any systemic issues or other trends; and
- (g) the number of complaints or disputes closed, and an indication of the outcome of each closed complaint or dispute.

Note: An EDR scheme approved under the Corporations Act must collect and record the information at RG 139.149 for 'complaints', an EDR scheme approved under the National Credit Act must collect and record the information at RG 139.149 for 'disputes' and a scheme approved under both the Corporations Act and National Credit Act must collect and record the information at RG 139.149 for both 'complaints' and 'disputes'.

- RG 139.150 Where a scheme handles traditional services complaints, it must collect and record the following information:
- (a) the types of information listed at RG 139.149(a)–RG 139.149(f), for persons who have been *directly* provided the traditional services and for persons who may request an information return;
  - (b) the number of traditional services complaints put on hold (and for how long) because a person commenced legal proceedings to be included as a beneficiary; and
  - (c) the number of traditional services complaints received that fell outside of the scheme's Terms of Reference for the legitimate exclusions listed at RG 139.181 and RG 139.182.
- RG 139.151 We understand that schemes may encounter practical difficulties in obtaining some information about complaints and disputes, particularly demographic information about complainants. However, we expect that a scheme will have a case management system that enables this information to be recorded where available because demographic information provides an invaluable indication of a scheme's accessibility.
- RG 139.152 A scheme must provide us with updated complaints or disputes information, as described above, on a quarterly basis.
- RG 139.153 A comprehensive summary and analysis of this information must also be contained in each annual report published by a scheme.
- RG 139.154 From 1 January 2010, schemes must also publish information about complaints and disputes received and closed, with an indication of the outcome, against each scheme member in their annual report.
- RG 139.155 The number of complaints and disputes received and closed by an EDR scheme, and an indication of outcome, are an important measure for consumers and investors in choosing a financial service provider, credit

provider or credit service provider. It is also useful information for financial service providers, credit providers and credit service providers to compare their complaints experience against those who operate similar businesses.

- RG 139.156 We expect that EDR schemes will:
- (a) ensure that information is accurate;
  - (b) present the information in the appropriate context—for example, by categorising member information according to industry sector and/or size of business, or the number of credit representatives a credit licensee has; and
  - (c) if considered necessary, caution that complaints and disputes history may vary from time to time and be affected by various influences—for example, the occurrence of natural disasters may give rise to more insurance claims and, therefore, complaints.
- RG 139.157 We also encourage schemes to publish ‘practice notes’ or ‘guidelines’, which identify any problems or issues of interest as they arise during a reporting year.

### **Independent reviews**

- RG 139.158 An EDR scheme must commission an independent review of its operations and procedures:
- (a) three years after its initial approval by us; and
  - (b) every five years thereafter, unless we specify a shorter timeframe of less than five years.
- RG 139.159 These timeframes should not preclude a review occurring sooner if appropriate.
- RG 139.160 We believe that regular, independent reviews of an EDR scheme’s performance and procedures provide valuable feedback about how the scheme should evolve and about any areas that should be changed or improved.
- RG 139.161 The overseeing body of a scheme must consult with us about:
- (a) the terms of the independent review; and
  - (b) the appointment of the independent reviewer.
- RG 139.162 The review should include some form of qualitative assessment of the scheme’s performance in addition to quantitative measures of a scheme’s performance.
- RG 139.163 The results of the review must be made available to us and to other stakeholders.

## Efficiency and effectiveness

- RG 139.164 Requirements that relate to the principles of efficiency and effectiveness include:
- (a) the adequacy of a scheme's coverage;
  - (b) reducing consumer confusion where a complaint or dispute involves multi-party multi-licensees and/or credit representatives;
  - (c) the handling of complaints and disputes where a financial service provider, credit provider or credit service provider ceases to carry on business;
  - (d) adopting the time limits specified in this regulatory guide for bringing complaints or disputes to EDR;
  - (e) having procedures in place to ensure that a scheme member complies with scheme decisions;
  - (f) offering remedies that are consistent with the remedies available under the relevant laws;
  - (g) working collaboratively with the Australian Competition and Consumer Commission (ACCC) and state and territory Offices of Fair Trading (OFTs) when the scheme is approved for credit;
  - (h) monitoring members' compliance with IDR timeframes; and
  - (i) publishing members' contact details for hardship applications where the scheme is approved for credit.

### Coverage of the scheme

- RG 139.165 Before 1 January 2010, EDR schemes operated monetary limits. Under that approach, complainants were precluded from accessing a scheme if the value of their complaint exceeded the value of the scheme's monetary limit (unless a scheme member agreed to the scheme having jurisdiction).
- RG 139.166 From 1 January 2010, schemes must operate a compensation cap approach. Under a compensation cap approach, a scheme has jurisdiction to hear a complaint or dispute involving more than the amount of the compensation cap, but is only able to award compensation up to the value of the compensation cap amount.
- RG 139.167 A scheme's coverage under the Corporations Act and National Credit Act must be sufficient to deal with:
- (a) the vast majority of types of consumer complaints or disputes in the relevant industry (or industries); and
  - (b) for consumer complaints involving monetary amounts up to the value of the retail client test under s761G of the Corporations Act (currently \$500,000) or credit disputes involving monetary amounts up to the

value of \$500,000, the EDR scheme must be able to award compensation up to a capped amount that is consistent with the nature, extent and value of consumer transactions in the relevant industry (or industries):

- (i) between **1 January 2010** and **31 December 2011** we require EDR schemes to operate a compensation cap amount that is at least equal to or greater than the existing differential monetary limit the EDR scheme operated before 1 January 2010; and
- (ii) from **1 January 2012** we require EDR schemes to operate a compensation cap of at least \$280,000, unless the EDR scheme covers complaints concerning general insurance brokers, for which a compensation cap of at least \$150,000 will apply.

Note 1: We encourage schemes to award compensation at a higher amount where appropriate and relevant to improve the effectiveness of the schemes.

Note 2: Where a traditional services complaint involves other persons who may request an information return (e.g. other beneficiaries), the scheme must assess whether the individual beneficiary's complaint is within the scheme's monetary compensation award (regardless of the total value of the trust or estate).

- RG 139.168 As a starting point, we take the view that a scheme must be able to consider any complaint or dispute where the complainant or disputant has suffered a direct financial loss.
- RG 139.169 We understand that consideration of an appropriate compensation cap for a particular scheme has implications for scheme members who require professional indemnity insurance to meet any claims.
- RG 139.170 We note that:
- (a) Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) requires that AFS licensees who provide services to retail clients have adequate arrangements for compensating clients for losses suffered and that these arrangements must be approved by us; and
  - (b) Regulatory Guide 210 *Compensation and insurance arrangements for credit licensees* (RG 210) requires that credit licensees have adequate arrangements for compensating their clients and their credit representative's clients for losses (unless their credit representative's compensation arrangements indemnify them).
- RG 139.171 We may review the coverage of EDR schemes approved under the Corporations Act and National Credit Act in consultation with the schemes, industry, consumer representatives and other interested stakeholders.

### Types of complaints or disputes

- RG 139.172 An EDR scheme's coverage is set out in its Terms of Reference. When a scheme lodges an application for approval, we will assess the adequacy of its coverage in relation to dealing with the vast majority of consumer complaints or disputes by having regard to:
- (a) the types of complainants or disputants that can access the scheme;
  - (b) the types of complaints or disputes that the scheme can deal with; and
  - (c) the scheme's compensation cap.
- RG 139.173 This part of the regulatory guide contains guidance about the minimum level of coverage that an EDR scheme should provide in order to be approved. We encourage schemes to maintain a broad coverage that is consistent with the business of its members and the participation of consumers in the relevant industries.
- RG 139.174 The Terms of Reference of an EDR scheme must set out what types of complaints or disputes a scheme can deal with—that is, what is an 'eligible' complaint or dispute.
- RG 139.175 When we assess an EDR scheme for approval, we will review its Terms of Reference to make sure that it offers adequate coverage to deal with a 'complaint' or 'dispute', as defined in RG 165.
- RG 139.176 In order to gain approval, EDR schemes must deal with the vast majority of types of consumer complaints or disputes about the financial or credit products and services in the relevant industry or industries they cover.
- RG 139.177 The Terms of Reference of EDR schemes approved under the National Credit Act must be able to handle disputes involving the types of matters listed at s199 of the National Credit Act, up to the value of the monetary amounts and compensation caps specified at RG 139.167.
- RG 139.178 An approved EDR scheme does not have to deal with all complaints or disputes that a retail client or consumer may make about a particular financial or credit product or service, or the conduct of a financial service provider, credit provider, credit service provider or credit representative. There are some types of complaints or disputes that a scheme may legitimately exclude from its Terms of Reference, such as a complaint or dispute that is solely about a member's commercial policy, unless the complaint or dispute relates to a statutory obligation (e.g. responsible lending requirements for credit or margin lending financial services).
- RG 139.179 When we approve an EDR scheme, we also effectively approve any exclusions from that scheme's coverage. These exclusions may vary across schemes, depending on the nature of the financial or credit products or

services covered—however, we will take a consistent approach in assessing what are reasonable exclusions from that scheme’s coverage.

- RG 139.180 We recognise that all EDR schemes apply legitimate exclusions in their Terms of Reference that act to limit the coverage that the scheme provides.
- RG 139.181 Examples of the types of complaints or disputes that may typically be excluded from the Terms of Reference of an ASIC-approved EDR scheme include complaints or disputes that:
- (a) have already been ‘dealt with’ in another forum (i.e. a *decision on the merits having been made* has already been made or given, or should have been made or given, by a court, tribunal or another ASIC-approved EDR scheme);
  - (b) relate solely to the member’s commercial policy, unless they relate to a statutory obligation (e.g. the responsible lending requirements for credit and margin lending financial services);
  - (c) relate solely to the underlying performance of an investment; or
  - (d) are frivolous and vexatious.
- RG 139.182 The following types of traditional services complaints may *also* be typically excluded from the Terms of Reference of an EDR scheme:
- (a) complaints relating to the management of a common fund or management of a managed investment scheme as a whole;
  - (b) complaints relating to the level of a fee or charge—unless they relate to non-disclosure, misrepresentation or incorrect application of the fee or charge; or where the complaint concerns a breach of any legal obligation or duty on the part of the trustee company;
  - (c) complaints that a court would not normally consider or resolve (e.g. review of a trustee’s exercise of discretion, except where there is bad faith, failure to give fair and proper consideration to the exercise of the discretion or failure to exercise the discretion in accordance for which it was conferred);
  - (d) complaints or aspects of the complaint that a state or territory court, tribunal or board would be able to handle under relevant state and territory guardianship laws;
  - (e) complaints that would be more appropriately dealt with by a court (e.g. where a complainant or an interested beneficiary is a minor or lacks mental capacity);
  - (f) complaints involving more than one beneficiary where all beneficiaries do not first agree to the scheme’s jurisdiction and any outcome that the scheme may be able to achieve at RG 139.191 (including where all affected parties cannot be contacted or identified); and

- (g) complaints where the substance of the complaint has been resolved by a legal direction given by a court to the trustee and the complaint does not raise any post-court directions issues.
- RG 139.183 We will also take into account the scheme's capacity and expertise to deal with the full range of financial or credit products and services it intends to cover.
- RG 139.184 EDR schemes seeking approval under the National Credit Act should also handle disputes involving default judgments in the following way:
- (a) EDR schemes should not overturn, or be perceived to overturn, default judgment orders. This is because there are relevant court processes to set aside or vary a default judgment order. We expect that EDR schemes will generally assist disputants to find relevant information and be cross-referred to other agencies that can assist in providing legal representation or advice in setting aside a default judgment; and
  - (b) we expect that, where there has been a default judgment order, the EDR scheme should still handle the dispute provided that in so doing the scheme would not overturn, or be perceived to overturn, the default judgment order (e.g. where a post default judgment dispute is involved—for example, harassment).
- RG 139.185 EDR schemes that handle traditional services complaints must be able to handle traditional services complaints where a trustee company acts jointly with a personal co-appointee, including where the complaint relates:
- (a) solely to the trustee company's acts; or
  - (b) to the conduct of both the trustee company and the personal co-appointee, and the personal co-appointee consents to the scheme's jurisdiction.
- RG 139.186 We will continue to monitor the types of complaints or disputes that are both included and excluded from the jurisdiction of each EDR scheme.

### **Compensation caps**

- RG 139.187 Before approving a particular scheme, we will need to make an assessment about whether the scheme's compensation cap satisfies the objectives mentioned at RG 139.167. We will also review the compensation a scheme is able to award having regard to these objectives.
- RG 139.188 Compensation caps apply on a 'per claim' basis. This means that separate claims by the same complainant or disputant must not be aggregated by the scheme for the purpose of determining a maximum claim. Further, the adequacy of a scheme's compensation cap will be subject to review by us.

RG 139.189 We reserve the discretion:

- (a) as part of our approval process, to require an increase to the compensation cap applied by a particular EDR scheme; or
- (b) to stipulate a minimum compensation cap that is higher than \$280,000, and in the case of general insurance brokers, higher than \$150,000.

Before we do either, we will consult with the schemes and the relevant industry and consumer representatives about the relative costs and benefits of doing so.

RG 139.190 We may also review the efficiency and effectiveness of the compensation cap for:

- (a) schemes approved under the National Credit Act after the schemes have had a sufficient time in operation; and
- (b) schemes handling traditional services complaints after the schemes have had a sufficient experience with such complaints.

We will consult with the schemes and relevant industry and consumer representatives as part of any review.

#### **Minimum compensation caps, waiver and the binding nature of the scheme decision**

RG 139.191 In operating a minimum compensation cap:

- (a) the scheme should handle the complaint or dispute and make an award up to its compensation cap (or higher if the scheme member agrees);
- (b) a consumer or investor with a complaint or dispute involving an amount that is higher than the EDR scheme's compensation cap may be required to waive the excess at the end of the EDR process; and
- (c) the EDR scheme outcome should not bind the consumer or investor if they do not choose to accept it.

Note: If the complainant or disputant accepts the EDR outcome, the scheme or member may require the complainant or disputant to accept the EDR outcome as full and final satisfaction of their claim and it will be binding on both parties (i.e. the balance of the claim cannot be pursued in court).

RG 139.192 We consider that waiver at the end of the EDR process will act as an incentive for financial service providers, credit providers and credit service providers to resolve the complaint or dispute genuinely and in good faith, and in a timely and appropriate manner.

RG 139.193 This approach preserves a complainant's or disputant's legal right to reject the EDR outcome and pursue their entire complaint or dispute in a court of competent jurisdiction.

**Indexation of the compensation cap**

- RG 139.194 From 1 January 2012, schemes must adjust the compensation cap every three years using the higher of the increase in the Consumer Price Index (CPI) or the increase in Male Total Average Weekly Earnings (MTAWE).

**Interest on awards**

- RG 139.195 To provide an outcome that is fair and reasonable in all the circumstances, schemes must be able to award interest or earnings in addition to the amount awarded by a compensation cap.
- RG 139.196 We are of this view because an award of interest in addition to a compensation cap may also act as an incentive for parties to resolve the complaint or dispute more expeditiously and in good faith.
- RG 139.197 If interest is awarded, the Terms of Reference of the scheme must require that interest be calculated from the date of the cause of action or matter giving rise to the claim.
- RG 139.198 A scheme's Terms of Reference may prescribe that, when calculating an award of interest, the scheme may have regard to any factors it considers relevant, including, but not limited to, the extent to which the conduct of either party contributed to the delay.

**Traditional services complaints involving multiple beneficiaries**

- RG 139.199 For traditional services complaints involving more than one person who may request an information return (e.g. other beneficiaries), including where the complaint also involves a person who has been *directly* provided the traditional services, the scheme's Terms of Reference must state that:
- (a) the scheme may only handle the complaint if all persons with a reasonable interest in the outcome of the complaint first agree to the scheme having jurisdiction and being bound by any scheme outcome that may be achieved. This would result in waiver and deed of release at the beginning of the EDR process; and
  - (b) after a complaint is assessed as being within the scheme's jurisdiction, the scheme may have an ongoing discretion to discontinue handling the traditional services complaint if at any stage the scheme forms the view that a court would be the more appropriate forum in the circumstances.
- RG 139.200 To enable all beneficiaries to make a fully informed decision about whether to agree to the scheme's jurisdiction and give a waiver and deed of release at the beginning of the EDR process, the scheme must:
- (a) inform each beneficiary of their right to obtain independent legal advice so they properly understand what they are agreeing to; and

- (b) allow each beneficiary a reasonable time to obtain independent legal advice if they wish to do so.

## Reducing consumer confusion about where to complain

### Multi-licensee complaints or disputes

RG 139.201 Where a complaint or dispute involves:

- (a) two or more credit licensees (e.g. a lender and mortgage manager/broker, or a lender and debt collector), whether or not a credit representative is involved; or
- (b) an AFS licensee and a credit licensee (e.g. a financial adviser and a lender), whether or not a credit representative is involved,

we expect that EDR schemes will continue to have processes to assess the complaint or dispute and refer part or the whole of the complaint or dispute to another relevant EDR scheme where appropriate, depending on the nature of the complaint or dispute (i.e. the subject matter in dispute) and which licensee has responsibility.

RG 139.202 For complaints or disputes that are referred, the relevant date for determining whether the matter is within the time limit for bringing a complaint or dispute under RG 139.216–RG 139.219 is the date the complaint or dispute was first lodged with an EDR scheme.

RG 139.203 We will review this approach in consultation with the schemes, industry, consumer representatives and other interested stakeholders.

### Disputes involving credit representatives

RG 139.204 A scheme seeking approval under the National Credit Act must ensure that its Constitution and/or Terms of Reference provides that where a dispute involves a credit representative:

- (a) the EDR scheme of the credit licensee (if different) will handle the dispute in the first instance; and
- (b) where the credit licensee ceases to carry on business and the credit licensee's EDR scheme does not exercise its discretion to continue to handle the dispute in accordance with RG 139.211–RG 139.215, the dispute may then be referred to the EDR scheme of the credit representative (if different).

RG 139.205 Where the credit representative's EDR scheme receives the dispute, the relevant date for determining whether the matter is within the time limit for bringing a complaint under RG 139.216–RG 139.219 is the date the dispute was first lodged at EDR.

### **Disputes involving registered persons or credit licensees and securitisation bodies**

- RG 139.206 A scheme seeking approval under the National Credit Act must ensure that its Constitution and/or Terms of Reference (or an alternative arrangement agreed to by ASIC—for example, a Memorandum of Understanding) provides that where a dispute involves a securitisation body:
- (a) the EDR scheme of the registered person or credit licensee who acts on behalf of the securitisation body handles the dispute where the consumer claim relates to compensation; and
  - (b) the EDR scheme of the securitisation body handles the dispute where a potential change to the credit contract or consumer lease is involved. This may include where the consumer seeks to vary or set aside the credit contract on hardship grounds, for unjust fees and other charges, where a request for postponement of enforcement proceedings is made, or where the contract is ‘unsuitable’.
- RG 139.207 As it may not always be clear at the outset of the handling of the dispute how the dispute should be characterised and therefore which scheme should handle it, a dispute may need to be transferred part-way. We expect that the schemes will have appropriate procedures in place to refer disputes to another scheme in a timely manner. We also expect that the schemes, securitisation bodies and credit licensees will make best efforts to do so.
- RG 139.208 Where a dispute is transferred between schemes, the relevant date for determining whether the matter is within the time limit for bringing a dispute to the subsequent scheme under RG 139.216–RG 139.219 is the date the dispute was first lodged at EDR.
- RG 139.209 To ensure that this arrangement does not compromise the longstanding principle that disputants can always go to court instead of EDR, we expect that securitisation bodies will not attempt to use a statute of limitations defence against a client in any subsequent court proceeding brought by the client, where:
- (a) the client has followed these processes and successfully brought a claim against the credit licensee at EDR;
  - (b) the credit licensee has failed to pay the compensation because they ceased to carry on business; and
  - (c) the limitations period has expired subsequent to the matter going to EDR.
- RG 139.210 So that EDR procedures are effective, we expect credit licensees and securitisation bodies will refrain from commencing or continuing any legal action or other enforcement action (i.e. debt collection activity) while a dispute is being handled by any EDR scheme. This is so the client is not disadvantaged by having to respond to disputes in two different forums. We

expect the servicing agreement between the credit licensee and securitisation body will provide for this. It may also be dealt with in the schemes' documents as set out in RG 139.206.

### **Where a scheme member ceases to carry on business**

- RG 139.211 A scheme must ensure that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion about whether to cancel a scheme member's membership and/or to handle complaints or disputes in respect of the scheme member where the scheme member:
- (a) ceases to carry on business. Examples of ceasing to carry on business include where a scheme member closes its doors to consumers and investors but still has an AFS licence or credit licence, or where a financial service provider, credit provider or credit service provider sells its business;
  - (b) ceases to have a licence; and/or
  - (c) becomes insolvent under administration.
- RG 139.212 In exercising this discretion, the scheme must consider the complainant's or disputant's interests.
- RG 139.213 The scheme may also have regard to whether:
- (a) the general exclusions to scheme jurisdiction apply (see RG 139.178–RG 139.181);
  - (b) time limits apply (see RG 139.216–RG 139.219); and
  - (c) the coverage of the scheme precludes the scheme from handling the complaint or dispute.
- RG 139.214 Examples of where it is in the complainant's or disputant's interests not to cancel the scheme member's membership, and/or to handle the complaint or dispute, include:
- (a) where the complainant or disputant will be able to obtain redress; and
  - (b) in insolvency situations, where a scheme decision may assist in showing that a complainant or disputant is a creditor and has a 'proof of debt'.
- RG 139.215 The scheme must also require that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion to bypass IDR, if it is in the complainant's or disputant's interests to do so. This may include where there is no handling of complaints or disputes at IDR.

### **Time limit for bringing complaints or disputes to EDR**

- RG 139.216 We believe that schemes should have a consistent approach to time limits for bringing a complaint or dispute to a scheme. This will ensure consistency of

treatment of complaints and disputes in the Australian financial and credit system, and create a more level playing field for industry participants.

- RG 139.217 Schemes must ensure that their Terms of Reference require that the time limits for bringing a complaint or dispute to a scheme are:
- (a) for those aspects of credit disputes that relate to hardship applications, unjust transactions and 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 (see RG 165.98–RG 165.130); and
  - (b) for all other complaints or disputes, the earlier of either:
    - (i) six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or
    - (ii) two years from when a final response is given at IDR (see RG 165.98–RG 165.130).
- RG 139.218 The time limits at RG 139.217 apply unless the scheme considers that exceptional circumstances apply or the scheme member and scheme agree to the scheme having jurisdiction.
- RG 139.219 Where a disputant seeks more than one, or several, hardship variations during the life of the credit contract, each dispute relating to a hardship variation must be treated as a new dispute to allow the disputant access to EDR.

### **Compliance with scheme decisions**

- RG 139.220 A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. It should be noted that scheme decisions are not binding on complainants or disputants unless they choose to accept the scheme's decision at the end of the EDR process and (when a compensation cap applies) waive the excess of their claim: see RG 139.191(b) and RG 139.191(c).
- RG 139.221 A scheme must establish its own procedures for dealing with the non-compliance by a scheme member with a decision or rule of the scheme. These procedures should be detailed in the scheme's Terms of Reference.
- RG 139.222 We view non-compliance by a scheme member with a decision or rule of a scheme to be a serious breach of the terms of membership. However, because it is in the interests of consumers and industry that industry participants remain within the schemes, a scheme should not terminate the

membership of a non-compliant member without first allowing them the opportunity to comply.

- RG 139.223 We suggest that, in the event of non-compliance, a scheme might issue a 'notice to comply', which:
- (a) describes the act of the non-compliance;
  - (b) allows the scheme member a reasonable time, say five working days, to comply; and
  - (c) notifies the scheme member of the implications of failing to comply.
- RG 139.224 Where a scheme member is required, by virtue of a licence or registration granted by us, to join an ASIC-approved EDR scheme, then the scheme should inform us of any proposal to terminate that licensee's or registrant's membership. The scheme should also inform us of any proposal to terminate a credit representative's membership. The scheme should not unilaterally terminate the membership of a licensee because doing so would place the licensee in breach of a licence condition.
- RG 139.225 There are a number of administrative responses available to us following a referral of non-compliance by a licensee or credit representative with a decision or rule of a scheme. Subject to holding a hearing we might, for example:
- (a) impose or vary the licence conditions, including imposing a condition that requires ongoing compliance with an approved scheme's rules and decisions;
  - (b) make other orders, such as allowing sufficient time for the non-compliant licensee to join another approved scheme; and
  - (c) suspend or revoke the licence for the failure of the licensee to conduct business efficiently, honestly and fairly.

Note: See Regulatory Guide 8 *Hearings practice manual* (RG 8) for more information about hearing procedures. For a copy of RG 8, go to [www.asic.gov.au/rg](http://www.asic.gov.au/rg) or contact Infoline on 1300 300 630.

### **Available remedies**

- RG 139.226 The remedies offered by a scheme must be consistent with the remedies available under the relevant laws that apply to the arrangements between the scheme member and its customers.
- RG 139.227 By this we mean that a scheme must, as a minimum, compensate a complainant or disputant for any direct loss or damage caused by a breach of any obligation owed in relation to the provision of a financial or credit product or service. This excludes an award for punitive or exemplary damages.

- RG 139.228 In determining the extent of loss or damage suffered by a complainant or disputant, the scheme should have regard not only to the relevant legal principles, but also to the concept of fairness and to relevant industry best practice.
- RG 139.229 A scheme must also be able, under its Terms of Reference, to make appropriate non-monetary orders obliging a scheme member to take (or not take) a particular course of action in order to resolve a complaint or dispute. Examples of non-monetary orders that a scheme might make following the consideration of a complaint or dispute are:
- (a) releasing the complainant or disputant from a contract and refunding any money paid plus interest;
  - (b) varying the terms of the contract with the customer, provided any third party rights are not affected; and
  - (c) releasing documents and/or information relating to the customer that are under the control of the financial or credit product or service provider.
- RG 139.230 This framework anticipates the consideration of claims for opportunity costs and for non-financial loss where appropriate. It does not require the decision-maker(s) of a scheme to adopt a particular approach to the determination of remedies.

### **Working collaboratively with the ACCC and state and territory Offices of Fair Trading**

- RG 139.231 We expect that EDR schemes seeking approval under the National Credit Act will work collaboratively with the ACCC and state and territory OFTs to develop disputes handling and referral processes where disputes involve linked credit provider and fair trading issues.
- RG 139.232 We expect that these disputes handling processes will assist in efficient and effective disputes handling, and will clarify referral processes.

### **IDR timeframes**

- RG 139.233 We emphasise the importance of timeliness in handling complaints or disputes at IDR.
- RG 139.234 A scheme member's obligations to respond to a complaint or dispute within certain timeframes are explained further in RG 165. If a scheme member is unable to respond to the complaint or dispute within the timeframe, the scheme member should inform the complainant or disputant of the reasons for the delay.
- RG 139.235 A scheme should establish its own reasonable procedures about the circumstances in which an extension of time for resolving a complaint or

dispute by a member at IDR is warranted. The scheme should also have procedures addressing the ability of a complainant or disputant to appeal any extension of time. A scheme must monitor its members' compliance with timeframes relating to IDR.

- RG 139.236 Where a dispute involves an application for hardship variation or request for postponement of enforcement proceedings and the 21 days to consider the application has passed without agreement being reached (see RG 165), the EDR scheme may allow, where appropriate, a further maximum of 14 days for the dispute to be handled at IDR.
- RG 139.237 During the transitional period when members may still be registered persons, EDR schemes approved under the National Credit Act may have processes in place to clarify whether a scheme member has compliant IDR procedures or simple IDR procedures, and where they do not, may directly handle the dispute if considered appropriate.

### **Publishing scheme members' contact details for hardship applications**

- RG 139.238 Scheme members must have a dedicated telephone number and, where possible, a fax number and postal and email address to accept and handle hardship applications: see RG 165.
- RG 139.239 EDR schemes seeking approval under the National Credit Act should also make available and maintain on their websites their members' names, telephone numbers, and, where possible, other contact details (i.e. fax numbers, postal and email addresses) so that disputants can make hardship applications to a scheme's members.
- RG 139.240 We expect that this information will be posted in an easy-to-find webpage and will be kept updated to remain current.

## C The approval process

### Key points

You will need to lodge a written application with ASIC for your scheme to be considered for approval by us.

The written application must contain certain information.

We will provide a formal letter of approval if your scheme is approved and publish information about the schemes we have approved on our website.

### How to lodge an application for approval

RG 139.241 A scheme that requires or seeks our approval should lodge a written application addressing each of the guidelines contained in Section B of this guide. Applicants should read the information contained in Section B before completing their application.

RG 139.242 A scheme that seeks our approval should send a written application to:

Senior Executive Leader  
Consumers, Advisers and Retail Investors  
ASIC  
GPO Box 9827  
Canberra City ACT 2601

RG 139.243 The application should include the information described in RG 139.244 and RG 139.245.

### Information that should be included in an application

RG 139.244 An application for approval should include the following information:

- (a) why the scheme is seeking approval;
- (b) how the scheme meets the guidelines set out in our policy;
- (c) the current and projected membership details;
- (d) the current Terms of Reference (and details of any proposals to amend these);
- (e) the articles of association (or equivalent) of the overseeing body;
- (f) details of the membership of, and appointment to, the overseeing body;
- (g) details of contracts with the scheme members; and

- (h) a summary of the complaints or disputes information the scheme collects and records.

RG 139.245 An applicant must provide us with any other information we consider necessary to complete our assessment of the application.

## **The approval letter and class orders [CO 09/340] and [CO 10/249]**

RG 139.246 We will provide a formal approval letter to each scheme that is approved under this guide.

RG 139.247 Class Order [CO 09/340] *External dispute resolution schemes* for approvals under the Corporations Act and Class Order [CO 10/249] *External dispute resolution schemes (credit)* for approvals under the National Credit Act will also be updated to reflect that a scheme has been approved.

RG 139.248 The approval letter will be a public document and will contain details of any conditions under which the approval is granted. The approval letter will also contain information about the agreed guidelines under which the scheme will report information about systemic issues and serious misconduct to us.

RG 139.249 In order for an approval to remain in force, a scheme must continue to comply with the guidelines contained in this guide, and with any new or additional guidelines that are introduced in accordance with our regulatory objectives.

## Appendix: DIST Benchmarks

### DIST Benchmarks and their underlying principles

<b>Accessibility</b>	The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
<b>Independence</b>	The decision-making process and administration of the scheme are independent from scheme members.
<b>Fairness</b>	The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
<b>Accountability</b>	The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
<b>Efficiency</b>	The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
<b>Effectiveness</b>	The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Note: Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in 1997.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
AS ISO 10002–2006	Australian Standard AS ISO 10002–2006 <i>Customer satisfaction—Guidelines for complaints handling in organizations</i> (ISO 10002:2004, MOD)
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
beneficiary	Means: <ul style="list-style-type: none"> <li>• a beneficiary under a deceased's will;</li> <li>• where a person has died without a will, a person who has an entitlement or interest in the deceased's estate under a state or territory law;</li> <li>• a person who has commenced a proceeding in a court under a state or territory law to be included as a beneficiary of a deceased's estate; and</li> <li>• a beneficiary of a trust (excluding charitable trusts).</li> </ul> <p>Note: See regs 7.1.28A and 5D.2.01 of the Corporations Regulations.</p>
carried over instrument	Has the meaning given in s4 of the Transitional Act
[CO 10/907] (for example)	An ASIC class order (in this example numbered 10/907)
COI lender	A credit provider or lessor who only has a closed pool of carried over instruments as at 1 July 2010 and will not offer new credit contracts or consumer leases from 1 July 2010
complainant	A person or company who at any time has: <ul style="list-style-type: none"> <li>• made a complaint to an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or</li> <li>• lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules</li> </ul>

Term	Meaning in this document
complaint	Has the meaning given in AS ISO 10002–2006
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit contract	Has the meaning in s4 of the National Credit Code
Credit Guide	A document that must be provided to a consumer by a credit provider, credit service provider, credit representative or debt collector under the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee or registered person under s64(2) or s65(2) of the National Credit Act
credit service	Has the meaning given in s7 of the National Credit Act
credit service provider	A person who provides credit services
default judgment order	A verdict, handed down by a state, territory, or federal court, made in favour of the applicant (the industry participant) against the defendant (the disputant) and not on consideration of the merits of the case.  Depending on the relevant court or civil procedure rules applicable, such a verdict may be handed down where the disputant fails to lodge a defence, whether within a specific timeframe or fails to appear in court

Term	Meaning in this document
disputant	A person or small business who at any time has: <ul style="list-style-type: none"> <li>• a dispute with an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or</li> <li>• lodged a dispute with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules</li> </ul>
dispute	Has the same meaning as complaint
DIST Benchmarks	The Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in August 1997
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
final response	A response in writing required to be given to the complainant under RG 165, setting out the final outcome offered to the complainant at IDR, the right to complain to an ASIC-approved EDR scheme and the relevant name and contact details of the scheme
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
Financial Services Guide	A document required by s941A or 941B to be given in accordance with Div 2 of Pt 7.7 Note: This is a definition contained in s761A of the Corporations Act.
guardianship laws	Means the state and territory guardianship laws listed at Sch 8AC of the Corporations Regulations
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165

Term	Meaning in this document
information return	<p>A trustee company providing traditional services must give certain information to beneficiaries, settlors of trusts, and certain other parties within 30 days of a request.</p> <p>Such information must include:</p> <ul style="list-style-type: none"> <li>• the income earned on the trust's assets;</li> <li>• the expenses of the trust, including remuneration, commission or other benefits received by the trustee company; and</li> <li>• the net value of the trust's assets</li> </ul> <p>Note: See s601RAC(1)(e) of the Corporations Act and regs 5D.2.01, 5D.2.02 and 7.1.28A of the Corporations Regulations.</p>
licensee	An AFS licensee or a credit licensee
margin lending financial service	<p>A margin lending financial service is:</p> <ul style="list-style-type: none"> <li>• a dealing in a margin lending facility; or</li> <li>• the provision of financial product advice in relation to a margin lending facility</li> </ul>
Modernisation Act	<i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i>
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 of the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
old Credit Code	Has the meaning given in s4 of the Transitional Act
prescribed unlicensed COI lender	<p>Has the meaning given in modified s5A of the National Credit Act, as inserted by item 2.5 of Sch 2 of the National Credit Regulations</p> <p>Note: In general terms, a prescribed unlicensed COI lender is an unlicensed COI lender who fails to meet certain probity requirements and who has restrictions placed on their conduct in relation to their carried over instruments. A prescribed unlicensed COI lender must not engage in credit activities with respect to their carried over instruments. They must instead appoint a credit licensee or registered person as 'representative' to engage in credit activities on their behalf with respect to their carried over instruments.</p>
reg 16 (for example)	A regulation of a set of regulations as specified (in this example numbered 16)
registered	Registered to engage in credit activities under item 12 of Sch 2 of the Transitional Act
registered person	A person who is registered
registration	Registration to engage in credit activities granted under item 12 of Sch 2 of the Transitional Act

Term	Meaning in this document
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
RG 126 (for example)	An ASIC regulatory guide (in this example numbered 126)
s64 (for example)	A section of an Act or Code as specified (in this example numbered 64)
s33 notice	A notice issued by ASIC exercising its powers to compel production of documents under s33 of the ASIC Act
s267 notice	A notice issued by ASIC exercising its powers to compel production of documents under s267 of the National Credit Act
scheme member (or member)	An industry participant who is a member of an ASIC-approved EDR scheme
SCT	Superannuation Complaints Tribunal, established under the <i>Superannuation (Resolution of Complaints) Act 1993</i>
securitisation body	Means a special purpose funding entity (credit), including both: <ul style="list-style-type: none"> <li>• a securitisation entity; and</li> <li>• a fundraising special purpose entity,</li> </ul> as defined by s5 of the National Credit Act
servicing agreement	An agreement between a securitisation body and a registered person or credit licensee, as defined in s5 of the National Credit Act
small business	A small business as defined in s761G of the Corporations Act
sole beneficiary	Means the only beneficiary under a will, the only person who has an entitlement or interest in the deceased's estate under a state or territory law or the only beneficiary of a trust (excluding charitable trusts)
Terms of Reference	The document that sets out an EDR scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'Rules'
traditional services	Means traditional trustee company services, as defined by s601RAC of the Corporations Act
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>
Transitional Regulations	National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010

<b>Term</b>	<b>Meaning in this document</b>
unlicensed COI lender	Has the meaning given in s5 of the National Credit Act, as modified by item 2.4 of Sch 2 of the National Credit Regulations
unlicensed product issuer	An issuer of a financial product who is not an AFS licensee
unlicensed secondary seller	A person who offers the secondary sale of a financial product under s1012C(5), (6) or (8) of the Corporations Act and who is not an AFS licensee

## Related information

### Headnotes

AFS licensees, beneficiaries, carried over instrument, compensation caps, credit licensees, credit representatives, dispute resolution requirements, DIST Benchmarks, EDR scheme, EDR scheme membership, external dispute resolution, IDR processes, information return, internal dispute resolution, lender, margin lending financial services, monetary limits, person who may request an information return, securitisation body, servicing agreement, special purpose funding entities, traditional services, trustee company, unlicensed COI lender, unlicensed product issuers, unlicensed secondary sellers

### Class orders

[CO 09/339] *Internal dispute resolution procedures*

[CO 09/340] *External dispute resolution schemes*

[CO 10/249] *External dispute resolution schemes (credit)*

[CO 10/250] *Internal dispute resolution procedures (credit)*

[CO 10/517] *Internal dispute resolution procedures (credit—unlicensed COI lenders)*

[CO 10/907] *Exempted special purpose funding entities—deferral of start date for EDR scheme membership*

[CO 11/261] *Trustee companies providing traditional trustee company services—deferral of start date for dispute resolution requirements*

### Regulatory guides

RG 8 *Hearings practice manual*

RG 126 *Compensation and insurance arrangements for AFS licensees*

RG 165 *Licensing: Internal and external dispute resolution*

RG 203 *Do I need a credit licence?*

RG 210 *Compensation and insurance arrangements for credit licensees*

### Legislation

ASIC Act, s1, 33

Corporations Act, 601RAB, 601RAC, 601RAV, Ch 7, s760A, 761G, 766A(1A), 912A, 942B(2)(h), 1017G(2); Corporations Regulations, regs 5D.2.01, 7.1.17C, 7.1.28A, 7.6.02, 7.9.77 and Sch 8AC; Modernisation Act, Sch 1

National Credit Act, Ch 2, s10(1)(a), 11, 45, 47, 64, 65, 113, 126, 127, 136, 149, 150, 158, 199 and 267; National Credit Code, s72 and 94; National Credit Regulations, regs 9A, 10(3), 10(4)(a), 10(4)(b), 10(4)(c), 16, 23B, 23C, 25G and Schs 2 and 3; Transitional Act, s4(1) and items 12 and 16 of Sch 2; Transitional Regulations, regs 14B and 14C

*Retirement Savings Accounts Act 1997*

*Superannuation (Resolution of Complaints) Act 1993*

## **Cases**

*Australian Timeshare and Holiday Ownership Council Limited v. Australian Securities and Investments Commission* [2008] AATA 62 (23 January 2008)

## **Consultation papers and reports**

CP 102 *Dispute resolution—Review of RG 139 and RG 165*

CP 112 *Dispute resolution requirements for consumer credit and margin lending*

CP 138 *Dispute resolution requirements for trustee companies providing traditional services*

REP 156 *Report on submissions to CP 102 Dispute resolution—Review of RG 139 and 165*

REP 182 *Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference*

REP 195 *Response to submissions on CP 112 Dispute resolution requirements for credit and margin lending*

REP 236 *Response to submissions on CP 138 Dispute resolution requirements for trustee companies providing traditional services*

## **Media and information releases**

08-05AD *ASIC proposes new financial services EDR claim limit of \$280,000* (8 September 2008)

09-263AD *ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference* (18 December 2009)

10-95AD *Access to dispute resolution for consumers of credit and margin lending financial services* (7 May 2010)

10-150AD *ASIC sets dispute resolution standards for unlicensed lenders with carried over instruments* (6 July 2010)

11-23AD *Revised internal dispute resolution procedures for financial institutions* (16 February 2011)