Review of dispute resolution policies—RG 139 and RG 165

Regulation Impact Statement (RIS)

May 2009

What this Regulation Impact Statement is about

1 This Regulation Impact Statement (RIS) addresses ASIC's proposed update of its dispute resolution policies set out in:

(a) Regulatory Guide 139 *Approval of external dispute resolution schemes* (RG139); and

(b) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG165).

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

3 ASIC published Consultation Paper 102 *Dispute resolution—review of RG 139 and RG 165* (CP 102) on 8 September 2009 to consult on how we proposed to update RG 139 and RG 165. We received 24 submissions from stakeholders on the various policy proposals set out in CP 102. We also met with consumer representatives, industry representative organisations and external dispute resolution (EDR) schemes during a series of round table meetings. We also met with representatives from the professional indemnity (PI) insurance industry to consult on how our proposals could impact on the provision of PI insurance (especially in the context of Regulatory Guide 126 *Compensation and insurance arrangements for AFS Licensees* (RG 126)). ASIC has taken these submissions into account in preparing this RIS.

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

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

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

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

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Issues

Background

Dispute resolution requirements

6 Australian financial service licensees (Licensees), unlicensed product issuers and unlicensed secondary sellers (collectively financial service providers) are required to have a dispute resolution system that covers complaints made by retail clients in respect of the financial products and services they provide (sections 912A and 1017G, Corporations Act).

7 This dispute resolution system must consist of:

(a) IDR procedures that comply with standards and requirements made or approved by ASIC; and

(b) membership with one or more ASIC-approved EDR Schemes.

8 Where the Superannuation Complaints Tribunal (SCT), established under the *Superannuation (Resolution of Complaints) Act 1993* can deal with complaints made by retail clients, membership with an ASIC-approved EDR scheme will not be required, to the extent that the SCT can deal with *all* complaints made by retail clients in respect of the financial products and services provided by a financial service provider.

9 At the moment, when considering whether to make or approve standards or requirements relating to IDR, ASIC must take into account Australian Standard AS 4269-1995 on complaints handling (Corporations regulations 7.6.02(1) and 7.9.77(1)).

10 Australian Standard AS 4269-1995 has since been superseded by Australian Standard AS ISO 10002-2006. We understand that the Government intends to replace the reference to AS 4269-1995 with AS ISO 10002-2006 in the Corporations regulations this year.

11 ASIC may also vary or revoke a standard or requirement or the operation of such a standard or requirement it has made or required in relation to IDR procedures (Corporations regulations 7.6.02(2) and 7.9.77(2)).

12 When considering whether to approve an EDR scheme, ASIC must take into account the accessibility, independence, fairness, accountability, efficiency, and effectiveness of the EDR scheme, and any other matter ASIC considers relevant (Corporations regulations 7.6.02(3) and 7.9.77(3)).

13 ASIC may also require that an EDR scheme's approval be subject to specific conditions, including a condition relating to the conduct of an independent review of the operation of the scheme.

14 ASIC's current approach to dispute resolution is explained further in RG 139 and RG 165 (copies of which are available at www.asic.gov.au).

ASIC's process in reviewing its dispute resolution policies

15 In considering its revised policy on dispute resolution requirements, ASIC:

- conducted a series of round-table discussions with industry representative organisations, consumer representatives and EDR schemes.
- commissioned 2 pieces of independent research into consumer and investor experiences of and satisfaction with EDR schemes and IDR processes.
- published CP 102, detailing our various proposals on which ASIC sought comment.
- reviewed feedback to CP 102 and conducted further targeted consultation with stakeholders. We modified our proposals based on this feedback.

Research

16 In order to complement consultation with consumer representatives and as no accurate information about consumer and investor experiences of and satisfaction with dispute resolution processes in the Australian financial system existed, ASIC commissioned 2 pieces of independent research to better understand consumer and investor experiences with IDR and EDR processes:

(a) Newspoll Market Research was commissioned to conduct broad based quantitative research into consumer and investor satisfaction with financial products and services and experiences of and satisfaction with IDR processes; and

(b) Ipsos-Eureka Social Research Institute was commissioned to conduct quantitative and qualitative research about consumer and investor perceptions of and experiences with dispute resolution in the financial services industry. This piece of research focused on EDR and to a lesser extent explored IDR.

17 The key findings of both pieces of research were published in CP 102. A copy of CP 102 is available at ASIC's website at www.asic.gov.au/cp.

CP 102

18 ASIC published CP 102 on 8 September 2008 to consult on its proposed policy to review RG 139 and RG 165.

19 We received 24 submissions from a diverse range of stakeholders (including individuals, consumer representatives, Licensees, industry representative organisations and EDR schemes) on the various policy proposals set out in CP 102 (See Appendix 1 for a summary of parties who made submissions and www.asic.gov.au/cp for copies of public submissions). Submissions were often polarised on key issues and revealed fundamental differences of opinion in the role of EDR.

20 ASIC also met with representatives from PI insurers to consult on issues and concerns relating to our proposal to introduce a minimum compensation cap of $280,000 and the flow on effects for PI insurance (especially in the context of RG 126).

21 We have published a feedback summary report which highlights the key issues that were raised in consultation and our responses. See Report 156 *Report on submission to CP 102 Dispute resolution – review of RG 139 and RG 165*, which is attached at Appendix 2.

EDR scheme developments

22 Over the course of ASIC's review of its dispute resolution policies, five EDR schemes merged to become the Financial Ombudsman Service (FOS). FOS, formed by the merger of the Banking and Financial Services Ombudsman Limited (BFSO), the Financial Industry Complaints Service Limited (FICS) and the Insurance Ombudsman Service Limited (IOS) commenced operations on 1 July 2008 and provides dispute resolution services for up to 80% of Australian banking, insurance and investment disputes[1].

23 On 1 January 2009, two more EDR schemes also joined FOS, the Insurance Brokers Disputes Limited (IBDL) and the Credit Union Dispute Resolution Centre Pty Limited (CUDRC).

24 This consolidates the EDR scheme landscape into three ASIC-approved EDR schemes:

(a) the FOS;

(b) the Credit Ombudsman Service Limited (COSL); and

(c) the Financial Co-operative Dispute Resolution Scheme (FCDRS).

[1] Minister for Superannuation & Corporate Law Press Release No 45, 10 July 2008.

25 FOS was approved by ASIC under RG 139 on 16 May 2008. It is a condition of ASIC's approval of FOS that a single set of FOS Terms of Reference be in place by 1 January 2010. Until that time, FOS will continue to operate the existing rules and procedures of the BFSO, FICS, IOS, IBDL and CUDRC. The BFSO, FICS, IOS, IBDL and CUDRC will be wound down in due course.

What are the issues/problems being addressed?

26 As stated in RG 139, the specific functions of EDR schemes within the broader financial services regulatory system are to provide:

(a) a forum for consumers to resolve complaints 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.

27 The usefulness of the services in resolving disputes between many consumers and financial service providers is also evidenced by regular reports from schemes about the high volumes of complaints that are regularly received and resolved at no cost to the consumer and less cost to the financial service provider than if the matter had been litigated[2].

28 In the absence of the schemes, many consumers would lack a cost effective method to deal with their complaints: ASIC is neither empowered nor resourced to perform a dispute resolution function and instituting legal proceedings would be neither a practical nor affordable option for consumers in the vast majority of cases (in light of the fees and costs of legal representation, and the intimidating nature of legal proceedings[3]).

29 However, under the current regulatory guides (which have been subject to divergent and often polarised interpretations by industry and consumer groups and consequently inconsistently applied), a number of significant issues have arisen in relation to the processes and jurisdictions of EDR schemes. These issues (which are outlined in paragraphs 30-34 below and described in more detail in section A) have limited consumer access to the services, led to confusion about the eligibility of some "complaints" for resolution and, consequently, restricted the function of EDR schemes in improving industry standards of conduct.

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[2] Annual reports of complaints statistics are available on the websites of all financial services EDR schemes.

[3] See Productivity Commission report Box 9.1 at p194: "The costs of redress can be high. These involve the resources of the various agencies and courts that provide them, their support staff, the policy makers, the consumer agencies and all the various lawyers and other intermediaries that are involved. They involve unpriced costs too – such as time spent in seeking and securing redress, emotional distress for consumers and business and a litany of other obstacles that represent costs to users."

The issues/problems relating to EDR

30 One key problem that has arisen is that the coverage of EDR schemes has only been updated in a staggered way, such that the jurisdictions of some schemes have not been increased in pace with the increasing number of complaints falling outside the scheme's jurisdiction and the increasing value of products and services provided in particular industry sectors. For example, the Investments, superannuation and life insurance (ILIS) division of FOS[4] has only recently incrementally increased its limit for investment complaints to $150,000 (increased from $100,000 with effect from 1 July 2008[5]). This is despite the significant effect of inflation, increases in the size of complaints as the value of life insurance, superannuation and investments go up, and a number of drawn out and contentious reviews on the issue conducted by FICS[6].

31 As noted in the recent Productivity Commission Report into Australia's Consumer Policy Framework, "excessively staggered and untimely changes may undermine the adequacy of dispute resolution"[7].

32 In practice, the situation has left a significant number of consumers without affordable access to redress – undermining consumer confidence and participation in the market. For instance, at the time of the collapse of the Westpoint group of companies, FICS had a monetary limit of $100,000, which was not adequate to compensate many consumers for the full amount of money they lost as a result of their investment in Westpoint in cases where advisers breached their duties in advising on Westpoint products. This problem is described in more detail at paragraphs 57-82 below.

33 The scale of the problem of insufficient scheme coverage is also likely to increase in the current economic climate and with the transfer of credit from the states and territories to the commonwealth. To date, FOS has reported an average rise of 22.8% in the number of complaints received up to 30 June 2008 across all divisions[8], which highlights the impact of the global

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[4] Formerly the Investments complaints division of the Financial Industry Complaints Service (FICS).

[5] For all complaints received on or after 1 July 2008 and only to complaints where the complainant could not have known about the relevant facts before 1 July 2008, Increases to the Monetary Limits from 1 July 2008 – FAQs Members, http://www.fics.asn.au/Monetary_Limits_FAQ_members.pdf

[6] An increase was recommended in the Independent Review conducted in 2002 (p33), and the issue was again considered of FICS rules from 2004 onwards, with a specific review on the issue conducted in 2007.

[7] Productivity Commission Enquiry Report, *Review of Australia's Consumer Policy Framework,* Report No. 45 (Vol 2), Recommendation 9.2 (April 2008), pp 208-209.

[8] The General banking and finance division of FOS reported a 22.7% increase in new cases from 1 July 2007 to 30 June 2008, with the biggest increases in the home finance category.
The ILIS stream of FOS reported an increase of 33% in new cases over the 6 month period from 1 January 2008 to 30 June 2008 (with a 152% increase in disputes about managed investments and a 55% increase in financial planning disputes, involving allegations of inappropriate advice and standards of service).
The General insurance division of FOS reported a 12.6% increase in new cases from 1 July 2007 to 30 June 2008 (with the biggest rise in disputes in the home buildings category due to the damaging weather events of 2009).

financial crisis on the volume of complaints being handled at EDR (Media Release, 10 December 2008)[9].

34 Out of the consultation process and developments in relation to the convergence of FOS, a number of other EDR issues were identified which related to the unequal treatment of complaints.

The issues/problems relating to IDR

35 A key issue relating to ASIC's IDR requirements is that the regulatory guides still have regard to Australian Standard AS 4269-1995, when it has been superseded by Australian Standard AS ISO 10002-2006. We also understand that the Government intends to replace the reference to AS 4269-1995 with AS ISO 10002-2006 in the Corporations regulations. Accordingly, if the regulatory guides are not updated they will be out of date and inconsistent with current Australian Standards, industry best practice and the law.

36 Another issue with IDR relates to the lack of a consistently understood definition of "complaint" across the Australian financial services sector. When RG 165 was issued in November 2001, RG 165.7 referred to a "complaint" as any enquiry, complaint or dispute, however defined, that may be dealt with under a given IDR procedure or by a particular EDR scheme. RG 165 also stated that ASIC would consult further on the development of a definition. ASIC's regulatory experience and feedback from consumer representatives to date suggests that some financial service providers may not be identifying complaints early enough in the process, in part because of the ambiguity of the current definition of "complaint".

37 Finally feedback from consumer representatives and ASIC's regulatory experience to date also indicate that some complainants are spending a long time at IDR and having difficulty progressing to EDR, effectively limiting consumers' access to EDR services. This is because an issue is not characterised as a complaint early enough in the IDR process and consumers and investors are unaware of the right to complain to EDR.

The need for Government action

38 ASIC has regularly and consistently communicated our interpretation of the current regulatory guidelines by making submissions to independent reviews, when approving changes to scheme rules and in our oversight of schemes' ongoing compliance with our policy requirements (through both formal and informal liaison). We have also held a number of stakeholder

[9] http://www.fos.org.au/centric/home_page/publications/annual_reports.jsp

roundtables with industry, consumer and EDR stakeholders. However, this involvement has not been enough to prevent or address the development of the problems identified above.

39 Ultimately, ASIC's ability to address under-performance of schemes is limited. While we are able to revoke the approval of a scheme, this would be a significant step with serious implications for both the providers who are members of the scheme (as the dispute resolution requirements are a condition of their licence) and consumers.

40 The recent industry-initiated convergence of five of the seven financial services EDR schemes into FOS provides an excellent opportunity to harmonise the processes that apply to different types of financial services complaints. However, it does not cure the experienced ambiguity of the regulatory guides as interpreted and implemented by all the relevant stakeholders (the schemes themselves, scheme members and consumers). For instance, the submissions received in response to CP102 were often polarised on key issues, reflecting ongoing differences of opinion about the role of EDR[10].

41 These on-going differences in opinion about the role of EDR are best illustrated by comparing the views of consumer representatives with that of industry:

- consumer representatives – the existence of EDR schemes provide consumers with accessible and cheap dispute resolution processes and play a vital role in ensuring that IDR are good forums for the early resolution of consumer complaints. The fundamental principles of accessibility, independence, fairness, accountability, efficiency and effectiveness have contributed to this. As EDR schemes should be a forum of first choice for consumers and to enhance the effectiveness of the schemes, access to and coverage of the schemes should be increased as much as possible; *compared with*
- industry – EDR schemes have historically evolved along different industry sector lines, and have therefore developed their dispute resolution processes to cater to the specific needs of each particular industry's complaints. Any changes to EDR will need to accommodate these differences and ensure that appropriate transitional timeframes are allowed.

42 In these circumstances, government action is warranted to cure ongoing ambiguity and address key issues in the regulatory guides in order to

[10] We received 24 submissions from a diverse range of stakeholders (individuals, consumer representatives, licensees, industry organisations and EDR Schemes) in response to CP102. The date for submissions closed on 7 November 2008 however we received many submissions after the deadline. A list of all 24 submissions and respondents to CP102 is provided at Appendix 1.

improve the functionality and coverage of schemes so they more effectively promote consumer confidence and market integrity.

43 It should be noted that when ASIC first released RG 139 on 8 July 1999 and RG 165 on 28 November 2001, ASIC foreshadowed a review of each respective regulatory guide in 2 years time[11]. A considerable amount of time has passed since these proposed reviews, making a review long overdue.

44 It should also be noted that ASIC's regulatory guidance provides the broad, minimum settings for:

(a) financial service providers to comply with their dispute resolution requirements; and

(b) EDR schemes to obtain ASIC approval and continue to be ASIC-approved.

45 Financial service providers are still free to operate to higher standards than those prescribed by ASIC and EDR schemes are still free to set their own detailed rules and operate to higher standards than the broad, minimum settings. Where possible, in RG 139 and RG 165, ASIC also encourages financial service providers and schemes to adopt higher standards.

Objectives

46 Compensation for loss suffered by a consumer or investor or some other form of redress is an important consumer protection mechanism.

47 Bearing this in mind, the main objective of the dispute resolution requirements are to ensure that the dispute resolution framework in the Australian financial system is robust, accessible, fair and working efficiently and effectively where both IDR and EDR processes are concerned to:

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

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

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

(d) raise standards of industry best practice across all sectors of the Australian financial system, including promoting fairness, honesty and

[11] See RG 139.149 – "Review of this Policy" and see box titled ""Future guidance on IDR procedures" after RG 165.4.

professionalism amongst those who provide financial products and services; and

(e) reduce systemic risks and deter the bad behaviour of financial service providers.

48 In considering the ways in which ASIC should administer our requirements for dispute resolution in this RIS we seek to balance:

- the aim of ensuring that consumers and investors are sufficiently protected by having recourse to efficient and effective IDR processes and EDR schemes; and
- the desirability of facilitating activity in the financial services industry, including not unreasonably burdening financial service providers and EDR schemes.

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

Issues

50 In this RIS we consider alternative ways of administering our requirements for dispute resolution in respect of four main issues, as well as a number of minor issues.

51 The issues addressed in this RIS include:

(a) Issue 1: EDR scheme coverage;

(b) Issue 2: Definition of Complaint and adoption of AS ISO 10002-2006;

(c) Issue 3: Reporting of Statistical Information;

(d) Issue 4: Members ceasing to carry on business and EDR; and

(e) Other issues relating to IDR and EDR.

52 It should be noted that this RIS only addresses those issues that may have a cost impact on stakeholders. CP102 sought to fix a range of "problems" or issues within the current policy settings, many of which may have little or no cost impact. The fixing of many of these problems or issues were by way of clarifying the intention of our existing policy, where there was confusion or differences in interpretation.

Affected parties

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

(a) financial service providers (i.e. Licensees and unlicensed product issuers/unlicensed secondary sellers who are subject to the dispute resolution requirements);

(b) consumers and investors;

(c) PI insurers;

(d) ASIC-approved EDR schemes;

(e) Australian courts; and

(f) ASIC and the Commonwealth Government.

Qualification

54 In CP 102, ASIC sought feedback, in particular qualitative and quantitative data, on the likely compliance costs and the other impacts, costs and benefits of this, and other, proposals. In response to CP 102, ASIC received very little quantitative data.

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

A Issue 1: EDR scheme coverage

56 This section considers options to ensure that the coverage of EDR schemes is consistent with the nature, extent and value of complaints in the relevant industry or industries soconsumers are provided with effective and affordable access to redress, including options on how to approach awards of interest in respect of a complaint.

Assessing the problem

Current approach

Monetary limits

57 ASIC currently assesses the adequacy of each EDR scheme's coverage with regard to:

(a) the types of complainants that can access the EDR scheme;

(b) the types of complaints the EDR scheme can handle; and

(c) applicable monetary limits.

58 RG 139 provides guidance on how ASIC will assess the adequacy of the coverage of a scheme. In particular, RG 139.34 states that an ASIC-approved EDR scheme's coverage must be sufficient to deal with:

(a) the majority of consumer complaints in the relevant industry (or industries) and the whole of each complaint; and

(b) consumer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries.

59 At the moment, almost all ASIC-approved EDR schemes operate hard monetary limits.

60 Most schemes, including the Banking and finance division of FOS (which deals with the greatest number of complaints) operate a monetary limit of $280,000. The only exceptions are:

(a) the ILIS stream of FOS (formerly FICS) which operates a monetary limit of $150,000 for investment complaints;

(b) the Insurance Brokers stream of FOS (formerly IBDL) which operates a monetary limit of $100,000; and

(c) COSL which operates a compensation cap of $250,000.

61 When a scheme that operates a hard monetary limit receives a complaint, the scheme assesses the complaint to see if the value of the claim comes within the monetary limit.

62 If the claim is in excess of the monetary limit, even by a small amount, the consumer or investor is precluded from accessing the scheme (unless the scheme member consents to the scheme having jurisdiction). ASIC's regulatory experience and the information reported by schemes in quarterly reports and annual reports to date reveal that members hardly ever, if at all, consent to the schemes having jurisdiction in these circumstances.

63 COSL is the only scheme that operates a compensation cap approach. Under a compensation cap approach, all complainants, regardless of the value of their claim are able to access COSL, however COSL is only able to award compensation up to the value of its cap, currently $250,000. Complainants who access COSL and accept a decision of the scheme are required to sign a waiver to abandon the excess of their claim in full and final settlement of their claim at the end of the EDR process (i.e. the consumer/investor agrees that they will not pursue the balance of their claim in an alternative forum, such as a court).

Interest on a claim

64 At the moment, EDR schemes do not have a consistent approach to how they award interest in respect of a claim.

65 Currently:

(a) the Terms of Reference of COSL, FCDRS and the General insurance stream of FOS state that an award of interest will be included in the amount awarded under the monetary limit or compensation cap (in the case of COSL); compared with

(b) the ILIS stream of FOS's Terms of Reference which states that interest is claimable *in addition* to the amount that may be awarded under its monetary limit.

66 The ILIS stream of FOS has the most prescriptive approach to awarding interest, in that its Terms of Reference provides:

(a) for a cap on the total amount of interest awardable – i.e. an award of interest must not generally exceed $50,000;

(b) a rate of calculation of interest, depending on the financial product or service provided (e.g. prescribed rates under s 57, *Insurance Contracts Act 1984 (Cth)* for life insurance policies or the monthly 10 year Treasury bond yield rates for other financial products); and

(c) that ILIS decision makers may have regard to "*[a]ny factors it considers relevant, including but not limited to the extent to which the* *conduct of either the complainant or the member has contributed to delay*" (clause 34.3, ILIS Terms of Reference).

67 The Terms of Reference of other divisions of FOS - the General banking stream, the Insurance broking stream, and the Mutuals stream, are all silent on their approach to interest.

Problems

68 The fact that a significant number of consumers and investors are denied access to redress through EDR because of the way in which monetary limits operate, because the value of the monetary limit is inadequate to deal with the nature, extent and value of consumer transactions in certain industry sectors, and because of the way interest is awarded, has the following implications:

- consumer and investor confidence in Australian financial products and services is eroded, as consumers have no other low cost dispute resolution alternative. Consumers and investors are also unlikely to pursue their claim in court, due to high legal costs (unless ASIC and/or litigation funders are willing to become involved. This may only be the case for high value, "class action" type claims);
- the overall effectiveness of the dispute resolution framework in the Australian financial services system is undermined, as EDR schemes lose their effectiveness;
- the ability to raise standards of industry best practice and promote fairness, honesty and professionalism amongst those that provide financial products and services is negatively impacted; and
- the ability to reduce systemic risks and deter the bad behaviour of financial service providers is negatively impacted.

Problems with the way monetary limits operate

69 The three main problems with determining EDR scheme coverage by reference to hard monetary limits are that:

(a) certain schemes are not increasing the value of their monetary limit to keep pace with the nature, extent and increasing value of complaints in certain sectors of the financial services industry. We discuss this further at 71-80;

(b) consumers and investors with claims just above the monetary limit are precluded from accessing the scheme and depending on the scheme's approach to interest, the accrual of interest may take a complaint outside the scheme's jurisdiction, even though the complaint has been initially assessed as being within the scheme's monetary limit; and

(c) EDR schemes spend significant time and resources determining jurisdiction before the substance of a claim can be considered. This can substantially prolong the amount of time an EDR scheme takes to handle a complaint.

70 It should be noted that in relation to the costs associated with determining jurisdiction under monetary limits, COSL, the only scheme that currently operates a compensation cap, advises that, in contrast to schemes that operate a monetary limit, they do not spend significant time and resources determining whether a complaint falls within a monetary limit before the actual merits of the complaint are able to be considered[12].

Problems with the value of monetary limits not keeping pace with the increasing value of complaints in certain industry sectors

71 Available data indicates that the value of financial products and services provided to Australian consumers and investors are generally increasing in value. Some such indicators include:

(a) the growing levels of superannuation balances since 1992 (in 2005/06, ASFA research found that the average superannuation payout for men was $136,000[13] and ASIC's 2006 shadow shopping study found that the average level of superannuation assets for consumers aged 50 years and over was $188,525[14]);

(b) the high level of funds in self-managed superannuation funds (SMSFs) on which financial advice is obtained. The average account balance of a SMSF was $756,000 at July 2008[15] and approximately 55% of SMSFs (211,000) got advice from a licensed adviser and 74% of their assets were under advice[16];

(c) the high mean value of investment portfolios across all investors ($321,500) as estimated by Australian investors when asked to estimate the current value of their investments, excluding their family home[17];

(d) the amount households look to borrow to purchase a home: ranging between $370,000 and $500,000[18]; and

(e) the average loan size ($230,000) for first home buyers in 2007[19].

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[12] COSL's submission to CP 102, p 18.
[13] ASFA, *Retirement savings update*, Feburary 2008.
[14] ASIC Report 69, April 2006, 'Shadow shopping survey on superannuation advice'. The report is based on a survey of 306 consumers.
[15] Investment Trends, *2008 self managed super funds (SMSF) investor report*, August 2008. Although the vast majority of SMSFs have two members, very few SMSFs seek financial advice in respect of individual members, but instead seek advice about the investment objectives of the fund.
[16] See the Deputy Chairman of ASIC, Jeremy Cooper's address to the Insurance Council of Australia's 2009 Regulatory Update at the Four Seasons Hotel, Sydney, para 27, available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICA-Speech-040209.pdf/$file/ICA-Speech-040209.pdf
[17] ASIC Report 121, April 2008, 'Australian investors at a glance'. The question posed to research participants was "And what is the approximate value of your total investment portfolio (excluding your own home)?"
[18] The Deloitte Australian Mortgage Report, December 2008.

72 This, coupled with a staggered and ad-hoc approach to increasing monetary limits by schemes that cater for certain industry sectors creates an EDR landscape that disadvantages consumers and investors of certain financial products and services.

73 In ASIC's regulatory experience to date, in the face of significant industry opposition, increases to monetary limits in the case of the ILIS stream of FOS (previously FICS) have been particularly slow and incremental, failing to keep up with increases in inflation and the nature, extent and value of relevant consumer transactions – particularly where financial advice, investment products, life insurance and superannuation matters (not covered by the SCT) are involved.

74 In the case of the then FICS, which recently reviewed its then $100,000 monetary limit in 2007[20], the scheme was only able to achieve an incremental increase in its monetary limit to $150,000, despite calls since 2002 to increase its monetary limit to match that of the BFSO (a comparable ASIC-approved EDR scheme)[21]. The main obstacle that prevented a higher limit being achieved during the FICS 2007 monetary limits review was lack of support from FICS members who were opposed to a substantial increase in the monetary limits and the majority of whom only supported a much smaller increase (to $130,000, based on indexation of the $100,000 to include an increase in CPI).

75 In terms of the test at RG 139.34, a scheme may fail to provide sufficient coverage if its monetary limit is insufficient to reflect the nature, extent and value of consumer transactions in those industries.

76 In the case of FICS, now the ILIS stream of FOS, Table 1 shows that there has been a progressive increase in the number of complaints received by FICS that were above the then $100,000 monetary limit (particularly since the Westpoint group of companies collapsed in 2005).

[19] ABS, *Housing Finance Australia*, November 2008, category 5609, ABS, *Australian Social Trends*, July 2008, category 4102.
[20] Further information about the then FICS 2007 review of its monetary limits is available at http://www.fics.asn.au/monetary.asp
[21] Prior to 1 December 2004, the BFSO's monetary limit was $150,000, from 1 December 2004 to 20 November 2006, the BFSO's monetary limit increased to $250,000 and from 21 December 2006, the BFSO's monetary limit increased to $280,000. See BFSO Bulletin 44 (December 2004), p 2 and BFSO Bulletin 52 (December 2006), p 2.

Table 1: FICS (now the ILIS stream of FOS)'s complaints exceeding the $100,000 monetary limit

Category	2007	2006	2005	2003	2002	2001	2000	1999
Life insurance	19	23	16	10	4	4	1	1
Financial planning	35	40	10	2	2	4	3	
Managed investment	2	10	2	1	0	1	0	
Stockbroking	8	8	10	1	1	2	0	
Total – over limit	**64** **6.3%**	**81** **6.2%**	**38** **2.6%**	**14** **0.8%**	**7** **0.8%**	**11** **1.2%**	**4** **0.4%**	**1**
Total – written complaints finalised	1,009	1,307	1,483	1,758	863	899	971	849

77 The data in Table 1 indicates that the FICS $100,000 monetary limit was not consistent with the nature, value and extent of consumer transactions of the then FICS' members. However, what the data in Table 1 does not show and what ASIC does not currently collect nor have access to, is:

(a) the number of consumers and investors who do not complain to FICS (now the ILIS stream of FOS) because they were over the monetary limit;

(b) the number of complaints that financial service providers do not refer to FICS (now the ILIS stream of FOS) from IDR because they involved amounts that exceeded the monetary limit; and

(c) disaggregated statistics on the actual value of funds under advice or value of investment holdings by retail clients.

78 Despite ASIC's call for quantitative data of this type in CP 102, very little has been received to date. Whilst this information gap makes it extremely difficult for ASIC to quantify the full extent to which monetary limits exclude potential complainants from EDR, it is highly likely that the missing data of itself in relation to FICS' current monetary limit, could indicate that a significant number of consumers and investors are not able to access the scheme.

79 Compared with the nature, extent and value of complaints handled by the ILIS stream of FOS, complaints handled by the insurance broking division of FOS (previously IBDL) have tended to involve single claims disputes, that are generally lower in value, ranging between values of zero to $50,000.

Furthermore, the number of complaints in excess of the $100,000 monetary limit remain relatively low compared with the ILIS stream of FOS: 3.2% of the total number of complaints in 2005, 2% of the total number of complaints in 2006 and 0% of the total number of complaints in 2007[22].

80 It should be noted that 2008 data is not currently publicly available on the number of complaints falling outside the insurance broking division of FOS' $100,000 monetary limit.

Problems with interest

81 The different approaches of the schemes to awarding interest creates an uneven EDR landscape which disadvantages those consumers and investors who may have claims with members of EDR schemes that include interest in their monetary limit.

82 In light of these inadequacies, government action is warranted to ensure that the approach to coverage and accessibility of EDR schemes ensures sufficient consumer protection in the Australian financial services industry.

Objectives

83 In addition to the objectives outlined at 46-49, the more specific aims of this proposal is to ensure that EDR scheme coverage is adequate to give consumers and investors confidence to enter into higher value financial product and financial service transactions.

Options

Option 1 – EDR schemes operate a minimum compensation cap of $280,000, and to the extent insurance brokers are covered by the scheme, a minimum compensation cap of $150,000, for claims that meet the value of the retail client test (currently $500,000) plus interest

84 This proposal aligns with recommendation 9.2 of the Productivity Commission's Enquiry Report *Review of Australia's Consumer Policy Framework* (April 2008).

85 Under this Option, monetary limits would be replaced with caps on the amount of compensation an EDR scheme can award so EDR schemes would be required to cover the vast majority of types of consumer complaints in the

[22] See IBDL's 2007 annual report.

relevant industry or industries and provide a compensation cap that is "*consistent with the nature, extent and value of the consumer transactions in the relevant industry or industries*".

86 EDR schemes would also be required to award interest *in addition* to the amount awarded under the compensation cap for both phases described at 85.

87 From 1 January 2012, the compensation cap (whether this be $280,000, to the extent insurance brokers are covered by the scheme, $150,000, or a higher amount chosen by the scheme) would also be indexed by the higher of the increase in CPI or Male Total Average Weekly Earnings (MTAWE) every 3 years so the compensation cap remains relevant.

88 Any EDR outcome under this option would only bind the consumer or investor if they chose to accept it at the end of the EDR process. If this occurred, the EDR scheme could require the complainant to sign a Deed of Release in full and final settlement of their claim and the EDR scheme's decision would be binding on both parties.

Option 2 – EDR schemes operate a minimum compensation cap of $280,000 for claims that meet the value of the retail client test (currently $500,000) plus interest

89 This option is identical to Option 1, except there would be no special exemption to the minimum $280,000 compensation cap for insurance brokers.

Option 3 – EDR schemes operate a compensation cap of $500,000 (including interest)

90 Under this Option, monetary limits would be replaced with compensation caps, but the compensation cap would be the value of the retail client test under s761G under the Corporations Act, currently $500,000 (to be achieved in a staged process by 1 January 2012) instead of the minimum amount specified at Option 1.

91 Interest would be included *as part of* any award under the $500,000 compensation cap and indexation of the $500,000 compensation cap would not apply.

Option 4 – do nothing

92 Under this Option, the status quo would remain, so the current scheme coverage test would continue to apply - leaving it to the schemes to continue to attempt to balance the competing views of industry, consumers and the regulator when seeking to increase monetary limits.

93 If ASIC did nothing, the different approaches to how interest is awarded would also remain, leading to inconsistent EDR outcomes and unequal treatment of consumers and investors.

Impact analysis

Option 1 – a minimum $280,000 compensation cap and to the extent that insurance brokers are covered by the scheme, a minimum $150,000 compensation cap plus interest

Impact on Financial service providers

94 A shift from EDR scheme differential monetary limits to a compensation cap for claims that meet the value of the retail client test, under this Option and Options 2 and 3, may increase compliance costs for financial service providers regardless of which scheme they belong to as higher value complaints, currently excluded from the schemes' jurisdiction, would be able to be handled by the scheme.

95 Financial service providers who belong to the ILIS division of FOS would be impacted the most once schemes are required to operate a minimum compensation cap of $280,000 from 1 January 2012. The types of financial service providers who are members of the ILIS streams of FOS include financial planners and stockbrokers.

96 Financial service providers who belong to the insurance brokers division of FOS would be impacted less than members of the ILIS stream of FOS under this Option because their scheme would be required to operate a lower minimum compensation cap of $150,000 from 1 January 2012.

97 In the absence of quantitative data, it is not possible to measure the full extent of any likely increase in complaints for industry.

98 Any increase in costs to financial service providers by way of increased complaints numbers would be likely to consist of an increase in costs in responding to a higher number of complaints at EDR and a potential increase in membership fees levied by the EDR scheme charged on a per claims basis.

99 Financial service providers would also need to review their compensation arrangements to ensure they are adequate to comply with the requirements of RG 126, in particular whether their PI insurance policy (and/or alternative ASIC-approved arrangements) are adequate to meet amongst other things, EDR scheme claims.

100 The extent to which the unavailability of PI insurance or higher excesses or premiums may contribute to increased costs for financial service providers, may depend largely on how PI insurers respond to the second implementation phase of RG 126.

101 Some intermediaries have expressed concern in response to CP 102 that PI insurance will not be available to cover them.

102 Where the costs of PI insurance becomes prohibitive, financial service providers would have to consider alternative compensation arrangements and submit a written application to ASIC for approval.

103 It should be noted that it is impossible to know the extent to which PI insurance would be available at a reasonable cost until this proposal is put into practice.

104 The risks involved with how PI insurers may respond are considered in more detail at 116.

105 It is possible that some additional costs faced by financial service providers may be offset if there is a decrease in legal proceedings taken by consumers and investors. If, in fact, there is a decrease in litigation, then industry costs would also decrease because the cost of dealing with a complaint at EDR is significantly lower than taking a matter to court. However, it is more likely that this proposal would result in an increase in complaints from consumers and investors who would not have otherwise pursued their claim because of the prohibitive costs of initiating legal proceedings.

106 If consumer and investor confidence in the Australian financial industry is increased as a result of more people being able to access EDR, the flow-on benefits for financial service providers would be increased consumer and investor participation in financial products and services, thereby improving demand and subsequently profits.

Impact on consumers and investors

107 Replacing monetary limits with compensation caps and raising the compensation cap to a minimum level of $280,000 and in the case of insurance brokers, to a minimum level of $150,000, would greatly increase consumers' and investors' access to EDR schemes, not only for those with claims just above the cap, but also for the significant number of complainants who to date have been precluded from accessing a scheme.

108 These consumers and investors would have access to an independent, relatively quick and free dispute resolution mechanism to resolve their complaints. For most consumers and investors, accessing an EDR scheme is the only practicable avenue for redress, particularly when the costs and other barriers to litigation are prohibitive. For other consumers and investors who

would otherwise have litigated their claim, being able to access an EDR scheme would significantly reduce their costs because, unlike courts, there is no direct cost for a complainant to access EDR. These consumers would also benefit from:

(a) EDR schemes being more informal and not subject to the same strict evidential requirements imposed by courts; and

(b) the flexibility of EDR Schemes being able to provide a resolution that takes into account principles of fairness and industry best practice.

109 More generally, enabling access to redress for consumers and investors with higher value claims would benefit consumers and investors generally by increasing their confidence in the Australian financial system. It would also encourage future participation in the Australian financial system.

110 The number of consumers and investors who would benefit from this proposal is also likely to be higher than in other economic circumstances, in light of the current global financial crisis. To date, FOS has reported an average increase of 22.8% in the number of complaints received to 30 June 2008[23]. This trend is consistent with increases in complaints volumes also experienced by other equivalent dispute resolution schemes internationally. For instance the UK FOS anticipates that it will experience a 44% year-on-year increase in the number of complaints it will handle (i.e. deal with 150,000 new complaints in the 2009/10 financial year and resolve a record 165,000 cases[24]).

111 Complainants of insurance brokers would be unlikely to be disadvantaged by a lower minimum compensation cap of $150,000 as:

(a) insurance brokers, are covered by the deeming provisions under s985B of the *Corporations Act*, originating from the *Insurance (Agents and Brokers) Act 1984*. Section 985B affords some consumer protection as it clarifies when an insurance broker’s liability is discharged in an intermediary situation. It should be noted that equivalent consumer protections are not available to consumers and investors of providers in other financial services industries; and

(b) the number of complaints falling outside the jurisdiction of the scheme with respect to insurance brokers are not growing to the same extent as the ILIS stream of FOS.

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[23] The General banking and finance division of FOS reported a 22.7% increase in new cases from 1 July 2007 to 30 June 2008, with the biggest increases in the home finance category.
The ILIS stream of FOS reported an increase of 33% in new cases over the 6 month period from 1 January 2008 to 30 June 2008 (with a 152% increase in disputes about managed investments and a 55% increase in financial planning disputes, involving allegations of inappropriate advice and standards of service).
The General insurance division of FOS reported a 12.6% increase in new cases from 1 July 2007 to 30 June 2008 (with the biggest rise in disputes in the home buildings category due to the damaging weather events of 2009).

[24] http://www.financial-ombudsman.org.uk/news/updates/corporate_plan_and_09-10-approved.html

112 Awarding interest in addition to the compensation cap ensures that a consumer is adequately compensated where it is fair and reasonable to do so.

Impact on PI insurers

113 ASIC's RG 126 requires financial service providers to have adequate compensation arrangements in respect of their retail clients (generally a PI policy, or an alternative arrangement approved by ASIC). The PI policy must cover amongst other things, EDR scheme claims. Some of the available PI policies, may include a lower sub-limit for EDR scheme claims i.e. the policy may not cover the full amount of an EDR scheme claim and the financial service provider will be required to pay the difference themselves. Where the PI policy includes such a sub-limit, the financial service provider must have adequate resources to cover claims.

114 Whilst our guidance on having adequate compensation arrangements to cover EDR scheme claims in RG 126 is not directly affected by a move to compensation caps and the introduction of a minimum compensation cap at this time, there is a possibility that insurers may be less comfortable covering the full amount awardable in respect of an EDR claim.

115 An increase in EDR scheme coverage will not of itself increase the number of consumer loss events in any given year however it will affect the means of redress. An increase is likely to result in higher claims being resolved by EDR schemes as opposed to courts, and being an easier option for consumers, it may result in more consumer claims being pursued, resulting in actual compensation payments.

116 In these circumstances the most significant risks are that PI insurers:

(a) charge higher premiums for PI insurance and/or introduce sub-limits (or excesses) on EDR claim payouts;

(b) refuse to offer policies to certain sectors of the Australian financial services industry because they consider these sectors to be uninsurable or inherently too "high risk", regardless of whether the complaint is resolved at EDR or in a court; and/or

(c) exit the market altogether.

117 These risks are likely to be the greatest for PI insurers of ILIS members of FOS who provide investment advice because this is the industry sector that would be most significantly impacted by a minimum compensation cap of $280,000.

Impact on EDR schemes

118 At present, the EDR schemes that operate monetary limits spend significant time and resources in determining whether a complaint falls within its limit before being able to consider the actual merits of the complaint. One

advantage of replacing monetary limits with compensation caps is that it will be quicker and easier for schemes to determine whether a complaint is within jurisdiction (i.e. does the claim fall within the value of the retail client test, currently $500,000, not including interest).

119 Evidence of the benefits of compensation caps in this regard is already reflected by the experience of COSL, as previously mentioned at 70[25]. These savings in time and resources could also be passed on to industry and consumers in quicker and more effective EDR scheme decisions.

120 The potential increase in EDR scheme coverage would also require EDR schemes to ensure that they have sufficient resources (i.e. appropriately trained staff, computer systems, etc) to deal with any increase in complaints.

121 In response to CP 102, some industry submissions expressed concern that any move away from monetary limits to compensation caps would cause an increase in frivolous and vexatious claims. ASIC is not aware of any evidence to show that frivolous and vexatious claims are associated with higher value claims.

122 Allowing EDR schemes to require that complainants who accept a determination must waive their right to pursue the balance of their claim elsewhere would address concerns that consumers might use EDR as a 'dry run'. Also, such a process may facilitate commercial settlements where there is a valid claim.

Impact on Courts

123 Increased access to EDR for higher value complaints would potentially reduce the number of complaints being dealt with in court. This frees up the courts to deal with other cases and concentrates the costs of dispute resolution between financial service providers and their customers on the financial industry rather than society in general.

Impact on ASIC and government

124 Depending on the availability of PI insurance, financial service providers may need to consider alternative compensation arrangements, requiring ASIC-approval in order to meet their requirements under RG 126. This may result in an increased number of written applications submitted for ASIC's consideration.

[25] COSL's submission to CP102, p 18.

Option 2 - a minimum $280,000 compensation cap plus interest

Impact on financial service providers

125 Compared with Option 1, insurance brokers under this Option may be significantly impacted by the higher costs of operation in terms of having to obtain adequate PI insurance and/or have alternative ASIC-approved compensation arrangements, although not as significantly as under Option 3.

126 These additional costs might also force a significant part, if not all, of the insurance broking industry to either rationalise the services they offer or exit the market altogether by either closing down business or seeking to merge with other more viable market players and/or to pass on higher costs to consumers and investors.

Impact on PI insurers

127 Compared with Option 1, under this Option the risks for PI insurers of insurance brokers would be similar to those identified under Option 1. In particular, PI insurers for insurance brokers may charge higher premiums for insurance brokers' PI insurance.

Option 3 - $500,000 compensation caps including interest

Impact on all affected parties

128 The impacts of Option 3 on all categories of affected parties would be the same as for Options 1 and 2, but the degree of impact would be significantly magnified by the higher amount of the compensation cap, even though an award of interest would be included in the $500,000 cap.

129 In the absence of quantitative data, it is not possible to estimate the number of complaints that would exceed $500,000 (including interest) if this Option was adopted. Compared with Options 1 and 2, the number of excluded complaints under this Option may be slightly higher, given interest is included in the $500,000 cap. However, it is highly likely that these excluded complaints would be low in number and would tend to relate to longer term investment and/or superannuation products. In relation to superannuation products, the SCT would be able to deal with most of these complaints. It should also be noted that the SCT, unlike ASIC-approved EDR schemes, does not apply a jurisdictional monetary limit.

130 Also, compared with Options 1 and 2, this Option would put increased pressures on the PI insurance industry, increasing the likelihood that PI insurers would exit the market or charge significantly higher excesses and/or premiums. This would make it even more difficult than Options 1 and 2 for

financial service providers to obtain adequate PI insurance, thereby also increasing applications to ASIC for alternative compensation arrangements.

131 These additional costs might also force some financial service providers, particularly those who are smaller businesses, to rationalise the products and services they offer, to leave the market by either closing down business or to seek to merge with other more viable market players and/or to pass on higher costs to consumers and investors.

Option 4 – do nothing

Impact on financial service providers

132 Option 4 would relieve financial service providers from the additional compliance costs and risks outlined above for Options 1, 2 and 3. However, EDR schemes would still need to conduct regular reviews of their monetary limit to assess whether it is sufficient to meet the nature, extent and value of consumer transactions in the relevant industry or industries relevant to the scheme.

133 There is also a considerable risk that consequent low levels of consumer confidence would significantly undermine consumer and investor participation in the market, driving down demand and further dampening a financial services industry already affected by the Global Financial Crisis.

Impact on consumers and investors

134 Maintaining the status quo would mean that the problems identified above for consumers and investors, including in particular the lack of access to redress (leading to low consumer confidence) would remain largely unaddressed. This may significantly undermine the integrity, efficiency and effectiveness of the dispute resolution system in the Australian financial system.

135 Under this Option, if ASIC determined that the monetary limit set by a particular scheme was insufficient to meet the current test for coverage, ASIC's only recourse would be to revoke the scheme's approval. This would require Licensees to join another ASIC-approved scheme or risk being in breach of their licence, and would have dire implications for consumers, who would be left without any recourse to EDR, as the industry segmentation of EDR schemes mean that there is no alternative scheme a member can join.

Impact on PI insurers

136 Compared with Options 1, 2 and 3, PI insurers would face reduced risks under this Option.

Impact on EDR schemes

137 EDR schemes would continue to incur significant costs in interpreting and attempting to comply with the current test for scheme coverage. These costs would include costs incurred for recurrent reviews about the sufficiency of scheme coverage, consultation with a broad range of affected stakeholders on the issue, and the high costs of assessing whether claims fall within monetary limits (before the merits of the claim have been considered).

Impact on ASIC and Government

138 Without further clarification of ASIC's regulatory guidance, there would continue to be inconsistency in the application of, and arguably non-compliance with, ASIC policy about scheme coverage. Without clear, published and transparent policy on the issue, ASIC would continue to face increased costs in assessing applications for approval, and monitoring ongoing compliance of existing schemes with ASIC policy.

Recommendation

139 Our recommendation is Option 1. We recommend that EDR schemes be required to operate compensation caps of a minimum of $280,000, and to the extent that insurance brokers are covered by the scheme, a minimum of $150,000, for claims that meet the value of the retail client test (currently $500,000) instead of current monetary limits. We also recommend that compensation caps be indexed by the higher of the increase in CPI or MTAWE and that interest be awarded in addition to the compensation cap.

140 We consider Option 3 to have significantly higher compliance costs for financial service providers and PI insurances than Option 1. Similarly, we consider Option 2 to have higher compliance costs for insurance brokers and PI insurers (to the extent they provide cover for insurance brokers) than Option 1 This is why we do not propose Options 2 or 3. We also do not propose Option 4, because it does not address any of the problems we have identified.

Implementation

141 Our recommendation would be implemented by updating RG 139 and RG 165, to reflect this proposal.

142 The effective implementation date for EDR schemes to operate compensation caps instead of monetary limits, and allow EDR schemes to require complainants to waive their rights to pursue the balance of a claim elsewhere *if they accept the determination*, would be:

(a) from 1 January 2010 to 31 December 2011, require that EDR schemes operate a compensation cap, at least equivalent to or higher than the value of the monetary limit or compensation cap (in the case of COSL) it currently operates, for claims that meet the value of the retail client test under s761G of the *Corporations Act* (currently $500,000); and

(b) from 1 January 2012, prescribe that EDR schemes operate a minimum compensation cap of $280,000, and to the extent that the scheme covers insurance brokers, a minimum compensation cap of $150,000, for claims that meet the value of the retail client test under s761G of the *Corporations Act* (currently $500,000) (subject to limited exceptions for monthly income stream products and third party insurance claims). If they choose, EDR schemes would also be able to set a compensation cap that is higher than the prescribed minimum $280,000 or $150,000 cap.

143 The effective implementation date for:

(a) awarding interest in addition to the compensation cap would be from 1 January 2010; and

(b) indexation of the compensation cap every 3 years by the higher of the increase in CPI or MTAWE would be from 1 January 2012.

144 ASIC would be responsible for reviewing the effectiveness of the prescribed minimum compensation cap of $280,000 and in the case of insurance brokers $150,000, in future to ensure that the compensation cap continues to remain effective.

B Issue 2: Definition of complaint and adoption of AS ISO 10002-2006

145 This section considers options to ensure that complaints are efficiently and effectively identified at IDR, including improving IDR procedures in general.

Assessing the problem

Current approach

146 As part of the dispute resolution requirements, financial service providers must have IDR procedures to cover complaints made by retail clients (s912A and s1017G, Corporations Act).

147 Currently, ASIC must take the Australian Standard on complaints handling AS 4269–1995 into account when considering whether to make or approve standards or requirements relating to IDR (Corporations regulations 7.6.02(1) and 7.9.77(1)).

148 RG 165 sets out ASIC's requirements for IDR, taking AS 4269-1995 into account. RG 165.10 summarises what financial service providers must do under RG 165 in order to have IDR procedures that meet ASIC's requirements. Financial service providers must:

(a) satisfy the Essential Elements of Effective Complaints Handling in Section 2 of AS 4269-1995;

(b) appropriately document the IDR procedures; and

(c) have a system for informing complainants about the availability and accessibility of the relevant EDR scheme.

149 ASIC may also vary or revoke a standard or requirement or the operation of such a standard or requirement it has made or required in relation to IDR procedures (Corporations regulations 7.6.02(2) and 7.9.77(2)).

150 Australian Standard AS 4269-1995 has been superseded by AS ISO 10002-2006, the latter of which was published on 5 April 2006. ASIC understands that the Government intends to update the Corporations regulations to reflect the introduction of AS ISO 10002-2006 this year. In anticipation of this change, ASIC proposes to update RG 165 to reflect ASIC's new requirements taking into account AS ISO 10002-2006.

Problems

151 When RG 165 was issued in November 2001, there was no consistent definition of "complaint" across the Australian financial services sector. This situation remains whilst RG 165.7 refers to a "complaint" as any enquiry, complaint or dispute, however defined, which may be dealt with under a given IDR procedure or by a particular EDR scheme.

152 RG 165 notes that ASIC will consult further about developing a standard definition of "complaint" for the Australian finance sector.

153 Based on ASIC's regulatory experience and feedback from consumer representatives to date, it appears that complaints are not being identified early enough in the IDR process, perhaps due to there not being an established definition of "complaint". A clear and easy to understand definition would assist financial service providers to identify complaints so they can be addressed early in the IDR process.

154 When the Corporations regulations are updated so ASIC must take AS ISO 10002-2006 into account when making or approving any IDR standards or requirements, ASIC would be required to update RG 139 and RG 165. This would include updating the requirement that financial service providers satisfy the Essential Elements of Effective Complaints Handling in Section 2 of AS 4269-1995.

Objectives

155 In addition to the objectives outlined at 46-49, the more specific aim of this proposal is to ensure that IDR procedures are working efficiently and effectively, by encouraging the early identification of complaints in the Australian financial sector.

Options

Option 1 – adopt the definition of 'complaint' in AS ISO 10002-2006, but exempt financial services providers from applying the full IDR process where complaints are resolved *by the end of the next business day* from when they were received and adopt certain sections of AS ISO 10002-2006

156 Under this Option, ASIC would update RG 139 and RG 165 so financial service providers would be required to adopt the definition of complaint in AS ISO 10002-2006.

157 Under AS ISO 10002-2006, a “complaint” is defined as:

> *An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.*

158 So as to reduce administrative and compliance costs for financial service providers, particularly where minor and/or quick to resolve complaints are involved, under this Option, financial service providers would not be required to apply the full IDR process, in terms of capturing and maintaining records for complaints that are resolved *by the end of the next business day* from when the complaint was received.

159 ASIC would also update RG 139 and RG 165 so financial service providers would be required to adopt the Guiding Principles, and the following Sections of AS ISO 10002-2006:

(a) Section 5.1 – Commitment;

(b) Section 6.4 – Resources;

(c) Section 8.1 – Collection of Information; and

(d) Section 8.8 – Analysis and evaluation of Complaints.

160 The Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006 would update the requirements financial service providers are currently required to meet under RG 165 in relation to Section 2 of AS 4269-1995. See Appendix 3 for a comparison.

Option 2 – adopt AS ISO 10002-2006 in its entirety

161 Under this Option, ASIC would update RG 139 and RG 165 to require financial service providers to have IDR procedures that comply with AS ISO 10002-2006 in its entirety.

162 This would include requiring all financial service providers to adopt the definition of “complaint” (as discussed at Option 1) as part of their IDR processes.

163 Under this Option, financial service providers would also be required to meet the full requirements of AS ISO 10002-20006. So, in addition to the requirements under Option 1, financial service providers would be required to:

(a) track complaints from their initial receipt through the entire IDR process until a complaint is satisfied or the final decision is made (Section 7.2, AS ISO 10002);

(b) take regular action to determine satisfaction levels of complainants with the complaints handling process (Section 8.3, AS ISO 10002); and

(c) regularly audit the performance of the complaints handling process (Section 8.5, AS ISO 10002).

Option 3 – do nothing

164 Maintaining the status quo would result in the current dispute resolution requirements continuing, so there would be no change to RG 139 and RG 165 even though the Government would have updated the Corporations regulations to refer to AS 4269-1995. This would mean that the dispute resolution requirements would be out of step with the Corporations regulations and developments in complaints handling in other industries, given AS ISO 10002-2006 has a wide application to any product or service.

Impact analysis

Option 1 – adoption of the Guiding Principles, certain sections of AS ISO 10002-2006 and the definition of “complaint” with an exemption for complaints resolved by the end of the next business day

Impact on financial service providers

165 There would be an accepted, uniform definition of “complaint” amongst all financial service providers in the Australian financial system. This would promote greater certainty in the Australian financial system and assist in the early identification and therefore resolution of complaints at IDR.

166 The exemption from applying the full IDR process – in terms of capturing and recording complaints, where complaints are resolved *by the end of the next business day* from when they were received, would relieve administrative and compliance burdens, particularly for those financial service providers that operate smaller businesses.

167 The new definition of complaint would also help to improve IDR procedures as the definition clarifies that complaints about IDR procedures itself are subject to the dispute resolution requirements.

168 Financial service providers would be required to immediately acknowledge receipt of a complaint and address complaints according to their degree of urgency (See Appendix 3 under “Responsiveness”).

169 Under this Option, and compared with Option 3, whilst there would be no requirement at IDR for financial service providers to provide financial and non-financial remedies that are fair and reasonable, in compliance with legal obligations, relevant codes of conduct and good industry practice, there

would be minimal change to the full range of remedies provided (See Appendix 3 under “Remedies”).

170 This would be because EDR schemes would continue to be required to provide a full range of remedies under the regulatory guides. If financial service providers did not continue to provide these remedies, financial service providers may experience more complaints progressing to EDR, when they could have been resolved at IDR. The costs of resolving a complaint at EDR would be enough of an incentive for financial service providers to continue to provide the full range of remedies at IDR even though this would no longer be an IDR requirement.

171 Financial service providers would face initial compliance costs as they review their IDR procedures and update them to ensure they meet the new requirements (e.g. publish new internal IDR procedure manuals, train their staff, etc) and increased compliance costs in terms of recording and reporting IDR complaints. The costs involved in capturing and recording complaints would be reduced by the exemption that financial service providers will not have to capture and report complaints that are resolved *by the end of the next business day* from which they were received.

172 However, some of these initial compliance costs in terms of reviewing and updating IDR procedures would not apply to those financial service providers who have already updated their IDR procedures to comply with AS ISO 10002-2006. Submissions to CP 102 indicated that there are financial service providers who would fall into this category.

173 On the basis of the submissions provided, it is not possible to quantify the total number of financial service providers nor the particular sectors of the financial services industry that have already updated their IDR procedures in line with AS ISO 10002-2006. However, consumer representatives submitted that there would be “many” and at least one major insurance group of 9 companies also submitted that they fall into this category.

174 Adopting the Guiding Principles and certain key sections of AS ISO 10002-2006 under this Option, as opposed to the Australian Standard in full under Option 2, retains flexibility for financial services providers and allows them to tailor their IDR procedures, although within a prescribed dispute resolution framework. It should be noted that this approach of adopting key parts of the Australian Standard on complaints handling, is the approach that is currently adopted with respect to AS 4269-1995.

Impact on Consumers and investors

175 Immediate acknowledgement of receipt of a complaint by a financial service provider would help to assure complainants that the complaints handling process at IDR has commenced.

176 The new definition of “complaint” would remove the onus on consumers and investors to explicitly state that an issue or an enquiry is a complaint and would create certainty around what constitutes a “complaint”.

177 A consistently understood definition of complaint would also promote the more consistent treatment of complaints and assist in the early identification of a complaint so it is more quickly resolved and does no fall through the cracks. This would lead to more satisfied consumers and investors as the independent research commissioned for ASIC revealed that the timely resolution of complaints leads to more satisfied consumers and investors.

178 A complaint that is resolved more quickly and effectively at IDR would potentially result in fewer complainants needing to progress their complaint to EDR. This would generate more consumer confidence in the Australian financial system as consumers and investors remain with their financial service provider. It should be noted that the independent research commissioned for ASIC revealed that a significant proportion of consumers and investors who went on to complain at EDR were no longer doing business with the financial service provider they complained about.

Impact on EDR schemes

179 Under this Option, EDR schemes would need to amend their Terms of Reference, and systems and processes to reflect the new definition.

Impact on ASIC

180 Under this Option, it would be easier for ASIC to assess complaints under investigation in terms of how the financial service provider under investigation has defined “complaint”.

Option 2 – adopt AS ISO 10002-2006 in its entirety

181 Under this Option, compared with Option 1, consumers and investors would benefit by their complaints being subject to more rigorous IDR processes, including customer satisfaction surveys with the complaints handling process.

182 However, the impact on financial service providers would be significantly greater than Option 1 in terms of administrative and compliance costs as financial service providers would be required to comply with AS ISO 10002-2006 in its entirety, including tracking the progress of complaints and regularly auditing the performance of IDR procedures. There would also be no exemption for capturing and recording complaints that are resolved *by the end of the next business day*.

Option 3 – do nothing

183 Under this Option, if the status quo remains, confusion about what constitutes a "complaint" and complaints not being resolved efficiently, because they are not identified as a complaint early enough in the process, would continue.

184 To do nothing would also allow the inconsistent treatment of complaints in the Australian financial industry to persist, which would cause the Australian financial industry to lag behind businesses in other industries, where internal complaints handling is concerned.

185 This option runs the risk that regulatory uncertainty would be created through the continuation of inconsistent terminology and inconsistent interpretations of what constitutes a "complaint" across the Australian financial services industry and EDR schemes.

186 Allowing the status quo to remain would also continue to allow some complaints to fall through the cracks. The onus will remain on the consumer or investor to explicitly state that a matter is a complaint. This may also lead to the inconsistent treatment of 'complaints' and consequently reduce consumer confidence in the financial services industry.

187 In ASIC's view, this is an unrealistic option.

Recommendation

188 We recommend Option 1. We recommend revising RG 139 and RG 165 to adopt the definition of "complaint" in AS ISO 10002-2006, but to not require financial services providers to apply the full IDR process – that is capturing and maintaining records – to complaints that are resolved *by the end of the next business day* from when the complaint was received.

189 We also recommend adopting the Guiding Principles in AS ISO 10002 and the Sections 5.1, 6.4, 8.1 and 8.8 on commitment, resources, collection of information, and analysis and evaluation of complaints respectively.

Implementation

190 Our recommendations will be implemented to coincide with the Government's proposed update of the reference to AS 4269-1995 in the Corporations regulations.

191 Existing financial service providers will be required to adopt the definition of "complaint", the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 in AS ISO 10002-2006 by 1 January 2010.

C Issue 3: Reporting of statistical information

192 This section considers options to ensure that EDR schemes remain transparent by reporting statistical information about their members.

Assessing the problem

Current approach and its problems

193 ASIC does not currently require EDR schemes to publish statistical information in their annual reports against each member about:

(a) the number of complaints received by the EDR scheme; nor

(b) the number of complaints closed by the EDR scheme, with an indication of outcome.

194 However, the General Banking and finance division of FOS (formerly BFSO) and the General insurance division of FOS (formerly IOS) report complaints in this manner. This leaves COSL, FCDRS and the remaining streams of FOS (the ILIS stream (previously FICS), the Insurance Brokers stream (previously IBDL) and the Mutuals stream (previously CUDRC)), who do not report complaints in this way.

195 This information is useful to a diverse range of people, including ASIC, so inconsistency of reporting in this way leaves those who are not members nor complainants of the General Banking and finance division of FOS or the General insurance division of FOS disadvantaged.

196 The fact that not all EDR schemes report in this way causes problems including that:

(a) some consumers and investors are unable to access information that would help them make informed decisions about which financial service provider to transact with. The number of complaints received by an EDR scheme and the number of complaints resolved, with an indication of outcome in relation to a particular financial service provider are important measures for consumers and investors in selecting and choosing to remain with a financial services provider; and

(b) some financial service providers, depending on which EDR scheme they belong to, do not have access to this information. This information is useful to financial service providers, particularly those who may wish to compare their complaints experience with other similar businesses.

Options

Option 1 – require EDR Schemes to publish statistics about the number of complaints received and the number of complaints closed, with an indication of outcome against each EDR scheme member in its annual report

197 Under this Option, EDR schemes would be required to collect, summarise and accurately report statistics about the number of complaints received and closed, with an indication of outcome against each EDR scheme member in the scheme's annual report.

198 This information could also be posted on the scheme's website.

Option 2 – do nothing

199 Under this Option, the General Banking and finance division and the General insurance division of FOS, could continue to report data in this way in the scheme's annual report. However, in the absence of a regulatory requirement to report this information, it is likely that reporting in this manner would not continue once the development of the new FOS Terms of Reference is completed and all operational matters are settled.

200 In the absence of a regulatory requirement for schemes to report in this way, and if the General Banking and Finance stream and General Insurance stream of FOS continued to report in this way whilst other schemes did not, this would create inconsistencies in disclosure of information across EDR schemes.

201 If no schemes reported in this way once the operational matters of FOS are settled, then information which promotes the transparency and accountability of EDR schemes would be lost.

Impact analysis

Option 1 – require EDR Schemes to publish statistics about the number of complaints received and closed, with an indication of outcome against each EDR scheme member in the scheme's annual report

Impact on Financial service providers

202 Under this Option, financial service providers that are not members of the General Banking and finance stream or the General Insurance stream of FOS would potentially be subject to some additional reporting costs in terms of

having to verify statistical data with the schemes, when reporting to ASIC already occurs in relation to complaints data.

203 Industry's submissions to CP 102 expressed concern that the public reporting of such statistical information would unfairly disadvantage larger retail financial service providers and provide a misleading impression of their complaints history to consumers and investors, without balancing their relative market share. Submissions also expressed concern that this would be effectively a "naming and shaming" of financial service providers when it is inappropriate to do so.

204 ASIC would expect that the schemes would ensure that the data is reported according to size of business and/or appropriate categories and with appropriate cautions so as to ensure that the data is not misinterpreted.

205 Under this Option, financial services providers would have the added incentive to resolve complaints efficiently and effectively at IDR. Such information may also assist in identifying recurring systemic issues (e.g. where a particular financial service provider is consistently having high complaints numbers year after year).

206 The public reporting of data by each EDR scheme would also provide useful information to financial services providers so they could compare their complaints experience with those of other like businesses in the financial services industry.

207 This data would also provide EDR scheme members with information so they would be fully informed in relation to the operation of the scheme.

Impact on consumers

208 Consumers and investors would have access to better information about the financial service provider they currently do business with and other financial service providers who they may wish to do business with. This information would assist consumers and investors to make decisions about selecting and choosing to remain with a particular financial service provider.

209 Increased transparency and accountability would also benefit consumers and investors and motivate scheme members to consider ways to achieve more efficient and effective IDR outcomes.

Impact on EDR schemes

210 There would be no additional costs to the Banking and finance stream nor the General insurance stream of FOS as reporting already occurs in this manner.

211 Given FOS is already facing costs in terms of settling operational issues under the FOS merger, there would be minimal if no additional costs to FOS

in implementing this proposal. However, the FCDRS and COSL may experience costs in terms of ensuring their computer systems are capable of accurately capturing and recording this data and staff are appropriately trained so summary reports can be produced.

Option 2 – do nothing

212 Under this Option, financial service providers would have no incentive to achieve efficient and effective outcomes at EDR, as ineffective outcomes and high complaints numbers would not be disclosed to the public.

213 Maintaining the status quo would allow an inconsistent treatment of consumers and financial service providers to continue, where the disclosure of complaints data is concerned (assuming the General Banking and Finance stream and the General Insurance stream of FOS continue to report in this manner whilst other schemes do not).

214 In the absence of any regulatory requirement, it is possible that once FOS' new Terms of Reference and all other operational issues are settled, all streams of FOS would not report complaints data by complaints numbers received, closed and with an indication of outcome. This would result in the loss of highly valuable information.

Recommendation

215 Our recommendation is Option 1. We recommend updating RG 139 and RG 165 to introduce the requirement that EDR Schemes publish statistics about the number of complaints received and closed, with an indication of outcome against each EDR scheme member in the scheme's annual report. Our reasons are stated above.

216 As previously noted, we would expect that the public reporting of such information would be provided with additional information in relation to the size of business and/or industry sector, other appropriate categories (if necessary) and appropriate cautions as to how the information should be read. This would help consumers, investors and other readers to not misinterpret the information and would also make the information more accessible to all readers.

Implementation

217 Our recommendation would be implemented by updating RG 139 and RG 165 to reflect this proposal, with the effective date for implementation from 1 January 2010.

D Issue 4: Members ceasing to carry on business and EDR

218 This section considers options to ensure that EDR scheme coverage is adequate, particularly where complaints are made in respect of a scheme member that ceases to carry on business.

Current approach and problems

219 The regulatory guides are currently silent on whether EDR schemes should handle complaints where a scheme member ceases to carry on business.

220 Ceasing to carry on business includes situations where a scheme member becomes insolvent under administration, closes its doors to consumers and investors, but still has a licence, sells its business or ceases to have a licence.

221 In these situations, EDR schemes have different approaches under their Constitutions and/or Terms of Reference as to how they would handle complaints.

222 Under the FOS Constitution, for all divisions of FOS, a scheme member's membership is immediately terminated if the scheme member ceases to carry on business or loses its licence or authorisation.

223 The Terms of Reference of the Banking and Finance stream, the General Insurance stream and the ILIS stream of FOS clarify that these streams of FOS are precluded from handling a complaint, where the complaint is received after a member ceases to carry on business. This is because FOS no longer has jurisdiction under the FOS Constitution, because the scheme member is no longer a member. This leaves complainants who happen to submit their complaint to one of these streams of FOS after the scheme member ceases to carry on business without access to EDR, whilst those who happen to submit their complaint to one of these streams of FOS before the scheme member ceases to carry on business, would still have access.

224 The Terms of Reference of all other streams of FOS (the Mutuals stream and Insurance Brokers stream) do not expressly state whether complaints can be handled by the scheme where a complaint is received and the scheme member subsequently ceases to carry on business.

225 COSL's Constitution provides that a scheme member's membership immediately ceases where the member:

(a) if it is a company, becomes "externally administered", having the same meaning under the Corporations Act; or

(b) if it is an individual, becomes "insolvent under administration", having the same meaning under the Corporations Act.

226 COSL's Rules clarify that a scheme may handle a complaint which is received before the member ceases to carry on business.

227 The Rules of FCDRS provide that a member ceases to be a member of FCDRS when it is no longer a Credit Union, Building Society or financial service provider. However, FCDRS' Rules do not clarify further whether complaints will be handled if the complaint is received prior to the member ceasing to be a Credit Union, Building Society or financial service provider.

228 Government action is required to ensure that the approach taken by the schemes enables complainants to access a scheme where the scheme member ceases to carry on business, regardless of when the complaint is received and regardless of which scheme the member belongs to.

229 Not being able to access an EDR scheme where the scheme member ceases to carry on business can leave consumers and investors without any means of recourse, particularly where consumers and investors are unable to take legal action because they have already lost all their money.

230 Being able to obtain an EDR scheme decision, even where the member has ceased to carry on business, may be beneficial to complainants as a scheme decision may assist a complainant:

(a) in showing that they are a creditor and have a "proof of debt"; or

(b) to obtain redress, for instance where the financial service provider goes into administration and subsequently recovers and resumes trading.

Options

Option 1 – require EDR schemes to have a discretion about whether or not to terminate the scheme member's membership and/or to handle complaints where a scheme member ceases to carry on business depending on the complainant's interests and that IDR processes may be bypassed

231 Under this Option, EDR schemes would be required to ensure that their Constitution and/or Terms of Reference enable the scheme to have a discretion about whether or not to terminate the scheme member's membership and/or to handle complaints where the member ceases to carry on business depending, among other things, on the complainant's interests.

232 The meaning of "ceasing to carry on business" would be clarified to include situations where a scheme member:

(a) becomes insolvent under administration;

(b) closes its doors to consumers and investors, but still has a licence, or sells its business; and/or

(c) ceases to have a licence.

233 The discretion to terminate the member's membership and/or handle the complaint would be subject to the scheme considering:

(a) whether general exclusions to the scheme having jurisdiction apply;

(b) whether the time limits for bringing a complaint to EDR apply;

(c) whether the coverage of the scheme precludes the scheme from handling the complaint; and

(d) the complainant's interests.

234 EDR schemes would also be allowed a discretion to bypass IDR processes where it is in the complainant's interests to do so.

Option 2 – require EDR schemes to handle complaints where the complaint is received and the member subsequently ceases to carry on business

235 Under this Option, EDR schemes would be required to handle complaints where the complaint has been received and the scheme member subsequently ceases to carry on business. Compared with Option 1, under this Option, the EDR scheme would not be able to handle complaints that are received after the member has ceased to carry on business.

236 Under this Option, EDR schemes would not be able to bypass IDR processes where it is in the complainant's interests to do so.

Option 3 – do nothing

237 Under this Option, the status quo would remain so there would be different approaches to EDR scheme jurisdiction under each schemes' Constitution and Terms of Reference to complaints handling where the member ceases to carry on business.

Impact analysis

238 Both Option 1 and Option 2 would require EDR schemes to update their Constitutions and/or Rules and/or Terms of Reference, as well as policies and procedures.

239 Under Option 1, a discretion about whether or not to terminate a member's membership and/or handle the complaint would give the EDR scheme

flexibility to assess whether the scheme's time and resources should be devoted to handling a complaint when it would not be in the consumer's interests to do so (i.e. not benefit the consumer in some monetary or non-monetary way).

240 Under Option 2, the scheme would be required to handle complaints received against members who subsequently cease to carry on business, so the EDR scheme would have to devote time and resources to handling a complaint, even when doing so would not benefit the complainant.

241 Examples of how it would be in the consumer or investor's interests or benefit them in some way for the scheme to handle the complaint include the consumer or investor being able to:

(a) obtain redress (for instance where a PI policy would make a payout);

(b) show they are a creditor by having a proof of debt; or

(c) obtain a decision which would later assist the consumer or investor, should the financial service provider resume carrying on business.

242 Compared with Option 2, Option 1 would increase access to EDR as complainants who lodge their complaint with the scheme after the scheme member has ceased to carry on business would also be able to have their complaint handled by the scheme, subject to the scheme assessing that the consumer would benefit by the scheme handling the complaint.

243 Compared with Option 2, Option 1 would also give EDR schemes flexibility to bypass IDR processes where it is in the complainant's interests to do so. This would benefit complainants as EDR schemes would be able to handle complaints when complaints are no longer being handled at IDR.

244 Under Option 2, if schemes are unable to bypass IDR processes, this may result in the scheme referring complaints to an administrator, when an administrator does not handle complaints in the same way to complaints that have gone through the financial service provider's IDR processes.

245 Option 3 would allow the current inconsistencies in scheme approaches to continue.

Recommendation

246 We recommend Option 1 for the reasons mentioned above.

Implementation

247 RG 139 and RG 165 would be updated to reflect this proposal, with implementation from 1 January 2010.

E Other issues relating to IDR and EDR

248 This section considers options in respect of low or no impact proposals that seek to clarify existing IDR and EDR requirements so there is consistency of treatment of complaints amongst financial service providers across all sectors of the Australian financial system and harmonisation of complaints handling processes at EDR.

249 The problems being addressed in this section fall into two categories:

(a) Regulatory uncertainty – the existing RG 139 and RG 165 do not clearly set out ASIC's regulatory expectations, causing differences in interpretation and confusion for financial service providers, EDR schemes and consumers; and

(b) The regulatory guides do not cover all aspects of the operation of EDR schemes and financial service providers. Developments in the approaches taken by some EDR schemes and financial service providers require ASIC to update its regulatory guidance so ASIC's expectations are clearly enunciated.

250 These proposals are considered low or no impact because they clarify existing requirements and there was broad agreement on these proposals in feedback to CP 102.

251 The following proposals are discussed in this section:

(a) timeframes for complaints handling at IDR and multi-tiered IDR processes;

(b) outsourcing IDR processes;

(c) referral of complaints by members to EDR;

(d) legal proceedings and EDR;

(e) time limits for bringing a complaint to EDR;

(f) complaint already dealt with in another forum;

(g) changes to Rules or Terms of Reference;

(h) EDR scheme communication;

(i) independent reviews of EDR schemes; and

(j) scheme reporting.

Timeframes at IDR and multi-tiered IDR processes

Current approach and problems

252 Timeliness in responding to complaints is a key element of successful IDR procedures.

253 Both AS 4269–1995 (as an Essential Element) and AS ISO 10002-2006 (as a Guiding Principle) recognise the importance of timeliness in complaints handling at IDR – in particular, response times at IDR should be clear.

254 A key finding of the independent research commissioned by ASIC, revealed that the timely resolution of complaints at IDR leads to more satisfied consumers and investors.

255 RG 165 requires that a financial service provider should *substantially respond* to a complaint within a maximum of 45 days, but within a shorter timeframe if possible. If the financial service provider cannot respond to the complaint within this timeframe, it should inform the complainant of the reasons for the delay and the right to complain to an EDR scheme: see Schedule, 'IDR procedures and AS 4269–1995', RG 165.

256 Industry codes of conduct also have timeframes of 45 days and shorter aspirational timeframes for members to resolve complaints at IDR (see Table 2).

Table 2: Timeframes for IDR in industry codes

Industry Code of Practice	Aim	Time limit
Electronic Funds Transfer Code of Practice	21 days	45 days
Mutual Code of Practice Note: This Code comes into effect on 1 May 2009	21 days	45 days
Code of Banking Practice	21 days	45 days
General Insurance Code of Practice	15 business days*	Agreed reasonable alternative*
General Insurance Brokers' Code of Practice	20 business days*	Alternative time frame if agreed*

*Two-tied IDR approach: the same period applies at both tier 1 and tier 2. For example, for a complaint to which the General Insurance Code of Practice applies: at tier 1, the financial services provider should aim to handle the complaint within 15 business days or within the agreed reasonable alternative time frame. If the complaint escalates to tier 2, the same time frames apply as for tier 1.

257 ASIC's regulatory experience and feedback from consumer representatives to date, as well as the key findings of the consumer and investor research commissioned by ASIC, indicate that consumers and investors are taking a long time to get through IDR and that the requirement to "*substantially respond*" within 45 days causes confusion about IDR response times for consumers and investors.

258 RG 139 and RG 165 are currently also silent on whether IDR timeframes apply to multi-tiered IDR processes.

259 ASIC's regulatory experience, feedback from consumer representatives, the General Insurance Code and the General Insurance Brokers Code (see Table 2) indicate that some financial service providers operate multi-tiered IDR procedures that include internal appeals or escalation processes. These multi-tiers operate to increase the time a complaint is handled at IDR.

260 Revised regulatory guidance is required to clarify:

(a) timeframes at IDR, so IDR procedures can become more efficient and effective; and

(b) that multi-tiered IDR processes are also subject to the same timeframe requirements at IDR.

Options

Option 1 – financial service providers (including those that operate multi-tiered IDR processes) must provide a final response at IDR within 45 days and if this is not possible, inform the complainant of the reasons for delay and the right to complain to an EDR scheme

261 Under this Option, financial service providers, including those that operate a multi-tiered IDR process, would be required to provide a final response to consumers and investors within 45 days at IDR.

262 A "final response" would require the financial service provider to write to complainants within 45 days, advising them of:

(a) the outcome of their complaint;

(b) the right to take the complaint to EDR; and

(c) the name and contact details of the relevant EDR scheme.

263 Where a final response is not able to be provided within 45 days, the financial service provider would be required to inform the complainant of the reasons for the delay and their right to complain to an EDR scheme.

Option 2 – financial service providers (including those that operate multi-tiered IDR processes) must provide a final response within 45 days, but *within 30 days if possible*, and if it is not possible to provide

a response within 45 days, inform the complainant of the reasons for delay and right to complain to an EDR scheme

264 Under this Option, financial service providers, including those that operate a multi-tiered IDR process, would be required to provide a final response to consumers and investors within 45 days at IDR, and endeavour to, where possible, provide a final response within 30 days.

265 Like Option 1, a "final response" would have the same meaning as at 262 and if a final response is unable to be provided within 45 days, the financial service provider would be required to inform the complainant of the reasons for the delay and their right to complain to an EDR scheme.

Option 3 – do nothing

266 Under this Option, the status quo would remain, so financial service providers would be required to provide a *substantial response* to a complainant within 45 days and if this was not possible, inform the complainant of the reasons for delay and their right to complain to an EDR scheme.

267 Financial service providers would also continue to operate multi-tiered IDR processes, effectively requiring complainants to go through longer than 45 days before a complaint can lodge a complaint with an EDR scheme.

Impact analysis

Option 1 – financial service providers (including those that operate multi-tiered IDR processes) provide a final response at IDR within 45 days

268 This Option would clarify time frames at IDR for consumers and investors, and make it easier for consumers and investors to know when they can progress their complaint to EDR.

269 Under this Option, financial service providers would be encouraged to find more efficient and effective ways of resolving complaints, particularly where simple and easy to resolve complaints are involved. Financial service providers may also incur some compliance costs in updating their IDR procedures.

270 This Option would interface smoothly with the shorter aspirational IDR timeframes under Industry Codes and also align with the majority of Industry Codes in terms of the 45 day timeframe for giving a final response. However, the General Insurance Code and the General Insurance Broker's Code would need to be updated (see Table 2). This may involve a small cost to industry and/or the relevant bodies who are responsible for updating these Codes.

271 Under this Option, complainants would experience shorter IDR timeframes, particularly in the insurance and insurance broking industries, potentially resulting in an increase in the number of complaints that progress to EDR in these sectors, as complainants would not be "tired out" or fatigued by the IDR process.

272 The General Insurance Code and the Insurance Brokers Code would also need to be updated (see Table 2), so there may be a small compliance cost incurred by either industry or the organisation responsible for updating these Codes.

Option 2 – financial service providers (including those that operate multi-tiered IDR processes) provide a final response at IDR within 45 days, but if possible, within 30 days

273 This Option would cause greater confusion for consumers and investors about when they can progress their complaint to EDR, compared with Option 1.

274 Financial service providers, including those that operate multi-tiered IDR processes, would also have to potentially comply with 3 sets of different IDR timeframes: (1) the aspirational timeframes set out in Industry Codes (ranging from 15-21 days), (2) the 30 day (if possible) timeframe, and (3) the no longer than 45 day timeframe. This would cause confusion and difficulties in compliance for financial service providers, compared with Option 1.

275 The need to update the General Insurance Code and the General Insurance Broker's Code to align with the 45 day timeframe would remain, as discussed at Option 1.

Option 3 – do nothing

276 Under this Option, the status quo would remain so there would be no need for financial service providers to change their IDR procedures. Whilst this would reduce compliance costs for financial service providers, consumers and investors would still be confused about when they can complain to an EDR scheme.

277 Financial service providers would also continue to operate multi-tiered IDR processes, particularly in the insurance and insurance brokers' sectors and put complainants through longer than 45 days at IDR as the 45 days would recommence when the complainant progresses to the next tier.

278 Consumers and investors who would have otherwise progressed their complaint to an EDR scheme may not do so due to "complaint fatigue".

Recommendation

279 We recommend Option 1 for the reasons mentioned above.

Implementation

280 The implementation of our recommendation would be from 1 January 2010. Implementation would involve minor amendments to the IDR obligations in RG 165/139 to clarify ASIC's expectations about timeliness of complaints handling.

Outsourcing

Current approach and problems

281 RG 139 and RG 165 are currently silent on whether a financial service provider remains responsible for their IDR procedures, even if they outsource them to a 3rd party provider.

282 ASIC's regulatory experience and feedback from consumer representatives, indicate that some financial services providers, particularly smaller businesses, outsource their IDR procedures to a third party provider. Outsourcing may range from outsourcing a part or stage of the IDR process, (for instance, assessment of complaints) to outsourcing the entire IDR process to a third party provider.

283 ASIC's current regulatory guidance does not clearly specify that a financial service provider remains responsible for its IDR processes even if it outsources to a 3rd party. This causes confusion for industry in adopting the proper compliance practices, as well as confusion for consumers in knowing who they may complain to in respect of a complaint about the complaints handling process itself.

Options

Option 1 – update regulatory guides to clarify that outsourced IDR procedures remain the responsibility of the financial service provider

284 Under this Option, the regulatory guides would be updated to clarify that financial service providers remain responsible for their IDR procedures even if they outsource them.

Option 2 – do nothing

285 Under this Option, the status quo would remain so it would not be clear that financial service providers remain responsible for their IDR procedures, even when they outsource them to a third party provider.

Impact analysis

286 Under Option 1, there would be less confusion about who is responsible for IDR procedures amongst consumers/investors, financial service providers and those who provide the outsourced IDR procedures, where outsourcing occurs.

287 Option 1 may also make it less attractive for financial service providers to outsource their IDR procedures, particularly if the motivation for outsourcing was so the third party provider would be ultimately responsible for the IDR procedures.

288 There would also be equal treatment for consumers and investors, regardless of whether the financial service provider operates its own IDR procedures or outsources to a 3rd party. Consumers would not be disadvantaged by a financial service provider who does not fully comply with ASIC's IDR requirements because they outsource them.

289 If the status quo remained under Option 2, confusion and difficulties would remain for consumers and investors.

Recommendation

290 We recommend Option 1 for the reasons mentioned above.

Implementation

291 RG 139 and RG 165 would be amended. The implementation of this recommendation would be from 1 January 2010.

Referrals of complaints by members to EDR

Current approach and problems

292 Currently, an EDR scheme only handles a complaint, if a consumer or investor submits a complaint to the EDR scheme after going through the financial service provider's IDR process. There may be some exceptional circumstances where the financial service provider has genuinely attempted everything possible to resolve the complaint at IDR, but the consumer continues to contact the financial service provider in respect of the complaint

and does not progress their complaint to EDR, even when the consumer is fully informed of the right to complain to an EDR scheme.

293 In these circumstances, and where the member ceases to carry on business (discussed at Issue 3), it may assist in the resolution of the complaint if financial service providers are able to refer the complaint to EDR.

Options

Option 1 - update regulatory guides to clarify that financial service providers can refer complaints to an EDR scheme

294 Under this option, the regulatory guides would be amended to clarify that financial service providers could refer a complaint directly to an EDR scheme if the financial service provider had made all reasonable attempts to resolve the complaint at IDR, the complaint remained unresolved, and there was no likelihood of the complainant lodging a complaint with an EDR scheme, despite being made aware of the right to complain to EDR. For the avoidance of doubt, the financial service provider's ability to forward a complaint to an EDR scheme under this Option, would not interfere with the requirements of a financial service provider to genuinely attempt to resolve the complaint at IDR and meet all other IDR requirements set out in the regulatory guides.

295 As there are privacy restrictions in a direct referral of a complaint to an EDR scheme by a financial service provider, this would only be possible if the consumer or investor consented to the financial service provider forwarding the complaint to EDR.

Option 2 – do nothing

296 Under this Option, the status quo would remain so financial service providers would not be able to refer a complaint to an EDR scheme under any circumstance.

Impact analysis

297 Under Option 1, consumer confidence in the financial service industry would be enhanced if financial service providers could refer a complaint to an EDR scheme if they could not resolve the complaint themselves, as the EDR scheme may be able to achieve a resolution, where the financial service provider could not. Option 1 would also assist financial service providers to resolve these types of complaints, where Option 2 would not.

298 There would be minimal impacts on consumers and investors who would need to consent to the member referring the complaint to the EDR scheme under Option 1.

299 Under Option 1, financial service providers would benefit by being able to refer a complaint to the EDR scheme where it could not be resolved any further at IDR and the consumer, whilst being aware of the right to refer the complaint to EDR, did not.

300 Financial service providers may need to review their processes to ensure that they comply with all privacy requirements before referring such complaints to the EDR scheme.

301 Option 1 may also require the schemes to review and update their Terms of Reference and processes.

Recommendation

302 We recommend Option 1 for the reasons stated above.

Implementation

303 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Commencement of legal proceedings by scheme members

Current approach and problems

304 Currently, the regulatory guides are silent on when members can institute legal proceedings in respect of complaints lodged with an EDR scheme. EDR schemes have adopted different approaches in their Terms of Reference or Rules to when scheme members can commence legal proceedings in respect of a complaint that has been lodged with the scheme.

305 The ILIS stream of FOS states that a scheme member must not institute legal proceedings relating to the complaint. However, legal proceedings can be instituted where the limitations period is about to expire.

306 Members of other streams of FOS (except for the Insurance Brokers stream, previously IBDL) and COSL can commence legal proceedings where the complaint involves an important issue for business or the financial services industry in general, or where there is a novel legal issue.

307 FCDRS members cannot commence legal proceedings in any circumstances and the Insurance Brokers stream of FOS' Terms of Reference is silent on this issue.

308 The inconsistent treatment of complaints can erode consumer and investor confidence in the Australian financial services industry as some financial

service providers by virtue of their membership of a particular EDR scheme would be able to initiate legal proceedings, when others would not.

309 Allowing an EDR Scheme member to commence legal proceedings in relation to a complaint creates the potential for a scheme member to disrupt the EDR process. There is also a risk that the same complaint will be dealt with by two different forums.

310 It should be noted however, that whilst a consumer may withdraw from the EDR process and commence legal proceedings at any time, this is highly unlikely, given the prohibitive costs of initiating legal proceedings compared with accessing an EDR scheme.

Options

Option 1 – Allow scheme members to commence legal proceedings in relation to a complaint that has been lodged with an EDR scheme where there limitations period is about to expire and in test case situations

311 Under this Option, it would be clarified that scheme members would only be able to commence legal proceedings where a complaint has been lodged with an EDR scheme in 2 situations:

(a) if the legal limitations period for bringing a court action is about to expire; and

(b) in test case situations.

312 It would also be clarified that where a scheme member has instituted legal proceedings, they should be stayed or put on hold once a complaint has been lodged with an EDR scheme.

Option 2 – do nothing

313 Under this Option, the status quo would remain so EDR schemes would have different requirements under their Terms of Reference/Rules for when a scheme member can institute or can continue to proceed with legal proceedings when a complaint has been lodged with the scheme.

Impact analysis

314 Option 1 would assist in clarifying when scheme members can institute legal proceedings in respect of a complaint lodged with an EDR scheme. A harmonised approach would benefit consumers and investors as there would be a level playing field so some consumers and investors would not be disadvantaged because the financial service provider happens to be a member of a particular scheme.

315 Under Option 2, the risk would remain that a complaint at EDR could be disrupted by the scheme member instituting legal proceedings, even when a complaint has already been lodged at EDR. This would disrupt and delay EDR processes, cause additional expense for consumers and investors and undermine the effectiveness of EDR.

Recommendation

316 We recommend Option 1 for the reasons mentioned above.

Implementation

317 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Time limits for bringing a complaint at EDR

Current approach and problems

318 EDR schemes currently have different approaches to time limits for bringing a complaint at EDR.

319 All schemes except for IBDL impose limitation periods. The General insurance division of FOS does not accept complaints that would be statute barred (i.e. are precluded from going to court because the time limit for bringing a claim has expired). All other remaining streams of FOS and COSL and FCDRS impose a six-year time limit for bringing complaints at EDR.

320 EDR schemes also vary in their approach to when time starts to run in respect of their different time limits for bringing a complaint at EDR. The Terms of Reference for the ILIS stream of FOS provides that time starts to run when the *consumer or investor knew or should reasonably have known all the relevant facts*. The Terms of Reference of all other EDR schemes that address this issue provide that time starts to run when *the act, omission or event that the complaint relates to occurred*.

321 The lack of consistency of approach taken by schemes means that some consumers are disadvantaged by the financial service provider, with which they have a complaint, being a member of a particular EDR scheme.

Options

Option 1 – 2 tiered approach

322 Under this Option, the time limit for bringing a complaint to an EDR scheme would be a 2 tiered approach:

(a) 6 years from when the consumer/investor became aware (or should reasonably have become aware that they suffered the loss; and

(b) 2 years from when the financial service provider provides a "final response" at IDR.

323 These time limits would apply unless the scheme finds there are exceptional circumstances and/or the member agrees to the scheme having jurisdiction.

Option 2 – 6 years from when the consumer/investor first became aware (or should have reasonably become aware of the loss

324 This option is the first tier of the 2 tiered approach under Option 1.

Option 3 - do nothing

325 Under this Option, the status quo would remain so EDR schemes would continue to have different approaches to time limits for bringing a complaint at EDR and when time starts to run.

Impact analysis

326 Options 1 or 2 would harmonise the approach taken by schemes which would enable the equal treatment of consumers and investors in all sectors of the Australian financial industry.

327 Under Option 1, there would be an incentive for financial service providers to provide a final response at IDR compared with Option 2.

Recommendation

328 We recommend Option 1 for the reasons mentioned above.

Implementation

329 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Complaint already dealt with in another forum

Current approach and problems

330 ASIC's regulatory guidance currently allows EDR schemes to exclude certain matters from their jurisdiction. Provision for these exclusions are generally set out in the scheme's Terms of Reference/Rules. One such permitted exclusion is where the complaint has been "dealt with" in another forum. This exclusion is included to prevent the duplication of resources, and the risk of forum shopping.

331 Feedback from consumer representatives suggests that in some cases, EDR Schemes are excluding complaints on the basis that they have been "dealt with" by an industry Code Monitoring Committee or a State or Territory Fair Trading Office.

332 A Code Compliance Monitoring Committee performs different functions to dispute resolution. Whilst some State and Territory Fair Trading offices conciliate individual disputes in addition to performing their regulatory functions, consumers and investors should not be precluded from accessing an EDR scheme unless the conciliation has resulted in a resolution of the complaint.

333 Feedback from consumer representatives also suggests that "dealt with" is construed by EDR schemes in such a way so as to include default judgments.

334 Clarification of ASIC's regulatory guidance is required to address this issue.

Options

Option 1 – clarify the meaning of "dealt with"

335 Under this Option, schemes would be required to only exclude complaints, "the subject matter of which has already been dealt with by a court, tribunal or another ASIC-approved EDR scheme". The meaning of "dealt with" would also be clarified to mean *a decision on the merits having been made.*

Option 2 - do nothing

336 Under this Option, the status quo would remain so EDR schemes would continue to interpret "dealt with" broadly in order to restrict access to the scheme.

Impact analysis

337 Option 1 would clarify that complaints handled by State/Territory Fair Trading Offices and Code Compliance Committees where the complaint has

not been resolved (in the sense of a decision on the merits having been made) would not come within the exclusion of "dealt with" in another forum.

338 Option 1 would also clarify that default judgements are excluded from the definition.

339 Option 2 would have a negative impact on consumers and investors, as they would be denied access to EDR, even where they did not obtain a resolution in another forum.

Recommendation

340 We recommend Option 1 for the reasons mentioned above.

Implementation

341 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Changes to Rules or Terms of Reference

Current approach and problems

342 The Constitutions of then FICS (now the ILIS stream of FOS), the then IBDL (now Insurance Brokers stream of FOS) and COSL confer on members a power to veto a proposed amendment to the scheme's Terms of Reference or Rules.

343 Under this structure, scheme members hold a disproportionate level of influence over the evolution of the EDR scheme compared with other stakeholders, including consumers and investors.

344 This may undermine the independence of the EDR scheme.

345 Since FICS and IBDL have merged into FOS, the power of veto no longer applies, however COSL still has such a provision in its Constitution.

Options

Option 1 – require that EDR schemes disallow scheme members from holding power to veto changes to the Terms of Reference/Rules

346 Under this Option, EDR schemes would be required to remove provisions in their Constitutions which allow scheme members to have a power to veto changes to the scheme's Terms of Reference/Rules.

Option 2 – do nothing

347 Under this Option, the status quo would remain so schemes would be able to have a provision in their Constitutions which gives members the power of veto over changes to the Terms of Reference/Rules.

Impact analysis

348 Under Option 1, the independence and therefore integrity of EDR schemes would be preserved by ensuring that EDR scheme Terms of Reference/Rules can evolve and change as necessary, without the undue influence of scheme members.

349 This would also benefits consumers, as they would become more confident that the EDR system is independent and industry, as confident consumers are more likely to continue to transact with financial service providers.

350 Option 1 would also harmonise the approach taken by EDR Schemes.

Recommendation

351 We recommend Option 1 for the reasons mentioned above.

Implementation

352 The regulatory guides would be amended. The implementation of this recommendation would be from 1 January 2010.

EDR scheme communication

Current approach and problems

353 The regulatory guides do not currently provide for how EDR schemes should communicate with consumers and investors to ensure that the scheme meets the accessibility benchmark.

354 Independent consumer and investor research conducted by Ipsos-Eureka Social Research Institute identified a number of areas where some respondents did not appear to have understood the EDR process nor the role of the EDR scheme, contributing to the gap between what they expected and what happened in practice.

355 These findings suggest that there is room for EDR schemes to improve their communications with complainants about their processes, decisions and role so that expectations are realistic.

Options

Option 1 – introduce high level principles approach so EDR schemes are required to develop communications strategies to improve communication with complainants about the processes and role of EDR schemes

356 Under this Option, EDR schemes would be required to:

(a) develop a communications strategy to improve communication with complainants about the EDR scheme's processes, decisions and role;

(b) review the communications strategy periodically; and

(c) have regard to plain language principles when developing the communications strategy and ensure that the information is easily accessible, user-friendly, practically relevant and distributed appropriately.

Option 2 – prescriptive approach so EDR schemes are required to develop communications strategies to improve communication with complainants about the processes and role of EDR schemes

357 Under this Option, the revised regulatory guides would adopt a more prescriptive approach than Option 1, which would require ASIC guidance to touch on the operational requirements of the schemes.

358 Examples of what could be prescribed under this Option, include ASIC requiring the scheme to:

(a) explain what the EDR scheme can do for the complainant and the nature of jurisdictional issues when the complaint is received; and/or

(b) issue a one page summary document to all complainants on receipt of a complaint which shows a process chart, including average timeframes for how a complaint progresses through each stage of the process.

Option 3 – do nothing

359 Under this Option, the status quo would remain so schemes would be free to communicate with complainants in their own way.

Impact analysis

360 Option 1 & 2 would help to improve consumer awareness and understanding of the EDR scheme process and role.

361 Under Option 1, a high level principles approach would give EDR schemes flexibility to adopt the best approach to suit the particular requirements of the scheme. A prescriptive approach would require more detailed regulatory guidance, which would require constant review and updating by ASIC.

362 Under Option 1, EDR schemes may incur some compliance costs in assessing their communications strategy (if one already exists), to see whether communications are user-friendly and in plain English. EDR schemes would also incur some compliance costs in periodically reviewing their communications strategies.

363 If Option 2 was adopted, schemes that already have communications strategies may be required to make operational changes to adopt ASIC's requirements, when their current strategies are already effective.

Recommendation

364 We recommend Option 1 for the reasons mentioned above.

Implementation

365 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Independent reviews of EDR Schemes

Current approach and problems

366 Under RG 139.92, EDR schemes are required to commission an independent review of their operations and procedures every 3 years. The scheme may undertake a review sooner and more frequently if they consider it appropriate.

367 An independent review provides valuable feedback about how the scheme is operating and assists in identifying areas for change or improvement.

368 ASIC's regulatory experience and feedback from EDR schemes to date indicate that substantial time and resources are required to undertake independent reviews every three years. Also, several schemes already conduct ongoing internal reviews and continuous improvement initiatives.

Options

Option 1 – schemes undertake independent reviews 3 years after the scheme's initial approval and thereafter every 5 years or sooner if required by ASIC

369 Under this Option, schemes would be required to conduct an independent review of the scheme's operations:

(a) 3 years after the scheme's initial approval by ASIC; and

(b) thereafter, every 5 years or sooner if required by ASIC.

Option 2 – do nothing

370 Under this Option, the status quo would remain so schemes would continue to be required to undertake an independent review every 3 years.

Impact analysis

371 Under Option 1, an independent review conducted within 3 years of the scheme's initial approval by ASIC would assist a new scheme to identify areas of change and improvement. Thereafter, an independent review every 5 years or sooner if required by ASIC would reduce compliance costs for more established schemes and leave flexibility for ASIC to require an independent review earlier if necessary.

372 Compared with Option 2, less frequent reviews after the initial independent review under Option 1, may result in operational problems not being identified earlier. Such a delay in identification, may disadvantage not only consumers and investors who progress their complaint to an EDR scheme, but also scheme members, as areas for improvement are not identified as frequently, and are therefore not addressed as quickly.

373 Under Option 2, EDR schemes would continue to incur compliance costs in conducting an independent review every 3 years, when this would not be so necessary for more established schemes.

Recommendation

374 We recommend Option 1 for the reasons mentioned above.

Implementation

375 The regulatory guides would be updated and the implementation of this recommendation would be from 1 January 2010.

Scheme reporting

Current approach and problems

376 Currently, under RG 139, EDR schemes are required to report any systemic, persistent or deliberate misconduct of a scheme member to ASIC. Under RG 139.63, there is a general presumption that reports to ASIC should identify the financial services provider and RG 139.59-139.61 and RG 139.69-139.79

further sets out the procedure for reporting systemic issues and serious misconduct to ASIC.

377 EDR schemes do not currently identify EDR scheme member's names in these reports because of concerns of being sued for defamation by scheme members.

378 Whilst changes to defamation laws introduced on 1 January 2006 partly address concerns about exposure to defamation law suits if a member is identified in a systemic issues or serious misconduct report, there are still some types of financial service providers who would not be precluded from bringing an action in defamation[26].

Options

Option 1 – update regulatory guides so schemes do not have to identify individual financial service providers in systemic issue and serious misconduct reports

379 Under this Option, ASIC would update the regulatory guides to clarify that the presumption of identifying an individual financial service provider in systemic issue and serious misconduct reports would no longer apply. ASIC would also clarify that if ASIC required further information and documents, ASIC would use its s33 powers under the ASIC Act to compel an EDR scheme to identify a scheme member that is the subject of a systemic issues report.

Option 2 – do nothing

380 Under this Option, the regulatory guides would continue to require that EDR schemes must report the names of financial service providers in systemic issue and serious misconduct reports and EDR schemes would continue to be non-compliant due to concerns about being sued for defamation.

Impact analysis

381 Option 1 would ensure that information about systemic issues and serious misconduct is provided, whilst only identifying individual financial services providers when ASIC considers it is warranted.

382 Under Option 1, ASIC would also incur some additional costs in issuing s33 notices and enforcing them. EDR schemes would also incur some additional costs in complying with these notices. However, EDR scheme concerns about defamation would be alleviated.

[26] E.g. Financial service providers who are companies that employ fewer than 10 persons, individuals, businesses trading under a registered business name under the *Business Names Act* in any of the states/territories, certain types of partnerships, Incorporated Associations under the Incorporated Associations Act, etc.

383 Option 2 would allow the situation to continue where EDR schemes are non-compliant with the regulatory guides in terms of systemic issues and serious misconduct reporting, due to concerns about being sued for defamation.

Recommendation

384 We recommend Option 1 for the reasons mentioned above.

Implementation

385 The regulatory guides would be amended and the implementation of this recommendation would be from 1 January 2010.

Appendix 1: Parties who made a public submission to CP 102

Submission no	Stakeholder name/s
Individuals	
1	Bruce Keenan
2	Col Fullagar
Industry organisations	
3	ABACUS Australian Mutuals Pty Ltd
4	The Association of Super Funds of Australia
5	Australian Bankers' Association Inc
6	Australian Compliance Institute
7	Australian Institute of Superannuation Trustees
8	Avant Insurance Limited
9	AXA Asia Pacifica Holdings Limited
10	Deloitte Touche Tohmatsu
11	Financial Planning Association of Australia Ltd
12	Halsey Legal Services Pty Ltd
13	Insurance Council of Australia
14	Investment & Financial Services Association Ltd
15	National Insurance Brokers Association
16	Insurance Australia Ltd t/as NRMA Insurance
17	Securities & Derivatives Industry Association
18	Suncorp Ltd
19	Wesfarmers Insurance Investments Pty Ltd

Submission no	Stakeholder name/s
Consumer representatives	
20	(Joint Consumer Submission) • Australian Financial Counselling and Credit Reform Association· • Civil Justice (Consumer Protection Unit), Legal Aid Queensland· • Consumer Action Law Centre· • Consumer Credit Legal Centre (NSW)· • Consumer's Federation of Australia· • CHOICE· • Financial and Consumer Rights Council· • Financial Counsellors' Association of Queensland· • West Heidelberg Community Legal Service
EDR schemes	
21	COSL
22	FCDRS
23	FOS

Note: The total number of submissions was 24—one submission was confidential.

Appendix 2: Report 156 *Report on submission to CP 102 Dispute resolution—review of RG 139 and RG 165*

View the report

Appendix 3: Comparison between AS 4269-1995 and AS ISO 10002-2006

Principle	AS 4269–1995	AS ISO 10002–2006
Commitment	Essential Element: s3.2 There needs to be commitment to complaints-handling at all levels of organisation, particularly at the highest level. The commitment should cover both internal and external complaints, and be reflected in the adoption and dissemination of documented complaints-handling policies and procedures. Policy development and review shall be an organisational priority and be adequately and appropriately resourced. Training provisions demonstrate management commitment.	Provision in the main body: s5.1 It is important that commitment is shown by, and promoted from, the organisation's top management. The commitment should be reflected in the definition, adoption and dissemination of complaints-handling policy and procedures. Management commitment should be shown by the provision of adequate resources, including training.
Fairness	Essential Element: s3.3 The IDR process shall be fair to both the complainant and the person against whom the complaint is made.	The fairness principle is not addressed in the new standard either as a Guiding Principle or a provision in the main body. However the new standard includes a new requirement for objectivity: Guiding Principle s4.5
Resources	Essential Element: s3.4 The IDR staff shall be provided with training in product or services knowledge, interpersonal and communication skills, and policies and procedures. Staff handling complaints should have resources that will enable them to perform their duty efficiently and effectively. Measures for stress minimisation should also be considered.	Provision in the main body: s6.4 Top management should assess the needs for resources in the organisation and provide them. The selection, support and training of personnel involved in the complaints-handling process are particularly important.

Principle	AS 4269–1995	AS ISO 10002–2006
Visibility	Essential Element: s3.5 It is crucial that an organisation promotes its IDR system internally to its staff as well as externally to consumers and the community. This could be promoted by providing the details on the product labels, website and/or other forms of advertising. The system should be promoted as widely as possible and according to the special needs of consumers.	Guiding Principle: s4.2 Information about how and where to complain should be well publicised to customers, personnel and other interested parties.
Access	Essential Element: s3.6 The complaints-handling procedures should be made simple and flexible to allow greater accessibility to customers. Consumers should be able to submit complaints without charge. Special arrangements should be made for people with disabilities or specific needs.	Guiding Principle: s4.3 An accessible complaint-handling procedures will include: • readily accessible information about the process; • process should be easy to understand and use and in clear language; • information be made in alternative formats (e.g. Braille, audiotape); • flexibility in the methods of making complaints; • toll free or local call fee facilities for making complaints; • special arrangements for complainants with specific needs.
Assistance	Essential Element: s3.7 You should provide resources to assist complainants with making their complaint where necessary, eg assistance with filling in forms for people with limited literacy skills.	This principle is not addressed in the new standard as a Guiding Principle or a provision in the main body. However the principle has arguably been subsumed by the principle of accessibility: Guiding Principle s4.3
Responsiveness	Essential Element: s3.8 You should set reasonable time limits for each of the stages in the complaints-handling procedures. You should inform the complainants of how long the complaints-handling will take, and of the progress of their complaint.	Guiding Principle: s4.4 You should acknowledge the receipt of each complaint immediately. Complaints should be addressed promptly according to their urgency. For example, significant health and safety issues should be processed immediately. Complainants should be treated courteously and be kept informed of the progress of their complaint.

Principle	AS 4269–1995	AS ISO 10002–2006
Charges	Essential Element: s3.9 Complaints-handling process should be provided free of charge (subject to relevant statutory requirements).	Guiding Principle: s4.6 Access to complaints-handling process should be free of charge to the complainant.
Remedies	Essential Element: s3.10 Remedies should be fair and reasonable, and in compliance with legal obligations, relevant codes of conduct and good industry practice. Remedies may be financial or non-financial. Issues to be considered include: • addressing all aspects of the complaint; • following-up where appropriate; and • whether it is appropriate to offer remedies to others who may have suffered in the same way as the complainant but did not make a formal complaint.	This principle is not addressed in the new standard as a Guiding Principle or a provision in the main body.
Data collection	Essential Element: s3.11 Your complaints-handling procedures should include a recording system to monitor complaints, to identify repetitive complaints and to identify a fault in the product or system which can be rectified.	Provision in the main body: s8.1 You should establish a recording system for managing complaints, while protecting any personal information and ensuring complainant's confidentiality. The system should specify the steps for identifying, gathering, maintaining, storing and disposing of records. You should record your complaints-handling and take utmost care in maintaining and preserving such items as electronic files and magnetic recording media.

Principle	AS 4269–1995	AS ISO 10002–2006
Systemic and recurring problems	Essential Element: s3.12 The complaints-handling procedures should enable the organisation to identify and rectify systemic and recurring problems. The aggregated data can be used to redesign product and services, change organisational practices and procedures, retrain staff and reassess consumer needs.	This principle is not directly addressed in the new standard. It has been arguably been subsumed by section 8.1 ('collection of information') and 8.2 ('analysis and evaluation of complaints') in the main body of the new standard.
Accountability	Essential Element: s3.13 The organisations should have a culture of accountability which includes: • all levels in an organisation accepting responsibility; • managers having responsibility for maintaining effective complaints handling procedures.	Guiding Principle: s4.9 The organisation should ensure that accountability for and reporting on actions and decisions of the organisation in complaints-handling is clearly established.
Reviews	Essential Element: s3.14 Complaints-handling process should be reviewed on a regular basis. The actual depth and frequency of such reviews would vary with the nature of the organisation and its policy.	Provision in the main body: s8.6 Top management of the organisation should review the complaints-handling process on a regular basis. The output from the management review should include: • decisions and actions related to improvement of the effectiveness and efficiency of the process; • proposals on product improvement; and • decisions and actions related to identified resource needs (eg training programmes). Records from management review should be maintained and used to identify opportunities for improvement.
Objectivity	This principle is not directly addressed in the old standard. It is perhaps best reflected in Essential Element of fairness: s3.3.	Guiding Principle: s4.5 Each complaint should be addressed in an equitable, objective and unbiased manner.

Principle	AS 4269–1995	AS ISO 10002–2006
Confidentiality	This principle is not addressed in the old standard.	Guiding Principle: s4.7 Personally identifiable information about the complainant should be available only for the purposes of addressing the complaint within the organisation and be actively protected from disclosure, unless the customer or complainant expressly consents to its disclosure.
Customer-focused approach	This principle is not addressed in the old standard. However it is similar to the principle of commitment: Essential Element s3.2.	Guiding Principle: s4.8 Your organisation should adopt a customer-focused approach, be open to feedback and committed to resolving complaints by its actions.
Continual improvement	This principle is not addressed in the old standard. However it is similar to the principle of review: Essential Element s3.14.	Guiding Principle: s4.10 Continual improvement of the complaints-handling process and the quality of products should be a permanent objective of the organisation.
Analysis and evaluation of complaints	This principle is not directly addressed in the old standard. However it is similar to Essential Element 3.12 (‘systemic and recurring problems’).	Provision in the main body: s8.2 All complaints should be classified, then analysed to identify systematic, recurring and single incident problems and trends, and to help eliminate the underlying causes of complaints.