

ASIC Consultation Paper 112

Joint consumer submission:

**Summary of views arising from
teleconference held on 8 September 2009.**

**Authored by Consumer Action Law Centre
September 2009**

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1. Background

1.1 About this submission

This submission has been prepared on behalf of Australian consumer advocates by the Consumer Action Law Centre.

Consumer Action was requested by ASIC to co-ordinate a consultation process with consumer advocates, in order to generate a joint response to *Consultation Paper 112: Dispute resolution requirements for consumer credit and margin lending* (CP 112).

This submission has been endorsed by the following organisations:

- Consumer Action Law Centre (CALC)
- Consumer Credit Legal Centre NSW (CCLC)
- Consumer Credit Legal Service (WA) (CCLS)
- National Legal Aid (NLA)
- Consumer Law Centre (ACT) (CLC)
- National Information Centre on Retirement Investments (NICRI)
- Legal Aid Queensland
- Legal Aid NSW
- Illawarra Legal Centre Inc.
- Australian Financial Counselling and Credit Reform Association (AFCCRA)

Details of the consultation process are set out below.

1.2 Consultation with consumer advocates

This submission has prepared following consultation with consumer advocates.

This consultation included:

- A teleconference held by CALC on 8 September 2009, with the following attendees:
 - David Coorey and Lillian Chan, Legal Aid NSW
 - Catherine Uhr and Paul Holmes, Legal Aid Queensland
 - Katherine Lane, CCLC
 - Alison Pidgeon, CCLS
 - Agata Pukiewicz, CLC
 - Basil La Brooy, NICRI
 - Simon Howard, Illawarra Legal Centre
 - Consumer Action staff

In addition to this joint submission, CALC notes that additional consumer submissions are proposed by NLA, CCLC, CCLS and AFCCRA.

1.3 Nature of this submission

This submission is not intended as lengthy discussion paper of CP 112, but simply as a summary document of the views expressed by consumer advocates through the above consultative process.

Accordingly, the majority of the document is presented in a table format.

2. Consumer Response

2.1 Broad Summary

Consumer advocates are, of course, broadly in support of the extension of external dispute resolution (EDR) requirements to all credit licensees from 1 January 2010, as expressed by the National Consumer Credit Protection Bill 2009 (National Credit Bill).

External dispute resolution schemes, when well operated, provide vital access to justice for consumers. The broadening of EDR to encompass a greater variety of consumer credit disputes is to be applauded.

Consumer advocates see the importance of updating RG 165 and RG 139 appropriately, to accommodate and implement the new EDR requirements of the National Credit Bill.

Further, consumer advocates support the key objectives of CP 112 as expressed by ASIC in paragraphs 17 to 20.

In a broad sense, consumer advocates are strongly supportive of the policy direction of CP 112 and congratulate ASIC on its contents.

Finally, consumer advocates note that if adopted, some of the proposals in CP 112 will need to be reflected in both the COSL terms of reference, and the proposed FOS terms of reference.

Proposal by proposal comments are outlined below.

2.2 Proposal B1 - Transitional Arrangements for credit registrants

ASIC Proposal	<i>Registrants to maintain existing IDR processes for consumer credit complaints until they obtain a credit licence, and if no existing IDR process exists, then EDR schemes to be able to handle the complaint directly, without the requirement for prior IDR.</i>
Response	Consumer advocates support this measure as an appropriate response to the 'access gap' created by the transitional period between registration and licensing of those engaging in credit activities (1

	<p>November 2009 to 30 June 2010).</p> <p>This measure will ensure that consumers have access to some form of dispute resolution, in the event that no IDR scheme exists to handle their complaint during the transition period.</p> <p>Consumer advocates note that this proposal will require COSL and FOS to agree a temporary moratorium on the requirement for complaints to be first heard at IDR.</p> <p>Further, consumer advocates note that steps should be taken to actively encourage registrants to develop their IDR processes within the registration period, and prior to the 30 June 2010 deadline.</p>
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2.3 Proposal B2 - Urgent matters and IDR

ASIC Proposal	<i>Should IDR procedures apply to complaints involving default notices and, if so, should a shorter timeframe than the maximum 45 days apply?</i>
Response	<ul style="list-style-type: none"> • <i>B2Q1: Should IDR apply to complaints involving default notices?</i> <p>Consumer advocates strongly support this proposition, despite the lack of an explicit requirement under cl 88 of the National Credit Code.</p> <p>This would require lenders to engage with their own consumer base in cases where over zealous lending has occurred, and may have the positive effect of curbing irresponsible lending behaviour.</p> <p>Consumer advocates support the principle that IDR should be attempted for all complaints, if possible, prior to escalation to EDR.</p> <ul style="list-style-type: none"> • <i>B2Q2: Should a shorter than 45-day timeframe apply? If so, what is a more appropriate time-frame, and why?</i> <p>Consumer advocates are of the view that the IDR treatment of complaints involving default notices should be fast-tracked.</p> <p>It is likely that many credit providers will wish to do so, and that a speedy resolution at IDR level is beneficial to both parties.</p> <p>Consumer advocates propose a 30 day time-frame, as a realistic</p>

	<p>shortening of the 45 day maximum.</p> <ul style="list-style-type: none"> • <i>B2Q3: Should lenders be restrained from instituting legal proceedings while the complaint is handled at IDR, and for a reasonable time thereafter to allow for lodgment with an EDR scheme, where IDR has been unsuccessful?</i> <p>IDR processes cannot operate effectively if the lender is permitted to institute legal proceedings whilst the IDR is underway. If IDR fails, a consumer should be given adequate time to escalate the dispute to the appropriate EDR forum.</p> <p>Consumer advocates strongly support the principle that lenders should be restrained from launching legal action while alternative dispute resolution is in train, whether it be IDR or EDR.</p> <p>The rationale for both IDR and EDR is to provide cost free access to a dispute resolution forum. The primacy and effectiveness both is undermined if parallel legal action is taken, effectively defeating the purpose of the schemes.</p> <ul style="list-style-type: none"> • <i>B2Q4: Other modifications to RG 165?</i> <p>-</p>
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2.4 Proposal B3 - Hardship variations and postponement of enforcement

ASIC Proposal	<i>IDR procedures to not apply where the complaint relates to hardship or postponement of enforcement proceedings</i>
Response	<ul style="list-style-type: none"> • <i>B3Q1: Do you agree? If not, why not?</i> <p>Consumer advocates agree that IDR should not apply to the above complaints, as separate provisions already require lenders to engage with consumers in relation to such complaints, and to direct them to EDR in the event that the complaint is not resolved.</p> <p>In that sense, the principle that a lender be required to consider the matter and then to allow it to proceed to EDR in the event that lender and consumer have been unable to reach agreement, is preserved, despite the lack of a requirement for IDR.</p>

	<p>In cases where the lender is threatening action and where the consumer has raised hardship, then it could be argued that the lenders has effectively waived their right to IDR.</p> <ul style="list-style-type: none"> • <i>B3Q2: Are there other types of credit complaints that should not be subjected to IDR, or have different requirements? If so, please explain why?</i> <p>Consumer advocates are supportive of this principle in cases where a delay in access to EDR is likely to cause significant detriment to the consumer.</p>
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2.5 Proposal B4 - Application of RG 165 to credit licensees and their representatives

<p>ASIC Proposal</p>	<p><i>Should RG 165 generally apply to credit licensees and their representatives, and margin lenders and their advisers?</i></p>
<p>Response</p>	<ul style="list-style-type: none"> • <i>B4Q1: Do you agree?</i> <p>Consumer advocates strongly support this proposition, as a logical and necessary measure to ensure that the requirement for internal dispute resolution is applied fully to the consumer credit market, as intended by the National Credit Bill.</p> <p>A failure to apply RG 165 to credit licensee representatives has the potential to create significant loopholes, and leave many consumers without access to IDR. This is clearly not the intention of the Bill, so it is necessary that RG 165 be extended to those parties.</p> <ul style="list-style-type: none"> • <i>B4Q2: Do you think Appendix 1 to RG 165 sufficiently provides guidance to small and micro lenders and non-lenders. If not, why not?</i> <p>-</p>

2.6 Proposal C1- Reducing consumer confusion about where to direct complaints.

ASIC Proposal	<i>To update RG 139 to clarify complaints handling arrangements where complaints involve credit representatives</i>
Response	<ul style="list-style-type: none"> • <i>C1Q1: Do you agree? If not, why not?</i> <p>Consumer advocates do agree with the proposal.</p> <ul style="list-style-type: none"> • <i>C1Q2: Which of Option 1 and Option 2 do you prefer?</i> <p>Consumer advocates prefer Option 1, as it provides more certainty for consumers. The potential reliance on professional indemnity insurance under Option 2 is problematic, as professional indemnity policies are notoriously difficult to trigger in this context. Option 1 benefits from the stated intent to ensure that a complainant would not be excluded from EDR on limitation grounds, in accordance with paragraph 62 of CP 112.</p> <ul style="list-style-type: none"> • <i>C1Q3: Do you have views on other ways to more appropriately reduce consumer confusion where complaints involve credit representatives?</i> <p>-</p>

2.7 Proposal C2 - Multi-licensee, multi-EDR scheme complaints

ASIC Proposal	<i>RG 139 to be updated to allow for joint-EDR scheme complaint handling where a multi-party, multi-EDR scheme complaint is involved.</i>
Response	<ul style="list-style-type: none"> • <i>C2Q1: Do you agree with the proposal? If not, why not?</i> <p>Consumer advocates agree with this proposal in principle, for the reason that it is suggested (i.e. referral of disputes from one scheme to another do not always result in appropriate redress).</p> <p>However, consumer advocates are wary of the potential for blow-outs in the timelines of handling complaints, and are skeptical of the capacity for complaints to be dealt with efficiently on a joint-EDR scheme basis.</p> <p>Consumer advocates are supportive of updating RG 139 to allow for joint-EDR scheme complaint handling. We suggest that in addition to</p>

	<p>effecting the necessary changes, it would be appropriate for ASIC to take a strong leadership role in ensuring implementation of appropriate mechanisms. Certainly, it would be a desirable outcome, if it could be achieved in practical terms.</p> <ul style="list-style-type: none"> • <i>C2Q2: What do you consider to be appropriate joint handling requirements and why?</i> <p>-</p>
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2.8 Proposal D1 - EDR scheme coverage of small claims procedures

ASIC Proposal	<p><i>Update RG 139 to clarify that EDR schemes will be required to make clear their ability to handle complaints relating to small claims procedures within the monetary limits of the EDR scheme, rather than those set out in the National Credit Bill.</i></p>
Response	<p>Consumer advocates are supportive of this proposal, as it provides important access to consumers to EDR for small claims matters.</p> <p>It is appropriate that if small claims matters are to be handled by EDR schemes, then they should be subject to the monetary limits of the EDR scheme, rather than the arbitrary and often inadequate \$40,000 limit of the National Credit Bill.</p> <p>This capacity should be outlined in the EDR scheme's terms of reference or rules, as ASIC have suggested.</p>

2.9 Proposal D2 - Time limits for bringing a hardship complaint to EDR

ASIC Proposal	<p><i>Update RG 139 to clarify that the time limit for bringing a complaint to EDR where a hardship variation is involved is two years from when the credit contract is rescinded, discharged, or otherwise comes to an end.</i></p> <p><i>B3 proposes that IDR should not apply to complaints relating to hardship variations.</i></p> <p><i>If IDR were to apply to complaints involving hardship variations,</i></p>
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	<p><i>then the time limit for EDR should be the later of:</i></p> <ul style="list-style-type: none"> • <i>two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and</i> • <i>two years from when the credit licensee or its representative provides a final response at IDR.</i>
<p>Response</p>	<p>Consumer advocates support this proposal, noting that a two year limitation period from the time a credit contract is rescinded, discharged, or otherwise comes to an end is often preferable to a six year limitation period from the time at which a contract was entered into, and has less potential to cause unjust exclusion from an EDR scheme.</p> <p>In relation to the second half of the proposal (if IDR were to apply to complaints relating to hardship variations), consumer advocates note that the notion of a "final response at IDR" is notoriously problematic, and often difficult to identify in practical terms.</p> <p>Notwithstanding this difficulty, the use of this formulation is supported in the context that the two years should run from the "later of" the two potential events - i.e. the later of the time a credit contract is rescinded, discharged, or otherwise comes to an end; or the time at which a final IDR response was received.</p>

2.10 Proposal D3 - Time limits for bringing an unjust transaction, or unconscionable interest and other charges claim to EDR.

<p>ASIC Proposal</p>	<p><i>To update RG 139 to clarify that the time limit for bringing a complaint to EDR where unjust transactions or unconscionable interest and other charges are involved is the later of:</i></p> <ul style="list-style-type: none"> • <i>two years from when the credit contract is rescinded, discharged or otherwise comes to an end; and</i> • <i>two years from when the credit licensee or its representative provides a final response at IDR.</i>
<p>Response</p>	<p>See response above.</p>

2.11 Proposal D4 - EDR schemes and default judgments

ASIC Proposal	<i>Should RG 139 be updated to clarify how EDR schemes can handle complaints about credit transactions where a default judgement has been entered?</i>
Response	<ul style="list-style-type: none"> • <i>D4Q1: Do you think EDR schemes should be able to handle complaints involving default judgements? If not, why not?</i> <p>Consumer advocates strongly support EDR schemes being given the capacity to consider matters where default judgements have been entered, and that lenders should not enforce default judgements while the complaint is being handled by the EDR scheme. Consumer advocates note that the terms of reference for both FOS and COSL would have to be amended to achieve this.</p> <ul style="list-style-type: none"> • <i>D4Q2: Do you agree with the suggested example?</i> <p>Consumer advocates strongly agree with the given example, whereby an EDR scheme would seek to negotiate with a lender to arrange a hardship variation more appropriate to the debtor, in a situation where a default judgement had already been entered.</p> <p>This proposal implicitly acknowledges that more favourable outcomes can often be achieved through greater dialogue, and the involvement of EDR.</p>

2.12 Proposal D5 - Linked credit providers

ASIC Proposal	<i>To update RG 139 to make clear that ASIC expects EDR schemes to work collaboratively with the ACCC and the state and territory Offices of Fair Trading to develop complaints handling processes where complaints involve linked credit provider and fair trading type issues.</i>
Response	<ul style="list-style-type: none"> • <i>D5Q1: Do you agree with the proposal?</i> <p>Consumer advocates support this proposal, in that it seeks to address a</p>

	<p>significant 'gap' in access to justice for consumers under the Bill. Consumer advocates therefore see it as critical that EDR schemes work more closely with the ACCC and state and territory based Office of Fair Trading bodies, to ensure that these matters, which represent a significant body of complaints, are satisfactorily dealt with.</p> <p>We note more generally our view, however, that even the best collaborative efforts cannot substitute for the remedies presently available to consumers via state tribunals. For example, the Victorian Civil and Administrative Tribunal is presently able to address both elements of contracts involving linked credit. This ability will be lost in the transition to the National law.</p> <p>This underscores the importance of ensuring that this element of jurisdiction is replicated in the small claims procedure under the Bill and that this jurisdiction is made generally more workable, including monetary limits.</p> <p>We appreciate that issue falls outside the scope of CP 112 (and RG 139) and that ASIC has proposed the best option available. However the fact remains that in our view, that option will not provide satisfactory redress in linked credit matters.</p> <ul style="list-style-type: none"> • <i>D5Q2: Do you think ASIC should provide more detailed requirements for linked credit provider/fair trading issue type complaints?</i> <p>Consumer advocates are supportive of guidance and requirements that can assist in the resolution of common issues likely to arise in linked credit matters. This should be supported by preparedness to take action (collaboratively with other regulators if need be) to address problems arising in practice.</p>
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2.13 Proposal D6 - Responsible lending

ASIC Proposal	<i>To update RG 139 to clarify that EDR schemes will not be able to exclude complaints relating to responsible lending.</i>
Response	Consumer advocates strongly support this proposal, and regard it as a logical and necessary amendment to accommodate and apply key provisions of the National Credit Bill.

	<p>The responsible lending provisions of the National Credit Bill constitute a major reform of consumer credit practice in Australia. Consumer advocates applaud the intent of those provisions. It would be a major omission from EDR jurisdiction if schemes were not able to consider complaints relating to breaches of responsible lending provisions. It could significantly weaken schemes' impact on the lending practices of many credit providers and would put into question compliance with other RG139 requirements relating to coverage of a majority of consumer complaints.</p>
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2.14 Proposal E1 - Contact details for hardship applications

ASIC Proposal	<p><i>To update RG 139 to clarify that credit licensees should have a dedicated telephone number to accept and handle hardship applications.</i></p>
Response	<p>Consumer advocates strongly support this proposal, and note that if hardship application related complaints are to be exempted from IDR (as per proposal B3), then the need for dedicated hardship application phone lines is even clearer. We suggest RG139 should also specify that the number should be separate from the licensee's collections area. Further, consumer advocates are strongly of the view that fax, postal, and e-mail contact details should also be provided for the purpose of hardship applications.</p> <p>The hardship application process for many credit providers must be made clearer and more accessible for consumers, and the suggested measures would be a positive step in addressing this area, which has at times been neglected by credit providers.</p>

2.15 Proposal E2 - Publication of members contact details on EDR web-sites

ASIC Proposal	<p><i>To update RG 139 to require EDR schemes to make available and maintain on their web-sites the contact details of members, so that consumers can use those details to make hardship applications.</i></p>

Response	Consumer advocates are strongly supportive of this proposal, and can see no reason why it should be opposed. As above, consumer advocates strongly recommend that member fax, postal, and e-mail contact details also be posted on EDR web-sites.
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2.16 Proposal F1- Adequate resourcing

ASIC Proposal	<i>To update RG 139 to include ASIC's expectation that EDR schemes have adequate resources to handle the likely influx in new members and complaints.</i>
Response	<p>Consumer advocates are strongly supportive of this measure, and note that rising complaint numbers and significant delays continue to impact EDR schemes.</p> <p>In order to cope with future volumes, EDR schemes will have to significantly increase their resource base if they are to provide an adequate service.</p>