



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 139

Approval and oversight of external dispute resolution schemes

May 2009

About this guide

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

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

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This version was issued on 18 May 2009 and is based on legislation and regulations as at 18 May 2009.

Previous versions:

- Superseded Policy Statement 139, issued 8 July 1999 and rebadged as Regulatory Guide 139 on 5 July 2007.

Disclaimer

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

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

Contents

A	Overview—ASIC oversight of EDR Schemes	4
	Dispute resolution in the Australian financial system	4
	New licensees.....	5
	Initial and on-going approval of EDR schemes	5
	ASIC’s role.....	6
	How we will liaise with schemes and other stakeholders	7
	Applying for initial approval.....	8
	Ensuring on-going approval.....	8
B	Guidelines for initial and ongoing approval	9
	Interpreting these guidelines	9
	Timeline for adopting the new and updated requirements	11
	Accessibility	12
	Independence	15
	Fairness	18
	Accountability.....	19
	Efficiency and effectiveness	25
C	The approval process	34
	How to lodge an application for approval	34
	What information should be included in an application	34
	The approval letter and class order [CO 09/340]	35
	Appendix 1: DIST Benchmarks	36
	Key terms	37
	Related information	Error! Bookmark not defined.

A Overview—ASIC oversight of EDR Schemes

Key points

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

- internal dispute resolution processes that meets standards or requirements made or approved by ASIC; and
- membership of one or more ASIC-approved EDR schemes.

Under the Corporations Regulations, ASIC has the powers to approve an EDR scheme and vary or revoke that scheme's approval.

This regulatory guide outlines the matters that ASIC will take into account when considering whether to:

- approve a scheme and the process for applying for approval; and
- vary or revoke a scheme's approval.

Dispute resolution in the Australian financial system

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

- (a) internal dispute resolution (IDR) procedures that comply with standards and requirements made or approved by ASIC and that cover complaints made by retail clients in relation to the financial services provided; and
- (b) membership of one or more ASIC-approved external dispute resolution (EDR) schemes that covers, or together cover, with complaints that are dealt with by the Superannuation Complaints Tribunal (SCT), complaints made by retail clients in relation to the financial services provided.

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

RG 139.2 The SCT is a statutory tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth). It operates differently to ASIC-approved EDR schemes in that:

- (a) the SCT is not subject to ASIC's approval and this regulatory guide does not apply to it; and

- (b) the SCT only deals with complaints against trustees and certain insurers by virtue of the relevant provisions under the *Superannuation (Resolution of Complaints) Act 1993*.

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

- RG 139.3 AFS licensees, unlicensed product issuers and unlicensed secondary sellers are required to notify consumers and investors of their right to complain to an EDR scheme, if a final response cannot be provided by IDR within 45 days of the complaint being received (see RG 165 for further information on this requirement).

New licensees

- RG 139.4 This regulatory guidance anticipates that the Australian Government will extend mandatory EDR scheme membership and licensing requirements to margin lenders and—under the national credit laws—to credit providers and those who provide credit related broking services and advice. We also anticipate that these new licensees will be subject to the IDR requirements. We will update our regulatory guidance as necessary, in the light of these changes, in due course.

Initial and on-going approval of EDR schemes

- RG 139.5 Under the Corporations Regulations 2001, ASIC has the power to approve an EDR scheme:
- (a) for a specified period of time; and
 - (b) subject to conditions, including conditions in relation to the independent review of the operation of the scheme: see reg 7.6.02(4) and 7.9.77(4).
- RG 139.6 Under the regulations, ASIC also has the power to vary or revoke approval of an EDR scheme (see reg 7.6.02(4) and 7.9.77(4)).
- RG 139.7 The Corporations Regulations state that ASIC must take the following into account when considering whether to approve an EDR scheme:
- (a) accessibility;
 - (b) independence;
 - (c) fairness;
 - (d) accountability;
 - (e) efficiency;
 - (f) effectiveness; and

- (g) any other matter ASIC considers relevant: see reg 7.6.02(3) and 7.9.77(3).
- RG 139.8 The considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness are based on the principles in the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*, published by the then Department of Industry, Science and Tourism in 1997 (DIST benchmarks). See Appendix 1 for further information on the DIST benchmarks.
- RG 139.9 Currently, there are no ‘other matters’ which ASIC considers relevant when considering whether to approve an EDR scheme. However, ASIC reserves the discretion to introduce additional guidelines for the purpose of assessing a scheme for approval, for example, where the features of a product from a particular industry make additional considerations relevant. ASIC will consult with stakeholders about the introduction or reliance on any additional guidelines not currently contained in the Corporations Regulations.
- RG 139.10 This regulatory guide also explains the on-going requirements of an EDR scheme to maintain ASIC approval.
- RG 139.11 We will review the approval guidelines contained within this regulatory guide in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.
- RG 139.12 We will update this regulatory guide to remove obsolete requirements and references after the implementation period ends: see Figure 1.

ASIC’s role

- RG 139.13 The objectives of Chapter 7 of the Corporations Act are to promote:
- (a) the confident and informed participation of consumers and investors in the Australian financial system (also an objective of ASIC under s1 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act));
 - (b) fairness, honesty and professionalism by those who provide financial services;
 - (c) fair, orderly and transparent markets; and
 - (d) the reduction of systemic risks: see s760A.
- RG 139.14 Within this framework, we are responsible for overseeing the effective operation of EDR schemes, and approving these schemes as required.

- RG 139.15 We consider that our responsibility derives from a number of sources, including our licensing of industry participants and our power to approve industry codes of practice.
- RG 139.16 We believe that industry-supported EDR schemes play a vital role in the broader financial services regulatory system. These schemes provide:
- (a) a forum for consumers and investors 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.
- RG 139.17 As a result of continuing law reforms, an increasing number of industry participants will be, or are likely to be, required to join an ASIC-approved EDR scheme as a condition of carrying on their business.
- RG 139.18 In light of this, we wish to ensure that complaints handling procedures treat consumers and investors fairly and consistently across the different industry sectors of the Australian financial system. We therefore consider it necessary to approve schemes with reference to a common set of approval guidelines. The approval guidelines contained within this regulatory guide are intended to:
- (a) give guidance about what characteristics a scheme that applies for approval should have; and
 - (b) promote minimum standards across EDR schemes to achieve parity of schemes and equal treatment of complaints.
- RG 139.19 The application of these guidelines will nevertheless recognise legitimate differences between industries or between schemes. We believe that a consistent approach to regulation does not necessarily imply identical standards in all cases.
- RG 139.20 We acknowledge and support the schemes' core business of resolving consumer complaints, and intend this regulatory guide to contribute to the strength of the complaints resolution sector.

How we will liaise with schemes and other stakeholders

- RG 139.21 We will liaise with each of the EDR schemes operating in the financial sector on an ongoing basis. This will take place through a number of formal and informal channels.

Applying for initial approval

- RG 139.22 If you wish to apply to become an ASIC-approved EDR scheme, the steps you can take include:
- (a) assessing whether you satisfy the requirements set out in this regulatory guide at Section B; and
 - (b) submitting an application for approval in the form required by Section C.

Ensuring on-going approval

- RG 139.23 If you already are an ASIC-approved EDR scheme, you must continue to satisfy the requirements set out in your approval letter and this regulatory guide: see Section C for information on the approval letter.

B Guidelines for initial and ongoing approval

Key points

ASIC must take the following into account when considering whether to approve an EDR scheme:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency;
- effectiveness; and
- any other matter ASIC considers relevant.

Interpreting these guidelines

RG 139.24 We have structured our requirements in this guide according to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. Please note that as one principle may overlap with another, a requirement for approval may relate to more than just one principle. For example, the requirement of ‘scheme decision making’ discussed under the principle of ‘fairness’, may also relate to ‘effectiveness’ and ‘efficiency’.

RG 139.25 Table 2 summarises the principles and the requirements discussed in this regulatory guide. Table 2 also identifies whether a requirement is ongoing, new or has been updated for ease of reference: see Table 1 for an explanation of the types of requirement.

Table 1: Explanation of types of requirement

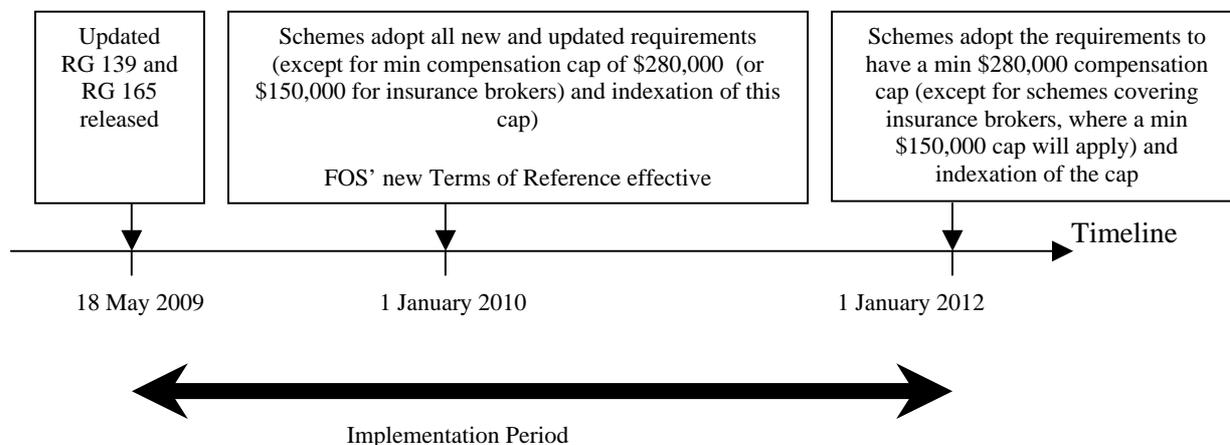
Types of Requirement	Explanation
Ongoing requirement	This is a requirement that has not changed since Superseded Regulatory Guide 139 (SRG 139) was first issued on 8 July 1999.
Updated requirement	This is a requirement that was included in SRG 139 when it was issued on 8 July 1999, but has been revised/updated when this regulatory guide was reissued on 18 May 2009.
New requirement	This is a requirement that was not previously included when SRG 139 was issued on 8 July 1999, but has since been included on 18 May 2009.

Table 2: The principles and the requirements in this guide

Principle	Requirements	See	New, updated or ongoing requirement
Accessibility	Cost to the complainant	RG 139.32–RG 139.38	Ongoing requirement
	Promotion of the scheme	RG 139.39–RG 139.43	Ongoing requirement
	Scheme communication	RG 139.44–RG 139.48	New requirement
	Referral of complaints by members to EDR	RG 139.145–RG 139.146	New requirement
	Legal proceedings and EDR	RG 139.51–RG 139.56	New requirement
	Types of complainants who can access the scheme	RG 139.57–RG 139.60	Ongoing requirement
Independence	Independence from industry	RG 139.62–RG 139.65	Ongoing requirement
	The overseeing body	RG 139.66–RG 139.72	Ongoing requirement
	Resources available to the scheme	RG 139.73–RG 139.74	Ongoing requirement
	Scheme member's powers of veto	RG 139.75–RG 139.77	New requirement
	Changes to the Terms of Reference	RG 139.78–RG 139.82	Ongoing requirement
Fairness	Scheme decision making	RG 139.84–RG 139.88	Ongoing requirement
Accountability	Reporting to ASIC—systemic issues and serious misconduct	RG 139.90–RG 139.113	Updated requirement
	General reporting guidelines	RG 139.114–RG 139.119	Updated requirement
	Complaints information	RG 139.120–RG 139.127	Updated requirement
	Independent reviews	RG 139.128–RG 139.134	Updated requirement
Efficiency and effectiveness	Coverage of the scheme	RG 139.136–RG 139.166	Updated requirement
	Where the scheme member ceases to carry on business	RG 139.167–RG 139.171	New requirement
	Time limit for bringing complaints to EDR	RG 139.172–RG 139.173	New requirement
	Compliance with scheme decisions	RG 139.175–RG 139.180	Ongoing requirement
	Available remedies	RG 139.181–RG 139.185	Ongoing requirement
	Internal dispute resolution time frames	RG 139.186–RG 139.188	Ongoing requirement

Timeline for adopting the new and updated requirements

Figure 1: Timeline for schemes to adopt the new and updated requirements



- RG 139.26 Figure 1 summarises the timeline for existing schemes to adopt the new and updated requirements referred to within this regulatory guide.
- RG 139.27 A transitional period ending 31 December 2009 applies for all new requirements and updated requirements, except for those mentioned at RG 139.28: see Table 2.
- RG 139.28 For the requirement to operate a minimum compensation cap of \$280,000 at this time (or the requirement to operate a minimum compensation cap of \$150,000, in the case of insurance brokers) and the requirement that compensation caps be indexed, a transitional period ending 31 December 2011 applies.
- RG 139.29 Between 1 January 2010 and 31 December 2011, schemes will be required to adopt a compensation cap of the value that is at least equal to, or higher than, their existing monetary claims limit. From 1 January 2012, schemes will be required to operate a compensation cap of a minimum of \$280,000 at this time (or a minimum compensation cap of \$150,000 in the case of insurance brokers).
- RG 139.30 We anticipate that these new and updated requirements will require ASIC-approved EDR schemes to update their Terms of Reference, in consultation with scheme members, consumer representatives and ASIC.
- RG 139.31 Schemes must continue to comply with the ongoing requirements set out in Table 2.

Accessibility

- RG 139.32 Requirements that relate to the principle of accessibility include:
- (a) the scheme promoting equitable access by providing its services free of charge;
 - (b) the scheme actively promoting itself so consumers and investors become aware of the existence of the scheme, thereby improving accessibility of the scheme;
 - (c) the scheme developing a communications strategy to improve consumer and investor knowledge of the EDR process and the role of the scheme;
 - (d) the scheme being capable of accepting complaints from a financial service provider where there is an intractable dispute;
 - (e) the scheme specifying in its Terms of Reference how legal proceedings can be brought where a complaint has been lodged with an EDR scheme; and
 - (f) the types of complainants who can access the scheme.

Cost to the complainant

RG 139.33 To promote equitable access, a scheme must provide its EDR procedures free of charge to any complainant whose complaint falls within the scheme's jurisdiction.

RG 139.34 We consider it a fundamental principle that consumers and investors of financial products and services have free access to the complaints handling procedures offered by a scheme.

RG 139.35 We understand, however, that charging may be appropriate in some limited cases or special circumstances. For example, where the scheme seeks to extend its jurisdiction to provide its services for a complaint that is clearly outside the scheme's jurisdiction (e.g. beyond the consideration of 'consumer' or appropriate 'small business' complaints).

Note: See RG 139.57–RG 139.60 for a further discussion of types of complainants who can access the scheme.

RG 139.36 Charging for access to a scheme's complaints handling procedures will be inappropriate if it is applied as a barrier to entry, or otherwise intended as an unreasonable disincentive to the complainant.

RG 139.37 If a scheme does introduce a limited charging policy, then it must collect and record information about:

- (a) the number of complainants unwilling to proceed when notified of the charge;
- (b) the number of complainants that request a waiver of the charge;

- (c) the terms and application of any waiver policy; and
- (d) some assessment of the level of charges as against the cost incurred by the scheme in processing relevant complaints.

RG 139.38 A scheme must consult publicly with industry and consumer organisations, and with us about any proposal to introduce charges, before the proposal is implemented.

Promotion of the scheme

RG 139.39 The effective promotion of a scheme through a wide range of channels, including the media, is an integral part of making sure that an EDR scheme is widely accessible.

RG 139.40 A scheme should be conscious, when preparing its promotions strategy, that there may be some classes of complainants who, for geographic, economic or other reasons, are not accessing the scheme in proportion to their use of financial products and services. The scheme should actively promote its existence, particularly to those complainants that are under-represented in the breakdown of people who access the scheme: see RG 139.120–RG 139.127.

RG 139.41 A scheme must publish and promote details about its complaints resolution procedures including:

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

RG 139.42 Scheme members must advise consumers and investors of their right to take their complaint to an EDR scheme if they are not able to provide a final response to a complaint at IDR within 45 days (see RG 165). We believe that this will improve scheme accessibility as more complainants will become aware of the right to complain to EDR and the relevant EDR scheme with which to lodge their complaint.

RG 139.43 There are also some regulatory requirements that scheme members must comply with to promote the availability of EDR schemes. For example, AFS licensees who provide a Financial Services Guide to their retail clients must include details of their scheme membership in that document: see s942B(2)(h) of the Corporations Act.

Scheme communication

RG 139.44 In addition to effectively promoting the scheme, schemes should develop communications strategies to improve their communication with complainants about their processes, decisions and role so consumer and

investor expectations are realistic. These strategies should be reviewed periodically.

- RG 139.45 Our experience indicates that not all complainants and investors who access EDR schemes understand the EDR process nor the role of the scheme.
- RG 139.46 When developing communications strategies, schemes should have regard to plain language principles, ensuring that information is easy to access, user-friendly, practically relevant and disseminated at key stages of the dispute resolution process.
- RG 139.47 It may also be appropriate to ensure that scheme communications are made available in different languages, in Braille or large font and in audio format, depending on the demographics and special needs of complainants.
- RG 139.48 We reserve our discretion to request further information about a scheme's communications strategies and to review whether those strategies and our guideline are working effectively. We will consult with EDR schemes, industry and consumer stakeholders before amending this guideline.

Referral of complaints by members to EDR

- RG 139.49 One benefit for members of belonging to an EDR scheme is that it provides an independent alternative to the courts for dispute resolution. Where a scheme member has provided a final response to a complainant at IDR (see RG 165) and the complainant has not been able to be resolved by IDR, nor by EDR because the complainant has not progressed their complaint to an EDR scheme, the Terms of Reference must allow scheme members to refer complaints to an EDR scheme for resolution.
- RG 139.50 We recognise that a direct referral of a complaint to an EDR scheme by a member will only be possible if the consumer or investor consents to the financial service provider forwarding the complaint, including the complainant's personal information to the scheme.

Legal proceedings and EDR

- RG 139.51 The Terms of Reference of an EDR scheme must require that legal proceedings by scheme members should not be commenced where a complaint has been lodged with the scheme unless:
- (a) the legal limitations period is about to expire; or
 - (b) in test case situations.
- RG 139.52 By test case situations, we mean disputes involving a novel point of law or circumstance requiring clarification.
- RG 139.53 Where legal proceedings have already commenced and a complainant takes their complaint to an EDR scheme, the Terms of Reference must require the

member to not pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.

RG 139.54 Commencing legal proceedings in relation to a complaint lodged at EDR creates the potential for scheme members to undermine the EDR process. There is also the possibility that the same complaint will be dealt with in two competing forums, wasting time and resources.

RG 139.55 However, we recognise the importance of allowing scheme members to preserve their legal rights where the legal limitations period is about to expire and in test case situations.

RG 139.56 The Terms of Reference should provide that where a scheme member commences legal proceedings in a test case situation, the scheme member should pay the complainant's legal costs.

Types of complainants who can access the scheme

RG 139.57 The Terms of Reference of an ASIC-approved EDR scheme must set out what types of complainants can access its complaints handling procedures.

RG 139.58 A scheme must, as a minimum, be able to deal with complaints from 'retail clients' as defined in s761G and related regulations. The definition of retail client varies depending on whether the relevant financial product is a general insurance product, a superannuation product, a retirement savings account product (within the meaning of the *Retirement Savings Accounts Act 1997* (Cth)), or any other type of financial product. A small business may be a retail client. A 'small business' is defined in s761G as a business employing fewer than:

- (a) 100 people (if the business is or includes the manufacture of goods); or
- (b) 20 people (otherwise).

RG 139.59 Each EDR scheme must make sure that its Terms of Reference enable retail clients (including small businesses that are retail clients) to access the scheme.

RG 139.60 Where appropriate, we encourage EDR schemes to accept complaints from a broader range of complainants than set out in the retail client definition.

Independence

RG 139.61 Requirements that relate to the principle of independence include that a scheme must:

- (a) have an overseeing body that meets certain requirements and ensures that the scheme has sufficient resources to carry out its functions;

- (b) not allow members a power of veto where changing the Constitution or Terms of Reference of a scheme is involved; and
- (c) consult with relevant stakeholders about the development of its Terms of Reference and any proposed amendments before their implementation.

Independence from industry

- RG 139.62 A scheme must be independent of the industry or industries that provide its funding and constitute its membership. In practice, this means that the decision maker(s) and/or the staff of the scheme are:
- (a) entirely responsible for the handling and determination of complaints;
 - (b) accountable only to the scheme's overseeing body; and
 - (c) adequately resourced to carry out their respective functions.
- RG 139.63 The principle of independence means that a scheme must be a legal entity in its own right: that is, it should be an incorporated entity.
- RG 139.64 If a scheme is not separately incorporated, there may be a perception that it is not independent of the industry members with which it is affiliated. This perception may arise, for example, in circumstances where the membership base of a scheme expands, but the scheme remains legally affiliated with a particular industry association or with a subset of industry.
- RG 139.65 The decision-making processes and the administration of a scheme must be independent of those sectors of industry which fall within its jurisdiction and which provide its funding.

The overseeing body

- RG 139.66 Our requirements for the membership and functions of the scheme's overseeing body, focus on ensuring:
- (a) independent decision making by scheme staff and the decision maker(s);
 - (b) effective consultation about any changes to the scheme's Terms of Reference;
 - (c) an appropriate balance of representation on the overseeing body; and
 - (d) that the scheme has adequate resources to perform its functions.
- RG 139.67 A scheme must have an overseeing body with responsibility to oversee the operations of the scheme, and to preserve the independence of the scheme and of the dispute resolution processes. In order to ensure that a scheme is clearly perceived to be independent, the membership of the overseeing body should comprise:

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

RG 139.68 A scheme's Constitution or Terms of Reference must include details about how consumer representatives will be appointed, including any requirements for consultation with appropriate individuals and/or organisations.

RG 139.69 One option is that responsibility for appointing consumer representatives could be given to the scheme or to another organisation or individual.

RG 139.70 We have decided after consultation with stakeholders that it is not appropriate for a representative to be appointed from or by ASIC to the overseeing body. This reflects our consideration of the appropriate balance of membership on the overseeing body and of the potential for a conflict of interest to arise with such an appointment.

RG 139.71 The minimum functions of a scheme's overseeing body must include:

- (a) appointing the scheme's decision maker(s);
- (b) agreeing the scheme's budget with relevant industry representatives;
- (c) recommending and promoting consultation about proposed changes to the scheme's Terms of Reference;
- (d) receiving and considering complaints about the operation of the scheme;
- (e) monitoring general trends and issues arising from the complaints that are lodged with the scheme, including those that fall outside the Terms of Reference;
- (f) monitoring the reporting of systemic issues and/or serious misconduct by the scheme; and
- (g) monitoring the scheme's ability to manage its caseload and to perform other promoted functions.

RG 139.72 Where the overseeing body appoints a person to manage the scheme's day-to-day operations, then that person should be responsible for appointing, supervising and dismissing the scheme's staff.

Resources available to the scheme

RG 139.73 A scheme's overseeing body must monitor whether the scheme is adequately resourced to carry out its promoted functions. This should include monitoring how the scheme manages its caseload over time.

RG 139.74 A consideration of resourcing should include provision to assist complainants to draft and lodge their complaints. This does not amount to scheme staff advocating for complainants, and should not jeopardise the impartiality of the complaints resolution process.

Scheme member's powers of veto

- RG 139.75 We require that a scheme must not give its members a right of veto over changes to the Constitution or Terms of Reference.
- RG 139.76 We believe that members' having a right of veto may undermine the independence of the EDR scheme as industry provides its funding and constitutes its membership.
- RG 139.77 We are also concerned that a power of veto would give scheme members a disproportionate level of influence over the evolution of the EDR scheme compared with the influence of other stakeholders, for example consumers and investors.

Changes to the Terms of Reference

- RG 139.78 A new scheme must consult with stakeholders about its Terms of Reference, before implementing them.
- RG 139.79 A scheme that already exists must consult with industry and consumer organisations, and other relevant stakeholders, prior to implementing any proposed changes to its Terms of Reference, unless RG 139.81 applies. A scheme should not rely on consulting only with its overseeing body prior to implementing any changes.
- RG 139.80 We consider it important that a scheme publicly consults about proposed changes to its Terms of Reference because it can result in a greater degree of understanding and acceptance about the scheme's operations.
- RG 139.81 We recognise, however that there may be some proposed changes to a scheme's rules or procedures that are 'minor' in nature. It may be unnecessary for a scheme to consult publicly about such changes.
- RG 139.82 A scheme must consult with us about all proposed changes to its Terms of Reference, and should identify those changes which it considers to be 'minor' in nature and which will not be the subject of broader consultation.

Fairness

- RG 139.83 We believe a scheme's complaints handling and other procedures must accord with the principles of natural justice.

Scheme decision making

- RG 139.84 In reaching a decision about a complaint, a scheme should not be entitled to rely on information that is not available to all parties.

- RG 139.85 We believe, however, that the effective and timely resolution of a complaint does not necessarily depend on the physical exchange of all relevant documents or information between the parties. This is the case, for example, when:
- (a) written reasons about a scheme's decisions clearly identify the documents or information relied on; and
 - (b) the identified documents or information can be provided to the parties on request.
- RG 139.86 There is a general presumption that a scheme member does not have the discretion to withhold documents or information from a complainant. We recognise, however, that there may be some limited circumstances where the scheme member might appeal to the scheme to withhold certain information.
- RG 139.87 These circumstances might include where the release of information would endanger a third party or where it would compromise a scheme member's general security measures.
- RG 139.88 In the interests of ensuring that parties to a complaint are treated fairly, a scheme should provide written reasons for any decision made about the merits of a complaint, including when a complaint is judged to be outside the scheme's Terms of Reference. We understand, however that there may be some circumstances in which a complaint may be resolved without providing reasons in writing.

Accountability

- RG 139.89 Requirements that relate to the principle of accountability include:
- (a) a scheme must report any systemic issues and matters involving serious misconduct by a scheme member to ASIC;
 - (b) a scheme must collect and report information about complaints it receives to ASIC on a quarterly basis and in its annual report; and
 - (c) a scheme must conduct independent reviews of its operations.

Reporting to ASIC—systemic issues and serious misconduct

- RG 139.90 A scheme must report any systemic, persistent or deliberate conduct to us. For the purposes of this guide we have classified the types of conduct or issues that might be reported to us into two broad categories:
- (a) systemic issues; and
 - (b) serious misconduct.
- RG 139.91 The broad application of this regulatory guide precludes us from providing an exhaustive list of examples about what might constitute reportable

conduct in each of these areas within our jurisdiction. However, working definitions are contained at RG 139.92–RG 139.96 for ‘systemic issues’ and at RG 139.97–RG 139.99 (inclusive) for ‘serious misconduct’.

Systemic issues

- RG 139.92 At a broad level, systemic issues relate to issues that have implications beyond the immediate actions and rights of the parties to the complaint.
- RG 139.93 While several complaints of the same type may indicate a systemic problem, we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints a scheme may have received.
- RG 139.94 A systemic issue may be identified out of the consideration of a single complaint. This is because the effect of the particular issue will clearly extend beyond the parties to the complaint. Some examples of a systemic issue include where there is a mistake in how interest is calculated or there is a mistake in how a fee is applied. Alternatively, a systemic issue may only become evident after the scheme has received multiple complaints which are similar in nature. For example, where a particular intermediary has mis-sold financial products to a number of consumers.
- RG 139.95 Factors causing systemic conduct or problems in the financial system might include poor disclosure or communication, administrative or technical errors and improper interpretation or application of standard terms.
- RG 139.96 The effects of systemic conduct (which by definition would be felt by more than one person) might include financial loss and loss of consumer confidence in the relevant financial service provider or intermediary or in the relevant financial product or service.

Serious misconduct

- RG 139.97 A definition of serious misconduct may include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws.
- RG 139.98 The Corporations Act requires AFS licensees to do all things necessary to ensure that the financial services covered by the licence are provided honestly, efficiently and fairly at all times. Other legislation that we administer provides information about what constitutes proper behaviour in the financial services marketplace, for example, by prohibiting misleading and deceptive conduct.
- RG 139.99 We believe that there will be cases of misconduct that, by their nature, require us to take further action. This might include the general category of misconduct referred to in RG 139.97. There is, however, a considerable ‘grey area’ including cases of misconduct in which the need to refer is not so

straightforward. Schemes should consult with us if they are unsure about whether they should refer a matter to us.

Responsibilities of the scheme

- RG 139.100 It is the responsibility of a scheme to:
- (a) *identify* systemic issues and cases of serious misconduct that arise from the consideration of consumer complaints; and
 - (b) *refer* these matters to the relevant scheme member or members for response and action; and
 - (c) *report* information about the systemic issue or serious misconduct to us, in accordance with these guidelines.
- RG 139.101 While EDR schemes are not required to identify the scheme member or members in reports to ASIC, we would strongly encourage them to consider doing so in appropriate cases. In any event, we reserve our right to compel a scheme to provide information identifying a scheme member by using our powers under s33 of the ASIC Act.
- RG 139.102 Under s33 of the ASIC Act, ASIC can give a person, such as an EDR scheme, written notice (s33 notice) requiring the production of books, being at a specified time and place, books and records in that person's possession that relate to the financial service.
- RG 139.103 We understand that there will be some systemic issues that relate to general industry practice or trends, which do not permit or warrant referral to a particular scheme member or members. These issues should still be reported to us.

Identification of reportable issues

- RG 139.104 In order to effectively identify systemic issues arising from complaints or inquiries, a scheme should have an appropriate 'systemic focus'. In particular, a scheme must collect and record information in a manner which enables the:
- (a) identification of trends and patterns in complaints; and
 - (b) simple retrieval of sorted data.
- RG 139.105 A scheme should also have the infrastructure to support effective case management and information collection.
- RG 139.106 A scheme must identify who is responsible for reporting systemic issues and serious misconduct to us. This responsibility should not be left only to the scheme's overseeing body.
- RG 139.107 Scheme staff who deal with complaints should be alert to conduct or issues which should be referred to scheme members and/or reported to us. Staff

should also be made aware of the terms of any reporting guidelines that are agreed with us.

Reporting of systemic issues involving a single member

- RG 139.108 Some systemic issues will arise in relation to the conduct of an individual scheme member. In these circumstances, the scheme should refer the matter to the scheme member for appropriate remedial action, in accordance with procedures set out in the scheme's Terms of Reference. Within a reasonable period, the scheme member should provide a concise report or 'audit' to the scheme that details the member's response to the referral.
- RG 139.109 A copy of the report must be made available to us as soon as practicable after the report is received by the scheme. There will be some circumstances in which a scheme should advise us that it has identified and referred a particular matter to a scheme member, prior to the member's report being made available.

Reporting systemic issues involving multiple scheme members

- RG 139.110 Some systemic issues will involve the conduct of multiple scheme members. This may include general trends that might not implicate individual scheme members, but might reflect, for example, the need for a change in our regulatory guidance.
- RG 139.111 The scheme should generally follow the same referral and reporting procedures described for systemic issues involving a single member at RG 139.108–RG 139.109.

Dealing with inter-scheme systemic issues

- RG 139.112 Some systemic issues may involve the conduct of multiple industry participants who are not members of the same scheme.
- RG 139.113 In some circumstances, these issues may only be identified by us through the information provided by different schemes about particular intra-scheme conduct and/or by us issuing a s33 notice. These issues might also be identified through informal discussions with schemes either individually or at joint consultative forums.

General reporting guidelines

- RG 139.114 A report should be made to us that satisfies at least one of the following objectives:
- (a) improving industry practice and communication;
 - (b) remedying financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);

- (c) preventing foreseeable loss to consumers and, more generally, ensuring that ‘high-risk’ issues might be effectively dealt with before problems develop;
- (d) minimising the risk of the conduct or problem recurring;
- (e) efficiently dealing with multiple complaints about a single incident or problem;
- (f) reviewing the circumstances in which a particular scheme member (licensee) should continue to conduct their business; and
- (g) sending a signal to the market about what constitutes acceptable market behaviour.

RG 139.115 While EDR schemes are not required to identify the scheme member or members in reports to ASIC, we would strongly encourage them to consider to do so in appropriate cases. In any event, based on the report provided to us, and any further information we may require from the schemes, we will consider whether we will compel a scheme to provide information identifying a scheme member by issuing a s33 notice. To assist us in making this decision, reports should provide information relating to whether the scheme member or members have been uncooperative or otherwise failed to take appropriate remedial action.

RG 139.116 Early and effective action by a scheme member or members in response to reportable conduct should reduce the costs of dealing with multiple complaints. There can be no general disadvantage to industry where such issues are addressed in a timely and comprehensive manner.

Further review and communication of our reporting guidelines

RG 139.117 This regulatory guide provides a basic framework within which a scheme should operate to satisfy the reporting guidelines: see RG 139.90–RG 139.113. This framework will be subject to periodic review in consultation with EDR schemes, industry, consumer representatives and other interested stakeholders.

RG 139.118 We will hold regular meetings between scheme staff and our staff to discuss the operation of the reporting guidelines and other relevant issues.

RG 139.119 We may establish more detailed reporting guidelines with each scheme that is approved. These guidelines will be tailored to the membership and complaints profile relevant to the scheme, and will be developed and agreed with the assistance of the relevant scheme staff.

Complaints information

RG 139.120 To comply with our requirements for reporting, a scheme must collect and record information about:

- (a) the number of complaints and inquiries received;

- (b) demographics of complainants (where practicable);
- (c) the number of complaints received that fall outside the scheme's Terms of Reference (with reasons);
- (d) the scheme's current caseload including the age and status of open cases;
- (e) the time taken to resolve complaints;
- (f) the profile of complaints to enable identification of:
 - (i) the type of financial product or service involved;
 - (ii) the product or service provider;
 - (iii) the purpose for which the financial product or service was obtained;
 - (iv) the underlying cause(s) of the complaint;
 - (v) any systemic issues or other trends; and
- (g) the number of complaints closed and an indication of outcome of each closed complaint.

RG 139.121 We understand that schemes may encounter practical difficulties in obtaining some information about complaints, particularly demographic information about complainants. However, we expect that a scheme will have a case management system that enables this information to be recorded where available because demographic information provides an invaluable indication of a scheme's accessibility.

RG 139.122 A scheme must provide us with updated complaints information, as described above, on a quarterly basis.

RG 139.123 A comprehensive summary and analysis of this information must also be contained in each annual report published by a scheme.

RG 139.124 From 1 January 2010, schemes must also publish information about complaints received and closed, with an indication of the outcome, against each scheme member in their annual report.

RG 139.125 The number of complaints received and closed by an EDR scheme and an indication of outcome are an important measure for consumers and investors in choosing a financial service provider. It is also useful information for financial service providers to compare their complaints experience against those who operate like businesses.

RG 139.126 We expect that EDR schemes will:

- (a) ensure that information is accurate;
- (b) present the information in the appropriate context, for example by categorising member information according to industry sector and/or size of business; and

- (c) if considered necessary, caution that complaints history may vary from time to time and be affected by various influences. For example, the occurrence of natural disasters may give rise to more insurance claims and therefore complaints.

RG 139.127 We also encourage schemes to publish ‘practice notes’ or ‘guidelines’ which identify any problems or issues of interest as they arise during a reporting year.

Independent reviews

RG 139.128 Until 31 December 2009, a scheme must commission an independent review of its operations and procedures every three years.

RG 139.129 From 1 January 2010, an EDR scheme must commission an independent review of its operations and procedures:

- (a) three years after its initial approval by ASIC; and
- (b) thereafter every five years, unless ASIC specifies a shorter than five-year time frame.

RG 139.130 These time frames should not preclude a review occurring sooner if appropriate.

RG 139.131 We believe that regular, independent reviews of an EDR scheme’s performance and procedures provide valuable feedback about how the scheme should evolve and about any areas that should be changed or improved.

RG 139.132 The overseeing body of a scheme must consult with us about the:

- (a) terms of the independent review; and
- (b) appointment of the independent reviewer.

RG 139.133 The review should include some form of qualitative assessment of the scheme’s performance and not only quantitative measures of a scheme’s performance.

RG 139.134 The results of the review must be made available to us and to other stakeholders.

Efficiency and effectiveness

RG 139.135 Requirements that relate to the principles of efficiency and effectiveness include:

- (a) adequacy of a scheme’s coverage;
- (b) the handling of complaints where a financial service provider ceases to carry on business;
- (c) adopting the time limits specified in this regulatory guide for bringing complaints to EDR;

- (d) having procedures in place to ensure that a scheme member complies with scheme decisions;
- (e) offering remedies that are consistent with the remedies available under the relevant laws; and
- (f) monitoring members' compliance with IDR timeframes.

Coverage of the scheme

- RG 139.136 Under monetary limits, complainants are precluded from accessing a scheme if the value of their complaint exceeds the value of the scheme's monetary limit (unless a scheme member agrees to the scheme having jurisdiction).
- RG 139.137 In contrast, under compensation caps, a scheme has jurisdiction to hear a complaint, but is only able to award compensation up to the value of the compensation cap.
- RG 139.138 A scheme's coverage must be sufficient to deal with the matters set out in Table 3.

Table 3: An EDR scheme should cover

Until 31 December 2009	From 1 January 2010
The <i>majority</i> of consumer complaints in the relevant industry (or industries) and the whole of each complaint	The <i>vast majority</i> of types of consumer complaints in the relevant industry (or industries)
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	For consumer complaints involving monetary amounts up to the value of the retail client test under s761G (currently \$500,000), the EDR scheme is required to award compensation up to a capped amount that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries: <ul style="list-style-type: none"> • between 1 January 2010 and 31 December 2011 we require EDR schemes to operate a compensation cap amount that is at least equal to or greater in value than the existing differential monetary limit the EDR scheme operated; and • from 1 January 2012 we require EDR schemes to operate a compensation cap of at least \$280,000 at this time, unless the EDR scheme covers insurance brokers, for which a compensation cap of at least \$150,000 will apply at this time.

- RG 139.139 Table 3 summarises how our approach to EDR scheme coverage will change from 1 January 2010.
- RG 139.140 As a starting point, we take the view that a scheme must be able to consider any complaint where the complainant has suffered a direct financial loss.

RG 139.141 We understand that consideration of an appropriate monetary claims limit or compensation cap for a particular scheme has implications for scheme members who require professional indemnity insurance to meet any claims.

RG 139.142 We also note that RG 126 *Compensation and insurance arrangements for AFS licensees* requires that AFS licensees who provide services to retail clients must have adequate arrangements for compensating clients for losses suffered and that these arrangements must be approved by us.

Types of complaints

RG 139.143 An EDR scheme's coverage is set out in its Terms of Reference. When a scheme lodges an application for approval, we will assess the adequacy of its coverage in relation to dealing with the majority of consumer complaints by having regard to:

- (a) the types of complainants that can access the scheme;
- (b) the types of complaints that the scheme can deal with; and
- (c) the scheme's—
 - (i) monetary claims limit (until 31 December 2009); or
 - (ii) compensation cap (from 1 January 2010).

RG 139.144 This part of the regulatory guide contains guidance about the minimum level of coverage that an EDR scheme should provide to be approved. We encourage schemes to maintain a broad coverage that is consistent with the business of its members and the participation of consumers in the relevant industries.

RG 139.145 The Terms of Reference of an EDR scheme must set out what types of complaints a scheme can deal with, that is, what is an 'eligible' complaint.

RG 139.146 From 1 January 2010, when we assess an EDR scheme for approval, we will review its Terms of Reference to make sure that it offers adequate coverage to deal with a 'complaint', as defined in RG 165.

RG 139.147 An approved EDR scheme does not have to deal with all complaints that a retail client may make about a particular financial service or the conduct of a financial service provider. There are some types of complaints that a scheme may legitimately exclude from its Terms of Reference, such as a complaint that is solely about a member's commercial policy.

RG 139.148 When we approve an EDR scheme we also effectively approve any exclusions from that scheme's coverage. These exclusions may vary across schemes depending on the nature of the financial services covered, however, we will take a consistent approach in assessing what are reasonable exclusions from that scheme's coverage.

- RG 139.149 We will also take into account the scheme's capacity and expertise to deal with the full range of financial services it intends to cover.
- RG 139.150 From 1 January 2010, in order to gain approval, EDR schemes will have to deal with the vast majority of types of consumer complaints about the financial services in the relevant industry or industries they cover. However, we recognise that all EDR schemes apply legitimate exclusions in their Terms of Reference that act to limit the coverage that the scheme provides.
- RG 139.151 Examples of the types of complaints that may be typically excluded from the Terms of Reference of an ASIC-approved EDR scheme include complaints:
- (a) that have already been, 'dealt with' in another forum (i.e. a *decision on the merits having been made* has already been given or should have been given by a court, tribunal or another ASIC-approved EDR scheme);
 - (b) relating solely to the member's commercial policy;
 - (c) relating solely to the underlying performance of an investment; and
 - (d) that are frivolous and vexatious.
- RG 139.152 We will continue to monitor the types of complaints that are both included and excluded from the jurisdiction of each EDR scheme.

Monetary limits and compensation caps

- RG 139.153 Before approving a particular scheme, we will need to make an assessment about whether the scheme's monetary claims limit or compensation cap satisfies the objectives contained in Table 3.
- RG 139.154 Where a scheme has already been approved, we will review the compensation it is able to award, having regard to:
- (a) until 31 December 2009—the monetary limit operated by the scheme to see whether it is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries;
 - (b) from 1 January 2010–31 December 2011—the compensation cap awarded by the scheme (compared with the monetary limit the scheme used to operate at (a)) for consumer complaints involving monetary amounts that meet the value of the retail client test under s761G (currently \$500,000), to see whether it is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries; and
 - (c) from 1 January 2012—the compensation cap awarded by the scheme for consumer complaints involving monetary amounts that meet the value of the retail client test under s761G (currently \$500,000), to see whether it is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries and in relation to the

minimum compensation cap prescribed by ASIC—at this time \$280,000 and for insurance brokers, at this time \$150,000: see Table 3.

- RG 139.155 Both monetary claims limits and compensation caps apply on a ‘per claim’ basis. This means that separate claims by the same complainant must not be aggregated by the scheme for the purpose of determining a maximum claim. Further, both a scheme’s monetary claims limit and compensation cap will be subject to review by us.
- RG 139.156 If, as part of our approval process, we seek to increase the monetary claims limit or compensation cap applied by a particular EDR scheme, we will first liaise with relevant industry and consumer representatives about the relative costs and benefits of increasing the monetary amount.
- RG 139.157 We encourage schemes to operate a compensation cap that is higher than the monetary limit (between 1 January 2010–31 December 2011) and higher than the \$280,000 minimum compensation cap, and in the case of insurance brokers, higher than the minimum compensation cap of \$150,000 (from 1 January 2012), where appropriate and relevant so as to improve the effectiveness of the schemes.
- RG 139.158 We reserve the discretion to stipulate a minimum compensation cap that is higher than \$280,000 and in the case of insurance brokers, higher than \$150,000. Before we do this, we will consult with the schemes and the relevant industry and consumer representatives about the relative costs and benefits of increasing the minimum compensation cap.

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

- RG 139.159 In operating a minimum compensation cap:
- (a) the scheme should handle the complaint and make an award up to its compensation cap (or higher if the scheme member agrees);
 - (b) a consumer or investor with a complaint involving an amount that is higher than the EDR scheme’s compensation cap may be required to waive the excess at the end of the EDR process; and
 - (c) the EDR scheme outcome should not bind the consumer or investor if they do not choose to accept it. However, if the complainant accepts the EDR outcome, the scheme or member may require the complainant to accept the EDR outcome as full and final satisfaction of their claim and it will be binding on both parties (i.e. the balance of the claim cannot be pursued in another forum, for instance a court of competent jurisdiction).
- RG 139.160 We consider that waiver at the end of the EDR process will act as an incentive for financial service providers to resolve the complaint genuinely and in good faith, in a timely and appropriate manner.

- RG 139.161 Waiver at the end of the EDR process will also preserve a complainant's legal right to reject the EDR outcome and pursue their entire complaint in a court of competent jurisdiction.

Indexation of the compensation cap

- RG 139.162 From 1 January 2012, schemes must adjust the compensation cap, every three years using the higher of the increase in the Consumer Price Index (CPI) or Male Total Average Weekly Earnings (MTAWE).

Interest on awards

- RG 139.163 In order to provide an outcome that is fair and reasonable in all the circumstances, schemes must be able to award interest or earnings in addition to the amount awarded by a compensation cap.
- RG 139.164 We are of this view because an award of interest in addition to a compensation cap may also act as an incentive for the parties to resolve the complaint more expeditiously and in good faith.
- RG 139.165 If interest is awarded, the Terms of Reference of the scheme must require that interest be calculated from the date of the cause of action or matter giving rise to the claim.
- RG 139.166 The scheme's Terms of Reference may prescribe that, when calculating an award of interest, the scheme may have regard to any factors it considers relevant, including, but not limited to, the extent to which the conduct of either party contributed to the delay.

Where a scheme member ceases to carry on business

- RG 139.167 A scheme must ensure that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion about whether to cancel the scheme member's membership and/or to handle complaints in respect of the scheme member where the scheme member:
- (a) ceases to carry on business. Examples of ceasing to carry on business include, where a scheme member closes its doors to consumers and investors, but still has an AFS licence, or where a financial service provider sells its business;
 - (b) ceases to have a licence; or
 - (c) becomes insolvent under administration.
- RG 139.168 In exercising this discretion, the scheme must consider the complainant's interests.
- RG 139.169 The scheme may also have regard to whether:

- (a) the general exclusions to scheme jurisdiction apply (see RG 139.147- RG 139.151);
- (b) time limits apply (see RG 139.172-RG 139.173); and
- (c) the coverage of the scheme precludes the scheme from handling the complaint.

- RG 139.170 Examples of where it is in the complainant's interests not to cancel the scheme member's membership and/or to handle the complaint, include:
- (a) where the complainant will be able to obtain redress; and
 - (b) in insolvency situations, where a scheme decision may assist in showing that a complainant is a creditor and has a 'proof of debt'.
- RG 139.171 The scheme must also require that its Constitution and/or Terms of Reference allows the scheme to exercise a discretion to bypass IDR, if it is in the complainant's interests to do so. This may include where there is no handling of complaints at IDR.

Time limit for bringing complaints to EDR

- RG 139.172 We believe that schemes should have a consistent approach to time limits for bringing a complaint to a scheme. This will ensure consistency of treatment of complaints in the Australian financial system and create a more level playing field for industry participants.
- RG 139.173 Schemes must ensure that their Terms of Reference require that the time limit for bringing a complaint to a scheme be:
- (a) six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or
 - (b) two years from when the financial service provider provides a 'final response' at IDR as required by RG 139.63–RG 139.66.
- RG 139.174 The time limits at RG 139.173 apply, unless the scheme considers that exceptional circumstances apply and/or the scheme member agrees to the scheme having jurisdiction.

Compliance with scheme decisions

- RG 139.175 A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. It should be noted that scheme decisions are not binding on complainants, unless they choose to accept the scheme's decision at the end of the EDR process and (when a compensation cap applies) waive the excess of their claim: see RG 139.159(c).

- RG 139.176 A scheme must establish its own procedures for dealing with the non-compliance by a scheme member with a decision or rule of the scheme. These procedures should be detailed in the scheme's Terms of Reference.
- RG 139.177 We view non-compliance by a scheme member with a decision or rule of a scheme to be a serious breach of the terms of membership. However, because it is in the interests of consumers and industry that industry participants remain within the schemes, a scheme should not terminate the membership of a non-compliant member without first allowing them the opportunity to comply.
- RG 139.178 We suggest that in the event of non-compliance, a scheme might issue a 'notice to comply' which:
- (a) describes the act of non-compliance;
 - (b) allows the scheme member a reasonable time, say five working days, to comply; and
 - (c) notifies the scheme member of the implications of failing to comply.
- RG 139.179 Where a scheme member is required, by virtue of a licence granted by us, to join an ASIC-approved EDR scheme, then a scheme should inform us of any proposal to terminate that licensee's membership. The scheme should not unilaterally terminate the membership of a licensee because doing so would place the licensee in breach of a licence condition.
- RG 139.180 There are a number of administrative responses available to us following a referral of non-compliance by a licensee with a decision or rule of a scheme. Subject to holding a hearing we might, for example:
- (a) impose or vary the licence conditions, including imposing a condition that requires on-going compliance with an approved scheme's rules and decisions;
 - (b) make other orders such as allowing sufficient time for the non-compliant licensee to join another approved scheme; and
 - (c) as a last resort suspend or revoke a licence for the failure of the licensee to conduct business efficiently, honestly and fairly.

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

Available remedies

- RG 139.181 The remedies offered by a scheme must be consistent with the remedies available under the relevant laws that apply to the arrangements between the scheme member and its customers.
- RG 139.182 By this we mean that a scheme must, as a minimum, compensate a complainant for any direct loss or damage caused by a breach of any

obligation owed in relation to the provision of a financial product or service. This excludes an award for punitive or exemplary damages.

- RG 139.183 In determining the extent of loss or damage suffered by a complainant, the scheme should have regard not only to relevant legal principles but also to the concept of fairness and to relevant industry best practice.
- RG 139.184 A scheme must also be able, under its Terms of Reference, to make appropriate non-monetary orders obliging a scheme member to take (or not take) a particular course of action in order to resolve a complaint. Examples of non-monetary orders that a scheme might make following the consideration of a complaint are:
- (a) releasing the complainant from a contract and refunding any money paid plus interest;
 - (b) varying the terms of the contract with the customer, provided any third party rights are not affected; and
 - (c) releasing documents and/or information relating to the customer that are under the control of the product or service provider.
- RG 139.185 This framework anticipates the consideration of claims for opportunity costs and for non-financial loss where appropriate. It does not require the decision maker(s) of a scheme to adopt a particular approach to the determination of remedies.

Internal dispute resolution time frames

- RG 139.186 We emphasise the importance of timeliness in handling complaints at IDR.
- RG 139.187 A scheme member's obligations to respond to a complaint within certain time frames are explained further in RG 165. If a scheme member is unable to respond to the complaint within the time frame, the scheme member should inform the complainant of the reasons for the delay.
- RG 139.188 A scheme should establish its own reasonable procedures about the circumstances in which an extension of time for resolving a complaint by a member at IDR is warranted. The scheme should also have procedures addressing the ability of a complainant to appeal any extension of time. A scheme must monitor its members' compliance with time frames relating to internal dispute resolution.

C The approval process

Key points

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

The written application must contain certain information.

ASIC will provide a formal letter of approval if your scheme is approved and publish information about the schemes it has approved on its website.

How to lodge an application for approval

RG 139.189 A scheme that requires or seeks our approval should lodge a written application addressing each of the guidelines contained in Section B of this guide. Applicants should read the information contained in Section B before completing their application.

RG 139.190 A scheme that seeks ASIC's approval should send a written application to:
Senior Executive Leader
Consumers and Retail Investors
ASIC
GPO Box 9827
SYDNEY NSW 2001

RG 139.191 The application should include the information described in RG 139.192 and RG 139.193 of this guide.

What information should be included in an application

RG 139.192 An application for approval should include the following information:

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

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

RG 139.193 An applicant must provide us with any other information we consider necessary to complete our assessment of the application.

The approval letter and class order [CO 09/340]

RG 139.194 We will provide a formal approval letter to each scheme that is approved under this guide.

RG 139.195 Class order [CO 09/340] *External dispute resolution schemes* will also be updated to reflect that a scheme has been approved.

RG 139.196 The approval letter will be a public document and will contain details of any conditions under which the approval is granted. The approval letter will also contain information about the agreed guidelines under which the scheme will report information about systemic issues and serious misconduct to us.

RG 139.197 In order for an approval to remain in force, a scheme must continue to comply with the guidelines contained in this guide, and with any new or additional guidelines that are introduced in accordance with our regulatory objectives.

Appendix 1: DIST Benchmarks

The DIST benchmarks and their underlying principles:

Accessibility	The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
Independence	The decision-making process and administration of the scheme are independent from scheme members.
Fairness	The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
Accountability	The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
Efficiency	The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
Effectiveness	The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.
<p>From the <i>Benchmarks for Industry-based Customer Dispute Resolution Schemes</i>, published by the then Department of Industry, Science and Tourism in 1997.</p>	

Key terms

Term	Meaning in this document
AFS licensee	An individual or entity having an Australian financial services licence under Part 7 of the Corporations Act
ASIC	The Australia Securities and Investments Commission
ASIC Act	The <i>Australian Securities and Investments Commission Act 2001</i>
complainant	A person or company that has lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
Corporations Act	The <i>Corporations Act 2001</i> (as amended by the FSR Act) and includes regulations made for the purposes of the Act
DIST Benchmarks	The Benchmarks for Industry-Based Customer Dispute Resolution Schemes published by the Department of Industry, Science and Tourism in August 1997
EDR scheme or scheme	An ASIC-approved external dispute resolution scheme: see s912A(2)(b) and 1017G(2)(b).
Financial product and service	have the meanings ascribed to them in s12BAA and s12BAB of the ASIC Act
IDR	Internal dispute resolution
IDR procedure	Internal dispute resolution procedure: see s912A(2)(a) and 1017G(2)(a)
regulations	Corporations Regulations 2001
retail client	A client defined as under s761G and Chapter 7 Part 7.1 Div 2 of the Regulations
RG 126 (for example)	An ASIC regulatory guide (in this example numbered 126)
scheme member or member	an industry participant who is a member of an ASIC-approved EDR scheme
small business	A small business as defined in s761G of the Corporations Act
SCT	The Superannuation Complaints Tribunal established under the <i>Superannuation (Resolution of Complaints) Act 1993 (Cth)</i>
s33 notice	A notice issued by ASIC exercising its powers to compel production of documents under s33 of the ASIC Act

Term	Meaning in this document
Unlicensed product issuer	An issuer of a financial product who is not a licensee
Unlicensed secondary seller	A person who offers the secondary sale of a financial product under s1012C(5), (6) or (8) and who is not a licensee
Terms of Reference	The document which sets out the scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'rules'

Related information

Headnotes

Dispute resolution requirements; external dispute resolution; EDR scheme; internal dispute resolution; IDR processes; monetary limits; compensation caps; DIST benchmarks.

Class orders and pro formas

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

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

Regulatory guides

RG 8 *Hearings practice manual*

RG 126 *Compensation and insurance arrangements for AFS Licensees*

RG 165 *Licensing: internal and external dispute resolution*

Legislation

Australian Securities and Investments Commission Act 2001 (Cth), s1, 33

Corporations Act 2001 (Cth), Ch 7, s760A, 761G, 912A, 942B(2)(h), 1017G(2)

Retirement Savings Accounts Act 1997 (Cth), s47

Superannuation (Resolution of Complaints) Act 1993 (Cth), s101

Cases

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

Consultation papers and reports

CP 102 *Dispute Resolution—review of RG 139 and RG 165*

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

Media and information releases

AD08-05 *ASIC proposes new financial services EDR claim limit of \$280,000* (Monday 8 September 2008)