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By email: IDRSubmissions@asic.gov.au

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Australian Securities and Investments Commission (ASIC)
GPO Box 9827
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Dear Ms Rush

ASIC CP 311: INTERNAL DISPUTE RESOLUTION – UPDATE TO RG 165

Consumer Action Law Centre welcomes the opportunity to comment on:

- ASIC Consultation Paper 311: Internal Dispute Resolution: Update to RG 165, May 2019 (**CP311**);
- Attachment 1 to CP311: Draft Regulatory Guide 165 (**Draft RG165**); and
- Attachment 2 to CP311: Draft Internal Dispute Resolution Data Dictionary (**Data Dictionary**).

We strongly support ASIC's work to improve the quality, transparency and oversight of internal dispute resolution (**IDR**).

It is critical that the process to make and resolve complaints with a bank, insurer, or super fund is timely, fair, and accessible, including for people experiencing vulnerability and disadvantage. Our casework experience reveals that IDR is highly variable between financial firms and often of poor quality. ASIC Report 604 estimated nearly 270,000 complainants dropped out of the complaints process due to barriers and obstacles.¹ Improvements to the oversight and reporting on IDR performance can't come soon enough for Australians struggling to get a fair outcome.

¹ ASIC, *Report 603: The consumer journey through the Internal Dispute Resolution process of financial service providers*, 10 December 2018: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-603-the-consumer-journey-through-the-internal-dispute-resolution-process-of-financial-service-providers/>.

We broadly support the proposed updates in Draft RG165. ASIC's proposed updates will enable accessible and faster dispute resolution, more consistent outcomes, and improved data collection and systemic issues insights.

About Consumer Action

Consumer Action is an independent, not-for-profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

General Comments

Fairness of outcome

Draft RG165 does not contain requirements that the IDR decision itself be fair. Procedural fairness alone is not enough – people expect a fair outcome from their complaint. There is an increasing and welcome focus on substantive fairness in financial services, particularly following the Financial Services Royal Commission.

ASIC is increasingly focused on the 'fairness imperative' and the requirements to act 'efficiently, honestly, and fairly' in section 912A.² At the Australian Financial Complaints Authority (AFCA), decision-makers must consider what is 'fair in all the circumstances' when determining complaints.³ AFCA is also undertaking a 'Fairness Project,' which will:

map community expectations and produce a set of criteria for fairness which can be plainly understood and will explain how we assess fairness in any given complaint. This approach will ensure we deliver clear, consistent and quality decision making and will set the bar for financial firms when applying fairness to their own internal dispute resolution processes.⁴

We recommend that RG165 impose requirements on firms that the outcome of IDR be fair and give guidance on what this means in practice.

Enforceability and 'core requirements'

We strongly support ASIC's proposal to make RG165 enforceable. A weakness of the existing RG165 is that it only requires firms to have an IDR system, rather than actually comply IDR standards set by ASIC. This may in part account for the low-quality IDR that we experience today.

² James Shipton, *Conduct Regulator's Address, the AFR Banking and Wealth Summit*, Sydney, Australia, 27 March 2019: <https://asic.gov.au/about-asic/news-centre/speeches/the-fairness-imperative/>.

³ AFCA, *Complaint Resolution Scheme Rules*, 1 November 2018, Rule A.14.2.

⁴ AFCA, *Six Month Report*, July 2019, p 15, available at: <https://www.afca.org.au/news/statistics/six-month-report/>.

If ASIC is to retain the concept of 'core requirements' at RG165.11, we recommend that ASIC consult on the proposed core requirements ahead of tabling the proposed legislative instrument. In principle, we would support the entire regulatory guide being a core requirement.

Application to non-ACL and AFSL holders

ASIC should clarify whether RG165 applies to firms that are not required to hold a relevant licence, but that operate in the financial system in consumer-facing businesses. This includes debt management firms, 'buy now pay later' providers and small business lenders (especially those who lend to sole traders and workers in the gig economy). Our casework experience shows that these firms, which offer services to consumers including people experiencing vulnerability, can cause problems and generate complaints.⁵ Just as these firms should be required to maintain AFCA membership, they should also be required to comply with IDR requirements. If ASIC considers it does not have power to impose IDR requirements on these firms, ASIC should champion law reform on this issue.

Outsourcing IDR processes

We note that Draft RG 165.51 acknowledges that some firms outsource their IDR process. We do not support the outsourcing of IDR, particularly to external parties outside the corporate group, as it does not support a culture of treating complaints as strategic insights.

Consultation questions

Social media

B1Q1 *Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain: (a) how you currently deal with complaints made through social media channels; and (b) whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.*

In principle, we support the proposal that complaints made through social media be dealt with under IDR processes. This proposal will future-proof the complaints framework as people – particularly younger people – increasingly use social media to make complaints about financial firms.

Social media offers an accessible medium for consumers to raise issues or complaints with a company. Social media is often more user-friendly than navigating a company's website to find contact details, where consumers are often asked to fill in a form or call a number. It can be much easier for people to navigate to an insurer's Facebook page, for example, and initiate contact from there. The public or 'social' nature of the forum provides an incentive for the firm to act (or at least be seen to act), which can result in prompt resolutions for customers.

⁵ See, e.g. Consumer Action et al, Joint submission to *EDR Review – Interim Report*, 3 February 2017, p18-24, available at: <https://consumeraction.org.au/edr-review-interim-report/>.

Initiating a complaint through social media should not mean that that complaint is treated any differently to other complaints. Nor should it be the only channel available for complaints.

At present, if contact is made through social media there is a concern that the social media team will correspond with the customer and that complaints may not be properly recorded if it remains in that team. If customers raise issues that fall within the definition of a 'complaint' then this should prompt the firm to pass the matter on to the appropriate team or record the matter as a complaint.

We recommend that further consideration and clarification is needed in the following areas:

- The definition of 'through social media channels' – for example, does this include 'tagging' a firm's verified Twitter account?
- That the firms 'own social media platform' means, at a minimum, the firm's own page (for example, a Facebook page);
- Privacy issues, including where information is used or sold for marketing purposes or otherwise misused;
- Impacts where the social media platforms censor, moderate or delete the consumer's post constituting the complaint;
- Discrepancies between the privacy policies of the platform and the financial firm.

Some of these issues intersect with the need to improve the laws and regulation of privacy, data and social media platforms more broadly.

Definition of 'complaint'—Additional guidance

B2Q1 *Do you consider that the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints?*

Yes. We strongly support ASIC's draft updated guidance. It is essential to effective dispute resolution that firms are accurately and consistently recording complaints, and that consumers are not required to use magic words such as 'complaint' or 'IDR' to trigger the firm's IDR processes. Our experience is consistent with ASIC's concerns outlined at paragraph 36 of CP311. The updated definition can help to resolve this problem.

B2Q2 *Is any additional guidance required about the definition of 'complaint'? If yes, please provide: (a) details of any issues that require clarification; and (b) any other examples of 'what is' or 'what is not' a complaint that should be included in draft updated RG 165.*

We are concerned that treating 'simple requests for information' as not being a 'complaint' at Draft RG165.35(b) may permit firms to continue the undesirable practice of closing complaints after requested documents are provided by the firm.

Often, a request for documents is the first step in a complaint, particularly where the dispute is complex, or the firm holds relevant information. This may include requesting a copy of the contract, product disclosure statement, statement of account, or the assessment of unsuitability. These documents may reveal a problem – such as an exclusion in an insurance policy – or may be required to help the client assess their legal position and substantiate their complaint. In this way, these requests are a pre-cursor to the substantive complaint.

In some cases, firms unreasonably close the complaint after the documents are provided. The time spent in re-opening the complaint creates further complexity, delay and wastes the limited resources of community legal centres and financial counselling agencies.

We also note the persistent issues with the timeliness of document provision by financial firms, notwithstanding strict time limits for some documents in, for example, the National Credit Code. This means considerable delay may have occurred by the point IDR timeframes starts running.

The revised RG165 should address this issue.

Recording all complaints received

B4Q1 *Do you agree that firms should record all complaints that they receive? If not, please provide reasons.*

Yes, we strongly support this requirement.

Recording a unique identifier and prescribed data

B5Q1 *Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received? If no, please provide reasons.*

Yes, we strongly support this requirement.

B5Q2 *Do you consider that the data set proposed in the data dictionary is appropriate? In particular: (a) Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers? (b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?*

We recommend that 'sales practices' be added as an additional 'complaint issue' in Item 32 of Table 4.

There is overwhelming evidence from our casework, numerous enquiries, and ASIC's own extensive work that people are often aggrieved by the sales practices of financial firms. These issues go beyond disclosure, which is listed in Item 32, to high-pressure selling, unsolicited selling, and misleading representations. These problems have been widespread and persistent. We note that in ASIC Report 605, the consumer survey included 'product sales' as a possible complaint type, and revealed interesting trends.⁶ For example, 31% of

⁶ ASIC, *Report 603: The consumer journey through the Internal Dispute Resolution process of financial service providers*, December 2018, Figure 4, p 18.

life insurance complaints were about product sales. The data dictionary should enable data capture and reporting on this complaint type.

IDR data reporting

B6Q1 *Do you agree with our proposed requirements for IDR data reporting?*

Yes, we support the proposed requirements for IDR data reporting, except for the definition of 'withdrawn' in 'complaint status' (data dictionary, Table 4, Item 19). Item 19 defines a complaint as withdrawn 'if the complaint was withdrawn by the complainant or contact with the complainant has been lost.'

An ongoing concern for consumer advocates is inaccessible or poor IDR leading to complaint fatigue and abandonment of meritorious complaints. It is important that the data reporting regime can distinguish between complaints that are actively withdrawn, and where the consumer disengages due to complaint fatigue, a breakdown in trust, inaccessible processes or communication from the firm, frustration or poor services.

The challenges of navigating IDR are reflected in the research commissioned by ASIC, which found that:

Almost one-in-five complainants (18%) withdrew from the process before reaching a conclusion. The leading reasons for withdrawing were not receiving a conclusion after chasing up the firm (45%), after not hearing from the company for an extended period of time (40%), or after receiving a poor response and realising that continuing with the complaint was too difficult (30%).⁷

In the insurance claims context, a further issue arises when insurers encourage consumers to withdraw claims that are likely to be denied. This can be appealing to consumers who do not want to lose a 'no-claim' bonuses but leads to an artificially high rate of withdrawn claims.

Our casework experience, together with ASIC's research, suggest the need to collect more granular data on the reasons for withdrawn complaints and withdrawn claims. This will assist ASIC, firms, and advocates to understand the reasons for abandoned complaints, and thus design solutions. This data will also be very useful in assessing the effectiveness of current and foreshadowed reforms, such as the design and distribution obligations, unfair contract terms in insurance, and removal of the claims handling exemption. For example, granular data on reasons for withdrawn insurance claims may reveal cohorts of people mis-sold policies that they can't claim on, or reveal unfair terms being relied on to deny claims.

We recommend:

- That further consideration be given to the definition of 'withdrawn' in Table 4, Item 19.
- ASIC collect more granular data on the reasons for withdrawn complaints and withdrawn claims.

⁷ Ibid 5.

Guiding principles for publication

B7Q1 *What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?*

We strongly support the publication of IDR data at both an aggregate and firm level. This will increase transparency and accountability, incentivising firms to improve the quality of their IDR and enabling consumers to better compare firms when making purchasing decisions.

We suggest the following principles for publication:

- **Transparency:** Full data sets should be available, as well as useful summary tables. Firm-level data is essential to transparency.
- **Accessibility:** For consumers to meaningfully use the data, it must be published in an accessible way, and in multiple formats to reach a variety of audiences. Consumer testing may assist. It may be helpful to convert the data into a comparison tool on MoneySmart, as for the release of the publication of life insurance claims and claims-related disputes data.⁸ ASIC should promote and provide media commentary on the data, to ensure it reaches consumers and policymakers alike.
- **Consistency and comparability:** The publication must enable trends to be identified within and across industries, and over time. We are aware of smaller financial firms with appalling IDR processes, so the publication must also meaningfully compare smaller and larger firms. For example, a consumer lease provider is unlikely to be visible as major bank or insurer in any 'Top Firms' summary table due to a smaller client base, but its poor IDR must not be masked simply because it has a smaller customer base. The publication must also take account of franchising arrangements (such as in the payday lending industry), where the number of franchisees may mask the complaints performance of the group.
- **Improving standards:** The publication of this data should encourage a 'race to the top', with firms competing to genuinely reduce complaints (rather than to mask complaints in the data) and to identify and address systemic issues.

We note ASIC will conduct a separate, targeted consultation on publication after the present consultation. However, we suggest that, at a minimum, the full data set be made available as well as summary information on the top firms, top products and top complaint types, and relevant changes over time.

⁸ <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-apps/life-insurance-claims-comparison-tool>.

Minimum content requirements

B8Q1 *Do you agree with our minimum content requirements for IDR responses? If not, why not?*

Yes, we strongly support this proposal. Our casework experiences reveal poor quality IDR responses, which creates confusion and frustration. This proposal can also improve the efficiency of dispute resolution at AFCA, as case managers will have a summary of the position of the firm (whether reasonable or not).

It is important that IDR responses are expressed clearly and appropriately when the firm is on notice of literacy, disability or issues that may impact understanding of the firm's written response. Firms should take reasonable steps, such as following up by telephone, communicating with the customer's chosen support person, or using Easy English.

We also recommend that IDR responses include an offer to provide the evidence or documentation relied on in making the IDR decision.

Reduced maximum timeframes

B11Q1 *Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide: (a) reasons and any proposals for alternative maximum IDR timeframes; and (b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line.*

We strongly support reducing maximum timeframes from 90 to 45 days for superannuation complaints and 45 to 30 days for most other complaint types.

The reduced timeframes are consistent with community expectations about timely dispute resolution. Waiting 45 days for a response can be incredibly stressful and frustrating for consumers, particularly for simple matters.

Most simple banking, credit and insurance complaints can be resolved within 30 days. The small number of complaints that are truly complex could be captured by the 'exceptional circumstances' exception to the maximum time limits at RG165.118 through IDR Delay Notifications. If it would assuage concerns by firms about the reduced timeframes, ASIC could consider providing further guidance on what constitutes 'exceptional circumstances' to capture the usual complexities that justify longer timeframes.

One of the ongoing frustrations for caseworkers is the slow provision of information and documents by the firm, which delays IDR. This is within the firm's control. Many firms appear remarkably adept at using their data, information and systems quickly for sales and profit-making activities, but slowly for consumer disputes. If firms are concerned about meeting reduced time limits, an easy fix would be to improve document provision at the early stages of IDR, allowing more time for consideration of the merits of the complaint.

B11Q2 *We consider that there is merit in moving towards a single IDR maximum timeframe for all complaints (other than the exceptions noted at B11(b) above). Is there any evidence for not setting a 30-day maximum IDR timeframe for all complaints now?*

We agree that there is merit in moving to 30 days for all complaints now. Particularly complex situations that may require longer timeframes, could be captured by 'exceptional circumstances' exception to time limits at RG165.118.

Systemic issues

B13Q1 *Do you consider that our proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate? If not, why not? Please provide reasons.*

Yes, we strongly support these important proposals, which will increase transparency and accountability, and improve complaints handling over time. One of the key benefits of well-functioning IDR is the ability to identify and resolve systemic issues, which can benefit both customers and the firm.

Role of customer advocates

B12Q1 *Do you agree with our approach to the treatment of customer advocates under RG 165? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR.*

We agree with the concerns outlined in the Consultation Paper 311 on the role of Customer Advocates (**CAs**). It is timely and important to consider the role and appropriate regulation of CAs within the dispute resolution framework, especially as the role has expanded beyond ABA members to smaller lenders, insurers and other industries, such as telecommunications.

Our experience

Our casework experience with CAs is mixed but largely positive. Feedback from caseworkers included that:

- Good outcomes have been achieved through CAs. In some cases, a better outcome was achieved than was likely to be achieved through AFCA or courts, such as a full waiver of debt.
- CAs tend to be best suited to achieving a compassionate response in matters with low legal merit. This may occur where our client was affected by complex issues, such as family violence, elder abuse, or gambling addiction. CAs can also assist where the claim is outside the AFCA monetary limits, or where the matter was particularly complex, such as where bankruptcy was involved.
- Some complex matters did require longer than 30 days to undertake a full review of the matter. Some caseworkers were concerned that imposing shorter time limits on CAs would make it easier for the CA to 'just say no' to the desired resolution.
- The roles, powers, processes and outcomes vary between customer advocates. Some CAs have different levels of authority to provide particular outcomes – for example, the ability to achieve a debt waiver in similar circumstance can vary between CAs.

- In some cases, a good or timely resolution was only achieved when the matter was escalated within Consumer Action from a caseworker to senior management. That is, who the CA responded to varied and on occasion a successful response from a CA was more likely when a senior staff member within Consumer Action became involved.

Our broader concerns about CAs performing an escalated complaints function include:

- Establishment of a two-tier IDR system, creating confusion, inefficiency, delay and complexity, and increasing complaint fatigue.
- Letting IDR 'off the hook' – IDR teams should be empowered and resourced to provide fair and compassionate outcomes without referral to the CA.
- Confusion about their role and overlap with AFCA – We agree with ASIC that there is potential for confusion about the overlap between the CA and the Australian Financial Complaints Authority as avenues for escalating complaints. This is particularly so given that both CAs and AFCA are relatively new, with members of the public likely to have low awareness or understanding about each of these roles. Even community workers and consumer advocates are confused, particularly about the operation of Customer Advocates in smaller firms.⁹ One IDR response that we have seen provided contact details for AFCA and the bank's CA with little meaningful information about the purpose of each, and what they could achieve for the consumer.
- Lack of transparency about outcomes, given there are no reporting requirements. This raises some concerns that people accessing the Customer Advocate without the support of a financial counsellor or lawyer may not be receiving similar outcomes to our clients.

Many of the above issues are reflected in the *Customer Advocate Initiative: Post-Implementation Review* report commissioned by the Australian Banking Association.¹⁰

Proposals for regulation

As a matter of principle, CAs that are involved in individual complaints handling should be subject to regulatory guidance on IDR.

In a better performing system, our preference would be that CAs are not involved in escalated complaints at all, particularly post-IDR reviews. Instead, IDR would provide fair and compassionate outcomes, and CAs would focus on:

- identification of systemic issues through own-motion thematic reviews;
- providing insights into product development and distribution process based on these reviews;
- reviewing IDR complaints periodically to ensure fair and reasonable outcomes;
- providing advice on "extra care" to consumers experiencing vulnerability, as required by the new Code of Banking Practice; and

⁹ Deloitte, *Customer Advocate Initiative: Post-Implementation Review: Report commissioned by the Australian Banking Association*, May 2019, p24: <https://www.ausbanking.org.au/customer-advocates-post-implementation-review/>.

¹⁰ Ibid.

- overseeing and reviewing remediation programs.

The reality is that, at present, some Customer Advocates are currently playing a valuable role in providing the compassionate outcomes that IDR is failing to achieve. We are concerned about disrupting the post-IDR reviews that some CAs perform until the quality of IDR improves. However, we are also concerned that allowing the continuation of unregulated post-IDR CA reviews on individual complaints entrenches a two-tier IDR system.

Maximum timeframes

Where CAs are involved in IDR (i.e. before an IDR response is provided), they should meet the requirements in RG165 regarding timeframes and minimum content requirements. We note that the CA could continue to provide feedback and insights from the matter to other business units, even after providing an IDR response to the consumer.

Where CAs are involved in a 'post-IDR response' review, further regulatory guidance should be considered. One option would be to use the 'exceptional circumstances' exception in RG165.118. Clarification of exceptional circumstances could be provided, and appropriate reporting requirements on timeframes and outcomes.

IDR response letters

We support ASIC's proposed requirement at RG165.117(b) that CAs must not prevent complainants from exercising their right to access AFCA by, for example, presenting the CA as mandatory step in the IDR process. We consider that CAs should be required to:

- make it clear to customers that they have the right to access both the Customer Advocate and EDR, and they retain the right to access EDR while the Customer Advocate considers their issue;
- clearly explain the role of the Customer Advocate, what support the customer can expect from them, and how and when to contact them.

ASIC should provide guidance on the minimum form and content of IDR Responses to address this communication issue.

Reporting requirements

ASIC should require Customer Advocates to report 6-monthly data on their escalated complaints performance. At a minimum, this should include:

- Number of approaches to the CA;
- Number of decisions;
- Number of decisions that:
 - were enhanced in the consumer's favour;
 - were overturned in the consumer's favour;
 - affirmed the original decision;

- Timeframes on decisions;
- Number of matters that progressed to AFCA during or after the CA process;
- Number and type of feedback to IDR teams;
- Number and type of systemic issues identified.

Review

Given the practical concerns and principled issues discussed above, we recommend ASIC review the performance and regulation of Customer Advocates in 2 years' time.

Transitional Periods

We support the proposed transitional periods.

Please contact Senior Policy Officer Cat Newton on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

Gerard Brody | CEO