

**CREDIT UNION
DISPUTE
RESOLUTION CENTRE**

**GUIDELINES TO THE
TERMS OF REFERENCE**

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INTRODUCTION

The Credit Union Dispute Resolution Centre

The Credit Union Dispute Resolution Centre (“CUDRC”) is an independent dispute resolution service that considers disputes between individuals or small businesses and credit unions as defined in the Terms of Reference.

CUDRC is an alternative to the courts and our services are free to individuals and small businesses.

CUDRC is approved by the Australian Securities and Investments Commission (“ASIC”).

Terms of Reference

The structure and operation of CUDRC and the powers and duties of the Credit Union Dispute Manager are set out in the Terms of Reference.

The current Terms of Reference are dated 1 July 2007.

Changes to the Terms of Reference may be made by the CUDRC Board of Directors at any time, but amendments will not take effect until 2 months after credit unions have been notified of the amendments.

Changes will only be made after the CUDRC Board of Directors has consulted with:

- Appropriate individuals and organisations about proposed changes that are not minor in nature; and
- ASIC about all proposed changes (including those identified as minor).

The Credit Union Dispute Manager would generally be involved in any discussions about changes to the Terms of Reference.

Guidelines to the Terms of Reference

We have prepared these Guidelines to the Terms of Reference to assist parties in understanding our powers and procedures.

The purpose of these Guidelines is to provide commentary on the application of the Terms of Reference. These Guidelines are designed to assist both members and their advisers as well as credit unions.

The Credit Union Dispute Manager may amend these Guidelines to the Terms of Reference from time to time, if for example, a new development in the law necessitates such a change. However, the Dispute Manager must consult with ASIC before doing so.

Structure of these Guidelines

The Guidelines should be read in conjunction with the Terms of Reference.

The Guidelines are divided into 8 main parts:

1. Structure of CUDRC and Funding
2. Who Can Lodge a Dispute?
3. What Types of Disputes Does CUDRC Consider?
4. Limits to the Dispute Resolution Powers
5. How the Credit Union Dispute Manager Makes a Decision
6. CUDRC's Investigation Principles
7. What Can the Dispute Manager Require a Credit Union to Do?
8. The Credit Union Dispute Manager's Obligations

CUDRC Procedures Brochure and Bulletins

In addition to the Guidelines to the Terms of Reference, the Credit Union Dispute Manager publishes regular Bulletins setting out our approach to particular types of disputes. These Bulletins are available from our office or on our website (www.cudrc.com.au.)

We also have a brochure "CUDRC Dispute Resolution Procedures" that sets out our dispute resolution procedures.

PART 1

STRUCTURE OF CUDRC AND FUNDING

Corporate Structure

The Credit Union Dispute Resolution Centre Pty Limited was established by Credit Union Services Corporation (Australia) Ltd. An independent Board of Directors has been appointed to fulfil both the statutory duties required under relevant legislation and the obligations set out in the Constitution of the Credit Union Dispute Resolution Centre Pty Ltd.

The Board of Directors

CUDRC is overseen by a Board of Directors which has two industry and two consumers' representatives, and an independent Chairperson.

The Board performs the following tasks:

- appoints the Credit Union Dispute Manager;
- assists the Credit Union Dispute Manager in developing policies ;
- approves the annual budget for the company; and
- amends the Terms of Reference from time to time after appropriate consultation.

The Board exists to preserve the independence of the scheme and the dispute resolution process.

Funding

CUDRC is an industry funded service. There is no cost for individuals or small businesses to lodge a dispute. CUDRC's costs are met by contributions from participating credit unions. Each credit union pays:

- An annual participation fee;
- A set fee for each complaint and dispute referred to CUDRC about that particular credit union; and
- An additional amount based on the time taken by CUDRC, to investigate unresolved disputes about that credit union.

PART 2

WHO CAN LODGE A DISPUTE?

The Credit Union Dispute Manager can consider unresolved disputes between a Credit Union and a Member. A Member is defined in clause 2.1 as:

1. An **individual** or **small business** that:
 - (a) acquires, or seeks information about a Credit Union Product or Service from a credit union; or
 - (b) acquires, or seeks information about a product or service from an Other Supplier that would be viewed as a Credit Union Product or Service if the Other Supplier were a credit union; and
2. A **guarantor** of such an individual; and
3. A person treated by the credit union as acting for:
 - (a) a Member or guarantor; or
 - (b) a deceased Member or guarantor,

whether or not the person is legally entitled to do so.

Who is an Individual? (2.1)

An individual is considered to be a natural person.

Individuals: authority to complain

In order to have a dispute considered, an individual must sign an Authority that allows CUDRC to obtain information from, and disclose information to, the credit union. If this is not provided, clause 5.2(l) provides that CUDRC cannot consider the dispute. See page 39 for a discussion of this clause.

If the account which is the subject of the dispute is held in joint names, we generally require all account holders to sign the Authority.

What if the authority is not signed by all account holders?

Claims for personal loss

Because the duties of the credit union are owed jointly and severally to the account holders, we will consider a dispute lodged by one joint account holder. For example, one of the joint account holders may wish to lodge a

dispute on their own behalf for personal loss arising from the actions of the other account holder and the actions of the credit union.

We will consider such a dispute on the general understanding that the appropriate remedy is for the joint account to be “rectified”. This means that if the claim is upheld, then the account would be returned to the position that it would have been in had there been no error. This might include:

- returning funds to a joint account where there have been unauthorised drawings; or
- where the claim is about an increase in joint liability, relieving the innocent party of the additional liability.

If there is any dispute about an account holder’s entitlement to the balance of the account, then it is appropriate that:

- the account be rectified; and
- an assessment of each account holder’s entitlement be made in another forum; unless
- the personal entitlement of the member to the compensation is clear, in which case a direct payment should be made to that member.

Claims for joint loss

If a claim for loss is lodged on behalf of all the account holders, it is only in exceptional circumstances that we will accept an Authority that is not signed by all of them. Some examples of “exceptional circumstances” might be:

- mental or physical incapacity of an account holder, although we may require the signature of an authorised representative;
- death of an account holder where no executor or administrator has been appointed to the estate; or
- an account holder cannot be located.

Authorised representatives

The general rule that a member must have received the credit union product or service does not prevent that member from authorising a third party to lodge the dispute and to deal with this office on their behalf.

What is a Small business? (2.1)

For CUDRC to consider a dispute from a small business, the business (incorporated or unincorporated) must have employed less than:

- 100 full time equivalent employees if the business is or includes the manufacture of goods; or
- 20 full time equivalent employees if the business is of another nature,

when the events relating to the dispute occurred.

Charitable organisations, statutory authorities, incorporated associations and companies acting as trustees are able to lodge disputes with CUDRC provided they meet the employee test.

Discretion to Consider Disputes from Businesses that Do Not Meet the Small Business Criteria (5.4)

“5.4 The Credit Union Dispute Manager may, at the Credit Union Dispute Manager’s discretion consider a dispute from a business which is not a small business if the Relevant Credit Union agrees.”

In some limited circumstances, we may consider a dispute from a business that does not satisfy the relevant small business criteria, if the credit union agrees. This may occur where:

- The credit union approaches us to request that we consider a particular dispute; or
- The member obtains consent to our involvement from the credit union. In such circumstances, the member should provide the name and contact details of the relevant person so that we can confirm that the credit union consents to our involvement in the dispute.

It is ultimately up to the Credit Union Dispute Manager to determine whether a particular dispute should be considered.

Small Business Authorities

Before we can consider a dispute lodged by a small business, the member will need to complete and sign an Authority which:

- certifies that the business meets the relevant definition of a small business;
- confirms in writing that the credit union may release documents to CUDRC, and authorises CUDRC to disclose information to the credit union; and
- identifies the person authorised to resolve the dispute on behalf of the business.

Incorporated small businesses: authority to complain

We will consider a dispute lodged by an incorporated small business if we are satisfied that a Resolution of the company directors has been passed in accordance with the company's Constitution, which:

- consents to the dispute being lodged with CUDRC; and
- nominates the person authorised to deal with this office.

The Authority must include a copy of the Resolution and an extract from the Constitution setting out how many directors are required to pass a Resolution. We will not consider a dispute if the Resolution has not been passed by the required number of directors set out in the Constitution.

Unincorporated small businesses: authority to complain

We generally require all of the owners of a small business to sign the Authority.

What if the authority is not signed by all business owners?

Claims for personal loss

If it is not possible for all of the business owners to sign the Authority, then our ability to consider the dispute will depend on the nature of the loss claimed.

For example, one or some of the owners may wish to lodge a dispute on their own behalf for loss that they have suffered as an individual. This may be because another of the owners has used business funds or security without authority.

We can consider a claim for such loss on the understanding that the appropriate remedy is for the business account to be "rectified". Any compensation would be paid directly to the business, and an assessment of

each of the owner's entitlements would then need to be made in another forum.

There may be exceptional circumstances where the personal entitlement of the member to the assets of the business is clear. In such a case, a payment of compensation may be made directly to that member.

Claims for joint loss

If a claim for loss is lodged on behalf of the business, it is only in exceptional circumstances that we will accept an Authority that is not signed by all of the owners.

Examples of such exceptional circumstances might be:

- mental or physical incapacity of an owner although we may require the signature of an authorised representative;
- death of an owner where no executor or administrator has been appointed to the estate; or
- an owner cannot be located.

Disputes Lodged by Guarantors

We can consider a dispute from a guarantor who has provided security in relation to the debts of an individual or a small business. The dispute may be about the security itself or the underlying credit union product or service. We will consider such a dispute provided that the alleged effect of the conduct complained about relates to the guarantor's liability or risk under the guarantee.

Where an individual or small business has provided security in relation to a business loan, and seeks to lodge a dispute about the guarantee or charge, we will only consider the matter if the business which is the principal borrower meets the small business definition. This is regardless of whether the guarantor is an individual or a small business.

If the business that owes the money is not a small business, but the credit union agrees to our involvement, we may consider the matter in accordance with clause 5.4 of the Terms of Reference

Types of disputes from guarantors

- The guarantor was not adequately aware of the legal effect of the guarantee or of their financial exposure under the guarantee;
- The credit union did not take adequate steps to ensure that the guarantor made an independent and informed decision about entering into the guarantee;
- The guarantor did not receive information about the guaranteed account/s as requested including copies of statements and any notices issued by the credit union;
- An increase to a loan or overdraft limit being made without the guarantor's knowledge or consent where that knowledge or consent is required; or
- Some other material change in the lending arrangements that took place without the guarantor's knowledge or consent where that knowledge or consent is required.

If we consider that the guarantor's liability under a guarantee has been increased due to an error on the part of the credit union, we may recommend that :

- The guarantor's liability be limited to a specific amount;
- The guarantor be released from liability under the guarantee; or
- Monies obtained by the credit union from realisation of the security provided by the guarantor be reimbursed.

Disputes Lodged by Representatives of Member or Deceased Member

The definition of "member" includes:

- "c) a person treated by the Relevant Credit Union as acting for a Member or guarantor or deceased Member or guarantor, whether or not the person is legally entitled to do so."*

Generally, we will only consider a dispute if it is lodged by, or on behalf of, the member. We will consider a dispute lodged by a third party if the third party is:

- the legal representative of the recipient of the credit union product or service; or
- if there is no nominated legal representative, someone who is authorised by the recipient of the credit union product or service to pursue the dispute on his/her/its behalf.

Whilst we are entitled, under paragraph 2.1(c) to consider a dispute from a third party who has, over a period of time, been treated by the credit union as acting for a member or deceased member, even if that person was not legally entitled to represent the member, in practice, CUDRC does not accept disputes from such parties except in special circumstances

Some circumstances in which a third party might seek to lodge a dispute, and our approach in such situations, are discussed below.

Spouses/partners/friends

A person can lodge a dispute on behalf of their husband, wife, de-facto, partner, friend etc. However the member must consent in writing to the Credit Union Dispute Manager investigating the dispute and releasing information to the third party, and also authorise the third person to act on their behalf.

Professionals

Solicitors, accountants, financial counsellors, members of parliament and other advocates may lodge disputes on behalf of members. However, the member must consent in writing to the Credit Union Dispute Manager investigating the dispute and releasing information to the third party, and also authorise the advocate to act on their behalf.

Parents/children

A parent or guardian can lodge a dispute on behalf of a child who is under 18 years of age. Any claim for financial or non-financial damage in relation to an account in a child's name must be the loss or damage suffered by the child.

A person who is over 18 years of age must give their written authority if they want a parent or guardian to pursue the dispute on their behalf.

Trust accounts

Disputes about the operation of a trust account held with a credit union must usually be made by the trustee. However, there will be some cases where

because of the circumstances, the credit union has obligations to a beneficiary, for example, where there is or may be a breach of trust for which the credit union is potentially liable. In these circumstances, we will consider a dispute lodged by a beneficiary provided it is otherwise within our jurisdiction. We will not consider the dispute if the court is a more appropriate forum.

Bankrupts

A bankrupt may wish to complain about the credit union product or service provided to them prior to their bankruptcy. Disputes lodged with CUDRC by bankrupts range from allegations of maladministration in granting a loan to claims that a credit union has breached its duty of care as mortgagee in possession.

Authority of trustee in bankruptcy required

Because the trustee in bankruptcy has responsibility for the financial affairs of the bankrupt until they are discharged from bankruptcy, a dispute cannot, generally, be considered by the Credit Union Dispute Manager without the authority of the trustee in bankruptcy.

In most cases reviewed by this office, the amount of the debts owed to creditors exceeds the amount of the member's claim against the credit union so that the bankrupt cannot demonstrate that they suffered a financial loss as a result of the actions of the credit union.

The Credit Union Dispute Manager may, therefore, decline to consider a dispute from a bankrupt unless they can show that:

- The acts or omissions of the credit union caused a financial loss which exceeds the debts owed in the bankruptcy such that there would be a residual amount owing to which the bankrupt would be personally entitled; or
- If the claim for loss does not exceed the debts owed in the bankruptcy, that payment of the claim would result in a demonstrable benefit to the member.

Claims for non financial damage

A claim by a bankrupt for compensation for non financial damage can be made to this office without the consent of the trustee in bankruptcy. We take this approach because s.116(2)(g) of the *Bankruptcy Act* 1966 provides that claims for personal injury or wrong do not form part of the bankrupt's divisible estate.

Incapacity

Members suffering from mental incapacity or a disability may be represented by a third party. If an administrator has been appointed because of the mental incapacity of the member, then the administrator should lodge the dispute. A person holding a valid power of attorney may also bring a dispute on behalf of a person without capacity. We would require a copy of the power of attorney or the administration order in favour of the person bringing the dispute.

Where we have concerns that the member's interests may not be adequately protected, we will ask the person bringing the dispute to make contact with the Public Advocate in the relevant jurisdiction so that an assessment can be made about whether an administration order should be sought from the tribunal or court.

Deceased estates

Disputes about losses caused to a deceased estate must be brought by the legally appointed representative of the estate (either the executor of the will or the administrator of the estate). This is necessary because the Credit Union Dispute Manager needs:

- the appropriate authority to obtain confidential information about the deceased from the credit union's files; and
- correct identification of the person to whom any financial compensation should be paid.

We require a copy of the Will or letters of administration in order to verify the legal status of the person lodging the dispute.

We will not consider a dispute lodged by a beneficiary of an estate unless the legally appointed representative authorises the beneficiary to lodge the dispute.

PART 3

WHAT TYPES OF DISPUTES DOES CUDRC CONSIDER?

Clause 4.2 provides that the Dispute Manager can consider “Disputes”. A “Dispute” is defined in clause 2.1 as:

“... a Complaint by a Member to the Relevant Credit Union concerning:

- (a) A Credit Union Product or Service; or*
- (b) A privacy issue of the type described in Section 4,*

which complaint has not been resolved through the internal dispute resolution process of the Relevant Credit Union within 45 days of its receipt by the Relevant Credit Union or as to which the Member has notified the Relevant Credit Union that its formal proposal to resolve the dispute is not acceptable, whichever is the earlier.” (emphasis added)

A dispute must also satisfy the definition of “Complaint” before it can be considered by the Dispute Manager. “Complaint” is defined in clause 2.1 as follows:

“Complaint means a complaint by a Member to their Relevant Credit Union concerning:

- (a) any act or omission by a Credit Union in relation to a Credit Union Product or Service used or purchased by a Member;*
- (b) any act or omission by a Credit Union relating to confidentiality and/or personal privacy.”*

In order for a dispute to be considered, therefore, it must be about an **act** or **omission** by a credit union relating to:

- a **credit union product** or **service**; or
- **confidentiality** and/or **privacy**.; and
- it must have been unresolved by the credit union’s internal dispute resolution process.

Any Act or Omission

An act or omission includes offering, withholding, providing and administering a credit union product or service. For example, a member may complain about the use or management of a credit union product or service they have received from a credit union.

A member may also complain about the failure or refusal of a credit union to provide a credit union product or service where there is an obligation to do so. That is, the member may claim to have suffered a financial loss because they did not receive a particular credit union product or service that the credit union agreed or was obliged to provide.

What is a Credit Union?

Clause 2.1 contains several definitions which, when read together, provide that CUDRC may consider disputes about acts or omissions by:

- a credit union; or
- other supplier

that has entered into an agreement with CUDRC which makes the Terms of Reference applicable and binding on that organisation.

Where a credit union has merged with another credit union, we will only consider a dispute if, at the time the dispute arose, the organisation complained about had an agreement with CUDRC making the Terms of Reference binding on that organisation.

Other supplier

Where an “other supplier” has entered into an agreement with CUDRC which makes the Terms of Reference binding on them, CUDRC may consider a dispute about that supplier.

The term “other supplier” means:

- The Cuscal Limited (an organisation that provides services to credit unions in Australia); or
- Any body corporate related to the Cuscal Limited; or

- Any other person who is not a credit union but in the opinion of the Board, would be viewed by consumers as supplying Credit Union Products or Services.

We are able to consider disputes relating to any employee, agent or contractor of a credit union or other supplier.

What is a Credit Union Product or Service? (2.1)

A credit union product or service is defined in Clause 2.1 of the Terms of Reference as a *“deposit, loan, or other facility, product or financial service provided by a Credit Union to a Member.”* We interpret the term “credit union product or service” broadly.

Disputes must relate to a product or service, so we cannot consider disputes relating to a credit union in its capacity as an employer. Nor can we consider a dispute from a prospective purchaser about the actions of a credit union that is selling a property as mortgagee in possession. This dispute would arise from a commercial relationship between the parties, not from the provision of a credit union product or service.

Disputes about Confidentiality and Privacy (5.2(m) and (n))

Both individuals and small businesses may lodge a dispute about a breach of a duty of confidentiality by a credit union. An individual may also lodge a dispute about a breach of their privacy.

While the terms “privacy” and “confidentiality” are sometimes used interchangeably, there are important differences between the two concepts. A small business, company or trust does not have a right to privacy under privacy legislation and cannot, therefore lodge a dispute with us about an alleged breach of privacy.

Confidentiality

Clause 5.2(m) provides that:

“if the Dispute involves a confidentiality issue the Dispute Manager may consider it to the extent that the Dispute Manager considers the dispute relates to information which is confidential information.”

We can only consider a dispute involving a confidentiality issue if we are satisfied that:

- The member is a natural person or a small business; and

- The dispute relates to information which is confidential information.

Confidential information is any information to which a duty of confidentiality attaches.

A duty of confidentiality arises from an implied term in the contract between a credit union and its customer. In addition, a duty can arise in respect of:

- information which an individual or entity discloses on the understanding that it will be kept confidential; or
- where a contract or relationship between two parties demands information to be kept confidential.

However, we will not usually consider disputes that relate to confidential information in a commercial contract between a credit union and a supplier or contractor as the court is likely to be the more appropriate forum for such disputes.

Privacy

Clause 5.2(n) provides that:

“if the Dispute involves a privacy issue the Dispute Manager may consider it to the extent that the Dispute Manager considers that the dispute relates to information which is personal information.”

If the dispute involves a privacy issue, we must be satisfied that:

- The member is a natural person; and
- The dispute relates to information that is personal information.

Personal information is defined in Privacy Act 1988 as:

“information or opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion.”

The following are examples of personal information:

- An individual’s name and address;
- An individual’s employment details; and

- An individual's marital status.

Examples of disputes the Dispute Manager may consider

The following are some examples of acts or omissions in relation to a breach of confidentiality or privacy that might arise in relation to a credit union:

Acts

- Releasing information about a customer, without their knowledge, to a related entity to market a product; and
- Accessing a customer's account details for the purpose of passing on details of that person's financial situation to a third party, such as a former spouse.

Omissions

- Failure of a credit union to notify an individual that it has collected information about that person and kept the information. This would breach the Collection principle of the National Privacy Principles;
- Failure to abide by a customer's election not to be contacted for marketing purposes. This would breach the Use principle of the National Privacy Principles because an election in relation to contact for marketing purposes should be taken seriously and acted upon; and
- Failure to keep records, which are in use, up to date. This would breach the Use principle of the National Privacy Principles which requires reasonable efforts to ensure that records are kept up to date.

PART 4

LIMITS TO THE DISPUTE RESOLUTION POWERS

- “5.1 The Dispute Resolution Powers are limited in the manner set out in paragraphs 5.2 and 5.3.”*
- “5.3 The Credit Union Dispute Manager has an absolute discretion to decide whether a Dispute exists, and if so, whether to exercise its, his or her Dispute Resolution Powers.”*
- “6.2 In making a decision pursuant to paragraph 5.3, the Credit Union Dispute Manager must:*
- (a) consider any submissions made by the Relevant Credit Union and Member; and*
 - (b) if required to do so by the Relevant Credit Union or member, give written reasons for a decision pursuant to paragraph 5.3.”*
- “6.8 If, as a minimum, information requested by the Credit Union Dispute Manager pursuant to paragraph 6.5 is made available or authorised to be made available to the Credit Union Dispute Manager by or on behalf of the Member, the Credit Union Dispute Manager may decide that the Manager is unable fairly and reasonably to exercise the Dispute Resolution Powers, and may notify the Relevant Credit Union and the Member that the Credit Union Dispute Manager does not intend to further exercise the Dispute Resolution Powers.”*

The Credit Union Dispute Manager has the power to decide whether or not to consider a dispute. The circumstances in which the Dispute Manager may decline to consider a dispute include:

- Where the information provided indicates that the Dispute Manager could not “fairly and reasonably” exercise the Dispute Resolution Powers; or
- Where the dispute is outside CUDRC’s Terms of Reference (see below).

Disputes Outside Terms of Reference

Clauses 2.1, 5.2 and 10 of the Terms of Reference set out the types of disputes that the Credit Union Dispute Manager cannot consider. These are summarised below:

- disputes that have not first been considered by the credit union;
- disputes about commercial judgement;

- disputes about interest rate policy and general practice or policy;
- disputes that are more appropriately dealt with in another forum;
- disputes where the claim for loss exceeds \$280,000;
- disputes that are outside various time limits;
- disputes that the Credit Union Dispute Manager has already considered, unless new information becomes available;
- disputes that are being, or have been, considered in another forum;
- disputes where the member has not waived their rights of confidentiality to enable the Credit Union Dispute Manager to access otherwise confidential information;
- disputes that are frivolous or vexatious; and
- disputes where a credit union issues a test case notice.

Settlement Already Reached with Credit Union

In addition to the types of disputes excluded by clauses 2.1, 5.2 and 10, we will not consider a dispute which has previously been settled or compromised, even if proceedings were not issued. For example, the same claim has previously been made, the credit union has offered a sum in full and final settlement of the claim and the member has accepted it. In this situation, any liability of the credit union is discharged by the settlement.

Disputes Not First Considered by the Credit Union (2.1)

The Credit Union Dispute Manager may only consider a “dispute”, which is defined in clause 2.1 as a:

“complaint [which] has not been resolved through the internal dispute resolution process of the Relevant Credit Union within 45 days of its receipt by the Relevant Credit Union or as to which the Member has notified the Relevant Credit Union that its formal proposal to resolve the dispute is not acceptable, whichever is the earlier.”

Each credit union is required to have an internal dispute mechanism to deal with members’ complaints. A member must try to resolve their complaint with the credit union before the Credit Union Dispute Manager can consider the matter. If a member contacts us before using the credit union’s internal dispute mechanism, we will refer the member to the credit union’s head office to give it the opportunity to resolve the matter.

We cannot consider the dispute until:

- 45 days have elapsed since the member lodged the complaint with the credit union's dispute resolution process, and the matter has not resolved;
or
- The member has notified the credit union that its formal proposal to resolve the dispute is unacceptable,

whichever is the earlier.

Disputes About Commercial Judgment (5.2(a))

"5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (a) *if the Dispute involves the exercise by a Relevant Credit Union of Commercial Judgment in decisions about lending or security;"*

We cannot consider a dispute that relates solely to a credit union's commercial judgment about lending or security.

Definitions

Clause 2.1 states that "*commercial judgment*" means the exercise of financial or commercial risk analysis in decision making.

The decision to lend

A dispute may, however, allege maladministration. Maladministration involves an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the credit union and the member.

A dispute that alleges maladministration in decisions about lending or security may be within the Dispute Manager's jurisdiction. Typically, questions about commercial judgement and claims of maladministration arise in disputes about the credit union's decision to lend.

Some complaints allege that a credit union did not properly assess the loan application when considering whether or not to loan funds to the member. A dispute might arise if a credit union either:

- refuses to lend funds as requested by the member; or
- lends funds to the member where they had no reasonable prospect of repaying the loan.

If the dispute is about the credit union's refusal to lend and there is no evidence of a pre-existing obligation to lend, then that decision is an exercise of the credit union's commercial judgement. It is not something that we can review.

If the refusal to lend was because of discrimination based on race, gender, etc, then the matter may be more appropriately dealt with by the Human Rights & Equal Opportunity Commission.

However, if the dispute is about a credit union providing a loan that is wholly unsuitable given the member's circumstances, then this office will need to investigate whether the decision to lend:

- was a proper exercise of the credit union's commercial judgement; or
- whether there was maladministration in the making of that decision.

When dealing with disputes against credit unions, we will have regard to the fact that a credit union has a duty under the credit union-customer contract to exercise reasonable care and skill.

The following extract provides a summary about how a bank might exercise its commercial judgement when assessing a loan application. We consider that the principles apply to both banks and credit unions:

"The ultimate lending decision should be made on an assessment of the ability of the applicant to repay the loan. This will be based on the figures provided by the applicant, supplemented by the bank's own research, and calculated using the bank's credit scoring tables, acceptable ratio limits or whatever other methods are appropriate.

However, it is likely that, to some extent, the decision will also be influenced by the 'personal element', which is usually based on the bank's impression formed at the initial interview.

This may take into account the personal factors of the individual loan applicant or the business ability..., the technical ability of the loan applicant to properly perform his or her trade or profession, and their administrative skills, but it is important that the bank keeps a flexible view through the interview".¹

¹ *Banking and Lending Practice* by PM Weaver & KM Shanahan (3rd edn) (1994) (Serendip Publications) at para 1120, page 225.

Maladministration in the decision to lend

In determining whether there has been maladministration in the decision to lend, the issue of the borrower's ability to repay is critical:

If a loan is approved, and it transpires that the customer had little or no hope of servicing the loan, then a dispute may raise issues of maladministration. This issue is made explicitly relevant to consumer loan transactions by the *Consumer Credit Code*.

We take the view that a credit union should act prudently in making a decision about lending, and that the decision should be in accordance with the relevant standard of care.

How do we assess whether the standard of care has been met?

When investigating a dispute alleging maladministration, we will review the decision to lend having regard to the credit union's lending guidelines, and other relevant circumstances including any observations by staff who dealt with the application. These criteria are discussed below.

Lending guidelines

Was the loan made outside the credit union's normal guidelines for lending?

This is an important criterion by which to assess the credit union's actions. We know that considerable skill and care has gone into the development of lending guidelines so that staff can properly analyse the risks associated with lending.

If a loan has been approved outside the lending guidelines, then the credit union would need to be able to demonstrate that the decision was nevertheless made in accordance with a standard of care recognised by industry to avoid a finding of maladministration.

Did the credit union's officers express doubt and concerns about the application?

The views of staff can be relevant to an assessment of the risks associated with lending.

If an investigation reveals that staff had valid concerns about a decision to lend, then the credit union would again need to be able to demonstrate that the decision was made in accordance with a standard of care recognised by industry to avoid a finding of maladministration.

Sale of security property

Does the balance of information suggest that the sale of the security property provided was the only real prospect for repayment of the loan from the outset?

It should be fundamental to any loan contract that the borrower can meet the repayments in the expectation that the security will be released when the loan is repaid.

There may, of course, be borrowing arrangements which specifically envisage the realisation of security for repayment of all or part of the loan, and where the customer agrees to this. However, if the customer cannot meet the loan repayments, and cannot realistically hope to have the security released, then questions arise about whether the decision to lend was a prudent one.

Looking at all the loan circumstances

Each of the three criteria applied by this office (identified above) are alternatives which, if not satisfied by the credit union, raise doubt about whether the credit union fulfilled its duty.

However, an apparent failure to meet *one* of the criteria may not establish a breach of the duty of care when all of the circumstances relevant to the decision to lend are examined.

A simple example is a loan for subdivision and sale of a property where:

- the borrower's income is insufficient to service the loan on a principal and interest basis; but
- the aim of the parties is to complete the subdivision, sell part of the land and either extinguish the debt or repay only part of the balance of the debt.

In this case, sale of the security property is the only way the debt can be wholly or partially repaid. But the granting of the loan does not amount to a breach of the law or good industry practice for this reason alone.

When considering all the loan circumstances, the CUDRC case manager investigating the dispute may look at:

- the borrower's borrowing history;
- the borrower's relationship with the credit union;
- whether the loans officer had authority to approve a loan outside the credit union's lending guidelines;

- whether the credit union relied on information provided by the borrower's accountant or financial counsellor;
- whether the borrower fully disclosed relevant financial information;
- whether the borrower had a real prospect of repaying the loan without undue hardship; and
- if income consisted of government payments – whether these were likely to be ongoing.

Extent of investigation into disputes about maladministration

A dispute about maladministration in the decision to lend will usually need to be investigated by obtaining the credit union's complete and original lending file. If a credit union is concerned about the security and confidentiality of its lending manual, it may request that the extract remain confidential in accordance with paragraph 6.9 of the Terms of Reference.

Disputes About General Interest Rate Policy (5.2(b)) and Practice and Policy (5.2(e))

"5.2 *The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:*

- (b) *if the Dispute relates to a Relevant Credit Union's general interest rate policy;...*
- (e) *if the Dispute relates to a practice or policy of a Relevant Credit Union which does not alone (as opposed to by its implementation) give rise to a breach of any obligation or duty owed by the Relevant Credit Union to the Member;"*

We cannot consider disputes about a credit union's general interest rate policy, for example, a dispute about an increase to the interest rate on a variable home loan product.

Also, we cannot consider a dispute about a credit union's general practice or policy. For example, a dispute about mergers of credit unions, location of ATMs or fees and charges will be outside the Terms of Reference.

However, we can consider a dispute which relates to a practice or policy if it involves an alleged breach of a duty or obligation owed to a member.

Disputes about fees and charges

We can consider a dispute about a fee or charge applied in relation to a credit union product or service if it is alleged that the fee has been incorrectly

applied by the credit union. A general dispute about the fairness of fees and charges or the amount of the fee or charge levied in accordance with the credit union's policy and the terms and conditions of the account, is not within the Dispute Manager's jurisdiction.

Disputes that are More Appropriately Dealt with in Another Forum (5.2(c))

"5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (c) if the Credit Union Dispute Manager considers that it is more appropriate for the Dispute to be dealt with by a court or other tribunal, other means of dispute resolution, or the Privacy Commissioner;"*

We will not deal with a dispute if we consider there is a more appropriate place to deal with the matter, such as:

- a court;
- tribunal;
- another alternative dispute resolution ("ADR") scheme; or
- the Privacy Commissioner.

Our general approach is that disputes should be referred to other forums, particularly the courts, only in limited circumstances. Each dispute will, however, be assessed on its merits.

In some cases, we may start an investigation and receive information which indicates that there is a more appropriate forum to deal with the matter. In these circumstances, we would cease the investigation and advise both parties of the more appropriate forum.

Below are some examples of when we may consider that CUDRC is not the most appropriate forum to consider a dispute. These examples are not exhaustive.

Allegations of fraud

Sometimes, a member makes an allegation of fraud, conspiracy or theft by an officer of a credit union. They may want the Credit Union Dispute Manager to find that an officer has been involved in criminal activity. We will not consider this aspect of a dispute because such an issue is better dealt with by a court.

This does not mean that the Credit Union Dispute Manager cannot consider disputes about lost deposits or mistakes with withdrawals or other disputes to the extent that they raise civil causes of action. If the available information establishes that a document has been altered without authority by an officer, or that a teller has failed to properly credit or debit an account, then we can still make a Determination about any loss suffered by the member. Our Determination will not, however, include any view about whether there has been criminal activity.

Consumer Credit Code

The *Consumer Credit Code* (“the Code”) confers on Credit Tribunals and courts the power to impose civil penalties on credit providers where key requirements of the Code have been breached. These penalties are punitive in nature.

Therefore, if we receive a dispute which indicates that there has been a breach of a key requirement of the Code, we would refer the member and the credit union to the Credit Tribunal or court in the relevant jurisdiction.

If the dispute involves breaches of the Code, but the breaches do not relate to key requirements, we will continue to consider the matter and apply the appropriate provisions of the Code.

Other ADR schemes

There are a number of alternative dispute resolution (“ADR”) schemes in the finance sector. These include schemes that deal with disputes about general insurance, life insurance, investment advice and superannuation. Credit unions may be members of more than one ADR scheme depending on their business. They may also have affiliates which are members of other specialist ADR schemes.

In some circumstances, where a dispute relates to matters beyond traditional credit union services, and specialised knowledge is required, we may conclude that another ADR scheme is a more appropriate forum. We would only form this view if:

- we are sure that the credit union is a member of the other scheme; and
- we think it would be in the member’s best interest to have the dispute considered by that scheme.

Privacy disputes

Both the Federal Privacy Commissioner and the Credit Union Dispute Manager have the power to consider disputes about a credit union breaching an individual's privacy.

When we receive a dispute about an alleged breach of privacy by a credit union, we write to the member to inform them that they have the option of pursuing the matter with the Privacy Commissioner, rather than the Credit Union Dispute Manager.

There may be some limited circumstances, however, where we form the view that the Privacy Commissioner is the more appropriate forum for considering the dispute. This may occur if the dispute is entirely about a breach of privacy, and either of the following applies:

- The Privacy Commissioner's specialised knowledge is required; or
- The dispute relates to a systemic issue that is being investigated by the Privacy Commissioner.

Disputes Where the Claim for Loss Exceeds \$280,000 (5.2(d))

"5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (d) if the Credit Union Dispute Manager is satisfied that, at the time a Complaint becomes a Dispute:*
 - (i) the amount in Dispute exceeds \$280,000; or*
 - (ii) the Dispute is part of or relates to a larger claim which the Member has made or may be entitled to make, and the aggregate of the Member's claims and possible claims exceeds \$280,000. (Nothing in this clause 5.2(d)(ii) excludes or limits the Credit Union Dispute Manager's powers under these Terms of Reference to make a Recommendation);"*

The relevant monetary limit increased from \$100,000 to \$280,000 effective from 1 July 2007.

Where a dispute involves:

- (a) one claim against the credit union, and we are of the view that the claim for loss exceeds \$280,000;

- (b) a number of separate claims against the credit union, and the total of these claims exceeds \$280,000;

we may consider the dispute. In such circumstances, we cannot issue a Determination, but may issue a non binding Recommendation. For more information about Recommendations, see page 51.

Whether or not a dispute falls within the monetary limit depends on the amount claimed, and not on the monetary value of the underlying credit union product or service. For example, a customer with a loan of \$350,000 may have a claim for financial loss of only \$1,000. The customer can lodge this dispute with the Scheme.

We determine whether a dispute exceeds our monetary limit by assessing the information provided to us by the parties. We assess the amount of the claim as at the date the *"Complaint becomes a Dispute"*. This means either:

- 45 days after the credit union has received the Complaint, if it remains unresolved; or
- The date on which the member advises the credit union that its formal proposal to resolve the dispute is unacceptable,

whichever is the earlier.

Claim increasing during an investigation

A claim that is below the \$280,000 limit when it is lodged with CUDRC, may exceed the limit during the course of an investigation because of interest and other costs that may accrue over time.

We will continue to consider the dispute in these circumstances. However, the member must be aware that the Credit Union Dispute Manager can only make a binding Determination of up to \$280,000. Therefore, even though the loss claimed may have increased to more than \$280,000 because of the accrual of interest, a Determination can only be made for \$280,000.

No abandonment of excess

A member who has a claim exceeding \$280,000 may not abandon any excess or separate claim to bring the dispute within the monetary limit. Nor can they artificially construct a claim for this purpose.

Ultimately, the Dispute Manager will determine whether a particular claim exceeds \$280,000 based on an objective assessment of the available information.

Disputes Outside the Dispute Manager's Time Limits (5.2(f), (g) and (h))

"5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (f) if the act or omission to which the Dispute relates took place more than 6 years before the date on which the Member made their Complaint;*
- (g) if the event occurred before the Relevant Credit Union was admitted to the Credit Union Dispute Resolution Scheme;*
- (h) if the dispute is between a Member and an entity, the business of which has been acquired by the Relevant Credit Union, and if that entity was not a financial services provider at the time the events the subject of the dispute occurred;*

In order for a dispute against a credit union to be considered, the events giving rise to the dispute must have occurred:

- less than six years before the member first wrote to the credit union about the complaint; and
- on or after the credit union became a member of CUDRC.

The application of the principle of the maximum of up to six years as the proper time for the bringing of an action is more tightly construed in the Terms of Reference than at law.

Rather than time running from the cause of action accruing or the damage arising, the act or omission giving rise to the dispute must have occurred for the first time not more than six years prior to the member first complaining in writing to the credit union.

Disputes arising prior to 1 November 1996

"2.3 The definition of Complaint in par. 2.1 is to be interpreted as enabling a dispute which involves a connected series of transactions both prior to and after 1 November 1996 to be considered in its entirety."

CUDRC began its operation on 1 November 1996. Most credit unions joined CUDRC on or around this date. Clause 2.3 provides that where a dispute relates to a series of events that commenced prior to 1 November 1996 and

continued after this date, CUDRC is able to consider the matter in its entirety (including those events that occurred prior to 1 November 1996).

Disputes about privacy

Credit unions have obligations relating to credit information and personal information under the *Privacy Act 1988* (Cth). The obligations concerning personal information only arise from 21 December 2001. Therefore, we will only consider disputes about privacy and personal information if the events giving rise to the dispute first occurred:

- less than six years before the member first wrote to the credit union about the dispute;
- on or after the credit union became a member of CUDRC; and
- on or after 21 December 2001.

However, we will still consider a dispute, in so far as it relates to credit information under the *Privacy Act* or a duty of confidentiality, if the events occurred prior to 21 December 2001.

Acquired entities (5.2(h))

If the entity complained about has, since the dispute arose, been acquired by a member credit union, the dispute will only be considered if the entity was in the business of providing financial services at the time the dispute arose and had an agreement with CUDRC at the time the dispute arose.

Disputes Already Considered by the Credit Union Dispute Manager (5.2(i))

“5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (i) if the subject-matter of the Dispute has previously been considered by the Credit Union Dispute Manager, unless the Dispute relates to new evidence relating to the earlier Dispute;*

We cannot reconsider a dispute that has already been considered by CUDRC unless new information becomes available. The case would usually only be re-opened if the new information is compelling and has the potential to change the previous decision. The new information must be provided to us within a reasonable time of the closure of the case.

This provision does not prevent us from reconsidering a case which has been previously closed on the understanding that it may be reopened on the happening of some specific event. If that event occurs, we will recommence our investigation of the dispute.

Disputes that Are or Were the Subject of Other Proceedings (5.2.(j) and (k))

“5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (j) unless the Relevant Credit Union and Member otherwise agree, if the subject-matter of the Dispute is also the subject-matter of a separate proceeding, claim, action or dispute before any court, tribunal, arbitration or conciliation body or is the subject of any investigation by a statutory ombudsman or other State, Territory or Federal Government body;*
- (k) if the subject-matter of the Dispute has already been the subject-matter of:*
 - (A). a proceeding, claim, action or dispute before any court, tribunal, arbitration or conciliation body; or*
 - (B). is the subject of any investigation by a statutory ombudsman or other State, Territory or Federal Government body, which has been determined or reported on”;*

It is not in the general interest for a dispute to be the subject of multiple proceedings. Therefore, we will not generally consider a dispute if it:

- *already is; or*
- *was*

the subject of proceedings in a court, tribunal, arbitrator, independent conciliation body or an investigation by a ombudsman or other government body.

Where the dispute “is” already the subject of proceedings in another forum

Proceedings commenced by member

If a member lodges their dispute with CUDRC when they have already commenced proceedings elsewhere, we will not be able to consider the dispute.

Proceedings commenced by credit union

There may be instances where a member lodges a dispute with the Scheme after the credit union has commenced proceedings against them. This would usually occur where the credit union has issued legal proceedings in a court for the recovery of a debt from the member.

In cases where it appears that legal proceedings have already been commenced when we receive the dispute, we will write to the credit union asking:

- Has it issued legal proceedings against the member?
- When were the proceedings issued?
- When were the proceedings served? and
- If they have not been served, does the credit union consent to stay the proceedings to enable us to consider the dispute?

Proceedings issued by the credit union

We treat legal proceedings as having commenced when the writ or other originating process is filed at the court or other forum. A letter demanding payment of arrears or a demand does not constitute the commencement of legal proceedings. Therefore if we receive a dispute after an originating process has been filed in court, we cannot investigate the dispute unless both the credit union and the member agree. If the credit union's consent is not provided to CUDRC in writing at the time of the lodgement of the dispute, the member will be referred back to the credit union.

Where the dispute "was" the subject of proceedings in another forum

The Dispute Manager has no power to overturn a court judgement or go behind a decision obtained in another forum. Therefore we will not consider a dispute if it has already been considered elsewhere.

Also, if a dispute has been considered by a statutory ombudsman, or other State, Territory or Federal Government body, but there was no determination or a report issued, we would be able to consider the matter.

If a member is not satisfied with the outcome of previous proceedings, they should seek legal advice about the options that are open to them.

Legal proceedings commenced after dispute lodged with CUDRC

Proceedings commenced by credit union

Once a dispute has been lodged with us, the credit union should not commence legal proceedings before we have closed our file. To do so would defeat the purpose of CUDRC.

If proceedings are commenced by the credit union after we have referred the complaint or dispute to it for consideration, we require the credit union to discontinue the proceedings in the court at its own cost.

In unusual circumstances, if proceedings are issued by the credit union after the dispute is received by us but before we have sent it to the credit union, the proceedings should be discontinued.

Proceedings commenced by member

If a member decides to commence proceedings in another forum, after lodging their dispute with us, then they should immediately notify us. The credit union should also advise us if they receive notice that the member has initiated alternative proceedings.

In this situation, we will immediately cease our consideration of the dispute, and close our file.

If the member wants to preserve their right to bring proceedings in an alternative forum, they should obtain independent advice about any applicable limitation periods.

Waiver of Duty of Confidentiality (5.2(1))

“5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (1) unless the Member and all other persons to whom the Relevant Credit Union owes a duty of confidentiality in relation to the Dispute have waived their rights of confidentiality to the extent necessary to permit the Credit Union Dispute Manager to have access to and to consider otherwise confidential information in the exercise of the Credit Union Dispute Manager’s powers and duties;”*

In order to bring a dispute to CUDRC, the member must authorise the credit union to disclose the member’s confidential information to the extent necessary to permit CUDRC to have access to and consider such information

in the course of considering the dispute. If authorisation is not provided, then the Manager cannot consider the dispute. This is why members are asked to sign the authority referred to on pages 10 and 12.

Frivolous and Vexatious Disputes (5.2(o))

“5.2 The Credit Union Dispute Manager may not exercise any of the Dispute Resolution Powers:

- (o) unless the Credit Union Dispute Manager is satisfied that the Member has brought a Dispute in a bona fide manner and is not pursuing it for frivolous or vexatious reasons.”*

If we consider that a dispute is frivolous or vexatious, we may refuse to consider the matter. In assessing whether a dispute is frivolous or vexatious, we will have regard to the case law dealing with frivolous or vexatious litigation and the circumstances of the particular dispute. For example, if the dispute:

- is made for collateral purposes, and not for the purpose of having the Dispute Manager assist to resolve a dispute;
- is lodged with the intention of annoying and embarrassing the credit union; or
- is clearly untenable or groundless, irrespective of the motive of the member;

we may form the view that the dispute should not be considered. We would only make such a decision, however, in exceptional circumstances.

Disputes Where the Credit Union Issues a Test Case Notice (10)

We are prevented from considering, or continuing to consider, a dispute, which may otherwise be within the Terms of Reference, if the credit union issues a *Test Case Notice* to CUDRC.

A Test Case Notice is issued when a credit union decides that the dispute raises novel or important legal issues, or an issue with important consequences for its business or industry, which justifies the referral of the dispute to a court or tribunal.

Upon receipt of a Test Case Notice, our office will stop considering the dispute, provided that the Notice contains all the matters set out in clause 10.2 including:

- Reasons why the credit union considers that the matter raises important or novel legal issues or may have important consequences for the business; and
- An undertaking that the credit union intends to commence proceedings within six months of the date that the Notice is received by CUDRC; and
- A statement that if proceedings are commenced within six months of CUDRC receiving the Notice, the credit union will pay the member's costs and disbursements including interim payments.

If neither the credit union nor the member has commenced proceedings within six months of CUDRC receiving the Notice, we will recommence our consideration of the dispute if the member wishes us to do so.

Transitional Clause (5.2(p))

"5.2 (p) if the dispute related to an event which occurred before the commencement date of these revised terms of reference, then it will be determined in accordance with the terms of reference in force immediately before these terms of reference."

These Terms of Reference take effect from 3 March 2003. They replace the previous Terms of Reference valid from 25 November 2002. This means that from 3 March 2003, all new disputes relating to events arising on or after that date will be dealt with in accordance with these Terms of Reference. Where the event arose before that date, it will be dealt with in accordance with the November 2002 Terms, which are very similar to the present Terms.

PART 5

HOW THE CREDIT UNION DISPUTE MANAGER MAKES A DECISION

“4.2 The functions, powers and duties of the Credit Union Dispute Manager are contained generally in these Terms of Reference and include:

- (c) facilitating using any available dispute resolution means which the Credit Union Dispute Manager considers in its, his or her absolute discretion to be appropriate for the satisfactory resolution or withdrawal of Disputes by agreement between the parties; and*
- (d) In the absence of agreement between the parties, making Recommendations and Determinations in accordance with the powers conferred by these Terms of Reference;”*

“6.3 The Credit Union Dispute Manager must determine, prepare, publish, and has an absolute discretion from time to time to amend dispute resolution procedures which will apply to Disputes, provided they are consistent with and promote the Dispute Resolution Powers and are not inconsistent with these Terms of Reference.”

“6.4 Details of the Dispute resolution procedures published by the Credit Union Dispute Manager must be provided by the Relevant Credit Unions to Members on request, and whenever the Member is notified in accordance with paragraph 6.1.”

The Terms of Reference contain clauses about how the Credit Union Dispute Manager should reach a decision about a dispute, and what procedures should be followed in reaching a decision. The Terms of Reference also give the Credit Union Dispute Manager discretion to set additional procedures, provided that they are consistent with the requirements set out in the Terms of Reference. These additional procedures may, for instance, provide for less formal alternatives to some of the strict procedural steps outlined in the Terms of Reference.

CUDRC’s procedures, which are modified and updated from time to time, are contained in the **CUDRC Dispute Resolution Procedures brochure**. These deal with everything from lodging a dispute to response timeframes and details of the investigation process. Credit unions must provide a copy of this brochure to members on request, and whenever a credit union refers a dispute directly to CUDRC in accordance with paragraph 6.1.

The following is a brief summary of the procedures we follow after we have received a written dispute from a member.

Member Must Try to Resolve with Credit Union First

Each credit union is required to have an internal dispute mechanism to deal with members' complaints. A member must try to resolve their complaint with the credit union before the Credit Union Dispute Manager can consider the matter. If a member contacts us before using the credit union's internal dispute mechanism, we will refer the member to the credit union's head office to give it the opportunity to resolve the matter.

We cannot consider the dispute until:

- 45 days have elapsed since the member lodged the complaint with the credit union's dispute resolution process, and the matter has not resolved; or
- The member has notified the credit union that its formal proposal to resolve the dispute is unacceptable,

whichever is the earlier.

Receipt of Dispute

Where a dispute has not been resolved by the credit union's internal dispute resolution process, the member may lodge their dispute with us in writing. Paragraph 6.1 also sets out an alternative procedure for disputes to be directly referred to CUDRC by the credit union rather than the member. The paragraph provides that the credit union must:

- Ask for the member's written consent to forward all documents relating to the dispute to CUDRC;
- If consent is given, forward the documents to CUDRC; and
- Inform the member about the powers and procedures of CUDRC.

While this procedure is available to credit unions and members, in most cases, disputes are lodged by members themselves.

When we receive a written dispute, we try to establish whether it is within our Terms of Reference. However, this is not always possible. For example, in some cases, the size of the claim cannot be established until we have reviewed the relevant information, or conducted an investigation of the dispute.

If we are unsure whether the dispute falls within our jurisdiction, we will still refer the dispute to the credit union, but advise both parties that there is a query whether the dispute is within the Terms of Reference.

Disputes outside the Terms of Reference

If we decide that a dispute is outside the Terms of Reference, then we will explain this to the member in writing. If the member wants us to reconsider our decision, then they may make a submission setting out why they consider that the dispute falls within the Terms of Reference.

Where there is a difference of opinion about a jurisdictional issue, it is ultimately the Credit Union Dispute Manager who has the power to decide whether a particular dispute falls within the Terms of Reference.

Whilst we endeavour to make decisions about jurisdiction as early as possible, sometimes, it is not until we have started an investigation that we find a dispute is outside the Terms of Reference. In this situation, we will cease our consideration of the dispute and inform both parties in writing.

Challenge to jurisdiction by credit union

A credit union should not make any comment to a member about the application of the Credit Union Dispute Manager's Terms of Reference or unilaterally advise a member that their dispute is outside the Terms of Reference. This is a matter for our office to determine. If a credit union wishes to challenge our jurisdiction to consider a particular dispute, then it should make a submission, as soon as possible after receiving the dispute, setting out the reasons for its view.

Dispute Referred to Credit Union

If a dispute is considered to be within our Terms of Reference, or likely to be within our jurisdiction, we send the dispute to the credit union's customer relations department or equivalent. We do this to give the parties an opportunity to resolve the dispute without our further involvement.

Often a member may have already tried to resolve the dispute with a specific branch or department. We understand that in some cases, the member may be reluctant for the dispute to be referred back to the credit union, however, our experience shows that a dispute which appears to be at deadlock may still be resolved when it is referred to the department which is responsible for dealing with customer complaints.

If the credit union has already investigated the dispute, we generally require a response from the credit union within two weeks. The most time we will usually allow is 30 days.

The credit union may request an extension of time to provide its response, but must give reasons for the request. If we consider that the request is reasonable, we may agree to an extension of time. We will confirm any extension of time to both the credit union and the member.

There may be exceptional circumstances where we will start to investigate a dispute before we receive a response from the credit union, or before the 30 days have elapsed. Examples of exceptional circumstances may include where:

- the sale of a security property is imminent; or
- the health of the member warrants the matter being fast tracked.

Resolved disputes

Where the credit union advises us that the dispute has been resolved, we write to the member to establish whether they also consider the matter to be resolved. If it is resolved, we will close our file. If the member is not satisfied with the response, they have 30 days to write to us to explain why the response has not resolved the dispute.

In some cases, if it appears that the matter may be able to be resolved fairly quickly, we will refer the case to the credit union again for further consideration.

Unresolved disputes

If:

- the credit union is unable to resolve the dispute directly with the member; and
- the credit union has responded to us and presented its position to the Credit Union Dispute Manager rather than to the member; or
- the member regards the dispute as unresolved,

the dispute will be investigated by a case manager.

The file will be placed into a Pending Investigation List to await allocation to a case manager. There may be some delay before the case can be allocated.

When a case manager commences their investigation, they will usually telephone or write to the member to:

- Outline their understanding of the dispute and the credit union's response;
- Set out the issues they will be addressing in the investigation; and
- Request any further information necessary for the assessment of the dispute.

Investigation Outcomes

After the case manager has obtained the required information, there are several ways in which the dispute may be resolved. Whilst paragraphs 8.1 – 8.4 allow the member or credit union to request a particular method of dispute resolution, it is ultimately up to the Dispute Manager to determine the most appropriate procedure to apply to a particular dispute. The Dispute Manager is unlikely to require the parties to strictly follow the procedures set out in paragraphs 8.1 – 8.4 for making their request for a particular procedure. A less formal approach would normally be adopted.

Negotiated settlement

At all stages of an investigation, it is open to the parties to negotiate a settlement of the dispute. Case managers often facilitate such settlements by acting as a conduit between the parties. The terms of settlement will be confirmed by the parties in writing.

We encourage members to seek legal advice before signing any settlement documents.

Conciliation conference

At any stage, a case may be referred to a conciliation conference with the Dispute Manager. This can be done at the suggestion of the case manager, or at the request of the credit union or member. However, not all cases are suitable for a conference, and it is CUDRC's decision whether to hold a conference in a particular case. Cases that are appropriate for a conciliation conference are generally those where the credit union agrees that an error was made, and the dispute is about the quantum of financial loss flowing from the error.

Members may choose to attend alone, or with someone they trust. Legal representation is not necessary at a conference. The Dispute Manager ensures that discussions between the parties are aimed at exploring solutions in a conciliatory, non-adversarial manner.

The credit union is usually represented by a member(s) of its senior management who has knowledge of the case and the appropriate authority to handle the dispute. This maximises the opportunity for reaching a resolution.

If a resolution is reached at the conference, the heads of agreement will be recorded. The credit union may also require the member to sign a Release and Indemnity. We encourage members to obtain legal advice prior to signing such documentation.

Finding

A case manager may set down in writing their views about the merits of the dispute. This is known as a Finding. The Finding includes:

- a summary of the dispute and the credit union's response;
- a summary of the issues raised by the dispute;
- the case manager's analysis of the case, including the application of any relevant law, code, or principles of good industry practice or fairness; and
- the case manager's conclusion about the merits of the dispute and how the matter should be resolved.

Any documents relied upon in the Finding will be either attached to the Finding or available to the parties upon request.

The Finding is sent to both the credit union and the member, and both parties have 30 days within which to accept or reject the suggested resolution.

If the Finding is accepted by both parties, the file is closed. If the Finding recommends that the credit union pay an amount of money to the member, or reduce their liability for a debt, the member must sign a Confirmation of Settlement which confirms that they accept the Finding in full and final settlement of the dispute.

If either the member or the credit union rejects the Finding, they must provide written reasons for their rejection.

Reasons may include the following:

- There is some fact or matter relied on in the Finding which is incorrect or misleading;
- There is additional relevant information which may change the Finding; or
- The advice or information provided by the other party is not correct.

CUDRC will then issue a Determination (or in the case of claims exceeding \$280,000, a Recommendation).

“8.5 If the Dispute is not either resolved by agreement or withdrawn within the period specified in the Designated Procedure, or if no period is specified, then within 30 days of commencement of the Designated Procedure, then the Credit Union Dispute Manager must notify the parties in writing that within 30 days of the date of that notice (unless earlier notified in writing by both parties that the Dispute has been resolved by agreement or withdrawn) the Credit Union Dispute Manager will make a Determination or Recommendation in accordance with paragraph 8.”

Paragraph 8.5 provides that 30 days notice must be given before a Determination or Recommendation is issued. Our Findings contain this notice and allow the parties 30 days before a Determination or Recommendation is issued (if the Finding is not accepted).

Determination

The final step in the dispute resolution process is the issuing of a Determination by CUDRC. The requirements for a Determination are set out in clauses 9.2, 9.3 and 9.4 of the Terms of Reference:

“9.2 If the Credit Union Dispute Manager is satisfied on the basis of facts and materials provided by the parties that:

- (a) the Relevant Credit Union should take action*
 - i) which does not involve the payment or making of any valuable consideration to the Member; or*
 - ii) which involves the payment or making of valuable consideration to the Member of less than \$280,000; or*
- (b) the Member must pay any money to the Relevant Credit Union*

then the Credit Union Dispute Manager must make a Determination in accordance with clause 9.3.

- 9.3 *If the Credit Union Dispute Manager makes a Determination specified in clause 9.2, the Determination:*
- (a) must be in writing and must state the reasons for the Determination;*
 - (b) must be notified to the parties and the Board;*
 - (c) must specify in detail the nature of the Determination being made;*
 - (d) must specify the action which the Member must take in order to accept the Determination;*
 - (e) will, if accepted by the Member under clause 9.4, be:*
 - (i) legally binding on the Relevant Credit Union and the Member; and*
 - (ii) enforceable in any court of competent jurisdiction by the Member as a Determination made pursuant to the binding Agreement between the CUDRC and the Relevant Credit Union; and*
 - (iii) may not be appealed against by the Relevant Credit Union."*

If the dispute is not resolved by way of a negotiated settlement, conference or Finding, then CUDRC may proceed to issue a Determination. The Determination must be in writing and include:

- A summary of the dispute and the credit union's response;
- A summary of the issues raised by the dispute;
- The Dispute Manager's analysis of the case; and
- The Dispute Manager's conclusion about how the matter should be resolved.

Credit union bound by Determination

“9.4 If the Credit Union Dispute Manager notifies the parties of a Determination, the Member may, within 30 days of receiving the notice notify the Credit Union Dispute Manager that the Member:

- (a) accepts the Determination as a full and final settlement of the Dispute, in which case the Determination becomes binding on each of the parties in accordance with clause 9.3(e); or*
- (b) rejects the Determination, in which case the Credit Union Dispute Manager must notify the Member of the Member’s rights to pursue the Dispute by other available legal means, including by reference to any State, Territory or Federal courts, tribunals or other bodies having jurisdiction to deal with the Dispute.*

Failure to advise of acceptance or rejection within 30 days of receiving the notice will be taken as a rejection.”

A Determination must be given to the member and the credit union, as well as the Board of CUDRC. Only the member has the option of accepting or rejecting it. The member has 30 days in which to decide. If the member accepts the Determination, then it is binding on the credit union, and can be enforced in *“any court of competent jurisdiction by the Member as a Determination made pursuant to the binding Agreement between the CUDRC and the Relevant Credit Union[cl 9.3(e)]”*.

If the member rejects the Determination, CUDRC will be unable to assist further. A failure by the member to respond will be deemed to be a rejection. CUDRC must advise the member of any other avenues of redress that may be open to them, such as a court or tribunal.

Recommendation

“9.5 If the Credit Union Dispute Manager is satisfied on the basis of facts and materials provided by the parties that the Relevant Credit Union should pay or give valuable consideration to the Member in excess of \$280,000, the Credit Union Dispute Manager must make a Recommendation in accordance with paragraph 9.6.”

9.6 If the Credit Union Dispute Manager makes a Recommendation specified in paragraph 9.5, the Recommendation:

- (a) must be in writing and state the reasons for the Recommendation;*
- (b) must be notified to the parties and the Board;*
- (c) must specify in detail the nature of the Recommendation being made;*
- (d) must specify the action which the Relevant Credit Union must take.”*

If the Credit Union Dispute Manager notifies the parties of a Recommendation, the Relevant Credit Union must, within 30 days of receiving notice of the Recommendation, either notify the Credit Union Dispute Manager that it:

- (a) accepts the Recommendation, in which case the Recommendation becomes a binding Determination and will, subject to acceptance by the member under clause 9.10 be:

 - (i) legally binding on the Relevant Credit Union and the member; and*
 - (ii) enforceable in any court of competent jurisdiction by the Member as a Determination made pursuant to the binding Agreement between the CUDRC and the Relevant Credit Union; and*
 - (iii) may not be appealed against by the Relevant credit union; or**
- (b) rejects the Recommendation and does or does not wish to have the Dispute independently arbitrated.*

9.8 If the Relevant Credit Union does not notify the Credit Union Dispute Manager within the period specified in paragraph 9.7, the provisions of paragraphs 9.7 (a)(i), (ii) and (iii) apply.

9.9 The Credit Union Dispute Manager must notify the Member of the content of the Relevant Credit Union's decision pursuant to 9.7(a) or (b) within 14 days of its receipt.

9.10 If the Relevant Credit Union has accepted the Recommendation then the Member may, within 30 days of receiving the notice, notify the Credit Union Dispute Manager that the Member:

- (a) accepts the Recommendation as a full and final settlement of the Dispute, in which case the Recommendation becomes binding on each of the parties in accordance with paragraph 9.7(a); or*
- (b) rejects the Recommendation, in which case the Credit Union Dispute Manager must notify the Member of the Member's rights to pursue the Dispute by other available legal means, including by reference to any State, Territory or Federal courts, tribunals or other bodies having jurisdiction to deal with the Dispute.*

Failure to advise of acceptance or rejection within 30 days of receipt of the notice will be taken as rejection.

9.11 If the Relevant Credit Union has rejected the Recommendation, and the Relevant Credit Union requests independent arbitration, then the Credit

Union Dispute Manager must seek the Member's agreement to have the Dispute independently arbitrated.

9.12 *If the Member agrees to the Dispute being independently arbitrated, the Credit Union Dispute Manager must refer the parties to local and national organisation which offer suitable arbitration services following which the Credit Union Dispute Manager will have no further responsibility with respect to the Dispute."*

A Recommendation is issued in limited circumstances where the claim or claims exceed \$280,000.

A Recommendation is in writing, and includes:

- A summary of the dispute and the credit union's response;
- A summary of the issues in dispute;
- CUDRC's analysis of the case, including an application of any relevant law, code, or principles of good industry practice or fairness; and
- CUDRC's conclusion about how the matter should be resolved.

The Recommendation is given to the member, the credit union and the Board of CUDRC. The member and the credit union have 30 days within which to accept or reject the Recommendation.

If the member rejects the Recommendation, there is no further right of appeal and CUDRC cannot assist further. CUDRC must, however, inform the member of any other avenues of redress that may be available to them.

If both the member and the credit union accept the Recommendation, it becomes a binding Determination.

If the credit union rejects the Recommendation, it can choose whether to have the dispute independently arbitrated. If the credit union does not want independent arbitration, CUDRC will not be able to assist further. If the credit union wants to have the matter independently arbitrated, and the member agrees to this, CUDRC will refer the parties to local and national organisations which offer suitable arbitration services.

Full and Final Settlement

“9.1 Where the parties reach a settlement of a Dispute by agreement, the Credit Union Dispute Manager may make a Determination. Any such determination must be in accordance with the parties’ agreement. The Determination:

- a) must be in writing;*
- b) must be notified to the parties and the Board; and*
- c) will be legally binding on and enforceable by the parties as a binding agreement in any court of competent jurisdiction.”*

If the credit union agrees to pay some financial compensation to resolve the dispute, the member will usually be required to execute a document releasing the credit union from any further action in relation to the dispute.

Where a Recommendation or Determination has been issued, a Confirmation of Settlement form is generally sent by this office to the member. In some cases, the credit union may request that the member sign an additional Release which has been prepared by its legal department. Occasionally, a credit union will request that a member keep the settlement confidential as a condition of settlement. Credit unions should be aware that this is not a condition we impose on members and it is entirely a matter for members whether they agree to a confidentiality condition.

A member should seek independent advice before they sign the Confirmation of Settlement or Release.

We will treat a settlement as full and final, which means that we will not reconsider the same matter.

Enforcement of Determinations and Accepted Recommendations (9.13, 9.14)

“9.13 The Relevant Credit Union must complete any action required and make any due payments in accordance with any Determination, or accepted/deemed accepted Recommendation within the period or by any due date specified in the Determination or accepted/deemed accepted Recommendation, and if no period or due date is specified, within 30 days of receiving the Determination, or accepting or being deemed to have accepted the Recommendation.”

“9.14 The CUDRC may take any necessary action (including legal action) to enforce a Determination. If the Relevant Credit Union does not comply with the Credit Union Dispute Manager’s Determination, its

membership of CUDRC may be terminated. CUDRC must consult with ASIC prior to the termination process taking place."

Where a credit union has agreed to take certain action to resolve a dispute, or has been required by a Determination to take such action, it must take the necessary action promptly. If a timeframe is agreed upon by the parties, this must be strictly followed. If no timeframe is specified, the credit union must take action within 30 days of either agreeing to the terms of settlement, or receiving a Determination.

CUDRC is able to take action, including legal action, to enforce a Determination or a Confirmation of Settlement. CUDRC may also terminate a credit union's membership with the Scheme, subject to approval from the Australian Securities and Investments Commission. It is envisaged, however, that such action would only be taken by CUDRC in exceptional circumstances.

Status of Determinations and Recommendations in Subsequent Legal Proceedings (9.15, 9.16)

"9.15 Subject to paragraph 9.16, the action of the Credit Union Dispute Manager in making a Determination or Recommendation and the content of any such Determination or Recommendation including but not limited to the matters to be notified to the parties in accordance with this paragraph 8 and any materials and documents created by the Credit Union Dispute Manager in dealing with the Dispute, may not be used as evidence in any subsequent claims, proceedings or actions of any nature brought by either the CUDRC, the Relevant Credit Union or the Member in any court, tribunal or body of competent jurisdiction."

"9.16 Where, in accordance with paragraphs 9.4(a) or 9.10(a), the Member notifies acceptance of a Determination or Recommendation respectively, the making of that Determination or Recommendation and its contents may be used in any subsequent proceedings to enforce the Determination or Recommendation against the Relevant Credit Union."

CUDRC provides a forum where disputes may be able to be resolved without the need for litigation. Information is sought and supplied by both parties to facilitate resolution if possible. However, if a dispute is not resolved other proceedings may commence.

The parties should be aware that any admissions made by either party during the course of the consideration of the dispute by this office are made on the understanding that they are privileged from admission into evidence in any later proceedings.

In addition, any documents created by CUDRC in the consideration of the dispute, and any Finding, Recommendation or Determination cannot be admitted into evidence in any legal proceedings, unless the purpose of the proceedings is to enforce the Finding, Recommendation or Determination.

PART 6**CUDRC'S INVESTIGATION PRINCIPLES**

- "6.5 The Credit Union Dispute Manager may request both the Relevant Credit Union and the Member to provide information which the Credit Union Dispute Manager reasonably considers necessary for, or of assistance in, exercising the Dispute Resolution Powers."*
- "6.6 The Relevant Credit Union must provide to the Credit Union Dispute Manager any information required in accordance with paragraph 6.5 unless:*
- (a) it certifies in writing that after all reasonable efforts it has been unable to obtain any waiver of confidentiality necessary to enable it to release the information; or*
 - (b) the information relates to a physical or electronic security measure employed by the Relevant Credit Union."*
- "6.7 A Member is not obliged to provide any information to the Credit Union Dispute Manager. However, unless the Credit Union Dispute Manager considers that it would be unreasonable to do so, Members should be encouraged to provide any information requested by the Credit Union Dispute Manager pursuant to paragraph 6.5."*
- "6.8 If, as a minimum, information requested by the Credit Union Dispute Manager pursuant to paragraph 6.5 is made available or authorised to be made available to the Credit Union Dispute Manager by or on behalf of the Member, the Credit Union Dispute Manager may decide that the Manager is unable fairly and reasonably to exercise the Dispute Resolution Powers, and may notify the Relevant Credit Union and the Member that the Credit Union Dispute Manager does not intend to further exercise the Dispute Resolution Powers."*

Our dispute resolution procedures are inquisitorial. This means that we ask questions of the parties and require information from them.

Members and credit unions need to be prepared to answer questions about their claims or views, and to provide supporting information wherever possible.

In all cases, the parties must provide us with information relevant to the dispute, and not just those documents that may seem favourable to their claim. We expect the parties to act in good faith in the resolution of the dispute.

Information from Member

If a member elects not to provide specific information or documentation in response to a request from CUDRC, then, this may mean that CUDRC is unable to consider the dispute and the member will need to pursue the matter in another forum. This is a matter which the Dispute Manager would decide.

Information from Credit Union

When we receive a written dispute, we ask members to sign an authorisation form which authorises the credit union to provide information relating to the dispute to our office. In some cases, where the credit union has referred the dispute to CUDRC itself in accordance with clause 6.1, an authority may already have been obtained by the credit union.

Once this authority has been received by the credit union, it should be prepared to provide any information requested by CUDRC, including its entire original file(s). This would include:

- All files held at branch and/or regional level, or located elsewhere; and
- Any computer records of diary notes, or other electronically stored information.

If the credit union has a particular reason for not wishing to provide original documents, then the file may be forwarded, by arrangement with us, to a branch near our office, where the files may be inspected.

Clause 6.6 provides that a credit union may refuse to provide information to the Dispute Manager in the following two situations only:

- It certifies in writing that after reasonable efforts, it has been unable to obtain a waiver of confidentiality from a third party whose privacy could be breached if the information were released; or
- The information relates to a physical or electronic security measure of the credit union. In order for a credit union to come within this exemption, the credit union would have to satisfy the Dispute Manager that the information is not otherwise known and that disclosure of such information would have an adverse effect on the credit union and its security measures.

Third Party Information

Information about a third party may, depending on the case, be directly relevant to the dispute and its resolution. For example, a complaint may be that:

- A bank paid a cheque where a third party had forged the member's signature; or
- A third party stole the member's ATM card and withdrew money from their account.

Our office acknowledges that credit unions have obligations to third parties under privacy legislation, and there may be some circumstances where providing information to our office, without obtaining a third party's consent, would breach a third party's privacy. However, in the following circumstances, we would not consider the credit union to be breaching a third party's privacy, and we would expect the credit union to provide information, even if it related to a third party.

De-identified documents

Where the name of a third party is not relevant to the dispute, the credit union should black out or delete the name from any correspondence or other information forwarded to this office. In this way, important information about the circumstances surrounding the dispute can still be provided to our office without the third party's privacy being breached.

Joint account holders

If one joint account holder lodges a dispute, we do not consider that a credit union would breach the other joint account holder's privacy if it disclosed information about the account to us for the purpose of dispute resolution. Our view is that joint account holders or other third parties such as guarantors or principal borrowers would reasonably expect that such information might be disclosed, even if they are not specifically informed of the dispute.

Investigating and reporting of unlawful activity

The Privacy Act allows organisations to use or disclose personal information, including third party information, without consent, when it has reason to suspect that unlawful activity has been, is being, or may be engaged in, and the use or disclosure is a necessary part of its investigations, or occurs in the context of reporting its concerns to relevant persons or authorities.

"Relevant persons or authorities" to which organisations may report unlawful activities include self-regulatory authorities such as CUDRC.

Therefore, if a dispute concerns unlawful activity, such as allegations of forgery and unauthorised transactions on an account by a third party, we would expect the credit union to disclose information about the third party to us.

Failure to provide information – credit union

If a credit union fails to respond to our request for information within a reasonable timeframe, then it runs the risk that the case will proceed based only on the information that is available to us.

Cost of providing documents

It may be necessary for a credit union to locate old account records from its archives, or copies of cheques or statements. If these documents are relevant to the dispute, it is not appropriate for the credit union to seek payment from the member for its administrative costs in locating the documents.

Legal Professional Privilege

In certain circumstances, a credit union may claim that legal professional privilege attaches to a document such that the credit union does not have to produce that document to this office.

As legal professional privilege is not merely a procedural right, but a right conferred by law to protect confidential communications falling within the privilege from compulsory disclosure, this office will not compel a credit union to provide confidential communications which this office is satisfied were made for the dominant purpose of that credit union obtaining legal advice or for use in existing or contemplated litigation. The types of communications covered by the privilege include communications between:

- The credit union and its internal or external legal advisers, or the agents of either or both of those parties;
- The credit union's legal advisers and a third party (for example, the credit union's solicitor obtaining an assessor's report for use in a legal advice to the credit union); and
- The credit union and a third party (for example, the credit union arranging for an assessor to advise the credit union directly, in order for the credit union to obtain legal advice on the assessor's report).

It remains open for the credit union to waive the privilege, but the credit union cannot be compelled to do so. It is also open for the credit union to provide the communication on the basis that it be kept confidential by this office.

Any information provided to this office by a credit union will not be treated as confidential, unless the credit union specifically makes such a request.

“Without Prejudice” Information

“9.15 Subject to paragraph 9.16, the action of the Credit Union Dispute Manager in making a Determination or Recommendation and the content of any such Determination or Recommendation including but not limited to the matters to be notified to the parties in accordance with this paragraph 8 and any materials and documents created by the Credit Union Dispute Manager in dealing with the Dispute, may not be used as evidence in any subsequent claims, proceedings or actions of any nature brought by either the CUDRC, the Relevant Credit Union or the Member in any court, tribunal or other body of competent jurisdiction.”

CUDRC provides a forum where disputes may be able to be resolved without the need for litigation. Information is sought and supplied by both parties to facilitate resolution if possible. However, if a dispute is not resolved, court proceedings may commence.

The parties should be aware that any admissions made by either party during the course of the consideration of a dispute by this office are made on the understanding that they are made without prejudice and are privileged from admission into evidence in any later proceedings.

In addition, the consideration of the dispute by this office and any documents created in the course of that review are confidential to the member, the credit union and the Credit Union Dispute Manager.

Confidentiality of Information (6.9)

“6.9 The Relevant Credit Union and the Member may each request that information provided to the Credit Union Dispute Manager is treated by the Credit Union Dispute Manager as confidential. The Credit Union Dispute Manager may not, unless released from the Manager’s duty of confidentiality, disclose that information in a manner inconsistent with that duty. If consent is not given the Dispute Manager is not entitled to use the information to reach a decision adverse to any party to whom confidential information is denied.”

A member or a credit union may choose to provide information or documents to us on a confidential basis. We will respect a request for confidentiality and will not disclose the information or documents to the other party without the express consent of the party who provided the information.

We are, however, unable to rely on that confidential information to reach an adverse decision against the other party. This would be contrary to the principles of transparency and natural justice, because it means that we would be unable to provide full reasons for a decision made about a dispute. However, we may rely on it to reach a decision favourable to the other party.

There may be some exceptional circumstances where we will rely on information that is not available to all parties. For example, we may take into account knowledge of a credit union's security measures without disclosing specific details of these measures to the member. This might arise in relation to a dispute about the security measures used to protect, for example, a security deposit box held by a credit union.

Where information has been provided on a confidential basis, we generally return that information to the member or the credit union as soon as our file is closed. Copies of the information will not usually be retained on our file.

Access to Information (6.10)

"6.10 Subject to 6.9, all documentation should be provided to all parties to a dispute. However, it is not necessary for documents and information used by the Dispute Manager to be provided to both parties as long as the Dispute Manager's written reasons clearly identified the documents or information relied on and the identified documents or information are provided on request."

The process of an investigation is a transparent one. In order to facilitate resolution of a dispute, the dispute is sent to the credit union and it is required to respond to the matters complained about to the member and/or this office.

If the credit union responds to this office but not to the member, we will advise the member of the basis of the response.

Our reasons for reaching a view in a Determination or Recommendation are provided to both parties and any documents relied upon in reaching a particular view are usually attached. Both parties are entitled to copies of documents relied upon on request.

A member may also be entitled to obtain access to additional information held on our file if they satisfy the criteria set out in the National Privacy Principles. For further information, see our Privacy Policy, available on our web-site.

“Fishing” for information

We request and receive information for the purpose of investigation and resolution of disputes. We do not assist members or credit unions to obtain information for some other purpose (such as future legal proceedings against the other party).

If we consider that a party is using our services for the sole purpose of “fishing” for information, we may cease our consideration of the dispute.

Return of Information (6.11)

“6.11 If a Dispute is resolved, or the Credit Union Dispute Manager determines not to continue to exercise the Dispute Resolution Powers, then at the request of the Relevant Credit Union or Member the Credit Union Dispute Manager must return any information provided by the requesting party. Nothing in this paragraph requires a Credit Union Dispute Manager to provide any materials or documents created by them in the course of dealing with the Dispute.”

“6.12 Nothing in paragraph 6.11 prevents the Credit Union Dispute Manager from retaining and making for its own records and for other purposes set out in these Terms of Reference copies of the information, including any confidential information.”

When a member or credit union asks for documents it has previously provided to CUDRC to be returned, we will return the documents promptly. In general, we will retain copies of the documents on our file. Whilst paragraph 6.12 allows CUDRC to retain copies of confidential documents, it is not CUDRC’s usual policy to do so.

Rules of Evidence (7.1)

“7.1 The Credit Union Dispute Manager is not, in exercising the Dispute Resolution Powers, bound by any common law or statutory rules of evidence.”

The Credit Union Dispute Manager must take the law into account when making a decision about a dispute, however, he/she is not bound by any legal rule of evidence.

The Credit Union Dispute Manager cannot take evidence on oath or cross examine the parties

Our procedures are not the same as those of a court and we do not have the power to take evidence on oath. In practice, this means that *information* rather than *formal evidence* is supplied to us by members and credit unions, because neither party can be examined or cross examined about the facts in dispute.

This does not mean that we are unable to thoroughly investigate a dispute or assess the merits of a claim. The Credit Union Dispute Manager is entitled to draw inferences and conclusions based on the information supplied. In most cases, we can reach a conclusion about a dispute by assessing what may have happened based on the balance of probabilities on the information available.

Statutory declarations

We sometimes receive information in the form of a statutory declaration. At law, a person who makes a declaration which they know to be false is liable to penalties imposed for perjury.

While we may give some additional weight to a matter detailed in a statutory declaration, our general principles about how we assess information will still apply. This is because we cannot sanction anyone who provides a false statutory declaration, nor can we test the information supplied by examining that person under oath.

Subpoenas

It is often suggested that we should subpoena documents from third parties. Because a subpoena may only be issued by a court, in relation to a matter before the court, we do not have the power to subpoena documents to assist in our investigations.

Previous Decisions (7.3)

“7.3 Subject to paragraph 7.2, the Credit Union Dispute Manager is not otherwise bound by authority or precedent, whether judicial or otherwise.”

While the Credit Union Dispute Manager is not bound by previous decisions that they, or another Dispute Manager has made, CUDRC is committed to consistency in decision making.

We have developed systems to promote consistent decision making. These include an electronic Thesaurus, a Knowledge Management System, and a review and quality assurance procedure for letters expressing a view on the merits of a dispute. We also hold regular meetings to discuss significant cases.

Our approach to particular types of disputes may be modified over time by changes to the law or standards of industry practice, and by developments in the financial services sector. Where necessary, such changes will be reflected in the publication of new Bulletins and Policies.

According to paragraph 7.3, the Dispute Manager is not bound by judicial precedent. However, it is the Dispute Manager’s practice to take relevant court decisions into account when considering a dispute.

Decision Making Criteria (7.2)

“7.2 In considering a complaint and in making any Determination or Recommendation while exercising the Dispute Resolution Powers the Credit Union Dispute Manager must:

- (a) observe any applicable rules of law, or relevant judicial authority or precedent;*
- (b) have regard to applicable industry codes including the Credit Union Code of Practice and the EFT Code of Conduct;*
- (c) have regard to good industry practice; and*
- (d) have regard to what is fair and reasonable in all the circumstances.”*

The law

When considering a dispute, we take into account any applicable rule of law or relevant judicial authority.

Both the credit union and the member are entitled to make submissions on any legal principles they consider are relevant to the dispute.

While the Credit Union Dispute Manager would generally follow the advice given by his/her legal counsel, that advice will be considered in the context of our other three decision making criteria.

For information about parties' rights to legal representation, see page 73.

Applicable industry codes

There are a number of self-regulatory Codes and industry guidelines that influence the way that credit unions operate. These include:

- the Credit Union Code of Practice;
- the Electronic Funds Transfer Code of Conduct; and
- the Code of Operation: Centrelink Direct Credit Payments.

These Codes and guidelines are developed in consultation with relevant interest groups such as consumer organisations, industry bodies and government agencies. In some cases, the Code or guideline will set standards of industry conduct that exceed those required at law. They may also establish standards where none previously existed.

Where a credit union subscribes to or warrants in contractual documents that it is a signatory to a particular Code or guideline, we will assess any relevant dispute by reference to the applicable Code.

Good industry practice

We treat the criterion of "good industry practice" as a broad model of corporate behaviour in the financial services sector.

It can refer to the manner in which a credit union should process transactions, handle information, communicate with customers and generally conduct its business in any given set of circumstances.

There is no comprehensive definition of what constitutes good industry practice for all situations that might arise in the financial services sector. And the requirement of good industry practice relevant to a particular case may raise the standard of care beyond that which a credit union owes at law.

We may seek advice from within the industry to ascertain what constitutes good industry practice in a particular case.

Fair and reasonable in all the circumstances

The criteria of “fair and reasonable in all the circumstances” allows us to temper a strict application of the law with considerations of equity and good conscience. It does not mean that we disregard the law, Codes or industry practice. However, it does mean that we may make a decision that:

- takes into account the specific circumstances of a case which may justify not applying the law rigidly;
- allows for the balancing or weighing up of the available information;
- recognises that in some circumstances a higher standard of care may be owed by a credit union because of the requirements of good industry practice;
- may excuse one or both parties for minor breaches which might otherwise lead to harsh results in the circumstances; and
- takes account of any uncertainty in the facts, the law or good industry practice as they apply to a particular case.

PART 7

WHAT CAN THE DISPUTE MANAGER REQUIRE A CREDIT UNION TO DO?

“9.2 If the Credit Union Dispute Manager is satisfied on the basis of facts and materials provided by the parties that:

- (a) *the Relevant Credit Union should take action*
 - (j) *which does not involve the payment or making of any valuable consideration to the Member; or*
 - (ii) *which involves the payment or making of valuable consideration to the Member of less than \$280,000; or*
- (b) *the Member must pay any money to the Relevant Credit Union*

then the Credit Union Dispute Manager must make a Determination in accordance with paragraph 9.3.”

This clause gives the Credit Union Dispute Manager the power to:

- Require a credit union to pay or make “*valuable consideration to the Member of less than \$280,000*”. The term “*valuable consideration*” means an actual cash payment or its equivalent. The equivalent of a cash payment may include the waiving of a debt, the reconstruction of a loan, or an interest adjustment; or
- Require a credit union to take action that does not involve “*the payment or making of any valuable consideration to the Member*”. This means that the Dispute Manager may require a credit union to take action that does not constitute the making of a cash payment or its equivalent, such as the provision of information, the amendment of a record of personal information held by a credit union about an individual, or the instruction to a credit reporting agency to remove or amend a default listing; or
- Determine that a member is liable to pay an amount of money to the credit union.

These powers are discussed below.

The Making of Valuable Consideration

The Dispute Manager may require a credit union to make or pay “*valuable consideration*”, up to a maximum of \$280,000 to compensate a member for loss or damage that they have suffered as a result of a credit union’s act or omission. (In cases where it is appropriate to issue a non binding

Recommendation, the amount of valuable consideration may exceed \$280,000. See page 50 for further information).

Any valuable consideration which the Dispute Manager awards must be:

- Fair and appropriate; and
- Compensate the member for **loss or damage** suffered as a result of a credit union's act or omission.

Loss may be financial and/or non financial

The loss or damage suffered by the member may be "financial" or "non financial".

Financial Loss

"Financial loss or damage" is any loss that has been caused by the act or omission of a credit union that can be quantified as a monetary sum.

Non financial loss

In some circumstances, the Dispute Manager may award a member compensation for "non financial loss". Examples of non financial loss include:

- Personal inconvenience;
- Anxiety; and
- Stress

caused by the credit union's conduct.

Assessing claims for non financial loss

We will generally only award compensation for non financial loss in limited circumstances. And an award for such loss is unlikely to be substantial.

When we are assessing a claim for non financial loss, we take into account:

- Any physical inconvenience experienced by the member;
- The length of time the member experienced inconvenience or stress;

- The extent to which the member's expectation of enjoyment or peace of mind was interfered with; and
- Where the credit union product or service was supplied in a travel-related situation, whether the member suffered distress which substantially reduced the enjoyment of recreational activities planned.

We do expect, however, that a member will be moderately robust in the way they deal with a problem. We also expect that a member will bear the ordinary degree of inconvenience involved in correcting an unexpected problem, and take reasonable steps to minimise any inconvenience suffered.

Stress and inconvenience

If a member specifically claims to have suffered stress and inconvenience, we will assess the claim based on an assessment of how the "objective" or "reasonable" person would have responded in the member's particular circumstances.

These cases are assessed conservatively and a claim, for example, of simple inconvenience would not be sufficient to warrant compensation. The Credit Union Dispute Manager does not award compensation in respect of the time spent by a member pursuing their dispute.

Consequential medical loss

Sometimes a member claims that, as a consequence of the conduct of the credit union, they have developed a clinical illness or an existing condition has been aggravated and they should be compensated accordingly. In order to prove such a claim, medical evidence would be required. Because we cannot test an expert's opinion by cross-examination under oath, it is our view that these claims are best dealt with in a court. A pre-existing condition which was known or ought to have been known to the credit union may, however, be taken into account in other ways. For example in:

- assessing the level of stress suffered by the member; or
- assessing whether legal principles to do with unconscionable conduct apply.

Case studies

Following are some examples of situations in which a claim for non financial loss may be made.

Holiday travel cases

A customer's credit card is stopped in error and the customer is stranded overseas and unable to obtain funds in the short term to allow them to continue their trip as planned.

These cases are relatively straightforward to assess because there is clearly a loss of enjoyment and inconvenience which can be observed as an objective matter. The cost of a replacement ticket, or the cost of preferred accommodation or transport alternatives, may, in some circumstances, represent appropriate compensation.

Embarrassment

A customer is denied access to their funds in a retail shop because of an error in a credit union's electronic funds transfer system.

These cases may be relatively easy to assess, if only because the cause and effect are fairly clear. However, any compensation awarded will be relatively small.

Wrongful dishonour of cheques

A customer's cheque is dishonoured in error.

A claim for non financial loss because a cheque has been wrongfully dishonoured, is essentially a claim of embarrassment or of defamation.

A member is entitled to be compensated for the breach of the credit union's contract to honour the cheque. However, a personal account holder would need to prove special circumstances to recover more than nominal compensation.

A small business may be entitled to recover more substantial compensation if the dishonour was found to be defamatory. However, because this is a matter usually left to a jury to determine, we are not the appropriate forum to consider such a claim. A claim for compensation for defamation should be distinguished from that claimed for "injured feelings". The latter does come within our jurisdiction.

Financial hardship

A customer is denied access to funds in an account because of an error in the electronic funds transfer system. The funds are needed to pay for essentials such as food and accommodation which the customer cannot otherwise afford.

This would attract a higher level of compensation because of the physical inconvenience experienced by the member, and the level of interference with their peace of mind.

Consequential losses and opportunity costs

The High Court decision of *Hungerfords v Walker* (1989) 84 ALR 119 summarises the principles applied by this office to determine whether a member is entitled to damages for the loss of use of their money as a result of a credit union's error.

A member may claim that as a result of the error, they have suffered a loss which is in the form of an "opportunity cost" or an opportunity for profit foregone.

Opportunity cost is an economic term. It means that when a particular resource (such as money) is allocated to a particular use (say, making payments to a home loan) there is necessarily a "cost" involved. This cost is represented by the opportunity foregone because the money cannot be used in the next best alternative (say, investing on the share market).

What the next best alternative is will differ from individual to individual and from small business to small business.

A claim for loss based on opportunity cost may arise where, in breach of contract, the credit union:

- withholds money which is due to the member; or
- pays away the member's money; or
- causes the member to be deprived of money which would otherwise have been paid to them.

If the loss was reasonably foreseeable when the breach occurred or was reasonably contemplated by the parties to the contract, and the member has actually sustained the loss, then in principle they can be compensated for the loss of use of that money. If this is the case, compensation:

- may be assessed as interest on the sum whose loss of use is in question;
- may extend to consequential losses such as the opportunity cost of not having had the money; or
- may be for the expenditure incurred by the member because they did not have access to the money.

This office will consider claims for compensation for consequential loss of this nature.

Identifying and quantifying the loss

A member does not need to quantify the loss that they may have suffered in order to lodge a dispute. However, they should be able to identify the nature of the loss, and explain how the loss was caused. For example, a member may say that due to the credit union unreasonably delaying in the settlement of a loan, they were charged penalty interest by the vendor of a property. We will ask you to quantify your loss as part of our investigation.

In some cases, where it appears that the claim may exceed our monetary claims limit, determining the size of the claim becomes a critical issue. If there are multiple claims against the credit union and the total of these claims exceeds \$280,000, then we can only make a Recommendation (see page 52). Alternatively, if there is no claimable loss, but this is not identified early, there is a risk that the member's expectation about a payment may be unrealistically raised. Quantifying any loss that a member may have suffered is, therefore, a routine and important part of our investigation process.

Accrual of arrears during an investigation

Interest and default charges will not cease to accrue to an account while we are considering a dispute. If a member chooses to stop making payments to an account that is in dispute, then they must bear the financial consequences if the investigation results in a decision in the credit union's favour. For example, if payments are not made during the period of investigation, the debt at the conclusion of the investigation will have increased and the member may not be in a position to repay the arrears on the loan or account.

In these cases, the credit union should make sure that their customer is aware that interest and charges will continue to accrue.

Rate of interest

Where it is appropriate to consider the interest on the sum whose loss of use is in question, the usual measure of damages adopted by this office is the term deposit rate for the amount of money which the member has been denied access to for the period in relation to which they were denied access.

Recovering Dispute Resolution Costs

“11.1 Subject to paragraph 11.3, all costs associated with the conduct and resolution of a Dispute in accordance with these Terms of Reference must be borne by the CUDRC and the Relevant Credit Union, in accordance with general payment procedures and cost arrangements determined by the Board and notified to all Credit Unions by the Board.”

“11.2 The member may not be charged (even if a Complaint or Dispute is dismissed) for any professional or administrative costs, and must be reimbursed for reasonable travel and accommodation costs (if any) associated with the conduct and resolution of the Dispute.”

“11.3 If the Member or the Relevant Credit Union is permitted, in accordance with paragraph 12.1, to be legally or separately represented or assisted in any manner in relation to the Designated Procedure, the costs associated with that representation and assistance must be met by the Member or Relevant Credit Union and may not be included as part of any Determination or Recommendation of the Credit Union Dispute Manager and may not be pursued by either party in any further or separate proceeding before any court or tribunal of competent jurisdiction. In determining the payment procedures and cost arrangements for a Test Case, the Credit Union Dispute Manager must do so on the basis that all costs will be borne by the CUDRC and/or the Relevant Credit Union.”

“12.1 Unless otherwise agreed by the Credit Union Dispute Manager, and subject to any authorisation to the contrary by a mediator or other person engaged by the Credit Union Dispute Manager to conduct any part of the Designated Procedure, the parties may only represent themselves or be represented by an employee representative who is not legally qualified in any activities relevant to the Designated Procedure or the Dispute. Notwithstanding the above, the parties have the right to be legally represented if the Dispute is to be conducted in accordance with paragraph 10 as a Test Case.”

“12.2 The use of legal representatives before the Credit Union Dispute Manager is to be discouraged.”

“12.3 If the Relevant Credit Union is the first party to request legal representation and the request is granted, the Relevant Credit Union shall pay the costs of

legal representation for the member, such payment not exceeding the legal costs incurred by the Relevant Credit Union in connection with the dispute after the dispute has been referred to the CUDRC."

"12.4 The costs of legal representation involved in a Test Case must be borne by the Relevant Credit Union in accordance with paragraphs 10 and 11."

Free Service to Members

CUDRC is an industry funded service. There is no cost for individuals or small businesses to lodge a dispute.

CUDRC's costs are met by contributions from participating credit unions who pay:

- An annual participation fee;
- A set fee for each dispute referred to CUDRC about each particular credit union; and
- An additional amount based on the time taken by CUDRC to investigate unresolved disputes about the particular credit union.

Legal Costs

Parties are not entitled to be legally represented in a dispute unless permission is granted by the Dispute Manager. In-house lawyers and external lawyers employed by credit unions may give legal advice to the credit union, but may not represent the credit union in a dispute before CUDRC unless permission is granted. It is not usually necessary for either party to be legally represented because we use internal or external legal counsel to give advice about issues raised by the dispute if necessary.

If a credit union is the first party to request legal representation and the request is granted by CUDRC, the credit union must pay the costs of legal representation for the member. The amount for which the credit union is liable cannot, however, exceed the amount of the credit union's own legal costs incurred after the dispute has been referred to CUDRC. The credit union's own legal costs cannot be passed on either directly or indirectly to the member.

If the member is the first party to request legal representation, and the request is granted by CUDRC, then according to paragraph 11.3, the legal costs are not recoverable. The costs cannot be included as part of any Determination or

Recommendation, and may not be pursued by either party in any further or separate proceedings before any court or tribunal.

Costs incurred by members for advice about their dispute from professionals such as accountants or property valuers are also non recoverable.

Representatives should ensure that they make their clients aware of this fact.

As a general rule, a member will not be compensated for their own time spent pursuing the dispute.

Power to Require Credit Union to Take Action that does not Involve the Making of Valuable Consideration

The Dispute Manager may require a credit union to take action that does not constitute the making of a cash payment or its equivalent to the member.

Examples include requiring a credit union to:

- Provide information to the member that relates to the subject matter of the dispute;
- Amend a record of personal information that it holds about an individual; or
- Instruct a credit reporting agency to remove or amend a default listing.

Power to Determine that Member Should Pay an Amount of Money to Credit Union

A member may claim that he/she should not have to pay a certain amount of money to a credit union. The circumstances where such a claim may arise include:

- Where a member claims that unauthorised ATM transactions have been made on their credit card account;
- Where a member believes that he/she is exempt from paying a particular fee or charge; or that the fee is not provided for in the contract for the product or service; or
- Where a member claims that due to an error by the credit union, the outstanding balance on their home loan account is greater than it should be.

If, after an investigation, CUDRC considers that the member is liable to pay the disputed amount, this may be set out in a Finding, Determination or Recommendation. The member may accept or reject CUDRC's view. If the view is accepted, but the member does not pay the amount to the credit union, the credit union must take separate proceedings in a court if it wishes to recover the debt.

PART 8

THE CREDIT UNION DISPUTE MANAGER'S OBLIGATIONS

The Credit Union Dispute Manager's core function is dispute resolution. In addition to this central role, however, the Credit Union Dispute Manager is required to perform a number of tasks, as specified in the Terms of Reference.

Reporting to Regulatory Bodies

- 13.1. *The Credit Union Dispute Manager must report all systemic issues and serious misconduct to ASIC and the Board as described in 13.2 and 13.3.*
- 13.2. *A systemic issue is one which will have a material effect which will clearly extend beyond the parties to a complaint. Some examples of systemic issues are: poor disclosure or communications, administrative or technical errors, product flaws, and improper interpretation or application of standard terms.*
- 13.3. *Serious misconduct is conduct which may be fraudulent, grossly negligent, or involve wilful breaches of relevant laws.*

Systemic Issues and Cases of Serious Misconduct

The Australian Securities and Investments Commission's (ASIC's) Policy Statement 139 sets out guidelines which we follow when dealing with systemic issues and cases of serious misconduct. According to these guidelines, we have three main obligations:

- To identify systemic issues and cases of serious misconduct that arise from our consideration of disputes;
- To refer these matters to the credit union for response and action; and
- To report information about systemic issues and serious misconduct to ASIC.

What is a systemic issue?

A systemic issue is one which has been raised in a dispute or several disputes to CUDRC which will affect a class of people in addition to those who have complained to us.

Several disputes of the same type may indicate a systemic problem, however, an issue may be identified out of consideration of one single dispute because the effect of the issue will clearly extend beyond the parties to the dispute.

Examples of systemic issues

Factors causing systemic problems might include:

Inadequate disclosure:	Credit union fails to disclose the ability to overdraw on a savings account, but charges default interest and unarranged overdraft fees when a customer overdraws the account.
Technical problems:	A particular ATM consistently shortchanges customers by \$50.
Breaches of privacy:	The credit union gives customers' names and telephone numbers to a telemarketer when many of the customers have silent numbers or have elected not to disclose information to related entities.

What is serious misconduct?

"Serious misconduct" is a broad term that includes fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws and codes of practice.

Some examples are:

- A credit union officer witnessing a fraudulent signature;
- Extortion, blackmail or other criminal conduct towards a customer; or
- Repeated failure to comply with CUDRC decisions, procedures or timeframes.

How do we identify and collect information about systemic issues and serious misconduct?

The words "systemic issues" below cover both systemic issues and serious misconduct.

We aim to identify possible systemic issues as early as possible, with most issues being identified when new disputes are received. All possible systemic issues are referred to CUDRC's Systemic Issues Manager who records the

details in a register. Staff are then notified about the details of the problem to ensure that all disputes about the issue are centralised.

The matter is then referred to the credit union concerned for a response. We usually ask for information to be provided which will assist us in determining whether a systemic problem does, in fact, exist.

If, after considering the response, we are satisfied that the problem is systemic in nature, a “notable case code” is created on our internal case management database for all cases which raise the issue.

How are systemic problems remedied?

We work with the credit union to ensure that:

- All customers affected by the problem are identified and appropriately compensated for financial loss (if any); and
- A strategy is put in place to prevent the problem from recurring.

For complicated matters, the following principles are usually included in the strategy to remedy the systemic problem:

- An agreement that the credit union will demonstrate commitment to ensuring equitable and fair treatment to all affected customers;
- The parameters for identifying the group of past and existing customers who are entitled to compensation are identified;
- The extent of any compensation is identified or the basis for calculation of a person’s right to compensation is identified;
- Where appropriate, an opportunity cost may be payable. If it is, the dates and the method for calculating the opportunity cost are outlined;
- If appropriate, advertisements are placed in certain newspapers at agreed regular periods with words to an agreed script in order to promote contact with all affected customers;
- If appropriate, a 1800 toll free number is established to take calls in response to advertisements about the issue;
- A letter is sent to affected customers explaining the situation, advising that the solution has been approved by the Credit Union Dispute Manager. The wording of such a letter is discussed and agreed upon between the credit union and the Credit Union Dispute Manager;

- The credit union agrees that the Credit Union Dispute Manager's office will operate as an avenue of appeal for customers who claim they have particular rights or circumstances which mean that they are entitled to be treated otherwise than in accordance with the general principles which have been established;
- In relation to appeals, the credit union agrees to be bound by the Credit Union Dispute Manager's decision in accordance with the CUDRC Terms of Reference;
- A time frame is established in which the credit union agrees to set up systems to deal with the group of affected customers; and
- It is a fundamental principle of the arrangements between the credit union and the Credit Union Dispute Manager's office that regard for the independence of the Credit Union Dispute Manager will be reflected in all references by the credit union to the Credit Union Dispute Manager in any of the communications, and in any subsequent litigation, between the credit union and any person who forms part of the group of affected customers.

Reporting to ASIC

We are obliged, under Policy Statement 139 and the Terms of Reference, to report systemic issues and cases of serious misconduct to ASIC. The following guidelines explain this obligation:

1. If, after CUDRC staff have consulted with the credit union, the matter is rectified and, in the Credit Union Dispute Manager's view, is unlikely to recur, the Credit Union Dispute Manager will include the matter in a report which will be sent to ASIC on a quarterly basis. The report will not identify the credit union, but will include details of the nature of the issue, and the numbers of each type of systemic issue that have been found, investigated and rectified; or
2. If the credit union does not rectify the systemic issue to the Credit Union Dispute Manager's satisfaction, the Credit Union Dispute Manager will:
 - (a) Notify the credit union that CUDRC believes that a report, identifying the credit union, should be made to ASIC. Ten working days will be allowed for a response as to why the matter should not proceed; and

- (b) If the matter is not rectified, or there is no response, or the response is not sufficient to satisfy the Credit Union Dispute Manager that the matter has been rectified or will not recur, the Credit Union Dispute Manager must make a report to ASIC containing:
- (i) The identity of the credit union;
 - (ii) The details of the systemic issues involved;
 - (iii) Action taken by CUDRC; and
 - (iv) The response from the credit union.

Other reports to ASIC

The Credit Union Dispute Manager is also obliged under Policy Statement 139 to provide ASIC with a quarterly statistical report which summarises the number and age of disputes, the time taken to resolve disputes, the profile of members and the details of disputes considered to be outside the Terms of Reference.

Collection of Information (14.1)

14.1. *The Credit Union Dispute Manager must collect and record the following information:*

- (a) *the number of complaints received;*
- (b) *the number of enquiries received;*
- (c) *demographics of complainants (where practicable);*
- (d) *the number of complaints received that fall outside the scheme's terms of Reference (with reasons);*
- (e) *the scheme's current caseload including the age and status of the open cases;*
- (f) *the time taken to resolve complaints; and*
- (g) *a 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 service or product was obtained;*
- (iv) *the underlying cause of the complaint; and*
- (v) *any systemic issues or other trends.*

CUDRC has developed its own Case Information Management System ("CIMS"). This is the data base from which all case related information is extracted and reports generated.

CIMS data includes information about:

- the member, including whether sensitive information is held;
- the credit union;
- the dispute - a short written summary with codes for the product and problem complained about;
- the status of the dispute, for example, whether the dispute is inside or outside the Terms of Reference or where the case is in the resolution process;
- relevant dates in the resolution process;
- whether there is a notable feature of the case or whether the case belongs to a particular group of cases;
- the location of the file in the office, for example, with legal counsel, or the Dispute Manager;
- case actions - this is an electronic record of all activity on the file including all correspondence and telephone calls in and out;
- whether third party information is held on file; and
- whether interpreter services are required and the language spoken.

We record the following information about telephone contacts:

- The product and problem if the dispute is within the Terms of Reference;
- A code to identify the reason why a dispute is outside the Terms of Reference;
- Who referred the caller to CUDRC;
- The post code of the caller;
- The gender of the caller; and
- Whether the caller is an individual, an unincorporated business or an incorporated business.

Reports to Credit Unions (14.2)

- 14.2. *The Credit Union Dispute Manager must also produce a report every twelve months for publication and provision to Credit Unions. The report must be a comprehensive summary and analysis of this information.*

Reports providing statistical information about the numbers and types of disputes and the stage in the dispute resolution process are issued to credit unions monthly, quarterly, half-yearly and yearly. Requests for specific information can be provided at any time.

We also produce an Annual Report which contains detailed analysis of statistics about disputes received and considered by the Credit Union Dispute Manager. The Annual Report is available to credit unions and the general public.

Promotion of CUDRC (15.1, 15.2, 15.3)

- 15.1. *The Credit Union Dispute Manager must ensure that the existence of the CUDRC is actively promoted.*
- 15.2. *In particular, the CUDRC should be promoted to members which are under-represented in the information collected on the CUDRC (including, for example, members in rural areas or from non-English speaking backgrounds).*
- 15.3. *The Credit Union Dispute Manager must publish and promote details about how the CUDRC works. This should include: how a dispute can be lodged, assistance which is available to Members, and the time frames which are imposed on the procedure.*

The Credit Union Dispute Manager is committed to promoting the existence of CUDRC to the public at large. He/she holds regular information sessions around Australia for consumers, and speaks with all sections of the media.

Manuals outlining CUDRC's services, procedures, policies and guidelines are provided to all participating credit unions and consumer bodies, and are available to consumers on request. Our website www.cudrc.com.au also provides detailed information about CUDRC.

The Credit Union Dispute Manager is particularly interested in targeting under-represented groups of the community, such as people living in rural areas, or people with non-English speaking backgrounds. Information collected on our case management database assists us in identifying these under-represented groups.

If members are experiencing problems lodging their dispute due to language problems or disability, the Credit Union Dispute Manager's staff are able to assist in a number of ways:

- By meeting with members to identify the grounds of their dispute;
- Providing translation services; and
- Assisting with writing the initial letter of complaint.

Day to Day Management (16.1 to 16.4)

16.1. *The Credit Union Dispute Manager has, and must properly exercise, all of the administrative, functional and operational powers vested in the Credit Union Dispute Manager by these Terms of Reference and the Articles.*

16.2. *The Credit Union Dispute Manager must, as notified by the Board:*

- (a) *attend meetings of the Board; and*
- (b) *provide the Board on request with any information and assistance which the Credit Union Dispute Manager is authorised to provide to them.*

16.3. *The Credit Union Dispute Manager must prepare or arrange to be prepared and submit for approval to the Board by 15 October, an annual report for the Dispute Resolution Scheme which:*

- (a) *shows its compliance with these Terms of Reference and the Articles;*
- (b) *contains details of the operation of the scheme and compliance of the Credit Union Dispute Manager with these Terms of Reference and the Articles; and*
- (c) *includes any other matters which the Credit Union Dispute Manager and the Board agree should be contained in the annual report.*

16.4. *The annual report must be published and made available to the public on request.*

Clause 16 of the Terms of Reference set out a number of administrative obligations of the Credit Union Dispute Manager to manage the day to day business of CUDRC, and the obligation to produce an Annual Report.