Australian Securities and Investments Commission

SUBMISSION TO
THE INQUIRY ON INDUSTRY SELF-REGULATION

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1. Introduction

1.1 Overview

ASIC considers that industry self-regulation can play a valuable role in conjunction with legislation and other regulatory mechanisms. For example, self-regulation can and should play an important “risk identification” role within the overall regulatory framework - the information generated under such schemes can help identify problem areas with industry practice, consumer knowledge, and government or regulator policies before they become bigger problems.

However, it needs to be recognised that there are significant risks associated with industry self-regulation. These include ineffective or inefficient regulation and inadequate compliance monitoring and enforcement. We consider that for self-regulation to be effective, certain key principles need to be followed. These principles are set out in this submission.

In addition to providing this written submission which summarises ASIC’s views about self-regulation in the financial services industry, we would welcome the opportunity for further discussions on the views set out in this submission or to provide any further information that may assist the Inquiry.

1.2 The meaning of ‘self-regulation’

One of the difficulties with an analysis of self-regulation is deciding on what this expression means. ASIC recognises that there is ongoing debate over the precise definitions of terms such as ‘self-regulation’, ‘co-regulation’, ‘quasi-regulation’ as well as debate over where various forms of regulation fit in the regulatory spectrum. We do not intend to discuss such definitional issues in this submission separately to the discussion of more substantive issues around self-regulation.

The expression "self-regulation" is used in this submission to refer to regulation where there is substantial industry-level involvement in the development or implementation of the regulation and where the regulatory arrangement is adopted and funded by industry.
2. ASIC’s role

2.1 Overview

ASIC is the regulator responsible for consumer protection and market integrity in the financial services sector. ASIC is also the national corporate regulator. ASIC regulates advising, selling and disclosure of financial products and services to consumers so that they have adequate information, are treated fairly and have adequate avenues for redress. We protect markets and consumers from manipulation, deception and unfair practices.

The first two objectives stated in the ASIC Act (s1(2)) are:

‘In performing its functions and exercising its powers, the Commission must strive to:

(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and the efficiency and development of the economy; and

(b) promote the confident and informed participation of investors and consumers in the financial system’

ASIC’s consumer protection role includes administering powers which are modelled on the consumer protection provisions of the Trade Practices Act, as well as relevant investor and consumer protection sections of the Corporations Law, superannuation legislation and insurance legislation.

In making this submission, ASIC has drawn on its experience of self-regulation in the financial sector. In some areas, this extends over many years (eg the regulation of exchanges). Since ASIC assumed its role as consumer protection and market integrity regulator for the entire financial sector on 1 July 1998, ASIC has dealt with a wider variety of self-regulatory arrangements. The comments in this submission have been drafted in light this experience of self-regulation in the financial services sector.

We would note that it is in ASIC’s interest to ensure that self-regulation works effectively. ASIC relies on self-regulatory schemes to cover many day to day complaints and industry issues that it would otherwise not have the capacity to deal with.

2.2 ASIC and Markets Regulation

ASIC has had extensive experience in dealing with self-regulation in the market exchanges in Australia (Australian Stock Exchange and the Sydney Futures Exchange). Further, ASIC has been extensively involved in international regulatory fora in the area of markets regulation.
Self-regulation is a pervasive feature of markets regulation, and it is closely integrated with the regulator’s responsibility. ASIC’s role includes supervising ASX Ltd as a self-listed company and dealing with potential conflicts that this can cause in a range of circumstances. This role has given ASIC extensive experience in dealing with self-regulatory issues in the finance sector. While some of these issues are of course distinct in the markets arena, the core principles of self-regulation are such as ensuring proper compliance and enforcement, dealing with conflicts of interests, developing appropriate standards of conduct and business behaviour, and promoting better communication with investors and industry participants.

ASIC has participated in international fora which have considered appropriate standards for the regulation of securities markets, including the role of self-regulation. IOSCO (the International Organisation of Securities Regulators) is the major vehicle for these activities. We would also point to industry initiatives such as the FIBV (International Federation of Stock Exchanges) 1998 Market Principles, which set out minimum levels of organisation, regulation and supervision as securities market needs in order to qualify as an organised market.

2.3 ASIC and self-regulatory codes and ADR schemes

As noted, ASIC now has responsibility for the oversight, and in some cases approval, of industry codes of conduct and ADR schemes in the finance sector.

ASIC’s powers contain explicit references to self-regulatory mechanisms such as market regulation, codes of conduct and dispute resolution schemes, including in the Corporations Law and Regulations, the Insurance Contracts Act, and the ASIC Act. For example, the ASIC Act sets out an explicit role in relation to codes and ADR schemes whereby ASIC has the function of "promoting the adoption of, and approving and monitoring compliance with, industry standards and codes of practice”.

Furthermore, when the ASC became ASIC it inherited the oversight responsibilities of various agencies including the former ISC and the Payments Systems Council, which had responsibility for monitoring the banking and EFT codes.

Having inherited a variety of oversight arrangements as part of this role, ASIC has sought to look for opportunities to encourage greater consistency in the structure and operations of self-regulatory mechanisms, as well as developing more consistent regulatory oversight of these mechanisms, without overriding legitimate sectoral differences. In relation to ADR schemes this approach is set out in PS 139, and a policy proposal paper on ASIC’s approach to codes of conduct is currently being developed.

ASIC has also engaged in a range of activities aimed at promoting alternative dispute resolution processes in the financial services industry. This includes the chairing the Complaints Scheme Roundtable. The Roundtable, an initiative of the former Insurance and Superannuation Commission, was originally set up as an opportunity for complaints schemes operating in the financial services industry to discuss common issues. The Roundtable was later extended to include representatives of selected consumer and government organisations including the Australian Consumers’ Association, Consumer
Rights Law Centre, ACCC, ASX and ASIC. The Roundtable provides a forum for the promotion and support of complaints schemes in the sector.

The Roundtable has been chaired by ASIC since 1997 and has promoted the harmonisation, where appropriate, of schemes’ terms of reference.
3. **Conditions for effective self-regulation**

The Inquiry has asked about the industry environment and market circumstances where self-regulation is most effective.

### 3.1 Why regulation?

Regulation may be required where market failures arise in the finance sector. The literature on this topic is extensive, and ASIC does not intend to explore the overall rationale for regulation in this submission.

We do, however, make the point that there will always be a mix of regulatory institutions and approaches in any financial environment, involving both legislative regulation and industry-based regulation. Professor David Llewellyn (1995) notes that:

> In practice, self-regulation operates within parameters clearly laid down by law, and the distinction between self-regulation and statutory regulation is to some extent artificial.

### 3.2 Why self-regulation?

Self-regulation offers some benefits as a form of regulation. These are summarised by Professor Llewellyn:

- ‘it utilises the expertise of the regulated;
- it is able to monitor financial innovation;
- it has a professional interest in ensuring that standards and public confidence are sustained;
- the consent of the regulated is more likely to be secured;
- it is flexible and adaptable; and
- there is a collective interest in ensuring that the potentially less scrupulous do not gain a ‘free-rider’ advantage based upon the public’s image of the regulated industry [see section 3.3.3 for a discussion of the concept of ‘free-rider’].’

He also notes the ‘distinct limitations’ to self-regulation:

- ‘it can prove to be anti-competitive in nature;
- it can be subject to regulatory capture;
- it may prove to be ‘fair-weather’ regulation;
- it may lack credibility and public confidence;
- it may lack effective enforceability; and
- the free-rider problem may not always be prevented.’

Once the case for regulation is established, the argument for self-regulation involves establishing that the benefits outlined above are achievable and consistent with the overall regulatory framework, and that self-regulation is the most appropriate form of regulation in the circumstances.
3.3 Conditions for effective self-regulation

3.3.1 Common industry interest

Industry self-regulation will only work effectively where there is a critical mass of common interest. This common interest will usually involve a mix of ‘positive’ and ‘negative’ incentives.

An example of positive common interest is a desire to improve professionalism in the industry.

Negative self-interest can include the desire to avoid government, which may be an explicit ‘threat’ via direct government pressure or an implicit ‘threat’ arising out of the general direction of government policy reforms. At its best this involves a genuine commitment to self-regulation that will deliver market improvements in a cost-effective manner. We note that, in the past, comprehensive self-regulatory schemes have generally been developed only where there has been a real threat of government or regulator intervention.

Improving consumer confidence can have both positive and negative elements. Most self-regulatory schemes also seek to improve consumer confidence where it is currently inadequate such as in areas of new technology or where there have been problematic industry practices.

3.3.2 Viable industry association(s) or industry commitment

The industry association must be able to harness the common interest and manage self-regulatory schemes. In particular, the industry association must be capable of delivering:
- sufficient resources to support the self-regulatory scheme (in ASIC’s experience, self-regulation is rarely inexpensive, and the costs can be underestimated by industry parties); and
- effective compliance and enforcement mechanisms.

Another vital role for an effective industry association is the ability to enlist the support and input of other stakeholders, notably relevant government agencies and consumer organisations. This will be an ongoing role.

It is worth noting that the need for a strong industry association may be reduced when the self-regulatory scheme has a ‘functional’ focus rather than institutional coverage. For example, a code of conduct that covers similar products or services regardless of the institutions that offer such products may provide a more commercial basis for membership than that which derives from a common industry perspective. That is, the common interest and commitment may be driven by a desire to meet appropriate market standards rather than the desire to meet the industry association’s requirements. Section 5.6 discusses the advantages of functional coverage in more detail.
3.3.3  **Wide industry coverage**

One of the basic lessons from self-regulation in Australian and abroad is that full industry coverage makes for more effective self-regulation. This may be easier to achieve in an industry with fewer and larger organisations as the problem of ‘free riders’ is less apparent.

Free rider problems can be of two broad types:
- Industry members may choose not to join the self-regulatory scheme at all. This can be a particular problem in those industries characterised by a large number of firms including many smaller firms or individual practitioners.
- Industry members may join the self-regulatory scheme, but choose not to properly adhere to the agreed rules.

In both cases the free riding firm may gain competitive advantages by enjoying the public benefits of self-regulation while not bearing its costs.

In some circumstances the first problem may be dealt with by ‘compulsory self-regulation’, and this is the approach the Government has taken in parts of the finance sector. For example, it is a compulsory requirement for securities and investments advisers to belong to an industry complaints resolution scheme. This retains much of the flexibility of self-regulation and ensures that in a diverse market, where the industry association does not have full industry coverage, that membership of a basic consumer protection mechanism is a requirement for all participants.

The second problem highlights the importance for self-regulation of public accountability and clear compliance mechanisms. That is, the free-rider problem will be largely reduced if the behaviour can be made visible and compliance is a meaningful requirement. Otherwise long term free-riding behaviour of this sort will cause the scheme to break down due to lack of credibility and public confidence.

In some circumstances, the existence of more than one code may ensure wider coverage if two industry groupings offer the same product or service. However, this will only be successful if the existence of multiple codes is cost effective for industry overall, does not result in confusion for consumers, and encourages higher standards.

3.3.4  **Competitive market**

Self-regulation is more likely to be effective in a competitive market, as it will lessen the risk of such regulation becoming an anti-competitive structure. However, this may also mean that the achievement of industry common interest can be more difficult.

3.4  **Changes in industry environment**
As with other forms of regulation, market developments and other changes in the industry environment can affect the conditions underpinning effective self-regulation. It is important to note that industry’s common interest changes over time like any other market development. If it declines then self-regulation may break down or become counter-productive, in which case other forms of regulation may be more appropriate. An example is where membership of an industry body no longer reflects higher professional standards but rather an anti-competitive barrier to entry, or where market convergence blurs the boundaries between different industry sectors.

The industry association needs to have the capacity to ensure that self-regulation is not simply fair weather regulation, which breaks down when:

- market conditions change;
- meaningful reforms are proposed;
- proper resources are required for the effective operation of the regulatory scheme;
- conflicts of interest arise between the aims of industry members and self-regulatory objectives;
- potential government or regulator intervention is not apparent; or
- there is low consumer uptake of new technology.
4. Characteristics of Effective Self-Regulation

4.1 Effective Self-regulation - Summary

The criteria for effective self-regulation are summarised below.

4.1.1 Clear Objectives Developed with Stakeholders

- The self-regulatory scheme should be designed to meet clearly identified regulatory objectives to improve market outcomes and address the main consumer problems in the market.

- The self-regulatory scheme should be developed in partnership between industry, the regulator and consumer organisations.

- The members must be committed to the success of the self-regulatory scheme.

4.1.2 Effective coverage

- Where relevant there should be a strong industry association backing the scheme

- The coverage of the self-regulatory scheme should be as broad as possible

- Functional coverage should be considered to ensure consistent regulation across similar products and services.

4.1.3 Accountability, Compliance and Enforcement

- The self-regulatory scheme must encompass effective compliance monitoring and enforcement mechanisms.

- The self-regulatory scheme must be underpinned by effective and efficient dispute resolution processes.

- There should be adequate education of scheme members regarding their obligations.

4.1.4 Integration into the Regulatory Framework

- The scheme must be effectively integrated into the regulatory framework. The scheme should operate harmoniously with the law, the regulator’s policies and with other self-regulatory schemes; that is it should should complement other forms of regulation in the industry.
4.1.5 Promotion and Review

- The self-regulatory scheme should be properly promoted (this ensures that consumers are aware of the existence of the scheme and the mechanisms for lodging inquiries or complaints);

- The self-regulatory scheme should be regularly and independently reviewed for efficiency and effectiveness. This should involve input from all stakeholders.

4.2 Clear Objectives Developed with Stakeholders

4.2.1 The identification of regulatory objectives

The self-regulatory scheme should have clear objectives designed to address consumer problems in the marketplace and improve market outcomes. At a general level, any self-regulatory scheme should aim to improve market outcomes by:

- promoting honesty and fairness in trading;
- enhancing the efficient operation of markets by:
  - clarifying rights, obligations and standards appropriate to the industry
  - providing machinery and procedures to remove pre-purchase uncertainty and resolve disputes; and
- make businesses and consumers better informed

These objectives are consistent with the aims set out in the ASIC Act set out in Section 2 of this submission.

At a more detailed level the regulatory outcomes or objectives may vary from scheme to scheme depending on the nature of the industry and the specific legislative requirements applying to that industry.

As an example, raising professional standards is a key area where ASIC sees a continuing role for professional bodies in encouraging higher level individual and organisational competencies and promoting a culture of compliance:

- to assist industry participants to comply with the law;
- to promote industry professionalism by setting out ‘best practice’ standards or ethical standards that go beyond what is set out in law; and
- to set up barriers to entry for industries with the positive objective of ensuring appropriate minimum standards.

Various options for achieving the identified regulatory objectives should be considered. Industry, consumer organisations and the regulator should work together to determine the best or preferred option for achieving the identified regulatory outcomes or objectives and to ensure that the scheme is workable in practice.
The form of self-regulation should also be appropriate to the objective. Broadly speaking there are two options:

- **formal self-regulation** - ie self-regulatory schemes which are enforceable (ie binding on industry participants through contractual arrangements. Much of this submission focuses on these schemes;

- **informal regulations** - ie various other informal types of self-regulatory arrangements which are not binding. These include, for example, guidelines on various aspects of disclosure as developed by the Financial Planning Association (risk disclosure) and the Investment and Financial Services Association (disclosure of management charges).

### 4.2.2 Partnership between industry, the regulator and consumer organisations

ASIC supports the proposition in the CLERP 6 Consultation Paper that self-regulation should be developed in partnership between industry, the regulator and consumer organisations. We note that this principle has been re-stated elsewhere by the Minister for Financial Services and Regulation (eg in the foreword to the Policy Framework for Consumer Protection in Electronic Commerce, October 1999).

While the primary impetus for self-regulation may come from any one of these three parties, it is important that all three parties are involved in, and committed to, the development of the self-regulatory scheme to ensure that the scheme takes into account and balances the needs and interests of consumers and industry. The involvement of all three parties ensures that the objectives of the scheme are understood and accepted by all parties.

An industry which is not committed to self-regulation (for example, because it has a disparate membership or one which does not have a strong industry association) is unlikely to develop an effective scheme.

### 4.2.3 Consumer and Community Organisations - Resources and Input

ASIC also notes that consumer organisations will require access to sufficient resources if they are to contribute effectively to the process of developing self-regulatory schemes.

Consumer interests are typically diverse and highly dispersed in comparison to industry interests. Because of this it will usually be more difficult for consumers to independently generate sufficient resources and expertise to provide effective input to the full range of self-regulatory mechanisms without additional assistance. Importantly, such input is required not only during the development of self-regulatory mechanisms, but also during the ongoing life of such mechanisms to ensure adequate accountability, appropriate independence and continuing relevance.

It may be appropriate at times for industry and/or regulators to fund focus group or other direct consumer research. This may be important to establish, for example, the visibility
of particular self-regulatory mechanisms. It should, however, be noted that such direct research is a complement rather than a replacement for more expert consumer or community input.

ASIC notes that, in practice, several existing self-regulatory arrangements have benefited considerably from the consultation process between industry, consumer organisations and government in their development. Examples include the complaint resolution schemes for the general insurance and life insurance industries and the EFT Code.

4.2.4 Support from stakeholders

The objectives of the self-regulatory scheme must be understood and accepted by all stakeholders. Self-regulation is generally more effective when it has widespread support. Credibility is crucial to the success of such schemes.

In particular, the members of the scheme must be committed to the success of the self-regulatory scheme. Self-regulation will usually be easier to establish is there are industry leaders who are prepared to promote schemes and educate industry members.

Industry ‘ownership’ is, however, a concept that has both advantages and limitations.
- It is important to have a level of industry commitment to self-regulation that ensures genuine compliance with the requirements of the self-regulatory scheme, a willingness to consider and participate in ongoing reform processes, and a desire to publicly promote the self-regulatory mechanism.
- On the other hand, industry ownership should not lead to the establishment of unwarranted, anti-competitive barriers to entry, or become a catch-cry used against reasonable reform proposals or public accountability.

Ensuring that the right balance of industry interest is achieved will be one of the keys to the success of any self-regulatory mechanism, and is an important role for a mature industry association. Given the importance of tripartite involvement in the development of self-regulation, ASIC believes the term ‘industry commitment’ better reflects in the role of industry members than ‘industry ownership’.

4.3 Effective industry coverage

A well established industry association, with wide membership coverage and the willingness and resources to monitor, enforce and publicise self-regulatory mechanisms will ensure better self-regulation. Alternatively, self-regulation that is functionally based may ensure better coverage without being so reliant on a single strong industry association. These issues have been discussed more fully in Section 3.

4.4 Accountability, Compliance and Enforcement
4.4.1 Overall importance

The requirements set down in an industry code should be underpinned by effective compliance monitoring and enforcement mechanisms. Effective compliance monitoring and enforcement is essential in order to:

- ensure the objectives of the self-regulatory regime are met;
- maintain confidence in the self-regulatory regime;
- ensure that the self-regulatory regime is fully accountable for its performance.

The consequences of inadequate enforcement in an industry such as the financial services industry can be serious. The industry is heavily dependent on consumer confidence - if consumers suffer financial losses due, for example to intermediary misconduct in contravention of the requirements of a self-regulatory scheme, the reputation of the Australian financial markets may suffer. Accordingly, we consider that it is essential that self-regulatory schemes are underpinned by effective sanctions.

Codes of conduct should specify the compliance monitoring and enforcement mechanisms for the scheme. The respective roles and responsibilities of the independent scheme administrator (if there is one), consumer organisations and the regulator in relation to compliance monitoring and enforcement should be made clear in the code. Compliance should relate to both the substantive requirements of the code (ie requirements relating to conduct towards consumers) as well as compliance by member firms with complaints handling obligations.

Key elements of effective compliance monitoring and enforcement are:

- the willingness of the scheme administrator (if there is one) to effectively sanction non-compliance with the code;
- adequate training of staff (ie compliance officers in individual firms, staff in scheme administrators and staff in external complaints resolution schemes);
- the effectiveness of the external complaints resolution scheme.

There should be the capacity for the suspected contraventions of the law or licence conditions to be referred to the regulator.

In order to ensure accountability, details of the scheme's compliance and enforcement program should be made available to government, the regulator and consumer organisations.

4.4.2 Compliance Monitoring:

The compliance monitoring mechanisms should be tailored to the particular scheme's circumstances. In some cases the regulator may fulfil the role of compliance monitor. In
this regard note that ASIC currently monitors compliance with the various Banking Codes.

The appropriate compliance monitoring mechanisms will depend on the identified regulatory outcomes and the nature of the particular industry sector. There are various possible methods of monitoring compliance, including:

- the internal controls of the individual firm (i.e., the member of the approved code of conduct);
- annual reporting on compliance;
- independent monitoring;
- an external compliance audit;
- the regulator.

### 4.4.3 Enforcement

The Code should set out the possible sanction options which apply in the event of a breach. The enforcement options should be contractually binding on members of the code. Depending on the scheme, these contractually-based enforcement options should be enforceable either by the consumer (i.e., via rights which may be enforced using the relevant external complaints resolution scheme or the courts) and/or by an independent scheme administrator.

It will generally be desirable for the scheme to provide for a range of enforcement options, depending on the nature of the breach.

### 4.4.4 The requirement for scheme members to belong to a complaints resolution scheme

ASIC considers that self-regulatory schemes must be underpinned by effective and efficient dispute resolution processes. These processes are essential to ensure that dissatisfied consumers have access to cost-effective mechanisms for resolving their complaints about the conduct of members of the code. The formal legal system involving court litigation is not designed to provide quick and cheap complaints resolution.

Accessible and effective complaints resolution mechanisms serve to buttress consumer confidence. They can also provide benefits to business, for example, by enabling industry to identify and address systemic consumer problems, thereby maintaining consumer confidence and avoiding the need for government intervention.

Effective and efficient dispute resolution processes encompass two elements:

- **Internal.** A requirement for the members of the relevant industry code to have adequate internal processes for dealing with complaints relating to the code. For this
purpose, the internal process should be consistent with the Australian Standard for internal complaints handling (ie AS 4269 1995, Complaints Handling); and

- **External.** A requirement for the members of the relevant industry code to belong to an independent external complaints resolution scheme which satisfies the DIST (Department of Industry, Science and Technology) Benchmarks and, in the case of the finance sector, ASIC’s Policy on Complaints Resolution Schemes (PS 139).

Where an industry code of conduct is submitted for formal regulator approval, the approval process should encompass an assessment of the code’s external complaints resolution mechanisms. (This is currently a requirement for ASIC under the codes approval power under s12FA of the Australian Securities and Investments Commission Act). In deciding whether to approve industry codes, we propose to assess the relevant external compliant resolution mechanisms in accordance with the principles set out in Policy Statement 139.

### 4.5 Integration into the Regulatory Framework

#### 4.5.1 Integration of self-regulatory schemes into the regulatory framework

It is essential to ensure that self-regulation is properly integrated into the regulatory framework. That is:

- the scheme must operate harmoniously with the law and government policies; and
- the scheme must operate harmoniously with other self-regulatory schemes.

Integration is particularly important in the financial services industry. The proposed financial services regulatory framework (under CLERP 6) will impose various obligations on all industry participants (eg the requirement to hold a financial service providers' licence and to comply with certain conduct of business requirements). Self-regulation in the financial services sector will, therefore, be complementary to legislative requirements. This marks an important point of difference between the financial services industry and some other industries where there is be little or no legislation or government regulation relating to consumer protection (apart from the Trade Practices Act regime).

Self-regulation that is not properly integrated into the existing regulatory framework may be ineffective and in some cases harmful because it is inconsistent with the requirements of the law and because it creates confusion for industry participants or consumers. It may generate gaps and overlaps, while failing to allow for the proper identification of industry risks and problems. The failure of self-regulation in this way was a key reasons for the recent restructuring of financial regulation in the UK (see for example Chin, 1999).

The various self-regulatory schemes should not produce inconsistent levels of consumer protection, that is, there should be a presumption that the various schemes should regulate the similar functions (business activities) in broadly the same way.
4.5.2 Risk Identification

A vital role that self-regulation can play in the broader regulatory environment is to identify emerging industry risk areas. In doing so self-regulation can serve to alert industry to potential problems before they actually materialise in market misconduct.

Such risk identification can also assist regulators and Government assess where they can pro-actively target their activities to minimise industry wide compliance problems, or to identify emerging policy problems.

The failure to help identify some major market risks and mis-selling problems was another reason why the UK self-regulatory regime is regarded by some commentators as having being unsuccessful (Chin 1999).

4.5.3 Integrating self-regulation and the role of the regulator

The involvement of the regulator in the development of a self-regulatory scheme is essential because the regulator will be in a very good position to assess whether the scheme will operate harmoniously with the law, the regulator’s policies and other self-regulatory schemes.

To ensure integrated self-regulation it would be desirable for the regulator to have the capacity to modify the law (ie to grant exemptions from the licensing, conduct and disclosure requirements of the law). At present, ASIC has the capacity to modify some areas of the law, but not the licensing and intermediary conduct requirements. If the regulator does not have this capacity, it may sometimes be difficult to avoid regulatory duplication or overlap. For example, it may be appropriate in some circumstances for ASIC to grant relief from certain intermediary conduct rules set out in legislation for market participants who are members of a regulator-approved code of conduct.

4.5.4 Cross sectoral issues - competition and privacy

In developing a self-regulatory scheme it will be necessary to consider some regulatory issues which transcend the responsibility of the industry regulator. In the case of financial services these include competition issues and privacy issues. Where a code is submitted for approval it may be necessary for the ASIC to liaise with other relevant regulators in relation to these issues as part of the code approval process. (In relation to competition issues, for example, it may be appropriate for ASIC to liaise with the ACCC in a manner similar to that adopted under the ASIC-ACCC Memorandum of Understanding in relation to the examination of market rule amendments).

4.6 Promotion and Review

4.6.1 Promotion
The self-regulatory scheme should be adequately promoted. This ensures that consumers are aware of the existence of the scheme and the mechanisms for lodging inquiries or complaints.

Adequate promotion in which ASIC believes there is considerable room for improvement in finance sector self-regulation. For example, reviews of ADR schemes indicate that consumer users are skewed towards higher income, urban and higher educated backgrounds, which suggests that better communication with a wider cross-section of the community may be necessary.

4.6.2 Scheme Reviews

Self-regulatory schemes should be regularly reviewed for efficiency and effectiveness. Such reviews are essential to deal with market changes due to innovation and other forces which can rapidly lead to out-of-date regulation.

Reviews of individual schemes are usually best conducted by an independent consultant in consultation with the stakeholders involved in the development of the scheme (ie industry members, consumers organisations and the regulator).

There are two pre-requisites to effective reviews:

- **Information-sharing** - ASIC considers that appropriate and relevant information about the operation of the scheme should be shared between industry, consumer organisations and the regulator. This will include information relating to compliance monitoring and enforcement and consumer inquiries and complaints.

- **Resources** - ASIC notes that consumer organisations may at times require access to resources if they are to effectively participate in reviews of the operation of self-regulation.

Scheme reviews should be undertaken at least once every three years. This should encompass the content of the code and the operation of the external complaint resolution scheme (refer to paragraphs 92 to 94 of Policy Statement 139).

It is desirable that reviews are publicly conducted wherever possible.

Less regular cross-scheme reviews or special reviews will also be important tools to ensure the continuing effectiveness, accountability and relevance of self-regulation.
5. The coverage of self-regulation: functional and institutional regulation

This section focuses mainly on the coverage of alternative dispute resolution schemes in the finance sector, as it is in this area that issues of coverage have received most attention in recent regulatory debates. This focus also has direct relevance for a consideration of industry codes of conduct, as ADR schemes are generally linked to a code of conduct.

5.1 ADR arrangements in the finance sector

5.1.1 Existing ADR Schemes

ADR schemes in the finance sector include:

- Australian Banking Industry Ombudsman (ABIO)
- Insurance Enquiries and Complaints (IEC)
- Insurance Brokers Dispute Facility (IBDF)
- Credit Union Dispute Reference Centre (CUDRC)
- Financial Industry Complaints Service (FICS)

The Financial Services Complaints Resolution Scheme (FSCRS) has recently merged with FICS.

There is also a statutory ADR scheme, the Superannuation Complaints Tribunal, which is based in Melbourne.

5.1.2 Potential additional schemes

Several schemes that have not yet been formally established have recently applied for approval under ASIC Policy 139 to cover managed investments. At the moment three industry bodies have submitted schemes for approval, while another body has expressed interest in applying.

It may also be worth noting that the Financial System Inquiry recommended the establishment of a scheme to cover Finance Companies (recommendation 17). This has not been implemented.

5.1.3 Other ADR arrangements

There is also a range of what might be termed ‘external ADR arrangements’ in some industries - these cannot really be classified as proper ADR schemes, but they go beyond internal dispute resolution. Some of the industries in which such arrangements exist have indicated that they will be looking to establish schemes or join other schemes once CLERP 6 is in place.
The industries in which such arrangements exist include:

- Building Societies
- Credit Unions outside of CUSCAL membership
- Accountants

5.2 Overlaps in the ADR sector

5.2.1 Financial Advice and Managed Investments

Until recently the two schemes approved under PS 139, FICS and FSCRS, had a very substantial degree of overlap in the area of complaints about licensees who provide investment advice to retail investors and about responsible entities of managed investment schemes.

These schemes were recently merged, and will now operate under the FICS banner. This was in part driven by the requirements set out under PS 139. ASIC welcomed this merger as it will deliver cost savings to industry and more consistent complaints handling for consumers. We will be assisting the transition process wherever necessary to ensure consumers and industry members are not disadvantaged.

Note that there are several other bodies seeking approval for schemes to cover managed investments. Should these schemes satisfy the approval requirements then there will be overlap in this area.

5.2.2 Banking and Credit

There is jurisdictional overlap between schemes operating in the finance sector in relation to credit and deposit taking. There are currently three schemes/systems that consider complaints about credit providers and related entities (ABIO, CUDRC and the Australian Association of Permanent Building Societies ADR arrangement) with another scheme under consideration by the Mortgage Industry Association. Note that the overlap here exists in relation to the products and services offered (eg home loans) rather than the institutions.

5.2.3 Life and General Insurance

There is also potential jurisdictional overlap in the insurance area. For example, overlaps exist between the insurance brokers scheme (IBDF) and both the life insurance scheme (FICS) and particularly the general insurance scheme (IEC).

5.4 Gaps
Gaps in the coverage of formal ADR schemes in the finance sector arise in relation to:

- Credit (Finance Companies, Building Societies and some Credit Unions)
- Accountants (although accountants that provide financial advice are required to be members of an ADR scheme)
- Real Estate Investments other than Real Estate Managed Investments
- Some ‘transaction only’ activities (eg on-line share-broking services)
- Some cross-border financial services

ASIC does not believe that all these areas need immediate coverage, but rather that consideration should be given as to whether the absence of coverage by ADR schemes is a reflection of a lack of market problems or because of the difficulties in establishing schemes in such areas.

5.5. Multiple scheme membership

A related issue to scheme overlap is that financial institutions may be members of more than one code and ADR scheme, and for larger financial institutions this can extend to three of four. For example, different subsidiaries of the larger banks may belong to several codes as well as the ABIO, IEC and FICS (and previously the FSCRs).

This a key reason why several larger institutions, notably AMP and NAB, argued for a single ADR scheme in the finance sector in their original submissions to the Finance System Inquiry. This was also a key driver for the establishment of FICS and the recent merger with FSCRs.

To the extent that schemes continue to operate along sectoral or industry lines (eg general insurance, life insurance and managed investments, banking) the requirement to join an approved scheme means that there will be circumstances in which participants are members of more than one scheme. For example, a bank that is a member of the ABIO will be required to join an approved scheme (currently FICS) in respect of its retail advisory activities.

5.6 Institutional vs Functional Regulation

The above discussion leads to a consideration of the basis upon which self-regulation should establish its coverage. Here there may be a tension between the membership (institutional) coverage of the relevant industry organisation vs the desirable product/service (functional) coverage of the regulatory scheme. If the two types of coverage are substantially different then self-regulation may not be appropriate in that particular instance.

The Financial System Inquiry pointed the way towards a more functional approach to regulation in the finance sector in preference to a previous emphasis on institutional regulation. That is, regulation should desirably treat similar products in a similar
fashion, and not differentiate between functionally identical products just because they are provided by different institutions. This is particularly important in a marketplace characterised by industry convergence, and it also serves to facilitate competition. Industry preference for a more consistent and harmonious regulatory structure was one of the key drivers underlying this approach to regulation.

The same issue confronts those developing self-regulation - whether the scheme should be structured along institutional or functional lines. In some areas industry self-regulation is one of the remaining bastions of institutional regulation.

In practice the institutional basis of most self-regulatory schemes in the finance sector has contributed to a proliferation of self-regulatory organisations with substantial degrees of functional overlap but with inconsistent approaches and standards. Industry, consumer organisations and government have all at times expressed concerns over this fragmentation (see for example various submissions to, and the final report of, the Financial System Inquiry). An example is the coverage of consumer credit. As outlined above, there are currently three industry codes and related dispute resolution schemes covering credit, with at another scheme for the mortgage industry being developed. However, there is not complete coverage of consumer credit, as there is no scheme covering finance companies.

Functional coverage may offer advantages in self-regulation. It allows for a more consistent approach and will ensure that gaps in coverage are largely eliminated. Furthermore, as mentioned above functional codes may not have to rely so heavily on the activities of a key industry association, but can ensure membership through incentives such as quality assurance branding.

ASIC of course does not rule out institutionally-based self-regulation. Institutionally based self-regulation may be appropriate where a strong industry association can more effectively manage the regulatory scheme and has sufficient coverage. Functional regulation may be more difficult to achieve in some areas because there is a persistent difference, perhaps based on competitive marketing issues, between relevant sections of the one industry, even if the product is functionally similar. However, these arguments need to take into account the costs and benefits for the industry as a whole, not just the industry organisation. It is important that the structure of self-regulation is flexible and does not become the site of institutional empire building that will prove costly for industry members.

Self-regulation organised along functional lines should, therefore, be seriously considered when it meets consumer protection objectives and where it helps ensure that industry obtains the benefits from economies of scale that arise from broader based schemes with rationalised coverage. This approach would be consistent with the Financial System Inquiry approach of fostering functional regulation. A practical discussion of this issue is set out below in the discussion of ADR scheme rationalisation.
6. **Self-regulation: scheme proliferation and rationalisation**

6.1 **Problems with proliferation**

ASIC readily acknowledges the major contribution that the growth of effective self-regulatory mechanisms have made to consumer protection in the finance sector. However, this is now a more mature sector, and we doubt that the increasing number of external dispute resolution services and codes of conduct is likely to result in more cost-effective consumer protection and market improvement.

While this section focuses on ADR schemes, we note that this discussion is not restricted to this particular form of self-regulation, and many of the same arguments apply to codes of conduct. In some instances the arguments are even stronger in relation to codes, as the potential for consumer confusion can be greater if there are inconsistent standards of conduct between different institutions offering the same product. We note that the Government has also stated a commitment to assessing the standards of codes and encouraging the consolidation of codes ‘to produce fewer but better codes’. (A Fair Deal: Coalition Consumer Affairs Policy).

ASIC considers that a proliferation of compliant resolution schemes may result in:

- greater costs for industry due to diseconomies of scale;
- greater costs for industry due to gaps and overlaps in complaint scheme coverage;
- inconsistent treatment of disputes by the various external schemes;
- consumer and industry confusion;
- regulatory uncertainty and increased costs for regulatory agencies

ASIC also observes that to encourage a proliferation of schemes would be inconsistent with international trends (eg refer to the Financial Services Ombudsman Scheme in the United Kingdom and the proposals in the Canadian Task Force Report on Financial Services, pp.136-140).

The problem of consumer confusion associated with a proliferation of schemes may be overcome, to some extent, by implementing a referral centre (such as the Financial Complaints Referral Centre, operated by ASIC). However, referral centres can overcome the problem of consumer confusion only to a certain degree. It has been shown that consumers are far more likely to fail to pursue a complaint where they are required to proceed through several stages in order to determine the appropriate scheme for their particular complaint (SOCAP study of complaints behaviour undertaken by TARP consultants).

6.2 **Benefits of Rationalisation of Self-Regulation**
Benefits from a more rationalised self-regulation include

- Rationalised schemes will benefit from lower costs overall by virtue of the economies of scale arising from a single budget (e.g., for administration, property and marketing) that would otherwise have to be generated for several schemes. These lower costs can be passed on to industry members.

- For those financial institutions that belong to multiple schemes, a reduction in the number of schemes covering similar products may result in lower costs.

- Consumers would benefit through a less confusing and better promoted ADR system.

- Industry confusion would also be reduced. This may also help honest firms as free-riding behaviour may be easier to detect as there is less structural confusion.

- Consistency and harmonisation of self-regulation would be easier to achieve, and appropriate minimal standards may be easier to achieve.

ASIC doubts that it would generally be efficient or practicable to combine dispute resolution mechanisms relating to codes for financial services industry participants with dispute resolution mechanisms operating in other industries.

5.3 **Models for the structure of self-regulation in the finance sector**

ASIC is not proposing a preferred model for a rationalised self-regulatory structure in the finance sector. Rather, we believe this is an area where further study is required.

In particular, ASIC is not advocating the establishment of a single Ombudsman scheme along the lines of the UK scheme. Rather, ASIC acknowledges that there are several possible outcomes to a process of rationalisation of ADR schemes, and that more discussion of this issue is warranted.

A "one-size-fits-all" approach to self-regulation in the financial services industry would not be appropriate given the diversity of industry participants and regulatory issues in this industry and given the rapidly changing nature of the industry. Thus whatever the outcome the existence of some legitimate differences between different segments of the finance sector is important.

One possibility is a move towards three broad based ADR schemes, based on:

- banking and credit
- life insurance, investments and financial advice
- general insurance
This would still necessitate multiple scheme membership on the part of some larger institutions, but would clearly focus ADR self-regulation into the three areas where there appear to be legitimate ongoing differences in products and services.

It may be useful to have this issue given greater consideration through an independent study. ASIC would support the commissioning of such a study.

6.4 Market and Regulatory pressures for rationalisation

6.4.1 General Pressures

There will inevitably be some pressure for further rationalisation as:
• convergence continues to occur in the finance sector, generating pressure for the merger of codes and ADR schemes;
• membership of an approved scheme becomes mandatory for an increasing number of industry participants; and
• existing complaints resolution schemes are subjected to consideration under PS 139.

The announcement of the FICS/FSCRS merger is a clear indication of pressures for rationalisation.

The CLERP 6 requirements for ADR membership is also likely to be a key driver of rationalisation and is already being incorporated into the planning of various industry bodies. Rationalisation will also be encouraged if Government and industry support proper standards such as the DIST benchmarks and the ASIC approval process, as these mechanisms serve to discourage the establishment of marginal schemes that have difficulties in meeting minimal standards.

Whether there should be more formal pressure for rationalisation is an issue that requires further consideration, and as noted ASIC would support a study of this issue.

6.5 Possible costs of scheme rationalisation

6.5.1 Competition

Some industry members have suggested that competition may be reduced. ASIC does not believe this is a meaningful objection to code or ADR scheme rationalisation, as it confuses industry competition with competition between codes and ADR schemes. While ASIC is obviously keen to facilitate industry competition in the finance sector, we believe that competition between ADR schemes is not productive, and that the fragmentation of codes of conduct and ADR schemes may actually be one of the detrimental outcomes of what is otherwise healthy industry competition. The benefits of competition, such as lower overall costs and better quality service, are obtained through other mechanisms.
Relevant issues on this point include:

- **Competition** between multiple ADR schemes is not the same as competition in normal product markets. ADR schemes are ‘not for profit’ organisations and are alternatives to _courts_ and, like courts, do not face the same competitive incentives that arise in normal markets. As an example, consumers do not typically purchase products based on their assessment of the quality of the associated dispute resolution scheme that they may have to deal with in several years time should they unfortunately have a dispute with the company. Competition between ADR schemes can actually have perverse effects such as forum shopping, empire building, diseconomies of scale and bias in decision making.

- There is no apparent correlation between reduced industry competition and the existence of one or several industry ADR schemes. Industry competition is clearly determined by a range of other factors.

- Unlike normal markets, the volume of business of ADR schemes is not driven by the scheme’s performance, but is rather a by-product of the scheme’s coverage and the industry’s overall performance in dealing with customers. Thus the quality and cost of dispute resolution provided by a scheme will bear no simple relationship to the ‘business’ coming through the door.

- Experience in the finance sector has shown that cost pressures and service standards in ADR schemes are not regulated via competition but by economies of scale and an effective governing body that balances the interests of industry (who are interested in constraining costs given appropriate standards) and consumers/investors (who are interested in ensuring effective service and profile).

### 6.5.2 Institutionally based schemes

Schemes set up by individual firms have been suggested as an alternative model. For example, large institutions could set up their own ADR schemes or codes. While this may solve the problem of multiple scheme membership for a few large organisations, ASIC believes that this is not a solution to problems in the ADR sector. This approach would increase fragmentation, and the schemes would face significant credibility problems. Further, such an approach would possibly result in a ‘two tier’ structure, whereby large firms had their own ADR systems, while smaller firms belonged to less well resourced external schemes.

Firms need to have sound internal dispute resolution procedures in place, but this not the same as establishing effective industry self-regulation. Interestingly, the closest overseas example to this model overseas is in Canada, where there is an ‘internal ombudsman’ in each large bank. However, there is still an external ombudsman scheme that covers the banking sector and whose coverage may become wider as a result of the Canadian finance sector inquiry.

In relation to codes, in Australia we have seen welcome initiatives such as AAMI’s Customer Charter, but AAMI also belongs to the industry code and ADR scheme.
6.5.3 Less industry ownership

Industry members have observed that inappropriate rationalisation may lead to a loss of ‘industry ownership’ and therefore commitment in some schemes.

ASIC believes that industry commitment is a desirable feature of most industry schemes. Regular consultation with industry members in the ongoing development of self-regulation will help ensure the continuation of this commitment. However, it is also important that higher levels of industry ownership be balanced against the desirability of regulatory reform.
7. Financial Complaints Referral Centre

7.1 Background

One of the concerns identified during the Financial System Inquiry was that consumers in the finance sector might not be adequately informed, or might be confused, about how to pursue and resolve complaints about their financial service providers.

This confusion was thought to result from a number of factors including the increasing convergence of financial services and products, the proliferation of alternative dispute resolution (ADR) schemes in the finance sector and the relatively low profile of some of these schemes.

Recommendation 25 of the FSI Report formalised these concerns stating that:

“(the regulator) should facilitate the creation of a central complaints referral service for all consumer of financial products and services, funded by retail financial service providers on a cost recovery basis.”

In response to this recommendation, ASIC accepted responsibility for the development of a central referral service within the forum of the Complaints Scheme Roundtable (Roundtable).

During 1997, a number of models were considered by a Roundtable working party for the operation of a central referral service. The options considered were a fully staffed call centre, an interactive voice response system and a hybrid model. It was resolved that a staffed service, the Financial Complaints Referral Centre (FCRC), should be built upon the existing infrastructure of ASIC’s Infoline on a trial basis.

7.2 The operation of the FCRC

The FCRC commenced operations on 26 February 1998. It operates effectively as a portal to the ADR sector. FCRC staff do not give advice about the resolution of complaints. They advise callers to refer their complaints to the relevant service provider in the first instance and provide contact details for any appropriate ADR scheme(s) if deadlock is reached.

During its development, industry stakeholders expressed reservations not only about the actual demand for a central gateway, but also that the promotion of the FCRC might detract from the efforts of the ADR schemes to effectively promote themselves, therefore detracting from industry’s sense of ownership of the established dispute resolution processes.

There was also strong resistance from existing ADR schemes to devoting significant resources to the establishment and operation of a central gateway without detailed
evidence that there was a sufficient level of demand for the service. In all of these circumstances, the FCRC has therefore not operated with a budget commensurate with a high public profile.

7.3 Volume of queries

The operations of the FCRC were reviewed by ASIC in late 1998, after approximately 9 months of operation. This review found that the FCRC was receiving approximately 17 calls per day, which equated to approximately 4,700 calls per year. Of these 5.5 calls per day were being referred to the industry-funded complaints schemes.

For the purpose of comparison, the two largest industry ADR schemes - the Australian Banking Industry Ombudsman and the Insurance Enquiries and Complaints - each receive between 45,000 to 50,000 telephone contacts per year.

Following this review, ASIC decided that it would operate the FCRC for another 12 months (that is, until 26 February 2000). This decision was based on the relatively short period in which the first review was conducted, and the time-lag associated with advertisement of the FCRC in the various telephone directories.

The number of calls received by the FCRC subsequent to this first review remained fairly static at around 25 calls per day, of which around 6 are referred to complaints resolution schemes. Whilst these statistics do not generally support the view that there is a substantial pool of consumers who do not know where to go about their complaint, they may also reflect a lack of public recognition about the existence of the FCRC. In effect the FCRC was not established in such a manner to properly test the proposition that some consumers do not know where to go with complaints.

7.4 Conclusion

The FCRC was established primarily to address concerns about consumer awareness. And given its relatively low public profile, the level of contacts that it has received is not surprising. The FCRC was not, however, intended to act as a driver for harmonisation or rationalisation in the ADR sector. Nor was it intended to generate economies of scale by creating a central service that would replace the referral services already provided by existing ADR schemes. It is not the solution to the problem of scheme proliferation. Rather, it has a more modest aim of helping to address consumer information problems.

The operation of the FCRC out of ASIC’s Infoline has resulted in internal efficiencies at a time when Infoline staff were being trained on the handling of complaints and enquiries in ASIC’s new jurisdiction. This is because the referral of complainants to those ADR schemes dealing with general and life insurance, superannuation and banking is a role that Infoline would have played in any event, and that it will continue to play in the future.
ASIC is currently reviewing the operations of the FCRS so as to allow a decision on how and/or whether it will operate in the future.
8. The Role of the Regulator

8.1 Overview

In order to ensure effective self-regulation it is essential that the regulator has the capacity to work with industry and consumer organisations to produce effective self-regulation. This will encompass some or all of the following:

- promoting the development of self-regulatory schemes where appropriate;
- assisting in the process of developing schemes - this will include providing information and advice designed to ensure that the schemes are properly integrated into the regulatory framework, that they operate harmoniously with each other and that they addresses relevant regulatory issues;
- approving codes of practice;
- approving compliant resolution schemes;
- in some cases, monitoring compliance with the code;
- enforcing the law (ie where there is an alleged or suspected breach of the law by a scheme member);
- working with industry to rationalise existing schemes and arrangements where this would be likely to achieve more cost-effective self-regulation;
- assisting in the process of reviewing the operation of self-regulatory schemes, which may lead to alterations to the scheme or to other regulatory responses (eg regulator-issued standards to law reform recommendations).

It is very much in the regulator’s interests to help ensure that self-regulation is effective. ASIC relies on self-regulatory mechanisms, in particular ADR schemes, to handle many complaints and deal with many individual industry matters that it cannot deal with on a day to day basis.

8.2 Adding Value

As outlined in Section 4, the regulator is in an ideal position to assist in the development of self-regulation and to ensure that it is appropriately integrated into the regulatory framework. ASIC has had extensive experience in dealing with a range of self-regulatory mechanisms that can be brought to bear during the consideration of any self-regulatory scheme.

8.3 Approval role

Self-regulatory schemes may be submitted by industry to the regulator for approval. This should encompass a power to impose conditions on approval of a code and to revoke approval of a code. This is consistent with the powers already vested in ASIC under s12FA of the Australian Securities and Investments Commission Act. ASIC would envisage approving codes where they satisfy the characteristics for effective self-regulation.
regulation set out in this submission. (Note that ASIC may take the presence of a self-regulatory scheme into account in its regulatory activities even where a code is not submitted for formal approval. ASIC may, for example, recognise the presence of an effective self-regulatory scheme in its own surveillance activities. Also, it may grant relief from the law, partially in reliance on industry self-regulation. In this regard, refer to the role of self-regulation in ASIC Policy Statement 85 (Cattle Breeding) and Policy Statement 144 (Mortgage Investment Schemes)).

8.4 Intervention when self-regulation is not working

The capacity for timely regulator intervention is especially important in the case of financial services because the industry is heavily dependent on consumer confidence. If the regulator does not possess the power to intervene in a timely fashion in the case of market failure, consumer confidence in the integrity of the Australian financial markets may be compromised.

ASIC will take into account effective self-regulation in targeting our surveillance and compliance activities. If self-regulation is not working, we may wish to make the industry area of market practice an surveillance and/or enforcement priority. This can happen in two ways:

- where the code interprets the law, ASIC may focus on enforcing the relevant law; or
- where the code deals only with best practice issues, we may wish to look more closely at the activities of the industry, as poor market conduct in one area is a typical risk indicator of potential problems in other areas.

ASIC considers that the presence of appropriate intervention powers vested in the regulator is likely to minimise the risk that market failure will arise from insufficient enforcement. We consider that the regulator's power of intervention should include the power for the regulator to issue its own legally-enforceable standards (this could be implemented, for example, via the power to impose conditions on classes of financial service providers' licences). It should also include the power to revoke approval of an industry code where the self-regulatory scheme is failing to achieve its identified outcomes. We note that the Financial System Inquiry recommended that the regulator possess these powers.
9. REFERENCES


Appendix 1

ASIC Act - Section 12FA

SECTION 12FA INDUSTRY CODES TO BE APPROVED BY COMMISSION

12FA(1) [Industry standards and codes of practice] The Commission has the function of monitoring and promoting market integrity and consumer protection in relation to:

(a) the Australian financial system; and
(b) the provision of financial services.

Without limiting paragraph (b), the Commission has the function of promoting the adoption of, and approving and monitoring compliance with, industry standards and codes of practice (including standards and codes in relation to the resolution of disputes between the providers of financial services and consumers).

12FA(2) [Alternative dispute resolution] The Commission must not approve an industry code under subsection (1) unless the Commission is satisfied with the procedures for alternative dispute resolution, having had regard to any of the following guidelines:

(a) they do not permit a complaint or dispute to be considered unless it has first been lodged with the relevant scheme member and:
   (i) has been resolved by the scheme member, but not to the satisfaction of the complainant; or
   (ii) has not been resolved by the scheme member and 90 days have elapsed since the complaint or dispute was lodged;

(b) they provide for any systemic, persistent or deliberate conduct to be reported to the Commission;

(c) they operate free of charge to the complainant;

(d) they cover a sufficiently broad range of complaints, with the terms of reference of the scheme to be determined after consultation with consumer organisations and the Commission;

(e) they provide for independence from the parties to the complaint;

(f) they are overseen by a body which includes consumer representation (appointed or approved by the Minister with responsibility for consumer affairs) and a person appointed by the Commission;
(g) they accord with the principles of natural justice (including that information used by the decision-maker is provided to the complainant unless prohibited by law, and that reasons for decisions are given in writing);

(h) they provide for decisions to be made by reference to what is fair in all the circumstances, observing applicable law and relevant judicial authority and having regard to good practice in the relevant industry;

(i) they have appropriate published procedures, including suitable standards of timeliness;

(j) they include arrangements for appropriate promotion of the procedures;

(k) they are supported by adequate resources, including staff whose responsibility is to assist consumers in making their complaints, if necessary by investigating the conduct of a financial services provider;

(l) they decisions made under the procedures will be observed by the relevant scheme members;

(m) they provide adequate remedies;

(n) they provide for the maintenance and publication of appropriate statistics on its operations; and

(o) they provide for the provision to the Commission and the relevant industry associations, details of the decisions made in respect of all complaints, or a representative selection of complaints, including the reasons for the decisions but excluding any information that would identify any of the parties to the complaint.

12FA (3) [Revocation of approval] The Commission may revoke an approval given under subsection (1) if the Commission is satisfied that the code no longer meets, or substantially meets, the guidelines of subsection (2).