

**SUBMISSION IN RELATION TO ISSUES AND OPTIONS PAPER  
ENTITLED  
“COMPENSATION FOR LOSS IN THE FINANCIAL SERVICES SECTOR”**

**Introduction**

The Financial Industry Complaints Service (the Service) is an approved External and Dispute Resolution Scheme in the financial services sector. The Service deals with complaints about life insurers, financial planners, stockbrokers and managed investments. The Service is also about to take on the complaints resolution function for Friendly Societies. The Service also has other Members of the financial services sector such as, Future Dealers etc.

The Financial Industry Complaints Service is a Company limited by guarantee. It has an Independent Board of Directors. The complaints system of the Service deals with written complaints, first by attempting to conciliate the complaint. If this is unsuccessful the consumer has an option to have their complaint determined by an independent Panel or an Adjudicator (non complex less than \$10,000). The Service is approved by ASIC, pursuant to Policy Statement 139. The Service's Membership consists of a wide range of financial/investment service providers. These can range from very large bank owned entities down to very small one or two person businesses.

The Financial Industry Complaints Service is not in a position to suggest how the requirements for compensation arrangements should be performed, however, the Service considers that it would be helpful for it to comment upon circumstances in which the Service has been unable to proceed with dealing with complaints when a Member has gone into liquidation, had its licence revoked or voluntarily surrenders its licence. This may assist in ascertaining the nature and size of the problem to be addressed. In particular, the Service will concentrate upon answering the questions posed in Chapter Two of the Issues and Options Paper, which is concerned with the problem and objective.

**Principle Issue One**

The Issues & Options Paper asks the question, “Can you provide any evidence of the nature and extent of losses suffered by consumers of financial services to assist us to understand the extent of the problem?”.

The Service's relationship with its Members is governed by a Constitution and Rules. Entities wishing to join FICS sign an application form which is an agreement with the Service binding the Member to the Service's Constitution and Rules. It is part of the ASIC licensing requirement for the financial/investment services industry for licence holders to be a Member of an approved External Dispute Resolution Scheme. Therefore, there is a significant relationship between the licensing of the Member and Membership of the Financial Industry Complaints Service. In general terms, the relationship usually works well while a Member continues to be licensed. The Member agrees to be bound by the Rules of the Service, including the provisions in relation to complaint handling and an obligation to comply with decisions made by the Panel or Adjudicator.

Generally, the Service is able to enforce determinations by the threat of termination of Membership of the Service if the determination is not complied with. Termination of Membership affects the Member's ability to be licensed because Membership of an External

Dispute Resolution Scheme is a licensing condition. Of course, the vast majority of Members comply with determinations as a matter of course, and the Service rarely uses the threat of expulsion of a Member.

Rule 38 of the FICS Rules provides that,

“Members participating in the Service have agreed to abide by the Panel’s decisions”.

Rule 39 provides that

“The Service may take any necessary action (including legal action) to enforce a Panel decision. This may include seeking specific performance of the agreement to abide by these Rules”.

Rule 40 also provides that

“A Member who does not comply with the decision of the Panel may have its membership terminated. The Service must consult ASIC prior to the termination process taking place”. (Rules 24 and 25 are the equivalent Rule for Adjudicator determinations)

## **Ceased Members**

Once a Member goes into liquidation or ceases to be licensed either by the act of ASIC revoking a license or the Member surrendering their licence, the Service’s ability to enforce compliance with its Rules is adversely affected. I shall now proceed to outline this situation in detail.

I attach a copy of Clause 10 of the FICS Constitution in relation to cessation of Membership. The Constitution provides for Members to resign from the Service by giving three months notice in writing and the notice expiring at the end of the Company’s next financial year. However, the Constitution also provides that, if a Member being a corporate entity, ceases to carry on business, is ordered to be wound up or ceases to be authorised to carry on business which would entitle it to be admitted to Membership of the company, then that Member ipso facto ceases to be a Member of the company. There are similar provisions in relation to non-corporate entities.

The effect of the Constitution is that, as soon as a Member ceases to be licensed either by way of the licence being revoked or the licence being surrendered by the Member or the Member is subject to a winding up, the cessation of Membership of the company is immediate. At the last Annual General Meeting of the Company a new Clause 10.1 (d) was adopted. This clause provides that, the Service may deal with a complaint against a Member if that complaint was received prior to the Member ceasing to be a Member. This clause was adopted in order to deal with some of the problems caused by Membership immediately terminating when a Member ceased to be licensed.

The current situation still raises a number of problems for consumers;

### ***1. New Complaints***

Under the current Rules and Constitution the Service is unable to deal with new complaints received after a Member of the Service ceases to be a Member. In circumstances when a Member has had its licence revoked there is very likely to have been conduct, which is cause for numerous consumer complaints. Consumers currently have no access to external dispute resolution in these circumstances.

## 2. *Existing Complaints*

In May 2002 the Service's Constitution was amended to provide that the Service may deal with complaints in relation to Members who have ceased to be Members provided those complaints were received before the Membership ceased. It remains to be seen how this provision will work in practice, as the Constitution was only amended five months ago and FICS has not had experience of the circumstances where complaints have been received after the Constitutional amendments and Membership has ceased since the Constitutional amendments. The Service still considers there will be problems continuing to deal with these complaints for a number of reasons:

1. In the case of insolvency or revocation or cancellation of a licence, there may be no one with the authority or ability to respond to a complaint lodged with the Service. There is a very high possibility that there will be insufficient information upon which the Service can deal with the complaint and in particular the Panel or Adjudicator may not be able to make a determination.
2. If an award is made in favour of a complainant there are issues of whether the Service would be able to enforce payment of the determination. In particular the Service would be unable to enforce the determination by applying the threat of termination of Membership of the Service (therefore affecting licensing) and in the case of insolvency in particular there may be no assets against which to enforce a determination. In the case of liquidation the best outcome that could be achieved for a complainant is that they be added to the list of creditors.
3. There may be a small possibility that if a professional indemnity insurer is involved it would pay out upon a determination, although this would seem unlikely if the determination process is regarded as unfair by the professional indemnity insurer, or the professional indemnity insurer considers that the Service does not have jurisdiction to consider the complaint.

### **Cases where the Service has been unable to assist complainants**

1. *A* had its licence revoked on 1 November 2001. This has affected 15 complaints which cannot be pursued through this Service. Those complaints ranged from \$2,198 to \$98,294 and totalled \$907,247.
2. *B* was wound up by a court order dated 5 August 2002. This has affected 4 complaints with the Service ranging from \$2,500 to \$6,500 and totalling \$16,950.
3. *C*'s licence was revoked by ASIC on 28 November 2001 and the Service was unable to assist one complainant with an existing complaint seeking \$14,452.
4. *D* ceased business and its licence was revoked by ASIC on 4 January 2002. The Service was able to negotiate that it deal with one complainant through a buyer of part of that business. There are currently 2 further complaints (for \$72,000 and \$85,592) with the Service to be determined by the Panel. *D* objected to the Service's jurisdiction in both cases but has withdrawn that objection in one of those cases.
5. *E* handed in its licence on 14 May 2002, prior to the Service amending its Constitution and prior to the Panel making a determination on 28 May 2002 in favour of the complainant in the amount of \$14,452 plus interest. *E* has refused to comply with the determination and it is doubtful that the Service will be able to enforce the determination. There is another complaint before

the Service for \$12,098 lodged before *E* handed in its licence, which is also likely to face difficulties in relation to the Service's jurisdiction.

6. *F* had their licence cancelled on 9 July 2002. It is unlikely that the Service will be able to continue to deal with a complaint for about \$90,000, which commenced on 7 December 2001, as the complaint was received before the Service had changed its Constitution.
7. *G* sold its business assets to another Member on 28 May 2001 and its licence was revoked on 1 February 2002. It is unlikely that two complaints lodged in June 2002, totalling about \$150,000, can be dealt with by the Service against either *G* or the Member that purchased its assets.

## **Conclusion**

As can be seen by the FICS experience consumers have been disadvantaged by Members going into liquidation, having their licenses revoked or otherwise ceasing to be licensed. Parts of the FICS Membership are a "moving feast", in particular with the requirement to obtain the new financial services licence, Members are dissolving and reforming into new groups, leaving the industry, and otherwise reorganising their business activities. The casualty of all this is that in many instances consumers lose the ability to pursue and achieve redress for genuine complaints through the approved External Complaints Resolution Scheme.

**Alison Maynard**  
**Chief Executive**