Financial Services
Consumer Policy Centre

Review of Compensation Arrangements

Consumer Submission

November 2002

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1 Executive Summary

Consumer organisations are happy to participate in the ongoing debate about compensation arrangements and to contribute to further detailed discussion about the exact structure of those arrangements. At this time our preferred structure is as follows:

1. Where a licensee is solvent, the EDRs will be the main compensation mechanism (subject to certain improvements being made to EDR schemes as detailed in this submission).

2. Where a licensee is solvent , but the claim exceeds the jurisdiction of the relevant EDR scheme ie is “high value”, the courts will be the main compensation mechanism.

3. Where a licensee is insolvent or unable to pay, a broad compensation scheme will apply. That scheme will include:

    - A broad ability to hear claims
    - A “reasonable grounds to believe” misconduct test
    - Subrogation of rights in order to recover some funds

4. The compensation scheme will cover the areas of identified need: intermediaries, registered schemes, insurance companies and superannuation funds.

5. Mandatory minimum PII will underpin EDR determinations, court judgements and in some cases funds recovery by the compensation scheme.

In this submission we have attempted to concentrate on identifying consumer losses, and justifying a broad compensation scheme as part of the layered compensation arrangements outlined above.

Where possible, we have answered direct questions raised in Treasury’s review paper. The submission also contains the following 36 detailed Consumer Recommendations:

Consumer Recommendation 1

The scope of the review should be broadened beyond intermediaries to include consideration of compensation arrangements for some product issuers – managed investments, superannuation schemes and general insurance companies. Complementary compensatio arrangements should be developed for these categories of issuers.

Consumer Recommendation 2

The compensation arrangements should apply to all licensed intermediaries, and some licensed product issuers – the operators of managed schemes, superannuation funds and general insurance companies.

Consumer Recommendation 3

The compensation arrangements as a whole should include coverage of breaches of all of the licensee's obligations.

Consumer Recommendation 4

The compensation arrangements as a whole should include coverage where a licensee is acting outside the terms of their license.

Consumer Recommendation 5

ASIC should develop an education campaign to continually reinforce the message that consumer protections only extend to licensed operators.

The disclosure provisions in Chapter 7 should be amended to provide consumers with greater disclosure regarding the details of the licence and where the licence can be checked.

Consumer Recommendation 6

As a minimum compensation arrangements covering insolvency/inability to pay must provide coverage for and facilitate access to compensation for losses arising from:

- Failure to account;
- Gross incompetence;
- Fraud or fraudulent conduct;
- Dishonesty;
- Fidelity breaches; and
- Grossly misleading and deceptive conduct.

Consumer Recommendation 7

Compensation arrangements should only be available to retail clients, as defined by s761G, which includes small business clients.

Consumer Recommendation 8

Compensation arrangements should be available to any person who can demonstrate that they have a beneficial interest in a dealing or a transaction, as long as they would also meet the definition of retail client.

Consumer Recommendation 9

Compensation arrangements should not be available to any person who had some responsibility for, or profited from, the relevant difficulties of a failed licensee.

Consumer Recommendation 10

That PII underpin the compensation regime and that all licensees be required to hold PII up to prescribed minimums (these are discussed below).

Consumer Recommendation 11

Licensees should be required to include the name of their insurer and the terms of the contract at least up to the regulatory requirements in their Advisory Services Guide.

Consumer Recommendation 12

Either the *Corporations Act* or the *Insurance Contracts Act* should be amended to allow consumers who are beneficiaries under an insurance contract to enforce the contract.

Consumer Recommendation 13

Minimum PII requirements should include non avoidance clauses for innocent and fraudulent non-disclosure and non-notification. This is consistent with I(AB)A and will end legal uncertainty.

Consumer Recommendation 14

Minimum PII requirements should include clear coverage of dishonesty and fraud.

Consumer Recommendation 15

Policies must be deemed current for the full year irrespective of the funding arrangements.

Consumer Recommendation 16

There should be no change to the joint and several rule without a full exploration of its impact.

Consumer Recommendation 17

The PII requirements of I(AB)A should apply across financial services licensees. The detail however should provide flexibility to accommodate differences of detail across the sector (see run-off cover below).

Consumer Recommendation 18

In addition to the I(AB)A requirements mandatory PII should include:

- Endorsement of EDR determinations
- Coverage of Trade Practice Act, ASIC Act and Corporation Act breaches
- Unambiguous fraud and fidelity cover.

Consumer Recommendation 19

In mandating minimum insurance requirements, the Government should encourage professional associations to work with insurers to obtain group insurance.

If the insurance industry is unwilling or unable to provide appropriate insurance for licensees then the Government should consider organising a scheme for the licensees.

Consumer Recommendation 20

Mandatory PII minimums must have a general requirement for run-off cover however the detail should be settled by ASIC on a sector by sector basis.

Consumer Recommendation 21

Mandatory PII minimums must have a general requirement for excess maximums with the flexibility to accommodate those licensees with a capacity to self-insure.

Consumer Recommendation 22

A broad compensation scheme is required to cover market participants. Market licensees should contribute in some way to the scheme given that they will also benefit from its existence.

Consumer Recommendation 23

The EDR schemes should be acknowledged as the primary compensation mechanism for claims against solvent licensees.

The Government should undertake a major campaign to promote awareness of the schemes.

Consumer Recommendation 24

ASIC encourage the EDR schemes to harmonise their definitions of eligible claims and ensure that they include any breach of Chapter Seven of Corporations Act, relevant ASIC Act breaches and any other breaches of financial services law.

Consumer Recommendation 25

The claims limits of the EDR schemes should be increased annually in accordance with the consumer price index.

ASIC PS139 should specifically require that the dollar limits of the EDR schemes are reviewed every three years to ensure the majority of consumer claims are captured.

Consumer Recommendation 26

The EDR schemes amend their rules to enable them to deny membership to an entity where there is an outstanding decision from any approved EDR scheme against an employee, principal or director of that entity.

ASIC deny a license to any an entity where there is an outstanding decision from any approved EDR scheme against an employee, principal or director of that entity.

Consumer Recommendation 27

The EDR schemes be required to report members who fall more than four months behind in their financial obligations to the schemes to ASIC.

ASIC be required to audit any licensee who has fallen more than four months behind in their financial obligations to an approved EDR scheme within one month of the notification.

Consumer Recommendation 28

A broad compensation scheme should apply for certain classes of claims on insolvency / inability to pay.

Consumer Recommendation 29

Claims should be paid where the scheme has "reasonable grounds to believe" that there has been either:

- A failure to account;
- Gross incompetence;
- Fraud or fraudulent behaviour;
- Dishonesty;
- Fidelity breaches; or
- Grossly misleading and deceptive conduct.

Consumer Recommendation 30

A new body should be established to operate a broad based compensation fund.
The new body should operate as an independent company governed by a Board comprised equal numbers of industry and consumer directors headed by an independent Chair.

Rather than existing in legislation we support a mandatory requirement that licensees participate in the scheme and that the scheme be subject to approval and oversight by ASIC

Consumer Recommendation 31

A single scheme should cover the width of the financial services sector. Sub-schemes would be useful.

Consumer Recommendation 32

Funds in the SFE, Bendigo and Newcastle Fidelity Funds and a relevant portion of the NFG should be applied to assist those market participants meet their obligations to the new broad scheme.

Decisions around the division of the NGF funds should occur in an open and transparent manner with funded consumer input.

Consumer Recommendation 33

Compensation should restore the consumer to the position they would have been in at the time the claim is settled had it not been for the misconduct. Also:

- The scheme should be given a discretion to make awards.
- Interest should be payable.
- Costs of pursuing claims recoverable.

Consumer Recommendation 34

A tiered capping system is supported: one that provides 100% compensation up to a designated amount and 90% compensation to a further dollar limit or for the balance of the claim in the case of insurance products.

Compensation should be paid in full for any compulsory component of any product such as insurance and superannuation.

Dollar limits should be CPI indexed annually and subject to review every three years.

Consumer Recommendation 35

The scheme should have a discretion to either manipulate levies or make excess funds available for purposes consistent with the purposes of the fund.

Consumer Recommendation 36

It would be reasonable to limit the fund to hearing claims three years from the time the claimant knew or should reasonably have known of the all the relevant facts. If any shorter period were to apply then the fund should be given a discretion to hear claims back

2 Introduction

This consumer submission address the issues raised in the Treasury discussion paper *Compensation for loss in the financial services sector* from the consumer perspective.

2.1 The Treasury review

Treasury is conducting a review of compensation arrangements in the financial services sector. Under the *Financial Services Reform Act* financial services licensees are required to have compensation arrangements in place. These requirements will affect all licensees including life and general insurance companies; superannuation funds; brokers; advisers and planners; fund managers; and deposit taking institutions (banks, credit unions etc.). The review discussion paper is called.

At present the ability of consumers to get compensation for losses arising out of a licensee's breach of licence conditions, particularly in cases of fraud, or insolvency is limited by the fact that at the end of the day there are simply no funds available to pay consumers. Even where funds may be available the various avenues are limited. For example the external complaints schemes all have limited jurisdiction, the surety bond lodged with ASIC is only $20,000, legal action is slow and costly and ultimately the costs can outweigh the benefits.

While the government has a discretion to compensate consumers out of consolidated revenue it has tended to do so only in cases where consumer losses are large and widespread, such as following the HIH collapse. In particular it has not used this capacity to assist the large number of consumers affected by the collapse of smaller (often employer-run) superannuation funds – known losses in this category total many millions to date.

So with the exception of the Stock Exchange's compensation fund and large scale collapses, the capacity of consumers to recover losses for misconduct on the part of licensees is extremely difficult.

The Treasury review of compensation for loss in the financial services sector is one of the last pieces of the major overhaul of financial services regulation that has been going on since 1996. The *Financial Services Reform Act 2001* changed the regulation of financial services businesses as well as financial market operators such as the stock and futures exchanges.

The *FSRA* includes a general requirement for financial services licensees to have retail client compensation arrangements in place to cover losses arising from a breach of their licence obligations (s912B). The long standing requirements for market operators (ie the Australian Stock Exchange and other exchanges) to have fidelity or compensation funds remained with only minor changes.

The Treasury review goes right back to scratch. It asks whether compensation arrangements are required at all. If arrangements are justified what sort of losses should be covered, and what sort of compensation mechanisms should be put in place and why. It opens up the possibility of considerably limiting the requirements of section 912B.

2.2 The consumer submission

The Financial Services Consumer Policy Centre was asked to develop a joint consumer submission to the review, to help balance the submissions expected from industry and government, and to articulate a common consumer position and perspective. The consumer submission is funded by the Consumer Advisory Panel (CAP[1]).

The consumer submission has been written by the Centre after consultation with an extensive network of community organisations, consumer advocates and consumer caseworkers. The Centre also conducted two workshops (Sydney 15 October 2002 and Melbourne 22 October 2002) to gather detailed input on the recommendations to be contained in the consumer submission. Ultimately, however, the views expressed in the submission are those of the Centre.

The Centre has taken a balanced approach to the compensation arrangements, based on an assessment of the likely benefits of wider and more uniform access to compensation, weighed against the costs to business (which are ultimately born by all consumers through higher prices). This approach is consistent with a key requirement of Treasury's review paper:

> "The ambit and structure of the compensation model will be influenced by the experience of misconduct and financial failure, the values held and the perceived tolerance in the community for risk of financial loss.[2]"

2.3 Scope of the review

The scope of this review is consumer losses as a result of a licensee providing a financial service to a client.

This includes losses as a result of :

- Providing advice;
- Dealing in a product
- Making a market
- Operating a registered scheme
- Providing deposit taking or custodial services.

Therefore the review is covering the conduct of financial intermediaries including:

- Insurance brokers
- Stockbrokers
- Financial planners
- Investment advisers.

1.1

[1] A panel established to provide the Australian Securities and Investments Commission with expert consumer input and research.
[2] At page 26

It would also cover the operational side of registered schemes. We strongly support the inclusion of losses on the operational side of managed funds in this review. Some of the most significant consumer losses have been occurring at the hands of operators of managed investment schemes, particularly in the area of agricultural and timeshare schemes.

However losses at the operational level of superannuation funds, insurance companies and credit providers are outside the review. We accept the exclusion of deposit taking services from the scope of this review on the basis that we have not at this point identified a need to change existing arrangements. We accept the exclusion of credit providers given the practical difficulties of the commonwealth mandating arrangements for bodies that are currently regulated at state level.

However we strongly support widening the ambit of the review to include compensation arrangements for superannuation funds. Significant consumer losses are occurring in this area and while the current arrangements have assisted some consumers recoup losses they have by no means assisted all affected parties. Given that the superannuation guarantee is mandatory and forms a key pillar of the government's retirement incomes policy, consumer losses through no fault of their own cannot be justified. At one level consumers have no choice but to contribute to superannuation products, and the government has made voluntary contributions extremely attractive to individuals with the capacity to do so as a means of furthering its objectives. In such circumstances government has an obligation to ensure maximum consumer confidence in the superannuation system. In this regard a review of the existing compensation arrangement is required. This is consistent with initiatives currently being undertaken by APRA.

There appears to be broad agreement that some form of compensation arrangement for the failure of superannuation funds is required, beyond the current arrangements which require the intervention of the Minister. For example, the Mercer report recently concluded:

> "Because of the compulsory nature of superannuation, fund members expect that their savings will enjoy an adequate level of protection and, in particular, not be lost as a result of fraud, theft or inept investment strategies."

The Mercer report recommended a review of Part 23, and the Government response on 28 October 2002 has accepted that recommendation.

The other area that it appears timely to include in the scope of this review is losses arising from the collapse of major insurance companies. The collapse of HIH and the subsequent suggestion by the Insurance Council of Australia that some form of policy holder protection scheme be established, make it sensible to include insurance company collapses if consistency of approach across the sector is to be maintained.

Current compensation arrangements via the EDR schemes do not make an arbitrary distinction between claims against intermediaries and issuers. Those with wide jurisdiction are all encompassing. In the investment area FICS handled complaints about financial planners, stockbrokers and the operators of managed schemes from tax effective agricultural schemes to the largest fund managers.

For these reasons we support a more integrated approach to compensation arrangements covering not only intermediaries but product issuers, particularly in areas of concern identified above – managed investment schemes, superannuation funds and insurance companies. An integrated approach is consistent with the FSR theme of uniformity.

Consumer Recommendation 1

The scope of the review should be broadened beyond intermediaries to include consideration of compensation arrangements for some product issuers – managed investments, superannuation schemes and general insurance companies. Complementary compensatio arrangements should be developed for these categories of issuers.

3 Current compensation landscape

Current compensation arrangements are disorganised, fractured and inefficient. They rely on a layered approach which is confusing for consumers and includes significant gaps. The key layers are EDR schemes, the courts (usually involving professional indemnity insurance), some limited existing compensation funds, and general insolvency law.

This chapter examines some of the existing compensation arrangements from a consumer perspective.

3.1 ASIC surety bonds

The Australian Securities and Investments Commission holds surety bonds for each financial services licensee. Currently it holds some 2000 bonds. However, as the licensing regime expands in the post FSR period, this number of bonds may grow significantly.

Few if any bonds are more than $20,000, some are less, and there is little differentiation between the size and financial position of the licensee and the size of the bond.

Claims against a single bond can so exceed the size of the bond that consumer may end up with little more than a couple of cents in the dollar.

Bonds therefore play only a limited role in compensation arrangements.

3.2 EDR schemes

The ASIC approved EDR schemes – membership of which is a requirement under Chapter Seven - are the entry level for clients to seek compensation for misconduct by solvent intermediaries. However their jurisdictions are limited, vary and the schemes themselves are not well known. Their jurisdiction ends once a licensee is insolvent or has its license revoked or otherwise cancelled - eg if the licensee hands back its licence.

From March 2004 all financial services licensee will be required to be join an ASIC approved external dispute resolution scheme which must cover the majority of consumer complaints in the relevant sector of the industry. Individual schemes are free to set monetary limits within this parameter. There are likely to be three or four approved schemes covering the conduct of intermediaries: the Financial Industry Complaints Scheme (FICS), the Australian Banking Industry Ombudsman (ABIO), the Insurance Brokers Disputes Facility (IBDF) and possibly the Australian Timeshare Holiday Ownership Council Consumer Complaints Committee (ATHOC). FICS has the widest coverage and the most diverse membership.

Jurisdictions of these schemes vary both in terms of conduct that can be complained about and in terms of financial limits. The relevant FICS limit is $100,000, the ABIO is $150,000, IDBF is $50,000, and while ATHOC has no limits. FICS can deal with complaints that raise issues of fraud and dishonesty by a licensee but the IBDF cannot. While FICS theoretically can deal with such complaints it has not been able to in a practical sense because the licensee has either lost or handed back its license or has become insolvent, in each case putting itself beyond FICS' jurisdiction[3].

EDRs aim to provide a cheap, fast and accessible alternative to the courts for solvent licensees. They provide an opportunity to improve industry standards and to improve relations between industry participants and consumers.

3.3 Professional Indemnity Insurance

For claims that exceed or are otherwise outside the scope of the EDR scheme consumers can take their claims to court. For claims to be more than a pyrrhic victory someone must be standing behind the licensee be it an insurer or business with the capacity to meet the claims. Legal action of itself does not mean assets will be available to pay any judgement. Whatever the outcome delay and financial cost will be considerable.

PII can be an accessible means of providing consumer compensation where an insurer accepts and pays a claim without contest or where an insurer pays a claim following a determination by an EDR scheme.

However difficulties arise where the claims are declined whether contested or not. Particularly problematic is where the insurer denies the claim and refuses to stand behind a licensee.

Where a claim is contested through the courts consumers can be significantly disadvantaged. The limitations of legal processes in providing consumer redress have been well documented[4]. There will be an imbalance of resources and expertise between clients and licensees. The nature of our legal system means outcomes can be more dependent on legal technicalities than the merits or justice of a claim. Legal processes are complicated, costly and slow.

However this method only works when funds are available to pay successful claims and costs awards. This tends to be the case where the licensee is part of a larger entity that has the resources to compensate consumers for losses to safeguard its reputation. It can also occur where the licensee has in place an applicable professional indemnity policy and the insurer is willing to stand behind the licensee.

However PII coverage across licensees is varied and coverage is by no means universal. Where is it held there is little consistency in the nature of policy either across licensee or within particular segments of the industry with the exception of insurance brokers as a result of requirements of the *Insurance (Agents and Brokers) Act 1984*. Coverage is mandatory and minimum conditions are specified including minimum indemnity limits, non-avoidance clauses and run-off cover requirements.

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[3] For actual cases see the FICS submission to this review.

[4] See Access to Justice Advisory Committee 1994*, Access to Justice : An Action Plan*; ALRC 89 Managing Justice: A review of the Federal Civil Justice System; ALRC 75 Costs Shifting – Who Pays for Litigation; NSW Law Society Access to Justice - Final Report: December 1998

3.4 Compensation funds

Some claims against market participants can be directed to the various market compensation schemes such as the NGF and SFE's Fidelity Fund. These have significantly greater limitations that the EDR schemes and are virtually unknown.

These apply only to those participating on formal markets; the stock exchanges and futures exchange. Four currently exist and jurisdictions are limited to fraud and dishonesty with the exception of the largest which covers failure to account and failure to complete transactions. Each apply whether the intermediary is solvent or not. All are virtually unknown; none of our consumer, investor or shareholders groups had heard of them. Consequently overall claim numbers are not high, but significant peaks continue to occur. For example 2407 claims were brought in 1988, over 1200 in each of 1989 and 1990, 448 in 1991 and 132 in 2000. The monetary value of claims to the NGF is however significantly larger that those brought to FICS the relevant EDR scheme. . For example since 1994 34% of successful claims were in the $50,000 to $100,000 range and 20% of successful claims exceeded $100,000.

3.5 Existing arrangements – summary table

The biggest failings of the current system are inconsistencies and flaws with PII insurance, difficulties of contesting claims where an insurer denies liability and the fact that the market compensation schemes are unknown. As a means of handling consumer claims and ensuring consumers are compensated the EDR schemes have much to recommend them, irrespective of the room for improvement.

	Surety Bonds	EDR schemes	PII	Compensation funds
Access	Access is via ASIC action only (eg in insolvency).	Quick, cheap accessible for both licensees and consumers.	Access dependent on EDR jurisdiction or court access. Client do not have accessible rights against the insurer even though they are the ultimate beneficiaries of a policy.	Very accessible for qualifying claims.
Available funds	Limited to $20,000 per licensee.	Funds available from licensee or insurer up to jurisdictional limit (range is $50,000 to $250,000 (or higher if licensee consents).	Funds generally available however consumers with valid claims may be denied access to funds.	Funds generally available.

(continued)	**Surety Bonds**	**EDR schemes**	**PII**	**Compensation funds**
Coverage	ASIC holds 2000 bonds (up to 10,000 licensees are expected).	Will have comprehensive coverage of licensees by March 2004. In general majority of consumer claims are covered.	Fragmented coverage of licensees. Limited coverage of many consumer claims. Fails as a compensation mechanism when insurers deny claims as a result of the insured breaching a contract condition irrespective of the merits of the consumer claim - eg insurer fails to meet notification or disclosure requirements.	Very limited coverage in Australia. Markets area only.
Consumer support	Not known because of low profile.	Strong support from consumer / user groups largely due to governance structure and consultative processes at operational level.	Strong consumer opposition, owing to difficulties in pursuing claims, exclusions etc.	Not known because of low profile.
Oversight	ASIC has direct oversight.	Requirement for three yearly external review. ASIC approval process increases consistency but allows for difference. Consumers involved in governance structure and in determination process.	Subject to occasional review, but no formal oversight arrangements in place. May be subject to increased ASIC oversight.	Limited oversight. No input from consumer/investor groups into management of funds, no consultation around jurisdiction or processes.

(continued)	**Surety Bonds**	**EDR schemes**	**PII**	**Compensation funds**
Jurisdiction	At present a maximum of $20,000 for all claims against a licensee.	Limited jurisdictions in terms of financial limits and types of claims - eg IBDF only handles claims about certain class of insurance (public liability and professional indemnity insurance are excluded).	Jurisdiction caps subject to each policy.	Have very limited jurisdictions both in terms of conduct covered and financial caps eg all bar NGF are limited to fraud and fidelity, SFE fund has a $500,000 per event cap.
Costs	ASIC bears costs.	Free to consumers and cheap for licensees.	Can require expensive, complicated litigation which involves considerable delay.	Free to consumers.
Coverage of insolvency	Yes, but inadequate to meet claims.	Ineffective where licensee is or becomes insolvent, or has its license revoked or hands back its license prior to a determination or hands back or becomes insolvent following a determination and prior to paying.	No.	Yes.
Success rates	Unknown.	Differs from scheme to scheme, but usually reasonable. Limited forms of compensation are payable.	Expensive legal strategies can be necessary to get an insurer to stand behind an insured. Poor success rate in general.	Since 1997/98 there have been 178 claims: 7 allowed, 129 settled, 34 disallowed, 8 withdrawn.

(continued)	**Surety Bonds**	**EDR schemes**	**PII**	**Compensation funds**
Consumer awareness	Non-existent.	Not well-known – this is compounded by the large number of them – and the overlapping jurisdictions eg FICS and ABIO, FICS and IBDF.	To make a judgement about the likelihood of legal action providing compensation, consumers need to know the terms of any insurance policy. Finding this information out currently can be a complicated and expensive exercise involving legal assistance.	Are virtually unknown amongst relevant consumers. There is no requirement for brokers to inform consumers of its existence and the Fund itself does no promotion beyond having a page on the ASX website.
Enforce-ability	Yes. Bond is held by ASIC.	Enforceability of determinations generally good, but problems arise when licensee is willing to hand back their licence to avoid a determination.	In the face of recalcitrant insurers clients may depend upon support from the insured to further their claim.	No requirement for enforceability as money is held by the fund.
Coverage of fraud	Yes.	Ability to handle complaints where fraud is involved is unclear – some schemes either do not cover fraudulent conduct or are ineffective in the face of fraudulent conduct.	Fraud and dishonesty is often excluded or policy terms are so vague that determining whether it was covered could require several thousands of dollars of litigation.	Yes.

4 Consumer losses (Q1)

We believe the extent of uncompensated consumers losses is significant, and growing. We know that the EDR schemes are not well known and that complaints are rising significantly as they become increasingly well known. We know that the market operated compensation funds are virtually unknown and that complaint levels almost certainly reflect this given the trends we are experiencing with the ASIC approved EDR schemes. We know that redress through the courts is time consuming and extremely expensive. One plaintiff law firm has told us that they accept about 1 in 20 cases clients bring to them. Even where clients have a good case the risk of losing and facing an adverse costs order is such that significant numbers of meritorious cases do not run.

It is without question that many consumers walk away from losses. Many have no idea where to turn and others are deterred by the enormity of the barriers to obtaining redress, especially through the courts.

This section pulls together what we know about the extent of consumer losses from the external dispute resolution schemes, the courts, government inquiries and other sources.

4.1 Failure to recover losses

A major source of uncompensated loss is where successful court action (or regulatory intervention by ASIC) is taken, but insufficient assets or insurance are available to meet all outstanding claims.

As noted in the Compensation discussion paper, ASIC annual reports provide information about consumer losses, although the data appears to be limited to the amounts recovered and paid to consumers ($54 million in 2000/01; $65 million in 2001/02). No information is provided about the extent of uncompensated loss in these cases.

On occasions, the losses resulting from a single breach can be significant. In the case of ASIC v Hutchings NSWSC 522 2001 the judge banned the operators for life in light of the extent of consumer losses.[5] Overall losses were about $29 million.

Additionally ASIC notes in its 2000/2001 report at page 20 that "the substantial reduction in summary prosecutions and also, to a lesser extent, criminal and civil litigation reflect the diversion of enforcement resources from relatively minor offences to the more complex cases now confronting us". While no regulator could be expected to prosecute the all breaches of the law, this statement indicates that a number of cases have not been pursued by the regulator. Although the losses in these 'minor' cases may be comparatively small to the regulator, they are unlikely to be small for the individuals concerned.

1.1

[5] Hutchings was unlicensed at the time

4.2 No-one standing behind the licensee

Another category of uncompensated loss is where no-one is standing behind the licensee. Typically these are losses as a result of misconduct by licensees that either stand alone or are part of a group that lacks the ability to compensate for losses as a result of the actions of one or more individuals within the business. The indications are that losses sustained as a result of misconduct by individuals within larger groups are generally absorbed by that group - eg Thompson Brindal case.

In other cases consumers have successfully sued legal advisers of managed schemes where an adviser fails to defend a case because they have no assets and their insurer has denied liability - eg Feldsworth case below. The uncompensated losses are those sustained at the hands of operators where at the end of the day nothing is standing behind the licensee: no personal assets, no larger company or group, no insurer. Regrettably these can sometimes be unlicensed operators - eg ASIC v Hutchings[6].

From the available data it appears a majority of licensees have some form of professional indemnity insurance in place. However coverage is neither comprehensive nor consistent. The system can fail consumers completely when the insurer denies liability against a valid claim through no fault of the client. That is, the insurer denies liability as a result of conduct on behalf of the insured, most typically for failing to comply with disclosure and notification provisions of the contract of insurance. In these cases the insured has no assets and becomes insolvent as in the Feldsworth case.

Feldsworth Financial Services[7]

Forty plaintiffs sought to recover about $4million when the scheme they had invested in collapsed. The plaintiffs (all near retirement age) had invested in the scheme on the advice of Feldsworth Financial Services. Claims were lodged, the insurer denied liability and FFS went into liquidation. At the subsequent court cases the first and second defendants – Feldsworth personally and his firm - failed to appear. After a lengthy trial they were found liable for damages arising out of negligent advice and misleading and deceptive conduct.

In this case the clients were able to pursue other defendants. The matter was finalised four years after consumers became aware of their losses, following an appeal by a defendant. One plaintiff died in the interim. Legal costs were over $800,000, only $600,000 of which was recovered on a party party basis. Alternate defendants with deep pockets are not always available.

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[6] 2001 NSWSC 522

[7] Wilkinson & Ors v Feldworth Financial Services Pty Limited & Ors Matter No 50230/97 [1998] NSWSC 775 (30 November 1998).

4.3 Insolvency

A major category of uncompensated loss is, of course, insolvency. Once a licensee is insolvent the jurisdiction of the EDR schemes fails and where an insurer denies liability the remaining choice for consumers (with the exception of narrow grounds in the markets area) is expensive and time-consuming litigation. Litigation for losses below certain levels is clearly not a viable option.

4.4 The external dispute resolution schemes

4.4.1 Financial Industry Complaint Scheme

The Service was established in October 1999 to hear complaints about financial intermediaries, life insurance, superannuation and managed investment products. On the investment side FICS can hear complaints up to a value of $100,000.

It received nearly 1000 formal complaints last reporting period. While many of these complaints are about life insurance products (reflecting the history of the scheme)[8] complaints about financial planners, investment managers and stockbrokers are the fastest growing categories of complaint. Financial planning complaints rose from 83 in 2000 to 186 in 2001. They focus on inappropriate advice and failure to disclosure fees and charges. Stockbroking complaints rose from 88 in 2000 to 134 in 2001. They focus on various disclosure breaches including about fees and charges and the tax implications of transactions. Managed investments complaints rose form 23 in 2000 to 80 in 2001. These are also focused on inappropriate and misleading advice but include a number related to poor customer service.

All complaints that come to FICS must have been through the licensee's internal complaints system. Despite this, the scheme finds in consumers' favour in about 40% of cases overall with 48% finalised in favour of consumers in financial planning disputes and 47% finalised in favour of consumers in managed investments disputes in 2001.

FICS has had a number of cases recently that have underlined the ineffectiveness of its jurisdiction to deal with matters where the licensee no longer has a licence for whatever reason. It is also experiencing considerable movement among parts of its membership and evidence is emerging that some licensees are willing to hand back a licence to avoid the jurisdiction only to reapply for a licence as a new entity.[9]

4.4.2 Insurance Brokers Disputes Facility

This scheme handles complaints between insurance brokers and clients up to a value of $50,000. Complaints to the IBDF are growing by more than 20% a year with nearly 200 complaints

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[8] Prior to 1999 the scheme handled only complaints about life products
[9] see FICS submission to this review for cases

received in 2001. About 30% of complaints received last year related to problems with arranging renewal cover; 20% related to new cover and its adequacy; and 13% related to incorrect cover.

It cannot deal with allegations of fraudulent conduct.

4.4.3 Australian Banking Industry Ombudsman

The ABIO has recently expanded its jurisdiction enabling it to hear a complaint about the whole of a bank's business and handles complaints up to $150,000. This means that for the first time it can hear complaints about intermediaries and in the three months between 11 March 2001 and the end of the financial year it received about 35 insurance product complaints mostly on the service and advice side and 11 complaints about financial planning services.

In 22.4% of cases last year the consumer's claim was upheld and in a further 33.7% the outcome was a compromise benefiting both parties.

4.4.4 Australian Timeshare Holiday Ownership Complaints Council

This scheme has not received ASIC approval and does not keep statistical records. On paper it can hear any complaint relevant to the industry about a member (it covers about 60% of the industry –although a number of timeshare operators belong to FICS) and has no claim limit. Decisions are only binding on the member if the member accepts the decision.

4.5 Stockbroker court cases

It is difficult to collect comprehensive information on consumer losses from those consumers who attempt to seek redress through the courts. For every case which goes to trial and leads to a published judgment there must be many hundreds which are abandoned or settled. We therefore tend to hear only about high profile matters. Nevertheless, some interesting information can be drawn from the published decisions.

Litigation against stockbrokers has been growing steadily in recent years in the United States, and this trend seems to also be developing in Australia. Two high profile cases dominate the discussion on this issue:

Hartley Poynton case

Mr Ali, a Fijian farmer entrusted his retirement savings of nearly $300,000 to Hartley Poynton on the promise of high monthly returns. He gave the broker a wide discretion to trade on his behalf and draw on a margin lending facility the broker had arranged. Over a six month period the broker traded more than $39million in shares and derivatives earning a brokerage of $140,000. By February 1999 all the client's funds had been lost. The client was awarded $846,818 for losses and $260,000 in damages. The client died before the judgement came down and legal bills must have been in the millions of dollars given that the trial ran for nine months.

Thompson Brindal case

About 400 clients lost around $17 million in Adelaide in 1997 as a result of the actions of employees of Thompson Brindal, including its managing director. The claims arose after Thompson Brindal had effected unauthorised dealings of certain securities which caused these investors to suffer losses.

Ultimately RetireInvest Corporation Ltd (RCL) and its subsidiary RetireInvest Pty Limited (RPL) decided to pay the investors an amount for their loss. In return for payment, each investor had to assign its rights in any action it may have against Thompson Brindal .

Subsequently, RCL lodged the claims with SEGC, which the SEGC refused. In subsequent legal action the SEGC sought a declaration that the Board of SEGC could take into account the fact that the investors were no longer entitled to make a claim on the Fund as each had been fully compensated in respect of the loss allegedly suffered. Additionally it was argued by SEGC that the assignment by investors made SEGC's statutory right of subrogation worthless.

The court found the clients had been compensated but the assignment did not make the SEGC's statutory right of subrogation ineffective.

4.6 Investment schemes and advisers

Information from consumer organisations and plaintiff law firms backed up by the cases suggests significant consumer losses are occurring at the hands of operators of managed schemes either through fraud or gross mismanagement. Clear patterns emerge, particularly among agricultural schemes promoted to financial planners and investment advisers offering excessively high commissions.

At the operational level of these managed schemes fraud or gross incompetence appears to be significant. The advice of planners and advisers is tainted by the excessive commission payments. The advice cannot be construed as in the client's interest. It is simply in the planner or adviser's interest.

In a case currently under preparation at one of larger plaintiff law firms it appears that a network of planners and advisers were aggressively marketing an investment scheme which paid commissions as high as 23%. The scheme collapsed when, as it appears, the operators stole the clients' money.

ASIC's head of policy and regulation Ian Johnston is concerned that significant damage to investors may be occurring in the financial planning world[10]. The key issue is that brokers or

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[10] "Hartley decision a dire warning to reckless brokers, planners", The Age, April 21 2002.

advisers must know their clients – and recommend appropriate investments that match their risk profile, level of knowledge, capacity to sustain losses and so on.

Anecdotal evidence suggests that aggressive gearing strategies are rife in both the financial planning and stock broking worlds. In one case the level of gearing appeared to be totally inappropriate considering the investor's tax position (not on the top marginal rate) and in another their employment position (recently retrenched).

Some categories of managed investment schemes have an extremely poor track record. Improvements in regulation and oversight do not appear to have led to adequate improvements in these areas. Ostrich farms, olive farms, cattle breeding projects, emu farms, tea tree oil plantations, timeshare schemes, and mass marketed tax effective schemes have all resulted in significant problems for consumers.

Case after case has demonstrated gross incompetence in the operation of these schemes. Poor record keeping, especially in relation to the keeping of monies received and invested[11], is a common problem. More significant problems have included finance companies with no finance[12]; ostrich farms with no birds[13], timeshare holiday accommodation with no accommodation and worse.

These schemes are typically sold by networks of financial planners and investment advisers (including accountants) earning excessive commissions. Consumers are attracted by promises of high returns and often, substantial tax benefits.

When these schemes collapse, consumers may have recourse against the advisers and the operators of the schemes. However the operators are almost always in liquidation by the time the problems emerge and are therefore outside the jurisdiction of the EDR schemes.

There may be no applicable PII policy (policies typically fail for non-disclosure or non-notification[14]) and failing and grossly incompetently run businesses are likely to let PII cover lapse.

Complaints against the advisers could be taken to the EDR schemes. However the pattern and nature of complaints coming before the EDR schemes suggests this is occurring to only a very limited extent. Only complaints arising out of the Budplan schemes appear to have made it to FICS. Anecdotal evidence from lawyers involved in some of the tax effective schemes cases and other cases involving managed investment schemes suggests the EDR schemes and their jurisdictions are not well known amongst that particular legal community.

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[11] ASIC v Hutchison
[12] Vincent v Commissioner of Taxation
[13] Landy DFK Finance v Rasaratnam [2000] VSC 322 (17 August 2000)
[14] See Felsworth above and Tracknet – a case currently under preparation

4.7 Agribusiness schemes

ASIC told the Senate Economics Committee inquiry into mass marketed tax effective schemes (final report Feb 2001) that as a percentage of the managed investments industry as a whole, the compliance problems in the agribusiness schemes area were high. It spends a disproportionate amount of its resources on these schemes: "some 30 per cent of our managed investment surveillance capacity for what is perhaps only five or six per cent of the managed investments market".[15]

Van Eyk Capital, an independent agribusiness research house, told the same inquiry that a 'fundamental problem' in the agribusiness sector is 'the unacceptable and unsustainable levels of remuneration earned by the promoters, and by the people who actually sell the product contained within the offering document (ie. the financial advisers)'.[16]

According to van Eyk Capital, despite the existing disclosure requirements in the Corporations Law, the real levels of fees and commission can still be hidden by a variety of means. The result is 'a significant imbalance between the returns offered to investors, and the often exorbitant returns accruing to both the promoters and their sales force'.[17] Van Eyk submitted:

> It is inconceivable to us how any project, or any business for that matter, can expect to be successful when between 70% and 80% of the funds invested are immediately diverted into what is basically non-productive expenditure.[18]

Van Eyk Capital argues that the majority of agribusiness schemes are likely to fail commercially because not enough of the funds raised are 'going into the ground' as a result of remuneration structures. Investors will thus gain no return on the investment and a potentially viable industry sector will be brought into disrepute.

Despite criticisms of van Eyk Capital's analysis, ASIC conceded to the inquiry that these schemes are 'on occasion', miss-sold on those benefits.[19]

These schemes continue to be licensed, and consumers continue to lose money.

4.8 Tax effective schemes

Tax effective schemes, especially agricultural schemes, have typically followed this model. Aggressive marketing underpinned by excessively high commissions coupled with gross mismanagement and/or fraud at the operational level of the scheme. In some cases consumers have lost their money and had to pay large tax penalties following unsuccessful litigation. They have also had to bear the litigation costs.

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[15] Evidence, p.744.
[16] Van Eyk Capital, Submission No. 691, p.5.
[17] Van Eyk Capital, Submission No. 691, p.5.
[18] Van Eyk Capital, Submission No. 691, p.8.
[19] Evidence, p.745.

Vincent v Commissioner of Taxation

Julie Vincent was one 427 people who, in the mid 1990s invested in a cattle breeding project operated by a group of companies controlled by an accountant/farmer at Tamworth in New South Wales. According to Justice French[20] "the agreements under which she invested in the project bear the hallmarks of many such arrangements familiar to those who practice in the area of taxation law and financial advice". Under the scheme clients could take out loans up to the value of 71% of the investment and claim tax deductions for those loans. The loans turned out to be fictitious. The finance company did not have any finance and never made any of the payments to the management company which it had promised to make under the Loan Agreement with individual clients.

Justice French found "Ms Vincent entered into the project in good faith after taking advice from her accountant. The gaining of a tax benefit was not her principal purpose. It was her hope that the scheme would eventually yield a modest income stream for her and her family. In the end the scheme has failed, the companies involved have been placed under administration and the deductions disallowed."

The 427 clients were faced with two choices: they could either sue their investment advisers or challenge the tax office rulings. They chose to challenge the tax ruling in a test case arrangement with a legal firm in which the affected investors will contribute to the costs which to date are in excess of $300,000. This sort of action was not available against the advisers because of the numbers involved and variations in individual circumstances.

In this scheme two layers of intermediaries existed and commissions were around 15%.

The Budplan Personal Syndicate scheme was another similar arrangement attracting over 10,000 investors in the Gold Coast region.[21] Some of these complaints ended up at FICS after litigation against the Tax Commissioner failed.

4.9 Timeshares

Collapses due either to fraud or gross mismanagement have also left consumers with no earnings and large debts. As with the tax effective schemes the promoters of other managed investments encourage consumers to take out loans with third parties in order to buy into schemes. The Consumer Credit Legal Centre of Victoria has had seventy clients involved in such arrangements with timeshare promoters. In all cases the schemes collapsed (through fraud or gross mismanagement) and consumers were left with debts to the credit provider. In a majority of its

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[20] Vincent v Commissioner of Taxation [2002] FCA 656 (24 May 2002)
[21] Howland-Rose v Commissioner of Taxation (2001) FCA

cases the timeshare accommodation had never been built. Most of the clients were led into the "investment" through competitions advertised in various local venues. All you had to do was turn up and listen to the sales spiel and you would get a prize. Most of CCLCV's clients were signed up on the day or very soon after as a result of pressure selling tactics.

CCLCV has similar cases involving ostrich schemes where consumers have taken out loans to buy birds, where no birds existed. When the scheme collapsed (gross incompetence) consumers are left with credit contracts to third parties. However, where a linked credit provider relationship can be demonstrated the courts have extinguished the debt[22]. Although the direct link has not always been easy to establish.

4.10 Schemes which deliberately avoid the MIA

There is also some indication of an emerging market in schemes, which pay high commissions to advisers in exchange for aggressive marketing, which appear to be specifically designed to avoid regulation by the Managed Investments Act, a fact that consumers are not aware of.

Ms B

Ms B invested $150,000 with a Melbourne based company that set up unit trust schemes, each with less than 20 members. This arrangement avoids the requirements of the Managed Investments Act, a fact Ms B was not aware of. Over 300 clients invested having been directed to the company by a network of financial planners who aggressively promoted the schemes to clients. Ms B lost all her money when the two directors of the investment company defrauded the clients. They do not have insurance and assets cannot be found.

Ms B has explored the option of taking an action against one of the financial planners who directed her to the scheme. The case would have to be pursued in the County (or equivalent) Court. Documents received from the planner's insurer indicates it intends to mount a strong defence. Ms B's own legal costs are likely to be around $65,000 and with the possibility of an adverse costs order she has been advised that it is not worth the risk to recover her $150,000. It could cost her an additional $130,000.

4.11 Superannuation

Another major source of consumer loss is full and partial collapses in the superannuation sector. Although superannuation product issuers are technically outside the scope of this review, consumer organisations recommend that the review is broadened to include this category of loss (see Consumer Recommendation 1).

A recent report by the Select Committee on Superannuation and Financial Services titled "Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial

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[22] Landy DFK Finance v Rasaratnam [2000] VSC 322 (17 August 2000)

Services - Second Report - Some Case Studies" (30 August 2001[23]) describes typical consumer losses in the superannuation sector:

> **Employees Productivity Award Superannuation, Hairdressers Association Superannuation Fund and the Law Employees Superannuation Fund.**
> These three Queensland superannuation funds caused over 36,000 members to suffer significant losses in terms of negative or very poor returns from their funds over several years. In the case of EPAS, members suffered a negative 43 per cent return in 1998, while members of the Hairdressers Association Superannuation Fund suffered a negative 38 per cent return in 1993.
>
> **Commercial Nominees of Australia Pty. Limited**
> Commercial Nominees of Australia was the trustee of approximately 475 small APRA funds, a master trust known as the Confidens Investment Trust, two trusts known as Enhanced Equity Fund (EEF) and the Enhanced Cash Management Trust (ECMT), and a number of corporate and public offer superannuation funds. CNA's management of the funds held in the ECMT included inappropriate investments in ventures such as a mushroom farm, and investments not always being at arm's length. As a result, the company suffered significant financial losses. Funds in the ECMT were frozen in November 2000 and pension payments drawn from this fund were stopped. CNA's licence as an APRA approved trustee was revoked, replacement trustees were appointed to the various funds, and the company was placed into liquidation in May 2001. The size of the loss caused by the collapse of CNA is estimated to be in the order of $25 million and has affected close to 25,000 investors. Those mostly affected were the 475 or so small APRA funds, most of whom had invested funds in the ECMT.

Superannuation funds are a form of managed investment although specific compensation provisions exist in Part 23 of the Superannuation Industry Supervisory Act. Despite widespread losses, these provisions have only been activated on one occasion - following the partial collapse of Commercial Nominees Australia.

The CNA case was a case of established fraud, although not, ultimately, to the level of proof required by a court, yet the prudential oversight system failed. It has also become evident that the scope of the compensation provisions of Part 23 are inadequate, as clients with self-managed super funds, which are oversighted by the Tax Office rather than by APRA, were excluded from the compensation arrangements (as envisaged by the legislation).

The government agreed to compensate consumers 90 cents in the dollar. However, this was more than 18 months after consumer assets in the CNL "Enhanced" Cash Management Trust were frozen. How many clients have obtained compensation to date is not known.

About 110 self-managed super funds were excluded from the compensation deal because they were not regulated funds under the SIS Act. This group is now attempting to obtain compensation through other means. However suing the directors of Commercial Nominees would be worthless if the directors have no funds and/or if the PI policies exclude fraud and

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[23] http://www.aph.gov.au/senate/committee/superfinan_ctte/report_a2/index.htm

dishonesty or otherwise fail to provide coverage. Also, most of the advisers who recommended these funds were with the Saxby Bridge group - a company that had its licence revoked by ASIC. Suing remains a possibility although claims will almost certainly be vigorously contested.

Irrespective of the fact that people using self-managed funds tend to be in higher incomes brackets[24] they are using a legitimate vehicle to meet government objectives - ie reduced reliance on the aged pension and self-funded retirement. It is also a vehicle that the government has made very attractive (primarily by way of tax concessions) and over 222,000 currently exist with net establishment running at the rate of just over 14,000 a year (although this is a declining figure)[25].

Recent research by the Tax Office[26] has found that self managed fund members are significantly closer to retirement than other super funds members and this is the case with the 110 SMF members who the government failed to compensate for their losses [27]. It sits uneasily with the general thrust of the government's retirement incomes policy that the consumer protection provisions of SIS can so spectacularly fail a group engaged in legitimate retirement incomes savings strategies – a number of are very close to retirement.

4.12 Private finance investment losses

Private investors have racked up significant losses in Australia by entering the finance market through solicitors, accountants and brokers. The two best known case are:

Solicitors' Mortgage Schemes in Tasmania[28]
Around 300 investors lost more than $20 million following problems in the Tasmanian market with Solicitor's Mortgage Schemes. In some cases retirement income streams have ceased, and repayment of principal or interest has not been forthcoming when requested.

Finance Brokers WA[29]
Private investors in Western Australia lost many millions of dollars owing to fraud and unscrupulous practices in the WA Finance Broking industry, leading to several high profile inquiries (such as the Gunning Report and Temby Royal Commission) and major law reform at the State level.

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[24] See Roberts, Matthew, 2002, *Self Managed Superannuation Funds – Overview*, paper presented at the 10th Annual Colloquium of Superannuation Researchers.
[25] ibid
[26] ibid
[27] Perceptual information provided by Max Press, the group organiser, It is suggested losses range from about $20,000 to $300,000 per fund.
[28] ibid
[29] http://www.financebrokers.wa.gov.au/4gunning.shtml

5 Justification for Reform (Q2)

There is a long standing recognition of the need for compensation arrangements in the financial services sector as evidenced by the existence of the EDR schemes, the market compensation schemes, mandatory PII requirements in legislation, business rules and professional association membership rules.

Further, the government's retirement incomes policy has dramatically pushed up participation rates in the sector and is increasingly exposing unsophisticated and highly vulnerable groups, such as retirees, potentially to complete financial ruin.

There is also some evidence that market imperfections – especially in the information area – are exacerbated by competition and major scandals can give rise to a crisis of confidence in the markets.

Further, in cases of insolvency / inability to pay, consumers may have no avenue for redress as there may simply be no funds to pay a claim.

Section 912B of the Financial Services Reform Act also envisaged mandatory compensation arrangements. We are unable to find any reason to detract from this requirement.

5.1 Objectives of compensation arrangements

There appears to be consensus around three objectives of compensation arrangements.

Firstly the purpose of compensation arrangements must be to ensure funds are available to pay valid claims.

Secondly compensation arrangements must facilitate access to compensation. (Where compensation mechanisms encompass complaint schemes and compensation funds they must operate independently of licensees and be accountable for their operations. Access to compensation arrangements must be reasonable. That is the mechanisms must facilitate access and not place any unnecessary barriers between consumers with valid and/or proven claims. While it may be appropriate for some claims to be tested in less accessible forums (eg high value inappropriate advice claims) there will be classes of claims for which it is imperative that access to compensation is facilitated - eg fraud and theft.)

Thirdly unless consumers have access on reasonable terms to appropriate remedies for misconduct by licensees, confidence in the market place will be eroded and participation rates fall.

5.2 Need long recognised by mandatory arrangements

There has long been a recognised need for client compensation arrangements, going back to the 1930s when a predecessor of the National Guarantee Fund was established.

More recently, the late 80s and early 90s saw the development of industry based consumer complaints schemes as an alternative to the courts. The financial services industry in particular has long recognised the value in providing a quick, cheap alternative to the courts for both itself and its clients. The Government has recognised the value and importance of these schemes in the *Financial Services Reform Act* and membership of these schemes is now a license condition. Schemes must be approved by ASIC, must report to ASIC and be externally reviewed every three years in accordance with the requirements of ASIC's Policy Statement 139. ASIC has already approved four schemes in the financial services area and another four are seeking approval. The established schemes are continually improving their coverage and accessibility.

Further, professional indemnity insurance has been recognised by both industry and government as playing a crucial role in providing client compensation. The law requires insurance brokers to have it, ASX rules require stockbrokers to have it, professional association rules require financial planners, investment advisers and accountants to have it, and ASIC requires the operators of managed schemes to have it.

The majority of current arrangements[30] have developed as a combination of consumer pressure, government persuasion and industry initiative reflecting the combined need to maintain confidence in the financial services market and facilitate client access to redress for wrongdoing.

5.3 Government's retirement incomes policy

However a number of more recent development have underscored the need for greater protections. The pace of change has escalated and consumers are participating in the financial markets more than ever before - largely as a result of government requirements, incentives and other initiatives to increase the nation's savings pool. All workers now have some form of superannuation account (many have a number). Assets of managed funds nearly doubled between June 1998 and December 2001, with the bulk of the growth in super funds and unit trusts.[31] And share ownership is increasing.

The Government's retirement incomes policy is based on the three pillars of mandatory superannuation, voluntary superannuation and the age pension. Both mandatory and voluntary superannuation are designed to reduce calls on the age pension and consequently attract considerable tax concessions, which are part of the large budgetary support[32] provided to the superannuation side of retirement incomes policy.

Mandatory superannuation is forcing all workers into the private superannuation system, the majority of whom are completely unaware and disinterested in its operation. Because of superannuation's mandatory nature they tend to assume that the government is looking after things. Because government has adopted an approach based on private sector operations it has

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[30] The EDR schemes are all industry initiatives, PII is a requirement of membership of professional associations and the market compensation schemes were also industry initiatives
[31] Ramsay I Disclosure of Fees and Charges in Managed Investments Sept 2002
[32] These concessions were about 1.7 per cent of GDP in 1996/97.

additional obligations to ensure the system is working for consumers' benefit and to provide protections where the market fails.

On retirement some people will have money to invest for the first time. This lack of experience makes them particularly vulnerable to fraudulent and smooth talking but incompetent operators, as ASIC prosecutions attest. These operators have tended to target less sophisticated retirees living in rural and regional areas, particularly in Queensland.

Even relatively sophisticated consumers making provision for themselves by way of self managed super funds have not been immune from fraudulent operators (eg Commercial Nominees).

Retirees are an inherently vulnerable group and have the most to lose. As a group they are dependant on their savings and have very limited capacity to recover from the consequences of misconduct by licensees. It is simply inappropriate to expose retirees to potential financial ruin, more so in light of government policy that encouraged and/or mandated their savings.

5.4 Information problems

There is an abundance of evidence to suggest that consumers are not even able to work out the cost of financial products let alone assess the creditworthiness of a financial provider.

Bateman[33] found that information asymmetries on the consumer/investor side distort the operation of the market and mean, for example, that investors lack the information to assess and manage investment risks and make choices between funds based on costs.

Ramsay[34] found significant variations in the degree and manner in which fees are described - both across the industry and within similar prospectuses. In some prospectuses fees and charges are referred to but not defined, or relevant fees are not disclosed in the fees section requiring the need to search the entire prospectus for fee details. Ramsay's surveys of investors reveal it is difficult for investors to understand fee structures and work out how much a product is costing them. A substantial number of investors fail to understand that fees are disclosed in prospectuses and one third of respondents were unable to define the types of fees they were paying.

The complexity of financial products and the confusing and sometimes incomprehensible manner in which their performance and cost is portrayed virtually guarantees consumers will not be fully cognizant of all the elements of their purchase. Misrepresentation is the fourth most significant ground of complaint to FICS about investment advisers (inappropriate advice is the number one ground of complaint)[35].

Additionally, historically the financial services sector has engaged in a range of sharp practices, particularly misrepresentation about both products and associated charges, often a result of

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[33] See Bateman H, Disclosure of Superannuation Fees and Charges, Australian Institute of Superannuation Trustees, Melbourne.
[34] Ramsay I, Disclosure of Fees and Charges in Managed Investments Sept 2002
[35] FICS annual report 2001

competitive pressures[36]. Evidence from the UK suggests that part of the reason for the substantial fall in sales of pension products in 1994 and 1995 arose out of the collapse in consumer confidence following the pension miss-selling scandal.

5.5 Inability to pay / insolvency

The jurisdictions of the EDR schemes do not extend to insolvency. Their jurisdiction also ends at the same time a license ends. The exception to this rule is FICS, which recently extended its jurisdiction following a number of problems to allow it to complete hearing existing complaints. This was not in force at the time of the outstanding claims against Saxby Bridge which totalled nearly $1million. This does not however increase its capacity to enforce a decision and may leave consumers with a determination that no-one pays.

FICS has also experienced a number of cases where claims have remained outstanding once ASIC has revoked a licence. While FICS can terminate a licensee's membership of the scheme it cannot otherwise compel a member to pay a determination. Similarly members can avoid a determination by handing back their license as has occurred.

There is evidence emerging from FICS that some licensees are prepared to give up their licence to avoid the jurisdiction, including paying a determination. A more worrying observation is that some of these licensees are effectively re-birthing as new organisations (reminiscent of the phoenix construction companies in NSW in the early to mid 90s) and can obtain a new licence while avoiding the earlier EDR determination. The EDR schemes are in a unique position to capture this information – if it is occurring as a result of court decisions the data would be difficult to track. This issue must be addressed within the design of the overall compensation system.

Consumers with determinations/judgements may be able to establish them before liquidators but will almost certainly not receive the full amount.

The capacity of liquidators to deal with new claims, especially those involving complex questions is extremely limited. Further proceedings against a company cannot be started without leave of a court. Unless an insurer is willing to stand behind the licensee, any victory is likely to be pyrrhic. A compensation fund would provide a method for determining a claim and a source of funds on insolvency.

5.6 Moral hazard arguments

We reject moral hazard arguments that imply that ordinary consumers will take less care in choosing financial products because of the existence of a compensation fund and may even gravitate towards risky licensees. This assumes consumers have access and are able to assess

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[36] See Trade Practices Commission, 1994 *Selling Practices in the Life Insurance Industry*. Commonwealth of Australia, Canberra

information about a licensee's financial position, competence and trustworthiness, contrary to the evidence. As noted above, Bateman found that information asymmetries on the consumer/investor side mean that investors lack the information to assess and manage investment risks and make choices between funds based on costs.[37]

The moral hazard argument also assumes consumers are aware of the existence of compensation schemes, contrary to the evidence. Research into consumer awareness of EDR schemes consistently suggests that consumers stumble on the schemes at the point that they have claims. Most are referred by scheme members when they remain dissatisfied with the outcome of an internal disputes procedure (as required by the rules) or find them in the Yellow Pages. Virtually none have prior knowledge.

5.7 Cost / benefit analysis

The balance between the costs and benefits of any proposed solution need to be kept in mind. Ultimately, consumers will pay for the costs of any compensation arrangements through higher prices or lower returns.

Another balancing factor which needs to be kept in mind is that resources allocated to compensation arrangements could instead be allocated to other consumer protection mechanisms, such as regulatory oversight, investigations and enforcement activity. Other consumer protection mechanisms tend to have a stronger preventative impact. Compensation arrangements would appear to have little preventative impact on the behaviour of licensees.

However, consumer organisations have reached the overall conclusion that some form of uniform, no-gap compensation arrangements are justified and will deliver substantial benefits to consumers. In order to keep the costs of such arrangements to a minimum, we have made several Consumer Recommendations (below) which should ensure costs remain reasonable. In particular:

- Allowing some claims to be capped
- Utilising some existing funds
- Requiring only a small annual levy
- Relying on post-event levies for major incidents
- Returning excess funds to members.

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[37] see Bateman H, Disclosure of Superannuation Fees and Charges, Australian Institute of Superannuation Trustees, Melbourne.

6 Coverage of compensation arrangements (Q3, Q4, Q5)

This chapter looks at the appropriate extent of coverage of compensation arrangements, and considers limits on compensation under the following categories:

- Which licensees and activities should be covered
- How insolvency should be treated
- Who can claim

6.1 Coverage of licensees / activities

Compensation arrangements should, in the immediate future, focus on the areas where losses are the greatest. This means arrangements should cover:

- advising
- dealing
- operating a registered scheme
- operating superannuation funds and
- operating insurance companies.

This would therefore cover the activities of:

- Financial planners
- Investment adviser
- Stockbrokers
- Insurance brokers
- Operators of managed schemes
- Operators of superannuation funds; and
- Operators of insurance companies.

There are a number of problems with separating claims against the conduct of intermediaries from issuers. Intermediaries are essentially the distribution arm of issuers and issuers provide them with considerable support and training. Consumer claims could arise out of matters that were a result of flawed servicing by an issuer including flawed product advice, training or even inherently flawed products or any combination of these. Who then should be liable for a consumer claim – the intermediary or issuer? It would not be acceptable for such claims to fall through the cracks.

Similarly, if arrangements cover only intermediaries and not issuers where does the client seek redress if they purchase a product through an intermediary but the issuers fails after receipt of the funds but before issue of the product? Would a claim against the intermediary succeed? Would it be fair if it did? For these and other reasons we have recommended broadening the scope of this review to include some product issuers (see also Consumer Recommendation 1).

Consumer Recommendation 2

The compensation arrangements should apply to all licensed intermediaries, and some licensed product issuers – the operators of managed schemes, superannuation funds and general insurance companies.

We also want to see the broadest range of activities covered by the compensation regime. Unless consumers can have confidence that licensees will meet all of their obligations imposed by Chapter Seven then confidence in the market will deteriorate. The compensation system as a whole must ensure that consumers can obtain compensation for all forms of misconduct under Chapter Seven. This should be read widely to include any breaches of financial services law.

Consumer Recommendation 3

The compensation arrangements as a whole should include coverage of breaches of all of the licensee's obligations.

At present consumers can bring claims against solvent licensees to the various EDR schemes up to the dollar limits of those schemes. It is our view that the jurisdictions of these schemes should be reviewed to ensure any claim under Chapter Seven is within jurisdiction. We are aware that some schemes exclude complaints that fall within Chapter Seven. For example, the IDBF will not deal with complaints where fraud is alleged against the broker. That scheme has taken the view that these are criminal matters and outside its jurisdiction. In our view the EDR schemes should provide an alternative to the courts for any Chapter Seven breaches including those that go to honesty while the licensee is solvent market confidence dictates that these more serious claims are settled expeditiously. The schemes are now required to report such conduct to ASIC.

While we accept that compensation arrangements must be limited to licensed providers we are strongly of the view that the arrangements should apply where a licensee is acting outside the terms of its licence. Even if consumers are informed in general terms about the extent of the licence and make checks through ASIC it is unlikely that they will be able to distinguish between licensed and unlicensed activities. At any rate the ASIC database that allows consumers to check licensees provides little information other than the name and address and licence number. In this regard the jurisdictions of the EDR schemes and any compensation fund should also apply to any complaints against a licensee whether the conduct complained about is internal or external to its licence conditions.

Consumer Recommendation 4

The compensation arrangements as a whole should include coverage where a licensee is acting outside the terms of their license.

However consumers must be made aware of the need to deal with licensed operators only and the fact that the range of consumer protections only extend to licensed operators. ASIC should develop an education campaign to continually reinforce the message that consumer protections only extend to licensed operators.

In this regard it could be useful to require a licensee's licence number, a brief description of the terms of that licence, and a note advising the consumer that the details can be checked at ASIC, to appear up front on the advisory services guide and on financial plans. If there is to be any hope that the message will get through it must be repeated and repeated. Therefore it would be useful if this information was required to appear on every written communication between a licensee and a client. It could for example be incorporated into letterhead or footers. For example:

> **Financial Services Ltd**
> **Licensed Securities Dealer No: 124444**
> **We are licensed to advise on and sell financial products.**
> **Our licence can be checked at ASIC www.asic.gov.au/fido/yy or 131313.**

Consumer Recommendation 5

ASIC should develop an education campaign to continually reinforce the message that consumer protections only extend to licensed operators.

The disclosure provisions in Chapter 7 should be amended to provide consumers with greater disclosure regarding the details of the licence and where the licence can be checked.

6.2 Treatment of insolvency / inability to pay

Beyond the dollar limits of each EDR scheme, consumers currently have access to redress through the courts for any breach. However the mere existence of these mechanisms does not guarantee that funds will be available to pay any successful claims. Market confidence dictates that funds must be available to pay successful claims. For all practical purposes this means licensees must be backed by professional indemnity insurance.

As a general point we support the framework of the current arrangements for complaints against solvent licensees. The detail needs addressing in a number of ways. These go mostly to the jurisdictions of the EDR schemes and PII requirements each of which is detailed below.

Coverage in cases of inability to pay/insolvency must extend to those matters that are crucial to consumer confidence. As a minimum consumers must be able to have implicit confidence that any money or property that entrusted to a licensee will be dealt with efficiently, honestly and fairly.

The types of conduct in which compensation in our view should be facilitated whether a licensee is solvent or not and which should apply to both intermediaries and issuers should include any loss of or deficiencies in property as a result of:

- Failure to account
- gross incompetence;
- fraud or fraudulent conduct[38];
- dishonesty;
- fidelity breaches; or
- grossly misleading and/or deceptive conduct.

The evidence is that where losses have been sustained as a result of gross incompetence or fraudulent conduct the licensee is insolvent.

It is preferable that compensation mechanisms for such fundamental breaches be ones that facilitate access. Where the licensee is solvent the EDR schemes would be the most appropriate mechanism, in cases of insolvency a compensation fund would have greater merit.

Consumer Recommendation 6

As a minimum compensation arrangements covering insolvency/inability to pay must provide coverage for and facilitate access to compensation for losses arising from:

- Failure to account;
- Gross incompetence;
- Fraud or fraudulent conduct;
- Dishonesty;
- Fidelity breaches; and
- Grossly misleading and deceptive conduct.

6.3 Entitlement to claim

The short answer to the question of who should be entitled to claim, is those who are least able to bear any loss. For this reason it would be appropriate to limit mandatory compensation arrangements to retail clients as defined by the s761G of the Act. Importantly the definition captures small business clients at s761G(12). A similar limitation exists for the external dispute schemes and ASIC PS 165 requires the schemes to deal with complaints in accordance with definitions in the Act. PS 165 explicitly requires the schemes to review their rules to ensure small business clients in accordance with the definitions can access the schemes. While the Insurance Brokers Disputes Facility has recently widened its terms of reference to allow it to accept complaints from small business clients in accordance with s761G(12) this is not the case for all other schemes. FICS however is likely to implement the change following the current review.

1.1

[38] fraudulent conduct being a lesser standard and not requiring proof in a court

It would also be reasonable to limit any access to a broad compensation fund to retail clients despite the wider access currently available. Although this has not occurred in the lengthy history of the scheme, one claim by a wholesale client has the potential to exhaust the fund.

Additionally a range of Chapter Seven consumer protections are limited to retail clients and it is reasonable that the same policy underpinning should apply to compensation arrangements.

Consumer Recommendation 7

Compensation arrangements should only be available to retail clients, as defined by s761G, which includes small business clients.

Additionally arrangements must be available to any person who can demonstrate that they have a beneficial interest or other special interest in a dealing or transaction. This follows rule 6 of the FICS rules. If doubt remains the rules in relation to claimants should make it clear that partners and dependants are eligible to claims for losses suffered by a deceased person. This has been an ongoing problem with the UK Investor’s Compensation Scheme.

Consumer Recommendation 8

Compensation arrangements should be available to any person who can demonstrate that they have a beneficial interest in a dealing or a transaction, as long as they would also meet the definition of retail client.

We see no reason to provide coverage to potential claimants who had some responsibility for or profited from the relevant difficulties of a failed licensee.

Consumer Recommendation 9

Compensation arrangements should not be available to any person who had some responsibility for, or profited from, the relevant difficulties of a failed licensee.

7 Professional Indemnity Insurance (Q6, Q7)

We have decided to include a comprehensive chapter on Professional Indemnity Insurance, as PII is likely to form one of the key planks of future compensation arrangements.

Insurance could form the basis of the compensation regime. It is currently the primary mechanism by which funds are available to pay claims where the licensee cannot. For this reason PII has become a standard business practice and is a requirement of membership of a number of professional associations.

Although most licensees have some form of cover, coverage is by no means universal.[39] Where it is held, there is little consistency in the nature of policies neither across licensees nor within particular segments of the industry (with the exception of insurance brokers who have mandatory minimum coverage).

7.1 Current insurance arrangements

7.1.1 Insurance brokers

Under the *Insurance (Agents and Brokers) Act 1984* general and life insurance brokers are required to have an insurance contract that is "accepted by ASIC". This must cover liabilities "incurred as a result of a breach of professional duty by the broker in the course of carrying on business as an intermediary" up to an amount specified in the regulations of between $1 and $5 million.[40] The excess cannot exceed $10,000 or 2.5% of the broker's annual income.[41]

Despite section 28 of the Insurance Contracts Act 1984, insurers cannot avoid the contract or reduce liability even where the insured has:

- failed to comply with a duty of disclosure when seeking to enter a contract; or
- made a misrepresentation to an insurer before the contract was entered into, whether that failure or misrepresentation was fraudulent or not.[42]

An acceptable contract of professional indemnity insurance must in certain circumstances provide "run-off" cover such as where:

- the insured ceases to trade
- the insurer cancels the contract
- the insured, or any other person who becomes responsible for the liabilities of that person, is required to continue to be indemnified in relation to a claim.[43]

1.1

[39] According to the FPA a significant portion of non-FPA members (which is about 30% of financial planners) do not hold PI insurance
[40] Regulation 2B
[41] reg 2B (3)
[42] s9 B (3)
[43] s9B(4)

Acceptable contracts can only be cancelled by the insurer giving three business days notice of the date and reason for cancellation to ASIC.[44]

Failure to meet obligations under any agreement where the insurer lends the insured funds for the premium payments is not a reason to void the contract.[45]

The Act does not require the policy to endorse determinations of the Insurance Brokers Dispute Facility, although it is a requirement of membership of the industry association - the National Insurance Brokers Association - that policies contain such an endorsement. About 60% of the industry belongs to NIBA.

Despite the stringent requirements of I(AB)A few brokers have had difficulty in obtaining cover. According to Marsh, when the non-avoidance clause was first introduced (in 1994 following a high profile case in which an insurer successfully denied liability on the grounds of non-disclosure) premiums rose and insurers were very nervous about its impact. Eight years on Marsh has not received a single claim under the clause.[46]

Despite the current tight market ongoing cover for insurance brokers has been possible. The I(AB)A has a proven record of workability and is a useful starting point.
Presumably a number of financial planners would already be bound by the I(AB)A given that life brokering increasingly appears to be an additional service provided by financial planners and investment advisers. Many other financial planners would have PII in place because of their membership of the FPA.

7.1.2 Financial Planning Association members

Currently the FPA requires each Principal member to have professional indemnity insurance. Principal members are licensed securities dealers and comprise 550 of the 7500 active financial planners. The FPA requirements are:

- Minimum limit of indemnity:
- $1,000,000 per claim
- $3,000,000 aggregate, but not less than 50% of estimated gross income from financial planning /advising.
- A maximum deductible (excess) of less than 25% of current surplus liquid funds or net tangible assets as defined in the member's licence.

Policy extensions available:

- Loss of documents
- Libel and slander
- Fraud and dishonesty
- Trade Practises Act and Fair Trading legislation
- Retroactive cover

1.1

[44] section 9B(5) (6)
[45] s9B(7)
[46] Conversation with Ray Armstrong of Marsh

- Intellectual property
- Fidelity
- Run-off cover
- Endorsement of FICS determinations not exceeding $100,000.

There is no requirement for individual advisers and planners who are authorised representatives or proper authority holders to hold PII. While they are covered by the dealer's policy, increasingly the larger dealers (AMP, MLC) as well as some of the small to medium groups are requiring advisers to obtain PII as a precondition of becoming an authorised representative or proper authority holder. While the large dealer groups arrange group cover, authorised representatives of the small to medium dealers have to get it where they can find it.

No guidelines exist for these policies but the FPA says authorised representatives are arranging standard negligence cover with some extensions for Trade Practices Act actions, FICS endorsement and "a bit of fraud and dishonesty".[47]

Where cover is provided by the dealer group questions the extent of the coverage can be limited to advice in relation to products sold by that group, which raises issues for proper authority holders who sell the products of a number of companies.

According to the FPA, PII cover is becoming extremely difficult to arrange. Obtaining run-off cover is very difficult and policies are increasingly excluding particular types of advice - notably in relation to:

- tax effective products;
- agribusiness products; and
- margin lending.

Obtaining fidelity extensions is also becoming difficult. However insurers say part of the problem is that PII for planners has been underpriced for years (citing policies previously costing $200 a year). Cover is available but the planners are resistant to prices which are now more accurately reflecting risk and are not disproportionate to premiums paid by other classes of licensee, in particular insurance brokers.

7.1.3 Stockbrokers

Under the ASX Business Rules all ASX participating organisations must have cover against liability for negligence, errors, omissions, misstatements, statutory warranties and indemnities, infidelity of staff, loss, destruction or deprivation of securities or other documents of title. Cover must be of the kind and amount "which a reasonable person would determine to be adequate having regard to the nature and extent of the business and the responsibilities and risks assumed."

We do not know the extent to which dishonest acts, fraud and fidelity are covered.

1.1

[47] Peter Kalantziz, Policy Officer FPA

7.1.4 Managed investment schemes

ASIC PS 131 requires operators of managed investment schemes to “maintain appropriate PII and insurances against fraud of your officers”. Cover up to $5 million or the value of the scheme is required. Small scale schemes (less than 20 members) are excluded.

7.1.5 Conclusion

Although licensees generally have a form of PII, coverage is by no means universal. Where it is held, there is no consistency in the nature of policies either across licensees nor within particular segments of the industry with the exception of insurance brokers who have the most detailed requirements.

For this reason s912B probably should require all licensees to hold PII up to prescribed minimums established by either regulation or ASIC policy.

Consumer Recommendation 10

That PII underpin the compensation regime and that all licensees be required to hold PII up to prescribed minimums (these are discussed below).

7.2 Problems of PII as a compensation mechanism

The issues paper identifies three important disadvantages of PII as a compensation mechanism.

- While client’s rights are against the insured, action will be against the insurance company, and payment will depend on the manner in which a claim is accepted or contested
- If litigated there will be an imbalance in resources and expertise between the client and company
- There is a crisis in the cost and availability of professional indemnity insurance and this is impacting on the availability of important components eg run-off cover, fraud and fidelity

Below we provide some of the detail in support of the above. It appears that some deficiencies could be readily corrected, while others are more problematic and go to the heart of whether PII is an accessible and appropriate compensation mechanism for certain classes of claims.

The deficiencies could be described as fitting into two broad categories. The first relates to problems of access deriving from the adversarial nature of the claims process. The second relates to policy construction.

However where claims are contested PII can by no measure be considered an accessible compensation mechanism. It is our view that it is best used in support of other more accessible mechanisms eg EDR schemes in the case of solvent licensees and a compensation fund in cases of insolvency. We accept that there will be a gap between the two, and that clients facing contested higher value claims will be forced to use to courts. For this reason it is crucial that the dollar limits to the EDR jurisdictions continue to capture the majority of consumer claims.

7.3 Problems with the claims process

7.3.1 Identifying insurers and policy terms

The first difficulty derives from the fact that consumers have no independent legal rights against insurers even though they are the ultimate beneficiaries of such policies.

Unless an insurer stands behind a licensee, particularly a licensee that has no assets, it is unlikely that a successful claim will be more than a pyrrhic victory. For a claimant to have any hope of obtaining compensation a licensee's insurer must be there and the terms of the relevant policy determined.

In Australia defendants have no general obligation at law to disclose the identity of their insurer or the contents of a policy to a person who is not a party to the contract of insurance[48]. Rather insurers actively tell insureds not to reveal details of the policy to third parties and regard disclosure of such details as co-operation with an opponent and grounds for either voiding the policy or denying the claims[49].

In short the information cannot be obtained in the discovery process as the aggrieved person is a third party and not a party to the insurance policy. While legal avenues exist they are not guaranteed and can be expensive for claimants. If PII is to be part of the mandatory compensation arrangements and its purpose is to both ensure that funds are available to pay clients with valid claims and facilitate access to redress, then it would be essential to remove these barriers to access. It is not reasonable to force consumers to engage a lawyer simply to determine the name of the insurer and terms of the policy.

To facilitate identification of the terms of PII policies and the name of the insurer by clients of licensees a number of options are available.

1.1

[48] Beneficial Finance Corporation Ltd & Ors v Price Waterhouse (1997) 9 ANZ Insurance Law Cases 61,360
[49] The means of obtaining this information are set out in detail in a paper, "Ensuring that the defendant's insurer participates", by Ben Slade – a solicitor with Maurice Blackburn Cashman.

1. Licensees should be required to include the name of their insurer and terms of the contract at least up to the required minimums in their Advisory Services Guides. For example ASGs could state:

   Professional indemnity insurance
   We hold a PII policy that meets ASIC requirements. This includes a minimum excess of $xx. Cover up to $xmillion for any civil actions. Fraud and dishonest acts are covered. Etc Our insurer is XYZ Insurers.

2. Alternatively ASIC could hold a central register to allow potential claimants to identify insurers and policy terms.

To reduce any potential exposure ASIC may face in 2 above licensees should be required to prove by way of a certificate from a broker or insurer that their PII policy meets the regulatory requirements. At present we understand that brokers provide this sort of certification in relation to PII policies for chartered accountants.

Consumer Recommendation 11

Licensees should be required to include the name of their insurer and the terms of the contract at least up to the regulatory requirements in their Advisory Services Guide.

7.3.2 Getting the insurer to participate

The most straight forward way of getting a recalcitrant insurer to participate is to get the defendant (the insured) to make a cross-claim. However this is well beyond the control of a client and can only be achieved by informal (and often impractical) means - largely those arising out of a positive working relationship between the legal representatives of both parties.

Various causes of action may be directly available to a plaintiff against the defendant's insurer. The general rule is that persons who are not a party to a contract have no rights or liabilities under a contract and cannot enforce it even if it was clearly made for their benefit.[50]

Section 48 of the Insurance Contracts Act provides that a person who is not a party to a contract, but who is specified or referred to in the contract, (whether by name or otherwise) as a person to whom the insurance cover extends, can recover under the insurance policy directly.

However it is not clear how far s48 goes to enable people who are unnamed but arguably the intended beneficiaries to sue on the contract. If the scope is limited to people such as those who drive a car with the permission of the insured rather than for example clients of negligent financial services licensees, then s48 is of limited value.

1.1

[50] Midland Silicones Ltd V Scruttons Ltd (1962) AC 446

It is possible in cases where the licensee is insolvent for a consumer to join an insurer to a matter. However, claimants facing recalcitrant insurers will have to engage in complex and expensive legal manoeuvring to do so. The various strategies all require running technical points of law and/or using court rules in an attempt to join an insurer.

The process is somewhat easier in Queensland and Western Australia where legislation exists giving a stranger to a contract, including an insurance contract, the right to enforce a term of the contract which his intended to benefit her or him[51]. In NSW s12 of the Contracts Review Act 1980 limits a court's ability to make an order for a third party to proceedings that have been commenced by a party to the contract.

However where a licensee remains solvent but has no assets and the insurer denies liability, irrespective of the grounds it is considerably more difficult for consumers. In this situation to have any hope of obtaining compensation under the PI policy consumer claimants must rely on the licensee to claim against the insurer. In this case the consumers could apply to be heard by the court.

Tracknet

155 consumers invested a total of $2.8 million in a scheme. In attempting to recover a portion of this money, action has been taken against the management company, which has a PII policy. However the insurer has denied liability on the grounds of material non-disclosure. The Chairman of the management company has no assets but the company is not insolvent. In this situation the consumers are relying on the Chairman to cross-claim against his PII insurers, a matter that does not appear to be a priority for him. In this case the Chairman has a valid claim against the insurer under s54 of the Insurance Contracts Act.

This issue could be addressed by a separate amendment in either the *Corporations Act* or the *Insurance Contracts Act* that creates a right or shows an action available to the ultimate beneficiary under an insurance policy.

Consumer Recommendation 12

Either the *Corporations Act* or the *Insurance Contracts Act* should be amended to allow consumers who are beneficiaries under an insurance contract to enforce the contract.

7.3.3 Costs of litigation

Discussions with lawyers reveal that in a number of the tax effective scheme test cases clients were faced with a choice of challenging the Tax Commissioner's ruling or challenging the advice of their adviser.

1.1

[51] s55 Property Law Act 1974 (Qld); s11 Property Law Act 1969 (WA)

Whereas clients were able to collectively pool resources to mount a challenge to the Tax Commissioner this option was not available against advisers, given that a network of advisers were involved and differences in the detail of the advice.

In one case mentioned above 427 clients involved in a tax effective agricultural scheme chose to challenge the tax ruling in a test case arrangement with a legal firm in which the affected investors will contribute to the costs (which to date are in excess of $300,000).

In other cases lawyers are advising clients that the possibility of an adverse costs order combined with the clients own legal bills mean aggressively contested cases will not be worth pursuing. See Ms B above.

7.4 Policy construction issues

7.4.1 Insurers denying claims on the basis of non-disclosure or non-notification

A major way in which insurers will seek to avoid policies is by claiming non-disclosure or non-notification by the insured. That is, when the insured fails to disclose prior events that would impact on the insurer's decision to offer insurance, or where they fail to notify the insurer of a potential claim as soon as the insured becomes aware of it.

The problem with both these clauses is that consumer rights are prejudiced by a licensees' failure to meet its obligations under the insurance policy and not by any action of their own.

Denial of claim A

The misconduct occurred in 1998/1999. The client complained to the investment adviser in February 2000. The client saw a lawyer in June 2000. The licensee notified the insurer in October 2000. The client filed a claim in December 2000. The insurer denied liability on the basis of a material non-disclosure in that the licensee failed to tell the insurer that its licensee to deal in securities had been cancelled May 2000.

The non-avoidance clause was inserted into *the Insurance (Agents and Brokers) Act* in 1994 following a highly publicised case in which a genuine claim was denied on the basis of fraudulent non-disclosure by the licensee. . The major arranger of PII insurer in the broking area, Marsh, has said that no claims have been made under this clause since 1994 despite the requirement pushing up premiums following its introduction.

Insurers will also seek to avoid claims where the insured has failed to meet its notification obligations. Insureds are required to notify an insurer as soon as they become aware of a potential claim. The first question an insurer will ask an insured on notification of a claim is when did they first become aware of the possible claim. If it becomes apparent that the insured was aware of the potential claim and failed to notify the insurer then this becomes a ground for avoidance of the policy. Marsh has also noted that few insurance broking claims have been rejected but of those few the main ground for rejecting a claim has been non-notification, including innocent non-notification once the contract has been entered into.

The landscape has changed recently with the High Court decision *FAI v Australian Hospital Care 2001*, although its impact is far from settled. The decision has been interpreted as dispensing with notification requirements where policies have an "occurrence notified" clause which require insureds to notify the insurer of an occurrence that could give rise to a claim. It remains an open question whether the case applies to contracts that lack an occurrence notified clause. However it is clear that the decision will be further tested.

Consumer Recommendation 13

Minimum PII requirements should include non avoidance clauses for innocent and fraudulent non-disclosure and non-notification. This is consistent with I(AB)A and will end legal uncertainty.

7.4.2 Claims made polices

'Claims made' policies provide for claims that are made and notified during the policy period. Typically, policies are in force for one year. While some policies allow claims made and notified during other periods when the same insurer was providing coverage a significant number of policies do not allow such backdating.

The problem with these policies is that it can take time between clients complaining to a licensee and actually filing a claim.

Another problem with 'claims made' policies is that fraudulent or dishonest operators and failing licensees are unlikely to have cover in place by the time consumers become aware of a claim.

7.4.3 Dishonesty and fraud.

While policy extensions are available to cover dishonesty and fraud, they are often confused by various exemptions or by the terms of other extensions. For example one extension may cover dishonesty, fraud and malicious acts or omissions by employees, partners and directors, but another clause may cover only unintentional breaches of the Trade Practices Act (presumably knowingly misleading conduct is excluded).

Other exemptions may exclude reckless dishonest acts. When such a combination of clauses appears it is very difficult for consumers to have any certainty about the scope of coverage provided by licensee's PII. One lawyer has said the answer to whether the policy provides coverage would be likely to cost tens of thousands of dollars of litigation.

Consumer Recommendation 14

Minimum PII requirements should include clear coverage of dishonesty and fraud.

7.5 Other issues

7.5.1 When insurance is not maintained

Failing licensees and licensees engaged in fraudulent behaviour who are about to abscond rarely maintain coverage. While most policies are paid annually up front it is not uncommon for policies to be paid in quarterly instalments. Where payment is not received the policy lapses.

Consumer Recommendation 15

Policies must be deemed current for the full year irrespective of the funding arrangements.

7.5.2 Joint and severally liable

Auditors have complained that as a consequence of the joint and several rule that their insurance funds are required to provide compensation for losses well beyond the negligence of the auditor, which is pushing up the cost of their insurance. The accounting bodies state that while it is possible for a defendant who bears the full extent of a judgment to seek contribution from other defendants that have contributed to the loss, equitable apportionment in this manner is rarely achieved because of the insolvency or lack of assets on the part of the other defendants, or because they are untraceable or beyond jurisdiction

Under CLERP 9 the Government has said it would seek agreement from the State governments to introduce a proportionate liability rule. The Government says the change is required to limit liability to the amount of the plaintiff's loss actually caused by their own negligence. This would overcome the 'deep pocket' syndrome and avoid the need to sue other defendants for losses for which they are responsible – a matter that becomes particularly problematic when the other defendants have no assets or are insolvent.

However the arguments in favour of solidary liability focus on the idea of fairness to the plaintiff in an action for damages:[52]

- First, solidary liability aims to ensure, as much as possible, full compensation for a plaintiff.

1.1

[52] See Discussion Paper 38 (1997) - Contribution Between Persons Liable for the Same Damage, NSW Law Reform Commission

- Secondly, solidary liability has the effect of putting the burden of complex legal proceedings on the defendants, who are often more able to bear it, rather than the plaintiff.
- Thirdly, each wrongdoer has caused indivisible damage to the plaintiff, therefore it is just that each wrongdoer is fully liable for that damage. The fact of the liability of other wrongdoers should not prejudice a plaintiff's chance of full recovery.

The impact of a change to proportionate liability needs exploration beyond the scope of this review. It has been the subject of numerous reports at both federal and state level over the years, often with conflicting outcomes. A number of changes have already occurred, particularly at state level (see NSW Professional Standards Act) which aim to limit liability in an attempt to overcome the impact of this rule on defendants .

Consumer Recommendation 16

There should be no change to the joint and several rule without a full exploration of its impact.

7.6 What should PII cover?

We note that at the meeting Treasury convened on 14 November the insurers made it clear that a legislative floor which clearly identifies benchmarks makes it easier for insurers to underpin a scheme. Brokers, more generally, have noted to us that it provides less room for underwriters to "play around" with or "screw down" contract terms.

Drawing all of the above together it is our view that as a minimum, the requirements of the I(AB)A should apply across the sector. This includes:

- Minimum indemnity limits
- Maximum excess thresholds
- Non-avoidance clauses covering both innocent and fraudulent non-disclosure and non-notification
- Run-off cover
- Notification to ASIC prior to termination of contract

Consumer Recommendation 17

The PII requirements of I(AB)A should apply across financial services licensees. The detail however should provide flexibility to accommodate differences of detail across the sector (see run-off cover below).

There are three additional elements which we believe are important in PII and should be included as minimum requirements. These are:

7.6.1 Endorsement for EDR determinations

The EDR schemes are now an essential part of the consumer compensation landscape and it is therefore necessary that policies terms include endorsement of EDR determinations. This is a requirement of membership of the IBD and part of the FPA's requirements. It would be a useful minimum. Requirements should constrain insurers from setting excesses that exceed the jurisdictions of the schemes unless the licensee can demonstrate a capacity to self-insure.

7.6.2 Broad form civil liability policies

If PII is to form the basis of any compensation regime then it must provide wide cover. In our view it should cover all the general obligations under Chapter Seven of the *Corporations Act* as well as the consumer protection provisions in the TPA, ASIC Act. Therefore it is preferable that licensees be required to hold a broad form civil liability policy (as opposed to a narrower standard negligence policy). This is the sort of policy that Marsh provides to brokers. If this cannot be extended to other sectors and negligence wordings are adopted then extensions should be required for Corporations Act, ASIC Act and TPA breaches.

7.6.3 Unambiguous fraud and fidelity cover

As previously mentioned while fraud and fidelity are typically covered they are often surrounded by numerous vague and sometimes contradictory clauses that have the potential to undermine their meaning. It can take ten of thousands of dollars of litigation find out whether fraud is in fact covered.

Consumer Recommendation 18

In addition to the I(AB)A requirements mandatory PII should include:

- Endorsement of EDR determinations
- Coverage of Trade Practice Act, ASIC Act and Corporation Act breaches
- Unambiguous fraud and fidelity cover.

7.7 Insurance market

There is no doubt we currently experiencing a hard insurance market, which has been exacerbated in Australia by the collapse of HIH (which held around 35 per cent of the professional indemnity market), and further compounded by the terrorist attacks on 11 September 2001. As a consequence choice has reduced and premiums have risen. However insurance business is by nature cyclical[53] and the acuteness of the crisis in Australia has been exacerbated to some extent by the collapse of HIH and the withdrawal of bargain price insurance. Premiums have risen and for example financial planners will never see a return to the cheap premiums of the past.

There is also some evidence that the insurance industry has significantly contributed to the current crisis by focusing on increasing market share than maintaining profitability.[54] The Senate committee found a lack of reliable data in relatively straightforward matters such as number of claims made, settled and number of premiums making it impossible to determine whether increased numbers or size of claims had any role. This led the Institute of Actuaries to note "this is an issue of incompetent or even no underwriting". Further poor management practices have resulted in lower than expected investment returns.

In considering mandating minimum insurance requirements the Government should work with insurers to ensure that policies are fairly and transparently priced and based on realistic actuarial assessment. If the insurance industry is unwilling or unable to provide appropriate insurance for the licensees and their authorised representatives then the Government should either facilitate or organise a scheme for the sector.

Given the experience following the introduction of the *I(AB)A* the Government should have confidence that the market will respond to any mandatory requirements, although we would anticipate resistance from some quarters.

Pooling or group insurance has been identified[55] as a means of bringing down the cost and increasing the availability of insurance. Where group insurance schemes operate, members can be obliged to adhere to risk management procedures to retain membership of the scheme. The insurance brokers have a voluntary scheme arrangement that accounts for about 50% of the broking market. NSW lawyers have a compulsory scheme arrangement run by Law Cover (although those arrangements are currently under review). It is our understanding that these schemes, in particular the brokers scheme have managed to navigate their way through the current crisis despite the run-off and other requirements of the I(AB)A.

Consumer Recommendation 19

In mandating minimum insurance requirements, the Government should encourage professional associations to work with insurers to obtain group insurance.

If the insurance industry is unwilling or unable to provide appropriate insurance for licensees then the Government should consider organising a scheme for the licensees.

1.1

[53] Economics References Committee, A review of Public Liability and Professional Indemnity Insurance, October 2000 quoting Prowbridge Consulting Public Liability Insurance – analysis for meeting of ministers 27 March 2002
[53] Beneficial
[54] Nigel Ray, Acting Executive Director Department of Treasury in evidence to Economics References Committee review of insurances, ibid
[55] Economics References Committee, A review of Public Liability and Professional Indemnity Insurance, October 2000

7.7.1 Run-off cover

We are aware that some financial planners are having difficulty meeting the current requirements of the FPA's guidelines on insurance, particularly in relation to run-off cover. Difficulties in the market do appear concentrated at the smaller end of the financial planning/advising market where cheap premiums have been available in the past. We are also aware the chartered accountants' professional association is considering reducing its run-off requirements to two years because of difficulties with the market.

We understand that the insurance brokers scheme operated by Marsh has not been automatically providing run-off cover despite the requirements of the legislation and that ASIC has accepted this. However the scheme has been able to provide run-off cover on an individual needs basis such as when a broker exits the market or sells a business. However most consumer claims in the broking area would be expected to arise within a relatively short term framework because of the one year nature of insurance contracts.

Run-off cover has been accepted as an essential ingredient of effective PII, not only by the Government in the I(AB)A but also by the various industry associations.

An analysis of FICS determinations over 2000 and 2001 reveal average periods of one to 13 years between point of sale and a complaints reaching an EDR scheme. As expected complaints about long term products such as super, life and investment products occur over significantly longer periods than transactional based complaints for example about stock brokers.

Category	**Life products**	**Stock-brokers**	**Non-super or life investment products**	**Super**	**Planning and advice**
Number	107	5	5	14	10
Average time from point of sale to complaint reaching FICS	8 years	10 months	5 years 9 months	13 years 3 months	5 years 8 months
Longest period	31 years	3 years	14 years	21 years	10 years
Shortest period	1 year	2 months	6 months	4 years	2 years

We accept however that there may be difficulties introducing stringent run-off cover requirements into the existing market. However insurers tell us the market is cyclic (the last hard market was 1985 -1989) and it is also rapidly moving.

A number of approaches are available to the government. However we would support and approach whereby a general requirement for run-off cover is introduced but let the detail be settled on a sector by sector basis by ASIC. This provides the flexibility for requirements to be tailored to the various needs of the different segments and to take account of market conditions over time. It also provides the flexibility to adjust the requirements should any significant issues emerge.

As a minimum there must be a requirement that insists on the purchase of run-off at the point a licensee is exiting the market.

Consumer Recommendation 20

Mandatory PII minimums must have a general requirement for run-off cover however the detail should be settled by ASIC on a sector by sector basis.

A similar flexibility may be workable in regards to non-deductibles or excesses. The limit could be higher where for example licensees have a demonstrated capacity to self-insure. Low excesses are crucial for licensees with few assets.

Consumer Recommendation 21

Mandatory PII minimums must have a general requirement for excess maximums with the flexibility to accommodate those licensees with a capacity to self-insure.

7.8 Professional Standards schemes

Under the Professional Standards schemes that operate in NSW and QLD improvements in risk management and consumer protections are traded for limitations on civil liability under state law. This does not effect Federal law nor does it effect claims outside the relevant states' jurisdiction. Participants in the schemes must adopt risk management strategies, complaints and discipline mechanisms, and compulsory insurance requirements. The NSW accountant scheme requires participants to obtain PII that meets the "standards specified from time-to-time by the CPAA or ICAA, whichever is applicable"[56] Claims under $500,000 are unaffected. Where damages are above $500,000, the scheme limits liability for those damages to between $500,000 and $20 million.[57] No liability limits are available for fraud and dishonesty.

In setting limits the Council draws on data provide by professional associations and insurers and seeks to ensure limits cover the vast majority of consumer claims.[58]

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[56] Accountants Professional Standards Scheme (NSW)

[57] The amount of the limited liability is calculated by multiplying the reasonable charge for the service by 10. This is called the *limitation amount*. However, the *limitation amount* cannot be less than $500,000. The limitation amount cannot be higher than $20 million

[58] Discussion with Bernie Marden Secretary NSW Professional Standards Council

To obtain approval the schemes must have strategies and procedures to reduce, rectify and compensate any mistakes made by professionals when serving consumers, including complaints and disciplinary schemes as well as compulsory PII. PII minimums are set by professional associations and approved by the Council.

However the Council's guidelines require:

- Coverage of any acts, errors or omissions
- Misleading and deceptive conduct
- Run-off cover with no additional limits on the terms of that cover
- At least one automatic reinstatement extension
- Payment of legal costs (these must be additional to the indemnity limits set by the Council)
- Set a retroactive date for claims
- Specific excess maximums

If the Government chose to set minimum standards in line with our recommendations above, we would be willing to consider liability caps that covered the full extent of claims by retail clients.

8 Market licensees (Q8, Q9)

Market participants should be subject to the same compensation requirements as other intermediaries. In our view this should include participation in the broad compensation scheme discussed below. The historical underpinnings for the existence of the funds remain as important as ever. Low uses of the funds are not an accurate reflection of need – the funds are simply unknown.

In 2000 the SEGC conducted a review of the risks to the NGF and raised the minimum amount of the fund for the purposes of the Act from $70 million to $80 million. The Board did this "to ensure as far as possible that the NGF will be able to meet all potential claims."[59]

What the historical uses of the funds do reveal is that the need is greatest in a falling market where weakness in the business structures of intermediaries are more likely to be exposed. Additionally a single incident can give rise to a large number of claims.

We strongly support a consolidated fund with consistent coverage. Single entry points are more likely to be found by consumers. Differing access for different market participants cannot be justified in light of the overall thrust of FSR.

The low level of claims against the NGF, the SFE Fidelity Fund and the other market operated fidelity funds are an unrealistic measure of the need for such funds. Prior to this review the funds were unknown amongst consumer organisations and the low level of claims may simply reflect the fact that they are unknown amongst consumers. The NGF has indicated that most consumers come to it through the ASX or ASIC. FICS has never referred a client to the NGF. There does not appear to be any regulatory requirement compelling brokers to inform consumers about its existence - consequently it is not mentioned in Advisory Services Guides, or in client agreements.

We have found brief references to it in old Chess Sponsorship Agreements. For example a 1997 Potter Warburg agreement at clause 20 noted "You may make a claim against the NGF." No other information was included. The other available reference appears to be to transactions that are not covered. A letter from Bell Potter recently informed a client that a particular transaction was not covered by the NGF. No detail was provided in the letter.

ASX Business Rule 3.16 provides that brokers must tell clients that lending money to brokers is a transaction not covered by the NGF. Similarly guidance notes 1/98 and 7/01 ask brokers to inform clients that transactions involving unlisted securities and monies at call in cash management accounts are also not covered by the NGF.

It appears some consumers can find their way to the Fund following the collapse of a broker (presumably via the ASX) as evidenced by the large number of claims from 1988 to 1993 during which time eight stockbroking firms collapsed. These insolvencies were attributed to poor management practices, back office and other inefficiencies and losses from principal trading - all matters likely to rise to the surface in a falling market. The comparatively low claims level

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[59] Chairman's message 2000 SEGC Annual Report

between 1993 and 2001 is more likely a result of the lack of awareness of funds coupled with the buoyancy of the market during that time which would assist in obscuring losses, rather than due to any structural changes that make fraudulent behaviour or collapses otherwise less likely.

The claims level at the NGF contrasts with the trend of complaints to FICS, which has only recently begun handling consumer complaints about stockbrokers. Complaints rose from 88 in 2000 to 134 in 2001 and FICS suggests the trend may be a product of increased consumer awareness of the service it provides. FICS has done much to promote itself over the last few years which contrasts sharply with the total lack of promotion of the market compensation funds.

Information about the SFE fund is virtually unavailable. If it is mentioned in the Exchange's annual reports it is very difficult to find. Two paragraphs deep in the SFE website mention it. It basically has to be located by search. Despite the range of printed material prepared by the SFE no material appears to exist in relation to the fund.

The current market schemes are manifestly inadequate, in large part because they are so poorly known. Because of this the real benefits that can flow to industry from the existence of compensation schemes have not been even moderately realised.

For the reasons set out above the compensation scheme discussed below should apply to market participants. It would not be unreasonable for market licensees to contribute in some way to the scheme given that they will also benefit from the market confidence its existence engenders.

Consumer Recommendation 22

A broad compensation scheme is required to cover market participants. Market licensees should contribute in some way to the scheme given that they will also benefit from its existence.

9 A broad compensation scheme (Q10, Q11)

9.1 Is a broad compensation scheme warranted?

Whether a broad compensation scheme is needed or not depends on the extent to which other arrangements can fulfil the objectives of the compensation regime more generally.

As previously noted in our view the purpose of compensation arrangements is to:

- ensure funds are available to pay valid claims;
- facilitate access to those funds; and
- maintain market confidence.

Neither EDR schemes nor PII can guarantee that funds will be available to pay claims where a licensee is unable to pay or insolvent.

On insolvency legal avenues will be very limited and in some cases unavailable.

There are certain classes of claims that have the capacity to do the greatest damage to consumer confidence in the financial services market. These include:

- failure to account;
- gross incompetence;
- fraud or fraudulent acts;
- dishonesty;
- fidelity breaches; and
- grossly misleading and deceptive conduct.

For these types of claims the choice of compensation mechanism must be one that facilitates access.

9.2 Compensation mechanisms must be accessible

Facilitating access in our view must be a key objective of any compensation arrangements. Unless the arrangements are accessible, confidence will not be maintained and any requirements will be ineffective and meaningless.

Providing an accessible alternative to the courts has been a key rationale behind the establishment of the EDR schemes. Considerable effort has been put into ensuring the processes for bringing claims and handling claims are accessible to claimants.

Key accessibility indicators sitting over the schemes include[60]:

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[60] these are requirements of the Benchmarks for Industry-Based customer Dispute Resolution Scheme, ASIC PS 139 and are reflected in the terms of reference of approved schemes

- existence is widely known;
- written material is available describing in simple terms how the schemes work, coverage, limitations etc;
- appropriate assistance is provided to complainants in bringing complaints;
- no fees for complainants' use of the service;
- processes are low cost, simple to use and easy to understand; and
- non-adversarial approach by providing informal proceedings that discourage a legalistic approach

9.3 The relationship with EDR schemes

We see both EDR schemes and a broad compensation scheme playing significant roles in the overall compensation arrangement.

9.3.1 EDRs to apply when solvent

We are of the view that the EDR schemes provide the most effective compensation mechanism where a licensee is solvent. This role should be clearly acknowledged. Consumer awareness of these schemes overall is low, with the majority finding out about their existence when they have a complaint. More should be done to promote the schemes, by the schemes themselves and by the government. If it is accepted that they are the primary compensation mechanism for consumer claims against solvent licensees then the Government should undertake a major campaign to promote public awareness of the schemes.

Consumer Recommendation 23

The EDR schemes should be acknowledged as the primary compensation mechanism for claims against solvent licensees.

The Government should undertake a major campaign to promote awareness of the schemes.

9.3.2 EDRs to have consistent claims eligibility

As part of the formal recognition of the EDR schemes as the main mechanism for compensation for claims against solvent licensees, there is a need to increase the consistency of the operating rules of the schemes with the requirements of the FSRA more generally. While ASIC is progressively ensuring that all schemes modify their rules to ensure that the definition of eligible claimants accords with the definition of retail client and includes small business clients within the terms of the FSRA, little is being done to ensure that the definition of eligible claims clearly includes all Chapter Seven breaches as well as relevant ASIC Act and breaches of financial services law more generally. The definition of eligible claims varies considerably from scheme to scheme and harmonisation at this level would be a valuable initiative.

Consumer Recommendation 24

ASIC encourage the EDR schemes to harmonise their definitions of eligible claims and ensure that they include any breach of Chapter Seven of Corporations Act, relevant ASIC Act breaches and any other breaches of financial services law.

9.3.3 EDRs to index claims limits

At present no scheme indexes its claims limits and limits have historically remained static for long periods of time. This has meant the limits have not kept pace with inflation and have remained at arbitrary levels

Consumer groups have raised the following concerns in relation to the FICS limits but the same could be applied to the limits of all the EDR schemes:

- The setting of the limits appears to be arbitrary, and not linked to any particular policy objective
- The limit appears quite low, and is lower than some other complaints schemes
- The limit can remain unchanged for long periods of time, despite economic growth[61]

We therefore propose annual increases in line with the consumer price index of all dollar limits for the approved EDR schemes.

Further ASIC PS 139 which sets out the basis on which the EDR schemes are approved should specifically require as part of the three yearly reviews that the dollar limits of the schemes are tested to ensure they are continuing to capture the majority of claims.

Consumer Recommendation 25

The claims limits of the EDR schemes should be increased annually in accordance with the consumer price index.

ASIC PS139 should specifically require that the dollar limits of the EDR schemes are reviewed every three years to ensure the majority of consumer claims are captured.

9.3.4 EDRs to prohibit "re-birthing"

Finally evidence is emerging that some licensees are willing to hand back their licensee in order to avoid the jurisdiction of EDR schemes, and a 'phoenix' company problem may be emerging as companies "re-birth" and apply for a new licence. This is not a problem unique to financial

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[61] See Combined Consumer Submission to 2002 review of FICS available from the Financial Services Consumer Policy Centre at UNSW.

services and has been observed in a number of sectors. There are a number of ways this issue could be dealt with. One option would be for the EDR schemes to change their rules to prevent them from allowing membership to any entity where a determination is outstanding against any employee, principal or director of the licensee. Additionally ASIC could be empowered not to license such an organisation.

Consumer Recommendation 26

The EDR schemes amend their rules to enable them to deny membership to an entity where there is an outstanding decision from any approved EDR scheme against an employee, principal or director of that entity.

ASIC deny a license to any an entity where there is an outstanding decision from any approved EDR scheme against an employee, principal or director of that entity.

9.3.5 EDRs to ensure currency of membership

The EDR schemes are all industry funded and members pay both annual levies and complaint fees (as well as initial joining fees). Debtor management is becoming an issue, in particular for FICS which has the broadest membership basis. FICS is also experiencing considerable movement among its members with about 20 members every quarter notifying the scheme that their business has been wound up, in some cases as a result of insolvency or liquidation. There is likely to be considerable merit is requiring the EDR schemes to report to ASIC the names of any members who fall more than four months behind in meeting their financial obligations to the schemes. ASIC should then be required to carry out business checks on the licensee including PII checks.

Consumer Recommendation 27

The EDR schemes be required to report members who fall more than four months behind in their financial obligations to the schemes to ASIC.

ASIC be required to audit any licensee who has fallen more than four months behind in their financial obligations to an approved EDR scheme within one month of the notification.

In our view the EDR schemes are the most appropriate vehicle for claims against solvent licensees. For this reason there is no need for a compensation fund to cover such claims if the above recommendations are accepted.

9.4 Compensation fund to apply on insolvency

However the EDR schemes currently have no jurisdiction where a licensee is insolvent. They have been set up to deal with claims against solvent licensees and it is the specific licensee who meets the cost of any claims against it. This model fails when a licensee is unable to pay a determination.

As noted above there are certain classes of claims that if left uncompensated have the capacity to significantly impact on market confidence. Given that all licensees benefit from market confidence it is also reasonable to ask all licensees to contribute to the costs of meeting those claims.

Because these claims have the potential to negatively impact on market confidence it is crucial that the compensation mechanism be one that facilitates access in a similar manner to the EDR schemes.

We therefore propose a broad compensation scheme to apply for claims against insolvent licensees.

A broad scheme would avoid the confusion that currently operates at the level of the EDR schemes. In an attempt to address some of the consumer issues arising from the sheer number of EDR schemes the big three (IEC, ABIO and FICS) have recently merged the entry points to the schemes providing a single entry point for consumers.

A broad scheme would meet the consistency objectives of FSRA by providing harmonised arrangements across the sector for insolvency claims. It could provide simplicity and clarity, and would have the capacity to develop the necessary profile to attract consumer confidence.

A broad scheme spanning sub-schemes that covered the width of the industry would not necessarily impose significant additional costs on the industry. Funding arrangements could be sector specific and there is the potential for any ongoing levies (at least in some sectors) to be extremely modest. Funding arrangements are discussed in detail below.

Consumer Recommendation 28

A broad compensation scheme should apply for certain classes of claims on insolvency / inability to pay.

9.5 On what grounds should compensation be paid?

The UK scheme has wide claims grounds, and includes claims about advice and operational issues. While advice claims are generally more contentious and difficult to prove than dishonesty breaches, they represent the overwhelming number of successful claims to the UK FSCS and would almost certainly represent the bulk of claims to an Australian fund if this ground was admitted.

We are mindful that in the majority of cases of successful claims, the good licensees will subsidise the bad. However, by limiting claims to matters that go to the heart of consumer confidence, the costs for the good licensees are justifiable. They will be the ultimate beneficiaries of the market confidence the scheme engenders.

It would therefore be appropriate to limit the fund to:

- failure to account;
- gross incompetence;
- fraud or fraudulent acts;
- dishonesty;
- fidelity breaches; and
- grossly misleading and deceptive conduct.

These are the grounds on which the compensation scheme should pay claims.

Further it would not be appropriate to apply a claims test that contained standards that required proof in a court. This would not only defeat accessibility considerations but result in unacceptable delays. Additionally such standards are likely in practice to turn out to be unworkable[62]. Such standards have not been a feature of compensation funds in Australia nor overseas. Nor are they a feature of the EDR schemes. In our view the appropriate claims test is a "reasonable grounds to believe" test with decisions made administratively.

Consumer Recommendation 29

Claims should be paid where the scheme has "reasonable grounds to believe" that there has been either:

- A failure to account;
- Gross incompetence;
- Fraud or fraudulent behaviour;
- Dishonesty;
- Fidelity breaches; or
- Grossly misleading and deceptive conduct.

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[62] APRA's experience in handling the claims against Commercial Nominees is relevant.

10 Secondary issues (Q12 - Q25)

10.1 Operator (Q12)

We support a model similar to that operating in the financial services EDR sector. That is the scheme should operate as an independent company governed by a Board comprised equal numbers of industry and consumer directors headed by an independent Chair.

Rather than existing in legislation we would support a mandatory requirement that licensees participate in the scheme and that the scheme be subject to approval and oversight by ASIC. We are not totally opposed to the requirements for the scheme to be detailed in legislation or regulation. However in our experience the EDR model has proved to provide the following benefits:

- strong industry commitment;
- strong consumer commitment; and most importantly
- flexibility to quickly adapt the jurisdiction to deal with problems and changes in the market place.

We strongly support the creation of a new body.

Too many EDR schemes exist, there is already jurisdictional inconsistency and overlap. At any rate there would be a clear delineation of functions between the EDR schemes and a compensation fund and the two require quite different expertise.

The SEGC would require such dramatic reformation that effectively a new body would be created. Neither its administrative structure nor operational functions are appropriate for a broader scheme. Given the practice of rotating the CEO on annually there is little institutional knowledge or experience at the operational level that would benefit a new scheme.

Consumer Recommendation 30

A new body should be established to operate a broad based compensation fund.
The new body should operate as an independent company governed by a Board comprised equal numbers of industry and consumer directors headed by an independent Chair.

Rather than existing in legislation we support a mandatory requirement that licensees participate in the scheme and that the scheme be subject to approval and oversight by ASIC

10.2 Single scheme (Q14)

The aim of FSR is to provide harmonised regulatory arrangements. It is therefore desirable that the umbrella arrangements apply across the width of the sector. This does not mean that differences cannot be accommodated in details of design.

We would anticipate significant differences in claims patterns across the sector. We would expect a small but steady flow of claims against intermediaries, smaller operators of registered schemes and superannuation funds, whereas we would expect the collapse of a large issuer to result in a flood of claims. The compensation scheme would need the flexibility to quickly assemble the necessary infrastructure to deal with these events. However we would also anticipate significant differences in claims patterns against intermediaries.

There are two possible sub-structures. The sector approach or the market segment approach.

The sector approach would follow the UK model. That is, three sub-schemes that cover the major sectors of the market. The UK sub-schemes are:

- Investment;
- Insurance; and
- Deposit takers.

An adaptation of this model to the Australian environment would separate out superannuation from other investment products, partly to reflect the importance of these products in meeting government objectives but also to reflect our regulatory arrangements.

Broadly speaking the sector approach is followed by FICS. That is all investment claims whether about issuers or intermediaries fall under the same jurisdictional limits whereas a separate limit has been established for life insurance claims (which are the only insurers in that scheme). Claims handling procedures are consistent across the scheme and no significant administrative difficulties have been encountered despite the different nature of the claims.

The market segment approach would have sub-schemes divided into issuers and intermediaries and contain a number under each heading.

For example intermediary sub-schemes might include:

- Investment advisers and financial planners;
- Insurance brokers; and
- Market participants.

Issuer sub-schemes might include:

- Insurance companies;
- Registered schemes;
- Superannuation funds; and
- Deposit takers.

At this stage we do not prefer one approach over another.

Consumer Recommendation 31

A single scheme should cover the width of the financial services sector. Sub-schemes would be useful.

10.3 Existing fidelity funds (Q15)

In general we support the view that these funds (or in the case of the NGF a portion of these funds) should be applied to assist those market participants meet their obligations to the new fund. The SFE, Bendigo and Newcastle funds exist solely for investor protection and compensation purposes. Consequently the whole of the funds should be applied to assist participants in those markets meet their obligations to a new scheme.

The SEGC's website and the 2000 annual report describe the National Guarantee Fund's function as protecting stock market investors in certain situations. However the 2001 annual report characterises a dual function:

- Compensating investors and
- Clearing and settlement support.

These were clearly delineated by FSR and the legislation enables the splitting of the functions.

Funds in the NGF comprise:

- The assets of the fidelity funds following the merger of the six State exchanges to form the NGF in 1987 - about $60.4 million according to the 2001 annual report
- Interest on brokers trust accounts - about $15 million over 2000 and 2001[63].
- Investment income on the combined funds - about $20million over 2000 and 2001[64].

Today the fund's balance exceeds $160 million.

To assist Treasury in assessing future uses of the fund we make the following comments:

- The SEGC has recently reviewed the Fund and set $80 million as its minimum. This should therefore be the minimum amount made available to pay claims against ASX participants of the new fund.
- A large portion of the fund comprises interest on monies held in brokers trust accounts - $15 million was contributed over the two years to 2001 from this source.
- This money and its earnings is effectively consumers' money and that portion of the fund should only be applied for purposes which benefit investors. This would include using some of this money to assist ASX participants meet the costs of the new fund.

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[63] See annual reports
[64] ibid

- Any excess should be applied for public benefit purposes only - ie projects that substantially benefit consumers. This is consistent with the use of interest on trust accounts in other jurisdictions (eg the legal professions Statutory Interest Account in NSW and equivalent in Victoria). This is particularly important in light of the historical use of excess funds for industry development purposes.

The decision to split the investor protection component from the settlement and clearing component under the Act should take account of the above and should occur in an open and transparent manner that involves input from consumer / investor representatives. It would be useful if the SEGC funded consumer input into the review.

Consumer Recommendation 32

Funds in the SFE, Bendigo and Newcastle Fidelity Funds and a relevant portion of the NFG should be applied to assist those market participants meet their obligations to the new broad scheme.

Decisions around the division of the NGF funds should occur in an open and transparent manner with funded consumer input.

10.4 Funding (Q16)

Funding will be required for three main purposes:

- **Establishment costs** - Depending on the overall cost establishment charges could be spread over a number of years. For example the establishment costs of the UK scheme are being spread over three years.

- **Management charges** - Ongoing management charges could be levied on a market share basis given that all licensees with benefit from the consumer confidence such a fund would engender. However it may be that there are two components to the ongoing management charge – one component covering the umbrella structure and an other component to cover sub-scheme costs where variation will exist. Both components could be set and if necessary adjusted annually on a needs basis. This is what currently occurs with the EDR schemes.

- **Claims funding** - There are two main alternatives for claims payment funding – ongoing charges or needs based charges (often called post event charges). However these are probably most effective when they operate together.

We believe that a mix of ongoing levies and pot event levies will deliver enough income to meet the needs of the fund.

A major advantage of ongoing levies is that that responsible for the losses contribute while they are solvent. A further advantage is that this method creates a pool of funds, which can reduce the harshness of any post-event levies. Additionally once the fund gets to a certain size investment income can be such that levies can be significantly reduced if not avoided all together for a period. Further the pool of funds can be applied to appropriate research and education purposes.

Post event levies mean those responsible for the losses avoid contributing altogether. Post event levies if used in isolation can be very harsh. They can be spread over a period eg three years to lessen their impact (although this just increases the overall amount that needs to be raised to cover interest on borrowing).

In practice a mix of ongoing levies and post event levies will be appropriate to fund claims payments. Where a steady flow of claims are experienced ongoing levies will be the only practical approach – for example we would expect a steady flow of claims in the investment advice/financial planning area. However the appropriate mix of levies in areas where isolated events are likely to produce large numbers of claims will depend on the industry's capacity to bear large isolated payments.

Experience of the financial services EDR schemes is that members generally accept ongoing charges but intensely dislike the claims based payments. Schemes with large numbers of members have had to employ debt recovery strategies to ensure complaint fees are paid.

This experience has been replicated with compensation funds such as the NSW Solicitor's Fidelity Fund where the legal profession complained loudly and bitterly about the post event levies following the collapse of Tietyens mortgage practice in Albury in 1996.

A further potential source of funding is interest on trust accounts. Prior to FSR interest on deposits in ASX brokers trust accounts was paid to the NGF. About $15,000 was paid to the NGF over the two years to 2001. As a consequence of this source of funding, investment income and few claims payments the fund has grown rapidly and no levies have been necessary. FSR has removed the requirement that interest on trust account deposits be remitted to the NGF. Now brokers are free to make whatever arrangements they wish with clients in regard to this money[65]. While this may have been intended to harmonise arrangements effectively FSR has provided about an $8 million a year windfall to stockbrokers.

Interest on trust account deposits is clients' money and should only be applied for purposes which benefit them. In our view regulation 7.8.02(7) should be amended to either establish that clients alone are entitled to interest on their deposits in brokers accounts, or provide for interest payments to be forwarded to the new fund where it should be applied to assist relevant licensees meet their obligations to the fund. Excess funds could be applied in the same manner as excess funds generally; that is for investor protection and other public benefit purposes.

1.1

[65] reg 7.8.02 (7)

10.5 Measuring loss (Q19)

The fund should be largely directed to consumers who are least able to sustain loss and should be designed to provide substantial cover for loss those consumers.

Compensation awards should aim to put the consumer in the position they would have been in if the misconduct had not occurred. This does not mean putting them in the pre-loss situation but putting in the position they would be in at the time the claim is settled had the misconduct not occurred. By definition this requires interest payments. It also includes some matters that might be construed as consequential loss eg a house burning down uninsured as a result of a failure by a broker. A discretion should be given to the scheme to allow the scheme to make the necessary award.

There will be claims where it is appropriate that the products are restored. In other cases the appropriate award would be equivalent monetary value. It will depend on the circumstances. Consumers should be given a choice. In the case a claim arising out of stolen investment monies it may be reasonable to return the dollar value of any premiums plus interest over the relevant term. In other cases consumers may be happy for the fund to return to them the shares they had instructed their broker to buy.

The scheme should not account to clients for profits but should pay interest on monetary awards. Where the award is in relation to an investment product compound interest should be paid. The cost of pursuing claims should be recoverable and it may be appropriate to take into account clear cases of contributory conduct of a claimant to a loss.

Consumer Recommendation 33

Compensation should restore the consumer to the position they would have been in at the time the claim is settled had it not been for the misconduct. Also:

- The scheme should be given a discretion to make awards.
- Interest should be payable.
- Costs of pursuing claims recoverable.

10.6 Capping (Q20)

Irrespective of the method of funding the burden of a compensation fund will fall most significantly on the good. For this reason despite the benefits the good will receive from the existence of the scheme, overall we would regard some form of capping as reasonable as long as the vast majority of consumer claims were captured.

The UK scheme uses a tiered capping method. That is 100% of the claim is paid up to a dollar limit and 90% of the excess up to a further dollar limit, which may be the balance of the claim as in the case of insurance claims. Claims about compulsory insurance products are not subject to caps.

Data from its last two annual reports show that in the investment area about 85% - 90% of claims have been paid in full using this method.

We endorse this method of capping. Capping systems that ensure 100 percent of at least part of the claim is paid provide maximum protection to consumers who are those with least disposable income and least able to bear the loss. The most obvious group in need of protection in relation to investment products is retirees. The impact of the government retirement incomes policy means that retired people will be increasingly dependent on their savings. As a group they tend to have lower household incomes than the general population.

However dollar caps must be subject to annual indexing. One of the difficulties with any scheme that uses dollar caps is changing them. The UK limits for investment products have been unchanged since 1988. The SFE's limits have not changes since the scheme's inception. For this reason we propose CPI indexing of dollar limits plus review every three years.

An additional capping question goes to aggregation caps. That should claims in the aggregate from any one instance be capped. Claims in the aggregate are back door means of imposing individual claim limits and we do not support them. The UK scheme rejected aggregation limits.

Consumer Recommendation 34

A tiered capping system is supported: one that provides 100% compensation up to a designated amount and 90% compensation to a further dollar limit or for the balance of the claim in the case of insurance products.

Compensation should be paid in full for any compulsory component of any product such as insurance and superannuation.

Dollar limits should be CPI indexed annually and subject to review every three years.

10.7 Relationship with EDR schemes (Q22)

We see the jurisdictions of the EDR schemes and the compensation fund as mutually exclusive, although at the practical level some grey areas emerge.

The EDR schemes apply for claims against solvent licensees whereas the compensation fund applies where the licensee or former licensee is insolvent. However the EDR schemes cannot provide certainty that claims will be paid where a licensee is prepared to surrender a license or becomes insolvent.

The grounds on which complaints can be brought against solvent licensees who will have the burden of responsibility for making those claims will be wider than those that can be brought to the compensation funds against insolvent licensees, where the burden of meeting claims falls more heavily on innocent third parties.

Where an EDR scheme makes a determination about a claim that would have been within jurisdiction of the compensation fund but the licensee is unable to pay then the fund should pay the claim.

More problematic are those determinations of the EDR schemes where the licensee cannot meet the claims but they are outside the jurisdiction of the compensation fund. A large number of determinations or a single large determination against a small operator could cause a collapse.

In these cases the compensation fund should have a discretion to pay the claims. In exercising its discretion it should consider:

- impact on the claimant of not paying the claim; and
- consumer confidence more generally.

In coming to a decision about such a matter the fund should be able to consider claims individually or as a class, and should be required to seek input from industry and consumer representatives in relation to “confidence more generally”.

10.8 Use of excess funds (Q23)

The scheme should have the capacity to invest its funds as a means of increasing revenue.

Flexible funding mechanisms will enable the scheme to limit the build up of excess funds, including by way of removing levies for a period. However any parts of the scheme that are subject to steady claims flows will need to maintain minimum levels.

Where pools exceed minimum requirements the Board should have a discretion to either manipulate levies (by way of a reduction) or to make those funds available for purposes consistent with the purposes of the fund.

This would only include financial industry development purposes to the extent that they were primarily for investor protection – the overarching objective of the fund. Use of excess funds should be limited to public benefit, investor protection purposes.

Consumer Recommendation 35

The scheme should have a discretion to either manipulate levies or make excess funds available for purposes consistent with the purposes of the fund.

10.9 Time limits (Q24)

There are a number of approaches to formulating time limits. The two main ones are:

- set period from time conduct occurred; and
- set period from time claimant first became aware of or should reasonably have been aware of the conduct occurring.

The latter is preferred in the EDR jurisdictions and we support such a formula.

Short claim limits serve a single purpose: to invalidate otherwise valid claims. Short time limits will only serve to reduce confidence in the effectiveness of the compensation arrangements overall.

Claim limits should be such that they allow the majority of claims to be put. In practice this means they should be longer rather than shorter.

FICS cannot deal with complaints where the complainant knew or should reasonably have known of all relevant facts more than 6 years before notifying the service.[66] However FICS is handling claims against solvent licensees. The compensation fund will be handling claims against insolvent licensees and whatever funding mechanism is being adopted good licensees will be paying for the actions of bad licensees. Therefore a shorter time limit would be appropriate.

An additional point is whether the fund should be given a discretion to consider out of time complaints. Our answer to this question would depend upon the substantive time limit.

Consumer Recommendation 36

It would be reasonable to limit the fund to hearing claims three years from the time the claimant knew or should reasonably have known of the all the relevant facts. If any shorter period were to apply then the fund should be given a discretion to hear claims back to three years.

1.1

[66] Rule 18

11 Proposed compensation arrangements

Consumer organisations are happy to participate in the ongoing debate about compensation arrangements and to contribute to further detailed discussion about the exact structure of those arrangements. At this time our preferred structure is as follows:

6. Where a licensee is solvent, the EDRs will be the main compensation mechanism (subject to certain improvements being made to EDR schemes as detailed above).

7. Where a licensee is solvent , but the claim exceeds the jurisdiction of the relevant EDR scheme ie is “high value”, the courts will be the main compensation mechanism.

8. Where a licensee is insolvent or unable to pay, a broad compensation scheme will apply. That scheme will include:

    - A broad ability to hear claims
    - A “reasonable grounds to believe” misconduct test
    - Subrogation of rights in order to recover some funds

9. The compensation scheme will cover the areas of identified need: intermediaries, registered schemes, insurance companies and superannuation funds.

10. Mandatory minimum PII will underpin EDR determinations, court judgements and in some cases funds recovery by the compensation scheme.

	EDR Schemes	Courts	Compensation Fund	PII
Solvency	Applies to all solvent licensees	Applies to all solvent licensees	Applies to insolvent licensees	PII stands behind both solvent and insolvent licensees. Claims subrogated to compensation scheme as appropriate
Claimants	Retail and small business, and some third parties who are also retail or small business clients	Wholesale, retail, and small business	Retail and small business and some third parties who are also retail or small business clients	Wholesale, retail, small business, compensation fund on behalf of above clients
Conduct covered	Chapter Seven obligations, ASIC Act, TPA	Civil and criminal	Failure to account, fraud, fidelity, dishonesty, gross incompetence; gross misleading and deceptive conduct	Broad form civil liability policy with extensions for fraud and fidelity; run-off cover; EDR determinations
Type of compensation payable	Restores consumer to pre misconduct position for losses less than jurisdictional limits, plus interest and some expenses	General damages, exemplary damages consequential loss, cost awards, interest	Losses up to dollar limits and percentages of losses up to further limits plus interest and some expenses	Minimum policy requirements eg cover must be held for up to $5million or 15% of annual turnover see I(AB)A
Source of funds for payment of award	Licensee, its group or PI insurance	Licensee, its group or PI insurance	Compensation fund could pursue licensees, insurers for replenishment of funds	Premiums, risk pools
Test for awards	Decisions must be fair in the circumstances, accord with good industry practice and the law	In accordance with the law	Reasonable grounds to believe a relevant breach has occurred , decisions should be fair and reasonable	Government to mandate minimums, non-avoidance on grounds of failure to disclose or non-notification etc

12 Appendix - About the Centre

The Financial Services Consumer Policy Centre is a not for profit research organisation affiliated with the University of New South Wales Faculty of Law.

The Centre has wide expertise across financial services issues and has been at the fore of advocating for reform..

The Centre is a non-profit research organisation affiliated with the University of NSW Law Faculty. We rely on a variety of sources to support our continued funding and consumer advocacy.

This research project has received generous support from the Australian Securities and Investments Commission Consumer Advisory Panel. The Centre receives invaluable support from the:

- University of NSW
- Consumer Education Trust
- National Consumer Trust Fund

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