

HALSEY LEGAL SERVICES
BARRISTERS & SOLICITORS

45 Ventnor Avenue
West Perth WA 6005
Phone 08 9381 2914
Fax 08 9381 2915
Direct 08 9382 4128
Email mark.halsev@halsevs.com.au

7 November 2008

Ms Ai-Lin Lee
Consumer and Retail Investors
Australian Securities and Investment Commission
GPO Box 9827
MELBOURNE Victoria 3001

email: disputeresolutionreview@asic.gov.au

Dear Ms Lee

**RESPONSE TO CONSULTATION PAPER 102 – DISPUTE RESOLUTION -
REVIEW OF RG139 AND RG165**

We refer to Consultation Paper 102 (“**CP102**”), and to ASIC’s invitation to comment on the proposals in CP102.

BACKGROUND

By way of background, Halsey Legal Services is a law firm whose financial services practice has provided legal services to approximately 80 Australian Financial Services licensees since March 2002. In addition, since November 2005, Halsey Legal Services has provided advice to licensees, and their representatives, in relation to approximately 470 complaints lodged by clients regarding financial services. As a consequence, we believe we are well placed to provide ASIC with detailed feedback about the practical workings of the financial services industry retail client dispute resolution systems.

Before addressing the specific proposals set out by ASIC in CP102, we refer you to the second and third paragraphs of page 4 of CP 102. In those paragraphs, ASIC states that as well as responding to the specific proposals and questions, ASIC also asks persons providing their comments to describe any alternative approaches they think would achieve ASIC's objectives. ASIC also states that it is keen to fully understand and assess the financial and other impacts of ASIC's proposals, and any alternative approaches, in the context of:

- compliance costs;
- likely effects on competition; and
- other impacts, costs and benefits.

We will commence our comments by addressing issues not directly addressed in CP102.

ISSUES NOT ADDRESSED IN THE PUBLISHED PROPOSALS

The comments provided below relate specifically to the scheme formerly known as the Financial Industry Complaints Service (“**FICS**”), which is now referred to as the Investments, Life Insurance and Superannuation stream of the Financial Ombudsman Services (“**FOS**” – for the purpose of our comments we shall continue to refer to the scheme as FICS), and to the FICS Rules – July 2008 (the “**FICS Rules**”).

We see a significant variety of issues and problems relating to the FICS scheme and the FICS Rules in their current form. However, for the purpose of this submission it is our intention to narrow our focus on **three fundamental deficiencies** in relation to the current FICS scheme (the “scheme”) and the FICS Rules. Those deficiencies relate to:

1. the absence of any mechanism to correct errors in law that may occur in relation to FICS determinations;
2. the scope of the scheme as it relates to financial services; and
3. the scope of the scheme as it relates to persons who may use the scheme.

We believe that the deficiencies referred to in the abovementioned three issues threaten the notion of the fairness and credibility of the scheme. We also believe that these issues threaten the ongoing viability of the scheme in the event that professional indemnity insurers may not be prepared to provide ongoing support for such schemes in future by not extending cover to some, or all, financial services licensees.

1. NEED FOR AN APPEALS MECHANISM TO CORRECT ERRORS OF LAW

In our view, **the most significant deficiency** in the current system is the absence of any form of mechanism to **correct errors of law**. This is also a sentiment that has been conveyed to our firm by certain members of the management in Claims Departments of at least two large professional indemnity insurers.

Under the current FICS Rules there are only very limited opportunities for a review of a FICS determination. FICS Rule 36.2 provides that a determination is final, and cannot be re-opened except:

- where the panel chooses to correct a clerical or arithmetic mistake or an error arising from an accidental slip or omission (FICS Rule 36.3); or
- if the Panel or a Panel Chair decides at their discretion to set aside a determination (FICS Rules 36.6 and 36.7 respectively).

These review provisions are very clearly inadequate.

The simple fact is that no regulator, tribunal or even court makes perfect decisions all of the time. It is for this reason, and in the name of fairness as well as the credibility of the schemes, that an appeals mechanism to the courts in relation to the limited grounds of a perceived error of law is essential.

A practical example of this deficiency can be seen in the Federal Court judgment: *FICS Ltd v Deakin Financial Services Ltd* [2006] FCA 1805. In the *Deakin Case* the Federal Court ruled that the way in which FICS administered its monetary limits jurisdiction was contrary to Australian law. Prior to the *Deakin Case*, FICS practice had been to allow each of the joint owners of a joint account to lodge separate claims, even though their joint investment value exceeded the monetary limits. So for example, when the FICS limit was \$100,000, FICS practice was suggesting that a couple with joint investments would be allowed to bring a claim for up to \$200,000. Two years prior to the *Deakin* judgment, on 17 May 2004, FICS had issued Practice Note “PN5 - Handling Joint Complaints” which documented the then FICS practice and referred to previous FICS determinations 02-11903 and 03-1304 as determinations in which FICS had applied those practices.

Subsequent to 2004, our firm had argued what the Federal Court later determined was the correct legal position in matters before FICS. However, FICS rejected those arguments. The way in which the scheme is structured meant that our clients (licensees) could not appeal, even though an error of law was apparent. As a consequence the licensees had adverse determinations against them, which amounted to errors of law, with no prospect of any remedy.

It is important to reflect that not even *Deakin* was in a position to appeal on these type of issues. It was only because FICS had initiated court action against *Deakin* that these manifest errors in FICS’ procedures were able to be highlighted and remedied. This type of situation is clearly unreasonable, and should be regarded by ASIC as unacceptable.

Proposed remedy: Section 912B(2)(b) of the Corporations Act 2001 provides that a licensee who provides financial services to retail clients must be a member of an ASIC approved external dispute resolution scheme. Section 912B(3) provides that, regulations may be made for the purposes of, or to deal with the variation or revocation of standards or requirements made by

ASIC, or approvals given by ASIC, in respect of these approved external dispute resolution schemes.

The FOS scheme is a form of mandatory and binding commercial arbitration. Section 38(2) of the Commercial Arbitration Act 1985 (WA) provides that an appeal shall lie with the Supreme Court **on a question of law** arising out of an award. Section 38(4) provides that the appeal may be brought by any of the parties to an arbitration agreement with the consent of all of the other parties to the arbitration agreement. Similar provisions apply in the other States and Territories.

We submit that ASIC vary or approve such standards to require that the relevant **approved scheme amend its rules in order to provide that, as a condition precedent to engaging in the scheme dispute resolution process, all parties unequivocally consent to the right of any of the parties to appeal to a court in relation to a “question of law”**.

Since the determination is only binding upon the licensee, it is apparent that the parties to the appeal would only need to be the licensee and FICS (or if necessary, FICS could also represent the retail client in relation to whom FICS had made an award), and as a consequence there should be no reason that the retail client would face any costs in relation to the matter.

Even in the event of an appeal being upheld for a licensee, there should be no financial detriment to the retail client, since any purported overturned award would have been incorrect in law and hence not really an entitlement to the client – in much the same way that a crediting error to a client’s bank account could be corrected once discovered without any true detriment to the client.

2. THE FICS RULES DEFINITION OF “FINANCIAL SERVICES” NOT CONSISTENT WITH THE LEGISLATION

Deficiencies 2 and 3 arise from what we describe as **“failures in integration”** between the legislation and regulations on the one hand, and the way in which the FICS Rules appear to have independently and separately evolved on the other hand.

We queried this apparent “failure in integration” directly with FICS.

On 4 May 2006, Legal Counsel for FICS – Mr Michael D’Argaville, in replying to an e-mail from our firm stated:

*“... the definitions of financial services and financial services industry in the Rules do not represent (and are not intended to represent) an expansion of FICS’ jurisdiction, **To the extent of any inconsistency between the above definitions [the FICS Rules] and the definition of “financial services” in the Corporations Act and/or ASIC Act as in force from time to time, when interpreting and applying the FICS Rules, FICS must necessarily rely on the definitions in the FICS Rules when applying those***

Rules to determine whether it has jurisdiction to deal with a particular complaint ...”

The consequence of these failures in integration have resulted in outcomes that appear inconsistent with the intention of the legislation and regulations. Those failures in integration, and other deficiencies, are described in greater detail below.

As extraordinary as it may seem, the FICS Rules definition of what constitutes “financial services” is different from the definitions in both the Corporations Act 2001, and the ASIC Act 2001. ASIC is well aware of the definitions of financial services under the relevant legislation, so I will not presume to repeat that in this correspondence.

The FICS Rules definition is as follows:

*“Financial Services means **any form of service or advice for any product provided** [emphasis added] by a person participating in the financial services industry, and includes: ...”*

This is clearly a much **broader** definition than that provided by the Corporations Act, or the ASIC Act. For example, this means that if a person participates in the financial services industry, then any service or advice provided by them in relation to antiques could be included.

A consequence of this broader definition was seen in the NSW Supreme Court judgment - *Masu Financial Services Pty Ltd v FICS and Julie Wong No. 2* [2004] NSWSC 829. In that matter, the subject of the complaint was advice provided in relation to a directly held residential home unit in Melbourne – i.e. direct holdings in real estate. An award of compensation for the client was made by FICS against the financial services licensee in respect of this matter. As you are aware, a matter relating to advice about a directly held residential home unit is clearly beyond the scope of a financial service within the meaning of either the Corporations Act, or the ASIC Act.

If the principles of the *Masu Case* are extrapolated, there is virtually an indeterminate scope of potential liability for a licensee.

When Parliament provided for an external dispute resolution system for retail clients, it does not appear to have been Parliament's intention to have extended the jurisdiction of financial services regulation, or ASIC's jurisdiction, to directly held residential rental property. That being the case, we believe that it is not proper that this jurisdiction be unilaterally claimed by FICS, a public limited company acting as an ASIC approved external dispute resolution scheme.

This unilateral claim of jurisdiction is particularly troubling when one considers that licensees that must submit to FICS, an external dispute resolution (“EDR”) scheme in which the licensee is denied a right of appeal to the courts,

or other remedies at law which are generally available to other Australian entities and persons.

The fact that the *Masu Case* was heard by the NSW Supreme Court related to a claim by *Masu* for judicial review in relation to the decision-making process of the FICS determination. *Masu* was successful in arguing that aspects of the FICS decision-making process were unreasonable within the administration law context. The NSW Supreme Court decision did not provide any remedy in relation to the issue of the jurisdiction claimed by FICS.

Proposed remedy: Section 912B(2)(b) of the Corporations Act 2001 provides that a licensee who provides financial services to retail clients must be a member of an ASIC approved external dispute resolution scheme. Section 912B(3) provides that regulations may be made for the purposes of, or to deal with the variation or revocation of standards or requirements made by ASIC, or approvals given by ASIC, in respect of these approved external dispute resolution schemes.

We submit that ASIC vary or approve such standards to require that the **determinations of an approved scheme be only binding to the extent to which they apply to financial services within the meaning of the ASIC Act 2001**. Such a definition would arguably even extend the Corporations Act definition of “financial services” to cover the provision of credit products - which we believe is reasonable and consistent with our understanding of Government policy.

We believe the proposed remedy would be consistent with controlling the potential risk of indeterminate levels of liability for financial services businesses, which we understand to be consistent with Commonwealth Government policy as demonstrated by the Government’s position in relation to tort law reform. The proposed remedy would also appear to be consistent with the intention of Parliament when it passed the provisions of what is now Chapter 7 of the Corporations Act 2001, as those provisions relate to external dispute resolution schemes for retail clients.

3. FICS RULES AS THEY RELATE TO ACCESS BY NON-RETAIL CLIENTS

Section 912A(1)(g) of the Corporations Act 2001 obliges a financial services licensee who provides financial services to a person as a retail client, to have a dispute resolution system complying with subsection (2). Subsection 2(b) provides that the licensee must be a member of one or more ASIC approved external dispute resolution schemes.

It is clear that the legislation imposes the obligation in respect of **retail clients only**. It is also clear from the Explanatory Memorandum to the current legislation (the former Financial Services Reform Act of 2001) that Parliament’s intention was that this should be limited to retail clients.

In another example of a failure of integration, the FICS Rules have evolved to produce a perverse situation that appears inconsistent with the provisions of the legislation, and the intentions of Parliament. FICS Rule 14.2 provides that:

*“The Service [FOS] may **at its discretion decide that it will not deal with** [emphasis added] a complaint by a person who is not a “retail client” as defined under the Corporations Act 2001.”*

The legislation provides that the licensee’s obligation under section 912B(2) relates to “retail clients” (a narrow approach), whereas the FICS Rules start from the proposition that FICS will deal with complaints from both retail and non-retail clients, and may purely **at FICS’ discretion** decide not to deal with a complaint from a non-retail client.

We believe that FICS Rules have evolved in such a way as to extend FICS’ jurisdiction without any clear mandate to do so under the legislation or regulations. As noted above, there is no provision or mechanism for any licensee to be able to seek any review of this process, or obtain remedy from the courts. Such a situation is entirely inappropriate.

The ability of persons to access an ASIC approved external dispute resolution schemes provides a significant benefit to a class of persons that may be perceived to be at a relative disadvantage – i.e. the ordinary retail client. The wording of the relevant legislation and the relevant explanatory memoranda to the legislation makes it clear that access to the scheme was not intended to benefit non-retail clients.

FICS Rules specifically allow FICS to provide assistance to complainants to effectively draft their complaint (FICS Rule 10). Surprisingly, FICS then hears that same complaint, and makes a binding determination in relation to the complaint. This is contrary to one of the basic principles of procedural fairness - the bias rule, based upon the maxim *nemo debet esse iudex in propria sua causa*. This rule requires that the decision-maker not be interested in the matter to be decided, nor that there be an appearance that the decision-maker brings to the matter a prejudiced mind.

Since the scheme essentially suspends one party’s rights of access to the courts as well arguably procedural fairness in cases where an investor has benefited from FICS Rule 10, access to FICS should be allocated narrowly and prudently to classes of persons who might suffer relative disadvantage (the retail client).

In practice, ASIC has constructed the current external dispute resolution system in such a manner as to deny over 3,000 Australian businesses (licensees), and in certain cases potentially up to 12,000 Australian individuals (representatives), their proper legal rights of access to the Australian courts system in relation to disputes defined as financial services disputes under the rules of the EDR schemes. There is not even a mechanism to challenge determinations on the basis of questions of law.

Our reference to representatives of licensees may appear surprising, since EDR scheme only appears to apply to licensees that are members of the scheme. However, it is not widely appreciated that, although the EDR scheme jurisdiction is limited to licensees (the businesses), most licensees have representative employment or contractor agreements that provide for the representative to indemnify (wholly or in part) the licensee in the event that their conduct results in financial detriment to the licensee. Such indemnities typically cover adverse FICS determinations, and there are several recent examples of licensees seeking and obtaining indemnities from their representatives in relation to client disputes.

There may be some argument that licensees and representative need to have their ordinary rights of access to the courts removed from them in cases relating to a limited class of relatively disadvantaged persons. At the same time, some argue that the class being defined as “retail clients” is of itself excessive – but, that is the current position in law.

However, in the context of an “non-retail” client making a complaint, it would be perverse in the extreme to have a circumstance where a simple employee or contractor who works as a representative for a licensee would be faced with the burden of:

- meeting **all** of the substantial dispute resolution costs (this is so because even if it is determined that the non-retail client has no case the licensee must still pay all of the FICS costs associated with the dispute), and
- be denied a right of appeal in the event that the FICS determination appears contrary to Australian law.

It would be perverse because it is virtually certain that the non-retail client would have substantially greater resources and net assets than a representative, who in the main are simply working people.

Proposed remedy: Section 912B(2)(b) of the Corporations Act 2001 provides that a licensee who provides financial services to retail clients must be a member of an ASIC approved external dispute resolution scheme. Section 912B(3) provides that Regulations may be made for the purposes of, or to deal with the variation or revocation of standards or requirements made by ASIC, or approvals given by ASIC, in respect of these approved external dispute resolution schemes.

We submit that ASIC vary or approve such standards to require that the **determinations of an approved scheme be only binding to the extent to which they apply to “retail clients” within the meaning of the Corporations Act 2001.**

Having completed our comments in relation to the deficiencies of the FICS scheme we will now address the proposals in CP102.

ISSUES COVERED IN CONSULTATION PAPER

C1

We do not object to ASIC's position regarding the standardisation of the definition of complaint consistent with AS ISO 10002. Compliance with AS ISO 10002 is already a current obligation of members of the former FICS scheme, and the standardisation of these standards by ASIC and FICS will mean that licensee are not subjected to having to comply with two separate standards in relation to the same issue - dispute handling.

There may arguably be cost savings in this regard.

C2 and C3

We support ASIC's position relating to satisfying the guiding principles in section 4, rather than the alternative approach which would mandate compliance with AS ISO 10002 in full.

D1

The current position under FICS Rule 8.1(b) provides for a response within 45 days, but also recognises that there may be circumstances that require 90 days to provide a response. Mandating a 45 day period for a final response in all circumstances would indicate a lack of understanding of how the dispute resolution works in practice.

Access to client files

It is the licensee who is served with the complaint because the licensee is the member of the approved EDR scheme, and it is the licensee who is required to evaluate the complaint with reference to client records.

However, the practical position in the industry is that representatives typically operate from their own premises rather than their licensee's premises and the licensees typically do not have, and have never had, physical possession of the relevant client files. In the financial planning industry there is a significant level of movement by representatives from licensee to licensee. If, after a representative has left a licensee to go to another licensee, a complaint is received, the licensee in receipt of the complaint may find it difficult and time consuming to access the relevant information in order to be able to respond to the complaint in a timely manner. In some cases they may simply be denied such access.

Proposed remedy: Since both the representative and the "new" licensee are subject to ASIC's overall regulation and enforcement powers, and it is ASIC's stated position to ensure the efficiency and integrity of the external dispute resolution system, we recommend that ASIC prescribe either through

regulation (possibly through the provisions under section 951B or 951C of the Corporations Act 2001), or through the publication of a Regulatory Guide relating to dispute resolution, that there is a positive obligation on the part of **both** the representative and the “new” licensee in such circumstances to use their best endeavours to provide all relevant information as is required from time to time by an ASIC approved EDR scheme. Such a measure will arguably go a long way to hasten response times and the availability of information in relation to many disputes.

Dealing with professional indemnity insurers

On a significant number of occasions, professional indemnity insurers require all correspondence between a licensee and complainant to be reviewed, or sometimes even approved, by the insurer. If this is not done, the policy may not respond to any claim. This means that compliance with an insurer’s rules in relation to dealing with claims is of paramount importance. You will appreciate that legal review of correspondence will add to the time taken in being able to give a final response.

The initial response from both certain members of ASIC and FICS has been that this is the licensee's problem. However, we would submit that the entire client compensation system is dependent upon ensuring that the professional indemnity insurer is given no reason to abandon the matter. As a consequence, it is not simply a matter of responding to a client within an arbitrary aspirational time limit set by a regulator, and ignoring the consequences in relation to insurance coverage. If FICS determinations are made which are not covered by insurance payouts the system will be seen to fail, and will lose credibility. Importantly, in the end it is the retail client claimant who will suffer if they have a valid claim that is not supported by insurance cover.

Proposed remedy: Since professional indemnity insurers are themselves Australian Financial Services licensees regulated by ASIC, and it is ASIC’s stated position to ensure the efficiency and integrity of the external dispute resolution system, we recommend that ASIC prescribe either through regulation (section 951B or 951C of the Corporations Act 2001), or through the publication of a Regulatory Guide relating to dispute resolution, that there is a positive obligation on the part of professional indemnity insurers involved in these types of claims to provide a final response to relevant questions. If a 90 day limit is retained, ASIC could require professional indemnity insurers to make a decision in relation to relevant client correspondence and correspondence to FICS within 30 days of receipt of all information relevant to the insurer.

In relation to the issue of timeliness and delay, it is more important that retail clients’ entitlement to an award is not compromised due to the failure to work with the relevant professional indemnity insurers. This is particularly so when any perceived delay can be addressed by the EDR making a further award of interest as compensation for delay.

D2

In the interests of fairness and efficiency we submit that a single timeframe or time limit apply to all licensees irrespective of whether they have multi-tiered IDR procedures. A retail client is understandably interested in a result, and not a process.

D3

We do not object to ASIC's position in relation to third-party service providers.

E2

We would only support the removal of monetary limits and its replacement with compensation caps where, if the retail clients accepted the EDR determination, the member (licensee) could require the consumer or investor to enter into a binding agreement, as a condition precedent to the member meeting the terms of the EDR determination, that the EDR determination is in full and final satisfaction of the consumer or investor's claim.

In *FICS Ltd v Deakin Financial Services Ltd* [2006] FCA 1805, Finkelstein J rejected FICS' then interpretation of the application of the FICS Rules in relation to monetary limits and was critical of a position that would permit a complainant to make a claim which is fictitiously low so as to bring it before FICS, and also allow the complainant to pursue the balance of the claim in the courts – essentially “two bites” at the same claim. His Honour stated that if a complainant were to take the same course in a court, his actions would be struck out as an “abuse of process” unless the excess to be pursued in a higher court was abandoned.

Currently, FICS Rule 38.2 provides that a member (licensee) is entitled to “ask” the complainant to sign a deed of release. That is clearly inadequate and inappropriate. The provision should read that if the complainant accepts compensation pursuant to a FICS decision, the licensee is entitled to “obtain” from the complainant a signed deed of release.

E3

We believe that a binding compensation cap or a monetary limit of a maximum of \$280,000 should only be considered if the following are also provided:

- a right of appeal for a licensee to the courts in relation to a question of law, as set out in the earlier comments;
- the jurisdiction of the scheme to be limited to “financial services” within the meaning of the ASIC Act 2001; and
- the jurisdiction of the scheme to be limited to “retail clients” within the meaning of the Corporations Act 2001.

The ability to move the compensation cap or monetary limit must only be done in the context of the availability of sufficient professional indemnity cover to support the scheme. The failure to do so will result in a breakdown of the scheme, and detriment to the retail clients the scheme seeks to assist.

We noted the comments attributed to the Productivity Commission in paragraph 123 page 30 of CP102. We can only consider that that was rather misguided and ill-conceived, and contradicts current approaches to tort reform. What is required is to ensure a balance between the objective of reasonable compensation for retail clients, and the ability of the financial services industry (including professional indemnity insurance) to meet those objectives.

Broadly similar issues arose and were dealt with in relation to striking a balance between the appropriate level of civil liability, and the level of insurance coverage in the market place in relation to other professional service providers (such as medical professionals) as well as appropriate levels of insurance coverage for local governments in the provision of government services.

Insurance and compensation arrangements reflecting a balance of fairness to plaintiffs in relation to torts and the reality of the market were put in place at the beginning of the decade. These arrangements reflected a level of compromise based on compensation needs, and the costs that the market could sustain. Those tort law reform initiatives were positive and beneficial for society as a whole, and arguably have been largely successful in providing reasonable compensation to victims, and ensuring the viability and continuing provision of services by the professions and governments. We cannot understand why the Productivity Commission appears to somehow see the financial services industry as being in some way divorced from this type of process.

The observation relating to the so-called “rationalisation of excessively risky suppliers” appears to reflect a perspective based on theoretical outcomes, but also betrays a complete lack of understanding of practical day-to-day operations of the market. A more detailed elaboration is beyond the scope of this paper, but we would be happy to have that discussion if ASIC would like further information from practitioners actually involved in the day-to-day operations.

E4

We believe that it is reasonable for a scheme to award reasonable interest in relation to a complaint, and that it is reasonable that such interest would be in addition to the compensation or monetary limit, subject to the other qualifications that we have referred to in our answer to “E3”, above.

E5

We believe that it is not unreasonable that compensation caps or monetary limits be linked to some form of objective indexation criteria, such as the consumer price index, again, subject to the capacity of the insurance market.

E6

We concur with the need for an adequate transition period. Once again, we refer to the main limiting factor in relation to consumer compensation arrangements – i.e. the ongoing availability of professional indemnity insurance coverage.

Much of the pace at which the proposed changes can occur will depend on the availability of such insurance cover. Our concern is that the current financial crisis has done severe damage to the financial reserves of professional indemnity insurance companies. Most professional indemnity insurers fund payments of claims through a mix of premiums received and existing reserves. This means that at the very time there are likely to be claims in respect of financial services, the reserves to fund the claims will also be at their lowest.

The financial services industry is in a unique position in that its propensity to face claims (typically linked to financial market crashes) is directly correlated with the damage that is done to professional indemnity insurer's reserves. For example, there is no such obvious correlation between financial markets crises impacting on insurers and claims from medical practitioners, engineers or architects.

This means that the financial services industry may face particular problems in terms of obtaining adequate coverage, and this needs to be taken into consideration by ASIC.

E7

The EDR schemes were intended for "retail clients". For the reasons previously mentioned in our commentary, it is entirely inappropriate that non-retail clients (which by definition includes licensees) be allowed access to the schemes.

F1

We do not believe that it is appropriate that an EDR scheme have jurisdiction to deal with complaints in relation to a person or entity that is no longer a member of the scheme.

F2

We strongly object to any restriction or prohibition on scheme members from commencing legal proceedings that are related to a complaint that has been lodged with the EDR scheme. This appears to be yet another example of an attempt to strip appropriate and proper legal rights from one class of persons by virtue solely of them operating in the financial services industry.

The law has a number of corrective mechanisms in relation to inappropriate legal claims or abuses of process. So, for example, if the member seeks to unjustifiably intimidate the complainant, it is likely that the member would be treated as a vexatious litigant by the courts – or worse.

It would also be open for the EDR scheme to take this matter into consideration. A member instituted (rather than consumer instituted) legal action should arguably also not prevent the EDR scheme from making a determination. However, it is clearly not fair or reasonable to deny a member an action against the complainant where they have a legitimate grievance.

We are particularly troubled by what we perceive to be ASIC's willingness to prevent legitimate issues of concern to come before the nation's courts.

F3

We support ASIC's position in relation to time limits.

F4

We support the general thrust of ASIC's position. However, instead of the proposition that the EDR scheme "can" exclude complaints that have already been dealt with in another forum, we believe that the wording should be that the EDR scheme "must" exclude such complaints, and that the EDR scheme must exclude complaints where the subject matter of the complaint has already been dealt with by the EDR scheme.

F5

We strongly reject the proposal that there be a prohibition on EDR schemes conferring a power on scheme members to veto proposed amendments to their rules or terms of reference. FICS members are members of a public company. Is ASIC seriously suggesting that disenfranchising members of public companies is a desirable principle?

In addition, currently ASIC has constructed a mechanism where there are very limited actual checks and balances in relation to EDR schemes, particularly in the absence of a right of appeal in relation to questions of law and also proposal F2 which seek to further remove access to the courts. We have already demonstrated earlier in this commentary how the current arrangements have resulted in unfair outcomes and has compromised the

concept of procedural fairness. The proposal in F5 would only make an unbalanced and unfair system even more so.

F6

We agree with the general proposition that EDR schemes communicate clearly with components and members about the role, process and decisions.

G1

We are strongly of the view that the EDR schemes take a balanced approach. We can see no reason that if a consumer chooses to use such a scheme, which:

- causing a considerable cost to the licensee and no cost at all to the consumer; and
- results in the licensee and its representatives surrendering substantial legal rights that they would otherwise have in terms of access to the courts,

why a consumer obtaining these substantial benefits should not also be bound by the decision of the EDR scheme in much the same way as the licensee and representative.

It may be worth reflecting on the comments of the learned Finkelstein J in *FICS Ltd v Deakin Financial Services Ltd* [2006] FCA 1805. In relation to this matter, his Honour was critical of the then FICS Rule 37.

The then FICS Rule 37 required the licensees to abide by any FICS Panel decision, while allowing the complainants to pursue whatever rights they have in the courts, irrespective of the FICS' decision.

His Honour stated:

“For what it is worth, my view is that this rule is unreasonable ...”

However, if ASIC is minded to ignore or reject his Honour's views on this matter, we see merit with the position where, if the consumer waives a potential claim to an amount in excess of the scheme's compensation or monetary limit in order to have their complaint heard, then the consumer must accept the decision made under the EDR scheme – i.e. the decision must be binding on the consumer.

G2

We support ASIC's position.

G3

We support ASIC's position.

Thank you for the opportunity to comment on the proposals in CP102. If you would like to discuss these comments further please feel free to contact Mark Halsey on (08) 9382 4128.

Yours sincerely

**MARK HALSEY
HALSEY LEGAL SERVICES**