

Parliament of Victoria

**Law Reform Committee Inquiry into
Property Investment**

**Submission by
Financial Industry Complaints Service**

August 2007

Executive Summary

The Financial Industry Complaints Service (FICS) welcomes the opportunity to make this submission to the Parliament of Victoria Law Reform Committee Inquiry into Property Investment.

FICS' Key Submissions are:

1. Background information on the industry based external dispute resolution schemes in the financial services sector – including the regulatory framework.
2. Benefits of industry-based external dispute resolution (EDR).
3. Recommended application of industry-based EDR model in other industries and jurisdictions.
4. FICS currently provides external dispute resolution services to consumers in relation to property investment advice given by Australian Financial Services Licensees.
5. FICS expresses interest in being considered for the provision of EDR for disputes concerning provisions of property investment advice under any proposed regulatory regime.

Introduction

The Financial Industry Complaints Service (FICS) is a national industry based external dispute resolution scheme (EDR) approved by Australian Securities and Investments Commission to resolve disputes concerning the provision of financial services.

This submission responds for the call for submissions by the Law Reform Committee inquiry into property investment. FICS thanks the Law Reform Committee for the opportunity to make this submission.

About FICS

FICS is an independent dispute resolution service which considers and seeks to resolve disputes between consumers and members of the financial services industry, including life insurance, managed investments, some friendly societies, financial advice, stock broking, investment advice and sales of financial or investment products. It is an alternative to litigation, and free to consumers. Its members include life insurers, funds managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers.

Other Industry-Based EDR Schemes

In addition to FICS, there are a number of other industry-based EDR schemes operating in the financial services sector. These are:

- Banking and Financial Services Ombudsman (BFSO);
- Credit Ombudsman Service Limited (COSL);
- Credit Union Dispute Resolution Centre (CUDRC);
- Financial Co-operative Dispute Resolution Scheme (FCDRS);
- Insurance Brokers Disputes Limited (IBD); and
- Insurance Ombudsman Service (IOS).

In addition to these industry-based EDR Schemes, the Superannuation Complaints Tribunal (SCT) has been set up under statute by the Commonwealth Government to deal with superannuation related disputes.

The Financial Ombudsman Service

Telephone enquiries to any of the schemes listed above are initially answered by the Financial Ombudsman Service (FOS).

FOS is a central telephone contact point for consumers wishing to access a financial services EDR scheme. When a consumer calls the 1300 780 808 number to discuss their complaint, a FOS Enquiry Officer refers the caller

to the correct scheme. If the enquiry does not involve a FOS scheme member, FOS will refer the caller to the most appropriate service.

FOS also engages in co-operative promotional activities aimed at educating consumers about the availability of industry-based EDR schemes in the financial services industry and the 1300 number.

Further information

Additional information about FICS and the other financial sector Schemes and their operations can be obtained on:

- www.fics.asn.au ; and
- www.fos.org.au.

FICS publishes its Rules, Annual Report and other information about its policies and procedures online.

Industry-Based External Dispute Resolution Schemes in the Financial Services Industry

Compliance with consumer protection laws depends on both the effective enforcement of those laws and accessible and effective dispute resolution mechanisms.

A brief overview of the benefits to consumers of industry-based EDR schemes in the financial services industry follows.

The Regulatory Framework

Each of the industry-based EDR schemes operating in the financial services sector are approved by the Australian Securities and Investments Commission (ASIC) as EDR schemes for financial services licensees under Part 7 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

All financial services licensees that provide services to retail clients must, in accordance with section 912A of the *Corporations Act*:

- have an internal dispute resolution procedure that complies with standards set by ASIC; and
- belong to an EDR scheme that is approved by ASIC.

All of the ASIC approved EDR schemes operate in accordance with the requirements of ASIC's *Regulatory Guide 139: Approval of external complaints resolution schemes (RG139)*. RG 139 also requires that approved schemes operate in accordance with the Commonwealth Department of Industry, Science and Tourism's, *Benchmarks for Industry Based Customer Dispute Resolution Schemes* (1997) (the **DIST Benchmarks**). Under these requirements, the schemes must be:

- accessible;
- independent;
- fair;
- accountable;
- efficient; and
- effective.¹

¹ Commonwealth Department of Industry, Science and Tourism, *Benchmarks for Industry Based Customer Dispute Resolution Schemes* (1997) at 10.

Not all of the ASIC approved industry-based EDR schemes operate in exactly the same way. However, broadly speaking, adherence to RG139 and the DIST Benchmarks ensures, amongst other things, that industry-based EDR schemes dealing with financial services do have some common features including that they:

- are free for complainants;
- are informal and have an inquisitorial approach, so that complainants do not require legal representation;
- promote their services to the community and in a manner that targets particularly disadvantaged groups;
- have independent boards that consist of equal numbers of consumer and industry representatives and an independent chair;
- have independent decision-makers who are entirely responsible for the determination of disputes;
- have procedures that ensure that the scheme's decision-makers are free from conflicts of interest;
- are adequately funded to carry out their functions;
- operate under Terms of Reference or Rules;
- have procedures that ensure procedural fairness;
- make decisions with reference to:
 - the law;
 - applicable industry codes of practice;
 - good industry practice ; and
 - fairness in all the circumstances;
- have mechanisms to ensure that disputes are dealt with in the most appropriate forum;
- provide the independent decision-makers with powers that are clear and sufficient to deal with the majority of disputes in the industry;
- make decisions that are binding on scheme members but not consumers to ensure that consumers are able to preserve their right to access the courts with their disputes;
- provide mechanisms to deal with systemic issues and to report systemic issues and serious misconduct to ASIC; and
- provide for an independent review on a regular basis.

We consider that the existence of the regulatory framework under the Corporations Act and the existence of objective benchmarks providing for high consistent standards are important requirements for an effective industry-based EDR system for the financial services industry. This framework also facilitates ongoing evaluation and improvement of the services provided by EDR schemes to industry and the community.

In our view, the requirements of RG139 and the DIST Benchmarks remain a good guideline for the essential elements of an effective industry-based EDR scheme.

Benefits of industry-based EDR

High level of acceptance by both industry and consumer groups

Industry-based EDR schemes are well accepted by both the financial services industry and consumer groups as an accessible, expeditious and cost-effective method of dispute resolution.

Although originally designated as “alternative”, as in “alternative dispute resolution schemes”, industry-based EDR schemes have now become an important part of the mainstream framework for resolution of disputes and form an integral part of the regulatory environment for financial services. In addition, the current system of ASIC approval for the industry-based EDR schemes operating in the financial services industry ensures that all retail clients of financial services providers have access to a dispute resolution mechanism that is guaranteed to comply with objective standards set by the regulator.

Accessible and effective consumer redress

In comparison with other dispute resolution mechanisms, industry-based EDR schemes offer a great deal of benefit to consumers by offering more accessible and effective redress.

Most other alternative dispute resolution services cannot offer consumers the ability to obtain a decision that is binding on the other party. Uniquely, industry-based EDR schemes have the ability to make decisions that are binding on their members but are not binding on consumers, which means that a consumer’s ability to access the courts if dissatisfied with the decision of the scheme is preserved. This is because the members agree contractually to be bound by the decisions of the scheme. Decisions

of industry-based EDR schemes in the financial services sector can also be enforced by reporting any non-compliance to ASIC.

Industry-based EDR schemes also offer a much simpler and accessible method of dispute resolution than most courts or tribunals and have greater flexibility respond to changing needs and demands in the community.

As noted earlier, industry-based EDR schemes are free for consumers and offer procedures that are simple enough to use without the need for lawyers. By comparison, in court proceedings, even at tribunal level, consumers may feel out of their depth without legal representation and can be at risk of incurring the other party's costs (in addition to their own legal costs) if they are not successful. Industry-based EDR schemes also have inquisitorial powers which assists in creating a "level playing field" because disputants are not reliant on their own ability to put forward their case and evidence to support it, as they would be in a court of law.

At the same time, industry-based EDR schemes do not conflict with a well-functioning courts and consumer tribunal system and should not be seen as a substitute for well-funded courts and tribunals. This is because consumers, if they choose, can still access any other dispute resolution forums because the decisions of the schemes are not binding on consumers.

Finally, as noted earlier, all financial service licensees are required under Part 7 of the Corporations Act to have in place internal dispute resolution procedures to respond to the complaints of their retail clients. This ensures that there is a mechanism in place to encourage the earliest possible resolution of disputes.

Ability to apply a wide range of laws and standards

Industry-based EDR schemes can apply both generic and industry specific laws depending on what is required in the particular industry, as well as normative standards set out in non-legally binding industry codes or guidelines. This also means that the Schemes have developed expertise in the factual subject matter of disputes in a particular industry sector and an awareness of industry practice and standards. As noted earlier, under their Terms of Reference or Rules each of the Schemes can consider the applicable law, applicable codes or guidelines, good industry practice and fairness in all the circumstances when making decisions. This provides a broader context for decision-making than is available in a tribunal or court

that is bound to follow legislation and precedent. Ultimately, this is of benefit to consumers because it enables a range of sources defining best practice to be taken into account. For example, FICS regularly takes into account the Financial Planning Association Rules of Professional Conduct.

Independence

From time to time, there has been some suggestion or perception that industry-based EDR schemes lack independence because they are “owned” by industry. In most cases, industry-based EDR schemes were set up initially by industry bodies. For example, FICS was originally set up by the Life Insurance Federation of Australia. However, the requirements of RG139 and the DIST Benchmarks provide for certain features that facilitate independent decision-making and serve to overcome any perceived lack of independence. For example, the Board, or similar overseeing entity, of an ASIC approved industry-based EDR scheme is comprised of equal numbers of consumer and industry representatives and an independent chair. In addition, the independent decision-makers are entirely responsible for the handling and determination of disputes, adequately resourced to carry out their functions and accountable only to the overseeing entity.

While most industry-based EDR schemes attempt to facilitate a good working relationship with industry groups and their members, these regulatory benchmarks provide an adequate level of independence to ensure that decision-making is not compromised or influenced by those relationships.

For these reasons, we again emphasise the role of such benchmark measures in the development of industry-based EDR in other industries.

Improving industry standards and training and education programs

Importantly, industry-based EDR schemes create valuable feedback to members about the consumer experience that raises the standards of the individual members and the industry as a whole. This role should not be underestimated.

The publishing of various reports and guidelines for industry, such as FICS practice notes and Bulletins can create real changes in industry practices. FICS publishes determinations on its website, which provides guidance and feedback to the industry in relation to the issues arising in consumer complaints.

Industry-based EDR schemes are also proactive in training and educating industry on best practice. Each of the Schemes conduct open fora, liaison meetings, conferences and hold regular meetings with individual members to raise industry standards. For example, FICS has conducted internal dispute resolution workshops for its members to improve the standard of internal complaints handling and so far between 700 and 800 people have attended the workshops.

Resolving systemic issues

Of particular note is the power to resolve systemic issues: that is, issues apparent from disputes that will have a material effect on a class of individuals or small businesses beyond the parties to the dispute. This is a highly cost-effective and powerful tool for addressing disputes that may affect more than one consumer, including the ability to facilitate substantial redress to large numbers of consumers where it is warranted. Other methods of obtaining redress of this nature, such as a class action, would be much more expensive and time consuming for consumers and are not as readily accessible and inexpensive. The ability of industry-based EDR schemes to resolve systemic issues also provides a low-cost way of "troubleshooting" for industry, making it easier to improve its practices.

ASIC approved industry-based EDR schemes also have the ability to refer an unresolved systemic issue and/or serious misconduct to ASIC, with potentially significant implications for the financial service provider's licence.

Schemes may also combine this role with advocacy for necessary law reform or other policy initiatives and contribute to policy debates via submissions drawing on their experience. For example, FICS has recently brought to the attention of ASIC its ongoing concerns in relation to the wider issue of the availability of redress to consumers in circumstances where the financial services provider has ceased trading. Further to this, FICS has made submissions to Treasury in relation to its proposed regulations requiring financial services licensees to have Professional Indemnity Insurance in place to fulfil their obligation to have adequate arrangements in place for retail client compensation. FICS had concerns that the proposed regulations did not address circumstances where the licensee had become insolvent or had otherwise ceased to trade. FICS has been able to contribute to the ongoing discussion of compensation issues, because of its experience in dealing with consumer complaints.

In our view, powers to deal effectively with systemic issues are vital to the ability of an industry-based EDR scheme to create benefit for consumers beyond the individual disputants who come to the scheme. Ultimately, if the industry-based EDR schemes are seen to be creating positive changes in the industry by resolving systemic issues and promoting good industry practices this in turn creates increased consumer confidence in the market.

Low Regulatory Costs

Industry-based EDR schemes are provided for a relatively low regulatory cost. As the operational costs are recovered from industry members, there is no cost to taxpayers in providing the service. In most cases, industry-based EDR schemes are funded by a combination of fixed membership fees or levies and fees charged per dispute. In some cases, fees are charged in accordance with both the number and complexity of disputes. This system indirectly encourages members to implement more effective internal dispute resolution mechanisms because there is a direct cost incentive for early resolution of disputes.

Furthermore, the costs to consumers are also low. As already mentioned, the services of industry-based EDR schemes are provided free to consumers and consumers are not required to employ legal advisers to lodge a dispute.

Potential for application of model in other industries and jurisdictions

Each of the Schemes operates on a nationwide basis but is based in Victoria. Other industry-based EDR schemes in this sector also operate from a single state but have a national jurisdiction. This is possible because their procedures generally do not require evidence to be given by appearance in person. In our view, this is the ideal model because it is cost-effective and yet provides for disputes to come from any part of the country, which is important because the services provided by members of the financial services industry are usually provided to national markets.

In our view, the regulatory framework under section 912A of the Corporations Act that provides for compulsory membership of an EDR scheme and for the approval of EDR schemes by a single regulator in the financial services industry could be equally applicable to other industry sectors. In addition, the criteria set up by RG139 and the DIST Benchmarks could easily translate to different applications. For example, industry-based EDR schemes such as the Energy and Water Ombudsman

Victoria also make use of the DIST Benchmarks to provide guidance for their operations.

In our view, this model could also translate easily across national borders and it is noteworthy that the Banking Ombudsman of New Zealand operates in a similar way to the BFSO. Many overseas based industry-based EDR schemes have visited Australia to meet with BFSO, FICS and IOS to learn from the successes of the Schemes.

Current Role of FICS in relation to property investment advice

Where Australian Financial Services Licensees give property investment advice to retail clients, then that advice is given subject to their obligations as licensees under the Corporations Law and FICS is able to receive and deal with complaints in relation to that advice.

FICS, however, is not currently able to deal with consumer complaints about property investment advice given by persons or entities which do not have an Australian Financial Services License, for example, real estate agents, property spruikers (e.g. Henry Kaye) etc.

Possible Expansion of Role

FICS has the expertise, experience, systems and infrastructure to deal with property investment advice complaints in relation to Australian Financial Services Licensees. If further regulation of property investment advice in Victoria was to be considered, then FICS would want to be considered as a provider of consumer dispute resolution services.

This would provide a 'one-stop shop' for Victorian consumers in relation to disputes concerning the provision of Property Investment Advice. FICS would encourage the development of regulation of property investment advice along similar lines to the Corporations Law, which currently governs Australian Financial Services Licensees. However, even if the regulation of property investment advice in Victoria is different to that governing Australian Financial Services Licensees in the Corporations Law, FICS has demonstrated that it has the ability to apply a wide range of laws and standards to disputes concerning a broad range of financial services providers.