
Chapter 5. Investor Protection and Dispute Resolution

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Introduction

[5.10] This chapter focuses on the relationship between advisers and their clients and the scope of protection available for investors. It also examines the legal liability and remedies that flow when compliance requirements are ignored. The impact of financial services reform on traditional consumer protection remedies is discussed and the nature and need for efficient and effective dispute resolution processes is examined.

Consumer protection is best achieved through a well-regulated, informed, appropriately trained and educated industry. This was one of the reasons for the implementation of Ch 7 of the *Corporations Act 2001* (Cth), which deals with the general obligations of financial service licensees. These obligations overlap with common law and fiduciary duties.

According to s 912A of the *Corporations Act 2001*, a financial services licensee is obliged to:

- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- comply with any conditions imposed by the Australian Securities and Investments Commission (ASIC) on the licence;
- comply with the financial services laws;
- take reasonable steps to ensure that its representatives comply with the financial services law;
- maintain sufficient financial, technological and human resources to properly provide financial services and supervise representatives;
- maintain the competence to provide those financial services;
- ensure that its representatives are adequately trained, and are competent to provide those services;
- have internal and external dispute resolution procedures to handle complaints from retail clients;
- have adequate risk management systems; and
- comply with any other obligations that are prescribed by regulations.

These statutory obligations are a basis for a well-regulated industry which, by its very nature, provides consumer protection mechanisms.

Key points

[5.20] This chapter will provide a greater understanding of:

- the investor's rights under common law;
- the means by which Ch 7 of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) provide investor protection;
- the impact of conflict of interest laws on financial services; and
- the dispute resolution processes available in the investment industry.

Key terms

[5.30] The key terms in this chapter are:

- Statutory provisions
- Unconscionable conduct
- Misleading and deceptive conduct
- Implied warranties as to due care and skill
- Disclaimers (limiting liability)
- Remedies
- Conflict of interest
- Dispute resolution – internal process
- Dispute resolution – external process
- Financial Ombudsman Service

Consumer protection laws

[5.40] The legal basis of investor protection arises out of various common law and statutory duties. From an adviser's position, investor's rights correspond to compliance requirements. Whenever consumer protection is considered, the issues of the effectiveness of disclaimers, exclusions, exemptions and limitations are relevant.

There is often overlap between the case law and legislation. For instance, the duty of an adviser to use reasonable care and skill is found in contract law, the tort of negligence, fiduciary duties and various pieces of consumer protection legislation.

Common law obligations

[5.60] The legal nature of the adviser-investor relationship is both contractual and fiduciary. As with all legal relationships, rights and duties arise. The rights of investors can be related to the remedies that become available upon breach of the obligations of the adviser. Contractual terms, both expressed and implied, will initially determine the scope of an adviser's duties owed to an investor.

In the investor-adviser relationship there is a fiduciary duty to use reasonable diligence, care and skill. Advisers can also be liable for loss caused to investors by failure to take reasonable care to avoid foreseeable loss or damage under common law negligence.

The law of negligence is relevant to professionals in the financial services sector. People who suffer losses as a result of negligent advice have often recovered the loss through a claim for damages for the negligence of the professional.

In *Daly v Sydney Stock Exchange Ltd*,¹ Brennan J considered the nature of the adviser-investor relationship and said (at 385):

Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises. The adviser cannot assume a position where his self-interest might conflict with the honest and impartial giving of advice.

His Honour continued (at 385):

The duty of an investment adviser who is approached by a client for advice and undertakes to give it, and who proposes to offer the client an investment in which the adviser has a financial interest, is a heavy one.

Brennan J further stated (at 385):

His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have, but a third party did have, a financial interest in the investment to be offered, to reveal fully the adviser's financial interest, and to obtain for the client the best terms which the client would obtain

¹*Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.

from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction.

Gibbs CJ (at 377), with whom Wilson and Dawson JJ agreed, considered that the advisory function was fiduciary in nature:

The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession, which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction.

This emphasis on full and frank disclosure is consistent with the disclosure through documentation regime imposed on all financial service providers by Ch 7 of the *Corporations Act 2001*. This obligation stems from, in particular, Pts 7.7 – “Financial Services Disclosure” and 7.9 – “Financial Product Disclosure”, discussed in Chapter 4.

In *Newman v Financial Wisdom Ltd*,² the court discussed (at [410]) the common law obligations of the investment adviser in circumstances where legislation was also an issue:

I am therefore satisfied that Quarrell, by recommending the investment, acted in breach of a duty of care which he owed to Mr Newman in the circumstances. In my opinion, the recommendation of the investment in itself constituted negligence. In addition, there was negligence in the failure to ensure that there were reasonable grounds for recommending the investment, in the failure to make any proper inquiries or investigations concerning the investment and the persons involved in it and in the failure to explain the risks involved and to ensure that they were within the risks which Mr Newman was prepared to accept.

A person may limit or exclude their liability in tort and contract, although clauses that attempt to restrict the liability of one of the parties to a contract may be construed strictly by the courts.

Regulatory Guide 175.79 provides that a failure to comply with any of the obligations relating to the provision of advice, *including common law obligations*, may mean, among other things, that the adviser has failed to comply with the obligation to act “efficiently, honestly and fairly” under s 912A(1)(a) of the *Corporations Act 2001*. The common law obligations include duties to:

- disclose conflicts of interest that may affect the advice provided; and
- adopt due care, diligence and competence in preparing advice.

This recently updated regulatory guide (rereleased December 2012) recognises the importance of the common law duties of the adviser to the client and attempts to make these common law

²*Newman v Financial Wisdom Ltd* (2004) 56 ATR 634; [2004] VSC 216.

duties part of the statutory duties regime.

The duty to provide services that comply with particular standards is a thread that is encountered in many areas of law. In every contract for services there are implied terms that the services will be rendered with due care and skill.

Statutory obligations

Impact of financial services reform on the investment process

[5.80] In circumstances where Ch 7 of the *Corporations Act 2001* (Cth) applies, it is of paramount importance that the adviser act in accordance with the compliance requirements set out in that chapter. If an investor can show a breach of statutory duty, then reliance on the legislative remedies that flow from such breaches is probably the preferred path to be taken by the investor, despite various common law remedies also becoming available. Of course, the ultimate basis of legal liability will typically include all possible heads of claim as was the case in *Ali v Hartley Poynton Ltd*,³ as discussed in Ch 1. In that case, the statutory remedies under the *Trade Practices Act 1974* (Cth),⁴ as well as the common law remedies of breach of contract, the tort of negligence, and breach of fiduciary duty, were all part of the statement of claim against the defendant.

It is often easier for a plaintiff to use statutory remedies (where available) rather than common law remedies. This is because exclusion clauses or limitation of liability clauses in service contracts can limit the common law liability of the service provider and defences are also more readily available at common law. For example, a claim based on misleading and deceptive conduct under s 12DA of the ASIC Act is not affected by exclusion clauses or limitation of liability clauses in the contract or defences,⁵ and may be preferable to an action which has to establish the complex rules of misrepresentation under the common law to succeed in a civil action against the adviser. In some circumstances, the only remedies available may arise out of common law negligence or contractual remedies and in these cases exclusion clauses in contracts between financial institutions and institutional investors may be valid.⁶

The specific details of the clause and the relative bargaining power of the parties are important factors in determining the validity of the exclusion clause.

The remedies available for loss and damage resulting from breach of the various compliance requirements of advisers under Ch 7 of the *Corporations Act 2001* provide further avenues for the investor.

³*Ali v Hartley Poynton Ltd* [2002] VSC 113.

⁴The *Australian Securities and Investments Commission Act 2001* (Cth) would be used today in place of the *Trade Practices Act 1974* (Cth). Note that the *Trade Practices Act 1974* has been replaced by the *Competition and Consumer Act 2010* (Cth).

⁵Section 12EB of the ASIC Act renders disclaimers and exclusions ineffective in consumer financial services transactions.

⁶*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206.

Corporations Act

[5.90] The *Corporations Act 2001* provides proactive consumer protection in an attempt to regulate the industry:

- s 912A sets out the obligations owed by the licensee to the client. These obligations provide “consumer protection” because the obligations regulate the manner in which the licensee must conduct their business.
- ss 917A – 917E require the licensee to be responsible for the conduct of the authorised representative relating to the provision of financial services on which a client could reasonably be expected to rely and on which the client has relied in good faith. This is a form of consumer protection because the licensee is responsible for the representative's actions.
- s 945A sets out the disclosure and conduct of business rules (discussed in previous chapters). These are primarily for the purpose of consumer protection. If the client is a retail client, the duties and responsibilities of the financial services provider are far greater, particularly in relation to the disclosure documents that must be provided to the client and also the responsibility of ensuring that the financial product and services match the needs of the client.

ASIC Act

[5.100] One of ASIC's key roles is consumer protection:

We contribute to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers.

We are an independent Commonwealth Government body. We are set up under and administer the Australian Securities and Investments Commission Act (ASIC Act), and we carry out most of our work under the Corporations Act.

The *Australian Securities and Investments Commission Act 2001* requires us to:

- maintain, facilitate and improve the performance of the financial system and entities in it
- promote confident and informed participation by investors and consumers in the financial system
- administer the law effectively and with minimal procedural requirements
- enforce and give effect to the law
- receive, process and store, efficiently and quickly, information that is given to us

- make information about companies and other bodies available to the public as soon as practicable.⁷

The *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth), which inserted Pt 2 Div 2 within the ASIC Act, introduced broad consumer protection powers across all financial products and services. Initially credit was not regulated by ASIC, however the *National Consumer Credit Protection Act 2009* (Cth) which replicates the State-based Uniform Consumer Credit Code now provides that ASIC licenses and regulates credit providers.

Unconscionable conduct

[5.110] Part 2 Div 2 subdiv C of the ASIC Act focuses on unconscionable conduct in the provision of financial services and, like the *Competition and Consumer Act 2010* (Cth), leaves the definition of “unconscionable conduct” to be determined by the courts.⁸ Sections 12CA, 12CB and 12CC of the ASIC Act relate to unconscionability:

12CA(1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

This section prohibits unconscionable conduct but does not define the term. Instead, it refers to the “unwritten law”. This is a reference to case law, the original source of the legal concept of unconscionable conduct.

The High Court decision of *Commercial Bank of Australia Ltd v Amadio*⁹ introduced the concept of unconscionability into Australian law:

Unconscionability is deemed to occur when one party by reason of some condition or circumstance is placed at a special disadvantage ... and unfair and unconscientious advantage is then taken of the opportunity thereby created.¹⁰

The “special disadvantage” referred to in the *Amadio case* was the elderly couple's age, poor English, lack of business knowledge and lack of independent advice prior to the signing of the bank documents.

Section 12CB prohibits unconscionable conduct in relation to financial services that are ordinarily acquired for personal, domestic or household use, thus providing an extra level of protection for the domestic consumer.

12CB A person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all

⁷See ASIC website homepage: <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role>.

⁸ASIC is alleging contravention of the statutory prohibitions against unconscionable conduct in the Storm Financial matter.

⁹*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

¹⁰*Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474.

the circumstances, unconscionable.

Despite the general nature of s 12CA, s 12CB does list some matters to be considered when determining if there has been unconscionable conduct in the supply of financial services. These include:

- (a) the relative strengths of the bargaining positions of the supplier and the consumer;
- (b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the services;
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent services from a person other than the supplier.

The third section aimed at unconscionability in the supply or acquisition of financial services is s 12CC:

12CC Unconscionable conduct in business transactions

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of financial services ... to another person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of financial services ... from another person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

A person who has suffered economic loss as a result of the unconscionable conduct of another person can claim damages: s 12GF.

The unconscionability sections in both the ASIC Act and the *Competition and Consumer Act 2010* (Cth) are almost identical and therefore provide some reference for identifying unconscionable conduct in relation to the provision of financial services.

Misleading and deceptive conduct

[5.120] Sections 12DA and 12DB of the ASIC Act focus on misleading and deceptive conduct and false or misleading representations. These sections are similar to that found in s 18 of the Second Schedule of the *Competition and Consumer Act 2010* (Cth). Both s 12DA and s 12DB of the ASIC Act require that the prohibited conduct must occur in relation to financial services:

12DA(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

In the past, the courts have interpreted the term “misleading” to mean conduct which leads, or is likely to lead, into error, the person(s) to whom it is directed.

There are a number of issues to be considered:

1. The section does not require actual loss or damage to occur. The client need only demonstrate that he or she was *likely* to be led into error. The court will look at causation, ie that it was the defendant's conduct which led to the misconception. It cannot merely be linked to their actions, or claimed that the act led to confusion. There must be a direct nexus.
2. Fault is not an element of liability. It does not matter whether or not the defendant meant to mislead or deceive: the fact that their actions misled or deceived, or could have misled or deceived, is sufficient. This is true even if the defendant took all reasonable steps to prevent the possibility of the deception taking place.
3. The test also considers what was *not* said. Silence can be misleading and deceiving, particularly if an adviser fails to advise of the complete situation.

Specific issues

[5.130] Sections 12BB – 12DE of the ASIC Act prohibit misleading and deceptive conduct in providing financial services in regard to:

- misrepresentations about the future, eg future performance;
- misleading conduct as to purpose or quantity;
- harassment and coercion; and
- unsolicited financial services.

However, in the case *Avoca Consultants Pty Ltd v Millennium3 Financial Services Pty Ltd*,¹¹ Barker J held that the *Trade Practices Act 1974* (Cth) applied to an agreement between the licensee and the authorised representative as the agreement did not relate to engaging in conduct “in relation to the provision of financial advice”.

Implied warranty to render financial services with due skill and care

[5.140] Whether this legislation applies is determined by the definitions of “consumer”, “financial product” and “financial services”. Section 12BC of the ASIC Act provides that a person is deemed to have acquired particular financial services as a consumer if:

- the price of the services did not exceed \$40,000; or
- if the price of the services exceeded \$40,000 – the services were of a kind ordinarily acquired for personal, domestic or household use; or
- if the services were acquired for use in connection with a small business and the price of the services exceeded \$40,000 – the services were of a kind ordinarily acquired for business use.

In this context, “small business” means a business employing less than 20 people and, where the business involves the manufacture of goods, less than 100 people: s 12BC.

In every contract for the supply of financial services to a consumer in the course of business, s 12ED provides that (except contracts of insurance: s 12ED(3)) there is an implied warranty that:

- the services will be rendered with due care and skill; and
- any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

Section 12ED(2) also provides that where financial services are provided to a consumer in the course of a business and the consumer makes known either the purpose for which the services are required or the result that is desired to be achieved from the rendering of the services, there is an implied warranty that both:

- the services supplied under the contract; and
- any material supplied in connection with those services;

will be reasonably fit for that purpose or of such a nature and quality that it might reasonably be expected to achieve that result, except if the circumstances show that the consumer does not rely, or that it is unreasonable to rely, on the adviser's skill or judgment.

This provision mirrors s 60 of the *Competition and Consumer Act 2010* (Cth) and enshrines in

¹¹*Avoca Consultants Pty Ltd v Millennium3 Financial Services Pty Ltd* [2009] FCA 883.

legislation the common law duty to exercise reasonable care and skill. The use of the concept of “unreasonable reliance” in s 12ED(2) suggests that an adviser may be able to avoid a claim of lack of fitness for purpose by use of a qualification or limitation. However, this is unlikely because of s 12EB, which renders limitation of liability clauses void.

Unfair terms of consumer contracts

[5.145] On 1 July 2010 major reforms were implemented in relation to consumer contracts. The result of these reforms was that the ASIC Act was amended to include sections relating to unfair terms in consumer contracts.¹²

Section 12BF provides that an unfair term of a standard consumer contract,¹³ for the provision of financial services or financial products, is void but the contract may continue if it is capable of operating without the unfair term.

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract; and
 - (c) the contract is:
 - (i) a financial product; or
 - (ii) a contract for the supply, or possible supply, of services that are financial services.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

The term “standard form contracts” is not defined,¹⁴ but s 12BG does explain the term “unfair term”:

- (1) A term of a consumer contract referred to in subsection 12BF(1) is unfair if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

¹²Introduced into the ASIC Act by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) and came into force on 1 July 2010.

¹³The term “consumer” is defined according to s 12BC of the ASIC Act.

¹⁴Section 12BK of the ASIC Act provides indicators of standard form contracts but states that “a court may take into account such matters as it thinks relevant”.

- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
- (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is transparent if the term is:
- (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.

These amendments will provide greater protection for consumers of financial services.

Disclaimers, limitations and exclusions

[5.150] Disclaimers and exclusion of liability clauses are terms of an agreement that attempt to limit the liability of one of the parties and may be used to protect advisers from liability under both contract and tort: see *Hedley Byrne v Heller & Co Ltd*.¹⁵ This would not apply in a retail investment situation where Div 2 of Pt 2 of the ASIC Act applies since s 12EB renders disclaimers and exclusions ineffective in consumer financial services transactions.

Furthermore, in relation to financial services disclosure, s 951A of the *Corporations Act 2001* provides that disclosure requirements of Pt 7.7 cannot be avoided by a condition of a contract for financial product or financial services. This condition will be void if it provides that a party to the contract is:

- required or bound to waive compliance with any disclosure requirement of Pt 7.7; or
- taken to have notice of any contract, document or matter not specifically referred to in a Financial Services Guide (FSG), Statement of Advice (SoA) or other document given to the party: s 951A(1) and (2).

¹⁵*Hedley Byrne v Heller & Co Ltd* [1964] AC 465.

Section 945B of the *Corporations Act 2001* obliges the adviser to warn a client if the advice given is based on incomplete or inaccurate information. Sections 951A and 1020D make it clear that sections relating to financial services disclosure and financial product disclosure cannot be contracted out of. Section 1020D also provides that a term of a contract for the acquisition of a financial product is void if it provides that a party to the contract is:

- required or bound to waive compliance with any requirement of Pt 7.9; or
- if the acquisition occurs where a product disclosure statement (PDS) is required to be given, taken to have notice of any contract, document or matter not referred to in a PDS or supplementary PDS given to the party.

Disclaimers can be effective in the case of institutional investors in relation to implied terms but not in regard to the prohibitions against misleading and deceptive conduct (s 12DA of the ASIC Act) and unconscionable conduct: ss 12CA, 12CB and 12CC. The terms of the relevant sections render liability for such conduct non-excludable.

However, disclaimers which purport to exclude the duty to take reasonable care, due skill and care or due diligence, are ineffective once the relevant consumer “gateway” is established. Section 12EB of the ASIC Act has the effect that the application of conditions and warranties in consumer transactions cannot be excluded, restricted or modified. It provides that a term of a contract is void if it purports or has the effect of excluding, restricting or modifying the:

- application of terms implied into consumer transactions;
- exercise of rights conferred by such implied terms; and
- liability of a person for breach of a warranty implied by the legislation.

Liability under provisions such as s 12ED can be limited if the contract is for the supply of financial services other than services ordinarily acquired for personal, domestic or household use and it is fair and reasonable for the supplier to rely on the limitation clause. For example, liability may be limited to the cost of resupply of the financial services under s 12EC of the ASIC Act.

Codes of conduct

[5.160] Industry codes of conduct are part of the self-regulation of particular industries and are regarded as best practice and usually focus on the ethical standards expected of the particular industry.

Generally, the financial services industry uses codes of conduct – for instance, there are codes for banking, financial planning, life insurance, general insurance companies, general insurance brokers, credit unions and building societies. Although such codes are not law, they indicate to the public and to the regulator the appropriate standard of conduct expected of the industry and that is generally used as a guide. As they are not law, financial planners cannot be sued for a direct breach of the code.

Prior to the establishment of complaints schemes, almost all industry associations had developed codes of conduct. These codes set out the best practice for practitioners in the industry. Given that “good industry practice” is one of the three elements assessed by complaints schemes, such codes are an integral part of complaints handling and of conduct generally in the market.

Often a distinction is drawn between a code of conduct and a code of practice:

- a *code of conduct* sets out broad principles by which an industry should operate;
- a *code of practice* is very prescriptive, and generally sets out a series of rules that should be adhered to.

Regulatory Guide 183 sets out guidelines for codes of conduct and the principles that will be used by ASIC to approve industry codes.¹⁶ This RG states that, for ASIC's purposes, there will be no distinction made between a code of practice and a code of conduct.

The benefits to consumers of codes are set out in RG 183.5:

We believe that the primary role of a financial services sector code is to raise standards and to complement the legislative requirements that already set out how product issuers and licensed firms (and their representatives) deal with consumers. We expect an effective code to do at least one of the following:

- (a) address specific industry issues and consumer problems not covered by legislation;
- (b) elaborate upon legislation to deliver additional benefits to consumers; and/or
- (c) clarify what needs to be done from the perspective of a particular industry or practice or product to comply with legislation.

Thus, codes are an important part of investor protection in the financial services sector. The Financial Planning Association of Australia Ltd (FPA) has a *Code of Professional Practice* which includes three categories:

1. *Code of Ethics*;
2. *Practice Standards*; and
3. *Rules of Professional Conduct*.¹⁷

¹⁶ASIC, RG 183 (March 2005): see [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps183.pdf/\\$file/ps183.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps183.pdf/$file/ps183.pdf) (accessed 5 April 2011).

¹⁷<http://www.fpa.asn.au/default.asp?action=article&ID=21631>.

Dispute resolution in the investment industry

[5.170] Using the courts to resolve disputes between a licensee and client is time consuming and expensive – for both parties. In the late 1980s, there was increasing interest in avoiding the cost and time associated with a court action by using *alternative dispute resolution* (ADR) to resolve problems. This was formalised in the financial sector with the establishment of the Australian Banking Industry Ombudsman in 1990.¹⁸ Since that time, ADR has become a feature of the financial services landscape which must be considered when dealing with clients.

The provision of appropriate dispute resolution mechanisms to process disputes is an integral part of any consumer protection regime. The general obligations of financial services licensees require that if a licensee provides financial services to a retail client, the licensee must have a dispute resolution system: *Corporations Act 2001* (Cth) s 912A(1)(g). This system must include an *internal dispute resolution procedure*, approved by ASIC, which covers complaints against the licensee by retail clients in relation to the provision of financial services covered by the licence, together with membership of an ASIC-approved *external dispute resolution scheme*, such as the Financial Ombudsman Service. Section 912A(2) states:

To comply with this subsection, a dispute resolution system must consist of:

- (a) an internal dispute resolution procedure that:
 - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
- (b) membership of one or more external dispute resolution schemes that:
 - (i) is, or are, approved by ASIC ...

Internal dispute resolution

[5.180] Internal dispute resolution (IDR) refers to a dispute resolution process that is established within the licensee's business. It is a mandatory requirement as proscribed by s 912A(1)(g) of the *Corporations Act 2001* and an applicant for a financial services licence must have IDR systems in place when applying for a licence.

Regulatory Guide 165 sets out the details of the IDR requirements.

In a letter to Australian Financial Services Licensees whom ASIC believed had clients who invested in Westpoint (AFS holders), Mr Jeffrey Lucy, then Chairman of the Australian

¹⁸Replaced by the Financial Ombudsman Service (FOS).

Investor Protection and Dispute Resolution

Securities and Investments Commission stated:¹⁹

ASIC expects all complaints received by AFS holders in relation to advice about Westpoint products will be dealt with promptly, fairly and effectively in accordance with the requirements of each AFS holder's licence.

In ASIC's view, fair handling of complaints requires AFS holders:

- to ensure AFS holders' internal dispute resolution process (IDR) is readily accessible to complainants;
- to follow fully the IDR process;
- to provide genuine assistance to complainants in formulating their complaints, including providing them with information relevant to their investment and the history of their contact with you;
- to assess each complaint properly;
- to communicate to each complainant clearly and fairly;
- to make a clear decision supported by the material that is fair, reasonable and genuine especially where numerous complaints are made out of the same or similar factual circumstances; and
- to cooperate fully with any referrals to your external dispute resolution process (EDR) which, in most cases, is the Financial Industry Complaints Service (FICS).

ASIC will pay close attention to the number of referrals made to FICS that are determined in favour of the consumer. A high percentage of decisions upheld by FICS in favour of the complainant may indicate:

- the IDR procedures are not working well;
- AFS holders are not providing a fair deal to consumers; and/or
- action by ASIC is necessary to ensure the genuine interests of consumers are addressed fairly and not placed at further risk.

ASIC expects AFS holders to be able to resolve most consumer complaints through the IDR process.

¹⁹ASIC, Summary of letter sent to holders of Australian Financial Services licence concerning Westpoint (April 2006) pp 1-2: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/summary_of_letter.pdf/\\$file/summary_of_letter.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/summary_of_letter.pdf/$file/summary_of_letter.pdf) (accessed 5 April 2011).

External dispute resolution

[5.190] An external dispute resolution process (or EDR) is an external dispute resolution process that is approved by ASIC. It is a mandatory requirement that licence holders must be members of an approved EDR process. Regulatory Guide 139 sets out the procedure for ASIC approval of EDR schemes. Most licensees are members of the Financial Ombudsman Service (FOS), which is an approved EDR scheme.

Financial Ombudsman Service

[5.200] The Financial Industry Complaints Service Limited (FICS) was replaced by the Financial Ombudsman Service (FOS) from 1 July 2008.²⁰ The FOS website states:

The Financial Ombudsman Service provides accessible, fair and independent dispute resolution for consumers and financial service providers.

...

The Financial Ombudsman Service fairly and independently resolves disputes between consumers – including some small businesses and member financial services providers. Membership of the Financial Ombudsman Service is open to any financial services provider carrying on business in Australia.

Our independent dispute resolution processes cover financial services disputes including banking, credit, loans, general insurance, life insurance, financial planning, investments, stock broking, managed funds and pooled superannuation trusts.²¹

The FOS is a company limited by guarantee and its Constitution provides that financial service providers may apply to be members.

Included in the FOS Constitution is the objective:²²

- (a) to establish, maintain and promote a dispute resolution scheme for the Industry to be known as the “Financial Ombudsman Service”

The FOS Terms of Reference provide that the purpose of the service is to provide an independent forum to resolve disputes between applicants and financial services providers.²³ The service is free of charge for applicants. The costs of the service are met by the financial services providers.²⁴

4.1 Eligibility to lodge a Dispute with FOS

²⁰Financial Ombudsman Service website http://www.fos.org.au/centric/home_page.jsp.

²¹FOS website “What we do” http://www.fos.org.au/centric/home_page/about_us/what_we_do.jsp.

²²The constitution is available from the FOS website “What we do” http://www.fos.org.au/centric/home_page/about_us/constitution.jsp

²³Came into effect 1 January 2010 (amended 1 July 2010).

²⁴FOS website “What we do” <http://www.fos.org.au>.

FOS may only consider a Dispute if the Dispute is between a Financial Services Provider and:

- a) an individual or individuals (including those acting as a trustee, legal personal representative or otherwise);
- b) a partnership comprising of individuals – if the partnership carries on a business, the business must be a Small Business;
- c) the corporate trustee of a self managed superannuation fund or a family trust – if the trust carries on a business, the business must be a Small Business;
- d) a Small Business ...
- e) a club or incorporated association – if the club or incorporated association carries on a business, the business must be a Small Business;
- f) a body corporate of a strata title or company title building which is wholly occupied for residential or Small Business purposes; or
- g) the policy holder of a group life or group general insurance policy, where the dispute relates to the payment of benefits under that policy.

4.2 Types of Disputes that can be considered by FOS²⁵

FOS may only consider a Dispute between a Financial Services Provider and an Applicant:

- a) that arises from a contract or obligation arising under Australian law; and
- b) that arises from or relates to:
 - (i) the provision of a Financial Service by the Financial Services Provider to the Applicant;
 - (ii) the provision by the Applicant of a guarantee or security for, or repayment of, financial accommodation provided by the Financial Services Provider to a person or entity of the kind listed in paragraph 4.1;
 - (iii) an entitlement or benefit under a Life Insurance Policy by a person who is specified or referred to in the Life Insurance Policy, ...
 - (iv) an entitlement or benefit under a General Insurance Policy by a person who is specified or referred to in the policy,
 - (v) ...

²⁵FOS Terms of Reference.

- (A) a financial investment ...
- (B) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract);
- (vi) a claim under another person's motor vehicle insurance policy for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle ...
- (vii) where the Financial Service Provider is a mutual – the provision of a Financial Service by a third party through the agency of the mutual to a customer of the mutual; and

...

- c) ... approved deposit funds and of regulated superannuation funds ...

FOS is also excluded from hearing some disputes²⁶ and may also refuse to consider, or continue to consider, a dispute, if it considers this course of action appropriate. On occasions, a licensee has argued that the external dispute resolution body does not have jurisdiction.

In *Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd*,²⁷ the Federal Court determined that FICS could hear complaints against financial advisers who recommended clients invest in Westpoint promissory notes. One of the arguments put to the court by financial service licensees was that promissory notes and interests in unregistered managed investment schemes were not financial products. However, the court determined that they were financial products and that financial services were provided, and therefore FICS had jurisdiction.

Enforcement, remedies and defences

Civil remedies

[5.220] The most usual remedy sought by investors who have suffered financial loss is an action for damages, and issues of:

- reliance on the disclosure or non-disclosure; and
- causation – ie the damages suffered by the investor were caused by the advice relied on,

are common elements which must be proven by the aggrieved investor when claiming damages.

Section 1041H of the *Corporations Act 2001* and ss 12DA and 12DB of the ASIC Act prohibit

²⁶FOS Terms of reference 5.1 and 5.2

²⁷*Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd* (2006) 157 FCR 229; [2006] FCA 1805.

misleading and deceptive conduct. A plaintiff must establish that the conduct is misleading and/or deceptive or likely to mislead or deceive, and that they reasonably relied on the disclosure or non-disclosure, and that the particular conduct caused the loss.

The *Corporations Act 2001* provides that a person who suffers loss or damage by conduct of another person that contravened s 1041H may recover the amount of the loss or damage by action against that person or anyone involved in the contravention: s 1041I.

Section 12GI of the ASIC Act sets out the defences for allegations of misleading and deceptive conduct:

- it was due to a reasonable mistake;
- there was a reasonable reliance on information provided by a third person; and
- the problem occurred due to another person, and reasonable precautions had been taken.

This is the only time where reasonable precautions can be used as a defence, ie the event was the result of a third person.

Criminal liability

[5.230] If disclosure documents are not provided to the retail client or the disclosure documents are defective, then a penalty may be imposed on the licensee and the authorised representative for breaches of Pt 7.7 of the *Corporations Act 2001*. Criminal liability will also arise for breach of s 945A. This section imposes an obligation on the licensee or authorised representative to have a reasonable basis for the advice given to a retail client and, if the personal information supplied by the client is incomplete, then the client must be warned that the advice is given on the basis of the incomplete advice.

The ASIC Act also provides that misleading and deceptive conduct is a criminal offence but unconscionable conduct is not subject to criminal penalties.

Section 50 of the ASIC Act provides that ASIC may commence civil proceedings in the name of a person where it is in the public interest to do so. The civil proceedings are commenced with the consent of the other person and the purpose is to recover damages or property.

Administrative action

[5.235] Regulatory Guide 98 sets out the administrative powers ASIC uses to enforce financial services laws. The administrative powers that ASIC can use include:

- (a) immediately suspending or cancelling an Australian Financial Services (AFS) licence in certain limited circumstances;
- (b) suspending or cancelling an AFS licence after offering a hearing;

- (c) banning a person from providing financial services (via a banning order), either immediately, in certain limited circumstances, or after offering a hearing;
- (d) varying AFS licence conditions after offering a hearing.

In a recent speech by Tony D'Aloisio, Chairman of the Australian Securities and Investments Commission, he stated that:

Since 1 January 2009, in the aftermath of the GFC, ASIC commenced 323 new investigations. Many of these relate to events or collapses or matters that arose as a result of the GFC. ... Between 1 January 2009 and 31 October 2010, ASIC has had 28 successful market integrity related outcomes – included in this number are six significant outcomes for insider trading, six significant outcomes for market manipulation, two significant continuous disclosure outcomes and four for other market integrity offences. Ten people have also been banned.²⁸

Conflict of interest

[5.250] Investors are entitled to expect competence and integrity from advisers. Some remuneration arrangements can be perceived as promoting conflict situations. If advisers receive commissions from financial product promoters, and these are not disclosed to the client, this is a conflict of interest.

Section 912A(1)(aa) of the *Corporations Act 2001* (Cth) requires financial service licensees to have adequate arrangements in place for the management of conflicts of interest. The details pertaining to ASIC's interpretation of "conflict of interest" are contained in Regulatory Guide 181: *Licensing: Managing Conflicts of Interest*, which states:

[181.15] For the purposes of this policy, conflicts of interest are circumstances where some or all of the interests of people (clients) to whom a licensee (or its representative) provides financial services are inconsistent with, or diverge from, some or all of the interests of the licensee or its representatives. This includes actual, apparent and potential conflicts of interest.

Thus, the interpretation of the term "conflict of interest" has moved from a relatively straightforward common law fiduciary duty to a complex definition that incorporates actual, potential and apparent conflicts.

Regulatory Guide 181 identifies key mechanisms to achieve outcomes aimed at enhancing investor confidence, and to provide fairness, honesty, professionalism and market integrity in resolving conflicts of interest. The key mechanisms are:

1. identifying conflict;

²⁸Responding to the global financial crisis: the ASIC story, a speech by Tony D'Aloisio, then Chairman of the Australian Securities and Investments Commission, Trans-Tasman Business Circle, 30 November 2010 (accessed 6 April 2011).

2. controlling conflict;
3. disclosing conflict; and
4. avoiding conflict.

As one of the fundamental tenets of Ch 7, disclosure plays an important part in managing conflicts of interest. However, RG 181 makes it clear that if the conflict of interest cannot be managed, it must be avoided.

Conflicted Remuneration

[5.260] The Future of Financial Advice reforms have significantly altered this area of the law in relation to adviser remuneration. These provisions are mandatory from 1 July 2013, and may mean that remuneration structures in many financial services businesses may need to be restructured. The following sections of the Corporations Act are relevant:

- s 963E, which prohibits a licensee from accepting conflicted remuneration;
- s 963F, which requires that a licensee must take reasonable steps to ensure that its representatives do not accept conflicted remuneration;
- s 963G, which prohibits an authorised representative from accepting conflicted remuneration;
- s 963H, which prohibits other representatives from accepting conflicted remuneration;
- s 963J, which prohibits employers from giving employees conflicted remuneration;
- s 963K, which prohibits a product issuer or seller from giving conflicted remuneration; and
- s 963L, which provides that volume-based benefits are presumed to be conflicted remuneration. A volume-based benefit is a benefit which is wholly or partially dependent on the total number or value of financial products recommended to or acquired by clients;
- s 964D, which provides that a licensee must not charge an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client;
- s964E, which provides that an authorized representative must not charge an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client; and
- s964A, which provides that a platform operator must not accept volume-based shelf-space fees.

[5.270] Conflicted remuneration’ is defined in s 963A as ‘any benefit, whether monetary or non-

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monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:

- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
- (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.’

Regulatory Guide 246 was issued in March 2013 as a result of the Future of Financial Advice reforms, and provides guidance on what is conflicted remuneration for the purpose of the above sections and financial product advice given to retail clients.

Table 1, set out on pages 8-9 of Regulatory Guide, outlines the obligations of advisers and licensees:

Table 1: Other obligations in Pt 7.7A

Best interests duty and related obligations	Charging ongoing fees to clients
<p>These obligations apply when personal advice is provided to a retail client (see Div 2 of Pt 7.7A).</p> <p>Note: The person to whom these obligations apply is generally the individual who provides the personal advice. We refer to this person as the ‘advice provider’.</p>	<p>These obligations apply when personal advice is provided to a retail client by an AFS licensee or representative and there is an ongoing fee arrangement between the client and the licensee or representative (see Div 3 of Pt 7.7A).</p>
<p>Advice providers must:</p> <ul style="list-style-type: none"> • act in the best interests of their clients in relation to the advice; • only provide advice if, in light of the actions the advice provider should have taken to comply with the best interests duty, it is reasonable to conclude that the resulting advice is appropriate for the client; • give a warning to the client if it is reasonably apparent that the advice is based on incomplete or inaccurate information about the client’s objectives, financial situation or needs; and • generally prioritise the interests of the client over their own interests and those of some of their related parties. <p>Complying with the best interests duty and related obligations does not affect whether the conflicted remuneration provisions have been complied with. The best interests duty and related obligations and</p>	<p>AFS licensees or representatives must:</p> <ul style="list-style-type: none"> • give their client an annual fee disclosure statement outlining information about the fees paid and the services received by the client over the previous year; and • only charge an ongoing fee if the client ‘opts in’ to continue the ongoing fee arrangement every two years. This opt-in requirement applies unless ASIC is satisfied that the licensee or representative is bound by a code of conduct that, among other things, obviates the need for complying with the opt-in requirement in the Corporations Act. <p>For more information, see Regulatory Guide 245 <i>Fee disclosure statements</i> (RG 245) and Regulatory Guide 183 <i>Approval of financial services sector codes of conduct</i> (RG 183).</p>

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conflicted remuneration provisions impose separate obligations on AFS licensees and representatives that advise retail clients.

For more information, see RG 175 and RG 244.

In Regulatory Guide 246 (RG 246.37), ASIC makes the point that conflicted remuneration may include monetary or non-monetary benefits, including free or subsidized equipment or services, hospitality services such as ticket or travel, shares or other interests in a product issuer, marketing assistance and employee promotion or recognition on the basis of product sales or recommendation.

RG246.48 gives the following examples of benefits that are generally conflicted remuneration (although they are not necessarily conflicted remuneration if an exclusion applies, or they could not reasonably be expected to influence the advice given by the licensee or representative:

- ‘(a) commissions, whether upfront or trailing, fixed or variable, paid by a product issuer to a licensed dealer group, whether the payment is made directly or through some other arrangement;
- (b) volume-based payments from a platform operator to a licensed dealer group;
- (c) volume-based payments from a licensed dealer group to an authorised representative or other representative;
- (d) volume-based bonuses and other payments, such as a commission or one-off payment, to a financial adviser, which is calculated by reference to the number or value of financial products acquired by clients following the advice of the financial adviser. The payment could be made by:
 - (i) the financial adviser’s dealer group;
 - (ii) a platform operator; or
 - (iii) a product issuer; and
- (e) a discount on the fees paid by an authorised representative to its AFS licensee based on client funds held in a particular financial product.’

Even a product-neutral benefit can be conflicted remuneration, if the advice encourages the client to acquire a financial product they would not otherwise acquire, and it is not excluded from the conflicted remuneration provisions (RG 246.55).

A benefit will not be conflicted remuneration, whether volume-based or not, if it is given by a retail client in relation to financial product advice given by the licensee or representative to the client, because this is seen as the retail client authorizing that benefit. The consent must be ‘genuine, express and specific’ and knowledge of the benefit or proceeding after disclosure of the benefit, is insufficient consent (RG 246.64).

A salary will not be conflicted remuneration, provided that neither the salary nor a component of it (or any increase in it) could be reasonably expected to influence the advice given. It will be conflicted remuneration if it is calculated by reference to the number or value of financial products recommended by the employee to clients (RG 246.68-71).

Payments made by a licensee to its representatives to cover business expenses (eg business equipment such as office furniture) will not be conflicted remuneration provided these could not reasonably be expected to influence the advice given, or it is excluded from these provisions (RG 246.72-73).

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A non-monetary benefit worth under \$300 is not conflicted remuneration provided it or identical or similar benefits is/are not given on a regular or frequent basis. Regulation 7.8.11A requires licensees to keep records of benefits between \$100 and \$300, so that the regularity and frequency can be monitored.

A volume-based benefit is presumed to be conflicted remuneration, but is not necessarily so. For example, if the benefit is then passed onto the client, or is so small that it could not reasonably be expected to influence the advice given, it is not likely to be conflicted remuneration (RG 246.118). Similarly benefits that received by the licensee, but are not passed on to the actual adviser, will be unlikely to influence that advice (RG 246.121). Employee benefits calculated from the profitability of the business as a whole, where the business is sufficiently large so that the individual employee's sales would not affect the profitability of the entire business (RG 246.143). Non-monetary benefits that have a genuine educational or training purpose relevant to providing financial product advice to the client, or comprise information technology software or support for the purpose of providing financial product advice to retail clients, are also exempt from the provisions: section 963C(c) and (d) and Regulations 7.8.11A, 7.7A14 and 7.7A.15.

Similarly, brokerage of no more than 100% of a brokerage fee, is not conflicted remuneration: Regulation 7.7.12D.

Regulatory Guide 246 sets out the following table of considerations relating to performance benefits on pages 38-39:

Table 3: Factors to consider when evaluating performance benefits

Eligibility criteria	<p>What are the criteria that must be met for an employee to be eligible to receive a performance benefit, and could satisfying such criteria reasonably be expected to influence the advice given? For example, a relevant consideration is whether eligibility criteria explicitly or implicitly encourage the recommendation of a particular product.</p> <p>The more difficult it is to satisfy the eligibility criteria, the less likely that the performance benefit could reasonably be expected to influence the advice given. One way to measure this might be by reference to the proportion of employees who are able to meet the criteria.</p>
Purpose of the performance benefit	<p>What behaviour does the employer appear to be trying to encourage through the performance benefit? For example, the criteria that make up the scorecard may appear to be designed to encourage an employee to recommend that clients acquire specific financial products regardless of their interests, which means the performance benefit is likely to be conflicted remuneration. It may also cause advice to be given that does not comply with the best interests duty and related obligations in Div 2 of Pt 7.7A.</p>
Weighting of the benefit in relation to total remuneration	<p>What is the relative proportion of the benefit compared to the employee's overall remuneration? For example, the overall remuneration would include the performance benefit and any other forms of remuneration (e.g. salary).</p>

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Link between the benefit and financial product advice	How direct is the link between the performance benefit and the value or number of financial products recommended or acquired by clients, based on the advice provided by the employee? For example, a performance benefit is more likely to be conflicted remuneration if it contains a criterion based on the volume of product sales compared with one that contains a criterion based on the profitability of an employee's business unit: for more information, see RG 246.143.
Involvement of recipient in advice giving process	How directly involved in the advice giving process is the recipient of the benefit? For example, if the recipient of a benefit helps prepare the advice but does not provide input into the recommendations that are made to a retail client, the performance benefit is less likely to be conflicted remuneration.
Environment in which the benefit is given	<p>In addition to the factors above, it is also relevant to consider whether the benefit is given in an environment that encourages the provision of good quality financial product advice that is in the client's interests.</p> <p>This could be specifically evidenced if, to qualify for the benefit, the recipient must also satisfy other criteria, such as criteria based on the quality of advice given, consumer satisfaction and compliance with internal processes and legal requirements.</p> <p>It may also be relevant to consider non-performance-based practices such as:</p> <ul style="list-style-type: none">• training;• monitoring and supervision; and• workplace policies and procedures, including the consequences of not complying with such policies and procedures.
Excluded benefits	If part of a performance benefit is not conflicted remuneration because one or more exclusions apply, it is not relevant to consider that part of the benefit in determining whether the rest of the performance benefit is conflicted remuneration.

Privacy and confidentiality issues

[5.280] In order to provide appropriate advice, a financial planner must obtain personal and sometimes sensitive information from a client. Clients are often cautious in parting with this information, as they have genuine concerns as to where it may end up.

Issues concerning privacy and confidentiality are not prescribed by any one body of law. They are generally a mix of industry practice, codes and common law. Accordingly, it is important that advisers have a broad knowledge of the basic issues.

Privacy and confidentiality are paramount. Industry bodies strongly discourage the use of personal information for anything other than the purpose for which it was intended. Thus, most industry bodies prohibit the use of client information for on-selling, for mailing lists and for other areas not sought by the client within the practice. Most financial planners usually reassure clients by stating in their agreements the reasons the information is required and the way it will be used.

The *Privacy Act 1988* (Cth) defines personal information as:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.²⁹

The *Privacy Act 1988* (Cth) applies to businesses and non-government organisations that have a turnover of more than \$3 million, credit providers, credit reporting agencies, organisations that trade in personal information and also to government departments and agencies as public entities and government agency contractors.³⁰ The Privacy Commissioner³¹ has issued a series of privacy standards known as the National Privacy Principles (NPP).³² The NPP essentially set out best practice when dealing with customer information in any organisation. The NPP specifically preclude an organisation disclosing information of a personal nature other than for the primary purpose of collection. Exceptions are made for police and regulators, but not for family members. Some States have sought to implement the NPP as State privacy legislation. The key issue concerning confidentiality is in relation to client files. Financial Planning Association (FPA) Rules of Professional Conduct state that members must respect the confidentiality of, and safeguard, client documents.³³ There is also constant debate within the industry as to “who owns the client”. The common law is clear – the client files are “owned” by the licensed securities dealer, not the authorised representative. Thus, the authorised representative cannot treat these files as their property. To ensure that the files are the confidential property of the licensee, the “ownership” of such files is generally stated in the employment contract of the licensee. There have been successful prosecutions of authorised representatives who have taken possession of client files, thus breaching the contract with the licensed dealer.

Consumer protection has many aspects – it is not just a remedy available to a disgruntled client. However, while consumer remedies are of value to the consumer, the industry receives little benefit from that form of consumer protection. Compensation claims occur through the actions (or inactions) of the professionals concerned and damage to the reputation of the industry may be a further consequence. Adherence to the principles set out in s 912A of the *Corporations Act 2001* (see [5.10]) provides the most effective consumer protection for the investor and the industry generally.

²⁹*Privacy Act 1988* (Cth) s 6.

³⁰*Privacy Act 1988* (Cth) ss 6C, 6D.

³¹On 1 November 2010 the Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner (OAIC).

³²These principles are set out in Sch 3 to the *Privacy Act 1988* (Cth).

³³Financial Planning Association (FPA) Rules of Professional Conduct, PS [Practice Standard] 2.