ASIC

Australian Securities & Investments Commission

Consumers & money

A quick guide

June 2003

Acknowledgments

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Section 1: Consumer protection

It's important to understand the framework of consumer protection in the financial services industry because most people in Australia have at least one or two financial products or services regardless of how much money they have. Financial services don't just relate to investments like stocks and shares. They also include everyday things such as bank accounts, credit cards, insurance policies and superannuation. Since financial products and services are widespread and involve many people's money (which can add up to a large amount), it's important that the rights of individual consumers are effectively protected. The costs of not doing so can be high – both for individuals and for the industry as a whole.

The financial services industry is a very important part of the Australian economy. In 2001/02, the industry contributed around 7.2%, or approximately $46 billion, to gross domestic product (GDP) and employed about 350,000 people (3.9% of total people employed). So the industry has a major impact on the Australian economy.

What is consumer protection?

Whenever you buy a product or service, you are acting as a consumer. As a consumer, you are faced with a vast range of choices and decisions to make about products and services. There are hundreds of different brands to choose from, all competing for custom, so companies bombard us everyday with advertising to promote their brands.

When you go to buy a product or service, there are lots of things to think about. For example:

- Which product or service is right for me?
- Which product provider do I want to go with?
- Can I believe what the advertising tells me?
- How do I compare similar products?
- Where can I get some independent advice information about the product or service?
- How much will it cost?
- When and how will the product get delivered?
- How do I know if the company is any good?
- What happens if I change my mind?
- What if something goes wrong with the product? Can I get my money back?

Consumer protection is the name given to a whole range of measures which are designed to make sure that individual consumers can make more informed choices about what they buy and get treated fairly by the companies they deal with. These include:

- giving consumers impartial and accurate information to help them make the right choice
- educating consumers about their rights and responsibilities

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- making sure companies that sell products or services meet set standards, tell their customers certain key information and deal with customers honestly and fairly
- making sure products or services themselves meet set standards of quality and safety
- making sure advertising about products and services is not misleading or deceptive
- giving consumers easy access to quick and inexpensive systems for getting money back if things go wrong
- enforcing the law so as to identify, stop and deter misleading and fraudulent conduct

Measures to protect consumers can be brought about as a result of legislation, or they can be voluntary initiatives or guidelines put in place by a particular industry, or even an individual company. If certain consumer protection measures are set out in legislation (or a company agrees to sign up to a voluntary but binding and enforceable initiative, such as a code of practice), they create consumer rights. A consumer right is something that the law says a consumer is entitled to – if the entitlement is denied then legal action can be taken. However, consumer rights can only be effective if consumers are aware of them and they are enforced.

Why is it necessary to protect consumers?

The main reason is that individual consumers are not normally on an equal footing with the companies who sell consumer goods and services, particularly when it comes to how much information and money they have.

For example, it is not easy for an individual consumer to find information about all the products or services on the market, whereas a company may have spent months, or years, developing their product or service and the marketing strategy designed to sell it to consumers. If something goes wrong with a product or service after it is purchased, most consumers do not have enough money to take the company to court to get their money back.

To sum up, consumer protection aims to ensure that consumers are treated fairly; are not disadvantaged by their relatively weaker position in the market and have access to redress when something does go wrong.

What are financial products and services?

The financial services industry is very diverse. There is a wide range of financial products and services offered by many different types of financial institution.

Financial products include:

- bank accounts, such as transaction or savings accounts
- credit and loans, including credit cards, personal loans and home-loans
- general insurance policies, such as motor insurance or home insurance
- life insurance
- superannuation

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- investments, such as shares, bonds or managed investments

Most people have a bank account and maybe a credit card, and everyone who has a job has a superannuation policy. If you own a car, you will probably have car insurance.

A financial service is a service provided to you in relation to a financial product. Examples of financial services include:

- giving advice about financial products eg advising you where to put your money
- investment management
- arranging investments
- dealing in investments, eg buying and selling investments

Financial products and services are offered by a wide range of financial institutions, including:

- banks
- credit unions
- insurance companies
- superannuation providers
- financial planners and advisers
- insurance brokers
- building societies
- stockbrokers and futures dealers

Regulators

For consumer rights to be effective, it is important that consumers are aware of their rights and that they are enforced. A specific organisation, known as a **regulatory body** or **regulator**, is usually required to do this job.

The main regulatory body to protect consumers in Australia is the Australian Competition and Consumer Commission. The ACCC administers the *Trade Practices Act 1974* and the *Price Surveillance Act 1983*, two fundamental pieces of consumer protection legislation. The ACCC protects consumers of a wide range of goods and services, ranging from transport to telecommunications. Its consumer protection role does not, however, cover financial services.

Certain retail industry sectors have a sector-specific regulatory body whose job it is to protect consumers who buy goods and services in that particular industry. One such industry is the financial services industry. Financial products and services tend to be complex and can involve large amounts of people's money (possibly their life savings). It is particularly important, therefore, that specific measures exist to protect consumers in the finance industry. The **Australian Securities and Investments Commission** (ASIC) is the statutory regulatory body with responsibility for consumer protection in the financial services industry.

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Section 2: Key organisations

Government regulators

The following table sets out the main regulators and their key responsibilities in relation to financial services.

Regulator	Key responsibilities in financial services
Australian Securities and Investments Commission	Administers company law and laws governing financial services licensing, conduct and disclosure requirements. It is the consumer protection regulator for financial services. Objectives include promoting the informed and confident participation of investors and consumers in the financial system.
Australian Prudential Regulation Authority	Prudential supervision of banks, credit unions, building societies, friendly societies, insurance companies and superannuation funds to ensure their financial soundness and prudent management. [**prudent**: careful in providing for the future, particularly in money matters]
Australian Taxation Office	Collects tax, administers tax legislation and is involved with tax policy. Types of tax managed by the ATO include income tax, company tax, fringe benefits tax, GST and the superannuation guarantee. Also regulates self-managed super funds or DIY super.
Reserve Bank of Australia	Responsible for monetary policy, stability of financial system and safety of Australian payments system; issues Australian currency notes; and serves as banker to the Commonwealth Government.
Australian Competition and Consumer Commission	Administers the *Trade Practices Act 1974* covering competition regulation for the whole economy, including the financial sector, and consumer protection regulation for most of the economy but *not* financial services.
Australian Stock Exchange	Operates the primary national stock exchange. It provides a market for buying and selling shares in companies listed on the stock exchange.
Office of the Federal Privacy Commissioner	Administers the Federal *Privacy Act 1988* that provides protection for, amongst other things, information about individual's credit worthiness held by credit reporting agencies and credit providers and personal information held by most private sector organisations, including those in the financial sector.
State/Territory Departments of Fair Trading or Consumer Affairs	Administer and enforce State and Territory Fair Trading legislation that mirrors the consumer protection provisions of the *Trade Practices Act*. They also administer and enforce the Uniform Consumer Credit Code.

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TIP
Companies listed on the stock exchange must be public companies not small private companies. They have 'Ltd' (limited) after their name not 'Pty Ltd' (proprietary limited).

These regulators work cooperatively to regulate the activities of the financial services industry. They cooperate on education, compliance and enforcement matters, share information, refer matters appropriately and meet regularly to discuss current issues. These cooperative relationships are formally set out in Memorandums of Understanding.

The main legislation governing the financial services industry is Commonwealth legislation:

- *Corporations Act 2001*
- *Australian Securities and Investments Commissions Act 2001*
- *Banking Act 1959*
- *Insurance Act 1973*
- *Life Insurance Act 1995*
- *Insurance Contracts Act 1984*
- *Superannuation Industry (Supervision) Act 1993*
- *Retirement Savings Accounts Act 1997*

There are also various pieces of State and Territory legislation governing certain aspects of the financial services industry:

- *Uniform Consumer Credit Code*
- *State and Territory Fair Trading Acts and/or Sale of Good Acts*
- *State and Territory finance broker legislation*

Industry associations

An industry association is an organisation that represents the interests of members of a particular industry. They can be a powerful lobby group on policy and political matters. Industry associations may offer services to members such as training, mentoring and networking. Some industry associations also have a role to play in setting standards for member firms and disciplining those firms that do not follow those standards.

Some of the main financial services industry associations are:

- Australian Banking Association (ABA)
- Association of Superannuation Funds (ASFA)
- Investment and Financial Services Association (IFSA)
- Financial Planning Association (FPA)
- Insurance Council of Australia (ICA)

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Consumer organisations

Similarly to industry associations, consumers have organisations to represent their interests in various forums. Consumer organisations provide a range of services for consumers such as advocacy, advice, information and education.

The Australian Consumers' Association is the main consumer organisation. It has a key advocacy role with a high media profile. It also provides valuable consumer information on a range of goods and services via its magazine *Choice* and website. Some consumer organisations represent a particular group of consumers such as shareholders, seniors or investors. Other consumer organisations primarily provide advice and information, for example financial counsellors and community legal centres. Consumer organisations include:

- Australian Consumers’ Association (ACA)
- Australian Investors’ Association
- Australian Shareholders’ Association (ASA)
- community legal centres
- Consumers’ Federation of Australia
- Council of the Ageing (COTA)
- financial counsellors
- National Information Centre for Retirement Incomes (NICRI)

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Section 3: Consumer protection laws

This section focuses on the central pieces of legislation regulating the financial services industry – the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001.* Significant reforms to the section of the *Corporations Act* covering financial services (see page XX) were introduced as a result of the *Financial Services Reform Act 2001*. These pieces of legislation are administered by ASIC, and the consumer protection aspects can be broadly categorised as:

- prescribing standards of conduct eg acting honestly, fairly and efficiently; and
- prescribing the disclosure of specified information eg providing product disclosure statements.
- prohibiting certain conduct eg misleading or deceptive, unconscionable and undue harassment.

Financial Services Reform Act 2001

The *Financial Services Reform Act 2001* (FSRA) commenced on 11 March 2002, although there is a transition period of two years. This means that most of the reforms won't apply until March 2004.

The FSRA replaced or made major changes to several pieces of legislation, making significant changes to the financial services industry such as:

- regulating how people or companies who provide financial services are licensed
- prescribing the type of information that consumers must receive about financial products and services. These are known as the disclosure requirements.

The main objectives of the FSRA are to promote confident and informed decision-making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services. It is also intended to promote fairness, honesty and professionalism by those who provide financial services.

Before the FSRA, regulation of the financial services industry was complex. Legislation often related to a particular financial product rather than applying to the entire industry. For example - an insurance agent or broker had different licensing and disclosure requirements to a financial adviser. It made it hard for consumers to compare products and services. Under the FSRA there is:

- a consistent and comparable disclosure regime for financial products and services; and
- a single licensing regime for providers of financial products and services.

The FSRA distinguishes between **retail** and **wholesale** clients. Most consumers and some small businesses are retail clients. Retail clients are offered a greater level of protection by the FSRA.

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TIP
What are financial services and financial products?
The provision of a financial service is advising, dealing or selling a financial product. Financial products include general insurance (car, home, boat, travel), life insurance, banking, superannuation, managed investments, shares.

Licensing

The idea behind a licensing regime is to ensure that those who provide financial services and products are suitably qualified and have in place appropriate mechanisms to protect the interests of their clients.

Any person who provides a financial product or service in Australia must be licensed (or be an authorised representative of someone who is licensed). This may cover the following conduct:

- Providing financial product advice. For example a financial adviser.
- Dealing in a financial product. For example an insurance broker or a stockbroker.
- Making a market for a financial product. For example the stock exchange is a market for shares and derivatives.
- Operating a managed investment scheme. For example a fund manager operating a managed fund.
- Providing a custodial or depository service. For example a bank.

ASIC is responsible for assessing licence applications, granting licences, monitoring licensee's conduct and varying suspending or cancelling licences.

A financial services licence is usually held by a business, such as a company or a partnership, although individuals can hold a licence in their own right (eg sole trader). Any company, partnership of individual holding a licence is known as a **licensee**. Employees of the business operate under the licence, as do any authorised representatives the licensee may have.

To obtain a financial services licence you have to apply to ASIC and comply with the general licensee's obligations. Under the *Corporations Act* (s 912A) these obligations include:

- providing financial services efficiently, honestly and fairly
- ensuring representatives comply with financial services laws
- having sufficient financial, technological and human resources
- maintaining competence and adequate training to provide financial services
- having a dispute resolution system to handle consumer complaints
- having adequate risk management
- having compensation arrangements for losses suffered by consumers as a result of breaches of the law by the licensee.

ASIC can make a banning order against a person who has not complied with their obligations (or ASIC has reason to believe they will not comply with their obligations). ASIC can also suspend or cancel the licence of a licensee who has not complied with their obligations (or ASIC has reason to believe they will not comply with their obligations).

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Disclosure

Disclosure laws are designed to reduce the information imbalance between financial services providers and consumers. They are designed to help consumers make informed decisions.

The financial services reforms introduced new consistent requirements covering what you should be told about a financial product or service. These requirements help consumers compare similar financial products and make informed decisions about whether to buy them.

The three main disclosure documents are:

- Financial Services Guide
- Statement of Advice
- Product Disclosure Statement

A Financial Services Guide must be provided to a client before the financial service is provided. The Financial Services Guide is the introductory document that sets out information about the licensee, services provided, remuneration and complaints handling.

A licensee providing personal advice to a retail client must provide a Statement of Advice. The Statement must have regard to the client's objectives, financial situation and needs and must tell the client about any benefits the licensee will obtain(eg fees, commissions) in relation to a product that might reasonably be expected to influence their advice. A Statement of Advice is not required for general advice however the licensee must tell you that their advice does not take into account your objectives, financial situation or needs.

A Product Disclosure Statement (PDS) provides information about a particular financial product. In most situations, a consumer must receive a PDS before purchasing or investing in a financial product (with the exception of shares).

TIP

What are the different ways of purchasing shares and what sort of disclosure document must a consumer receive?

There are three main ways a consumer can purchase shares and the required disclosure document is different in each case.

1. A consumer can purchase shares in a public company that is about to be listed on the stock exchange for the first time. This is sometimes called a fundraising, a float or an initial public offering. The consumer must receive a fundraising disclosure document (called a prospectus) before they apply for shares. A prospectus must contain information a consumer would reasonably need to make an informed investment decision about the company and the shares.

2. A consumer can purchase shares in a company that is already listed on the stock exchange. This must be done through a broker. The listed company must continuously keep the market informed of matters likely to affect the price of its

shares. For this reason no disclosure document is required, unless the company is raising a significant amount of extra capital. All listed companies must produce audited financial statements each year as well as a half yearly financial report.

3. A consumer can purchase shares indirectly by investing in a managed fund that invests wholly or partly in shares from a range of companies. The consumer must receive a Product Disclosure Statement (PDS) before investing.

A PDS provides consumers with information about:

- features of the product
- commissions and fees
- benefits and risks of investing
- cooling off rights
- complaints handling

It is an offence to fail to provide a consumer with one of these disclosure documents or to provide a disclosure document that is defective. The court can impose penalties of up to $11 000 and /or two year's imprisonment for failure to provide a disclosure document, and $22 000 and/or five years imprisonment for knowingly providing a defective disclosure document. See *Corporations Act*.

Protection from pressure selling

In the past, high pressure sales tactics have often been used to sell inappropriate financial products and services to consumers. The FSRA protects consumers from pressure selling by:

- imposing a 14 day 'cooling off' period for risk insurance products, investment life insurance products, managed investment products and certain superannuation products[1]; and
- including 'anti-hawking provisions' for all financial products. This means that a licensee cannot sell a financial product to a consumer as a result of an unsolicited meeting, for example, selling products door-to-door.[2]

ASIC Act 2001

In 1998 ASIC took on consumer protection responsibilities in relation to financial products and services. The consumer protection provisions are in Part 2, Division 2 of the *ASIC Act 2001*.

Prohibition against misleading or deceptive conduct

The prohibition against misleading or deceptive conduct is at the core of consumer protection law. It means that businesses are required to be truthful and honest in all their dealings with consumers.

[1] Sections 1019A and B Corporations Act
[2] Section 992A Corporations Act

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The *ASIC Act* states that

> *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.* (section 12DA)

Similar prohibitions against misleading or deceptive conduct are found in state Fair Trading legislation and in section 52 of the *Trade Practices Act.* The substantial amount of case law which has built up around section 52 also applies to the *ASIC Act*.

Under the *ASIC Act* misleading or deceptive conduct carries a maximum penalty of $220 000 for individuals and $1.1million for corporations. In addition, under the *Corporations Act*:

- ASIC can make a banning order against a person who has engaged in misleading or deceptive conduct (s 920A). A banning order prohibits a person from providing a financial service for a set period of time or permanently.
- a consumer can take legal action to recover the amount of any loss or damage caused by misleading or deceptive conduct (s 1041I).

CASE STUDY – MISLEADING OR DECEPTIVE

A billboard on a busy highway had an advertisement from an insurance company offering: 'Save up to $115 on your home and car insurance'. The important information about the promotion appeared in small font at the bottom of the billboard. This information was wordy and complicated and explained the special terms of the offer. They were crucial for a consumer deciding whether or not to take up the offer.

The important information included the following:

- the savings were calculated on the insurance company's average premiums only
- consumers were obliged to take out three insurance policies with the company – not just home and car insurance
- to get the savings the consumer had to get home insurance with the company in addition to car insurance
- compulsory third party (CTP) insurance was excluded from the offer.

The advertisement was found to be misleading and deceptive because:

- the important information was too small to be read by passing traffic at which the billboards were targeted.
- the conditions were 'wordy' so most consumers would not be able to accurately pick up all the exclusions from a single reading;
- the advertisements didn't explain the basis of the savings.

Enforceable Undertaking received by ASIC from Suncorp Metway Insurance Limited, 30 August 1999. ASIC Media Release 99/304. Available from ASIC website.

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The following are some key propositions about the offence of misleading and deceptive conduct that have been developed by case law[3]:

- The relevant 'conduct' covers promotional activities, advertising, printed materials, verbal or written advice, and any representations made.

- There is no definition of 'misleading or deceptive'. The ordinary meaning of the words apply and the words should be interpreted broadly

- The intention behind the conduct is irrelevant. The only thing that matters is whether a person was misled or deceived or was likely to be misled or deceived. A person may be acting honestly but still be misleading.

- Whether conduct is misleading or deceptive depends on the audience. The audience may vary depending on the circumstances, the nature of the financial services and the conduct in question.

- Silence can be misleading or deceptive where circumstances where a consumer would reasonably expect to be informed about a particular matter.

Prohibition against unconscionable conduct

Another consumer safeguard is the prohibition against unconscionability based on principles of equity. Unconscionable conduct has been described variously as conduct that goes against one's conscience, is unfair, wrong, or immoral. The concept has been developed by judges in case law and codified in legislation.

TIP
EQUITY is a set of legal principles based on ethical concepts which developed as part of English legal tradition. These principles allowed courts to intervene in cases where no clear legal guidance existed, and offer relief on the basis of fairness.

An example is the equitable principle of looking at substance rather than form, often applied to contracts where courts look at what the parties were trying to achieve, rather than just the words.

Under the judicial doctrine of unconscionability a court may refuse to enforce a contract at the request of 'person A' if this would be unconscionable in the circumstances. For example, if in making the contract 'person A' took advantage of a disability affecting 'person B' the court may refuse to enforce the contract. Examples of possible disabilities affecting 'person B' are poverty, illiteracy, lack of education, mental impairment, lack of relevant information or misinformation. One of the most important cases in Australia to explore the judicial doctrine of unconscionability is *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

The prohibition against unconscionable conduct is also found in legislation, for example the *Trade Practices Act*, State and Territory Fair Trading Acts, *Uniform*

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[3] For example see *Taco Company of Australia Inc & Anor v Taco Bell Pty Limited & Ors* (1982) ATPR 40-303; *Equity Access Pty Ltd v Westpac Banking Corporation* (1990) ATPR 40-994; *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR 41-658

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Consumer Credit Code and the *ASIC Act*. The *ASIC Act* prohibits conduct that is unconscionable in the (possible) supply or acquisition of financial services. This applies to consumer transactions and business transactions up to $3 million. Business transactions are included to protect small businesses from being the victims of unconscionable conduct by larger businesses.

The legislation does not define the term 'unconscionable' but gives a list of factors that may be taken into account in deciding whether conduct is unconscionable, including:

- relative strength of bargaining position
- whether contractual conditions reasonably necessary to protect [stronger party's] legitimate interests
- [weaker party's] ability to understand documents
- whether undue influence or pressure or unfair tactics used
- amount for which, and circumstances in which, consumer could have acquired identical or similar services

Under the Corporations Act ASIC can make a banning order against a person who has engaged in unconscionable conduct (920A). In addition a consumer can bring a legal action to recover the amount of any loss or damages caused by unconscionable conduct (991A).

CASE STUDY – UNCONSCIONABLE CONDUCT

The Federal Court declared that a bank had acted unconscionably in obtaining and enforcing a personal guarantee from a woman in relation to a loan for her husband's business. The bank had not explained the effect or nature of the guarantee or advised her that she should obtain independent legal advice before signing it. The woman's husband was seriously incapacitated and she executed the guarantee in her own name and her husband's name under power of attorney. At the time the business was in serious financial difficulty which the bank was aware of and didn't inform the woman.

ACCC v National Australia Bank (unreported, FCA, 5 June 2001, No. T 22 of 2000)

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Section 4: Self-regulation

In addition to legislation, the regulatory landscape also includes self or co-regulation. Self or co-regulation involves such mechanisms as voluntary codes of practice and industry standards. The best of these are developed in cooperation with industry, government, consumer and dispute resolution organisations.

The objectives of self-regulation include:

- expanding on and clarifying general legal requirements for specific industry
- raising industry standards
- increased flexibility for industry participants
- reducing compliance costs for industry participants
- maintaining control and ownership of industry issues and problems
- averting threat of (increased) government regulation
- promoting positive public image of industry

Examples of self-regulation are

- industry codes of practice
- dispute resolution procedures
- association codes
- best practice guidelines
- industry standards

Codes of practice

Industry codes of practice have been developed by a number of industry associations in the financial services sector. A best-practice code sets out the standards of disclosure and conduct that you can expect when dealing with a company that has agreed to abide by the code. Although membership of an industry code is normally voluntary, many companies choose to adopt a code applicable to their sector. The key finance sector codes are:

- Code of Banking Practice
- Credit Union Code of Practice
- Building Society Code of Practice
- Electronic Funds Transfer Code of Practice
- General Insurance Code of Practice
- General Insurance Brokers' Code of Practice

Consumers can ask their bank, building society or credit union if they are a member of their industry code of practice or they can check the list of members of the various codes at <www.fido.asic.gov.au>.

Breach of industry codes of practice

Generally, the industry codes require members to have process for dealing with complaints. Also, the legislation now requires licensees to have dispute resolution procedures. A consumer can take a complaint about a breach of a code that has resulted in financial loss to the relevant complaints scheme. A breach of a code may also be a breach of the consumer's contract with the member financial institution,

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giving the consumer a right to take legal action for breach of contract. Some industry associations can also impose sanctions on a member if they breach their code.

Review of industry codes

Industry codes need to be reviewed and updated regularly. Many codes state that they will be reviewed regularly. An independent review of the Code of Banking Practice was recently conducted, with a process of wide consultation with industry, consumer organisations, and government agencies.

Codes of practice and government regulation

Under the new *Financial Services Reform Act*, ASIC has a voluntary power to approve industry codes. However, as at February 2003 there have not been any applications to ASIC for approval of industry codes of practice.

ASIC also monitors compliance with the codes of banks, building societies, and credit unions, and the code covering Electronic Funds Transfer (EFT) transactions.

External dispute resolution (EDR)

External dispute resolution (EDR) schemes are another important form of self-regulation. An EDR scheme is an independent mechanism for resolving disputes which cannot be resolved directly between the parties. EDR schemes provide consumers with a quick and easy alternative to taking disputes to the courts. As most consumers could not afford to take a financial services provider to court, they perform a crucial consumer protection function and give consumers greater confidence in the industry as a whole.

EDR schemes have been a feature of the financial services industry for many years. At first, EDR schemes were set up by industry associations, and members joined voluntarily – see also Legal Requirements (following). For those members who signed up, they represented best practice, since the firm was agreeing to give up some of their legal rights and abide by the decisions of a third party in the interests of self-regulating the industry. Schemes developed along similar lines to codes of practice and, indeed, many codes included a requirement for subscribing firms to join the EDR scheme.

Most EDR schemes operate in a similar way. Most importantly, the member firm agrees to be bound by the decisions of the scheme in respect of individual complaints. This means that a member firm must comply with the decision that is finally reached by the EDR scheme, even if they disagree with it. Another important feature is that access to the scheme is free for consumers.

Unlike a court, in reaching decisions on disputes, EDR schemes can go beyond the strict legal position and take into account the following factors:

- relevant law
- applicable codes of practice and standards of good industry practice
- what is fair and reasonable in all the circumstances.

EDR schemes apply industry codes of practice when investigating complaints, so they are uniquely placed to see where codes might be being breached. In this way, they

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have a role in ensuring that the industry adheres to the code. They also help to raise standards in an industry by publishing guidelines about best practice and contributing to code reviews when they occur.

Legal requirements

Access to dispute resolution is a key consumer protection tool and this is recognised in the *Financial Services Reform Act.* Under the Act, all financial services firms who do business with retail clients must have a dispute resolution system in place. This will consist of:

1. an **internal dispute resolution** system that complies with standards or requirements set by ASIC; and

2. membership of an **external dispute resolution** scheme which has been approved by ASIC.

Therefore, although a firm's membership of an EDR scheme is still contractual, it is now a mandatory requirement under the law to belong. The voluntary nature has effectively been removed.

Financial services firms may only join ASIC-approved EDR schemes to fulfil their legal requirements. ASIC approval guidelines[4] are designed to ensure that all schemes operate on a platform of common minimum standards. The standards are based on the following key principles:

- independence - of both industry and consumers
- accessibility - the scheme must be easily accessible and free of charge for consumers
- effectiveness - the scheme must adopt quick, informal and flexible procedures
- efficiency
- transparency - the scheme must abide by rules of procedural fairness and natural justice

ASIC has approved the following EDR schemes:

- Financial Industry Complaints Service – covers life insurance companies, financial planners, stockbrokers, friendly societies and futures traders
- Insurance Enquiries and Complaints – covers general insurance companies and their agents
- Australian Banking Industry Ombudsman – covers retail banks and bank-owned subsidiaries
- Insurance Brokers Disputes Limited – covers general insurance brokers
- Credit Union Dispute Resolution Centre – covers most credit unions
- Financial Co-operative Dispute Resolution Scheme – covers some credit unions and building societies

The websites for the main schemes contain lots of information.

[4] ASIC's approval guidelines are set out in Policy Statement 139, *Approval of External Complaints Schemes,* available on ASIC's website, www.asic.gov.au.

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Internal dispute resolution

For consumers, internal dispute resolution (IDR) is just as important as external dispute resolution. IDR refers to procedures that operate within a firm or product provider for resolving complaints. Since consumers need to raise any problems directly with the firm first before they can refer the matter to an external dispute resolution scheme, it is important that internal procedures are effective and fair.

- As noted above, under the FSRA, it is a legal requirement for all financial services firms to have an IDR procedure in place. This IDR procedure must comply with the essential elements of the Australian Standard on Complaints Handling (AS4269-1995). These relate to such things as making the complaints procedure accessible, fair and effective, as well as having systems in place to record and analyse complaints data and rectify any problems.

Research shows that many consumers find it difficult to make complaints. Not only do many people lack the confidence to complain if something goes wrong, often they do not know how to go about making a complaint. ASIC has published a useful guide to making a complaint, *You Can Complain*, which is available in English, Chinese, Arabic and Vietnamese.

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Section 5: E-commerce

E-commerce is the name given to any form of business which is transacted electronically, for example, buying goods or services on-line. E-commerce is growing as more people get access to the Internet. Many businesses, large and small, have websites, and some of these allow customers to place orders.

E-commerce and use of the Internet creates greater opportunities for consumers to purchase goods and services from overseas operators. The advantage of this is that it opens up new markets for consumers. However, the downside is that it is much more difficult for a consumer to be sure about who they are dealing with and what they can do if things go wrong if the business is based overseas. The challenge for Australian law-makers and regulators is to work with international counterparts to find solutions to global problems, including how to resolve cross-border disputes effectively.

As there is usually no physical product involved in buying or selling a financial product, the financial services industry is well suited to e-commerce transactions. Electronically transacted business is subject to much of the same consumer protection law as more traditional forms of business (in particular the prohibition against misleading or deceptive conduct), but it is also important that consumer protection measures specifically designed to apply to e-commerce are put in place. One such measure is the Electronic Funds Transfer Code.

Electronic Funds Transfer Code

Electronic funds transfers (EFT) are transactions where money is taken out of or paid into a bank account or a credit account electronically. EFT transactions include:

- getting money out of an ATM or paying money into one
- buying goods or services on EFTPOS (electronic funds transfer at point of sale)
  doing telephone or internet banking
- buying goods or services with a credit card when you don't need to sign for them (eg over the phone)
- using 'stored value facilities' such as prepaid phone cards

To ensure that the rules governing EFT transactions are fair and that consumers are adequately protected, ASIC established a working party of industry and consumer groups to draw up a Code of Practice. This Code sets out rules about how electronic funds transfers should work. It is a voluntary Code which over 200 businesses have subscribed to, including all major banks and credit unions.

What's in the EFT Code?

The areas covered by the EFT Code are discussed below.

What information must consumers be given, and when?

When opening a new account, consumers must be given a copy of the contract (or terms and conditions) for the account. The contract sets out what consumers can expect from the institution they have their account with, and their rights and responsibilities. The contract should be given at the time of, or before, using a new

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way to access an account.

The financial institution must also provide certain information relating to a new card or PIN, including information about:

- any fees associated with the card or PIN
- any restrictions that apply, such as limits on how much money can be withdrawn in a day
- what accounts can be accessed with the card or PIN
- how to report the loss, theft or unauthorised use of the card or PIN
- how to make a complaint

This information must be provided before the card or PIN is used for the first time.

In addition to this, financial institutions must offer consumers a receipt, each time they deposit, withdraw or transfer money electronically. Receipts must include:

- the date of the transaction
- the type of transaction
- the account and amount involved
- the amount remaining in the account (subject to privacy considerations)
- the location of the machine involved or the name of the merchant

Slightly different requirements apply to receipts for telephone transactions.

What happens in the event of an unauthorised transaction?

An unauthorised transaction is a transaction which is made on an account without the knowledge or consent of the account holder.

Although rare (less than 25 in every million ATM and EFTPOS transactions) unauthorised transactions are often the subject of dispute. The EFT Code sets down who is liable in the event of an unauthorised transaction. Often the question of liability boils down to whether the consumer kept their PIN or password a secret.

The consumer will get their money back for any unauthorised transactions on their account in the following circumstances:

- where there has been fraudulent or negligent conduct by the employees or agents of the financial institution or of merchants
- a forged, faulty, expired or cancelled card, PIN or password was used
- the transaction took place before the consumer received their card, PIN or password
- a merchant incorrectly debited the account more than once for a sale
- the transaction took place after the consumer had notified the financial institution that their card had been stolen, or that someone else knew the PIN or password
- the financial institution expressly authorises the conduct that contributed to the unauthorised transaction

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The consumer will not get their money back where the financial institution can prove that they contributed to the loss on their account by:

- acting fraudulently
- not keeping their PIN or password secret
- unreasonably delaying before notifying their financial institution that the card had been lost of stolen or that someone else knew the PIN or password

If a PIN or password was needed to perform the unauthorised transaction, but it cannot be proved that the consumer contributed to the loss, then the liability will be split between the consumer and the financial institution.

PIN security

Most unauthorised transactions occur because a person gave someone else their PIN or password. The consequences of not keeping a PIN or password secret may be that a consumer is liable for financial loss on their account.

The EFT Code contains rules for protecting PINs or passwords. Consumers must not:

- tell a PIN or password to anyone, including a family member or friend
- write a PIN or password on a card or keep an undisguised record of the PIN or password on items that are likely to get lost or stolen at the same time as the card
- choose a PIN or password which represents their birth date or a recognisable part of their name if they have been instructed not to by their financial institution (after 1 April 2002)
- act with extreme carelessness in failing to keep a PIN or password secret, for example storing a PIN number in a diary under the heading PIN Number

Stored value facilities

Stored value facilities include things such as smart cards (eg prepaid telephone cards) and digital cash that allow you to transfer money from them and sometimes to them.

As with new accounts, consumers are entitled to certain information when they first get their stored value facility. Consumers must be given information about:

- all associated fees and charges
- the expiry date, if any, of the facility
- any rights to exchange stored value for money or replacement stored value
- any procedure to report problems with the operation of the stored value facility or its loss or theft
- when (if at all) the stored value operator will replay you if value is stolen or lost from the facility
- where you can obtain more information

The EFT Code gives consumers a right to be able to find out the balance on your stored value facility, which must be possible either through a feature of the facility

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itself, or by using the facility with other equipment, such as a reader. Consumers are also entitled to exchange stored value for money or replacement stored value subject to certain limitations.

Providers of stored value facilities are yet to sign up to the code in large numbers.

Complaints

Institutions that have signed up to the Code are required to have procedures in place for handling complaints, which must meet certain minimum requirements. For example, the Code requires that most complaints be dealt with within 21 days. If the matter cannot be resolved satisfactorily, the complaint must be referred to an external dispute resolution scheme (eg an ombudsman scheme).

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Section 6: Credit

'Credit', 'loans' or 'finance' are words used to describe money that has been borrowed from someone else and must be paid back. Credit allows us to buy things now, rather than saving up first. Many people find they need to borrow money during their lives for one reason or another, for example to cover an unforeseen expense, or to buy a car or house.

Credit is provided by a range of different financial institutions, such as banks, credit unions, mortgage lenders and brokers and finance companies. There are many forms of credit such as:

- credit cards
- store cards
- overdrafts
- student loans
- personal loans, to buy a new car for example
- home loans (or mortgage) to finance buying a house

Credit comes at a cost. With any form of credit, the total amount which must be paid back is more than was originally borrowed because of the **interest**, **fees and charges** which get added. The interest is what the lender charges for lending the money and is normally expressed as a percentage.

Interest rates can be:

- fixed at a set rate for the full length (or term) of the loan; or
- variable ie the lender can change the interest rate up or down; or
- both fixed and variable - some loans incorporate both a fixed and variable element in their interest rates.

Another factor which determines how much credit costs is the term of the loan. Even though a longer term loan might have a lower rate of interest, it can end up costing more as you pay the loan back over a longer period of time. This is illustrated by this simple example:

Kim wants to take out a personal loan of $1000 to buy a new stereo. The bank will lend her the money over 3 years at 7% fixed rate or 5 years at 5% fixed rate.

OPTION A: Repay $1000 over 3 years at 7%
Total repayments = $1210

OPTION B: Repay $1000 over 5 years at 5%
Total repayments = $1250

Loans can be **secured** or **unsecured.** A **secured** loan is effectively guaranteed by the asset bought with the loan, such as a car or house or some other asset. If the borrower is unable to meet their repayments, the lender can take the car or the house and sell it,

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without taking you to court first. 'Mortgage' is a common term for a loan secured on a house.

An **unsecured** loan is not secured on a piece of property or goods. A lender cannot take and sell your property if you do not repay an unsecured loan, unless they take you to court first (and even then only in certain circumstances). Secured loans are generally for much higher amounts than unsecured loans.

As can be seen from the above, whenever you are comparing different types of loan, it is very important to make sure you are comparing like with like.

The regulation of credit

As with all financial products and services, ASIC's general consumer protection powers set out in the ASIC Act apply in relation to credit, including most centrally the prohibitions on misleading and deceptive conduct, unconscionable conduct and undue harassment.

However, the new licensing and disclosure rules of the FSRA do not apply to credit. This is because the primary regulation of credit is done at the State and Territory level under the following pieces of legislation:

- The Uniform Consumer Credit Code (UCCC) was introduced on 1 November 1996[5] and operates in all States and Territories. The Code is administered and enforced by State and Territory consumer affairs agencies and contains provisions on disclosure, legibility of documentation, advertising, calculation of interest and unconscionable fees and charges.

  Under the UCCC, a credit contract between a consumer and a lender must contain the following terms and information:

- o the name of the business or person lending you the money
- o details about the credit to be provided
- o how interest is calculated and when it is charged
- o credit fees and charges to be paid
- o how you are to be informed of changes to the contract
- o any default rate of interest and how this is calculated
- o the frequency with which account statement will be sent to you
- o whether any mortgage or guarantee has been taken by you or another person
- o details of relevant commission charges
- o details of any credit-related insurance included in the contract.

Under the UCCC, a consumer must receive a copy of the written contact with 14 days, plus regular account statements. The Code also includes hardship provisions which enable consumers to renegotiate repayments when they fall into difficult economic times and a requirement for lenders to give notice before they start repossession.

[5] The UCCC was introduced in Tasmania in March 1997.

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- Credit is also regulated under individual State and Territory Fair Trading Acts and/or Sale of Goods Acts that substantially mirror the consumer protection provisions in the ASIC Act. These laws apply to all goods and services regulated at a State or Territory level, including credit.

- Finally, some States and Territories also administer a licensing or registration system for credit brokers under separate legislation[6].

The UCCC does not cover lending for investment purposes or small business lending.

Credit cards

Credit cards are offered by a range of different companies, including banks and credit unions, major retailers and credit card specialists.

For most people who have a regular income, a credit card can be easy to obtain and can be convenient to use. It can also be a useful source of funds in an emergency. Many people use credit cards sensibly and pay off the entire credit card balance by the due date. This way, they can take advantage of the credit card's interest free period if it has one.

However, credit cards are an expensive type of loan. Credit card interest rates are usually higher than most other types of loan, and they normally attract account fees as well. You may also be charged extra by merchants for paying by credit card (see text box below).

Some people find it easy to get carried away with a credit card and they can be a real problem for people who don't have the discipline to control their spending. Credit cards make it easy to buy things on impulse, whether or not you can really afford it. By using the credit card and not paying off the balance in full, it's easy to rack up a large credit card balance which is extremely difficult to pay off.

Credit card surcharging

From 1 January 2003, businesses, such as shops, may charge customers extra for paying by credit card under reforms introduced by the Reserve Bank of Australia.

Since credit card transactions cost businesses more than other forms of payment (because they have to pay their bank for each credit card transaction received), the reforms allow:

- merchants to choose whether or not to pass on the cost directly or indirectly to consumers; and
- consumers to make an informed decision about the means of payment that represents best value for them.

Businesses that do decide to charge customers a fee for paying by credit card will need to make sure they do not act in a misleading or deceptive way. They should make sure that consumers are aware of the extra charge and how much it will be,

[6] Victoria - Consumer Credit (Victoria) Act 1995; ACT - Consumer Credit (Administration) Act 1996; WA - Finance Brokers Control Act 1975; NSW - Consumer Credit Administration Act 1995

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before the transaction is entered into. They can do this in many ways, including in-store notices or prominent messages on bills.

Consumers can choose whether to pay the credit card fee, or to use another form of payment (eg cash or EFTPOS) or to take their business to another trader which does not charge fees.

Lay-bys

Paying for things gradually through lay-by is often a good alternative to using credit cards.

A lay-by sale is an agreement between a consumer and a business for the purchase of goods, such as an item of clothing or jewellery, at a fixed price to be paid over a certain period of time. Normally there are no credit charges, but there may be an administration fee. Lay-bys are regulated by States and Territory consumer affairs and fair trading agencies.

In a lay-by, the business agrees to keep the price the same until the item is fully paid, and the consumer agrees to make regular payments. When you take out a lay-by, you enter into a contract with the trader. You should check the terms and conditions before you lay-by the item. The agreement should include:

- a description of the goods
- the total price
- the deposit paid
- time intervals for payment (eg every week etc)
- maximum length of the lay-by
- cancellation process or charges

If you break the lay-by agreement, you may lose money already paid, plus the goods. If the business breaks the lay-by agreement, you are entitled to get your money back.

Budgeting

Do you feel like you never have any money? Budgeting is a useful way to manage your money and stay out of debt.

Budgeting involves writing down what you receive and everything you spend. This way you can figure out how you spend your money and where you can cut back if you need to. It's easy to overlook how much you spend on little things, like snacks or magazines.

By spending less money than you receive, you create spare cash which you can use to pay off debts or save for something special.

Use Fido's budget planner to work out your income and expenses for a week, month or quarter. Once you have done your budget, you can see where your money is going.

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If you need or want to save more, your options may include:

- spending less money, particularly on non-essentials
- increasing your income, by getting a second job for example
- controlling and paying off your debts, particularly high interest debts such as credit cards.

Financial counsellors provide a free service to help people with money problems or who are struggling to repay debts. Their contact details can usually be found in the phone book or from local Fair Trading or Consumer Affairs departments.

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Section 7: Insurance

Insurance is a fact of life. This section focuses on how insurance works and then at a common type of insurance – car insurance.

What is insurance?

Insurance is a way of protecting ourselves or things we own from the risk of damage (or in the case of a person, ill health or death) or loss. Insurance involves the transfer of risk from you to an insurance company. It works like this:

TIP
When you take out a new insurance policy, the money you pay for the policy is called the **premium**. Your premium, and the premiums of all the other policyholders, goes into one large pool which is managed and invested by the insurance company. If a policyholder suffers a loss and needs to claim on their insurance, the money is paid out of the total pool. It is extremely unlikely that all policyholders will need to make a claim at the same time, so there should always be enough money to meet those that do.

When you take out a new insurance policy, you are entering into a contract with the insurance company. Insurance contracts are regulated by federal legislation and the common law. The main acts regulating the insurance industry are the *Life Insurance Act 1995*, the *Insurance Contracts Act 1984* and the *Corporations Act 2001.* Different rules apply depending on whether the insurance is classified as general or life insurance.

General insurance policies typically last for one year. The most common types of general insurance are:

- Home and contents insurance
- Car insurance
- Travel insurance

Life insurance is long term insurance. The purpose of life insurance is to protect family members who rely on you for money (known as **dependents**) in case you die, or are unable to work (either temporarily or permanently).

Utmost good faith and duty of disclosure

The *Insurance Contracts Act 1984* places obligations on both the consumer and the insurer to act with **utmost good faith**. These obligations are briefly summarised below:

What must the consumer do?
When applying for an insurance policy, it is very important that you answer all questions the insurer asks you as accurately and completely as possible. This is called the '**duty of disclosure**' ie your duty to disclose to the insurer all relevant information

about what you are insuring and the risks they are accepting. Even little things that might not seem that important, such as modifications to a car, must be disclosed.

If you do not answer the insurance company's questions properly, you may find you have misled the insurer about the risk they are accepting. As a result, the insurer may be entitled to refuse to pay any claim you make.

Your duty to disclose also applies when you are renewing a policy and you should make sure that you tell your insurer about any changes that impact upon the risks they are accepting.

You should not assume the insurance company will check the answers you give, so that it is alright to give a vague or incomplete reply. If you give the wrong answer (even if this was unintentional) then it is possible the insurance company will be able to reject your claim. For example, if you are asked to list any driving offences in the last two years, you may mislead the insurer if you only put down two offences that you remember, when in fact you had three.

Under the Act, you are also under an obligation not to make false claims or exaggerate claims and to co-operate with the insurer if you make a claim.

What must the insurer do?

The law says that an insurer must 'clearly inform' you of the restrictions in the insurance policy before you enter into the contract. This only applies to some policies, such as for car, home contents, travel, consumer credit, and some sickness and accident policies. The insurer may have failed to clearly inform you of the policy's cover if:

- they do not give you a copy of the policy document and the product disclosure statement; or
- the wording of the policy is unclear or ambiguous.

If this is the case, the insurer is penalised. The penalty is that the contract will have terms set by law (which are usually more generous and less restrictive than those in the policy document). That is to say, you may have the right to claim a greater amount than the contract allows, or to claim where the contract does not allow it.

Before your existing policy expires, insurers must tell you in writing whether or not they are prepared to enter into a new insurance contract with you. The law says that your insurance continues with that insurer if:

- they don't send you a letter telling you that your policy is expiring and
- you do not arrange other insurance.

Under the law, an insurer is also required to assess any claims promptly, and not to delay paying or refuse to pay a claim without proper cause.

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Car insurance

In addition to the compulsory third party personal insurance which gets paid when registering a car (called a 'green slip' in NSW), there are three common types of optional car insurance policies:

- *Comprehensive insurance* - If the driver of your car is covered under the policy, this policy covers damage to your own car and damage to other people's property (usually their car) in an accident.

- *Third party fire and theft insurance* - This policy covers damage caused by your car to other people's property, and limited cover for loss or damage to your car caused by theft or fire only.

- *Third party property insurance* - This policy only covers damage caused by your car to other people's property. It does not cover the cost of repairs to your own car.

Most policies do not cover loss or damage resulting from:

- mechanical, structural or electrical failure
- depreciation, wear and tear, and rust
- lost wages or income because you cannot use your car
- unauthorised modifications to the car from the maker's specifications

Also, most policies will not cover loss or damage if you drove your car when it was in an unroadworthy or unsafe condition, and this contributed to the accident.

The driver makes a difference

The person who is driving the car can affect:

- the cost of the insurance; and
- whether the insurance company will pay for damage if there's an accident.

If you have a good driving record (rating 1) your premium (ie the cost of insurance) will be lower than if you have a bad driving record (rating 6). The premiums for young men under 25 will be more expensive (even for rating 1 drivers) due to the greater number of accidents by this group generally.

Your insurance may not cover damage if you let someone drive the car who:

- was over the alcohol limit or under the influence of drugs
- did not have a driving license
- was not authorised under the policy to drive the car.

Making a claim

In the event of a car accident, it is important to tell the insurance company what has happened as soon as possible and include as many details as possible.

When dealing with the insurance company, it is important to give all the facts surrounding your claim, even if they are personally embarrassing. It is better to be

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honest than have to change your story later, which could result in an investigation and a delay in payment of your claim, or in it being refused because you have changed your story.

Before making a claim, it is worth considering what the impact will be on the **policy excess** and any **no-claims bonus**.

What is an 'excess'?

The 'excess' is an amount of money that you must contribute towards any expenses as a result of the loss or damage. An insurance company usually requires you to pay the excess when you make a claim. If you cannot pay the excess as a lump sum, check to see if you can arrange to pay it by instalments.

What is a 'no claims' bonus?

A 'no claims' bonus is an annual reduction on your premium if you have not made any claims under your policy. If you make a claim, you may lose all or part of your 'no claim' bonus and have to pay more for insurance next year. Check with your insurance company about the circumstances in which you will lose your 'no claim' bonus.

What if an insurance company refuses to pay a claim?

The Insurance Enquiries and Complaints (IEC) scheme is the external dispute resolution scheme which handles disputes about insurance claims. If a dispute cannot be settled by conciliation, the matter is determined by a panel of experts. Panel determinations are not binding on consumers, but the insurer must comply with them. Awards can be made up to $120 000. The IEC can also make recommendations about disputes involving claims up to $290 000.

All panel determinations can be found on the IEC's website: **www.iecltd.com.au**.

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Section 8: Superannuation

Superannuation is a compulsory savings program for employed people to make sure they have money to live on when they reach retirement age. Nearly every employed person must join a superannuation fund that meets Government standards, usually chosen by their employer or set by an award. Proposed changes to law, if passed, may provide choice of funds.

Who contributes to superannuation?

Under the Superannuation Guarantee, an employer must contribute an amount equal to 9% of an employee's earnings to their super fund. Most people's 9% is based on 'ordinary time earnings', which under the law means earnings for their ordinary hours of work and could include overtime. Self employed people can decide whether they want to contribute to a super fund. The government offers tax concessions if they do.

Occasionally employers pay too little or even none of their employer superannuation contributions. Employees can check with their fund that they are registered as a member and that the right contributions are getting through. This is especially important for casual or part-time employees.

Employers are not required to make super contributions for:

- employees earning less than $450 a month;
- part-time employees under 18 (part-time is up to 30 hours per week); or
- employees over 70.

How superannuation works

Superannuation grows because:
1. the employer and/or employee make regular contributions,
2. the superannuation fund invests the money, and
3. the superannuation fund gets tax concessions that boost the earnings.

By law, you generally get your superannuation payout only when you:
1. permanently retire from the workforce, and also
2. reach the minimum age set by law, see the table below.

Date of birth	Minimum age for getting superannuation benefits
After June 1964	60
July 1963-June 1964	59
July 1962-June 1963	58
July 1961-July 1962	57
July 1960-June 1961	56
Before July 1960	55

Except for cases of death, permanent incapacity or special situations, you cannot get your super early. Some people set up unscrupulous businesses that tempt people to illegally get their super money early. ASIC has charged a number of people and organisations in relation to setting up schemes to illegally access people's super early.

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What type of fund?

There are four basic fund types:

1. Employer or corporate funds open to people working for a particular employer or corporation
2. Industry funds open to people working in a particular industry or under a particular industrial award. Some industry funds now allow anyone to join.
3. Retail funds open to the public, run for profit by financial institutions.
4. Self-managed funds open only to you and up to three other people.

Superannuation funds are required to give fund members a product disclosure statement that sets out detailed information about the fund such as benefits, contributions, fees, investment strategy and past performance on investments.

Role of superannuation trustees

Superannuation trustees manage the super fund. They are required to act honestly and make decisions in the best interests of all fund members. Trustees in employer and industry funds normally include a member representative. Trustees of retail funds must be approved by the regulators.

Superannuation trustees must meet legal standards designed to protect member's benefits and to guard against fraud or gross mismanagement. Trustees are accountable to Government agencies:

- ASIC regulates what funds tell people, how they treat members and how they abide by company law.
- The Australian Prudential Regulation Authority (APRA) regulates the prudent management and soundness of all funds, except self-managed ones.
- The ATO regulates self-managed funds, employer contributions (the Superannuation Guarantee) and superannuation tax concessions.

- Government agencies do not guarantee member's capital and investment earnings.

An accumulation or defined benefit fund?

Most people must join an *accumulation* fund. Benefits depend on how successfully the fund invests the money. Members reap the investment rewards and they bear the investment risks.

Less commonly, some people may be able to join a *defined benefit* fund where the member as well as their employer may have to contribute. The benefit usually depends on how long the member has worked for the employer and how much money they are earning when they retire. For example, they may get four times their salary if they retire at 55 after 20 years membership or five times if they retire at 60. Generally the employer bears the investment risk.

Keep fees and charges down

Every dollar paid in fees reduces the final benefit - keeping fees down can make a big difference. Choosing a fund with higher fees requires a higher return just to come out even. Most experts agree that higher fees do not guarantee higher returns. When super

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returns are low, the level of fees that are charged on your account become more important.

Payment if a member dies

All funds pay a benefit if a member dies. The calculation of the benefit varies between funds (in many funds it includes an insured amount as well as contributions). The trustee must only pay the benefit to:

1. the dependants (spouse, children or people who depend on the member financially), or
2. the estate.

Most funds let the member nominate who they want their benefits paid to however it is important to note that not all nominations are binding.

Splitting super

Family law changes which came into effect on 28 December 2002 mean that superannuation can be part of the property settlement and divided on separation or divorce. Superannuation will be treated like any other property in the event of marriage breakdown.

Super statements

Super funds are required to provide fund members with regular statements about their investment. A super statement should set out information on the following amounts:

1. money in the member's account at the start of the year
2. employer contributions during the year
3. member contributions during the year
4. earnings on money invested by fund
5. charges to member for managing their money
6. deductions for government taxes and charges
7. money in the member's account at the time of the statement.

What about small amounts in lots of accounts?

People who do a lot of casual work or change jobs a lot, may have small accounts. They may be able to combine small amounts into a single account in a single fund. If an account has less than $200, the fund rules will say if you are allowed to take the money when you terminate your employment.

Looking for lost superannuation?

The Australian Taxation Office holds an estimated $6 billion on behalf of lost superannuation fund members. Even if these people know where their money is, their funds may not be able to reach them.

To check if they have any lost money in superannuation, members can contact their current superannuation fund and ask them to search for their name through the 'SuperMatch' system. Alternatively, they can complete the ATO Lost Members enquiry form on the ATO's website www.ato.gov.au/super under 'Lost Members Register' or phone 13 10 20.

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Section 9: Indigenous consumers

It is important that appropriate consumer protection measures extend to all members of the community. It also important to understand that the needs of some groups of consumers will be different to others and they will face different types of problems.

One such group of consumers is Indigenous people, particularly those living in rural and remote Australia. According to an ACCC report, *Competition and Consumer Issues* (2000), evidence suggests that many Indigenous people are not aware of their consumer rights. Drawing on a range of sources, the report found that 'disadvantage and poor literacy as well as limited access to information about finance and cost of finance … can make [Indigenous people] vulnerable to exploitation'.

The following case study, based on a report, *'Book Up' Some Consumer Problems*[7], outlines some particular finance problems faced by consumers in rural and remote Australia, particularly Indigenous consumers.

Book-up

'Book-up' and 'book-down' are terms used for forms of store credit, which are common in regional and remote Australia. It is a system that involves a trader, such as a storekeeper or a taxi driver, offering small amounts of short-term credit to individuals. In many cases, traders are only prepared to offer this credit if:

- the consumer has their social security cheque posted care of the store and routinely cashes the cheque there
- the consumer hands over their debit card (key card) to the store, often together with their PIN number. The store then uses its EFTPOS machine to debit the consumer's account on their social security payday, or
- the consumer completes a blank withdrawal form and gives it to the trader or completes a direct debit authority in favour of the trader.

As the consumer protection regulator, ASIC had received a number of complaints from consumer advocates about the book up practice. In view of this, ASIC commissioned a report to explore the extent and range of practices associated with book-up and to suggest measures for tackling related problems.

Extent of the practice

Whilst an accurate picture of the extent of the use of book-up is not available, research shows that the practice is available in a large number of rural and regional towns in most states of Australia and the Northern Territory. Various local factors, including liquor licensing laws, attitudes of police, Indigenous involvement in management of stores, and the attitudes of traders, influence how particular arrangements are operated and effect the consumer.

[7] prepared for ASIC by Gordon Renouf, March 2002

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Example: a store in a major centre holds about 300 keycards and PINs on behalf of customers. Customers come from many different places and travel long distances in taxis and other forms of transports to get to the store. The store will normally advance them the taxi fare when they arrive. It is alleged that the store will provide liquor on credit in breach of its liquor licence, that accounting 'errors' are often made in the store's favour and that it charges some customers a $10 fee for each book up.

Who uses book-up?

ASIC's research suggested that affected consumers:

- were usually, but not always, Indigenous Australians
- have relatively poor financial literacy and consumer knowledge
- have certain cultural attitudes to income and savings
- lack familiarity with banking generally and debit cards in particular
- lack safe storage facilities at home for example due to overcrowding
- are on low incomes
- do not have access to other forms of credit

The combination of all of these factors together with unregulated book-up arrangements gives rise to considerable potential for exploitation.

Advantages and disadvantages of book-up

Despite the potential problems, significant levels of complaint and reported exploitation, many consumers choose to use book-up services offered where deposit of their keycard is required. There are probably a number of reasons for this, including:

- lack of access to banking services or alternative forms of credit
- poor financial literacy and budgeting skills
- convenience
- monopoly position of the trader, and
- feelings of being unwelcome elsewhere

There is also the sense that whilst the existence of book up may not of itself be a bad thing, it is the *practices* associated with it which cause problems for consumers.

Advantages

The main advantage for consumers in a book up arrangement is that they have access to a source of credit that can help them manage their money between payments.

Disadvantages

ASIC's research revealed a number of disadvantages and problems for consumers in using book-up. Here are some of them:

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- Consumers are tied to the retailer where their keycard is held for all purchases, which prevents them from being able to shop around to get the best deal and means prices can be raised unfairly.

- Stores may impose various costs on the consumer, including fees, additional charges and costs associated with 'errors' in record keeping.

- Stores may allow a consumer to go into debt beyond their means.

- Stores may offer credit to third parties (normally relatives of the cardholder) without the consent of the cardholder.

- Stores may allow the purchase of alcohol on the book up system which is a breach of an alcohol license in the Northern Territory.

- Where a card and PIN number are left with the trader, the consumer runs the risk of fraudulent access to the account and loses valuable protections from fraud because of their failure to keep the PIN confidential.

- No access to card or funds while the store is closed (eg over Christmas) or if the store refuses to return a card.

Regulatory responses

Mainly because of the lack of alternative sources of credit and, to a lesser extent due to the lack of access to banking facilities, there is no simple regulatory solution available at present which would overcome all of the disadvantages for affected consumers without causing perceived or possibly real problems for those or other consumers.

The report recognised that there was no one solution to the problem and therefore suggested a range of policy responses, including:

- improving consumer education and financial literacy skills in Indigenous and disadvantaged consumers and those living in remote areas
- supporting initiatives to improve access to financial services in remote and regional areas and by low-income consumers
- supporting the development of alternative ways of operating book-up services with possibilities including alternative payment devices, codes of conduct and regulation of particular practices.

CASE STUDY: COMBINED INSURANCE

In November 2000, ASIC obtained consent orders in the Federal Court and accepted an enforceable undertaking from Combined Insurance Company of America following an investigation into the marketing and sale of Combined insurance policies in a number of Aboriginal communities. ASIC considered that the sales were unfair and may have been misleading and deceptive.

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ASIC's investigation found that agents of Combined sold accident insurance policies and sickness policies to members of at least 18 Aboriginal communities across Australia. The accident insurance policy covered people for a range of injuries caused by an accident while travelling on a plane, monorail, bus, train, tram, truck, car, or by travelling in an elevator. As most Aboriginal communities were located in remote or rural areas, ASIC considered that few members of the communities would have the opportunity to travel by these means.

Amongst other things, the company failed to explain the insurance properly, represented that the insurance had benefits it did not and used unfair pressure or influence to sell insurance.

The court orders required Combined to take a number of steps to put things right. The enforceable undertaking required Combined to fund the preparation of consumer education material to help inform Aboriginal people of the issues to consider when purchasing insurance.

Enforceable Undertaking received by ASIC from Combined Insurance Company of America , 13 November 2000 (EU Number 111) Available from ASIC website.

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Section 10: Scams

Financial fraud or scams are as old as finance itself. These scams often 'suck in' a vast number of people. People are often reluctant to come forward because they feel guilty or embarrassed about their actions and the fact that they were conned. By making the victims feel implicated in the scheme the promoters of the scheme reduce the chances of being detected. This section explains some of the well-known scams and some of the more common tricks.

Pyramid schemes and Ponzi schemes

In these schemes the promoter promises an investment with very high returns and very little risk. Investors put their money into the scheme and for the first few months they do appear to receive good returns on their capital investment – every month they are receiving substantial dividend or interest payments. The investment seems so good that they put more money in or convince their friends to invest as well.

Does this sound too good to be true? You're right – it is too good to be true, it's a fraud. The monthly payments they are receiving are taken from their initial investment. As more money flows into the scheme the promoter uses money from the new investors to pay the existing investors and so the fraud goes on. There is never any real investment or product in which the money is invested – the money simply flows up the pyramid as new investors join the scheme. Theoretically the fraud could continue for many years - so long as new investors continued to join the scheme and no one asks too many questions. What usually happens is the promoter gets greedy and starts to spend the money too quickly so the pool of money dries up.

Affinity fraud

Affinity frauds are financial scams targeting a particular group - religious, sporting, professional, ethnic, elderly. The promoters of the fraud are existing members of the group, claim to be members of the group or infiltrate the group by persuading a leader within the group to spread the word about the investment opportunity. This scam exploits the trust and friendship that exists in a tight-knit group or community. Scams are more likely to go undetected in environments such as these because people start from a relationship of trust and are reluctant to suspect other people within their community.

Nigerian letter scams

Some 1000 000 000 'confidential' emails get sent from people claiming to represent government agencies or businesses in Nigeria or personalities, public servants or business people in Nigeria and other African nations. The letters ask you to give your bank account details so they can use your bank account to get many millions of dollars offshore - for which you will be paid a generous commission. Ignore these letters and do not give the scamsters any bank details. All that happens is that they withdraw the balance out of your account. At least six people who provided their account details travelled to Nigeria to investigate the scheme and have been murdered.

Cold calling and telephone investment fraud

Cold calling scams have been a worldwide problem for many years. Cold calling is

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simply a sales call out of the blue you did not ask for, generally over the phone. Sometimes the word 'hawking' is used to describe unsolicited offers of financial products and services. Cold calling about financial products or services is illegal if the caller does not have an Australian financial services licence from ASIC. Even if the caller claims to be calling from overseas they still require an Australian licence. Cold calling activity by licensed businesses is legal in certain situations – special rules in the Corporations Act govern what they can and can't do.

One of the most dangerous illegal cold calling frauds involves unlicensed overseas organisations posing as brokers/investment houses. ASIC estimates that Australians alone have lost at least $400 million to cold calling scams.[8] The callers phone potential investors, offering them particular investment products, or shares or units in a company or scheme. They can be extremely persuasive, or even aggressive and people can easily end up buying their product just to get them off the phone. Investors get left, at best, with drastically deflated shares in small 'start up' companies that are unlikely to get off the ground and, at worst, you lose everything.

Warning signs and tricks to avoid

You can avoid phoney investment schemes and financial scams if you know what to look for. These are some suspicious tell tale signs in investments that should ring alarm bells for you.

- Promises unrealistic returns and claim to be 'risk free' or '100% guaranteed' - sounds too good to be true? It's probably a lie
- Offered as an 'exclusive' investment opportunity, often with confidentiality agreements required.
- Funds kept in foreign banks, sometimes claiming this will 'reduce tax'
- The promoter doesn't have a licence from ASIC
- You are not given a prospectus or product disclosure statement about the investment.
- The business doesn't exist on any company registers
- The only contact details provided are a mobile phone numbers
- Pressure to make a decision to invest.
- High pressure selling techniques – sales people make you feel bad if you don't sign up.
- Returns are paid in cash, no written records are maintained.

Tips to help you avoid being a victim of a scam or fraud

- Making investment decisions can be risky. Always ask lots of questions about the investment and the person selling you the investment. If they avoid these questions or make you feel uncomfortable for asking – don't deal with them. You have are entitled to know the facts before you give them your money.
- Don't base an investment decision on a friend's word alone. Always check it out for yourself – it's your money.

[8] *'International Cold Calling Investment Scams'*, an ASIC report into international telemarketing scams. This report can be found at www.fido.gov.au

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- Remember that the greater the reward or return – the greater the risk. There is no such thing as an investment with high returns and no risk.
- Always get a prospectus or product disclosure statement (PDS).
- Deal only with people who are operating under an Australian financial services licence. Get the details of their name and the licence number just to make sure.

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Section 11: Costs: fees, charges and commissions

This section explains the (sometimes hidden) costs of financial products and services in the form of commissions, fees and charges. The cost of a product is one of the key pieces of information a consumer needs to know to enable them to compare products and choose the best product for their needs and budget. For some (non financial) products this information is easily discerned from the price tag eg a book, a shirt or an apple. The cost of a financial product or service is not quite as simple. The cost of a financial product or service may be made up of one or more of the following:

- Commissions
- Entry and exit fees
- Transaction costs
- Management fees
- Flat fees
- Hourly fees
- Annual fees
- Premiums

The types of costs will vary according to the nature of the financial product or service eg a car insurance policy will have different costs from the costs involved in seeing a financial adviser or using a bank account.

Different types of costs

Bank fees and charges

Deposit accounts with banks, building societies and credit unions attract a variety of fees and charges. The types of charges and their amount vary between institutions and different types of accounts. The main fees are annual account fees and transaction fees. Transaction fees may apply to the whole range of methods available for accessing your money, including:

- over the counter
- cheques
- automatic teller machines (ATMs)
- telephone banking
- electronic funds transfer at point of sale (EFTPOS)
- B pay
- direct debit
- Internet banking

Many accounts offer a certain number of fee free transactions per month or a system of monthly fee rebates and some types of transactions will normally attract lower fees than others. For example internet banking is often cheaper than over the counter or using an ATM from another bank (a ‘foreign’ ATM). Special low, or no fee, deals are often available for students.

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Commissions

A commission can be:

- a single payment in the form of an entry fee based as a percentage of the sum being invested;
- an ongoing commission, called a trail, which is also a percentage of the investment that the adviser receives for the life of the investment; or
- incentives and non-monetary rewards such as holidays eg if a financial adviser meets a funds' sales target.

The cost of these commissions is ultimately borne by the consumer. In most investment products, commissions come out of the money invested by the consumer at the beginning, or the annual management fee.

Many financial advisers earn most of their income from commissions. Good advisers will always put your interests first, even if it means recommending a product with a lower commission. Bad advisers put their own interests ahead of yours[9]. They may:

- try to sell you high commission products even if they do not suit you
- recommend only the fund that pays the highest commission even if two or more funds could meet your needs
- tell you to switch your funds to pick up commissions if you are already in a fund. This is known as 'churning'.

Managed fund fees

A managed fund is a type of investment product where your money is pooled together with money from other investors to buy shares or some other sort of asset. The fund is managed by a professional investment manager. In almost all cases, instead of shares you get units in the scheme. The number of units you receive depends on how much you invest in the scheme.

A managed fund may have the following types of associated fees:

- **Commission** – paid to the adviser by the managed fund both initially and on an ongoing basis.
- **Entry fee** – sometimes called a 'contribution fee' this is a fee charged upon investing money into the fund (and sometimes also on additional contributions). This is usually a percentage of the amount invested.
- **Management fee** – an annual amount paid to the manager of the fund to cover the costs of managing the investment. This is usually called the Management Expense Ratio (MER). In superannuation products it is referred to as the Ongoing Management Charge (OMC).
- **Exit fee** – sometimes called a redemption fee this is the fee charged when you sell or redeem your investment in the fund. This is also usually expressed as a

[9] See a discussion on the operation of commissions for financial advisers in the *ASIC research report - ASIC/ACA Survey on the quality of financial planning advice,* 11 February 2003, available at <www.fido.asic.gov.au>

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percentage of the amount invested and it may decrease the longer you remain in the fund.

Disclosure of fees and charges

There are disclosure requirements for fees and charges under the *Corporations Act 2001*, the *Uniform Consumer Credit Code* and various finance industry codes. In Consumer Protection Laws, page X, we looked at the three main disclosure documents - the Financial Services Guide, the Statement of Advice and the Product Disclosure Statement. In each of these documents there must be information for consumers about the fees and charges that apply.

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