"Complaints Against the Regulators"

Consultation Paper 20/11

Submission by the Transparency Task Force, October 12th 2020

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About the Transparency Task Force

The mission of the Transparency Task Force is to promote ongoing reform of the financial sector, so that it serves society better. Our vision is to build a large, influential and highly respected international institution that helps to ensure consumers are treated fairly by the financial sector. The primary beneficiaries of our work will be consumers; but the sector itself will also benefit through improved market conduct and increased trust in the services it provides.

Our objective is to carry out a broad range of activities that help to drive positive, progressive and purposeful finance reform, such as:

- Building a collaborative, campaigning community; the larger it is the more influence it can have in driving the change that is needed
- Raising awareness of issues; so that society better understands the problems that exist in the financial sector and how they can be dealt with
- Engaging with people who can make change happen; because through such dialogue we can influence thinking, policy making and market conduct

Much of our focus is on rebuilding trustworthiness and confidence in financial services. To make this possible we are busy developing a framework for finance reform which we describe as a "whole system solution for a whole-system problem" as described in our recently published book

For further information about the Transparency Task Force see:
http://www.transparencytaskforce.org

Introduction

It is vitally important that there is a mechanism for effective oversight of any regulator, and we feel that the complaints regime that the regulators have stated a desire to review, is a vital and fundamental part of this oversight mechanism.

This paper has been produced under significant time pressure, for the following reasons:

- The regulators, unusually, chose not to support the launch of this consultation with any media activity, so we became aware of it only after several weeks;
- It was initially open for a shorter period than is usual, namely two months, rather than the typical three or more, forcing us to truncate our normal internal discussion process;
- The period coincided with summer holidays and an unprecedented pandemic, factors we believe would argue for providing extra time for responses, not less.

The process is defective in other ways, too. The discussion paper takes as its start point the premise that the current complaints scheme is fundamentally fit for purpose and simply requires clarification. Our start point is the polar opposite: we believe that the existing scheme is non-compliant with the Financial Services Act 2012, and we note that the response of the outgoing Financial Regulators' Complaints Commissioner, Antony Townsend, takes a similar position.

We therefore believe that this current process should have been halted and replaced with a period of engagement with ourselves and other groups representing consumer interests aimed at jointly producing an agreed template for a new scheme that would be fully compliant with the Act, which should have been followed by a widely-publicised consultation process of conventional length. We believe that CP 20/11 has served only to delay this necessary process, which should take place as soon as possible.

Since we do not know at this stage whether the regulators will agree to adopt this course of action, we have responded to the best of our ability within the given deadline and subject to the constraints of the provided discussion document. In order to meet the deadline, we and other consumer groups have worked together to share information and ideas, so there may be similarities between our documents. We ask that this is not used to discredit or lessen the significance of our or their responses.

Finally, we hope the regulators will consider that compliance with the law is not optional, and nor can public consultation exercises be minimised by tactics such as those described at the beginning of this section or critical responses be ignored. The end result of this process must be a complaints scheme that meets the criteria laid out in the Act, and the regulators should be cognisant of the risk that they may be subject to judicial review should this not happen.

1. Do you agree that the language in Annex 2 is more accessible than the language of the current Scheme? Will the Scheme as proposed achieve the objectives set out in paragraph 3.3?

The language in Annex 2 is more accessible than the language of the current Scheme. However the wording – i.e. the actual content being expressed, as opposed to the manner of the expression – is unacceptable, because it further restricts consumers' right to have complaints considered by the Regulators, and because it is noncompliant with the obligations placed on the Regulators by Part 6 of the Financial Services Act 2012 ('the Act'), which requires the Regulators to operate a complaints scheme that meets specific criteria.

We believe that the wording in Annex 2, if adopted, would place the Regulators in Breach of the Act in the following areas:

- *84(5)(a)*: the investigator would not be free at all times to act independently of the regulators because the proposed Scheme would restrict the circumstances under which he or she could investigate complaints (Section 2 of the proposed Scheme) or recommend the payment of compensation (Annex A)
- *86(1)*: this consultation exercise has been issued without any public relations support, during the summer holidays and parliamentary recess and during a pandemic. It represents an attempt to materially reduce the scope of the Scheme such that it is in effect a new Scheme; the Regulators should therefore be compliant with the obligation to maximise public attention. Furthermore, the list of questions has been very narrowly drafted so that respondents are asked to consider only certain aspects of the proposed Scheme. For instance, they are not asked for their views on the proposed Scheme as a whole, such as what is missing or how it might be improved;
- *87(5)(a)*: the proposed Scheme limits both the scope for the payment of compensation to complainants and the scope for doing so (that is to say, the grounds on which compensatory payments may be made). The Act contains no such restrictions and the proposed Scheme is therefore noncompliant with the obligations on the Regulators imposed by the Act

As to whether the proposed Scheme meets the objectives set out in Section 3.3, we have the following feedback:

- It may well be less time-consuming for complainants to work out how to use the Scheme. However, this is of marginal benefit: people complain because they believe they have suffered serious distress and often material financial loss because of negligence or dishonesty by one of the Regulators, so they are willing to devote time to reading the Scheme rules. It is more important to them that the rules *favour their interests* than that they can be *read quickly*, provided of course that they are *comprehensible.* In short, the proposals appear to favour speed over effectiveness and we are concerned the unintended outcome might be quickly reaching an unsatisfactory outcome as opposed to taking the appropriate length of time to reach an appropriate outcome. The Scheme should be both quick *and* effective;
- More complainants would have *limited*, rather than *realistic*, expectations of what the Scheme can do for them, should the proposal be adopted. The intended wording materially limits the eligibility of complaints and the prospects of complaining resulting in compensation for financial loss. This represents consumer detriment. Conveying this fact in

plain English, with the likely result that fewer people will complain, is not something that should be encouraged;

- The law imposes obligations on the Regulators to operate a Scheme that meets certain criteria. For many years there has been concern that it has not done so, and in particular that constraints have been imposed on the Complaints Commissioner's scope to recommend the payment of compensation in cases where regulatory actions and inactions have led to financial loss. The proposed Scheme makes this restriction explicit for the first time, and also imposes onerous restrictions on which complaints are eligible for consideration. Were it to be adopted, far fewer people would complain, some because they'd be told their complaints are ineligible and others because they'd be deterred by wording indicating that they'd be unlikely to receive material compensation. While this might save the Regulators and Complaints Commissioner some time dealing with people whose expectations are based on what's in the Act, this should not be seen as an advantage of the revised Scheme. Both the existing Scheme and the proposed one should be replaced with one that is fully compliant with the Act.

2. Do you have any comments on our approach to ex-gratia compensatory payments for distress or inconvenience?

See our response to Q3, below.

3. Do you have any comments on our approach to ex-gratia compensatory payments in respect of financial loss?

We have decided to take questions 2 and 3 together, as many observations relevant to one apply also to the other.

Our feedback is as follows:

- *4.1*: this section raises the possibility that the outcomes envisaged for complaints under the proposed Scheme will focus on apologies and lessons learned (improved practises, policies and procedures aimed at preventing repetitions). There is no harm in aiming to achieve these things, but it is crucial not to lose sight of the requirements imposed by the Act, namely making a compensatory payment to the complainant or otherwise provide remedy appropriate to the nature of the complaint[1];
- *4.2*: this is disingenuous. You are not 'proposing further information'; you're trying to narrow down the scope for payment of compensation;
- *4.3*: the principle that financial compensation should be offered only if there is no other way of remedying the complaint. However, 4.1 talks only about apologies and lessons learned. In our experience most complainants have suffered distress and financial loss, so are seeking financial compensation;
- *4.4*: payments should be *appropriate to the distress and financial loss suffered by the complainant*. This means they may sometimes be *modest*, at other times *material* and in some cases *large*. The proposed Scheme should not contain any wording that prejudges or constrains the quantum of any compensatory awards or recommendations; to do so would be to deter people from complaining and would be in breach of the Act. With respect to the three bullet points under 4.4:
    - It is true that the Regulators are immune from liability in damages in civil law, excepting bad faith and human rights breaches. However, it is for this reason that Parliament required the creation of a complaints scheme and the appointment of an investigator that would have the powers to award and recommend respectively the payment of compensation – government wanted to spare the Regulators the cost and inconvenience of litigation, while also protecting citizens from suffering losses caused by negligent or dishonest regulation. The Regulators cannot take the former while excluding the latter, so should redraft the Scheme to ensure that the payment of *material* and *large* amounts of compensation in cases where it is necessary in order to remedy losses suffered are explicitly within scope;
    - If the Scheme is not designed to consider complex issues of causation, then the Regulators should redesign it so it can consider such matters. It is entirely possible for a body other than a court or a tribunal to calculate awards of compensatory damages; indeed, there are examples of such schemes being established with the Regulators' involvement and endorsement within UK financial services[2];
    - This is true, but it is a compelling argument *for* the Scheme having the power to award and recommend *material* and *large* sums of compensation where necessary

[1] Section 87(5)(a) and (b)

[2] The Financial Ombudsman Service, Financial Services Compensation Scheme and British Banking Redress Scheme

to remedy losses, not the reverse. Normally it is the industry that benefits from weak or captured regulation and consumers that bear the costs (negative externalities). Any mechanism by which those costs can be transferred from the public to the industry should be encouraged, both as a rough-justice form of equity and to create an economic incentive for the honest majority within the industry to align behind citizens in pushing for improved regulation. If the market operates efficiently, these additional costs will not be passed on to consumers but will rather result in lower profits for the industry. If this does not happen, it is a matter for the Regulators to address, and more specifically a challenge for the Financial Conduct Authority given its explicit statutory remit to promote competition

- *4.5*: this reads like a signal to the industry to support the proposed Scheme in the hope of the levy being reduced. The suggestion that compensatory payments might be reduced to keep down or reduce the levy is alarming: the legitimate way to reduce the impact of compensatory payments on the levy is for the Regulators to improve their performance and thereby reduce the amount of financial loss caused, not to leave complainants bearing losses to spare the industry. Worse still, the opposite holds true and this could be seen as a threat to the industry that we must accept these proposals else you will increase the regulatory fees to cover the costs of your potential incompetence;
- *4.6*: the description of the roles of the Ombudsman and Financial Services Compensation scheme is accurate. It is contentious to claim that the Scheme is not intended to insure against losses covered by firms that are not covered (or not covered in full) by the FOS or FSCS, and the addition of the words 'for any reason' is clearly unacceptable. If a firm or individual not covered by the FOS or FSCS carries out an act or acts resulting in a complainant suffering financial losses, or if the same happens in relation to a firm that is covered by the FOS or FSCS but the losses caused exceed the limits set on compensatory awards by those bodies, the Regulators (normally the Financial Conduct Authority) may be to blame if their or its actions or inactions made possible or contributed to the scale of the loss complained about. In such circumstances, the Scheme should not exclude the right to award or recommend sufficient compensation to redress in full the financial loss incurred[3];
- *4.7*: this distinction is legitimate; attempting to evade or minimise payments in relation to financial loss is not. The distinction here is concerning as it is presumed that you already make this distinction internally, but you now propose to do so to the public. Does this therefore mean that you intend for one to be of less value than the other? If not, then what practical use is there to the complainant as to the category of their complaint other than unnecessary obfuscatory data?;
- *4.8*: we agree with the grounds on which you propose to make awards for distress or inconvenience; we propose that the same criteria should apply to awards made for financial loss;
- *4.9*: we believe that the quantum of any award made for distress or inconvenience should be based on the merits of the complaint in question. For this reason, we oppose the provision of indicative or guideline figures. Of more concern is that this paragraph appears to imply that these figures are based on previous complaints data and represent the 'normal' scope

[3] For instance, if a consumer loses a significant amount of his or her savings invested in a boiler-room scam (colloquial term for a fraudulent investment scheme operating wholly outside the FCA's regulatory perimeter) and the complainant can show that the FSA had been made aware of that scam (or a previous one by the same perpetrators) sufficiently ahead of when he or she invested in it that the regulator had had the opportunity to obtain a court order to close it down and initiative proceedings against the perpetrators but did not do so, then we believe that consumer should be entitled to be compensated for those losses by the FCA

of an award. Perhaps the regulator can do itself a favour and either insert the relevant data into the consultation paper, or at least reference as to where on its website said data may be discovered;

- *4.10*: it is the job of the Regulators and the investigator[4] to evaluate the evidence provided by both the complainant and the relevant regulator. Specifying what evidence is required upfront should be avoided as it may deter legitimate claimants whose evidence may be non-documentary or imperfect but who nevertheless have valid claims. It is a general principle in tort that at the outset of an action the party bringing the action must provide some argument as to why they legally believe they have a claim. In many cases merely the provision of information by one side in the disclosure process may obviate a claim entirely. Conversely it may be the case that a complainant seems to reasonably have a case but until they have the regulators disclosure documentation cannot be certain they can prove a tort. Therefore the requirement for a significant amount of evidence flies in the face of this well-accepted legal practise and may ask a higher burden of proof before proceedings commence than the court would itself. This then causes the complaints service to fail as it is a form of out of court settlement service, and therefore should be easier, cheaper, and more accessible than the courts themselves. In response to the bullet points:
    - While the Scheme exists to deal with complaints about four regulators[5], in practice it is dominated by complaints relating to the Financial Conduct Authority[6]. Given its three statutory objectives, it is inevitable that many of the complaints about its conduct that relate to financial loss are from consumers who believe they were subject to harms caused by firms or individuals in the industry that the regulator could and should have prevented or mitigated or that believe the regulator could have done more to obtain redress for them. In such cases the FCA is unlikely to be the sole cause of loss, and in many it will be hard to argue it is the primary cause (often that will be misconduct by the firm/individual, with regulatory inaction a contributory or even enabling factor). The 'sole or primary cause of loss' qualification should therefore be replaced with the test proposed by the Regulators themselves for distress and inconvenience payments under 4.8, namely whether the actions or inactions of the relevant regulator contributed significantly to the complainant's losses;
    - The clear and significant failure test seems reasonable to us, provided it is applied in good faith;
- *4.11*: consideration should be given to revising the Scheme so witnesses and complainants *may* be interviewed, and a fuller investigation conducted. If both the respondent regulator and the investigator consider that a complaint is of such complexity and seriousness that such an exercise would exceed their capabilities, the case should instead trigger an investigation under Section 73 of the Act, on the basis that if such a Review were to find that regulatory failures led to consumer losses, the consumer or consumers so affected could then re-enter the complaints scheme, their claim having been proven, to receive the appropriate compensation. As mentioned above, where the conduct of a firm or individuals is the principal cause of financial loss but the regulator (in practice, the FCA) can be shown

[4] Currently the Complaints Commissioner

[5] The Financial Conduct Authority, the Prudent Regulatory Authority, the Bank of England and the Payment Systems Regulator

[6] In 2019, for instance, the Complaints Commissioner published 63 final reports; 62 relating to the FCA, one to the PSR and none to the BoE and PRA

not to have taken reasonable steps to prevent that harm or to order restitution, or where the perpetrator is unable to pay and any losses remain after any FOS and FSCS interventions, it is absolutely right that the cost of that regulatory failure should be socialised within the industry through the mechanic of the levy rather than sitting with the customers of the failed firm;

- *4.12*: in circumstances in which a complainant has shown that regulatory failure has caused him or her a quantified loss, compensation should be paid by the relevant regulator to the complainant to that value. There should be no further qualifications;
- *4.13*: as stated above, it is for the complainant to evidence both causation and quantum of loss. Once that is done, he or she should be compensated in full. Setting a guideline upper limit, and introducing wording about the expected scarcity of larger awards, would merely deter legitimate complainants from pursuing claims, a consumer detriment, so must be avoided;
- *4.14*: the scale of historic recommended payments reflects the expectation set by the wording and custom and practice of the current Scheme that pay-outs will not be large. It is no reflection on the quantum of claims that should have been brought, or that we might reasonably expect might be brought in the future. In particular, three External Reviews will soon be published into cases in which the FCA has been accused of acting in ways that led to consumers and small business owners suffering large financial losses[7]. The Scheme should be revised in time to deal with complaints brought by the victims in those cases who, given the obligations on the Regulators contained within the Act, will reasonably look to them to have in place a Scheme that enables the award and recommendation of payments unlimited in quantum;
- *4.15*: we believe that the proposed Scheme would, if implemented, reduce the number of complaints and hence the total amount of compensation paid, though we agree it might not materially impact the size of such awards. It is our view that a fit for purpose Scheme, one compliant with the Act, would result in both more complaints and an increase in the proportion of compensation awards and recommendations for sums in excess of £10,000. We see this as a positive, and progressive objective, given the extent of harm caused by individuals and small businesses by regulatory failure in financial services, particularly by the FCA. It is important to highlight here that the costs of running the scheme and awards for redress should be compared not against historical awards, but awards in court. The absolute purpose of an out of court settlement service is to reduce the time and cost of litigation and similar actions.

[7] The Connaught Income Fund Series 1, London Capital and Finance and the Interest Rate Hedging Product redress scheme

4. Do you agree with our proposals for implementing the new Scheme?

For the reasons explained above, we do not agree with your proposals for implementing the new scheme.

5. What impact do you think our proposals in this consultation paper will have on persons who share protected characteristics?

The principal effect of the proposals, if implemented, would be fewer people complaining about the Regulators, principally the FCA, because they would be less likely than today to believe that their claims would be considered eligible for consideration or that claiming might lead to the payment of compensation, particularly in cases where the redress sought covers financial losses and not just token sums for distress and inconvenience. Secondary effects would include:

- Increased deadweight losses to the economy as consumers avoid financial services products because they fear being scammed (for instance, elderly people under-occupying family houses rather than downsizing and investing the balance);
- Politicians, the media and society being deprived of a valuable indicator of the effectiveness of the regulators (principally the FCA): if it were unambiguously on the hook to compensate victims of regulatory failure, tracking the numbers and scale of such payouts over time would provide a powerful indicator of how the regulator was performing, together with an early 'heads up' of any deterioration;
- A missed opportunity to create alignment of economic interests between consumers and the industry, with the honest majority in the latter keen to avoid being saddled with the cost of compensating the former for regulatory failure through the medium of the FCA levy;
- Consequent harm to the profitability and standing of the City, and UK financial services more widely, within the UK and globally, as a result of a continuing stream of misconduct cases in which regulatory failure or capture is a major factor

Given the positive correlation between individual net financial worth and age (a protected characteristic), it is probable that measures that have the intention or effect of reducing access for citizens to redress for regulatory failure, deterring them from participating in financial services markets or increasing the potential for them to suffer losses caused by financial services misconduct enabled by poor regulation, would disproportionately affect a group with a protected characteristic, namely the elderly.

Likewise, it is reasonable to believe that these measures would impact disproportionately on other vulnerable groups, one of which, those with mental or physical disabilities, constitutes a group with a protected characteristic.

Finally, those that have been victims of a scam are normally left with very little finances to pursue an action in the courts and therefore this proposal may result in reduced access for the most vulnerable in society.

6. Other points to consider additional to your listed questions

We have answered the questions set out in the consultation paper, as requested. It is our view that both the current Scheme and, more so, the proposed one, fall short of the obligations imposed on the Regulators by the Act. We have also set out further concerns about how both schemes, particularly the proposed one, fail to achieve other desirable goals such as building confidence in our financial services sector and fail to create a coalition in favour of improved regulation.

We believe that there is a compelling case for creating an actionable duty of care on firms in the financial services industry to their clients, a step that would remove any ambiguity or excuse for inaction behind which the regulator can hide. We sense that the FCA is not keen on this, which is why it has stalled the announcement of a (third) consultation exercise, to follow the 2016 one on the Mission review in which many consumer groups advocated such a policy and the 2018 one on the policy itself.

Likewise, we hold there is an urgent need to create such a duty of care of the FCA itself toward consumers, small and medium-sized businesses that use financial services and whistleblowers from the sector, as part of which the complaints scheme should be rewritten to make it compliant with the Financial Services Act 2012.

And finally, we believe there is a moral imperative to deal equitably with historic cases in which the payment of compensation for financial loss due to regulatory failure was merited but did not happen, whether because prospective complainants were deterred from using the Scheme due to constraints in its scope and powers, compensation was not recommended or awarded due to those limitations or the investigator recommended such payment but the regulator chose not to act on the recommendation.

We offer our notes on these subjects below.

a) Duty of care (firms)

- We believe that registered firms and individuals should owe an actionable duty of care to provide clients with information that is accurate, and to take reasonable steps to ensure that it is understood and that any recommendations made are genuinely suitable to the client's circumstances, goals and risk appetite;

- This duty of care should include revisions to Principle 11 of the FCA's Principles for Business so it amounts to an obligation of mandatory reporting when firms and senior managers become aware of any matter of which the regulator would expect to be made aware, whether or not it relates to the firm in question;

- When the FCA consulted on its Mission in 2016, most consumer responses, including ours, advocated the introduction of a Duty of Care

- Perhaps predictably, most industry responses favoured the status quo, in which it is subject to the Principles for Business, the sixth of which is an ill-defined requirement to treat customers fairly. Breach of this principle does not in itself provide grounds for successful civil litigation, nor to a requirement (only a right, seldom used) for the regulator to undertake enforcement action;

- Rather than side with consumers on the issue, the FCA announced a further consultation on the issue of Duty of Care, resulting in the publication in April 2019 of a summary paper promising further consultations, which have yet to emerge;

- We sense that the FCA is not keen on the introduction of a duty of care; it may therefore have to be imposed, as part of any reform process or the creation of a successor body

b) Duty of care (of regulator)

- The FCA currently has a set of statutory objectives, but no specific duty of care to consumers. It can therefore opt not to take actions, such as prosecuting or banning, or issuing restitution orders, that cause detriment and loss to consumers, largely without consequence
- It currently enjoys a general exemption from civil liability, except in cases where it has acted in bad faith or breached a claimant's human rights;
- Reversing these two points would create an obligation on the regulator to act where needed to protect the public and would also turn it into an additional, deep-pocketed respondent that misconduct victims could pursue for redress in situations in which regulatory failure is the, or a, cause of their losses and other options are unattractive or non-viable;
- Doing so would have additional benefits, including:
    - *Transparency*: the regulator would be required to justify its actions and inactions in any contested claims;
    - *Accountability*: the quantum of payouts made by the regulator would be visible to all stakeholders and would act as a measure of its performance;
    - *Alignment of interests*: introducing this duty of care would align the honest and capable majority in the industry with consumers in wanting to improve the regulator's performance, because they don't want to pay increased regulatory levies to fund compensation to the victims of regulatory failure.
- Even with this change, litigation by regulatory failure victims against the FCA would be challenging for many, requiring as it does significant outlay from people whose finances have been depleted and significant time inputs from people who may be elderly. This can be addressed by improving the complaints scheme, as outlined below

c) Strengthen complaints scheme

- Given the asymmetry of information and resources available to consumers (and the directors of small firms) and the regulator, litigation may not be the preferred option for the pursuit of redress under a new duty of care and expanded civil liability regime
- This can be resolved through three changes to the Financial Regulators' Complaints Scheme:
    - The Commissioner should be appointed by, and report to, a panel comprised of and representing the interests of genuine victims of financial service misconduct;
    - There should be a 'comply or explain' requirement on the regulator in respect of the Complaints Commissioner's recommendations;
    - The Commissioner should be free to recommend the payment of compensation by the regulator to victims of regulatory failure, without limit as to quantum or the

nature of the causation (and compensation for financial losses caused by regulatory failure should fall explicitly within scope)

- When both the Financial Services and Markets Bill and the Financial Services Bill were debated in Parliament, concerns were expressed by MPs about the difficulty of litigating against a regulator that has, in effect, limitless finances (it can simply raise the levy to cover expenditure). The complaints scheme was designed to address this potential inequity, and as is made clear in Section 87(5)(a) of the 2012 Act, politicians intended there to be no constraint placed on the nature of such recommended compensatory awards;
- Unfortunately the actual scheme rules devised by the FCA and its fellow regulators were worded in a way that has resulted in the Commissioner feeling limited to recommending *de minimis* payments to reflect inconvenience and distress, rather than material sums to remedy financial loss. The FCA has been asked by the Treasury to consult on changes to remedy this ambiguity; the FCA has worded the consultation document in such a way as to resolve it in favour of ruling out the recommendation of material redress in almost all cases. This change may therefore have to be imposed on a reluctant regulator, perhaps as part of a wider inquiry into the future regulatory environment following the publication of the three External Reviews[8] into alleged regulatory failures that will be completed in or around September 2020 and, we hope, published then or shortly thereafter

d) Achieve justice for historic victims of regulatory failure

- We question whether the complaints Schemes that have been in place in relation to the performance of the Financial Services Authority and Financial Conduct Authority have ever been fully compliant with the Act or its predecessor[9]; for example the consultation document anticipating a change to the Scheme when the FSA was replaced by the FCA admits that sums recommended in compensation 'have not been large', not least because the regulator and Complaints Commissioner have always been obliged to weigh the facts that a regulated firm may have contributed to the causation and that any redress comes from the industry;
- We believe that these qualifications to the Scheme, which were never envisaged or approved by parliament, placed the Regulators in breach of their obligations under both Acts;
- There is therefore a compelling case in law and morally to revisit all historic cases considered under the Scheme to determine whether material or large sums of compensation for financial loss should be paid and to allow people who consider themselves to have been suffered financial loss caused by failure by one or more of the Regulators in the past to use the new Scheme for a reasonable period of time, without their cases falling foul of any time limit applicable to new complaints;
- This could happen within the normal operation of the Scheme or as part of a wider process, perhaps similar to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that took place in Australia, that would deal with legacy cases of industry misconduct and regulatory failure

[8] The Connaught Income Fund Series 1, London Capital and Finance and the Interest Rate Hedging Product redress scheme

[9] The Financial Services and Markets Act 2000

Final thoughts

Replacing the regulators' current complaints scheme, which in practice deals largely with complaints about the FCA, into one that is compliant with the obligations placed on those organisations by the Financial Services Act 2012, and reopening legacy cases, will inevitably lead to some sizable pay-outs.

The victims of the defective regulation of firms and individuals associated with The Connaught Income Fund Series 1 and London Capital and Finance and those impacted by the defective redress scheme cooked up by the FCA and banks for victims of interest rate hedging product sales to small and medium-sized businesses will soon be in receipt of the findings of External Reviews into the regulator's conduct in these matters, and believe that the investigators are likely to find extensive evidence of regulatory negligence and capture. And there are many more cases in which regulatory failure is alleged equal or worse in severity to that asserted in these pilot examples.

Against this background, there may be a case for socialising these costs by meeting them through general taxation, as part of a Royal Commission, the goals of which should be the removal from the industry and regulator individuals whose conduct has been found wanting, the thorough ongoing reform, or replacement, of the FCA, and amendment or replacement of legislation if proven necessary.

End.