

Review into Dispute Resolution and Complaints Framework

FOS Response to Supplementary Issues Paper

Consultation on the establishment, merits and potential design of a compensation scheme of last resort and the merits and issues associated with providing access to redress for past disputes

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Glossary

AFCA	Australian Financial Complaints Authority
ASIC	Australian Securities and Investments Commission
CIO	Credit and Investments Ombudsman
EDR	External Dispute Resolution
FOS	Financial Ombudsman Service
FSP	Financial services provider
IDR	Internal Dispute Resolution
TOR	Terms of Reference

Executive summary

The Financial Ombudsman Service (FOS) has been a long-standing advocate for a compensation scheme of last resort and over several years has made submissions to government and parliamentary inquiries in support of such a scheme.¹ Our advocacy on this issue has been influenced by the experience of the 214 people who, since 2010, have been denied financial compensation awarded by FOS because of a financial firm's inability to pay them.

We consider that there needs to be a workable and acceptable compensation scheme of last resort to provide access to justice for consumers who do not receive awarded compensation for financial loss and fill the structural gap in the existing dispute resolution framework.

In our previous submissions, we have provided considerable detail on the design and operation of such a scheme. This work was based on treating the scheme design as a form of pooled insurance scheme, drawing on similar models that exist overseas and in Australia (where they are operated by professional bodies).

We acknowledge that in recent years there have been a number of reforms to improve the professionalism and standards across some segments of the financial services industry. We support these reforms, which are designed to reduce the incidence of misconduct and the risks of unpaid compensation.

However, the risk of unpaid awards of compensation can never be eliminated without imposing an undue burden on the whole industry. This is why we consider these measures are complementary to, but not a substitute for, a compensation scheme of last resort.

This submission provides comments about the amended terms of reference being addressed in the Supplementary Issues Paper by the Ramsay Review Panel (the Panel):

- the establishment, merits and potential design of a compensation scheme of last resort, and
- the merits and issues involved in providing access to redress for past disputes.

We agree with the Panel that there are different policy considerations, and potentially different funding models and administrative arrangements, for a compensation scheme of last resort compared to

¹Summary of [FOS submissions](#) - Compensation Scheme of Last Resort. The most relevant of these, for purposes of this paper are:
Updated proposal for a compensation scheme of last resort May 2015-
<http://www.fos.org.au/public/download/?id=42223&ssstat=343438>
FOS FSI interim submissions with Grant Thornton costings (Appendix 2)-
<http://www.fos.org.au/custom/files/docs/fos-submission-to-fsi-interim-report-august-2014.pdf>

one that provides redress for past disputes. Both are important and we consider that while the two should be guided by the same principles and have many similar characteristics, they should be established separately.

Our submission² responds broadly to the key areas and questions outlined in the Supplementary Issues Paper, rather than responding in detail to each question. Appendix 1, however, provides a brief response to the questions posed by the Panel.

In summary, FOS considers that a compensation scheme of last resort should:

- provide a material degree of protection for consumers (individuals and small businesses) who have not been paid an eligible determination or award owed to them by a financial services provider (FSP)
- have minimal complexity and ease of access for eligible consumers
- be prospective (subject to the caveat below on how unpaid external dispute resolution (EDR) determinations are to be addressed) and established to coincide with the commencement of the new single EDR scheme
- accept compensation claims from eligible consumers who have a determination in their favour from the EDR scheme or court, or tribunal of competent jurisdiction (so long as it was awarded after the commencement of the EDR scheme and falls within the prevailing EDR jurisdictional limits on the date awarded), and
- cover awards of compensation owed by providers of all forms of financial services, financial advice or financial products, including credit providers.

FOS appreciates the complexity of dealing with current unpaid EDR awards of compensation. The key question is whether they should be included with, or separated from, other potential claims that could have come to FOS but did not progress because the firm was in liquidation, or were not pursued by a consumer because there was no reasonable prospect of any payment. We note that these latter examples are part of the Panel's consideration of appropriate redress mechanisms for past disputes.

We consider, at a minimum, compensation should be paid (in part or in full) to consumers who have existing unpaid EDR determinations. A

² This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of individual FOS directors. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

preferable course would be to treat these as a class of known and quantified claims as part of the past redress mechanism. However, if no viable scheme for past redress is implemented, we consider that existing unpaid determinations would need to be covered appropriately by the new compensation scheme of last resort.

FOS supports the establishment of a broader mechanism to provide redress for past disputes that extend beyond those that have prevented consumers bringing a dispute to an EDR body (or court or tribunal) due to jurisdictional or cost constraints, and we appreciate the design challenges involved. In our submission, we make some observations about the design issues that could be considered in this regard.

Our submission is in four parts:

- Existing compensation arrangements
- A compensation scheme of last resort
- Existing unpaid EDR determinations
- Access to redress for past disputes.

We would be happy to provide the Panel further information on any aspects of our submission.

Value of FOS's unpaid determinations as at 2 May 2017

Since 1 January 2010:

- 38 FSPs were unwilling or unable to comply with 151 FOS determinations, affecting 214 consumers.
- In 113 of these determinations, the consumer received no payments despite the requirement on Australian Financial Services Licence holders to have 'adequate compensation arrangements' in place.
- Of the other 38 determinations, partial payment to consumers was usually the proceeds of insolvency proceedings and represented a minimal return on the dollar.
- As a result of this non-compliance, \$13,909,635.50 has not been returned to affected consumers.
- This figure does not include any interest awarded as part of the determinations nor does it include any adjustments for inflation over time.

Existing compensation arrangements

The Supplementary Issues Paper describes the current policy framework and compensation arrangements that are available to consumers who are seeking redress for financial loss.

In various publications and submissions in recent years³, FOS has analysed many features of the current compensation framework. These features include policy enhancements to Australian Financial Services (AFS) licence obligations, the role of professional indemnity insurance, the professionalisation of financial advice and coverage of existing compensation schemes. These measures contribute to the consumer protection framework but are complementary to a last resort compensation scheme, not a substitute for it.

As the Panel points out:

Given the existence of unpaid EDR determinations, it is clear this framework is not delivering effective outcomes for some of its users.⁴

We make the following high level observations about other existing compensation arrangements:

Compensation element	Who does it protect?	Shortcomings
Requirement that AFS licensees hold professional indemnity insurance in accordance with Australian Securities and Investments Commission (ASIC) Regulatory Guidance	AFS licensees Clients do not have direct access to PI cover, except in very limited circumstances	Even with strict guidance from ASIC, the PI market determines whether it will offer run-off, how it will impose limits to aggregate claims, excess levels and what types of fidelity it will cover
Financial Claims Scheme	Retail clients who hold a deposit or policy with a prudentially regulated entity that becomes insolvent and may not meet its obligations to retail clients	The FCS provides compensation only for retail clients who have bought certain products It does not protect retail clients who have bought other products, or used a service such as personal financial advice
Existing compensation arrangements (e.g. National Guarantee Fund, SIS Compensation)	Clients who have lost money or property through fraud or dishonesty	Do not cover all financial services, and relate primarily to stockbrokers and superannuation funds

³ Summary of [FOS submissions](#)- Compensation Scheme of Last Resort.

⁴ Supplementary Issues Paper 'Review of the financial system external dispute resolution framework', May 2017, paragraph 48.

Professional Indemnity (PI) insurance

The obligation for AFS licensees to have adequate PI insurance (or other ASIC-approved arrangements for compensating clients) is an important element of the existing framework for compensating losses in the financial system. FOS supports strengthening PI standards and compliance with those standards. However, such improvements will not eliminate the inherent limitations of PI insurance as a commercial product that was not intended or designed as a comprehensive consumer compensation mechanism.

ASIC Regulatory Guide 126 provides guidance in relation to compensation and insurance arrangements and sets minimum requirements about the amount and scope of PI insurance cover. But as ASIC states in Regulatory Guide 126:

It is important, however, to recognise the limitations of PI insurance as a consumer protection mechanism. PI insurance is not designed to protect consumers directly and is not a guarantee that compensation will be paid.⁵

Richard St John, in his April 2012 *Report on Compensation arrangements for consumers of financial services*, identified the problems discussed by ASIC in Regulatory Guide 126, and detailed additional limitations associated with relying on PI insurance as a consumer protection mechanism.⁶

⁵ ASIC Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees- RG 126.7 & 126.8

⁶ *Compensation arrangements for consumers of financial services, Report by Richard St John*, April 2012, pg.31- limitations of professional indemnity insurance.

Compensation scheme of last resort

FOS accepts that a compensation scheme of last resort could be structured as an industry scheme with legislative backing, modelled on industry-based EDR arrangements, or as a standalone statutory scheme. The different models will involve a number of public policy trade-offs, in particular between the scope of its operations and costs to industry and on the extent of industry and consumer involvement in any governance arrangements.

To be successful, an industry-based scheme would require sufficient broad-based industry support with general agreement on key design features, such as scheme coverage, funding and governance. Where there is a diversity of views across industry sectors on these key design features, a statutory model would be the more viable approach.

FOS supports the establishment of a compensation scheme of last resort that provides a material degree of protection for financial services consumers (individuals and small businesses whose disputes sit within the EDR jurisdictional limits) who have not been paid an eligible determination or award owed to them by an FSP. We consider that this could include a court award as long as it is consistent with the EDR jurisdictional limits at the time of the award.

The guiding principles applied by the Panel to its analysis are appropriate as design principles of a compensation scheme of last resort. Importantly, its scope and coverage should be simple to communicate and understand and provide certainty to consumers about the eligibility of their claims.

Scope of the scheme

FOS considers that the scheme should cover providers of all forms of financial services, financial advice or financial products such as: derivatives, foreign and payment products, foreign exchange contracts, general insurance, securities, managed investment schemes, life insurance products, superannuation⁷, and other financial investment products in respect of which there has been a determination in favour of the consumer by an EDR scheme or court, or tribunal of competent jurisdiction. We also consider that the compensation scheme of last resort should extend to the credit industry because the risk of non-payment of EDR determinations can equally arise in that industry.

While some industry sectors, such as the Australian Bankers Association (ABA), argue for a compensation scheme of last resort covering only financial advice activity of financial firms, FOS considers

⁷ That are not already covered by other compensation arrangements.

it should cover all areas where unpaid awards of compensation to consumers might arise.

We consider that managed investment schemes (MIS) should also be included because:

- of the potential for unpaid determinations and consumer detriment to flow from this sector
- of the involvement of broader financial firms in the funding, distribution or other arrangements with MIS, and
- funding contributions to a scheme across the whole 'value chain' would support increased accountability of all participants, including registered MIS operators.

We consider that a well-designed scheme with clear compensation limits and well established funding and contribution criteria should be able to mitigate the concerns expressed by the ABA about the potential broader prudential and capital implications of a scheme with a wider scope beyond financial advice.

Further, we consider that credit providers and mortgage arrangers should be included because FOS disputes and awards for compensation in relation to credit can involve particularly vulnerable and disadvantaged consumers.

We acknowledge the diverse nature of credit provision by a wide variety of market participants will give rise to some design challenges for the scheme.

If the compensation scheme of last resort was limited to providers of personal and general advice on financial products, on an activity basis, a challenge exists in defining who and what would be in scope. Licence authorisations for AFSLs and Australian Credit Licensees (ACLs) have three dimensions which were used in establishing the Financial Advisers Register:

- type of financial services offered (e.g. advice, dealing)
- types of products offered (e.g. securities, managed investment schemes), and
- types of customers to be served (retail or wholesale).

Most AFSLs carry authorisations for multiple and sometimes ancillary financial services. So, for every unpaid award, an assessment would need to be made by the compensation scheme of last resort about the financial service type, the product type and the client type. For example, many MIS providers have an AFSL to operate an MIS, and provide general advice on that scheme. This would be difficult to explain to a consumer or have them readily know whether the

transaction/advice subject of their dispute would have recourse to the compensation scheme of last resort.

FOS disputes may also involve a range of licensee activity that is dealt with in the decision of the dispute as a whole. It would be impossible to explain to a consumer why only part of their unpaid compensation awarded by the EDR scheme would be covered by the compensation scheme of last resort.

Inclusion of court awards

If the ultimate policy target is to restore consumer trust and confidence in the financial system, consumer redress should not be limited to unpaid EDR determinations. We consider that from a public policy perspective, there is merit in considering the inclusion of court determinations in the compensation scheme of last resort's scope, but aligning the claims limit and compensation to the prevailing EDR jurisdictional caps and limits. This would mitigate against exposure for claims beyond the EDR jurisdiction and potential cost increases, providing more certainty around the funding pool for the compensation scheme of last resort.

Funding options

Decisions about funding contributions will be shaped by decisions about the scope of the scheme and the extent of retrospective cover required. In our submission to the Financial System Inquiry Interim Report⁸, we presented illustrative high level funding models for a scheme, with the assistance of Grant Thornton⁹. Our modelling showed that if all AFSL holders and MIS providers were required to fund a compensation scheme of last resort, when spread across all providers, both the establishment costs and annual contributions to the scheme's pool of funds and its administration could be kept quite low.

If an industry-based industry scheme were to be adopted, the funding mechanism would need to be separately designed and administered by the scheme itself.

If a statutory scheme were established, the funding could form part of, or leverage off, the ASIC levy funding arrangements. This would have advantages in terms of calculation, consistency and ease of administration for both the scheme and financial firms.

⁸ FOS submission to FSI Interim Report – Appendix 2 pg. 21:
<http://fos.org.au/custom/files/docs/fos-submission-to-fsi-interim-report-august-2014.pdf>

⁹ Grant Thornton analysed costs for a narrower scheme that just applied to financial advice and registered managed investments schemes. It also assumed that the scheme would not determine complaints but rather its role would be confined to deciding whether unpaid determinations are covered by the scheme.

Administrative arrangements

It would be important to have cost-effective administrative arrangements for the scheme. Relying on the existing EDR determinations or court/tribunal awards as valid legal claims for compensation wherever possible would prevent the need for separate decision makers, thereby keeping scheme administration costs low. Also, we would recommend that if administrative efficiencies could be achieved by utilising existing compensation scheme or other administrative infrastructure, options to do so should be explored.

Arrangements such as those contained in the Corporations Law for the Companies and Auditors Liquidators Board and similar entities could provide a possible model for a statutory scheme.

Phased approach

Given that it is apparent that support for a compensation scheme of last resort differs across sectors, a phased approach to inclusion of all financial and credit services in any industry-based scheme may be proposed by some industry sectors. While we understand the reasons for this proposed phased approach, we caution that the guiding design principles of equity, complexity (lack of) and comparability of outcomes should not be compromised.

Moral hazard arguments

The Panel acknowledges that 'there are claims that moral hazard issues may arise with the existence of a compensation scheme of last resort'.¹⁰ Essentially these are:

- that AFS licensees could exercise less caution with knowledge that their customers could be compensated, or
- if consumers know they have recourse to a compensation fund, they will assume risks as they know there is a fall-back if they suffer financial loss.

In our view, these are not persuasive arguments and any such risks could be mitigated through good scheme design and enhanced regulation:

- The existence of a scheme would not change the legal liability of the AFS licensee.
- A firm's own capital must be depleted first, before the scheme's funds are relied on as the avenue of consumer redress.

¹⁰ Supplementary Issues Paper- Review of the financial system external dispute resolution framework, pg. 21

- The scheme should have the authority to make payment of compensation to a claimant in respect of an eligible claim conditional on the claimant assigning the whole or any part of their rights against the participant, or against any third party or both, to the scheme. This would allow the scheme to pursue recoveries from the firm itself, or through liquidators/insolvency practitioners.
- ASIC's banning powers should be enhanced and apply when a person has been implicated in a claim that is successfully made on the scheme.
- In regard to consumer behaviour, if EDR limits apply to the scheme, there will be caps and limits on the amount a consumer could claim through the scheme. Further, given the time and effort involved in making a claim, it would be highly unlikely that a consumer's decision would be influenced by the existence of a scheme at the time of deciding the choice of a firm or a financial course of action.

Recognised limitation of the proposed compensation scheme of last resort

FOS recognises that a prospective compensation scheme based on prevailing EDR limits and reliant on existing clear legal liability for compensation through an EDR scheme, court or tribunal could prevent the handling of claims for compensation that have not been the subject of a formal merits assessment.

This might arise where a financial firm goes into liquidation before all applicants have lodged a dispute with the EDR scheme. FOS's practice has been that where this is the case and there is little or no prospect for recovering any compensation, we will not progress the claim and communicate to the consumer the reasons why.

The new single external dispute resolution scheme would need to have procedures under which these matters would progress to formal decision based on available information from the consumer, FSP, liquidator/receivers and other sources given that this would then trigger a claim for payment by the compensation scheme.

Unpaid EDR determinations

FOS appreciates the complexity of dealing with current unpaid EDR awards of compensation. The key question is whether they should be included with, or separated from, other potential claims that could have come to FOS but did not progress because the firm was in liquidation or were not pursued because there was no reasonable prospect of any payment. We note that these latter examples are part of the Panel's consideration of appropriate redress mechanisms for past disputes.

We consider at a minimum, compensation should be paid (in part or in full) to consumers who have existing unpaid EDR determinations.¹¹ A preferable course would be to treat these as a class of known and quantified claims as part of the past redress mechanism.

The reasons for this are that:

- It would allow the new compensation scheme of last resort to be wholly prospective – one handling all unpaid awards made from the commencement of the new EDR scheme.
- If subject to the time limits of the EDR scheme, there would be a number of eligible claimants who are now outside the six-year time limit and there will be more in this category before the compensation scheme of last resort begins.
- Funding of a prospective scheme by all current industry participants has the benefit of linking funding with ongoing and future performance obligations of existing (rather than past failed) financial firms.
- It would address the equity arguments of treating those with such claims on an equal footing with those whose claims may not have been progressed or for those who did not submit a dispute given there was little or no chance of payment when a firm was already in liquidation.

However, if no viable scheme for past redress is implemented, we consider that existing unpaid determinations should be covered by the new compensation scheme of last resort as a special transitional category.

If this is considered the most effective way to address existing unpaid EDR determinations, for this 'transitional class' of claimants, the applicable timeframe should be longer than the EDR six-year time limit because already we have unpaid determinations that have fallen outside the limitation period within which recovery can be made.¹²

¹¹ As at 2 May 2017, the value of FOS unpaid determinations was \$13.9m (excluding interest) cover 38 Financial Service Providers, 151 determinations and 214 consumers.

¹² Due to the time that has elapsed approximately \$1.1m worth of unpaid claims determinations accepted prior to March 2011 have become statute- barred.

Redress for past disputes

As a matter of principle, FOS agrees that where a consumer or small business has suffered an uncompensated loss caused by misconduct of an FSP, some form of recourse to redress should be available.

We accept, however, that designing a mechanism for past dispute redress that meets the Panel's guiding principles is no easy task.

In response to the Panel's areas of focus on past dispute redress, we make the following general observations and comments:

- We consider that past redress would best be addressed by a scheme separate to the prospective compensation scheme of last resort with its own funding arrangements and administration.
- Because no clear legal claim for compensation would exist for the disputes that have not been through an EDR scheme, the courts or tribunals (for any of the reasons set out by the Panel), the scheme would require specialist expertise to determine the merits of a claim.
- Like almost all compensation schemes that operate in Australia and overseas, appropriate monetary limits and compensation caps should be established. These provide the framework to forecast the likely pool of funds that would be required to meet past redress claims and also work to manage expectations for consumers and small businesses that are seeking redress.
- Similarly, timeframes for the age limit of claims and an eligibility window should be established. FOS considers that the timeframe for past redress should be longer than the EDR six-year time limit because we already have unpaid determinations that have fallen outside the limitation period within which recovery can be made.
- We acknowledge that it may not be possible to fully compensate all claimants for losses arising from past disputes involving misconduct by the FSP. If this is the case, FOS considers that a priority mechanism based on a hardship assessment would be appropriate.

Appendix 1: Response to Panel Questions

	Panel questions	FOS response
Scope and principles		
1	Is the Panel's approach to the scope of these issues appropriate? Are there any additional issues that should be considered?	Yes
2	Do you agree with the way in which the Panel has defined the principles outlined in the Review's Terms of Reference? Are there other principles that should be considered?	Yes, and FOS considers that the principles should apply to both the compensation scheme of last resort and mechanisms for addressing redress for past disputes.
Existing compensation arrangements		
3	What are the strengths and weaknesses of the existing compensation arrangements contained in the <i>Corporations Act 2001</i> and <i>National Consumer Credit Protection Act 2009</i> ?	Refer to the body of our submission and our previous submissions at this link .
4	What are the strengths and weaknesses of the National Guarantee Fund, the Financial Claims Scheme and Part 23 of the <i>Superannuation Industry (Supervision) Act 1993</i> ?	Refer to the body of our submission and our previous submissions at this link .

	Panel questions	FOS response
5	Are there other examples of compensation schemes of last resort that the Panel should be considering?	None that we have identified outside the Panel's own research, as reported.
Evaluation of a compensation scheme of last resort		
6	What are the benefits and costs of establishing a compensation scheme of last resort?	<p>The benefits include:</p> <ul style="list-style-type: none"> • Key gaps in consumer protection would be addressed. • The scheme would be accessible to consumers and small businesses that have an eligible and legal claim to compensation but have not been paid due to a financial firm's inability to meet its obligations to the consumer. • A compensation scheme aligned to the EDR scheme's jurisdiction would meet the expectations of consumers and small business about the level of compensation they might receive, even in cases of FSP insolvency. • A scheme that is funded by all AFSL and ACL holders and MIS operators will be more affordable than one aimed at a particular sector of FSP.
7	Are there any impediments in the existing regulatory framework to the introduction of a compensation scheme of last resort?	Yes, refer to the body of our submission.
8	What potential impact would a compensation scheme of last resort have on consumer behaviour in selecting a financial firm or making decisions about financial products?	Limited. Given the time and effort involved in making a claim, it would be highly unlikely that a consumer's decision would be influenced by the existence of a scheme at the time of deciding a financial course of action.

	Panel questions	FOS response
9	What potential impact would a compensation scheme of last resort have on the operations of financial firms?	Limited, so long as there is a requirement that a firm's own capital must be depleted first, before the scheme's funds are relied on for consumer redress. The application of stronger ASIC banning powers would act as a disincentive for firms to change their financial operations due to the existence of a compensation scheme of last resort.
10	Would the introduction of a compensation scheme of last resort impact on competition in the financial services industry? Would it favour one part of the industry over another?	FOS considers industry is better placed to respond to this question.
11	What flow-on implications might be associated with the introduction of a compensation scheme of last resort? How could these be addressed to ensure effective outcomes for users?	Refer to FOS's response to questions 8 and 9 above and to the body of our submission.
12	What other mechanisms are available to deal with uncompensated consumer losses?	FOS has analysed many features of the current compensation framework in our previous submissions. These include policy enhancements to AFS license obligations, the role of PI insurance, the professionalisation of financial advice and coverage of existing compensation schemes. These measures contribute to the consumer protection framework and while they are complementary to a last resort compensation scheme, they are not a substitute for it.
13	What relevant changes have occurred since the release of Richard St John's report, <i>Compensation arrangements for consumers of financial services</i> ?	See above.

	Panel questions	FOS response
Potential Design of a compensation scheme of last resort		
14	What are the strengths and weaknesses of the ABA and FOS proposals?	Refer to the body of our submission.
15	What are the arguments for and against extending any compensation scheme of last resort beyond financial advice?	Refer to the body of our submission.
16	Who should be able to access any compensation scheme of last resort? Should this include small business?	FOS considers that all consumers and small businesses that could have an eligible but unpaid determination from an EDR scheme, court or tribunal (so long as the claim aligns with the prevailing claims limit and compensation cap of the EDR scheme at the time of the court/tribunal award) should be able to access the compensation scheme of last resort.
17	What types of claims should be covered by any compensation scheme of last resort?	FOS considers that the scheme should cover providers of all forms of financial services, financial advice or financial products such as derivatives, foreign and payment products, foreign exchange contracts, general insurance, securities, managed investment schemes, life insurance products, superannuation, and other financial investment products in respect of which there has been a determination in favour of the claimant by an EDR scheme or court, or tribunal of competent jurisdiction.
18	Should any compensation scheme of last resort only cover claims relating to unpaid EDR determinations or should it include court judgments and tribunal decisions?	See above.
19	What steps should consumers and small businesses be required to take before accessing any compensation scheme of last resort?	Consumers and small businesses should only have to provide the details of the existence of an unpaid eligible award of compensation from the EDR scheme or court/tribunal to the scheme's administrators. Given the considerable stress arising

	Panel questions	FOS response
		from pursuing their dispute and having an award in their favour unpaid, they should not be expected to go through more hurdles to access redress than necessary. It should be the scheme itself that conducts relevant checks to verify a firm's inability to pay.
20	Where an individual has received an EDR determination in their favour, should any compensation scheme of last resort be able to independently review the EDR determination or should it simply accept the EDR scheme's determination of the merits of the dispute?	In FOS's view, the EDR scheme's determination of the merits of a dispute should stand. A new review of the merits would increase the administrative costs of the scheme and would add time and stress to the consumer or small business that already has a valid claim for redress.
21	If a compensation scheme of last resort was established and it allowed individuals with a court judgment to access the scheme, what types of losses or costs (for example, legal costs) should they be able to recover?	The criteria should be the same as the prevailing EDR jurisdiction at the time of the court judgment.
22	Should litigation funders be able to recover from any compensation scheme of last resort, either directly or indirectly through their contracts with the class of claimants?	FOS does not support the use of compensation funds being made available to litigation funders.
23	What compensation caps should apply to claims under any compensation scheme of last resort?	The compensation caps and claims limits of the EDR scheme and the compensation scheme should be the same.
24	Who should fund any compensation scheme of last resort?	FOS does not have a preferred view on how the compensation scheme of last resort should be funded. Over recent years FOS has provided high level modelling on how a scheme could be funded by industry and if this is the agreed funding mechanism,

	Panel questions	FOS response
		<p>we consider that the costs of establishing and maintaining a scheme should be spread across all financial service providers.</p> <p>We note that given that ASIC has moved to industry levy funding arrangements, funding for the compensation scheme could form part of the ASIC industry levy.</p>
25	Where any compensation scheme of last resort is industry funded, how should the levies be designed?	<p>For examples of how a scheme could be funded, please refer to FOS papers and submission at the following links:</p> <p>Updated proposal for a compensation scheme of last resort May 2015- http://www.fos.org.au/public/download/?id=42223&sstat=343438</p> <p>FOS FSI interim submissions with Grant Thornton costings (Appendix 2)- http://www.fos.org.au/custom/files/docs/fos-submission-to-fsi-interim-report-august-2014.pdf</p>
26	Following the payment of compensation to an individual, what rights should a compensation scheme of last resort have against the firm who failed to pay the EDR determination?	The compensation scheme of last resort should be able to recover the compensation amount and costs of administering the payment to the consumer or small business from the firm that failed to pay, should that firm become solvent.
27	What actions should ASIC take against a firm that fails to pay an EDR determination or its directors or officers?	Relevant banning action should apply to the directors and officers of a firm that fails to pay an EDR determination and the ability for them to be directors and officers of new firms curtailed. ASIC's powers should be enhanced to facilitate this.
28	Should any compensation scheme of last resort be administered by government or industry? What other administrative arrangements should apply?	To be successful, an industry-based scheme would require sufficient broad-based industry support with general agreement on key design features such as scheme coverage, funding and governance. Where there is a diversity of views across industry sectors on these key design features, a statutory model would be the more viable approach.

	Panel questions	FOS response
		We note in our submission that the administrative costs should be kept to a minimum and this may be achieved through leveraging off the administrative infrastructure of existing compensation schemes.
29	Should time limits apply to any compensation scheme of last resort?	FOS considers that EDR timeframes should apply to the compensation scheme of last resort, as noted in the body of our submission.
30	How should any compensation scheme of last resort interact with other compensation schemes?	FOS considers that the scheme administrators should establish if the claim is more appropriately handled by an alternative compensation scheme and facilitate the direction of the claim to that scheme.
31	Are there any aspects of compensation schemes of last resort in other sectors and jurisdictions that should be considered in the design of any compensation scheme of last resort?	In regard to funding arrangements, FOS recommends that the Panel reviews the outcome of the UK FCA compensation scheme funding model consultation to see if the response to the consultation has useful insights for the design of the compensation scheme of last resort.
Legacy unpaid EDR determinations		
32	What existing mechanisms are available for individuals who have legacy unpaid EDR determinations to receive compensation?	Refer to the body of our submission.
33	Is there a need for an additional mechanism for those with legacy unpaid EDR determinations to receive compensation? If so, who should fund the payment of the legacy unpaid EDR determinations?	Refer to the body of our submission.

	Panel questions	FOS response
Redress for past disputes		
34	Other than circumstances that may be covered by a compensation scheme of last resort (such as outstanding unpaid determinations), what kinds of circumstances have given rise to past disputes for which there has not been redress? Are there any other classes besides those identified by the Panel?	FOS considers that the Panel's identification of the circumstances that have given rise to past disputes for which there has been no redress is accurate.
35	What evidence is there about the extent to which lack of access to redress for past disputes is a major problem?	Unpaid EDR disputes together with evidence of consumers who are currently seeking redress for financial loss through the courts.
36	Which features of other approaches established to resolve past disputes outside of the courts (whether initiated by industry or government) might provide useful models when considering options for providing access to redress for past disputes in the financial system?	We consider that reference to ASIC policy on firm-specific remediation along with an evaluation by ASIC of the lessons of recent firm remediation efforts might provide useful guidance to how a standalone scheme to redress past disputes might be structured.
37	What are the benefits and costs associated with providing access to redress for past disputes?	Primarily key gaps in consumer protection would be addressed and individual consumers and small businesses would have received access to justice after several years of pursuing legitimate claims for compensation covering financial loss as the result of the action of an FSP.
38	Are there any legal impediments to providing access to redress for past disputes?	Yes. State-specific legislation sets out the limitation periods which may apply to past disputes and other claims, whether or not a determination was made. FOS has a number of unpaid determinations dating to January 2010. Where determinations

	Panel questions	FOS response
		are more than six years old, claims in respect of those determinations will be statute-barred.
39	What impact would providing access to redress for past disputes have on the operations of financial firms?	Refer to our response to question 8.
40	What impact would providing access to redress for past disputes have on the professional indemnity insurance of financial firms?	Refer to our response to question 9.
41	Would there be any flow-on implications associated with providing access to redress for past disputes? How could these be addressed in order to ensure effective outcomes for users?	Industry and consumer bodies would be better placed to answer this question.
42	What are the strengths and weaknesses of the Westpac proposal?	A limitation of the Westpac proposal is that it deals only with past losses arising from disputes with banks rather than across the financial sector more broadly.
43	What range of parties should be provided with access to redress for past disputes? Should all of the circumstances described in paragraphs 133-144 be included?	FOS considers that if the compensation scheme of last resort does not address existing unpaid EDR determinations, these should be added as an additional class of the range of circumstances referenced at paragraphs 133-144.
44	What mechanism should be used to resolve the dispute and what criteria should be used to determine which disputes can be brought forward?	Refer to our high level observations in the body of the submission.
45	What time limits should apply?	Timeframes for the age limit of claims and an eligibility window should be established. FOS considers that the timeframe should

	Panel questions	FOS response
		be longer than the EDR six-year limit as already we have unpaid determinations that have fallen outside the limitation period within which recovery can be made.
46	Should any mechanism for dealing with past disputes be integrated into the new Australian Financial Complaints Authority (once established) or should it be independent of that body?	FOS considers that mechanisms would best be addressed by a scheme separate to the prospective compensation scheme of last resort and separate to the new Australian Financial Complaints Authority, with its own funding arrangements and administration.
47	Who should be responsible for funding redress for past disputes? Is there a role for an ex gratia payment scheme (that is, payment by the Government)?	FOS does not have a preferred view on how past redress mechanisms should be funded.
48	Should there be any monetary limits? If so, should the monetary limits that apply be the EDR scheme monetary limits?	Refer to FOS's high level observations in the body of the submission.
49	Should consumers and small businesses whose dispute falls within the new (higher) monetary limits of the proposed Australian Financial Complaints Authority but was outside the previous limits be able to apply to have their dispute considered? Should access to redress for past disputes be provided through a transition period whereby the higher monetary limits are applied for a defined period retrospectively? If so, what would be an appropriate transition period?	FOS considers that redress mechanisms for past disputes should operate separately from the new EDR scheme, including references to its jurisdiction, subject to the comments in the body of the submission about current unpaid FOS determinations.

	Panel questions	FOS response
50	If it is not possible to fully compensate all claimants, should a 'rationing' mechanism be used to determine the amounts of compensation which are awarded? Should such mechanism be based on hardship or on some other measure?	FOS considers that a priority mechanism based on a hardship assessment would be appropriate.
51	Are there any other issues that would need to be considered in providing access to redress for past disputes?	<p>Our approach to developing our submissions is evidence-based to the extent practicable, using available data or our dispute experience. This is why we have kept our comments in relation to mechanisms for past dispute redress at a general level, because FOS data and dispute experience is restricted to EDR disputes.</p> <p>A key challenge for the Panel will be to identify the data that helps to assess the likely amount of compensation involved to determine the required funding.</p>