

6 October 2016

EDR Review Secretariat
Financial System Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: EDRreview@treasury.gov.au


Dear Members of the EDR Review Panel

EDR REVIEW

I would like to firstly thank the Review Panel for the opportunity to provide comments on the performance of the Financial Ombudsman Service.

My submission is attached, and I would be pleased to elaborate further on any aspect of my submission as required.

Yours sincerely



Steve O'Reilly
oreillys@aanet.com.au

SUBMISSION TO EDR REVIEW PANEL

1. Focus

The focus of this Submission is the handling of investment-related disputes by the Financial Ombudsman Service (“FOS”).

2. Executive Summary

In this Submission, I advance the proposition that FOS is neither a fair nor an independent dispute resolution service, and suggest that a major overhaul of the dispute resolution system is warranted.

The above proposition is based not only on my several dealings with FOS over many years but also on extensive statistical analysis of FOS decisions, and a consideration as to whether the observed outcomes are reasonable.

The only conclusion that can be drawn from the attached statistical analysis is that FOS is neither a fair nor an independent dispute resolution service and that FOS routinely uses its position to protect the interests of its members.

Such a conclusion is not surprising when one considers that FOS has an untenable conflict of interest in being funded by members, and having a relationship with those members, and then having to determine cases brought against those members by individuals who are unknown to FOS.

3. Personal Background

I am an Actuary with more than 30 years of professional experience in financial services. During my career, I have worked for life insurance companies, fund managers and superannuation funds, both in Australia and overseas, and have held several senior management positions, most recently at CFO and director level.

I am also a principal of the Prime Trust Action Group, an organisation with more than 6,500 members formed in 2010 following the collapse of the Prime Retirement & Aged Care Property Trust and associated investor losses of more than \$500m. With the assistance of litigation funders, several legal proceedings against Prime Trust’s former directors, advisers and other parties are currently being pursued through the Courts.

4. Investment Landscape

Review Panel Members will of course be well aware of the massive investor losses suffered in recent years due to the collapse of various schemes, including Westpoint, Storm Financial, Prime Trust, Rubicon, Centro, MFS, City Pacific, Trio Capital, Lift Capital, Equititrust, and LM Investments to name just a few. What is perhaps less well known is the extent to which fund managers and Responsible Entities are able to engage in sharp practices and manipulate the trusts they manage for their own benefit, despite it being a requirement of the Corporations Act (s601FC) that trustees:

- (1) act in the best interests of investors; and
- (2) prioritise the interests of investors if there is any conflict with their own interests.

Having held discussions with hundreds of investors over the last several years, the common perception amongst investors is that ASIC is an inefficient and ineffective organisation which is unable or unwilling to uphold the Corporations Act and which continues to turn a blind-eye to rampant white-collar crime that has been allowed to proliferate in this country. Similarly, investors perceive FOS as a biased organisation which fails to thoroughly and independently determine disputes, an organisation which routinely overlooks or dismisses key evidence, an organisation that prefers to overlook instances of fund managers engaging in misconduct and sharp practices, an organisation which will often go to great lengths or bend over backwards to find an excuse for favouring the fund manager over the claimant, and an organisation which prioritises the interests of its members ahead of the interests of claimants.

It is a sad indictment on the current Australian financial system that the vast majority of investors that I have spoken to have promised to never again invest in any managed investment scheme. Many investors have told me that they have completely lost confidence in investment markets, in the promoters and managers of managed investment scheme managers and, most importantly, in ASIC and FOS. Based on their experience with various collapsed trusts, investors have formed the view that scheme promoters and fund managers are able to prioritise their own interests ahead of the interests of investors with complete impunity.

Many investors, including myself, have formed the view, based on personal experience, that:

- investors bringing a dispute to FOS are likely to be scammed twice, once by the fund manager, and a second time by FOS itself in unfairly promoting and defending the interests of its constituent members even when faced with compelling evidence of member misconduct;
- even in those rare cases where FOS is unable to determine a case in favour of a fund manager, including cases which are not contested or where the fund manager does not cooperate, several discretionary adjustments are routinely adopted by FOS which serve to arbitrarily and substantially reduce compensation amounts;
- FOS is an elaborate charade designed to give the appearance of independently and fairly determining disputes but in reality is an organisation that has become captive to the financial interests of its members;
- FOS is not an “*Ombudsman*” in the usual sense of the word as FOS fails to operate as a public advocate and unfairly favours its own constituents at the expense of the public.

5. Investment Dispute Characteristics

Investment disputes differ from the general disputes referred to FOS in two significant ways:

- (1) Whereas many of the disputes which are referred to FOS are for modest amounts of compensation, investment disputes differ because the amounts invested are typically quite large which naturally flows through to large amounts of compensation being sought by the claimant;
- (2) Investment disputes often centre on alleged misconduct by the fund manager or Responsible Entity (whether it be a defective Product Disclosure Statement, misleading and deceptive conduct, breaches of the Constitution, breaches of the Corporations Act, or failure to exercise reasonable care), and therefore have the potential to create a precedent through which other investors can lodge similar claims.

It is noted that complaints lodged to FOS by investors against financial advisers can also be for large amounts of compensation, but the circumstances are usually unique to that dispute and therefore do not create a precedent which other clients may seek to lodge similar claims.

As a result of the above two factors, namely claim size and establishing a precedent, fund managers and Responsible Entities have a strong incentive to ensure that investment claims lodged to FOS are unsuccessful.

6. Investor Options

When faced with an investment dispute, and a belief that an investor has suffered loss as a direct consequence of the actions of the fund manager, an investor essentially has five options, each of which is problematic as outlined below:

Option	Course of Action	Obstacles
1	Lodge a dispute with the fund manager and escalate to FOS as necessary	Refer Submission below
2	Report the matter to ASIC and request ASIC intervention	ASIC tends to only intervene in rare cases, quoting resource constraints, usually only intervenes when the investment vehicle has entered liquidation, and has a poor track record in prosecuting cases
3	Take legal action	Prohibitively expensive, beyond the capacity of all but the wealthiest of investors, and often an extremely stressful and soul-destroying experience for an individual investor
4	Seek litigation funding for a class action	Only viable for large claims, and with control of the claim ceded to the funders, and once legal and success fees are deducted, there may be only a small amount of compensation for investors (if any)
5	Report the matter to the media	Fund manager will often threaten, and may initiate, defamation proceedings against investor if the investor takes their concerns to the media

As shown above, faced with the quite often insurmountable hurdles in pursuing Options 2-5, investors often choose to pursue their claims through FOS. However, as demonstrated below, the pursuit of investment claims through FOS is highly likely to be unsuccessful.

7. Concerns about FOS Dispute Resolution Process Based on Personal Experience

Over the last decade or so, I have had considerable experience in dealing with investment disputes and in dealing with FOS.

Several disputes were not contested by the fund manager and resulted in confidential settlements without the need for the FOS to determine the matters in dispute.

Another dispute was escalated to FOS at a time when the fund was still operating but the fund subsequently collapsed before FOS had determined the matter. The Liquidators did not contest the dispute and agreed that there had been misconduct by the fund manager. Despite the dispute not being contested, it took FOS 28 months to issue a Determination and award compensation, by which time the funds available under the fund manager's professional indemnity insurance policy had been exhausted. As a result, despite an award of compensation by FOS, no compensation was actually paid. In addition, despite providing clear evidence of other well-performed investments that I had invested in, and in which I would have invested further had I not invested in the fund in dispute, FOS decided to unilaterally reduce the compensation awarded on the unwarranted and unilateral assumption that I would have invested in other funds that would have also performed poorly.

Another dispute related to a single asset property trust which had embarked on a substantial expansion. The fund manager committed to only acquire properties consistent with its flagship asset, a new, prime, state of the art, commercial building in Sydney. However, the fund manager then proceeded to dramatically expand the portfolio, rapidly acquiring seven additional properties, including properties more than 20 years old, properties in suburban locations and properties which were tenanted by related parties, and incurred substantial losses on these acquisitions. In support of my dispute, I provided a detailed outline of the extent to which investors had been misled and deceived about the investment strategy. I also provided testimony from a former employee of the fund manager, who confirmed that staff had a financial incentive to increase the size of the fund and to depart from the investment strategy. Other investors had also initiated disputes in relation to the same matters such that the potential payout for the fund manager, if all disputes were successful, exceeded several million dollars. Surprisingly, despite what I and others considered to be compelling evidence against the fund manager, FOS chose to overlook the fund manager's commitments regarding asset quality for new acquisitions, and ruled that the evidence from the former employee could not be considered, and therefore determined the disputes in favour of the fund manager.

Another dispute concerned a trust with a five-year term but which had continued to operate for more than 11 years. The dispute concerned whether the fund manager had extended the term of the trust beyond the initial five-year term, and whether investors had been denied their Constitutional right to vote on any further extension of the trust's term beyond seven years. In support of the dispute, I provided a signed letter from the Chairman of the fund manager which contradicted the fund manager's submissions to FOS and effectively confirmed that the fund manager had acted inappropriately. Despite what I considered to be compelling evidence of fund manager misconduct, FOS chose to ignore the Chairman's letter and decided the dispute in favour of the fund manager.

I would be pleased to provide further details of the above disputes as required.

8. FOS Independence

After having two disputes decided in favour of the fund manager despite what I considered to be strong cases, I had initially thought that perhaps I had just been unlucky, and I was cognisant of not drawing hasty conclusions based on a small sample size.

However, I decided to investigate further to determine the likelihood of FOS deciding cases in favour of the fund manager (or Financial Services Provider, "FSP", using the description commonly adopted by FOS) and to my amazement, the results were truly extraordinary.

Using the search engine available on the FOS website, I was able to compile a list of contested investment related disputes and record the results of each case.

This task was more difficult than I expected as many cases could not be found under the usual search fields, and many disputes relating to advice from a financial adviser were aggregated together with disputes against a fund manager.

Two extensive searches of the FOS database were undertaken in order to collate a significant and statistically reliable number of contested investment disputes. A tabulation of all of the investment disputes provided by the searches is provided in Attachment 1, and details about the searches undertaken is provided in Attachment 2. These searches produced a total of 271 disputes (including duplicates). Each case was then individually reviewed to select only funds management disputes and remove the many disputes which related to financial advice, other extraneous matters, or duplicate cases.

The results of these searches are presented in the following table:

Contested Disputes	Decisions <i>Wholly</i> in Favour of Claimant	Split Decisions	Decisions <i>Wholly</i> in Favour of Fund Manager	Total Decisions
Search 1	2	3	36	41
Search 2	1	2	17	20
Total	3	5	53	61
	5%	8%	87%	100%

Only 5% of claimants were wholly successful in their claims compared to 87% of Fund Managers who were wholly successful in completely avoiding the payment of compensation. The remaining 8% of cases were split decisions (ie. decided partly in favour of the claimant or including an adjustment for a deemed contribution by the claimant to the losses incurred), with the compensation awarded for these five cases, as a percentage of the compensation sought, being 43%, 28%, 6%, 5% and 0%.

It is also noted that one of the decisions wholly in favour of the claimant and one of the split decisions were cases where the FSP did not cooperate with, or respond to, FOS (refer Dispute 242664, para 19, "*FOS's attempts to obtain further information from the FSP were unsuccessful*", and Dispute 208511, para 17, "*The FSP did not respond to the Recommendation*"). Arguably these cases should be excluded from the sample as the dispute became uncontested, in which case the disparity of outcomes in favour of fund managers would be even greater than as shown in the above table.

By assigning a score to each claim based on the amount of compensation awarded as a percentage of the compensation sought, for example, 1 for a decision wholly in favour of the claimant with full compensation, 0.5 for a decision to award 50% of the compensation sought, and 0 for a decision wholly in favour of the fund manager, a total score of 3.82 is produced $[(3 \times 1) + 0.43 + 0.28 + 0.06 + 0.05 + 0]$ out of a maximum possible score of 61.

It is noted that investors escalating a dispute to FOS are typically confident that they have a strong case and that they have good prospects of being successful. Investors take considerable time and trouble in investigating and researching their disputes and in collating and presenting their findings and in calculating the amount of compensation that they consider to be appropriate.

By lodging a dispute with the fund manager and then escalating the dispute to FOS, an investor is committing to spending a considerable amount of time in preparing their submissions and in responding to requests from FOS for further information over the next one to two years, in responding to submissions by the fund manager and in attending conciliation conferences etc. When escalating my own cases to FOS, based on the detailed research I had undertaken and the detailed presentation of the cases, I had expected that my prospects of success were in excess of 80%. Other investors I have spoken to have expressed similar sentiments.

Even if one was to conservatively assume that a claimant's prospects for success are only 50%, it is extraordinary to note that, of 61 separate and independent investment disputes, the expectation is that 30.5 cases (50%) would be decided in favour of the claimants. As shown above, only 3 claimants were wholly successful, a further 5 were only partially successful, and taking into account the amount of compensation awarded, the total number of successful claimants was only 3.8.

The issue that then arises is that, if the FOS dispute resolution process is fair (as FOS claims it to be), what is the probability that only 3.8 claimants are successful out of 61 claimants. Again making the conservative assumption that investors have a 50% chance of success, the expected result of these 61 cases forms a normal (or bell curve) distribution, with an expectation of 30.5 successes and a standard deviation of 3.90. Details of the calculations are provided in Attachment 3.

The issue is therefore what is the probability of achieving 3.8 successes only when the bell curve has a mean of 30.5 and a standard deviation of 3.90.

It is commonly known in statistics that almost all (99.7%) of cases fall within 3 standard deviations of the mean expectation (ie between 19 and 42 successes out of 61 cases), so the result of 3.8 successes is readily seen as a complete outlier.

Statistical tables reveal that the probability of achieving only 3.8 successes out of 61 trials is infinitesimal. A score of 3.8 is approximately 6.8 standard deviations away from the mean, and the probability of achieving such a result is nil (calculated to four decimal places).

Even if all disputes in which FOS fully or partly agreed with the claimant are counted as if these cases had been wholly successful with full compensation paid, the resulting 8 disputes is still more than 5.7 standard deviations away from the mean, and the probability of such a result is still nil (calculated to four decimal places).

The extensive analysis of investment dispute outcomes therefore leads to the following inescapable conclusion:

- **There is statistically no chance that FOS fairly determines investment disputes.**

Another way to emphasise the probability of witnessing almost every investment dispute being awarded to the fund managers is to look at say all recent disputes. Using the data presented in Attachment 1, and extracting all recent cases (those with Dispute Numbers of more than 300,000), a sample size of 21 disputes is produced. Incredibly, each of these 21 separate and independent disputes was decided wholly in favour of the fund manager.

If the FOS dispute process is fair, and using a conservative assumption that a claimant has a 50% chance of success, a string of 21 successive cases determined wholly in favour of the fund managers is akin to tossing a coin 21 times and producing 21 heads in succession. This leads to the following inescapable conclusion:

- **There is only a 1 in 2 million chance that the 21 successive investment disputes were determined fairly.**

9. FOS Response to Collective Actions Against Fund Managers

As mentioned above, in the event that an investment dispute is determined in favour of the investor, the fund manager is exposed to a potentially large liability in view of the precedent it creates, and the potential for other investors to lodge similar claims.

Where significant numbers of investors lodge claims to FOS at around the same time, the potential liability faced by the fund manager becomes real rather potential.

It is instructive therefore to consider the behaviour of FOS when faced with multiple claims against the same fund manager over the same issues.

I have been personally involved in one such case (Collective Action 1 below) where more than 50 investors lodged claims against a fund manager for misleading and deceptive conduct, and in specifically breaching its own investment mandate. When interrogating the FOS database to compile a library of investment disputes, I came across several other cases where similar collective claims were lodged to FOS against a single fund manager.

The results of these various collective actions was as follows:

Collective Action	FOS Dispute Numbers	No. of Claimants	Nature of Dispute	FOS Decision
1	246619, 281642	2 (plus 50 claimants had lodged disputes to the RE and were intending to pursue claims through FOS)	Alleged misconduct by RE in committing to only acquire properties consistent with the quality of its flagship asset (a new CBD prime commercial property) and then rapidly expanding the portfolio to acquire a string of second rate suburban properties leading to substantial losses	Cases determined in favour of FSP
2	241989, 251062, 251063, 251198, 251616, 251617, 251618, 251625, 277663	9	Alleged defective PDS and misleading continuous disclosure by RE as manager of various property funds	All cases determined in favour of FSP except one (Dispute 251063 recommended 28% compensation, with assumed 50% capital loss on alternative investments and assumed investor contribution of 20%)
3	255787, 256180, 264117, 265374, 267723	5	Alleged misconduct by the RE as managed of property syndicate and property fund	All cases determined in favour of FSP except one (Dispute 255787

				recommended 43% compensation, with assumed 50% capital loss on alternative investments and assumed investor contribution of 10%)
4	357084 – 357089 inclusive, 357091 – 357099 inclusive	15	Alleged defective disclosure by RE as managed of property syndicate and property fund	FOS made a determination that there was no remedy available to the claimants
5	269535	82	Alleged improper fees charged by the RE and improper reimbursements made from the fund to the RE	FOS recommended compensation of \$54 for each dispute (5% of amount claimed of \$1189)
6	364318	358	Alleged breaches of disclosure obligations by RE	FOS refused to consider the disputes

It is salient to note the following additional points:

- In Collective Action 1 above, the FSP placed enormous pressure on FOS and threatened to take FOS to Court if it continued to consider the disputes (copy of documents available on request). The Determination issued by FOS was wholly in favour of the FSP and did not address the key arguments raised by the claimants, and also refused to consider a crucial written submission from a former employee verifying the RE misconduct that had occurred.
- In Collective Actions 2 & 3, only one claimant in each case was partially successful.
- Collective Actions 4 and 6 were organised by solicitors but both summarily dismissed by FOS, who refused to consider the disputes.
- In Collective Action 5, claimants were 5% successful and 95% unsuccessful.
- The above collective actions involved a total of 521 claims, but only two investors (0.4% of the total) received anything other than a trivial amount of compensation (one at 43% and one at 28% of the compensation sought), 82 others received 5% compensation (being 95% unsuccessful) and the other 437 claimants were wholly unsuccessful.
- Not a single claimant out of 521 claimants received more than half of the compensation claimed.

10. Timeliness of FOS Process

Despite frequently repeated claims by FOS that claims are determined in a timely manner, the reality is that investors face an extremely lengthy dispute resolution process. Based on my experience with several disputes lodged with FOS, the likely steps include the following:

Step	Process
1	Upon receipt of dispute, FOS advises the investor that there is a large backlog of claims and that disputes may not be able to considered if they are assessed as falling outside the FOS Terms of Reference
2	Typically, there is a delay of several months before FOS decides whether the dispute falls within FOS jurisdiction
3	Once a dispute is confirmed as falling within the FOS Terms of Reference, FOS typically advises the investor that it will take some time before a Case Manager is allocated to investigate the dispute
4	Subsequently, the FOS Case Manager embarks on a lengthy investigation process
5	The Fund manager is frequently allowed by the Case Manager to receive extensions of time to provide submissions

6	Fund manager typically claims that dispute falls outside the FOS Terms of Reference (“TOR”) prompting a reconsideration of the jurisdiction issue
7	Lengthy delays are experienced in scheduling conciliation
8	Lengthy delays are experienced in the Case Manager preparing Recommendation
9	Lengthy delays are experienced in the FOS Panel Member preparing Determination

My experience of the delays experienced in FOS disputes has been as follows:

Dispute	Time Taken to Determine Dispute
1	28 months
2	21 months
3	12 months
Average Delay	20 months

Such delays in resolving disputes are simply unacceptable from a claimant’s point of view.

11. Exclusions under FOS Terms of Reference

Investors are generally informed in the relevant PDS that, if they have any issue with the fund manager, they can lodge a complaint and then, if the complaint is not resolved, they can escalate the matter to FOS.

As always, the devil is in the detail, and many investors find that, after escalating their complaint, they receive advice that FOS is unable to consider the dispute under the FOS Terms of Reference (“TOR”).

The TOR contains no less than 21 exclusions (section 5.1 of TOR), and act to severely restrict the ability of investors to pursue complaints against their financial services provider. Many cases are excluded from consideration and in other cases, the exclusions serve to restrict the scope and magnitude of an investor’s claim. In addition, FOS has the discretion to exclude disputes from consideration on various other grounds (section 5.2 of TOR).

Interestingly, FOS concedes that, over the last four years alone, more than 20,000 disputes were deemed by FOS to be outside the TOR and therefore dismissed (refer FOS Annual Review 2015-16, page 55).

It would appear that the TOR has been deliberately designed to minimise the exposure of Financial Service Providers to disputes, and a review of the exclusions is genuinely warranted.

12. FOS Discretion Exercised Against Claimants

It is disturbing to note the extent to which FOS applies a number of discretions in order to artificially reduce compensation amounts. Set out below are three practices commonly adopted by FOS which unfairly reduce compensation amounts and thereby favour Financial Service Providers at the expense of claimants.

(a) Reduction in Compensation for Distributions Received

In those rare cases where an investor claimant is successful, the approach commonly adopted by FOS is to reduce the compensation amount for any distributions received by the investor. This approach is fundamentally flawed as it confuses the income and capital elements of an investment.

In making an investment, an investor typically wishes to receive income on that investment as well as maintain or increase the capital value of the investment. However, the FOS approach effectively restricts the successful claimant to only receiving their capital back only.

The flaw in the FOS approach is readily seen by considering the following example. An investor commits \$10,000 to a fund and receives an income distribution of \$1,000 each year for ten years. The investment continues to be worth \$10,000 during the ten-year period at which point misconduct by the fund manager results in the investment now being worthless. The investor receives a determination in his favour and FOS calculates the loss as follows:

Initial Investment	\$10,000
Less Distributions Received (\$1,000 x 10 years)	\$10,000
Quantum of Loss	\$NIL

In this example, the investor has lost 100% of his capital but the discretion exercised by FOS deems that no loss has occurred. The FOS approach confuses the income and capital elements of an investment, and fails to consider the time value of money and, as such, unfairly favours the FSP at the expense of the claimant.

(b) Interest Awarded on Compensation Amounts

Where one party has suffered economic loss as a result of another party's actions, the usual practice, as commonly found in cases which proceed to Court, is for the quantum of loss to be established and then interest be applied to this amount at commercial rates.

It is interesting to compare the above approach to the practice adopted by FOS. In those extremely rare cases where a dispute is determined in favour of the claimant, the following table shows the interest rates applied to the losses:

Dispute	Year of Determination	Interest Rate Applied (pa)	FOS Discretion Exercised Against Investor
<i>Contested Cases</i>			
208511	2012	Not Applicable	
242664	2012	CPI	
251063	2014	CPI (and interest only applied to part of compensation amount)	
255787	2013	CPI	Interest from lodgement of claim to payment date only
288654	2014	CPI	

258534	2012	5%	
269535	2013	CPI	
291237	2014	CPI	
Uncontested Cases			
212722 ^	2012	5%	Interest applied only from date of acceptance of FOS Determination
223013 ^	2012	5%	Interest applied only from date of acceptance of FOS Determination
245241 ^	2013	5%	Interest applied only from date of acceptance of FOS Determination

^ Related cases

The above data demonstrates that FOS typically applied interest of 5% pa in cases up to and including 2012 and thereafter embarked on a policy of applying interest at CPI. Over the last several years, CPI has of course been low, typically at 2-3% pa. This discretion exercised by FOS is readily seen to be against the interests of claimants and clearly in favour of the interests of its members.

Even in cases where interest of 5% pa was applied, this rate is not consistent in indemnifying an investor for his losses. Of course, for an investor to be indemnified for losses, the interest rate needs to be a rate commensurate with the rate that an investor would usually earn from alternative investments. In this regard, it is noted that long-term returns from investments in shares and property in Australia have been of the order of 9-10% pa.

It is also noted that FOS has frequently exercised a discretion to shorten the period over which interest is payable. To fully indemnify an investor for losses, interest should of course apply from the time the loss was incurred. Instead, FOS routinely truncates the interest period at its discretion, a discretion that once again favours its members at the expense of claimants.

With FOS exercising a discretion to only apply interest at CPI, as this rate is lower than the interest rate that a fund manager or their insurance company can reasonably expect to earn, an incentive is created for the fund manager to unnecessarily delay the resolution of a dispute. Through FOS awarding interest at CPI for those rare cases decided in favour of claimants, the invidious situation arises where the longer a dispute takes to be resolved, the lower the cost for the fund manager and/or their professional indemnity insurers, and the less valuable the compensation awarded to the claimant.

It is also interesting to note that FOS has often applied a further discretion to minimise the period over which interest is payable as highlighted in the table above. Again, this discretion is in the interests of its members and against the interests of claimants.

(c) Unilateral Adjustments to Compensation Amounts

Of further concern is another significant discretion applied by FOS in determining compensation amounts. In those rare cases where investors have succeeded in their claims (often uncontested disputes), investors have suffered from the imposition by FOS of an assumed deduction from their compensation amount.

In Court proceedings, the compensation amount is based on the quantum of loss and interest at commercial rates is generally applied over the period between the date of loss and the date of settlement. However, FOS applies a different methodology which has had a marked adverse effect on the compensation amounts awarded, as demonstrated by the following three examples:

- In Dispute 245241, FOS unilaterally reduced the two compensation amounts by 46% and 60% respectively, on the unilateral and untested assumption that, had the investor not invested in the trust, he would have invested in other property trusts which had performed poorly over the same period.
- In Disputes 251063 and 255787, FOS arbitrarily reduced the amount of compensation by 50% on the assumption that the investor would have sustained substantial losses on alternative investments had they not invested in the fund in question (and then, to add insult to injury, also applied an assumed investor contribution factor of up to 20%).

In all three cases, the discretion exercised by FOS resulted in successful claimants not being fully indemnified for their losses, and provided a windfall benefit (reduction in liability) for the FSP.

It is submitted that the above discretion for alternative investment performance as applied by FOS represents flawed methodology. The quantum of loss is an objective amount and it is not appropriate nor desirable for FOS to subjectively adjust this amount based on what *they* consider the investor would have otherwise invested in. FOS promotes itself as a “*fair*” organisation, however, these discretions as applied by FOS unfairly favour its members at the expense of claimants. Alternative investments are irrelevant to establishing the quantum of loss, as they are in Court related matters. Interest at commercial rates should be applied to losses from the time that the loss was incurred until the time of settlement.

By artificially reducing compensation amounts, it is noted that all three discretionary adjustments as described above are clearly unfair to claimants as well as being clearly beneficial to FOS members.

13. Disdain of Fund Managers towards Investors

Although investors are of course clients of the fund managers, it is interesting to note that, upon an investor raising a dispute, the investor is usually immediately treated as anything but a client and often subjected to intimidation and various threats, including threats of legal proceedings, defamation proceedings etc.

I am currently involved in a dispute with a fund manager after the fund manager paid itself a performance fee (around \$5m) from the trust despite the long-term performance of the trust being mediocre at best. This performance fee was triggered by a unilateral change in the Constitution which had not been approved by investors. I have raised concerns about this performance fee on several occasions with the fund manager, who has refused to debate the issues and instead simply and repeatedly suggested that I should report the matter to FOS, perhaps knowing that they could argue that the case could not be considered by FOS if it is deemed to relate to management of the scheme as a whole (exclusion 5.1(i) of the TOR), and seemingly knowing that my prospects of being successful through FOS are miniscule. I would be happy to provide further information about this matter to the Panel as required.

It is submitted that, if FOS was an effective and independent organisation, then fund managers would not be able to treat clients with contempt as currently frequently occurs.

14. Misrepresentations by FOS

I would now like to address specific representations frequently made by FOS. Turning first of all to the FOS Mission Statement (page 3 of the FOS Annual Review 2015-16), FOS claims amongst other things to:

- *“fulfil an important community role”*
- *provide “an independent dispute resolution service in which people can place their confidence and trust”*
- *resolve disputes “in a cooperative, efficient, timely and fair manner”*
- *understand “all sides of a dispute without taking sides”*
- *make “decisions based on the specific facts and circumstances of each dispute”*

Based on the analysis of investment disputes provided above, I would submit that each of the above elements of the FOS Mission Statement represents at best a misleading and deceptive statement and at worst a complete falsehood. It is my strong belief that:

- FOS is failing to determine disputes in a fair manner and is therefore failing to fulfil an important community role;
- by FOS not independently determining disputes, investors can have no confidence whatsoever in FOS as an organisation;
- FOS does not resolve investment disputes efficiently, fairly or in a timely manner;
- in the overwhelming majority of cases, FOS sides with the fund manager (its member) and rules wholly against the claimants; and
- FOS often overlooks key facts and circumstances of disputes in order to arrive at a decision favouring its member.

It is also interesting to note the way in which FOS describes its stakeholders. One would think that, as FOS is a dispute resolution service, the primary stakeholder would in fact be the claimants. However, as per the heading *“Our Stakeholders”* (page 21 of FOS Annual Review 2015-16), FOS lists the following parties in order:

- 1 Financial service providers
- 2 Consumer representatives
- 3 Industry bodies
- 4 ASIC
- 5 Other government bodies
- 6 the Australian community

It is interesting to note the order in which the stakeholders are listed, and the unfortunate position of the community (ie. claimants) in last position.

It is also interesting to note that FOS has a continuing relationship with all stakeholders other than the individual claimants.

The failure to focus on claimants is also evident in the FOS Constitution, a document which makes frequent references to members and no specific mention of claimants.

I would also take issue with the use of the word “*Ombudsman*” as part of the FOS name given the connotations usually associated with this word. Wikipedia states that:

“An ombudsman or public advocate is usually appointed by the government or by parliament, but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or a violation of rights.”

(refer <https://en.wikipedia.org/wiki/Ombudsman>)

To the contrary, FOS has not been appointed by government or parliament, and by deciding the overwhelming majority of investment disputes in favour of its members, has failed to act independently and has failed to protect the interests of the public. It is submitted that the use of the word “*Ombudsman*” misleads claimants as it conveys an impression of authenticity, propriety and government involvement. Rather than “*represent the interests of the public*” and perform the role of “*public advocate*” as one would usually expect from an Ombudsman, the above statistical analysis provides compelling evidence that FOS regularly and routinely shuns the interests of the public, the very people an Ombudsman is meant to represent, instead choosing to prioritise the interests of its own members.

15. ASIC Requirements for EDR Scheme

As per ASIC Regulatory Guide 139, an approved external dispute resolution scheme is required:

- to be free for consumers;
- to be independent from industry;
- to be sufficiently resourced;
- to have fair decision-making processes.

Taking each of the above points in turn, I would comment as follows:

- In relation to investment disputes, it is important to note that the FOS process is not free for consumers. Upon receipt of an investment dispute, the fund manager (or Responsible Entity) typically engages legal representation to defend the claim, and then typically charges all such costs back to the fund. This leads to the invidious position where the investor is committing significant time and resources (and potentially legal and other out of pocket costs) to pursue a dispute, and is also paying, together with all investors, the costs of the defence.
- As shown in the statistical analysis above, there is nil probability of FOS being independent from industry.

- My own experience with FOS, with disputes taking up to 28 months to be determined, confirms that FOS is either not sufficiently resourced, and either deliberately slows down the dispute resolution process or does not prevent the FSP from deliberately stonewalling and otherwise delaying the dispute.
- As per the above analysis, there is nil probability that FOS determines disputes fairly.

In terms of “*Corporate Governance*”, “*FOS prides itself on independence, integrity and transparency in all aspects of its operations...*” (please refer to page 124 of the FOS Annual Review 2015-16). Again, I would dispute these claims in the strongest terms possible and contend that, as per the above analysis of investment disputes, FOS is not independent and is indeed captive to the interests of its members (fund managers).

16. FOS Conflict of Interest

It is of course unsurprising that FOS would tend to favour the interests of its members over the interests of claimants. Members provide the funding to enable FOS to operate by way of annual fees and dispute fees, with dispute fees contributing more revenue to FOS than annual fees. The analysis presented above provide demonstrable proof that the members are exerting undue influence on the outcome of disputes and it is ironic to note that the dispute fees provided by the members to FOS are typically charged back to the fund itself, so that the influence that may be brought to bear on FOS through the dispute fees is actually paid for by investors themselves.

It is further submitted that:

- FOS cannot claim to be independent as long as the members provide the funding.
- FOS cannot claim to be fair when the observed results from the investment disputes are beyond the realms of possibility.
- FOS has a continuing relationship with its members but no such relationship with claimants and this is consistent with FOS favouring its members in almost all cases.
- FOS Case Managers typically come from within the industry, have connections back to the industry, and may later return to the industry.
- The cases where FOS has chosen to overlook key documents and other compelling evidence only further damages FOS’ reputation.

17. Accountability and Transparency of FOS

Despite the often repeated claims by FOS that it is transparent and independent etc, it is interesting to note the following additional points:

- Claimants are denied the opportunity to complain about an Ombudsman, Panel or Adjudicator decision. On its website, FOS states that -

“Ombudsman, Panel and Adjudicator decisions are final and cannot be reopened for review. Once we have issued an Ombudsman, Panel or Adjudicator decision (a Determination), our involvement in the dispute comes to an end. We are not able to accept complaints about dispute-related issues or arguments about an Ombudsman, Panel or Adjudicator decision.... Our Complaints & Feedback process can only review complaints about our service” (refer <http://fos.org.au/about-us/feedback-about-our-service/>).

- Unlike the Financial Ombudsman Service in the UK, FOS does not disclose its annual financial statements, nor include a Remuneration Report in its published Annual Review.
- The FOS Constitution describes the rights of members, including the ability of members to change the Constitution etc, and there is no reference to the rights of claimants.
- The FOS Constitution records that the first objective of FOS is *“to establish, maintain and promote a dispute resolution scheme **for the Industry** to be known as the “Financial Ombudsman Service”*.

Each of the above points is strongly suggestive of a situation where the interests of claimants are secondary to the interests of FOS members.

18. Odds Stacked Against Investors

Based on the information as presented above, it is submitted that the odds are stacked against investors at every turn, as evidenced by the following key steps:

- FOS has an inherent conflict of interest by way of having a financial relationship with the Financial Service Providers (who provide the funding for FOS) but has no such relationship with the claimant
- FOS is able to use the many exclusions under its TOR to either exclude disputes or narrow the issues in dispute
- Lengthy delays are typically experienced in FOS ruling on jurisdiction and in assigning Case Managers
- The process of investigation by the Case Manager is typically a lengthy process
- FOS commonly allows the Financial Service Providers to delay proceedings
- Financial Service Providers commonly engage solicitors to defend disputes, with the associated costs being charged back to the trust (ie paid for by all investors)
- Lengthy delays are commonly experienced in preparing Recommendations or Determinations
- FOS will often overlook key evidence and documentation in support of claims
- Despite promoting itself as a fair and independent dispute resolution service, only around 5% of investors are wholly successful in their claims
- FOS typically applies a number of discretions or adjustments in determining compensation amounts, with each discretion having the effect of reducing the compensation amount for claimants and reducing the liability for FOS members
- Successful claimants are often unable to receive compensation due to the collapse of the trust or fund manager and inadequacy of PI insurance cover and lack of a universal compensation scheme
- Cases where a number of investors lodge similar claims are typically rejected by FOS

- Claimants can reject a Recommendation and request a Determination, but in almost all cases, the FOS Determination will provide the identical outcome to the Recommendation
- Claimants are unable to complain to FOS about the outcome of their dispute as the case is closed once the Determination is issued

19. Professional Indemnity Insurance

For many years, fund managers and other financial service providers have maintained only minimum levels of professional indemnity (“PI”) insurance cover. Despite an obligation under their Australian Financial Services Licence to maintain an “adequate” amount of PI cover, many fund managers are holding PI cover of \$5m whilst simultaneously managing hundreds of millions of dollars or more on behalf of investors.

In some cases, investors in collapsed trusts have received FOS determinations in their favour only to find the entire PI cover consumed by the directors, leaving nothing for investors. This points to a fundamental flaw in the PI concept, in striving to provide protection for two masters, both directors and investors. One alternative to address this issue would be to require all fund managers to effect a PI policy for the exclusive protection of investors and which could not be accessed by directors.

Given the industry track record in effecting only low amounts of PI cover, it is considered that fund managers would tend to effect only low amounts of cover for any investors exclusive PI policy.

The preferred option therefore is to establish a compensation scheme of last resort so that investors can seek recourse from this scheme to the extent that the fund manager is unable to satisfy a claim determined in favour of the investor. It is recommended that such a scheme should operate retrospectively.

20. General Insurance

In view of the compelling evidence presented above that the FOS treatment of investment disputes is neither fair nor independent, it occurred to me that possibly these systemic issues within FOS may also exist in other dispute areas.

A search was therefore undertaken of General Insurance disputes and using the search engine available on the FOS website, I was able to compile a list of general insurance disputes and record the results of each case.

A tabulation of all of the insurance disputes provided by the search is provided in Attachment 1, and details about the searches undertaken and the search fields is provided in Attachment 4. These searches produced a total of 51 disputes after reviewing each individual decision in order to focus purely on general insurance disputes and remove several disputes which related to broker or advice from brokers, and produced the following results:

Contested Dispute	Decisions <i>Wholly</i> in Favour of Claimant	Decisions Substantially in Favour of Claimant	Decisions Substantially in Favour of Insurance Company	Decisions <i>Wholly</i> in Favour of Insurance Company	Total Decisions
Total	5	4	6	36	51
	10%	8%	12%	71%	100%

Only 10% claimants were wholly successful in their claims receiving full compensation compared to 71% of Insurance Companies who were wholly successful in avoiding the payment of compensation. The remaining 10 cases were split decisions (ie. decided partly in favour of the claimant or the Insurance Company) with the majority favouring the Insurance Company.

By assigning a score to each claim based on the result of the dispute it is possible to determine an overall success factor. For example, a score of 1 is counted for a decision wholly in favour of the claimant with full compensation, and a score of 0 for a decision wholly in favour of the Insurance Company. For split decisions, as the determinations often did not provide sufficient information to calculate the compensation as a proportion of the compensation sought, a score of 2/3 was counted for cases where the determination was substantially in favour of the claimant and a score of 1/3 for cases substantially in favour of the FSP. The resulting total score was therefore 9.66 (refer Attachment 1 for further details) out of a maximum possible score of 51.

As with investment disputes, it is noted that investors escalating a general insurance dispute to FOS are typically confident that they have a strong case and that they have good prospects of being successful.

Even if one was to conservatively assume that a claimant's prospects for success are only 50%, it is extraordinary to note that, of 51 separate and independent investment disputes, the expectation is that 25.5 cases (50%) would be decided in favour of the claimants. As shown above, only 5 claimants were wholly successful, and taking into account the amount of compensation awarded in these cases and in the split decisions, the total number of successful claimants was only 9.7.

The issue that then arises is that, if the FOS dispute resolution process is fair (as FOS claims it to be), what is the probability that only 9.7 claimants are successful out of 51 claimants. Again making the conservative assumption that investors have a 50% chance of success, the expected result of these 51 cases forms a normal (or bell curve) distribution, with an expectation of 25.5 successes and a standard deviation of 3.57. Details of the calculations are provided in Attachment 5.

The issue is therefore what is the probability of achieving 9.7 successes only when the bell curve has a mean of 25.5 and a standard deviation of 3.57.

It is commonly known in statistics that almost all (99.7%) of cases fall within 3 standard deviations of the mean expectation (ie between 15 and 36 successes out of 51 cases), so the result of 9.7 successes is readily seen as a complete outlier.

Statistical tables reveal that the probability of achieving only 9.7 successes out of 51 trials is infinitesimal. A score of 9.7 is approximately 4.4 standard deviations away from the mean, and the probability of achieving such a result is nil (calculated to two decimal places) and only 0.0005% (calculated to four decimal places).

This analysis leads to the following inescapable conclusion:

- **There is only an infinitesimal (1 in 200,000) chance that FOS fairly determines general insurance disputes.**

21. Recommendations

In view of the above analysis, the following recommendations are submitted to the Panel for consideration:

(1) FOS should be immediately relieved of its responsibilities to determine investment disputes

As FOS has been found to lack the independence required for this task, a replacement body, preferably a government agency / tribunal or suitable independent professional body should be immediately empowered and resourced to consider all investment disputes.

(2) All investment disputes determined by FOS over the last 10 years should be reopened and considered by the new independent agency.

A review should also be undertaken of all cases where FOS has applied a discretion which has resulted in the claimant not being fully indemnified for their losses, with supplementary compensation payments as appropriate.

In addition, for cases determined in favour of the claimants, all legal and other defence costs previously charged by the fund manager to the fund must be remediated back to the fund by the fund manager.

(3) FOS should be relieved of its responsibilities to handle other categories of dispute (such as general insurance disputes) where there is demonstrable proof that the FOS process is neither fair nor independent, and an independent body should be appointed to review all relevant past determinations.

(4) An investigation should be conducted to determine the extent of malpractice within FOS and if necessary, FOS should be disbanded. This investigation should also identify all instances of improper and biased determination of disputes with appropriate action taken against all parties found to have engaged in improper conduct.

The findings in this Submission against FOS in the context of both investment and general insurance disputes are sufficiently egregious to cause a complete loss of public confidence in FOS and to cause irreparable damage to FOS' reputation. As such, even if investment and general insurance disputes are transferred to a new agency, there may be little point in FOS continuing.

- (5) A universal compensation scheme of last resort should be established as a priority, with funding provided by the fund managers from their own resources.**

This compensation scheme should operate retrospectively and encapsulate all previous unsatisfied FOS determinations.

- (6) In the event that FOS continues in operation, FOS should be:**

- **prohibited from claiming to be an independent dispute resolution service;**
- **compelled to disclose its fundamental conflict of interest in resolving disputes;**
- **compelled to remove the word “Ombudsman” from its name;**
- **compelled to publish its Annual Accounts and Remuneration Policy;**
- **confined to resolving a much narrower selection of disputes.**

- (7) Dispute outcomes should be published in full and reveal the identity of the Financial Services Provider in question.**

Currently FSPs are able to hide behind redacted determinations but, in the same way that Court judgments are fully and freely published, a move to fully disclose dispute outcomes will not only motivate FSPs to be more commercial in resolving disputes but also make the process more transparent and enable the faster resolution of cases.

- (8) The Terms of Reference of any new dispute resolution scheme should be significantly expanded and many of the current exclusions applicable to FOS disputes, which unfairly protect Financial Service Providers, should be removed.**

22. Conclusion

FOS has an inherent, and indeed an untenable, conflict of interest in being funded by its members and simultaneously passing judgment on whether those members have unfairly treated their clients. This overwhelming conflict of interest is a fatal flaw in a so-called independent dispute resolution service.

FOS’ track record in determining investment (and other) disputes provides demonstrable proof that it does not treat claimants fairly, is beholden to the interests of its members and has indeed become a mouthpiece for its members.

Based on the above statistical analysis, it is beyond the realms of possibility for the observed outcomes to have been independently generated.

By unfairly treating claimants as demonstrated in this Submission, irreparable damage has been done to the reputation of FOS and it is impossible for investors (and other claimants) to have any confidence whatsoever in FOS going forward.

A major overhaul of the dispute resolution procedures is warranted and indeed long overdue, including the potential disbanding of FOS, as is the establishment of a universal compensation fund for successful claimants who have not received compensation awarded in their favour.

(1) Investment Disputes

(a) Contested Cases

Search 1					Compensation	Compensation
Number	Case No.	Nature of Dispute	Successful Party		Awarded	Awarded
					(excl interest)	(% of Claim Amt)
1	208511	Capital protection	Split ^		\$0	0%
2	231958	Hedge fund misrepresentation	FSP			
3	241989	Defective PDS *	FSP			
4	242664	Mortgage Investment Scheme	Applicant		\$25,000	100%
5	246619	Misleading and deceptive PDS	FSP			
6	251062	Defective PDS *	FSP			
7	251063	Defective PDS *	Split ^^		\$34,539	28%
8	251198	Defective PDS *	FSP			
9	251616	Defective PDS *	FSP			
10	251617	Defective PDS *	FSP			
11	251618	Defective PDS *	FSP			
12	251625	Defective PDS *	FSP			
14	254269	Misrepresentations	FSP			
15	255787	Fund manager conduct **	Split ^^		\$43,426	43%
16	256180	Fund manager conduct **	FSP			
17	257578	Mortgage fund	FSP			
18	264117	Fund manager conduct **	FSP			
19	265374	Fund manager conduct **	FSP			
20	267723	Fund manager conduct **	FSP			
21	268013	Inadequate disclosure	FSP			
22	271009	Withdrawal fees	FSP			
23	271122	Capital proection and withdrawal fees	FSP			
24	276453	Warrants	FSP			

25	277270 Redemption	FSP		
13	277663 Defective PDS *	FSP		
26	279980 Inadequate disclosure in PDS	FSP		
27	288654 Hedge fund misrepresentation	Applicant	\$70,080	100%
28	306238 Inadequate disclosure	FSP		
29	344091 Misleading information	FSP		
30	352849 Failure to Investment strategy disclosed in PDS	FSP		
31	355855 Misleading information	FSP		
32	357084 Disclosure (plus Disputes 357085, 357086. 357087, 357088, 357089, 357091. 357092, 357093, 357094, 357095, 357096, 357097, 357098 (withdrawn), 357099 on same issues) ***	FSP		
33	357884 Misleading information and lack of care	FSP		
34	364318 Defective PDS (358 disputes in total) ****	FSP		
35	369471 Misleading information and breaches of Constitution	FSP		
36	371846 Mismanagement of mortgage investment scheme	FSP		
37	373422 Misleading representations	FSP		
38	384163 Inadequate disclosure	FSP		
39	396536 Inadequate disclosure in PDS	FSP		
40	412026 Defective PDS (plus Dispute 412113 on same issues)	FSP		
41	412710 Defective PDS (plus Dispute 422430 on same issues)	FSP		

Notes	^	FOS found PDS not defective (para 62) and FSP did not breach obligations (para 84), effectively no compensation paid by FSP as FOS requested FSP to use claimant's funds to discharge outstanding loan balance, and also transfer funds for the outstanding interest from the FSP to a related party
	^^	Claimant sought compensation of \$121,872 but FOS assumed that claimant would have otherwise suffered losses of around 50% investing in other property trusts, and further reduced the compensation by assuming an investor contribution of 20%
	^^^	Claimant sought compensation of \$102,161 (excl int) but FOS reduced this by 50% assuming that claimant would have otherwise lost around 50% through other property investments, and further reduced the compensation by applying an assumed investor contribution of 10%
		Base compensation (before interest) of \$43,426 compared to compensation sought of \$102,160 (before interest)
	*	These 9 cases are related but are recorded individually as the outcomes are different
	**	These 5 cases are related but are recorded individually as the outcomes are different
	***	These 15 cases are related and are counted as a single outcome, with all disputes being decided in favour of the FSP
	****	These 358 cases are related and counted as a single outcome with all disputes being decided in favour of the FSP

Search 2				Compensation	Compensation
Number	Case No.	Nature of Dispute	Successful Party	Awarded (excl interest)	Awarded (% of Claim Amt)
1	214483	Mortgage fund redemption	FSP		
2	215728	Loan to invest in trust	FSP		
3	226109	Debentures	FSP		
4	240086	Wrap account	FSP		
5	257891	Redemption	FSP		
6	258534	Conduct of property syndicate manager	Split &	\$2,831	6%
7	269535	Managed fund fees (total of 82 disputes) #	Split &&	\$54	5%
8	276651	Wrap account fees	FSP		
9	276968	Fees and reporting errors	FSP		
10	283759	Fixed term investment agreement	FSP		
11	291237	Portfolio warrants	Applicant	\$147,187	100%
12	292483	Super fund tax	FSP		
13	299118	Managed fund instalments	FSP		
14	301249	Investment loan	FSP		
15	327364	Investment account	FSP		
16	368694	Fees, misleading information and poor performance	FSP		
17	377020	Margin lending	FSP		
18	402869	Redemption	FSP		
19	405457	Portfolio statements	FSP		
20	416768	Redemption	FSP		

Notes & Bulk of investor's claim for \$48,903 in compensation was dismissed, with FOS awarding only \$2,831
&& Bulk of investors' claims for \$1,189 each in compensation were dismissed, with FOS awarding only \$54 each
These 82 cases are related and are counted as a single outcome, with all disputes being determined 5% in favour of the Applicant

(b) Uncontested Cases

Cases where the dispute was not contested (FSP in liquidation)

Number	Case No.	Nature of Dispute	Successful Party	Compensation Awarded (excl interest)	Compensation Awarded (% of Claim Amt)
1	212722	Misleading disclosure (plus Dispute 223013 and 245241 on same issues)	Applicants	\$269,205	66%

General Insurance Disputes

(a) Contested Cases

Number	Case No.	Nature of Dispute	Successful Party	Result #
1	204523	Home Insurance	Applicant (substantially)	0.67
2	212349	Motor Vehicle Insurance	Applicant	1.00
3	213062	Contents Insurance	FSP	0.00
4	213164	Home and Contents Insurance	FSP	0.00
5	213774	Travel Insurance	Applicant	1.00
6	215326	Rental Agreement	FSP	0.00
7	216481	Motor Vehicle Insurance	Applicant	1.00
8	220422	Motor Vehicle Insurance	FSP	0.00
9	220798	Home Insurance	FSP	0.00
10	232441	Home Insurance	FSP	0.00
11	234559	Home, contents and MV insurance	FSP	0.00
12	237534	Travel Insurance	FSP	0.00
13	243052	Home Insurance	FSP	0.00
14	243468	Motor Vehicle Insurance	FSP	0.00
15	257273	Home and Contents Insurance	Applicant	1.00
16	289939	Motor Vehicle Insurance	FSP	0.00
17	295593	Motor Vehicle Insurance	Applicant (substantially)	0.67
18	297962	Third party property insurance	FSP (substantially)	0.33
19	307033	Motor Vehicle Insurance	FSP	0.00
20	310692	Home and Contents Insurance	FSP	0.00
21	313547	Landlord insurance	FSP	0.00
22	322430	Motor Vehicle Insurance	FSP	0.00
23	330184	Motor Vehicle Insurance	FSP	0.00
24	330519	Household insurance	FSP (substantially)	0.33
25	338547	Group insurance	FSP	0.00

26	348345 Contents Insurance	FSP	0.00
27	353348 Travel Insurance	FSP	0.00
28	361809 Travel Insurance	FSP (substantially)	0.33
29	362536 Travel Insurance	FSP	0.00
30	368800 Contents Insurance	FSP	0.00
31	371094 Home Insurance	FSP	0.00
32	371960 Motor Vehicle Insurance	FSP	0.00
33	371985 Home and contents insurance	FSP	0.00
34	373503 Landlord insurance	FSP	0.00
35	373820 Motor Vehicle Insurance	Applicant (substantially)	0.67
36	375016 Motor Vehicle Insurance	FSP (substantially)	0.33
37	384279 Home and contents insurance	FSP (substantially)	0.33
38	385092 Medical expenses	FSP	0.00
39	389311 Home Insurance	Applicant (partly)	0.33
40	389555 Travel Insurance	FSP	0.00
41	396615 Travel Insurance	FSP	0.00
42	401138 Phone insurance	Applicant (substantially)	0.67
43	401423 Loan protection insurance	FSP	0.00
44	402407 Medical expenses	FSP	0.00
45	403231 Pet insurance	FSP	0.00
46	406420 Landlord insurance	FSP	0.00
47	415506 Group insurance	Applicant	1.00
48	417731 Building insurance	FSP	0.00
49	419951 Motor Vehicle Insurance	FSP	0.00
50	420074 Loan protection insurance	FSP	0.00
51	422860 Travel Insurance	FSP	0.00
	Total		9.66

Notes	#	Results are scored as follows:	
		Wholly in Favour of Applicant	1
		Substantially in Favour of Applicant	0.67
		Substantially in Favour of FSP	0.33
		Wholly in Favour of FSP	0

Notes on Split Decisions

- 204523 Applicant successful re malicious damage but not loss due to wear and tear
- 295593 Applicant's claim for \$25,000 not accepted but valuation process agreed to determine compensation amount
- 297962 No misrepresentation by FSP and FSP to pay Applicant \$235 for incidental items
- 330519 Claim for loss of rent denied, \$750 paid to Applicant for time taken to resolve
- 361809 Travel insurance claim denied, \$500 paid to Applicant for claims handling errors
- 373820 Higher sum insured payable but Applicant unsuccessful re waiver of excess
- 375016 Claim denied with refund of premium to Applicant
- 384279 FSP to pay \$350 to Applicant
- 389311 Storm damage covered but not accidental damage
- 401138 Phone to be replaced but no reimbursement of monthly fee

(b) Uncontested Cases

Nil

Attachment 2

Investment Disputes - Notes on Compiling Database of FOS Decisions Relating to Fund Managers / Responsible Entities

In preparing the database of FOS decisions, the following approach was used, with all searches done as at 26 September 2016.

For all searches, the “*Search Decisions*” tool on the FOS website was accessed:

<http://fos.org.au/resolving-disputes/decisions/>

Some difficulties were encountered in searching the FOS database as the categorisation of disputes appears to be inconsistent and disputes relating to investment advice are often aggregated with disputes relating to complaints against fund managers.

Search 1

An “*Advanced Keyword Search*” was done with the following parameters:

Find decisions that have all these words:

Product Line

Product Category

Issue Type

“*investment*”

“*Investments*”

“*Managed Funds*”

“*Disclosure*”

In order to restrict the searches to more recent times, the box “*Include decisions under earlier Terms of Reference*” was left unchecked.

This search revealed a total of 136 cases, however the majority of the cases were disputes between an investor and their financial adviser.

Search 2

An “*Advanced Keyword Search*” was done with the following parameters:

Find decisions that have all these words:

But don’t show decisions that have any of these unwanted words:
(in an attempt to exclude disputes relating to inappropriate advice)

Product Line

Product Category

“*investment*”

“*inappropriate*”

“*Investments*”

“*Managed Funds*”

In order to restrict the searches to more recent times, the box “*Include decisions under earlier Terms of Reference*” was left unchecked.

This search revealed a total of 135 cases, however the majority of the cases were disputes between an investor and their financial adviser.

Selection of Disputes

All cases produced by the above searches were then individually reviewed to select only those disputes against a fund manager / Responsible Entity. Many disputes related to investment advice from a financial adviser and these were excluded from consideration. Disputes concerning memberships, primary production and timeshare developments were also excluded.

The following table provides a listing of all disputes produced by the searches and the selection of disputes forming the basis of this submission.

Disputes not selected are marked as follows:

- "A" advice disputes
- "M" membership disputes
- "P" primary production disputes
- "T" timeshare disputes

Selected disputes are shown in bold italics, noting that many of the selected disputes appear in both searches.

Search 1			Search 2		
200885 A	241989 *2	322938 A	204019 A	267723 *3	357086
202390 A	242664	330844 A	208511	268013	357087
202417 P	243356 A	331084 A	212722 *1	269535 <i>(82 disputes)</i>	357088
203310 A	243637 A	333919 A	214211 A	271009	357089
203805 A	244271 A	338246 A	214483	271042 M	357091
208511	245241 *1	340571 A	215416 A	271122	357092
208997 P	245328 A	344091	215728	276453	357093
210311 A	246619	350067 T	217559 A	276651	357094
212722 *1	247314 A	352849	218097 A	276968	357095
213080 A	248200 A	355855	219714 A	277270	357096
214211 A	250644 A	357084 *4	221010 A	277663 *2	357097
214298 A	251062 *2	357085 *4	221410 A	279845 A	357099
214998 A	251063 *2	357086 *4	221535 A	279980	357884
215244 A	251198 *2	357087 *4	223013 *1	280464 A	360191 A
215416 A	251616 *2	357088 *4	223490 A	282165 A	361215 A
217559 A	251617 *2	357089 *4	223796 A	283759	368694
217603 A	251618 *2	357091 *4	224957 A	288654	369357 A
218097 A	251625 *2	357092 *4	226109	291237	369471
219466 A	254269	357093 *4	226543 A	292413 A	371846
219714 A	255787 *3	357094 *4	228117 A	292483	373422
220181 A	256180 *3	357095 *4	230266 A	299118	374637 A
220474 A	257578	357096 *4	230290 A	301249	377020
221370 A	264117 *3	357097 *4	231958	306238	377053 M
221410 A	265374 *3	357099 *4	239408 A	308559 A	384163
221535 A	267723 *3	357884	240086	308565 A	388323 A
222911 A	268013	360623 A	242664	313905 A	394669 A
223013 *1	271009	362850 A	243356 A	316191 A	395389 A
223249 A	271042 M	364318 <i>(358 disputes)</i>	244639 P *6	319351 P	395922 A
223490 A	271122	369471	244690 P *6	322121 A	396536
223796 A	276453	369787 M	244951 P *6	323704 A	399675 A

224414 A	277270	371846	245328 A	325069 A	400047 A
224873 A	277663 *2	372106 A	246455 A	327364	400917 A
224957 A	279845 A	373422	254269	328983 A	401335 A
225603 A	279980	377053 M	255146 A	331938 T	402869
226109	282165 A	384163	255283 A	335996 A	403424 A
226543 A	288654	395389 A	255787 *3	344091	403716 A
228036 A	301249	395933 A	256180 *3	345592 A	405467
229117 A	302486 P	396536	257572 A	346259 T *7	407625 A
231485 A	305644 A	400047 A	257578	346261 T *7	411207 M
231958	305857 A	405467	257714 A	350309 A	411890 A
234008 A	306238	412026 *5	257891	352849	412710 <i>(incl 422430)</i>
234384 A	312140 A	412113 *5	258534	353046 P	416768
237090 A	315773 A	412710 <i>(incl 422430)</i>	262261 M	354817 A	418015 A
239408 A	316191 A	422335 A	263263 A	355855	
241006 A	321807 A		264117 *3	357084	
241495 A	322117 A		265374 *3	357085	

Cases marked with asterisks (*1, *2 etc) indicate related cases and are counted as one case where the outcome is uniform.

Selected investment disputes were further classified as either contested disputes (where the Financial Services Provider defended the dispute) and uncontested disputes (where the Financial Services Provider did not contest the claim).

Attachment 3

Investment Disputes - Probability of Achieving FOS Track Record

The issue that then arises is that, if the FOS dispute resolution process is fair (as FOS claims it to be), what is the probability that only 3.8 claimants are successful out of 61 claimants. Making the conservative assumption that investors have a 50% chance of success, the expected result of these 61 cases forms a normal (or bell curve) distribution, with an expectation of 30.5 successes and a standard deviation of 3.90.

$$\begin{aligned}\text{Expected Successes by Claimants} &= np \text{ (where } n = \text{ sample size \& } p = \text{ chance of individual success)} \\ &= 61 \times 50\% \\ &= 30.5\end{aligned}$$

$$\begin{aligned}\text{Variance} &= np(1 - p) \\ &= 61 \times 50\% \times (1 - 50\%) \\ &= 15.25\end{aligned}$$

$$\begin{aligned}\text{Standard deviation} &= 15.25^{1/2} \\ &= 3.9\end{aligned}$$

The issue is therefore what is the probability of achieving 3.8 successes only when the bell curve has a mean of 30.5 and a standard deviation of 3.9.

Statistical tables reveal that the probability is infinitesimal. A score of 3.8 is approximately 6.8 standard deviations away from the mean, and the probability of achieving such a result is nil (calculated to two decimal places).

The following website was used to determine the probability, using a z score of -6.8 [ie. $(3.82 - 30.5)/3.9$]:

<http://www.measuringu.com/pcalcz.php>

The result (calculated to four decimal places) was nil.

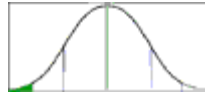
Even if all disputes in which FOS fully or partly agreed with the claimant are counted at full value, the resulting 8 disputes is still more than 5.7 standard deviations away from the mean, and the probability of such a result is still nil (calculated to four decimal places).

A screen shot of the probability calculation is attached:

Z-Score To Percentile Calculator

Jeff Sauro • December 3, 2007

Enter a z-critical value and get the area under the normal curve (a percentage). Selecting two-sided provides the area above Z and below -Z. Selecting one side provides the area only above or below the Z-value. See also the [interactive Graph of the Standard Normal Curve](#). To convert a percentage into a Z-Score use the [Percentile to Z-Score Calculator](#).



Z-Score	Percent of Area	100-Percent
---------	-----------------	-------------

-6.8

0

100

Two-Sided

One-Sided

Decimal Points

4

Submit

Attachment 4

General Insurance Disputes - Notes on Compiling Database of FOS Decisions Relating to Fund Managers / Responsible Entities

In preparing the database of FOS decisions, the following approach was used, with all searches done as at 5 October 2016.

For all searches, the “*Search Decisions*” tool on the FOS website was accessed:
<http://fos.org.au/resolving-disputes/decisions/>

An “*Advanced Search*” was done with the following parameters:

Product Line	<i>“General Insurance”</i>
Product Category	<i>“Domestic Insurance”</i>
Issue Type	<i>“Disclosure”</i>

In order to restrict the searches to more recent times, the box “*Include decisions under earlier Terms of Reference*” was left unchecked.

This search revealed a total of 56 cases, including a few cases which related to disputes between a claimant and their adviser/broker.

Selection of Disputes

All cases produced by the above searches were then individually reviewed to select only those disputes against a general insurance company.

The following table provides a listing of all disputes produced by the searches and the selection of disputes forming the basis of this submission.

Disputes not selected are marked as follows:

“B” broker or broker advice disputes

Selected disputes are shown in bold italics, noting that many of the selected disputes appear in both searches.

Search					
<i>204523</i>	<i>234559</i>	<i>297962</i>	<i>348345</i>	<i>375016</i>	<i>406420</i>
<i>212349</i>	<i>237534</i>	303222 B	<i>353348</i>	<i>384279</i>	<i>415506</i>
<i>213062</i>	240294 B	<i>307033</i>	<i>361809</i>	<i>385092</i>	<i>417731</i>
<i>213164</i>	<i>243052</i>	<i>310692</i>	<i>362536</i>	<i>389311</i>	<i>419951</i>
<i>213774</i>	<i>243468</i>	<i>313547</i>	<i>368800</i>	<i>389555</i>	<i>420074</i>
<i>215326</i>	<i>257273</i>	<i>322430</i>	<i>371094</i>	<i>396615</i>	<i>422860</i>
<i>216481</i>	274808 B	324538 B	<i>371960</i>	<i>401138</i>	
<i>220422</i>	286851 B	<i>330184</i>	<i>371985</i>	<i>401423</i>	
220798	289939	330519	373503	402407	
232441	295593	338547	373820	403231	

Attachment 5

General Insurance Disputes - Probability of Achieving FOS Track Record

The issue that then arises is that, if the FOS dispute resolution process is fair (as FOS claims it to be), what is the probability that only 9.66 claimants are successful out of 51 claimants. Making the conservative assumption that investors have a 50% chance of success, the expected result of these 51 cases forms a normal (or bell curve) distribution, with an expectation of 25.5 successes and a standard deviation of 3.57.

Expected Successes by Claimants = np (where n = sample size & p = chance of individual success)
= $51 \times 50\%$
= 25.5

Variance = $np(1 - p)$
= $51 \times 50\% \times (1 - 50\%)$
= 12.75

Standard deviation = $12.75^{\frac{1}{2}}$
= 3.57

The issue is therefore what is the probability of achieving 9.66 successes only when the bell curve has a mean of 25.5 and a standard deviation of 3.57.

Statistical tables reveal that the probability is infinitesimal. A score of 9.66 is approximately 4.4 standard deviations away from the mean, and the probability of achieving such a result is 0.0005% (calculated to four decimal places).

The following website was used to determine the probability, using a z score of -4.4 [ie. $(9.66 - 25.5)/3.57$]:

<http://www.measuringu.com/pcalcz.php>

A screen shot of the probability calculation is attached:

