

SUPPLEMENTARY ISSUES PAPER

Review of the financial system external dispute resolution framework

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

May 2017

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Communications
The Treasury
Langton Crescent
Parkes ACT 2600

Email: medialiaison@treasury.gov.au

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CONSULTATION PROCESS

REQUEST FOR FEEDBACK AND COMMENTS

Interested parties are invited to lodge written submissions on the issues raised in this Paper by 28 June 2017.

All information (including name and address details) contained in submissions will be made available to the public on the external dispute resolution review website at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/FS-external-dispute-resolution> unless the party making the submission indicates that all or part of the submission is to remain confidential. Automatically generated confidentiality statements in emails are not sufficient for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

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Submissions should include the name of the organisation (or name if the submission is made by an individual) and contact details including an email address and telephone number where available. While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

Closing date for submissions: 28 June 2017

Address written submissions to:

Email: EDRreview@treasury.gov.au

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

Enquiries: Enquiries can initially be directed to the EDR Review Secretariat by emailing EDRreview@treasury.gov.au.

INTRODUCTION

1. The Review's amended Terms of Reference require the Panel to:
 - make recommendations on the establishment, merits and potential design of a compensation scheme of last resort; and
 - consider the merits and issues involved in providing access to redress for past disputes.

WHY REDRESS MATTERS

2. These issues are of significant public interest given the scale of financial losses suffered by Australian investors in recent years. Estimates suggest that over 80,000 people have been affected with losses totalling more than \$5 billion (or \$4 billion after compensation and liquidator recoveries).¹
3. For those individuals who have suffered losses, the effect on their lives can be devastating. Additionally, where those individuals have not been able to receive compensation or even have their case heard, this undermines trust and confidence in the financial system.
4. In April 2017, the Panel made 11 recommendations to enhance the financial system's dispute resolution framework, recognising that consumers and small business should have effective access to redress. On 9 May 2017, the Government accepted all of these recommendations.
5. The Panel's view is that implementation of these recommendations will help to ensure that financial firms will provide compensation for wrongful losses through the EDR system. However, in a limited number of cases this may not occur, for a number of reasons. This Issues Paper seeks feedback on these situations, and possible models to resolve them.

BACKGROUND

6. In recent years, a number of inquiries have considered the causes of financial failures and the issue of compensating investors for their losses, including:
 - the Parliamentary Joint Committee on Corporations and Financial Services Report, *Inquiry into financial products and services in Australia* (November 2009);
 - Mr Richard St. John's report, *Compensation arrangements for consumers of financial services* (2012);

¹ Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 28.

- the Senate Economics References Committee Report, *Agribusiness managed investment schemes: Bitter harvest* (March 2016);
 - the Parliamentary Joint Committee on Corporations and Financial Services Report, *Impairment of customer loans* (May 2016); and
 - the Australian Small Business and Family Enterprise Ombudsman Report, *Inquiry into small business loans* (December 2016).
7. Consumers currently have a number of avenues for obtaining compensation, including:
- internal dispute resolution (IDR) — individuals can approach the firm directly to seek a resolution;²
 - external dispute resolution (EDR) — individuals can approach the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) or the Superannuation Complaints Tribunal (SCT) to have their complaint resolved;
 - self-initiated private action — individuals can sue in court or obtain an outcome through private negotiation, mediation or arbitration;
 - private class action — individuals can start or join a class action where people who have suffered loss from the same type of misconduct bring a group action;
 - the winding-up process of a financial firm (external administration); and
 - action taken by the Australian Securities and Investments Commission (ASIC) to obtain compensation for consumers — ASIC can take action through negotiations with the firm, legal or other enforcement action, or by leading a class action.³
8. In its Interim Report,⁴ the Panel observed that where consumers are denied access to justice due to a financial firm's lack of resources to pay a determination issued by an EDR scheme, this has serious and significant consequences for the individual consumer and undermines trust and confidence in the broader financial system.
9. This Supplementary Issues Paper continues the Panel's examination of the EDR framework by seeking the views of interested stakeholders on 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.

2 Participating in IDR is a prerequisite for accessing EDR.

3 Australian Securities and Investments Commission 2011, Report 240 *Compensation for retail investors: the social impact of monetary loss*, page 15; Australian Securities and Investments Commission 2014, *Senate inquiry into forestry managed investment schemes*, page 42.

4 Commonwealth of Australia 2016, *Review of the financial system external dispute resolution and complaints framework Interim Report* (6 December 2016), page 165.

REVIEW PROCESS TO DATE

10. On 20 April 2016, the Government announced this review of the financial system's EDR and complaints framework (EDR Review). On 8 August 2016, the Terms of Reference for the Review were released.
11. On 9 September 2016, the Panel released an Issues Paper and received 127 submissions from stakeholders. These submissions informed the Panel's Interim Report, which was released for consultation on 6 December 2016 and sought stakeholder views on 11 draft recommendations. Fifty-six submissions were received.
12. Among other issues, the Review's original Terms of Reference directed the Panel to make observations, but not recommendations, on the establishment of a statutory compensation scheme of last resort. In their responses to the first Issues Paper, a number of stakeholders made submissions on this issue which informed the Panel's observation in the Interim Report that there is considerable merit in establishing an industry-funded compensation scheme of last resort.
13. On 2 February 2017, the Minister for Revenue and Financial Services amended the Review's Terms of Reference to include recommendations on the establishment, merits and potential design of a compensation scheme of last resort. The Panel was also asked to consider the merits and issues involved in providing access to redress for past disputes. The amended Terms of Reference are contained in Appendix A.
14. On 3 April 2017, the Panel provided to the Government its Final Report on matters covered by the original Terms of Reference (other than that relating to a compensation scheme of last resort).

Final Report

15. On 9 May 2017, the Government released the Panel's Final Report on the matters covered by the original Terms of Reference (other than that dealing with a compensation scheme of last resort) and the Government's response to that Report. The Report makes 11 recommendations which represent an integrated package of reforms that will see the EDR framework well-placed to address current problems and ensure it is designed to withstand the challenges of a rapidly-changing financial system. The Government has accepted the Panel's 11 recommendations.⁵
16. The Panel's central recommendation is the establishment of a new single EDR body for all financial disputes (including superannuation disputes) to replace FOS, CIO and SCT. This is to be implemented via the establishment of the new Australian Financial Complaints Authority.

⁵ Morrison, S (Treasurer) 2017, *Building an accountable and competitive banking system*, media release, 9 May 2017, <<http://sjm.ministers.treasury.gov.au/media-release/044-2017/>>.

17. The Government has also, relevantly, accepted the Panel’s recommendations that:
- consumers and small businesses are provided with enhanced access to redress through higher monetary limits and compensation caps;
 - the single EDR body be subject to enhanced accountability measures, including an independent assessor to review complaints about its handling of disputes;
 - ASIC be provided with a general directions power to allow it to compel performance from the single EDR body if it does not comply with legislative and regulatory requirements; and
 - improvements be made to increase the transparency and accountability of IDR processes.

Next steps

18. The Panel is to report to the Government on the matters covered by the amended Terms of Reference in the second half of 2017.⁶ The table below outlines the chronology of events.
19. The purpose of publishing this Supplementary Issues Paper is to seek the views of interested stakeholders on matters covered by the amendment to the Review’s Terms of Reference.
20. The Panel encourages stakeholders interested in the matters raised in this Supplementary Issues Paper to make a submission by 28 June 2017.
21. The Panel will consider information provided in submissions and will conduct further consultations before providing an additional report to the Government in the second half of 2017.

Event	Date
Issues Paper on original Terms of Reference released	9 September 2016
Interim Report on original Terms of Reference released	6 December 2016
Minister for Revenue and Financial Services amended the Review’s Terms of Reference	2 February 2017
Final Report on matters covered in the original Terms of Reference provided to Government	3 April 2017
Final Report and Government response released	9 May 2017
Issues Paper on matters covered in amended Terms of Reference released	31 May 2017
Additional Report on matters covered by the amended Terms of Reference to be provided to the Government	Second half of 2017

⁶ The reporting deadline was extended beyond 30 June 2017 in an announcement by the Treasurer on 9 May 2017, see <<http://sjm.ministers.treasury.gov.au/media-release/044-2017/>>.

SCOPE

22. The amended Terms of Reference require the Panel to undertake two separate but related tasks:
 - Y make recommendations on the establishment, merits and potential design of a compensation scheme of last resort; and
 - Y consider the merits and issues involved in providing access to redress for past disputes.⁷
23. The Panel considers that these tasks raise different issues, which might involve different policy considerations, funding models and administrative arrangements. The Panel is, therefore, approaching them as separate and distinct pieces of analysis.
24. Given the Review's Terms of Reference focus on the EDR system, this has been the Panel's main focus in setting out issues surrounding a compensation scheme of last resort and access to redress for past disputes. However, the Panel is also interested in views on whether judgments and decisions from other dispute resolution processes, such as courts and tribunals, should also be considered.
25. The Panel has outlined below its understanding of the scope of the amended Terms of Reference, and the issues that fall within that scope.
26. However, the Panel wishes to make clear that it has not made a final decision on any of the issues contained in this Supplementary Issues Paper and welcomes all stakeholder comments and feedback, including on whether the Panel's scoping of issues is appropriate.

REVIEW PRINCIPLES

27. In undertaking its review, as required by its Terms of Reference, the Panel will have regard to the Review's core principles of efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs.

⁷ EDR Review Terms of Reference, paragraphs 3.5 and 6. See Attachment A to this Issues Paper.

PRINCIPLES GUIDING THE REVIEW

Efficiency

Any framework should provide outcomes in an efficient manner. This requires ensuring the framework possesses adequate coverage, powers, remedies, resources (that is, funding and skilled staff) to enable issues to be resolved quickly and with a minimum of resources.

Equity

Individuals should be treated fairly and be able to easily access any framework.

Complexity

Any framework should have minimal complexity. It must be easy to navigate and use, with a focus on informality.

Transparency

Any framework should be transparent and open. Users should have access to appropriately tailored information, including about what outcomes they can reasonably expect from the process.

Accountability

Relevant information should be made publicly available. There should also be scope for periodic independent reviews and responses to these reviews.

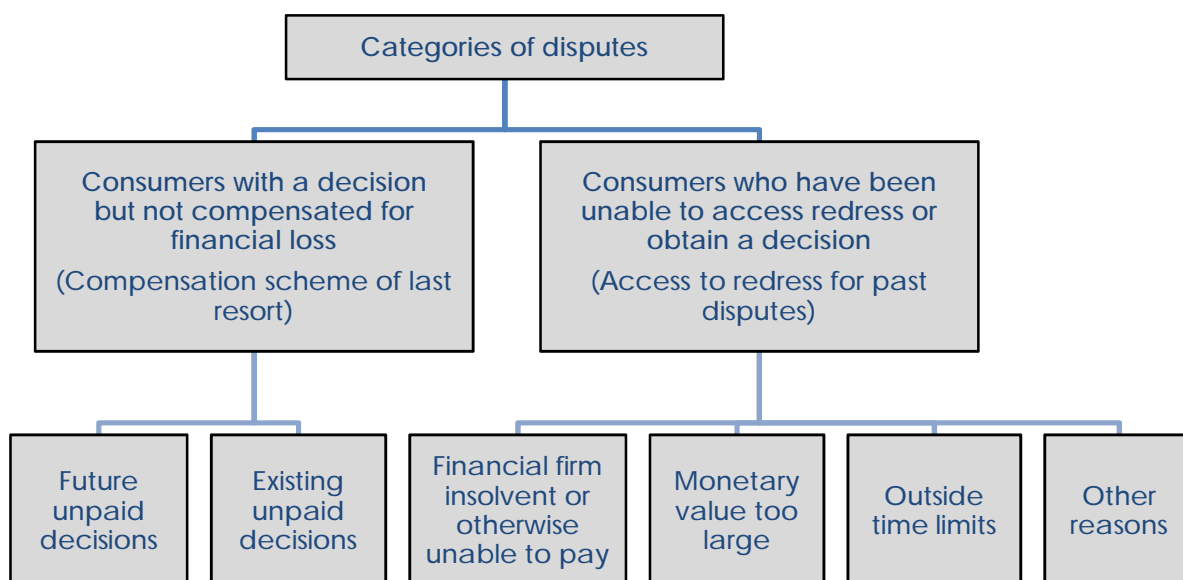
Comparability of outcomes

Any framework should ensure that individuals receive comparable outcomes, both procedurally and substantively.

Regulatory costs

The regulatory settings should, as appropriate, utilise market forces and avoid creating moral hazards. The framework should impose the minimum amount of regulatory costs necessary to ensure effective user outcomes. These costs should, where appropriate, be borne by those who create the requirement for regulation, with incentives for costs to be minimised.

28. The diagram below depicts how the Panel sees the amended Terms of Reference in relation to a compensation scheme of last resort and access to redress for past disputes interrelating:



Compensation scheme of last resort

29. The Panel takes as its starting point the premise that a compensation scheme of last resort is to be considered in the context of a dispute which:
- has been the subject of a decision; and
 - has remained unsatisfied because, for example, the firm is insolvent, has ceased trading or otherwise has insufficient assets to pay the claim.
30. Although the Review's Terms of Reference are focused on the EDR system, as part of its analysis, the Panel will be considering whether a compensation scheme of last resort should be available in situations where a court or tribunal has ordered that a consumer or small business be compensated and this has not occurred.
31. The Panel views the issue of a compensation scheme of last resort in a prospective way which means that should a scheme be established, it would be open to claimants who in the future receive a decision in their favour, but which is not ultimately paid.
32. The Panel considers that separate arrangements may need to be put in place to address legacy uncompensated losses, such as existing unpaid EDR determinations.
33. These matters are discussed in more detail in the 'Compensation scheme of last resort' section of this Issues Paper.

Redress for past disputes

34. The question of providing access to redress for past disputes is very complex.

35. The Panel considers that consumers and small businesses that have obtained a decision from any dispute resolution process (including from a tribunal or a court) have had access to redress and therefore are outside the Review's amended Terms of Reference. (If as part of that decision the consumer or small business was awarded compensation but this has not been paid, this will form part of the Panel's consideration of a potential compensation scheme of last resort.)
36. In this Issues Paper, the Panel has primarily focussed its consideration of this issue on situations where consumers or small businesses with disputes of a type that could be resolved through EDR have, for various reasons, not been able to resolve their disputes to date. However the Panel is interested in views about the proposed scope.
37. The Panel considers that potential scenarios could include where:
- the financial firm no longer exists (for example, because of insolvency) and therefore the dispute was either never lodged with an EDR scheme or was lodged but unable to proceed to determination;
 - the monetary value of the dispute exceeded the EDR scheme's monetary limits at the time, but could potentially fall within the monetary limits of the new Australian Financial Complaints Authority (once established);⁸
 - the dispute was outside of the EDR scheme's time limits; or
 - the consumer or small business did not pursue their dispute with the EDR scheme for other unspecified reasons (for example, because of personal circumstances, the costs of pursuing the dispute or emotional distress).
38. These matters are discussed in more detail in the 'Providing access to redress for past disputes' section of this Issues Paper.

Questions — 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?
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?

⁸ The Government accepted the recommendations of this Review to increase the monetary limits of the new single EDR body.

COMPENSATION SCHEME OF LAST RESORT

39. The amended Terms of Reference require the Panel to make recommendations on the establishment, merits and potential design of a compensation scheme of last resort.
40. In its Interim Report, the Panel expressed the view that in circumstances where the market is unable to provide a solution to the problem of uncompensated consumer losses, there is considerable merit in introducing an industry-funded compensation scheme of last resort.⁹ In light of the amendment to the Terms of Reference, the Panel is seeking additional information from stakeholders on these issues.
41. In this section of the Issues Paper, the Panel first considers the problem which a compensation scheme of last resort seeks to address: the issue of uncompensated consumer losses. This is followed by a discussion of the financial system's existing framework for compensating consumer losses and the compensation arrangements in other sectors and internationally. The Issues Paper then describes the arguments which are made for and against a compensation scheme of last resort, and discusses the potential design issues with such a scheme. Finally, the issue of legacy unpaid determinations is considered.

PROBLEM BEING ADDRESSED — UNCOMPENSATED CONSUMER LOSSES

42. Under the existing EDR framework, there are situations where an EDR body orders that a claimant be paid compensation, but that compensation is not paid.
43. As at 2 May 2017, \$13,909,635.50 (excluding interest) and \$399,862 (excluding interest) in determinations made in favour of complainants by FOS and CIO, respectively, had not been paid.
44. These uncompensated losses are relevant to the Panel's Terms of Reference in two ways. First, they indicate a problem that is likely to recur, creating further unpaid determinations in the future (which is the focus of most of this section). Secondly, it raises the question of whether complainants who have an existing unpaid determination should be compensated (which is considered in more detail at paragraphs [116]-[123]).

⁹ Commonwealth of Australia 2016, *Review of the financial system external dispute resolution and complaints framework Interim Report* (6 December 2016), page 165.

45. **The impact of uncompensated consumer losses can be significant and wide-ranging, including:**
- Y individuals will often experience severe emotional distress and financial hardship;
 - Y costs may be imposed on the wider Australian community as individuals are forced to rely on other forms of support, including the social security system; and
 - Y there is an undermining of trust and confidence in the EDR framework and the financial services sector more generally.¹⁰
46. **The wide-ranging nature of these losses is relevant when considering how to define ‘compensation’. For example, the Panel has heard from a stakeholder that compensation should include restitution and compensation for non-economic impacts, as well as direct financial losses.¹¹**

EXISTING FRAMEWORK FOR COMPENSATING LOSSES IN THE FINANCIAL SYSTEM

47. **Where an individual suffers financial loss, they can seek compensation from the relevant firm and, in certain circumstances, from targeted compensation schemes. These schemes, which are considered in further detail at paragraphs [64]-[72], cover losses associated with:**
- Y where a market participant of the Australian Securities Exchange becomes insolvent and fails to meet its obligations to a person who had previously entrusted property to it;
 - Y bank deposits and general insurance policies related to an Australian Prudential Regulation Authority (APRA) regulated entity in the event of insolvency; and
 - Y fraudulent conduct or theft related to APRA-regulated superannuation funds.
48. **Given the existence of unpaid EDR determinations, it is clear this framework is not delivering effective outcomes for some of its users.**

¹⁰ Australian Securities and Investments Commission 2011, Report 240 *Compensation for retail investors: the social impact of monetary loss*.

¹¹ Holt Norman Ashman Baker Action Group, submission to the EDR Review Interim Report, page 6.

Firm level compensation arrangements

49. The *Corporations Act 2001* requires that if a financial services licensee provides a financial service to a person as a retail client, the licensee must have arrangements for compensating the person for loss or damage suffered because of breaches of the relevant obligations under Chapter 7 of the Act by the licensee or its representatives.¹²
50. Financial services cover a range of activities including:
 - Y providing financial product advice;
 - Y dealing or making a market in a financial product;
 - Y providing custodial or depository services; and
 - Y operating a registered managed investment scheme.¹³
51. Similarly, the *National Consumer Credit Protection Act 2009* provides that a licensee must have adequate arrangements for compensating persons for loss or damage suffered because of a contravention of the Act by the licensee or its representatives.
52. The objective of these requirements is to reduce the risk that losses cannot be compensated because of a licensee's lack of financial resources.¹⁴
53. The justification for these compensation requirements include that consumers and small businesses:
 - Y are not always in a position to assess the information provided by a licensee or the worth of the service provided;
 - Y can incur severe financial hardship through losses resulting from the licensee's conduct; and
 - Y expect the level of comfort provided by a compensation regime.¹⁵

12 See section 912B of the *Corporations Act 2001*. The obligation extends to all financial services covered by chapter 7 and losses caused by negligent, fraudulent or dishonest conduct that amounts to a breach of that chapter: see ASIC *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees* at paragraph [126.44].

13 See section 766A of the *Corporations Act 2001*. Generally in a managed investment scheme: people are brought together to contribute money to get an interest in the scheme; money is pooled together with other investors (often many hundreds or thousands of investors) or used in a common enterprise; and a 'responsible entity' operates the scheme as investors do not have day to day control over the operation of the scheme: see Australian Securities and Investments Commission, <<http://asic.gov.au/for-finance-professionals/managed-investment-scheme-operators/starting-a-managed-investments-scheme/what-is-a-managed-investment-scheme/>>.

14 Australian Securities and Investments Commission, *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees*, paragraphs RG126.5 and RG126.19; see also Australian Securities and Investments Commission, *Regulatory Guide 210: Compensation and insurance arrangements for credit licensees*, paragraphs 210.7 and 210.8.

15 Commonwealth of Australia 2012, *Compensation arrangements for consumers of financial services*, at paragraph [2.63] citing The Treasury 2002, *Compensation for loss in the financial services sector: issues and options* (September 2002).

54. ASIC has stated in its regulatory guidance on the compensation and insurance arrangements for financial services licensees that the compensation requirements imposed by the *Corporations Act 2001* are not intended to cover:
- product failure or general investment losses;
 - all possible consumer losses relating to financial services;
 - claims for loss solely as a result of the failure (for example, through insolvency) of a product issuer (that is, it is not intended to underwrite the products of a product issuer); or
 - a return on a financial product that has not met expectations.¹⁶

Compensation arrangements involving professional indemnity insurance

55. The requirement to have arrangements in place to compensate consumers is, unless the financial services licensee is an exempt licensee, subject to the requirement that the licensee hold 'adequate' professional indemnity insurance cover.¹⁷ Exempt licensees include:
- a general insurance company regulated by APRA under the *Insurance Act 1973*;
 - a life insurance company regulated by APRA under the *Life Insurance Act 1995*; and
 - an authorised deposit-taking institution regulated by APRA under the *Banking Act 1959*.¹⁸
56. This exemption results in a large number of EDR scheme member firms not relying on professional indemnity insurance to compensate their customers where they suffer financial loss.
57. For those firms required to hold professional indemnity insurance, the question of whether an insurance policy is adequate depends on a number of factors, including:
- the amount and scope of cover;
 - whether the terms and conditions of the cover undermine the objective of providing compensation; and
 - whether the licensee has sufficient financial resources to enable the professional indemnity insurance policy to work in practice.¹⁹

16 Australian Securities and Investments Commission, *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees*, paragraph RG126.23.

17 *Corporations Regulations 2001*, reg 7.6.02AAA; regulation 12 of the *National Consumer Credit Protection Regulations 2010* (Cth).

18 *Corporations Regulations 2001*, reg 7.6.02AAA(3).

19 Australian Securities and Investments Commission, *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees*, page 13.

58. In relation to having sufficient financial resources available, ASIC has observed that firms should assess what financial resources are required (to cover the excess and gaps in cover due to various exclusions) and ensure they have appropriate financial resources available.²⁰
59. Before granting an Australian Financial Service (AFS) Licence, ASIC asks licence applicants about their professional indemnity insurance arrangements and will not grant a licence until it is satisfied that the applicant has the necessary arrangements in place. However, ASIC does not approve professional indemnity insurance arrangements, nor does it have data about the renewal of advice licensees' professional indemnity insurance cover.²¹
60. The Panel notes there is currently a paucity of data about the professional indemnity insurance market, in particular, the policies held by financial services licensees and credit licensees. This raises particular challenges for the Panel.
61. The objective underpinning the professional indemnity insurance requirement is to reduce the risk to a firm that compensation claims cannot be satisfied by the firm due to a lack of financial resources. It is not to provide compensation directly to consumers.²²
62. ASIC, in its December 2015 report, *Professional indemnity insurance market for AFS licensees providing financial product advice*, identified a number of the inherent limitations of using professional indemnity insurance as a compensation mechanism, including:
 - Y '[professional indemnity] insurance is designed to protect AFS licensees against business risk. It is neither intended nor designed to provide compensation directly to consumers. Therefore, even if a consumer is successful in their claim made to an EDR scheme, it is the AFS licensee that must make a claim on its PI insurance to compensate the consumer as required. The consumer cannot claim directly on the PI insurance'; and
 - Y '[w]hile ASIC provides detailed guidance to AFS licensees, [it] cannot regulate for a market-driven product. [It] cannot require insurers to extend or limit cover, nor can [it] prescribe key product features or policy terms, or influence price or the operation of exclusions and excesses'.²³
63. Submissions to the Panel's Issues Paper of 9 September 2016 also indicated there are significant limitations in relying upon professional indemnity insurance to provide compensation to consumers, which are outlined below.

20 Australian Securities and Investments Commission, *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees*, paragraph RG 126.48.

21 Australian Securities and Investments Commission 2015, Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, page 11.

22 Australian Securities and Investments Commission 2015, Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, page 14.

23 Australian Securities and Investments Commission 2015, Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, pages 14-15.

Limitations of using professional indemnity insurance as a compensation mechanism

Stakeholders responding to the Panel's Issues Paper indicated there are significant limitations in using professional indemnity insurance as a compensation mechanism, including:

- the total funds available under a policy may not cover all of the compensation awarded against the insured;
- the policy may not cover the conduct which gave rise to the order for compensation (for example, fraud);
- the amount of compensation payable may be less than the policy's excess; and
- cover may not have been taken out at all and self-certification often means this is only discovered after the firm is insolvent.²⁴

Compensation schemes for specific losses in the financial system

- 64. A number of targeted compensation schemes currently operate in the financial system to protect consumers from specific types of losses.**

National Guarantee Fund

- 65. The National Guarantee Fund (NGF) is a compensation fund available to meet certain claims which arise from dealings with participants of the Australian Securities Exchange (ASX) and, in limited circumstances, participants of ASX Clear Pty Limited, which provides clearing and settlement services. A range of claims can be paid under the NGF, but of particular relevance are claims relating to compensation for loss that results if a market participant becomes insolvent and fails to meet its obligations to a person who had previously entrusted property to it.**
- 66. The NGF is open to both wholesale and retail clients. There is no cap on claims of compensation for loss arising where a market participant fails to complete a sale or purchase of securities, makes an unauthorised transfer of securities, or cancels or fails to cancel a certificate of title to quoted securities. The scheme is funded by ASX participants.**

Financial Claims Scheme

- 67. The Financial Claims Scheme is an Australian Government scheme that protects retail clients of authorised deposit-taking institutions (ADIs) and policy holders of APRA-regulated general insurance companies from potential loss due to the failure of these institutions.**

²⁴ Commonwealth of Australia 2016, *Review of the financial system external dispute resolution and complaints framework Interim Report* (6 December 2016), page 166.

68. For banks, building societies and credit unions incorporated in Australia, the Scheme provides protection to depositors up to \$250,000 per account holder per ADI. The Scheme seeks to provide depositors with timely access to their protected deposits in the unlikely event of the failure of their ADI.
69. For general insurers, the Scheme provides compensation to eligible policyholders with valid claims against a failed general insurer. Under the Scheme, most policyholders with the affected general insurer are covered for valid claims up to \$5,000. For any valid claims of \$5,000 and over, the policyholder or claimant must be eligible under certain criteria.
70. The Scheme is funded by recovery action through insolvency proceedings, and if the assets are insufficient, through an industry levy on other ADIs or general insurers.

Part 23 of the *Superannuation Industry (Supervision) Act 1993*

71. Part 23 of the *Superannuation Industry (Supervision) Act 1993* makes provision for the grant of financial assistance to APRA-regulated superannuation funds that have suffered loss as a result of fraudulent conduct or theft. The loss must also have caused a substantial diminution of the superannuation fund leading to difficulties in the payment of benefits.
72. Compensation limits are at the Minister's discretion with previous grants ranging from 90 to 100 per cent of the eligible loss. If the Minister, after seeking the advice of APRA, is satisfied that the loss has caused a substantial diminution of the superannuation fund and that the public interest requires action, a financial grant may be made by government to the fund. The scheme is industry funded through a levy on APRA-regulated superannuation funds and approved deposit funds.

COMPENSATION ARRANGEMENTS OUTSIDE OF THE FINANCIAL SERVICES INDUSTRY

73. Compensation schemes for particular types of losses have also been established from time to time in other sectors. Several examples are described below.

Fair Entitlements Guarantee

74. The Fair Entitlements Guarantee is an Australian Government funded scheme of last resort that provides financial assistance for unpaid employee entitlements to eligible employees who lose their job due to the liquidation or bankruptcy of their employer. To be eligible, employees need to lodge a claim with the Government within either 12 months of losing their job or the liquidation or bankruptcy of their former employer, whichever is later. Directors of companies (and their spouses or relatives) and contractors are excluded from the scheme.

75. Once entitlements are paid to an employee under the Guarantee, the Government stands in the shoes of the employee as a subrogated creditor and is entitled to claim the amount paid, and is given priority over other unsecured creditors. The Government may also provide funds to liquidators to enable recovery efforts of the Guarantee from entities, including initiating legal proceedings to recoup any funds paid.²⁵

Travel Compensation Fund

76. The national licensing rules for travel agents, which were in place until 30 June 2014, required participation in the Travel Compensation Fund (TCF) as a precondition for being licensed. The TCF's purposes were to:
 - ensure that only persons who had sufficient financial resources could join, or continue to participate in, the fund and therefore carry on business as a travel agent; and
 - provide compensation to eligible consumers who had suffered financial loss as a result of the bankruptcy or insolvency of a registered travel agent.
77. The TCF, which closed at the end of 2015, provided for compensation to be paid to consumers in circumstances where they had paid a licensed travel agent for travel or travel-related services, and that agent subsequently failed to arrange the services requested by the consumer.
78. The TCF was funded, relevantly, through: initial contributions by new participants; initial administration fees by new participants; and ongoing annual renewal fees.²⁶

NSW Law Society Fidelity Fund

79. Administered by the NSW Law Society, the Fidelity Fund receives annual contributions from solicitors as part of their Practising Certificate requirements. The money received is used to pay compensation to members of the public who successfully claim financial loss due to a solicitor's or firm's dishonest failure to pay or deliver trust money or property.

25 On 17 May 2017, the Australian Government released a Consultation Paper on options for targeted law reform to address corporate misuse of the Fair Entitlements Guarantee scheme and to improve the recovery of Fair Entitlements Guarantee payments: see <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2017/Reforms-to-address-corporate-misuse-of-the-FEG-scheme>>.

26 PricewaterhouseCoopers (November 2010), *Review of consumer protection in the travel and travel related services market*, <http://consumerlaw.gov.au/files/2011/03/review_protection_in_travel_industry.pdf>.

80. Upon receipt of a claim, the Law Society may make further enquiries. The Fidelity Fund Management Committee decides the claim and it can allow, disallow, compromise or settle it. For almost all claims, there is a limit on payments of a total of \$1,000,000 for all claims against a particular solicitor or firm. The Law Society may increase this amount, but is not obliged to do so.

Motor Car Traders Guarantee Fund

81. The Motor Car Traders Guarantee Fund operates in Victoria to, relevantly, meet the cost of successful claims made by consumers who have suffered a loss after purchasing a car, motorcycle or commercial vehicle, as a result of the trader failing to comply with certain conditions of the *Motor Car Traders Act 1986* (Vic) (such as compliance with warranty provisions or transferring title to the car).²⁷
82. Claims for compensation from the Fund are heard by the Motor Car Traders Claims Committee. Attempts must have first been made to resolve the complaint directly with the motor car trader (IDR). Making a claim is free of charge, with the maximum amount awarded being \$40,000. The Fund is funded through motor car traders' licensing fees and penalties paid for breaches of the *Motor Car Traders Act 1986* (Vic). The Fund seeks to recover amounts paid out against the licensee.²⁸

INTERNATIONAL FINANCIAL SERVICES INDUSTRY COMPENSATION SCHEMES

83. Compensation schemes have been established in the financial services industry in other jurisdictions to address issues associated with consumers who have suffered financial losses (see table below).
84. While a number of the schemes in these jurisdictions are targeted at specific types of loss, similar to the existing approach in Australia, the United Kingdom has introduced a single, comprehensive scheme covering a broad range of losses, including those not currently covered by Australia's targeted compensation schemes, such as losses associated with poor quality financial advice.

27 State Government of Victoria, Consumer Affairs Victoria, *Motor Car Traders Guarantee Fund*, <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/motor-car-traders-guarantee-fund>>.

28 State Government of Victoria, Consumer Affairs Victoria, *Compensation claims — motor cars*, <<https://www.consumer.vic.gov.au/motor-cars/compensation-claims>> and *Motor Car Traders Guarantee Fund*, <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/motor-car-traders-guarantee-fund>>.

Table: International financial services industry compensation schemes

	United Kingdom ²⁹	Canada ³⁰	United States ³¹	European Union ³²
<i>Range of claims covered</i>	The scheme covers banks and building societies, credit unions, insurance, home finance, investments, pensions and endowments	Provides protection for cash, securities and other property held by investment firms on behalf of clients	Protects against the loss of cash and securities held by clients of a brokerage firm	Provides protection where an investment firm is unable to return money or instruments belonging to its investors
<i>When can an applicant apply?</i>	When the scheme is satisfied the firm is unable, or likely to be unable, to pay claims against it	When the firm becomes insolvent	When the firm becomes insolvent	When the authorities have determined the firm is unable to meet its obligations arising out of investor claims
<i>Who can apply?</i>	Individuals and small businesses	All investors are eligible	All investors (with limited exceptions)	Normally retail investors
<i>Level of compensation awarded</i>	For investment claims, up to £50,000 per person per firm	Up to C\$1 million	Up to US\$500,000 for securities and cash (including a \$250,000 limit for cash only)	The Directive requires minimum compensation of €20,000 per investor, but Member States can provide higher levels
<i>Funding</i>	Industry-funded	Industry-funded	Industry-funded	Industry-funded
<i>Administration</i>	Independent scheme but accountable to the regulators	Independent scheme	Independent scheme	Independent schemes

29 Financial Services Compensation Scheme: <<https://www.fscs.org.uk/>>.

30 Canadian Investor Protection Fund: <<http://www.cipf.ca/>>.

31 Securities Investor Protection Corporation: <<http://www.sipc.org/>>.

32 Directive 97/9/EC of the European Parliament and of the Council: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31997L0009>>.

Questions — Existing compensation arrangements

3. What are the strengths and weaknesses of the existing compensation arrangements contained in the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009*?
4. What are the strengths and weaknesses of the National Guarantee Fund, the Financial Claims Scheme and Part 23 of the *Superannuation Industry (Supervision) Act 1993*?
5. Are there other examples of compensation schemes of last resort that the Panel should be considering?

EVALUATION OF A COMPENSATION SCHEME OF LAST RESORT

85. In response to the Panel's Issues Paper of 9 September 2016 and Interim Report of 6 December 2016, the Panel received a large number of submissions which supported establishing a compensation scheme of last resort, although there were different views expressed in relation to the scheme's design. Stakeholders submitted that the current compensation arrangements for consumers were inadequate and that a scheme was important to:
- ensure that consumers who suffer loss from misconduct are compensated;³³
 - build trust and confidence in the current EDR arrangements;³⁴ and
 - ensure trust and confidence in the financial services sector more generally.³⁵
86. Consistent with the view that the existing compensation requirements should be strengthened, the Australian Bankers' Association (ABA) submitted that it supported establishing a mandatory, prospective compensation fund that covers individuals and small businesses who have received poor financial advice, and have not been paid a determination made by an ASIC-approved EDR scheme due to the validated insolvency or wind up of a financial advice business, where all other redress avenues have been exhausted.³⁶ Further information on the ABA's proposal is set out later in this section.

33 Joint Consumer Group, submission to the EDR Review Issues Paper, page 75.

34 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 52.

35 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 30.

36 Australian Bankers' Association, submission to the EDR Review Interim Report, page 16.

87. The ABA also stated that a scheme should be accompanied by other reforms to reduce the likelihood of unpaid determinations, including:
- a greater professionalisation of financial advice (the Panel notes the Government's recent reforms to lift the professional, education and ethical standards of financial advisers);³⁷
 - expanding the availability and coverage of professional indemnity insurance, including run-off cover, insolvency, fraud and other misconduct;
 - ensuring the scheme is well understood by consumers of financial products so that it is clear it is a last resort scheme, and not intended to cover investment losses; and
 - ASIC requiring an annual assurance statement from all AFS licensees that they have met their licence obligations, including compliance with ASIC's *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees* and *Regulatory Guide 166: Licensing: Financial requirements*.³⁸
88. The Panel also received submissions from stakeholders who held concerns about a compensation scheme of last resort, stating amongst other matters that:
- all taxpayers would be required to subsidise the scheme, as even with risk mitigation strategies, risk would not be fully priced into the market, with market participants and regulators taking on extra risk;³⁹
 - it would be inequitable to impose the costs associated with a compensation scheme of last resort on compliant financial firms;⁴⁰
 - appropriate professional indemnity and capital requirements would reduce the likelihood of unpaid FOS determinations in the first place and these should take priority;⁴¹ and
 - any increase in levies or other funding would increase the costs for firms, with many of those costs ultimately borne by consumers.⁴²
89. A number of submissions also referred the Panel to the 2012 report prepared by Mr Richard St. John, *Compensation arrangements for consumers of financial services*.

37 O'Dwyer, K (Minister for Revenue and Financial Services) 2017, *Higher standards for financial advisers to commence*, media release, 9 February 2017, <<http://kmo.ministers.treasury.gov.au/media-release/006-2017/>>; O'Dwyer, K (Minister for Revenue and Financial Services) 2017, *Financial Adviser Standards and Ethics Authority appointments*, media release, 10 April 2017, <<http://kmo.ministers.treasury.gov.au/media-release/033-2017/>>.

38 Australian Bankers' Association, submission to the EDR Review Issues Paper, pages 6-7.

39 Financial Planning Association of Australia, submission to the EDR Review Issues Paper, page 15.

40 Australian Collectors & Debt Buyers Association, submission to the EDR Review Issues Paper, page 29; National Insurance Brokers Association, submission to the EDR Review Interim Report, page 6.

41 Insurance Council of Australia, submission to the EDR Review Issues Paper, page 18.

42 Financial Services Council, submission to the EDR Review Issues Paper, page 17.

Richard St. John report: *Compensation arrangements for consumers of financial services*

In April 2010, Mr Richard St. John was asked by the Australian Government to consider the need for, and costs and benefits of, a statutory compensation scheme for financial services.

In April 2012, the report was published and it concluded that it would be inappropriate, and possibly counter-productive, to introduce a more comprehensive last resort compensation scheme to underpin the current relatively light compensation regime for financial advisers and other providers of financial services. Given the limited regulatory measures to protect retail clients from the risk of licensee insolvency, it was found that it would be inappropriate to require more responsible and financially secure licensees to underwrite the ability of other licensees to meet claims against them for compensation.

The report made a number of recommendations aimed at strengthening the existing compensation requirements, including:

- licensees providing additional assurances to ASIC in relation to their professional indemnity insurance cover; and
- for ASIC to take a more proactive stance on monitoring licensee compliance with compensation requirements.

In April 2013, the then Australian Government released its response accepting the report's recommendations.

90. The Panel is also aware that there are claims that moral hazard issues may arise with the existence of a compensation scheme of last resort. Moral hazard can arise where individuals assume risks as they know someone else is protecting them against possible financial loss.⁴³
91. The introduction of a scheme may, for example, encourage consumers to become complacent about the risks of dealing in the market and induce riskier behaviour by financial firms. Further, it may reduce the incentive for stringent regulation or rigorous administration of the existing compensation arrangements.⁴⁴

⁴³ Australian Government 2004, *Study of Financial System Guarantees* (March 2004), paragraph [4.17].

⁴⁴ Commonwealth of Australia 2012, *Compensation Arrangements for Consumers of Financial Services*, page 143, <http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/compensation_arrangements_report/default.htm>.

Questions — Evaluation of a compensation scheme of last resort

6. What are the benefits and costs of establishing a compensation scheme of last resort?
7. Are there any impediments in the existing regulatory framework to the introduction of a compensation scheme of last resort?
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?
9. What potential impact would a compensation scheme of last resort have on the operations of financial firms?
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?
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?
12. What other mechanisms are available to deal with uncompensated consumer losses?
13. What relevant changes have occurred since the release of Richard St. John's report, *Compensation arrangements for consumers of financial services*?

POTENTIAL DESIGN OF A COMPENSATION SCHEME OF LAST RESORT

92. The Review's Terms of Reference require the Panel to make recommendations on the potential design of a compensation scheme of last resort. Some of the potential design features are outlined below.

Types of claims covered

Inclusion of small business disputes

93. The *Corporations Act 2001* requires financial services licensees to have dispute resolution and compensation arrangements in place for financial services provided to a retail client in accordance with the *Corporations Act 2001*.⁴⁵ A retail client, relevantly, includes consumers and small businesses. Under the *National Consumer Credit Protection Act*, licensees must be a member of an approved external dispute resolution scheme and have in place adequate compensation arrangements.⁴⁶ As a matter of principle, there are strong policy grounds for small businesses having access to any compensation scheme of last resort.

45 Sections 912A and 912B of the *Corporations Act 2001*.

46 Sections 47 and 48 of the *National Consumer Credit Protection Act 2009*.

Financial advice disputes vs all disputes

94. Disputes relating to the provision of financial product advice currently make up the largest proportion of unpaid FOS determinations. These are followed by disputes with operators of managed investment schemes and credit providers.
95. In terms of the types of disputes covered by a compensation scheme of last resort, a broad compensation scheme would provide the greatest possible protection for consumers and small business. However, it would also increase the potential costs for those responsible for funding the scheme, who may then seek to pass those costs on, for example, to their customers and shareholders.

Accessing the scheme

Qualifying conditions

96. Before a claimant can access a compensation scheme of last resort, there is the potential for imposing qualifying conditions. For example, the claimant may have to prove they have received an EDR determination in their favour and the relevant firm (which is a member of the compensation scheme) is insolvent, has stopped trading or has insufficient assets to meet the claims made against it. Claimants may also have to wait for a specified period of time before making a claim or prove they have taken particular steps to satisfy the EDR determination from the firm.
97. An additional issue is how an individual could access a compensation scheme of last resort where the financial firm is insolvent and unable to defend a matter which is brought before an EDR body. Under the existing EDR scheme arrangements, there is the potential for complaints to be closed early in the process where there is no reasonable prospect of any order for compensation being met.⁴⁷

Court judgments

98. If a compensation scheme of last resort was established, it could apply only in relation to unpaid EDR determinations, or it could also apply where court-ordered compensation had not been paid. If a scheme were to include court judgments, it would be necessary to consider whether this should be subject to any restrictions—for example, whether any payments from the scheme should be subject to the monetary limits and compensation caps that apply in the EDR system.
99. Class action litigation would raise further questions—such as whether claimants with a right to compensation arising from a class action should have access to the scheme at all; whether payments from the scheme should include payments for legal costs or only compensation; and whether litigation funders should be able to recover from the scheme, either directly or indirectly through their contracts with the class of claimants.

⁴⁷ Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44.

Reviewing an EDR scheme's determinations

100. Where an individual has received an EDR determination in their favour, a question arises in relation to whether any compensation scheme of last resort is able to independently review the EDR determination or whether it should simply accept the EDR scheme's determination of the merits of the dispute.
101. In the United Kingdom, after an individual has made a claim to the Financial Services Compensation scheme (FSCS), the FSCS investigates and decides for itself, based on its own rules and liability standards, whether an individual should be paid compensation.⁴⁸ That is, it is not bound by an EDR determination.⁴⁹ For example, in relation to claims made against certain investment businesses, the FSCS may pay compensation "only to the extent that the FSCS considers that the payment of compensation is essential in order to provide the claimant with fair compensation".⁵⁰

Funding

102. Internationally, compensation schemes of last resort in the financial sector are industry funded. However, there is also the possibility of other funding models, such as those which have a degree of government involvement.
103. Under an industry funding model, there are a variety of ways to allocate the scheme's cost amongst contributors. For example, the United Kingdom's FSCS adopts a funding class model to cover its compensation costs.⁵¹ A participant firm's permissions to conduct activities determine which class, or classes, it belongs to. If a firm is a member of more than one funding class, they are required to contribute to both classes. Each of the relevant funding class has a threshold to try to ensure that firms' contributions to the FSCS are affordable and sustainable. If compensation and specific costs in a funding class are so high that the threshold is breached, firms in other classes are called upon to contribute.
104. While grouping firms based on the types of activities they carry on can create incentives for firms to work together at an industry level to improve practices, it can result in levies being subject to high degrees of volatility where those activities are subject to a high number of claims.

48 The Financial Services Compensation Scheme, 'Your claim', <<https://www.fscs.org.uk/your-claim/>>.

49 United Kingdom Financial Ombudsman Service, *Consumer fact sheet on enforcing an ombudsman's decision in court*, <<http://www.financial-ombudsman.org.uk/publications/factsheets/enforcing-an-ombudsmans-decision.pdf>>.

50 Financial Conduct Authority (May 2017), *Compensation*, Release 16 at [12.4.2], <<https://www.handbook.fca.org.uk/handbook/COMP.pdf>>.

51 The Financial Services Compensation Scheme applies a different calculation method for determining the levy which is used to fund the management expenses levy, which covers 'base costs', such as fixed running costs: Financial Conduct Authority, *CP16/42: Reviewing the funding of the Financial Services Compensation Scheme (FSCS)*, page 13.

105. By contrast, while a single class funding model may reduce volatility, it raises issues around cross-subsidisation as firms in one sector who are operating consistent with their legal obligations are required to subsidise the actions of firms in other sectors who are not.⁵²
106. The Panel notes that the United Kingdom's Financial Conduct Authority is currently consulting on options for changing the funding of the FSCS and the coverage it provides to consumers, and specific proposals to change rules around the scope and operation of FSCS funding.⁵³

Compensation caps

107. In compensation schemes of last resort, caps are often placed on the total size of claims that can be paid in order to manage the impact on the scheme from any one event. If any scheme was limited to unpaid EDR determinations, the compensation caps or monetary limits for the EDR scheme could act as limits for the scheme.

Scheme administration

108. There are a number of ways that a compensation scheme of last resort could be administered. For example, the scheme could be administered by Government with appropriate legislative backing (similar to the Fair Entitlements Guarantee, as described above).
109. Alternatively, the scheme could be industry administered with regulatory oversight. For example, an industry administered scheme, including its terms of reference, could be introduced by legislation. Similarly to the current provisions which require particular firms to be a member of an approved EDR scheme, legislation could require particular firms also to be members of a compensation scheme of last resort.
110. Any compensation scheme of last resort could form a part of the existing industry EDR arrangements, or operate as a stand-alone scheme.

A scheme's ability to recover compensation

111. In circumstances where a compensation scheme of last resort makes a payment to a claimant, the scheme may seek to recover this compensation from the firm that failed to satisfy the EDR determination. For example, as described earlier in this section of the Issues Paper, under the Fair Entitlements Guarantee program, once entitlements are paid to the employee, the Commonwealth stands in the shoes of the employee as a subrogated creditor and is entitled to claim in the liquidation and is given priority over other unsecured creditors under the *Corporations Act 2001*.

52 See Financial Conduct Authority, *CP16/42: Reviewing the funding of the Financial Services Compensation Scheme (FSCS)*, <<https://www.fca.org.uk/publications/consultation-papers/cp16-42-reviewing-funding-financial-services-compensation-scheme>>.

53 See Financial Conduct Authority, *CP16/42: Reviewing the funding of the Financial Services Compensation Scheme (FSCS)*, <<https://www.fca.org.uk/publications/consultation-papers/cp16-42-reviewing-funding-financial-services-compensation-scheme>>.

112. A related issue is the role played by ASIC where an EDR scheme member fails to pay a determination. For example, ASIC may have a role in bringing regulatory action against the firm and those who control it.

Interaction with other compensation schemes

113. A number of compensation schemes already operate within the financial services sector. For example, the *Superannuation Industry (Supervision) Act 1993* provides for compensation dealing with losses from fraudulent conduct or theft in an APRA-regulated superannuation fund.
114. The introduction of a compensation scheme of last resort would raise issues about how the new scheme would interact with existing schemes. It would be important to ensure that consumers knew which scheme to access depending on the circumstances and that firms were making appropriate financial contributions.

Stakeholder proposals for a compensation scheme of last resort

115. In response to the Panel's initial Issues Paper and Interim Report, submissions were received from a number of stakeholders on this issue, with the ABA and FOS providing detailed comments.⁵⁴ The Panel has highlighted these proposals to assist stakeholders in responding to design issues, but they do not represent a preferred view of the Panel. A summary of these two proposals is contained below.

Australian Bankers' Association proposal

The ABA supports establishing a mandatory, prospective compensation fund that covers individuals and small businesses who have received poor financial advice, and have not been paid a determination made by an ASIC-approved EDR scheme due to the validated insolvency or wind up of the financial advice business, where all other redress avenues have been exhausted.

However, the ABA believes that managing the risk to consumers of unpaid determinations requires a multifaceted response. The introduction of a last resort compensation scheme must be accompanied by other measures and reforms to reduce the likelihood of unpaid EDR determinations, both to ensure the scheme is truly a last resort, and promote the long term viability and success of a scheme. These measures include reforms relating to professional indemnity insurance, AFS licensing criteria, enhanced enforcement ASIC powers, and the professionalisation of financial advice.

⁵⁴ Australian Bankers' Association, submission to the EDR Review Interim Report, Appendix 3; Financial Ombudsman Service Australia, *An Updated Proposal to Establish a Financial Services Compensation Scheme*, May 2015.

Australian Bankers' Association proposal (continued)

Types of claims covered

The scheme should cover failures that arise in the context of a relationship where personal advice on Tier 1 products,⁵⁵ and/or general advice on Tier 1 products is provided to retail customers. Tier 1 products are all financial products except those listed under Tier 2. Tier 2 products are generally simpler and better understood than Tier 1 products.⁵⁶ The failure could relate to *Corporations Act 2001* breaches, fraud, negligence, misrepresentation and administrative errors connected with the advice relationship.

The scheme should cover general advice provided by financial advisers, product manufacturers and robo-advisers (who deliver financial advice online using algorithms and technology), as well as personal advice to avoid market distortions and take account of the low level of consumer understanding of the difference between personal and general advice. The scheme is not intended to cover retail bank staff providing retail banking services.

The scheme should not cover businesses that only provide dealing or arranging services, such as securities dealers or derivatives dealers, nor should it cover research houses that publish reports containing general advice.

Scheme membership

The scheme should require all AFS licensees who offer personal financial product advice and certain general advice to a retail client to be a member and contribute to the scheme. The scheme should be mandatory, with compulsion underpinned by a legislative or regulatory requirement.

Access to the scheme

There should be a validated insolvency or wind up of the financial advice business, and all other redress avenues should have been exhausted.

Generally, there would be an expectation that a customer would resort to the financial adviser (and through the financial adviser the professional indemnity insurer), the financial resources of the financial adviser, and would have explored legal enforcement options. Evidence will be required (possibly from a registered liquidator or administrator) that the assets of the financial advice business will not cover the determination.

55 Tier 1 products are defined in Australian Securities and Investments Commission (2012) Regulatory Guide 146, *Licensing: Training of financial product advisers* as follows: Tier 1 products: All financial products except those listed under Tier 2. Tier 2 products include: General insurance products, except for personal sickness and accident (as defined in reg 7.1.14); consumer credit insurance (as defined in reg 7.1.15); basic deposit products; non-cash payment products; first home saver deposit accounts.

56 Australian Securities and Investments Commission (2012), Regulatory Guide 146, *Licensing: Training of financial product advisers*, pages 15-16.

Australian Bankers' Association proposal (continued)

Funding

Broadly, the ABA supports a levy structure comprising:

- a prefunded establishment levy, based on borrowings from industry;
- prefunded management levies to support the operation of the compensation scheme of last resort and repay establishment levies; and
- prefunded compensation levies.

Funding contributions need to be calculated taking into account different advice models, such as general advice representative models, product manufacturers that provide financial advice, and robo-advice businesses. The calculation would need to balance appropriate risk weightings with the cost of administering the contributions.

The introduction of a scheme should work in an integrated way with other regulatory, professional and risk management structures, so as to actively encourage improved practice and professionalism at the level of individual advisers and practices.

Compensation caps

The ABA is of the view that the size of disputes and the quantum of compensation awards considered by the scheme should align with or be no greater than that provided by the EDR scheme.

Scheme administration

The structure of the scheme should be developed through flexible, industry based processes, with appropriate legislative underpinning to ensure all financial advisers contribute to the scheme. A largely industry based process will ensure the scheme can be established in a timely way, and to enable flexibility to adjust its remit, terms of reference and processes over time.

The governance arrangements should include:

- a board, with representation including an independent chair, a legal expert and an equal number of industry and consumer representatives;
- a claims management/assessment panel; and
- sufficient resources to respond to claims as they arise, but not to operate on a full time basis or be required to undertake additional tasks.

Where the EDR framework moves to one ASIC approved EDR scheme, there should be further investigation of the EDR scheme providing the administrative services for the scheme and collecting funding levies.

Australian Bankers' Association proposal (continued)

Prospective claims

The scheme should be prospective, with the design process considering the timing of the effective date of the scheme and appropriate event and cut-off dates for claims, to minimise distortions in consumer and financial adviser behaviour.

The scheme should not cover unpaid determinations made before the effective date, including the current unpaid FOS determinations. These determinations are the result of a combination of regulatory and conduct failures which are being addressed through the new professional standards framework and not a direct result of the absence of a last resort compensation scheme.

Financial Ombudsman Service proposal

FOS also supports the creation of an industry funded compensation scheme of last resort with legislative backing modelled on current industry based EDR arrangements.⁵⁷ In FOS's submission to the Panel's Issues Paper of 9 September 2016, it identified that its most recent documents dealing with a compensation scheme of last resort proposal included its submission to the Interim Report of the Financial System Inquiry and 'An Updated Proposal to establish a Financial Services Compensation Scheme' released in June 2015.⁵⁸

A summary of the Updated Proposal released in June 2015 is set out below.

Types of claims covered

The scheme should cover claims by retail clients⁵⁹ of AFS licensees who have unpaid determinations or awards by an EDR scheme, court or relevant tribunal with appropriate caps on the amount paid for each claim.

Scheme membership

All AFS licensees that provide financial services to retail clients would be required to become a member of the scheme, in order to meet the obligation to have 'compensation arrangements' under the *Corporations Act 2001*.⁶⁰

57 As set out at page 9 of FOS's 'An Updated Proposal to establish a Financial Services Compensation Scheme', FOS states that it 'accepts that a compensation scheme could be structured either as an industry scheme with legislative backing, modelled on current industry based EDR arrangements or as a standalone statutory entity. The different models would involve a number of public policy trade-offs, in particular between the scope of its operations and costs to industry and also on the extent of industry and consumer involvement in any governance arrangements'.

58 FOS has advised the Panel that these proposals were developed as a proof of concept (based on the data available to FOS) showing that a viable scheme could be designed and implemented. FOS states that it accepts that alternative approaches may be feasible and has continued to engage with stakeholders on options for the key design elements of a workable scheme.

59 Any person who at any material time was a retail client, as defined in Chapter 7 of the *Corporations Act 2001*.

60 FOS suggests that one way to achieve this may be to amend Corporations Regulation 7.6.02AAA to provide

Financial Ombudsman Service proposal (continued)

Access to the scheme

There are five elements required for a successful claim:

- The claimant must be a retail client;
- The claim must be against an AFS licensee that has agreed to pay levies to the scheme;
- The claimant must have received a determination in their favour by an EDR scheme, a court or tribunal of competent jurisdiction.⁶¹
- The determination must relate to the provision of a financial service no more than six years prior to the commencement date; and
- The scheme has declared that the AFS licensee is in default.

Funding

The scheme would be pre-funded by AFS licensees through a levy either collected by Government for distribution to the scheme or paid directly to the scheme.

Compensation caps

Retail clients could receive compensation up to a portion of the EDR scheme limits with the ability to spread payments over a few years.

Scheme administration

The scheme would be subject to ASIC approval and industry based.⁶² The scheme would be operated by an independent entity governed according to its constitution by a board of directors representing both industry and consumers with an independent chair.⁶³

The scheme would be supported by the Australian Government through a legislative requirement on AFS licensees to become members of the scheme.

that the requirement to have compensation arrangements is subject to the requirement that, in addition to holding adequate professional indemnity insurance, AFS licensees participate in a compensation scheme of last resort.

61 FOS states in its Updated Proposal (at page 8) that its approach 'is for reliance to be placed on the role of EDR schemes, courts or tribunals in making the assessment and determination of customers' claim for compensation. [FOS] recognise[s] there may be claims by retail customers for compensation where the claims have not been the subject of a formal merits assessment and decision. The challenge is that these would require a separate process for acceptance and review of the claim on its merits, and assessment of any compensation.'

62 Although FOS has indicated that a scheme could be either an ASIC-approved industry scheme, or a statutory based scheme.

63 However, as FOS has noted, a compensation scheme of last resort could be structured in different ways.

Financial Ombudsman Service proposal (continued)

Prospective claims

FOS proposes a period of transition to capture unpaid determinations where, at the time the scheme is established, there is a clear legal liability for payment of compensation which is clearly and readily identifiable, without further investigation and merits assessment. FOS considers that unpaid determinations since 1 July 2008 (when FOS was established) in favour of a retail client should be included.

Questions — Potential design of a compensation scheme of last resort

14. What are the strengths and weaknesses of the ABA and FOS proposals?
15. What are the arguments for and against extending any compensation scheme of last resort beyond financial advice?
16. Who should be able to access any compensation scheme of last resort? Should this include small business?
17. What types of claims should be covered by any compensation scheme of last resort?
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?
19. What steps should consumers and small businesses be required to take before accessing any compensation scheme of last resort?
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?
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?
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?
23. What compensation caps should apply to claims under any compensation scheme of last resort?
24. Who should fund any compensation scheme of last resort?
25. Where any compensation scheme of last resort is industry funded, how should the levies be designed?
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?

Questions — Potential design of a compensation scheme of last resort

27. What actions should ASIC take against a firm that fails to pay an EDR determination or its directors or officers?
28. Should any compensation scheme of last resort be administered by government or industry? What other administrative arrangements should apply?
29. Should time limits apply to any compensation scheme of last resort?
30. How should any compensation scheme of last resort interact with other compensation schemes?
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?

LEGACY UNPAID EDR DETERMINATIONS

116. Under the existing EDR framework, there have been circumstances where claimants have received an EDR determination in their favour, but that determination has not been paid.
117. As at 2 May 2017, \$13,909,635.50 (excluding interest) in determinations that FOS has made in favour of complainants has not been paid. Although the overall amount of EDR determinations exceeds \$169,000,000, which means the level of unpaid determinations represents a small amount in terms of the overall system, the effect on individuals can be devastating.⁶⁴
118. According to FOS, since 1 January 2010, 38 financial firms have been unable to comply with 151 determinations, affecting 214 consumers.⁶⁵
119. FOS notes only a very small percentage of all FOS members are involved with non-compliance and these are not spread evenly throughout different sectors of the financial services industry. The top three categories of non-compliant financial firms are:
 - financial planners and advisors (53 per cent);
 - operators of managed investment schemes (13 per cent); and
 - credit providers (11 per cent).⁶⁶

64 See Financial Ombudsman Service, *Circular*, Issue 27, October 2016 — the level of overall determinations has been calculated from 1 January 2010.

65 See Financial Ombudsman Service, *Circular*, Issue 29, April 2017.

66 Financial Ombudsman Service, *Circular*, Issue 29, April 2017.

120. For CIO, since 1 December 2014, four financial firms have not complied with five CIO determinations made in favour of seven consumers. As at 2 May 2017, the value of these outstanding determinations was approximately \$399,862 (excluding interest).⁶⁷
121. The difference in unpaid determinations between FOS and CIO can largely be explained by the significantly higher volume of disputes received by FOS (34,095 disputes in 2015-16, representing 83 per cent of all EDR disputes in total) compared to CIO (4,760 disputes in 2015-16, representing 12 per cent of all EDR disputes in total).
122. In the case of superannuation disputes, as at 2 May 2017, the SCT had no outstanding unpaid determinations. This is due to the nature of prudential regulation in the superannuation system, which means it would be rare for a superannuation fund to be unable to pay its obligations.
123. In response to the Panel's Issues Paper of 9 September 2016 and Interim Report of 6 December 2016, stakeholders expressed a range of views on whether a compensation scheme of last resort should provide compensation for past cases. For example, the Joint Consumer Group submitted a scheme should be retrospective to allow consumers with a compensation claim arising from behaviour before the scheme is implemented to make a claim.⁶⁸ Similarly, FOS's proposal would allow retail clients to receive compensation for existing unpaid EDR determinations. In contrast, the ABA has submitted that unpaid determinations made before any scheme commences should not be covered.

Questions — Legacy unpaid EDR determinations

32. What existing mechanisms are available for individuals who have legacy unpaid EDR determinations to receive compensation?
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?

⁶⁷ Commonwealth of Australia 2016, *Review of the financial system external dispute resolution and complaints framework Interim Report* (6 December 2016), page 165 (at paragraph [7.5]).

⁶⁸ Joint Consumer Group, submission to the EDR Review Issues Paper, page 77.

PROVIDING ACCESS TO REDRESS FOR PAST DISPUTES

124. The amended Terms of Reference require the Panel to consider the merits and issues involved in providing access to redress for past disputes in the financial sector.
125. Given that the Panel's Terms of Reference are centred on the EDR system, the Panel proposes to focus its analysis and any observations on this issue to circumstances where a consumer or small business had a dispute which for various reasons has not been resolved to date through EDR. However, the Panel is interested in whether other types of disputes should also be considered.
126. The Panel has attempted to set out the range of issues involved in this complex area. However, the Panel is aware that individual cases will have characteristics that cannot be captured in general terms. Submissions with specific examples will assist the Panel in better understanding the issues.
127. The Panel has not formed a preliminary view or made a final decision on any of the issues contained in this section. The Panel welcomes all stakeholder comments and feedback.
128. In this section of the Issues Paper, the Panel first considers the issue of access to redress for past disputes and the circumstances that prevented some individuals and small businesses from accessing redress. Following this, is discussion on how other sectors have approached the matter of access to redress. The section then considers the mechanics of, and design issues involved with, providing access to redress for past disputes.

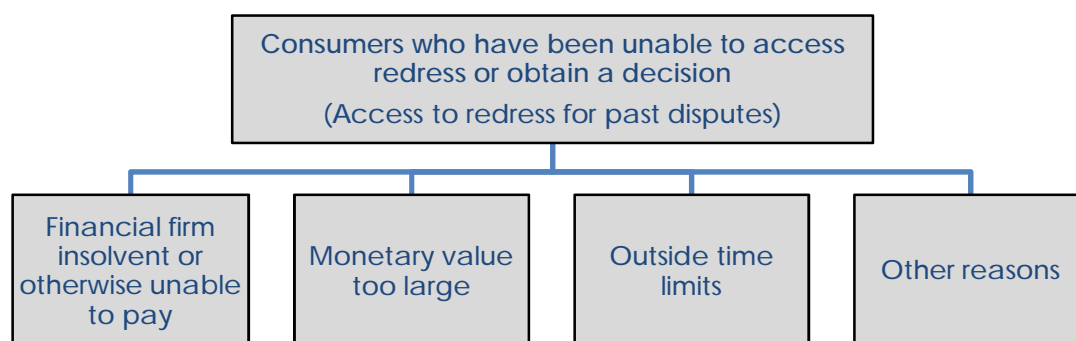
PROBLEM BEING ADDRESSED — ACCESS TO REDRESS

129. A range of government inquiries have identified a number of past disputes where consumers or small businesses have been unable to access redress.
130. These included the Parliamentary Joint Committee on Corporations and Financial Services Report, *Inquiry into financial products and services in Australia* (November 2009), the Senate Economics References Committee Report, *Agribusiness managed investment schemes: Bitter harvest* (March 2016), the Parliamentary Joint Committee on Corporations and Financial Services Report, *Impairment of customer loans* (May 2016) and the Australian Small Business and Family Enterprise Ombudsman Report, *Inquiry into small business loans* (December 2016).
131. If consumers and small businesses are unable to access redress, then this can lead to severe financial hardship and, more broadly, subsequent loss of trust and confidence in the EDR framework and the financial system more generally.
132. In addition to the severe emotional distress and financial hardship experienced by affected consumers, failure to provide access to redress may also impose further costs on the wider public as consumers are forced to rely on other forms of support, including the social security system.

What circumstances have prevented access to redress?

133. The diagram below depicts the range of scenarios that the Panel considers could lead to circumstances where consumers or small businesses are unable to access redress through EDR:

- Y the financial firm was insolvent or otherwise unable to pay;
- Y the monetary value of the dispute exceeded the EDR scheme's monetary limits;
- Y the dispute was outside of the EDR scheme's time limits; or
- Y the consumer or small business did not pursue their dispute with the EDR scheme for other unspecified reasons (for example, because of personal circumstances or cost involved, dispute fatigue or emotional distress).



134. These circumstances are discussed in detail below.

Financial firm was insolvent or otherwise unable to pay

135. Some disputes may not have been resolved because the financial firm was either insolvent or otherwise unable to pay. For example, the financial firm's professional indemnity insurance may have failed to cover claims, either as a result of the policy being exhausted or because the insurer relied on an exclusion clause to refuse indemnity.
136. This may have occurred before the consumer could lodge their dispute with an EDR scheme meaning the dispute was never heard. Alternatively, the EDR scheme may have closed the dispute after its lodgement because the financial firm became insolvent before a determination could be made.

Monetary value of the dispute

137. Under the existing framework, a dispute may fall outside of an EDR scheme's jurisdiction if the value of the dispute is above the scheme's monetary limits. As a result, consumers and small business may either have:
- never lodged their dispute with an EDR scheme because the monetary value of their dispute was higher than the scheme's monetary limits; or
 - lodged their dispute but the EDR scheme refused to hear it as the monetary value of the dispute exceeded the monetary limits.⁶⁹
138. In these circumstances, consumers are unable to access EDR and, other than taking matters through the courts, have been left with few other low cost avenues through which to seek redress.

Time limits

139. If a consumer or small business did not bring their dispute to an EDR scheme for resolution within the scheme's prescribed timeframe for lodgement of a dispute, this may mean that they are later unable to access redress.
140. Under the existing framework, disputes can generally be heard by an EDR scheme if the dispute was lodged within six years of when the consumer first became aware that they had suffered a loss or within two years of receiving an IDR response from a financial firm.
141. EDR schemes may waive these time limits in exceptional circumstances or where member firms consent to a waiver. Other than for death benefit and total permanent disability disputes, no limits apply to superannuation disputes.

Other reasons

142. There may be other situations which create the circumstances whereby a consumer or small business does not bring their dispute to an EDR scheme for resolution. For example, this category could also include disputes that were not pursued because of a lack of knowledge about the EDR process or the perceived complexity, difficulty or costs involved (dispute fatigue).
143. The Panel, through the course of its research for its Report of 3 April 2017, heard directly from individuals and groups who had suffered severe financial loss, resulting in serious impacts on their lives. In many cases participants advised the Panel that having to take a matter through a claims process could potentially add to the traumatic experiences associated with the dispute.

⁶⁹ On 9 May 2017, the Government accepted the Panel's recommendation to increase the monetary limits for the new EDR scheme.

144. In some cases the Panel was told that consumers were unable to take action because the circumstances of their losses were unclear or because the complexity of the issues meant that they were unable to pursue a dispute without professional assistance, which may have been unaffordable. Complicating this further were cases of incomplete or missing documentation that had made it even harder for consumers to progress their claim.

Circumstances preventing access to redress may arise in the future

145. The Panel notes that situations preventing access to redress may continue to arise in the future, so although the Panel's Terms of Reference focus on access to redress for past disputes, it may be necessary to consider how to address some of the circumstances that prevent access to redress in relation to future disputes.

Question — Circumstances which have prevented access to redress

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?
35. What evidence is there about the extent to which lack of access to redress for past disputes is a major problem?

APPROACHES TO PROVIDING ACCESS TO REDRESS FOR PAST MATTERS

146. The problem of how to provide redress for past matters arises in a number of policy areas. Some relate to the activities of government; in other cases, governments assume responsibility for compensation although there is no legal liability to do so.
147. Commonwealth and state and territory governments use a variety of mechanisms to provide discretionary payments in particular circumstances, including *ex gratia* and act of grace payments and statutory redress schemes.⁷⁰ The range of mechanisms allows governments to offer the most appropriate compensation remedy to suit the individual circumstance.
148. However, given funding constraints, whatever mechanism is employed, it may be considered inequitable by some consumers and small businesses, unless all past disputes are able to be compensated.

⁷⁰ Other mechanisms are the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration and waiver of debt schemes.

Ex gratia payments

149. There are a range of circumstances in which the Australian Government makes ex gratia payments. The Australian National Audit Office notes that:

*'Ex gratia payments are made, usually, to restore equity to a group of persons, irrespective of whether the Commonwealth has any direct moral responsibility for the losses the group has sustained. (The provision of relief for the effects of flood and drought are examples of this type of assistance). On the other hand, act of grace payments are made, usually, to effectively compensate individuals, in special circumstances, where the decision-maker determines that the Commonwealth has a direct moral responsibility to provide recompense.'*⁷¹

150. The authority for Commonwealth ex gratia payments comes from the Executive Power under section 61 of the Constitution. An ex gratia payment can deliver financial relief quickly and at short notice. Approval for ex gratia payments is sought from the Prime Minister and/or Cabinet and the Finance Minister after all other possible alternative avenues for redress have been explored.⁷²
151. States and territories also provide ex gratia payments. In some cases specific legislation provides for such payments; in others payments are made in reliance on the inherent executive power to make such payments.⁷³

Examples of schemes in other sectors

152. Some examples of schemes in other sectors which have been (or are proposed to be) established to provide redress for past matters include:
- Y the Asbestos Injuries Compensation Fund (also known as the 'James Hardie fund');
 - Y the redress scheme being delivered in response to the Royal Commission into Institutional Responses to Child Sexual Abuse;
 - Y the Aboriginal Trust Fund Repayment Scheme, established by the New South Wales Government;

71 Commonwealth of Australia, Australian National Audit Office 2004, *Compensation Payment and Debt Relief in Special Circumstances*, page 44 at paragraph 2.27, <<https://www.anao.gov.au/work/performance-audit/compensation-payment-and-debt-relief-special-circumstances>>. (See also paragraph 3.11 of Senate Standing Committee on Legal and Constitutional Affairs, Review of Government Compensation Payments, 6 December 2010, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/govtcomp/report/index>.)

72 Australian Government, Department of Finance and Deregulation 2010, Submission to the Senate Standing Committee on Legal and Constitutional Affairs on its Review of Government Compensation (11 June 2010), <https://www.finance.gov.au/sites/default/files/compensation_payments_finance_submission.pdf>.

73 Senate Standing Committee on Legal and Constitutional Affairs, *Review of Government Compensation Payments*, 6 December 2010, at paragraph 3.14, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/govtcomp/report/index>.

- the Forde Foundation, established in response to the Commission of Inquiry into Abuse of Children in Queensland Institutions; and
- reparation schemes for the Stolen Generations, which operate (or have been announced) in Tasmania, South Australia and New South Wales.

153. While some of these approaches have typically focused on redress for past wrongs rather than necessarily past disputes, they may possess features worthy of consideration in the context of providing redress for past disputes in the financial system. Further background on these schemes can be found in Appendix B.

Question — Approaches to providing access to redress for past matters

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?

EVALUATION OF PROVIDING ACCESS TO REDRESS FOR PAST DISPUTES

Policy considerations

154. Although it is common for regulatory changes to affect future conduct, providing access to redress for past disputes would involve consideration of events occurring prior to the introduction of a new system. Particular care must be taken when introducing policies that relate to past matters to ensure that they are justified and that there are no unintended negative consequences.
155. It would be necessary to consider the potential impacts of any mechanism on the relevant parties. While allowing access to redress through EDR for past disputes can *prima facie* only confer a benefit on consumers and small business complainants, retrospective application may alter obligations of financial firms with respect to past events. The desirability of extending additional benefits or rights to a party who would not otherwise have been entitled to it would need to be considered against any adverse effects on other parties (other than the Commonwealth).⁷⁴
156. The Panel notes that in many of the classes of cases identified the value of losses is unquantifiable. This creates challenges in determining how such a scheme could be funded.

⁷⁴ Note that subsection 12(2) of the *Legislation Act 2003* provides that an instrument which commences retrospectively, and which would disadvantage or impose a liability on any person other than the Commonwealth, is of no effect.

Consequences for consumers and small business

157. An inability to access redress can have devastating consequences for consumers and small businesses. ASIC identifies in its *Report 240: Compensation for retail investors: the social impact of monetary loss* that:

‘failure to fully compensate investors who lost money because of the conduct of their managed investment scheme or financial planner can cause the investor severe emotional and financial distress. [...] [T]he loss experience can have a corrosive effect on trust in the financial system.’⁷⁵

158. In relation to small businesses, the Australian Small Business and Family Enterprise Ombudsman’s *Inquiry into small business loans* report identified a number of cases where it considered there were ‘very real issues where bank conduct is unacceptable and possibly unconscionable’.⁷⁶ The report also identified ‘significant gaps in access to justice with nowhere to go except the court system, with borrowers having limited resources and banks having overwhelming resources’.⁷⁷

Consequences for financial firms

159. Dealing with past disputes has the potential to have significant consequences for financial firms. Firms have entered into contractual relationships with EDR schemes that specify the range of disputes that the scheme is able to consider. These limits cover the size of the dispute and the age of the dispute (for example, FOS can currently only hear disputes that have arisen in the last six years).
160. Financial firms may well have relied on these limitations in arranging their affairs; for example, the potential exposure of a firm may impact on their professional indemnity insurance cover. Any mechanism that extends the scope of dispute resolution arrangements may have potential effects on the adequacy of financial firms’ professional indemnity insurance in respect of those past events.
161. Depending on the scope of a potential scheme, it could create a liability for losses that are difficult for a firm to estimate and make provision for.
162. Additionally, for prudentially regulated bodies there are issues in relation to capital adequacy and provisioning.

⁷⁵ Australian Securities and Investments Commission 2011, Report 240 *Compensation for retail investors: the social impact of monetary loss*, page 8.

⁷⁶ Australian Small Business and Family Enterprise Ombudsman 2016, *Inquiry into small business loans*, page 6.

⁷⁷ Australian Small Business and Family Enterprise Ombudsman 2016, *Inquiry into small business loans*, page 6.

Questions — Evaluation of providing access to redress for past disputes

37. What are the benefits and costs associated with providing access to redress for past disputes?
38. Are there any legal impediments to providing access to redress for past disputes?
39. What impact would providing access to redress for past disputes have on the operations of financial firms?
40. What impact would providing access to redress for past disputes have on the professional indemnity insurance of financial firms?
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?

DESIGN ISSUES WITH PROVIDING ACCESS TO REDRESS FOR PAST DISPUTES

163. If implemented, providing access to redress for past disputes would involve consideration of a number of issues. Some of these issues are outlined below.

Range of parties able to seek redress

164. Any mechanism for providing redress for past disputes would need to specify the range of consumers and small business that would be eligible to seek redress. As a minimum, it would need to identify consumers and small business that have so far been unable to access EDR and have their dispute heard (for example, because of the scheme's monetary limits as discussed above.)

Mechanics

165. Consideration would need to be given to the mechanics of considering the dispute and to determine whether redress is to be provided. Relevant considerations could include:
 - who is the decision maker;
 - what decision making criteria apply to provide an appropriate form of redress;
 - what type of disputes (subject matter) may be considered;
 - what monetary limit applies;⁷⁸ and
 - whether there should be any limits on the age of disputes that are able to be considered.

⁷⁸ One key reason why past disputes have been ineligible through existing EDR schemes is because of the monetary limits. Disputes that exceed these limits must be resolved through a court.

Who is the decision maker

166. If any scheme to provide redress for past disputes is to be implemented, it will need to work effectively with the existing dispute resolution and compensation arrangements. This raises an issue with whether any scheme should be integrated with existing arrangements (for example, an existing EDR scheme) or form part of a separate program specifically established for the purpose of handling past disputes.

Decision making criteria

167. Consideration would need to be given to whether the decision making criteria should be the same as those applied by the EDR bodies (that is, the FOS or CIO test) or something different.
168. FOS currently makes decisions based on ‘fairness in all the circumstances’ having regard to: legal principles; applicable industry codes; good industry practice; and previous FOS decisions (although FOS is not bound by these).⁷⁹ CIO applies the same decision making criteria, but also has regard to rights provided by law to consumers and the independent and prompt resolution of the dispute.

Type of disputes

169. The question also arises as to the types of disputes which may be considered by a scheme to provide redress for past disputes. As noted in paragraphs [133]-[144], the Panel has identified the following circumstances that may prevent consumers from accessing redress:
- the financial firm was insolvent or otherwise unable to pay;
 - the monetary value of the dispute exceeded the EDR scheme’s monetary limits;
 - the dispute was outside of the EDR scheme’s time limits; or
 - the consumer or small business did not pursue their dispute with the EDR scheme for other unspecified reasons (for example, because of personal circumstances or cost involved, dispute fatigue or emotional distress).
170. Whether all or a subset of these should be included in a scheme to provide redress for past disputes would need to be considered in the design of such a scheme.

⁷⁹ Commonwealth of Australia 2017, *Review of the financial system external dispute resolution and complaints framework: Final Report* (3 April 2017), page 38.

Monetary limits

171. The existing EDR schemes operate caps on the value of disputes that they consider (currently disputes up to \$500,000) and the amount of compensation that may be awarded (currently up to \$309,000). In developing a scheme to deal with past disputes, consideration would need to be given to:
- whether any monetary limits should apply; and
 - if so, whether the monetary limits that apply should be the EDR schemes' monetary limits.
172. If it is appropriate to apply the monetary limits of the EDR schemes, an additional consideration would include whether consumers and small businesses whose dispute falls within the new, higher limits of the proposed Australian Financial Complaints Authority but was outside the previous limits should be able to apply to have their dispute considered. If so, access to redress for past disputes could be provided through a transition period whereby the higher monetary limits of the new EDR body are applied for a defined period (for example, one year) retrospectively.

Time limits

173. If a scheme to provide access to redress for past disputes was adopted, it would need to be subject to appropriate time limits. This could include adopting a dispute 'age' limit and a 'window of application'.

Age of eligible disputes

174. Placing a limit on the 'age' of disputes which may be brought before such a proposed scheme would limit:
- the length of time affected parties (that is, financial firms) need to retain evidence; and
 - the new and increased exposure that financial firms would potentially face (for example, in the case of increased monetary limits).
175. Access could be aligned with age limits administered by the existing schemes. Currently, both FOS and CIO have time limits on the age of disputes which they will consider, generally being those up to six years old.

Application 'window'

176. Another consideration is whether the scheme should be subject to a limited application 'window' during which time eligible consumers must come forward and identify themselves to the relevant body (for example, an EDR scheme). In the absence of an application window, the mechanism would be available on an ongoing basis, for any disputes within any age limits.

Compensation and funding

177. Under normal circumstances, the financial firm must pay the compensation awarded by an EDR body. As noted above, extending coverage to past disputes could have significant consequences for financial firms, particularly in relation to their professional indemnity insurance requirements.
178. In addition, some of the firms that would be a party to past disputes may no longer exist or may be insolvent. This raises questions about how awards in these matters should be paid for if such disputes are included in a scheme.
179. Given these issues, careful consideration needs to be given to the appropriate arrangements for funding any redress for past disputes.
180. Depending on how any compensation arising from past disputes is funded, it may not be possible to fully compensate all claimants. This may require a 'rationing' mechanism to determine the amounts of compensation which are awarded. A rationing mechanism could be based on hardship. For example, claims which have resulted in financial hardship may be given priority in cases where a defined pool of money is available to fund past dispute determinations.

Stakeholder proposal for providing access to redress for past disputes

181. The Panel has received a proposal from Westpac for the possible design of a 'bank-related past issues forum'.⁸⁰ An outline of this proposal is provided below to assist stakeholders in responding to questions about design issues.
182. This proposal does not represent a preferred view of the Panel, but is included to facilitate consideration of the issues.

Westpac proposal

Structure/governance

- Decisions of the past issues forum would be made by an ad-hoc expert panel appointed by the single EDR body. The expert panel would be constituted based on the nature of the disputes it considers. The expert panel would have commercial and legal capability and extended jurisdiction.
- The expert panel would be approved by members of the single EDR body.

Remit

- The remit of the past issues forum would be bank-related allegations relating to poor financial advice or maladministration in lending.

⁸⁰ Provided to the EDR Review Panel on 4 May 2017.

Westpac proposal (continued)

Funding

- The past issues forum would be industry-funded via a levy for potential participants (that is, banks), with a user-pays element for financial firms who have determinations made against them.

Eligibility criteria

Consumers or small businesses would have to satisfy the following eligibility criteria to access the past issues forum:

- Their dispute must come within stated time limits (for example, statute of limitations).
- The dispute must not have been previously heard (for example, by FOS or a court).
- The dispute must be outside the terms of reference of the EDR body (for example, the claim exceeded FOS's monetary limit).
- If the customer is a 'larger business' customer, then it must not have resources to take its dispute to court (for example, it must be insolvent).

Payment of compensation

- Determinations of the expert panel made in favour of the customer would be paid by the bank.

Appeals

Both the customer and the bank would be able to appeal decisions to the Supreme/Federal Court.

Disputes within scope of proposal

	IN	OUT		
<p>Past dispute relates to a bank</p> <p>AND</p> <p>Customer lacked resources to take bank to court (for example, bankrupt)</p> <p>OR</p> <p>Dispute was outside FOS's terms of reference</p> <p>AND</p> <p>Dispute and consumer meet relevant eligibility criteria</p>			<p>Past dispute is not bank-related (for example, dispute relates to a failed financial planner not associated with a bank)</p> <p>AND</p> <p>outstanding unpaid EDR determination</p>	<p>Past dispute is not bank-related</p> <p>AND</p> <p>Losses are uncompensated or dispute has not been prosecuted (for example, MIS collapses)</p>

Questions — Design issues for providing access to redress for past disputes

42. What are the strengths and weaknesses of the Westpac proposal?
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?
44. What mechanism should be used to resolve the dispute and what criteria should be used to determine which disputes can be brought forward?
45. What time limits should apply?
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?
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)?
48. Should there be any monetary limits? If so, should the monetary limits that apply be the EDR scheme monetary limits?
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?
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?
51. Are there any other issues that would need to be considered in providing access to redress for past disputes?

CONSULTATION QUESTIONS

General instructions

Please include relevant statistics and/or case examples, and a discussion of the costs and benefits, in responses.

Please consider the following when making a submission: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.

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?
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?

Compensation scheme of last resort

Existing compensation arrangements

3. What are the strengths and weaknesses of the existing compensation arrangements contained in the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009*?
4. What are the strengths and weaknesses of the National Guarantee Fund, the Financial Claims Scheme and Part 23 of the *Superannuation Industry (Supervision) Act 1993*?
5. Are there other examples of compensation schemes of last resort that the Panel should be considering?

Evaluation of a compensation scheme of last resort

6. What are the benefits and costs of establishing a compensation scheme of last resort?
7. Are there any impediments in the existing regulatory framework to the introduction of a compensation scheme of last resort?
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?
9. What potential impact would a compensation scheme of last resort have on the operations of financial firms?
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?

Evaluation of a compensation scheme of last resort (continued)

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?
12. What other mechanisms are available to deal with uncompensated consumer losses?
13. What relevant changes have occurred since the release of Richard St. John's report, *Compensation arrangements for consumers of financial services*?

Potential design of a compensation scheme of last resort

14. What are the strengths and weaknesses of the ABA and FOS proposals?
15. What are the arguments for and against extending any compensation scheme of last resort beyond financial advice?
16. Who should be able to access any compensation scheme of last resort? Should this include small business?
17. What types of claims should be covered by any compensation scheme of last resort?
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?
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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?
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?
23. What compensation caps should apply to claims under any compensation scheme of last resort?
24. Who should fund any compensation scheme of last resort?
25. Where any compensation scheme of last resort is industry funded, how should the levies be designed?
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?

Potential design of a compensation scheme of last resort (continued)

27. What actions should ASIC take against a firm that fails to pay an EDR determination or its directors or officers?
28. Should any compensation scheme of last resort be administered by government or industry? What other administrative arrangements should apply?
29. Should time limits apply to any compensation scheme of last resort?
30. How should any compensation scheme of last resort interact with other compensation schemes?
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?

Legacy unpaid EDR determinations

32. What existing mechanisms are available for individuals who have legacy unpaid EDR determinations to receive compensation?
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?

Providing access to redress for past disputes

Circumstances which have prevented access to redress

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?
35. What evidence is there about the extent to which lack of access to redress for past disputes is a major problem?

Approaches to providing access to redress for past matters

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?

Evaluation of providing access to redress for past disputes

37. What are the benefits and costs associated with providing access to redress for past disputes?
38. Are there any legal impediments to providing access to redress for past disputes?
39. What impact would providing access to redress for past disputes have on the operations of financial firms?

Evaluation of providing access to redress for past disputes (continued)

40. What impact would providing access to redress for past disputes have on the professional indemnity insurance of financial firms?
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?

Design issues for providing access to redress for past disputes

42. What are the strengths and weaknesses of the Westpac proposal?
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?
44. What mechanism should be used to resolve the dispute and what criteria should be used to determine which disputes can be brought forward?
45. What time limits should apply?
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?
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)?
48. Should there be any monetary limits? If so, should the monetary limits that apply be the EDR scheme monetary limits?
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?
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?
51. Are there any other issues that would need to be considered in providing access to redress for past disputes?

APPENDIX A — AMENDED TERMS OF REFERENCE

The amended Terms of Reference for the Review, issued on 2 February 2017, are outlined below.

Terms of reference for the review into dispute resolution and complaints framework

Purpose of the review

The Financial Ombudsman Service, Superannuation Complaints Tribunal and Credit and Investments Ombudsman help Australians to resolve disputes with financial services providers. The Government is committed to ensuring that these bodies are working effectively to meet the needs of users, including consumers and industry.

Terms of reference

1. The review will examine the following dispute resolution and complaints arrangements to consider whether changes to current dispute resolution and complaints bodies in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system:
 - 1.1. the Financial Ombudsman Service (FOS);
 - 1.2. the Superannuation Complaints Tribunal; and
 - 1.3. the Credit and Investments Ombudsman.
2. The review will have regard to: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.
3. The review will make recommendations on:
 - 3.1. the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users, including linkages with internal dispute resolution;
 - 3.2. the extent of gaps and overlaps between each of the bodies (including consideration of legislative limits on the matters each body can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users;
 - 3.3. the role of the bodies in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better outcomes for users;
 - 3.4. the relative merits, and any issues that would need to be considered (including implementation considerations), of different models in providing effective avenues for resolving disputes; and
 - 3.5. the establishment, merits and potential design of a compensation scheme of last resort.

Terms of reference for the review into dispute resolution and complaints framework (continued)

4. In making its recommendations, the review will, to the extent relevant, take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors.
5. The review will take into consideration, and consult with ASIC, on the concurrent review of the FOS's small business jurisdiction.
6. The review will consider the merits and issues involved in providing access to redress for past disputes.

Process

The review will be led by an independent expert panel, consisting of a Chair and two members, and be supported by a secretariat from Treasury.

A final report is to be provided to the Minister for Revenue and Financial Services by the end of March 2017 (with the exception of issues contained in clauses 3.5 and 6 which will be provided to the Minister by the end of June 2017).⁸¹

The review will invite submissions from the public and consult with a range of stakeholders, including consumers and industry.

81 On 9 May 2017, the Treasurer amended the date on which the Panel is to provide its report on the issues contained in clauses 3.5 and 6 from the end of June 2017 to the second half of this year.

APPENDIX B — EXAMPLES OF SCHEMES OUTSIDE THE FINANCIAL SECTOR THAT PROVIDE FOR PAST MATTERS

ASBESTOS INJURIES COMPENSATION FUND ('THE JAMES HARDIE FUND')

1. The Asbestos Injuries Compensation Fund (AICF) was created in February 2007 as an independent, special purpose vehicle to provide compensation for Australian asbestos related claims against former subsidiaries of the James Hardie Group.⁸² James Hardie provides funding for the AICF in accordance with an agreement entered into with the NSW Government. The AICF operates as the trustee for two trust funds.
2. James Hardie's former subsidiaries are insolvent, and are under NSW administered winding up, regulated by the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* (NSW). This legislation also governs the proceedings which can be taken against the former subsidiaries and the payments which can be made by the AICF trust on behalf of the former subsidiaries.⁸³
3. The primary activities of the AICF are to: receive and assess claims against James Hardie's former subsidiaries and pay those claims using company funds or AICF trust funds as appropriate; pursue insurance and other recoveries on behalf of James Hardie's former subsidiaries; receive and manage the funding paid into the AICF by James Hardie; and manage and administer the role of trustee.⁸⁴
4. James Hardie paid initial funding of \$184.3 million into the AICF in 2007. Additional annual contributions are made on 1 July each year based on relevant financial information. Total contributions to 1 July 2015 are \$799.238 million.⁸⁵
5. The Fund received 577 claims in the year ending 31 March 2016 (665 in the prior year), and made gross payments of \$146.749 million (\$142.014 million in the prior year) in respect of asbestos claims.⁸⁶

82 James Hardie, Asbestos Compensation, *Factsheet – How is James Hardie supporting asbestos education, medical research and contributing to asbestos disease related compensation?*, <http://www.ir.jameshardie.com.au/jh/asbestos_compensation.jsp>.

83 Asbestos Injuries Compensation Fund, About Amaca, Amaba and ABN 60, <https://www.aicf.org.au/about_sub.php>.

84 Asbestos Injuries Compensation Fund, About us, <<https://www.aicf.org.au/about.php>>.

85 Asbestos Injuries Compensation Fund, General Purpose Financial Report for the year ended 31 March 2016, page 5, <<https://www.aicf.org.au/docs/AICFL%202016%20Financial%20Accounts.pdf>>.

86 Asbestos Injuries Compensation Fund, General Purpose Financial Report for the year ended 31 March 2016, page 5, <<https://www.aicf.org.au/docs/AICFL%202016%20Financial%20Accounts.pdf>>.

6. According to James Hardie, no proven compensation claim against it or its former subsidiaries has been unpaid.⁸⁷ Since 2010, the State of New South Wales has provided 'financial accommodation' to the AICF to assist in paying liabilities (an AICF Loan Facility agreement).⁸⁸

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE — PROVIDING A REDRESS SCHEME

7. The Royal Commission published its 'Redress and civil litigation' report in 2015.⁸⁹ The report states that monetary payments as a tangible means of recognising the wrongs suffered is one element of appropriate redress for survivors, as is funding for unlimited counselling and psychological care throughout survivors' lives (recommendations 2 and 9). The redress scheme should have no fixed closing date (recommendation 48) and applications should not be subject to usual limitation periods (recommendation 85).
8. The purpose of monetary payments should be to provide a tangible recognition of the seriousness of the hurt and injury suffered by survivors (recommendation 15) and payments should be provided based on the severity and impact of abuse (recommendation 16). Monetary payments under redress should be a minimum payment of \$10,000, a maximum payment of \$200,000 and an average payment of \$65,000 (recommendation 19).
9. Counselling and psychological care should be provided to survivors, both through increasing access to Medicare funded services and providing for other gaps in care, funded by the Government. A trust fund should be established to receive funding for counselling and psychological care (recommendation 40).
10. The redress scheme should be established as a single national scheme by the Australian Government (recommendation 26) but funded by the institutions in which the abuse is alleged to have occurred, with the Australian Government and state/territory governments being 'funders of last resort' (recommendations 35 and 36).

⁸⁷ James Hardie, Asbestos Compensation, *Factsheet – How is James Hardie supporting asbestos education, medical research and contributing to asbestos disease related compensation?*, <http://www.ir.jameshardie.com.au/jh/asbestos_compensation.jsp>.

⁸⁸ Asbestos Injuries Compensation Fund, Key Documents, <https://www.aicf.org.au/key_docs.php>.

⁸⁹ Commonwealth of Australia 2015, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and civil litigation report*, <<http://childabuseroyalcommission.gov.au/about-us/our-reports>>.

Government announcement

11. On 9 May 2017 as part of the Federal Budget, the Commonwealth Government announced that it will establish a Commonwealth Redress Scheme for survivors of institutional child sexual abuse. The scheme will provide redress to survivors who were sexually abused as children in Commonwealth institutions. Survivors will be able to claim a monetary payment of up to \$150,000, based on the severity and impact of the abuse experienced. Survivors will also be able to access psychological counselling. The scheme will accept claims from 1 July 2018 and will end on 30 June 2028.⁹⁰

ABORIGINAL TRUST FUND REPAYMENT SCHEME

12. The Aboriginal Trust Fund Repayment Scheme (ATFRS) was established in 2004 by the New South Wales Government to provide a mechanism for Aboriginal people in NSW to recover 'stolen wages': wages, allowances and pensions held in trust by the NSW Government between 1900 and 1969 but never paid out.
13. Reparation schemes also operated in Queensland — under the Underpayment of Award Wages Process introduced in 1999 one-off payments of \$7,000 were provided to workers employed on Aboriginal reserves; the Indigenous Wages and Savings Reparations Offer introduced in 2002 provided for payments of \$2,000 or \$4,000, depending on the date of birth of the Indigenous worker.⁹¹

THE FORDE FOUNDATION: RESPONSE TO THE COMMISSION OF INQUIRY INTO ABUSE OF CHILDREN IN QUEENSLAND INSTITUTIONS

14. The Forde Foundation was established in August 2000 'for the relief of poverty, for the advancement of education, training or development, personal and social support, relief of sickness, suffering distress, general enhancement of social and economic wellbeing or for any other purposes beneficial to persons who have been wards of the State or under guardianship of the State or have been resident, as a child, in a Queensland institution.' The Foundation was established in response to the 1999 report of the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry), which recommended that '[t]he Queensland Government and responsible religious authorities establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services' (recommendation 39).

90 Commonwealth of Australia, Department of Human Services, Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse, <<https://www.humanservices.gov.au/corporate/budget/budget-2017-18/improving-services/commonwealth-redress-scheme-survivors-institutional-child-sexual-abuse>>.

91 Parliament of Australia, *Unfinished business: Indigenous stolen wages* (7 December 2006), Chapter 7: Repayment of monies by Governments, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/stolen_wages/report/c07>; Parliament of New South Wales, Questions & Answers Papers No. 13 and 25, 0048 – Aboriginal Trust Fund Repayment Scheme, <<https://www.parliament.nsw.gov.au/lc/papers/Pages/qanda-tracking-details.aspx?pk=181823>>.

15. The Queensland Government has contributed \$4.15 million to the Forde Foundation since its establishment. Income generated by the investment of these monies is distributed via a grants process to both individuals and to certain non-government organisations. Grant monies must be used within six months.⁹²

REPARATION FOR MEMBERS OF THE STOLEN GENERATIONS

16. Reparation schemes for members of the Stolen Generations operate in some States. The provision of monetary compensation was a key recommendation of the Human Rights and Equal Opportunities Commission's 1997 Report, *Bringing Them Home*. These schemes provide one-off lump sum compensation to eligible individuals for the pain and suffering endured as a result of government policy.
17. The first Stolen Generation reparation scheme (the Stolen Generations Fund) was established by legislation in 2006 by the Tasmanian Government, with \$5 million allocated for ex gratia payments, administered by the Department of Premier and Cabinet. Applications were accepted for a period of six months in 2007 and applicant eligibility was assessed by an independent assessor in accordance with legislation. A report of the independent assessor in February 2008 indicates that 84 eligible members of the stolen generations received \$58,333.33 each and 22 eligible children of deceased members of the stolen generations received either \$5,000 or \$4,000 each.⁹³
18. In March 2016, the South Australian Government set up a similar scheme providing a total of \$11 million, \$6 million of which is to be distributed as ex gratia payments of up to \$50,000 to members of South Australia's Aboriginal communities who were forcibly removed from their families. The scheme provided an 'application window' of 12 months.⁹⁴
19. On 2 December 2016, the NSW Government announced a \$73.8 million package offering compensation of up to \$75,000 for each claimant 'without the need for a lengthy and arduous legal process'. While the full details are not yet clear the program is expected to be operating by 1 July 2017. This program is to operate separately from the Aboriginal Trust Fund Repayment Scheme.⁹⁵

92 The Forde Foundation 2013, About the Forde Foundation, <<http://fordefoundation.org.au/about/forde-foundation>>.

93 State of Tasmania 2008, Department of Premier and Cabinet, *Stolen Generations of Aboriginal Children Act 2006 – Report of the Stolen Generations Assessor* (February 2008), pages 2 and 7-8, <http://www.dpac.tas.gov.au/_data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf>.

94 Government of South Australia, Department of State Development 2016, and Maher, K, Ministerial Statement, <<http://statedevelopment.sa.gov.au/aboriginal-affairs/stolen-generations-reparations-scheme>>. An ABC News report of 31 March 2017 indicated that the scheme was oversubscribed with over 350 applicants, which would reduce the value of each payout. See <<http://www.abc.net.au/news/2017-03-31/sa-stolen-generations-compensation-payment-will-be-a-bonus/8401836>>.

95 ABC News, article of 2 December 2016 by Brooke Boney, *Stolen Generations: Victims to get \$73 million compensation, NSW Government says*, <[http://www.abc.net.au/news/2016-12-02/stolen-generations-to-get-\\$73-million-compensation-package-nsw/8086126](http://www.abc.net.au/news/2016-12-02/stolen-generations-to-get-$73-million-compensation-package-nsw/8086126)>.