

## Introduction

This is the submission by the Financial Ombudsman Service (FOS) in response to the issues paper released in September 2013 for the Productivity Commission's inquiry into access to justice arrangements (Issues Paper).

FOS has contributed to, and supports, the submission to the inquiry by ANZOA, the Australian and New Zealand Ombudsman Association. Our submission is designed to complement and supplement the submission by ANZOA.

This submission has been prepared by the office of FOS and does not necessarily represent the views of the board of FOS. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

The submission refers frequently to our 2012-13 Annual Review. This review is on our website, [www.fos.org.au](http://www.fos.org.au) under "Publications".

## Executive summary

FOS resolves disputes relating to financial services. We provide services free to consumers. Our members, which are financial services providers, fund our operations. In 2012-13, we accepted 24,100 disputes and closed 24,968 disputes.

FOS provides a valuable community service by resolving disputes between consumers and financial services providers in a way that people can trust. The ability of Australians to access an independent third party review of a complaint supports consumer confidence in Australia's financial sector.

This submission provides information about themes addressed in the inquiry's Terms of Reference and the Issues Paper, such as providing timely and affordable justice, delivering fair and equitable outcomes as efficiently as possible and ensuring that services can be accessed easily by anyone in the community. The submission is particularly relevant to item 8 of the inquiry's Terms of Reference, which refers to alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, and the costs and benefits of these mechanisms.

## Information about FOS

FOS commenced operations on 1 July 2008. It is an independent dispute resolution scheme that was formed through the consolidation of three schemes:

- the Banking and Financial Services Ombudsman (BFSO)
- the Financial Industry Complaints Service (FICS) and
- the Insurance Ombudsman Service (IOS).

On 1 January 2009, two other schemes joined FOS, namely:

- the Credit Union Dispute Resolution Centre (CUDRC) and
- Insurance Brokers Disputes Ltd (IBD).

FOS is an external dispute resolution (EDR) scheme approved by ASIC. Membership of FOS is open to any financial services provider carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC. Replacing the schemes previously operated by BFSO, FICS, IOS, CUDRC and IBD, FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS.

Members of BFSO, FICS, IOS, CUDRC and IBD are now members of FOS. The members of those schemes included:

- BFSO – credit providers, mortgage brokers, payment system operators, Australian banks and their related corporations, Australian subsidiaries of foreign banks and foreign banks with Australian operations
- FICS – life insurance companies, fund managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers
- IOS – general insurance companies, re-insurers, underwriting agents and related entities of member companies
- CUDRC – credit unions and building societies
- IBD – insurance brokers, underwriting agents and other insurance intermediaries.

FOS and its predecessor schemes have over 20 years experience in providing dispute resolution services in the financial services sector, and it has been estimated that FOS covers up to 80% of banking, insurance and investment disputes in Australia.

FOS provides services to resolve disputes between member FSPs and consumers, including certain small businesses, about financial services such as:

- banking
- credit
- loans
- general insurance
- life insurance
- financial planning

- investments
- stock broking
- managed funds and
- pooled superannuation trusts.

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC. FOS also monitors compliance with a number of industry codes of practice.

FOS is a not for profit organisation that provides services free to consumers. FOS is funded by its members, which are financial service providers. A significant proportion of its funding is from case fees, and the fees paid by a financial services provider reflect the number of disputes in which it is involved and the stages to which they progress.

FOS is governed by a board with an independent chair and:

- four “industry directors” appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry and
- four “consumer directors” appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.

## **Role of FOS**

EDR schemes such as FOS were developed as industry-based schemes to give the Australian community a cheaper, quicker and less formal alternative to the courts to resolve certain disputes in the financial sector. Reforms to financial sector regulation have recognised the importance of consumers having access to a low-cost means to resolve disputes with financial services providers. ASIC’s regulatory framework sets the standards under which we operate including standards requiring independence and accountability.

FOS provides a valuable community service by resolving disputes between consumers and financial services providers in a way that people can trust. Access to an independent third party review of a complaint supports consumer confidence in Australia’s financial sector.

## **Submission**

### **Part 1 – Issues raised in sections 1 to 8 of Issues Paper**

Part 1 briefly notes aspects of our dispute resolution services that address issues raised in sections 1 to 8 of the Issues Paper. References to the relevant pages of the Issues Paper are given in brackets.

- FOS services are free for consumers (p7)

FOS provides a service that is free to consumers. FOS is funded by its members, which are financial services providers.

Our annual reviews provide detailed information about the consumers who lodge disputes with FOS focusing on factors such as their geographic location, age, gender and requests for translators or special assistance. See, for example, pp32-34 of our 2012-13 Annual Review.

- Legal representation is not necessary (p10-11)

It is not usually necessary for either party to be legally represented in a dispute considered by FOS. An Applicant can appoint another person to act for them, as a representative, in a dispute. In 2012-13, 5,716 Applicants used a representative in their dealings with FOS. 20% of these Applicants were represented by solicitors.

- FOS handles large numbers of inquiries (p6)

In 2012-13, our call centre received 234,063 phone calls. We have handled similar numbers of calls in each year since FOS commenced operating on 1 July 2008.

- FOS resolves large numbers of disputes (p2)

Part 2.1 below sets out information about the number of disputes FOS has received and closed in recent years. EDR reduces the demand for more formal dispute resolution processes such as court proceedings.

- Consumers can easily access FOS services (p7)

Our dispute lodgement process is explained on our website and in printed brochures that are available to anyone on request. FOS staff who handle telephone inquiries are trained to explain how disputes can be lodged.

We prefer disputes to be lodged in writing, online or in electronic or hard copy documents. However, if the need arises, we can help Applicants who can only lodge by telephone. The methods used to lodge the 32,307 disputes we received in 2012-13 are shown below in percentage terms:

○ Web	69.21%
○ Letter	19.59%
○ Email	6.80%
○ Phone	3.11%
○ Fax	1.19%
○ In person	0.02
○ Unknown	0.08%.

Although FOS is impartial and does not act as an advocate for any party, we can provide help to Applicants to ensure that:

- they understand whether they are eligible to lodge a dispute and the meaning of terms we use
- they know what documents to provide to support their application
- the dispute flows smoothly and in a timely way and
- parties can put their case to FOS.

FOS can also provide specific assistance with any part of our processes to Applicants with special requirements who may be disadvantaged if they do not receive that assistance. For example, we can arrange for disputes lodged in languages other than English to be translated. FOS can refer disadvantaged Applicants to community legal centres, legal aid offices, financial counsellors or other services for assistance after they have lodged their dispute.

- FOS informs consumers about its services (p7)

One of our key priorities is to make FOS as accessible as possible to consumers. Steps taken recently to enhance access are explained on pages 23-29 of our 2012-13 Annual Review and also referred to below.

In a survey to assess the level of awareness and profile of FOS in the general community in 2010, 50% of respondents claimed to be aware of FOS. This survey was conducted quite soon after FOS was established. Since the survey, a considerable amount of work has been done to raise community awareness of FOS.

The ANZ's *2011 Survey of Adult Financial Literacy in Australia*<sup>1</sup> asked respondents who they would contact if they experienced difficulties with a financial product that they could not resolve with the provider. The most common response (representing 46% of responses) was an industry Ombudsman. In a similar survey that the ANZ conducted in 2008, the response of contacting an Ombudsman represented 36% of responses.

The ANZ's 2011 survey also showed that 68% of respondents were confident they would know how to complain effectively against a bank or financial institution. In similar earlier surveys, this result was 63% in 2008 and 58% in 2005.

- FOS undertakes policy work (p12)

Our policy work aims to reduce disputes and strengthen dispute resolution arrangements. We make written submissions to consultations, reviews and inquiries relating to financial services policy and regulation or dispute resolution arrangements. We also contribute to the work of a range of policy groups and committees. Recent examples include:

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<sup>1</sup> On [www.anz.com](http://www.anz.com)

- work with other dispute resolution schemes and the Office of the Australian Information Commissioner to develop guidelines for privacy disputes and
- work in the Federal Treasury's Future of Financial Advice peak consultation group.

## **Part 2 – Alternative dispute resolution**

Part 2 addresses questions in section 9 of the Issues Paper about alternative dispute resolution (ADR) by providing information about FOS.

### **2.1 Disputes resolved through ADR**

To indicate the number and types of disputes handled by FOS in recent years, we provide:

- Table 1, showing numbers of disputes received by FOS from 2010-11 to 2012-13 and the financial products to which the disputes related and
- Table 2, showing numbers of disputes closed by FOS in those years.

Table 1 Disputes received by product from 2010-11 to 2012-13

	<u>2010-11</u>		<u>2011-12</u>		<u>2012-13</u>	
	<u>number</u>	<u>%</u>	<u>number</u>	<u>%</u>	<u>number</u>	<u>%</u>
<u>Credit</u>	<u>14,537</u>	<u>46%</u>	<u>18,485</u>	<u>50%</u>	<u>16,358</u>	<u>49%</u>
<u>General insurance</u>	<u>8,781</u>	<u>28%</u>	<u>10,423</u>	<u>28%</u>	<u>9,468</u>	<u>28%</u>
<u>Payment systems</u>	<u>2,422</u>	<u>8%</u>	<u>2,508</u>	<u>7%</u>	<u>2,457</u>	<u>7%</u>
<u>Deposit taking</u>	<u>2,244</u>	<u>7%</u>	<u>2,174</u>	<u>6%</u>	<u>2,086</u>	<u>6%</u>
<u>Investments</u>	<u>2,235</u>	<u>7%</u>	<u>1,923</u>	<u>5%</u>	<u>1,462</u>	<u>4%</u>
<u>Life insurance</u>	<u>1,193</u>	<u>4%</u>	<u>1,139</u>	<u>3%</u>	<u>1,268</u>	<u>4%</u>
<u>Traditional trustee services</u>	<u>-</u>	<u>-</u>	<u>20</u>	<u>0%</u>	<u>26</u>	<u>0%</u>
<u>Products outside Terms of Reference</u>	<u>464</u>	<u>1%</u>	<u>566</u>	<u>2%</u>	<u>324</u>	<u>1%</u>
<u>Not yet determined</u>	<u>5</u>	<u>0%</u>	<u>19</u>	<u>0%</u>	<u>88</u>	<u>0%</u>
<u>Total</u>	<u>31,881</u>	<u>100%</u>	<u>37,257</u>	<u>100%</u>	<u>33,537</u>	<u>100%</u>

Table 2 Disputes closed from 2010-11 to 2012-13

	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>
<u>Disputes closed</u>	<u>28,826</u>	<u>36,049</u>	<u>33,773</u>

Comprehensive information about the disputes FOS resolves can be found in our 2012-13 Annual Review.

### **2.2 Satisfaction with outcomes of ADR mechanisms**

FOS regularly obtains feedback from consumer and industry stakeholders about levels of satisfaction with outcomes that FOS achieves. We consider this feedback

when reviewing and developing our processes. We obtain feedback from consumer and industry stakeholders through various channels, including:

- stakeholder liaison
- our Complaints and Feedback Process
- independent reviews of FOS and
- research.

### **2.2.1 Stakeholder liaison**

We obtain feedback from stakeholders at events we hold regularly, such as:

- our National Conference, where we encourage stakeholders to raise and discuss any questions they have about our processes
- meetings with individual members and industry and group meetings and
- training sessions, seminars and presentations.

In July 2013, FOS launched its Consumer Engagement Strategy. It outlines our program to educate, consult and collaborate with the consumer sector. Measures implemented include:

- establishing a consumer liaison group (made up of 10 financial counsellors and community lawyers from around Australia who we meet with quarterly)
- maintaining an online hub for consumer liaison discussion and
- delivering forums to educate consumer representatives.<sup>2</sup>

### **2.2.2 Complaints and Feedback Process**

FOS has established its Complaints and Feedback Process to deal with complaints and feedback about the standard of the service we provide, including any process issues raised about the handling of disputes. Our website explains how feedback can be provided through this process and how we will address the feedback.<sup>3</sup> The process is user friendly and set out in clear, simple terms. Feedback can be given electronically, by post or by telephone.

The information on the website includes our Complaints and Feedback Policy and Procedure. We handle any complaints about our services as outlined in this document. The policy and procedure are aligned with the Australian standard for complaint handling<sup>4</sup>.

### **2.2.3 Independent reviews**

As explained in part 2.5 below, FOS is approved and overseen by ASIC in accordance with its Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139)<sup>5</sup>. RG 139 requires FOS to undertake an

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<sup>2</sup> For further information about our engagements with stakeholders, see pp21-29 of our 2012-13 Annual Review on [www.fos.org.au](http://www.fos.org.au) under "Publications".

<sup>3</sup> See [www.fos.org.au](http://www.fos.org.au) - "Feedback about our service" under "Quick Links".

<sup>4</sup> Australian Standard: Customer satisfaction – Guidelines for complaints handling in organisations (AS ISO 10002-2006).

<sup>5</sup> Available on [www.asic.gov.au](http://www.asic.gov.au) under "Regulatory Documents".

independent review every five years and specifies how reviews must be conducted.

Independent reviews, which assess an EDR scheme's performance in qualitative as well as quantitative terms, are designed to provide feedback on how the scheme should evolve and highlight any need for change or improvement. The results of the reviews must be made available to ASIC and other stakeholders.

The first independent review of FOS is being conducted at present. Information about the review is set out on our website under "News". As noted there, the independent reviewer has publicly invited submissions from stakeholders, to be considered in the review.

#### **2.2.4 Research**

FOS commissions stakeholder research from time to time. This year, external researchers have obtained qualitative information from 60 organisations on our behalf through interviews and we have sent out 14,000 surveys.

The stakeholder survey conducted this year assessed how key stakeholder groups perceive FOS. On measures listed below (selected due to their relevance to matters discussed in the Issues Paper) the following percentages of consumer representatives or organisations and financial services providers responding to the survey rated FOS positively (6 or above out of 10):

##### Consumer representatives or organisations

- FOS provides good value for money as an EDR service – 95%
- FOS is a credible arbiter of disputes – 95%
- FOS is an organisation I trust – 94%
- The steps undertaken by FOS add value – 92%
- Overall I think FOS is doing a good job – 90%
- FOS understands the importance of disputes to all parties involved – 93%
- FOS delivers fair resolutions to disputes – 89%
- FOS plays a useful role in monitoring compliance with codes of practice relevant to my industry – 88%
- FOS plays a useful role in the identification of systemic issues - 87%
- FOS provides me with useful information that assists me to resolve disputes – 84%
- FOS has efficient dispute service delivery processes – 81%
- FOS meets consumer expectations on delivering excellent service – 79%

##### Financial services providers

- FOS provides good value for money as an EDR service – 56%
- FOS is a credible arbiter of disputes – 73%
- FOS is an organisation I trust – 72%
- The steps undertaken by FOS add value – 64%
- Overall I think FOS is doing a good job – 68%
- FOS understands the importance of disputes to all parties involved – 70%
- FOS delivers fair resolutions to disputes – 64%

- FOS plays a useful role in monitoring compliance with codes of practice relevant to my industry – 73%
- FOS plays a useful role in the identification of systemic issues - 69%
- FOS provides me with useful information that assists me to resolve disputes – 61%
- FOS has efficient dispute service delivery processes – 55%
- FOS meets members’ expectations on delivering excellent service – 58%

More details of the survey research results are available on our website in “Business Plan 2013-14” under “Publications”.

### 2.3 Whether dispute resolution through ADR is quicker

To indicate the amount of time FOS takes to resolve disputes, we provide Table 3. For disputes closed in each year from 2008-9 to 2012-13, Table 3 shows the percentage of disputes closed within specified periods of time.

Table 3 Days taken to close disputes

	2008-9	2009-10	2010-11	2011-12	2012-13
Within 30 days	25%	14%	10%	12%	15%
Within 90 days	63%	48%	60%	63%	66%
Within 180 days	88%	79%	79%	81%	81%
Over 180 days	12%	21%	21%	19%	19%

Reducing the time taken to close disputes has been, and continues to be, a primary focus for FOS. The stakeholder survey discussed in part 2.2.4 above and other feedback highlights that we need to maintain this focus on timeliness.

In 2012-13, we reviewed our case management process and implemented significant improvements including:

- streamlining procedures for obtaining information from parties and exchanging it
- increasing direct telephone contact with parties
- relying more on electronic forms of communication and
- clarifying issues earlier in the process.

Our 2013-14 Business Plan<sup>6</sup> includes measures to reduce the amount of time we take to resolve disputes. For example, it:

- adds specialist expertise to the earlier part of our dispute process
- simplifies the process by reducing “touch points” and stages in it
- improves the workflow in disputes through electronic document exchange with financial services providers and

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<sup>6</sup> See [www.fos.org.au](http://www.fos.org.au) under “Publications”.

- continues our efforts to eliminate backlogs of cases.

## 2.4 Fairness in ADR

For FOS, fairness is a key consideration in decision making. Paragraph 8.2 of our Terms of Reference requires FOS, when deciding a dispute and whether to provide a remedy, to do what is fair in all the circumstances, having regard to:

- legal principles
- applicable industry codes or guidance as to practice
- good industry practice and
- previous relevant decisions of FOS or its predecessors.

We provide guidance on how we make decisions in given circumstances through material published on our website such as:

- “FOS Approach” documents, which explain how we reach decisions about key issues<sup>7</sup>
- Determinations, which are formal decisions on disputes<sup>8</sup> and
- articles in our quarterly publication, *The Circular*.<sup>9</sup>

As well as explaining our processes in detail on our website, we widely distribute printed brochures that summarise essential information. We ensure stakeholders have many opportunities to obtain information about, and provide input on, our processes. For example:

- FOS conducts seminars, training sessions and forums including –
  - our general insurance open forums, at which we invite industry participants to discuss FOS decisions and share their insights and
  - our forums for consumer representatives, to explain our dispute resolution processes and address key areas such as financial difficulty and responsible lending
- FOS attends events to provide information about, and assistance with, our processes. In 2012-13, we participated in 391 events or presentations relevant to financial services dispute resolution. FOS staff attend, for instance –
  - community forums and information sessions organised by the Insurance Council of Australia when natural disasters occur, to help residents and
  - conferences and educational events for consumer representatives.

## 2.5 Regulation of ADR services

FOS is approved and overseen by ASIC pursuant to RG 139. RG 139 explains the framework under Australian legislation<sup>10</sup> to manage complaints about financial services including credit. A key feature of this framework, in simplified terms, is that financial services providers must have dispute resolution systems consisting of:

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<sup>7</sup> See [www.fos.org.au](http://www.fos.org.au) – “Our approach” under “Resolving Disputes”.

<sup>8</sup> See [www.fos.org.au](http://www.fos.org.au) – “Decisions” under “Resolving Disputes”.

<sup>9</sup> See [www.fos.org.au](http://www.fos.org.au) under “Publications”.

<sup>10</sup> *Corporations Act 2001* (Corporations Act) and *National Consumer Credit Protection Act 2009*.

- internal dispute resolution procedures that meet standards imposed by ASIC and cover certain complaints about the services provided and
- membership of one or more ASIC-approved EDR schemes to cover these complaints.

FOS is one of the ASIC-approved EDR schemes within this framework. RG 139 sets out the requirements that an EDR scheme has to meet to obtain and maintain ASIC's approval. Reflecting obligations imposed on ASIC through legislation, RG 139 is designed to ensure that an EDR scheme is:

- accessible
- independent
- fair
- accountable
- efficient and
- effective.

The considerations listed above are based on the principles in the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* published in 1997 by the then Department of Industry, Science and Tourism. These benchmarks set dispute resolution standards that are long established and widely accepted. The benchmarks are at present being updated in a review by the Commonwealth Consumer Affairs Advisory Council, which involves extensive consultation.<sup>11</sup>

### **Part 3 - Ombudsmen**

Part 3 addresses questions in section 9 of the Issues Paper about Ombudsmen by providing information about FOS.

#### **3.1 Scope and operation of Ombudsman services**

Through RG 139, ASIC requires the jurisdiction of an EDR scheme to cover:

- the vast majority of types of consumer disputes in the relevant industry and
- disputes involving monetary amounts up to \$500,000, which is the value of the retail client test under section 761G of the Corporations Act.

Our jurisdiction is set out in Section B of our Terms of Reference and explained in detail in our Operational Guidelines<sup>12</sup>.

Information about how FOS operates and the role it fulfils is provided above under "Information about FOS" and "Role of FOS".

##### **3.1.1 Types of disputes**

Financial services consumers who are individuals or certain small businesses are eligible to lodge disputes with FOS. We can consider a dispute if it is within, and not excluded from, our jurisdiction.

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<sup>11</sup> Information about the benchmarks and the review is available on [www.ccaac.gov.au](http://www.ccaac.gov.au).

<sup>12</sup> See [www.fos.org.au](http://www.fos.org.au) - Operational Guidelines to the Terms of Reference, under "About Us".

The main requirements that a dispute must meet to fall within our jurisdiction are noted briefly below.

- The dispute must arise under Australian law or relate to a particular type of collective investment offered in Australia.
- The subject of the dispute must be:
  - a financial service provided to the Applicant
  - a guarantee, security or repayment provided by the Applicant
  - a benefit of a person referred to in an insurance contract
  - an interest in a financial product
  - a third party motor vehicle insurance claim
  - a service provided for a mutual financial services provider
  - an investment offered under a foreign recognition scheme or
  - a traditional trustee company service.
- The financial services provider in the dispute must be a member of FOS when the dispute is lodged.

Disputes referred to in paragraph 5.1 of the Terms of Reference are excluded from our jurisdiction. To mention a few examples, this provision excludes:

- disputes about the performance of investments
- disputes already dealt with in another forum and
- certain disputes about levels of fees.

We also have a discretion to exclude disputes from our jurisdiction where appropriate under paragraph 5.2. Examples of situations in which we may exercise this discretion include:

- there is a more appropriate forum for the dispute, such as a court
- the dispute is frivolous, vexatious or lacking in substance.

### **3.1.2 Monetary limits**

Paragraph 5.1o) of our Terms of Reference sets \$500,000 as the monetary limit of our jurisdiction. That provision states that we may not consider a dispute in which the value of the claim exceeds \$500,000.

RG 139 requires an EDR scheme to operate with a compensation cap. Under this approach, the scheme has jurisdiction to consider a dispute involving an amount larger than the compensation cap, but can only award compensation up to the cap. A compensation cap must be at least \$150,000 for disputes about general insurance brokers and at least \$280,000 for other disputes. At present, our Terms of Reference set these figures as our compensation caps.

## **3.2 Frequency and timeliness of dispute resolution by Ombudsmen**

Information about the frequency and timeliness of dispute resolution by FOS is provided in parts 2.1 and 2.3 above.

## **3.3 Efficiency and effectiveness of Ombudsman services**

As mentioned in part 2.5 above, efficiency and effectiveness are two of the criteria that ASIC considers when it approves and oversees an EDR scheme. RG

139.162 - 236 specifies that an EDR scheme must meet standards in regard to efficiency and effectiveness to obtain and maintain approval. These standards, and how FOS meets them, are a central focus of the current independent review of FOS. The independent reviewer should identify any areas requiring attention to improve our efficiency and effectiveness.

Some of the survey results noted in part 2.2.4 above relate to efficiency and effectiveness. For example, we refer to assessments of whether FOS:

- has efficient dispute service delivery processes
- provides good value for money
- meets stakeholder expectations on delivering excellent service and
- is a credible arbiter of disputes.

The survey results indicate areas where we need to do more work - particularly in continuing to improve the timeliness and quality of our dispute resolution process. Our three-year strategy and business plans also identify that these areas require attention. They include measures to reduce the time taken to resolve disputes while improving the quality of our dispute resolution services for Applicants and financial services providers.

Initiatives to reduce the time we take to resolve disputes are discussed in part 2.3 above. Our 2013-14 Business Plan explains current initiatives to improve the quality of our services. Examples of steps taken recently to continuously review and enhance our processes are provided in the material about conciliation on page 87 of our 2012-13 Annual Review.

### **3.4 Improvements to Ombudsman services**

In recent public submissions, we have drawn attention to an issue adversely affecting the service that FOS provides. The issue is that, in a growing number of circumstances, due to insolvency, financial services providers are unable to pay compensation awarded in Determinations by FOS.<sup>13</sup>

The Corporations Act requires holders of Australian Financial Services Licences to have adequate arrangements for purposes such as meeting awards of compensation by EDR schemes. To date the primary mechanism to provide for compensation has been professional indemnity insurance.

However, our experience highlights that professional indemnity insurance is not by itself an adequate solution. Professional indemnity insurance of the type required to meet the minimum standards prescribed by ASIC guidance is either not available or very costly for small firms to obtain. There have been cases where financial services providers with the required insurance have not paid compensation awarded to consumers. Accordingly, we consider there is a market failure that needs an appropriate policy response from industry and government.

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<sup>13</sup> See our submissions to Treasury in May 2011 and July 2012 to the review of compensation arrangements for consumers of financial services conducted by Mr Richard St John on [www.fos.org.au](http://www.fos.org.au) under "Publications".

Uncompensated loss is not a new concern and was examined recently by the Joint Parliamentary Committee on Corporations and Financial Services *Inquiry into financial products and services in Australia* following a number of collapses in the financial sector in 2009. That committee recommended that “the Government investigate the costs and benefits of different models of a statutory last resort compensation scheme for investors.”<sup>14</sup>

In 2012 Mr Richard St John delivered, after consultation in 2011, a report on compensation for consumers of financial services<sup>15</sup>. That report, which was wide ranging, did not support a scheme of last resort at that time, preferring other approaches.

However, as recent experience continues to highlight the limitations in availability and efficacy of professional indemnity insurance to meet the legislative requirements for adequate compensation, in our view the issue of uncompensated loss should be considered again in any broader review of financial sector issues. In this context FOS continues to be an advocate for a Financial Services Compensation Scheme of last resort as the most appropriate and cost effective solution to this market failure.

FOS remains ready to work with government, industry professional bodies and consumer groups to consider possible cost-effective solutions to current market failure in the provision of adequate compensation arrangements in the financial sector.

#### **Part 4 – International guidelines and principles**

The Issues Paper discusses ADR and Ombudsmen, but does not refer to the international complaints handling guidelines and principles that provide for ADR mechanisms including Ombudsmen. Two examples are noted below.

- G20 high-level principles on financial consumer protection<sup>16</sup>

The G20 Finance Ministers and Central Bank Governors endorsed these principles in October 2011. They provide for complaints handling and redress in the following clause, which states that an independent redress process should be available where internal dispute resolution does not effectively resolve complaints.

“Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress

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<sup>14</sup> Recommendation 10

<sup>15</sup> *Report on Compensation Arrangements for Consumers of Financial Services* by Richard St John April 2012.

<sup>16</sup> [www.oecd.org/g20/topics/financial-sector-reform/financialconsumerprotection.htm](http://www.oecd.org/g20/topics/financial-sector-reform/financialconsumerprotection.htm)

process should be available to address complaints that are not efficiently resolved via the financial services providers' and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolution should be made public."

Observance of the principles is voluntary. G20 members should assess their consumer protection arrangements in the light of the principles and strengthen the arrangements in a way that is consistent with, and builds on, the principles.

- European Union guidelines on complaint handling

The European Insurance and Occupational Pensions Authority adopted guidelines on complaint handling by insurance undertakings dated 14 June 2012.<sup>17</sup> The guidelines require insurance undertakings to give complainants information about the availability of an Ombudsman or other ADR mechanism when:

- explaining the complaints handling process or
- providing a final decision that does not fully satisfy the complainant's demand.

The European Banking Authority and the European Securities and Markets Authority are proposing to adopt equivalent standards for banking and securities. After this adoption, the guidelines will cover the whole financial services sector in the 28 member states of the European Union.<sup>18</sup>

The regulatory framework for financial services in Australia provides for EDR schemes to form part of the arrangements for complaint handling in a way that is consistent with the international initiatives outlined above.

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<sup>17</sup> See EIOPA-BoS-12/069, 14 June 2012 on [www.eiopa.europa.eu](http://www.eiopa.europa.eu).

<sup>18</sup> [www.eba.europa.eu/news-press/calendar?p\\_p\\_id=8&\\_struts\\_action=%2Fcalendar%2Fview\\_event&\\_eventId=475979](http://www.eba.europa.eu/news-press/calendar?p_p_id=8&_struts_action=%2Fcalendar%2Fview_event&_eventId=475979)