

Your World First



How to successfully manage a customer remediation project.

A joint presentation by CMS and Grant Thornton

31st January 2017



Looking at

- Issues on remediation
- The FCA focus
- Practical impact
- Handling the project
- What we will be looking at:
 - When an issue arises, the regulatory expectations and communicating with FCA – CMS
 - Scoping a project - limitation, litigation risk and customer communications – CMS
 - How a review affects your business, managing a PBR, redress methodologies and common pitfalls – Grant Thornton



The regulatory expectations

- *“23 compensation schemes have been established since the FCA took over, which will result in £334m being paid to customers“*

2015/16 FCA Annual Report

- *“We seek to ensure that firms ...promote the acceptance that not all news can be good and the willingness to act on and respond promptly to bad news”*

Andrew Bailey FCA CEO May 2016 on **culture** in FS

- Regulatory requirement to proactively remediate
 - Principle 6 – TCF
 - DISP 1.3.3 &1.3.6 – root cause analysis
 - Principle 11
- Principle of good regulation: consumers have to take responsibility for their decisions (FCA Mission Statement consultation)
- FCA considers complexity of the product and capability of the customer

The regulatory context

- How?
 - Self identified
 - Thematics & supervisory reviews
 - Industry wide: IRHP, payday lending, mortgage arrears, PPI & FX
- Benefits to the firm
 - Customers TCF
 - Reputation – doing the right thing
 - Avoids FOS and litigation/ claims management companies
 - Preserves relationship with regulator – less risk of enforcement
 - Keeps control and ownership of the issues

Notifying the regulators

- 1. Do we need to notify?**
 - Requirements: Principle 11 and SUP 15
 - Significant?
- 2. When?**
 - “Immediate” requirement but be prudent
 - Investigation may be required
- 3. How?**
 - Fixed and flexible portfolio firms
 - The challenge of the contact centre
- 4. What do we say?**
 - What has gone wrong, when and for how long?
 - What is the impact?
 - Has it been capped/stopped?
 - What caused it?
 - **How will you put it right?**

Notifying the regulators

- **The objective:**
 - Prompt, clear notification
 - Provides **assurance** to FCA/PRA that:
 - management is in control;
 - problem is being fixed;
 - customers are protected and are being treated fairly;
 - appropriate remedial action is being taken; and
 - appropriately skilled project team and adequate resources.
- **What goes wrong?**
 - Fail to tell (Prudential FN and censure for CEO March 2013)
 - Mislead regulator, false attestation, delay and incomplete information (Deutsche Bank FN April 2015)
 - Take too long to tell
 - Economical with the truth

Understanding the issues (1)

- Issues to consider at the outset
 - **Customers – population identification**
 - How many customers are impacted?
 - How far back, former and current customers, and issues of limitation
 - **Redress methodology**
 - Relevant legal principles -putting back in the position would have been in?
 - Consequential loss, de minimis, interest?
 - **Process**
 - Pilot and tranches
 - Evidential difficulties
 - Timing and proportionality of process
 - **Governance & project management**
 - Steering committee – senior management oversight & challenge
 - Project plan with realistic timeframes
 - Identify and monitor risks & audit trail
 - Resources, appropriate skills and independent support & advice

Understanding the issues (2)

- Issues to consider at the outset
 - **Wider impact**
 - Just regulated business?
 - Root cause, are other products, services impacted?
 - Evidence of any systems and controls failings which need rectifying?
 - **Managing litigation risk**
 - Consequential losses
 - Impact on complaints and FOS
 - Claims management companies
 - **Managing reputational risk**
 - Customer communications
 - Webpages – FAQs
 - PR and press
 - **Preserve constructive regulatory relationship**
 - Keep FCA updated. Will not approve but will challenge

How to meet the regulatory expectations

– **Ask the right questions.**

1. What would the customer expect?
2. What is fair?
3. How do we explain it to a customer?
4. What do the regulatory rules/ legal principles say?
5. How would FOS approach the issue?
6. What are the options, how long will it take and what do they cost?
7. How do we stop it happening again?

– **Objectives**

- Customers treated fairly
- Firm complies with relevant regulatory and legal obligations
- Redress based on sound principles
- Process proportionate and cost effective
- Provides certainty and finality
- FCA supportive of approach
- Commercially viable

Communicating with the regulators & legal privilege

- Why is this important?
- When does it arise?
- Protected items (s413 FSMA)
 - A communication or item falls within this subsection if it is made:
 - (a) in connection with the giving of legal advice to the client; or
 - (b) in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings
 - Unless held with the intention of furthering a criminal purpose
 - So a communication that is privileged under common law would almost certainly also be protected from disclosure to the regulators under FSMA
- BUT...may help to disclose privileged report or opinion
 - Use limited/non waiver of privilege agreement if possible
- Regular reporting to regulators
 - Beware of s166 and enforcement risk and seek to manage

Scope: Limitation periods

Legal

- Limitation Act 1980
- There has to be an actionable claim
- Limitation will differ from case to case, but 6 years is most common
- Contract: from date of breach
- Tort: from date loss suffered
- Negligence: 3 years from discovery of latent damage (with 15 year longstop)

Regulatory

- Can be very difficult to set a cut-off date.
- All right to treat customers unfairly in December 2010, but not in January 2011?
- Treating customers fairly
Principle 6
- Go back to date of regulation?
Or further?
- Impact of FOS – no 15 year longstop and discretionary approach to limitation.

Scope: Limitation

Practical examples/case studies:

- Overcharged customers fees not contractually entitled to charge
- Consumer credit breach of FCA Principles predates FCA regulation
- Breach of FCA Rule but arguably breach of FCA Principle predates introduction of Rule

Limitation: suggested approach

In all cases consider:

1. What obligation has been breached and from when?
2. Customer outcomes test
3. Proportionality
4. Can a cut off be objectively explained to a customer?
5. Consider reactive process

Scope: Unregulated business

- FCA remit more limited
 - No FCA conduct of business rules but
 - DISP applies if FOS eligible includes a requirement to remedy any recurring or systemic problems
 - FCA Principles only
 - Principle 3 only in a prudential context
 - Principle 4
 - Principle 11
- BUT an authorised firm so....
 - Threshold Conditions - suitability
 - Senior management fitness and propriety
 - Codes of Practice, internal procedures e.g more extensive TCF policy
- In practice
 - FX
 - Commercial lending
 - Consumer credit pre FCA regulation

Scope: Managing Litigation Risk

- At the outset
 - Consider scope for claims
 - When investigating the issue ensure you consider privilege and disclosure issues
- Seek to mitigate additional claims/complaints
 - Act promptly
 - Fair process which addresses customer loss
 - Customer letters allow for customers to raise additional claims or questions to cover individual circumstances
 - Customer services trained on specific issues
 - Internal escalation process
 - Effective complaints handling
 - Proactive interaction with FOS?

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www.cmslegal.com



Grant Thornton

An instinct for growth™

How to successfully manage a customer remediation project

31 January 2017

Alex Ellerton – Partner
Darren Castle – Associate Director

Remediation: BIG numbers.....BIG impact.....

"FCA fines five banks £1.1 billion for FX failings and announces industry wide remediation programme"¹

"23 compensation schemes have been established since the FCA took over, which will result in £334m being paid to customers"²

"£298 million of fines issued by the Financial Conduct Authority for mis-selling activity since April 2013"³

"FCA orders past business review over advice due diligence failings"⁴

"We took regulatory action against some of the firms involved, with a number undertaking substantial back book reviews"⁵

"FSA: 'split-capital scandal is the worst ever'⁷

"Payday lender agrees with the Financial Conduct Authority (FCA), to refund over £15.4 million to 147,000 customers"⁸

"Business the first to receive compensation for mis-sold interest rate swaps - a year after pay-outs were ordered"⁶

¹<https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide>

²<https://www.ft.com/content/b59f8638-0009-11e6-ac98-3c15a1aa2e62>

³<https://www.nao.org.uk/press-release/financial-services-mis-selling-regulation-and-redress/>

⁴<https://www.moneymarketing.co.uk/fca-orders-past-business-review-over-advice-due-diligence-failings/>

⁵<https://www.fca.org.uk/publications/thematic-reviews/tr15-12-wealth-management-firms-and-private-banks-suitability>

⁶<http://www.thisismoney.co.uk/money/news/article-2401679/Business-receive-compensation-mis-sold-rate-swaps-year-payouts-ordered.html>

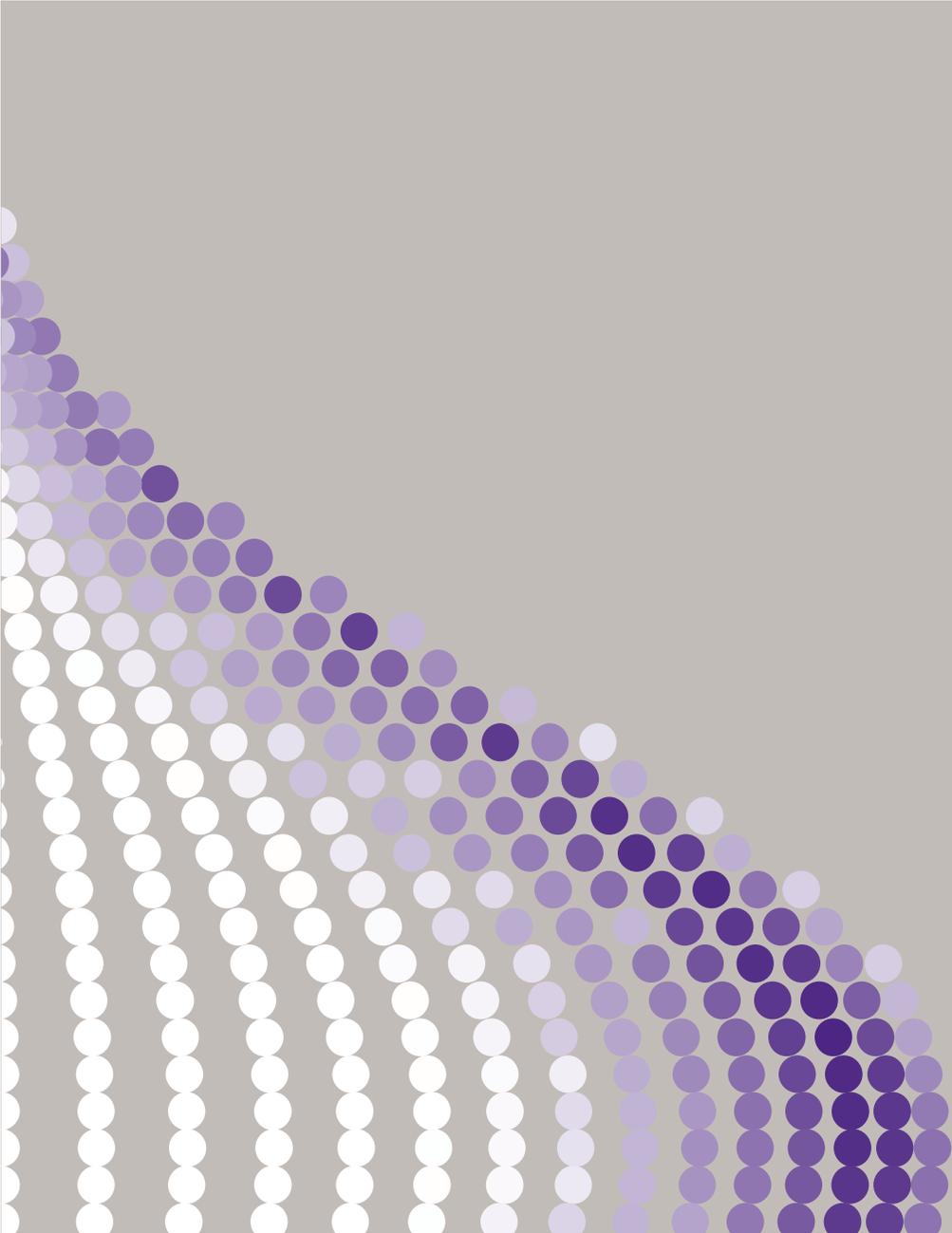
⁷<http://www.telegraph.co.uk/finance/2885007/FSA-split-capital-scandal-is-the-worst-ever.html>

⁸<https://www.fca.org.uk/news/press-releases/payday-lender-dollars-provide-%C2%A3154-million-redress-over-147000-customers>



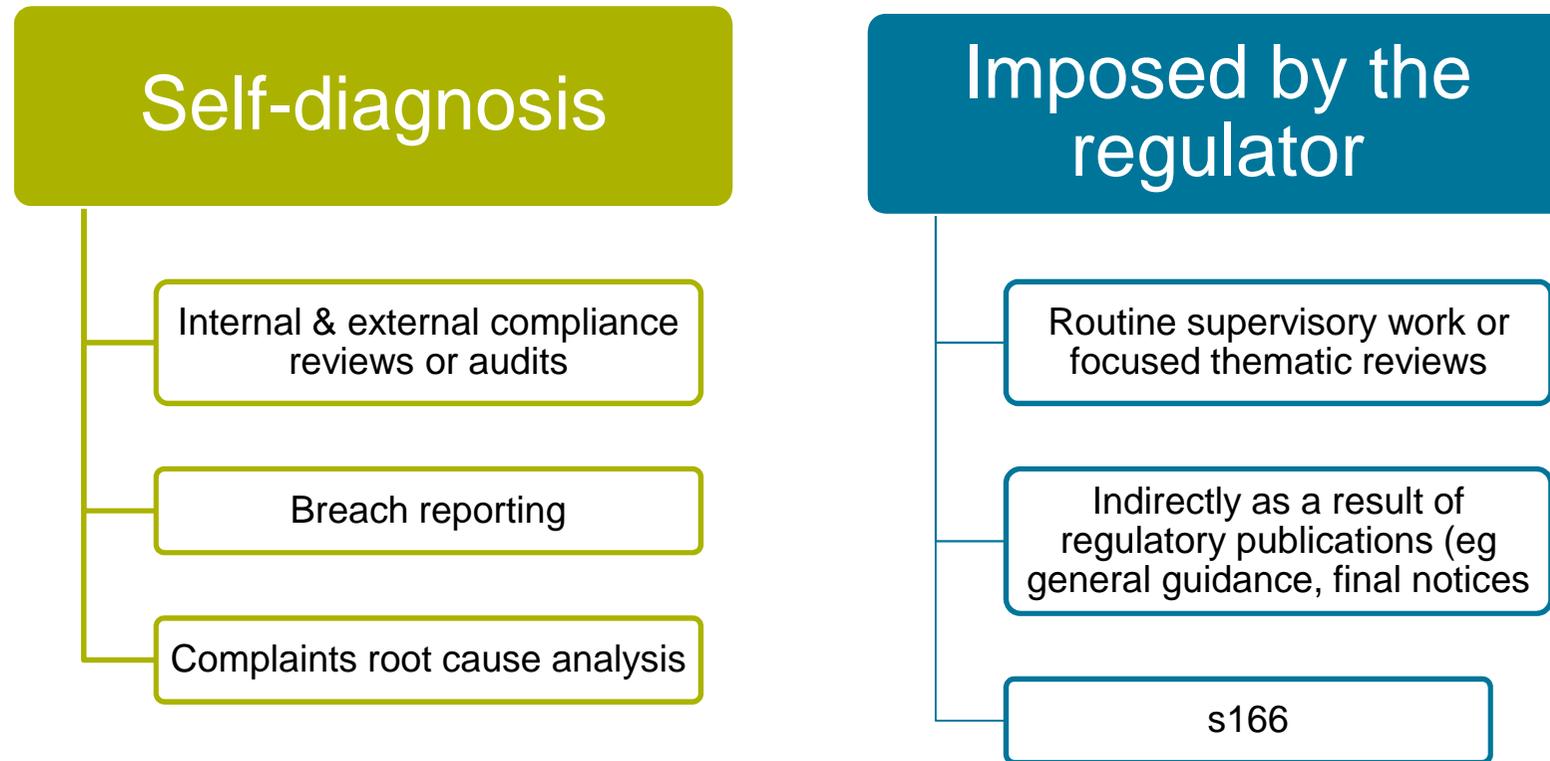
Agenda

- Why do firms find themselves facing a remediation exercise or Past Business Review (PBR)?
- The types of firms and products affected
- The business functions involved in delivering a PBR
- Key elements of a successful PBR
- Redress calculation - building a parallel universe
- Common pitfalls and the impact on a PBR
- The future landscape
- Questions

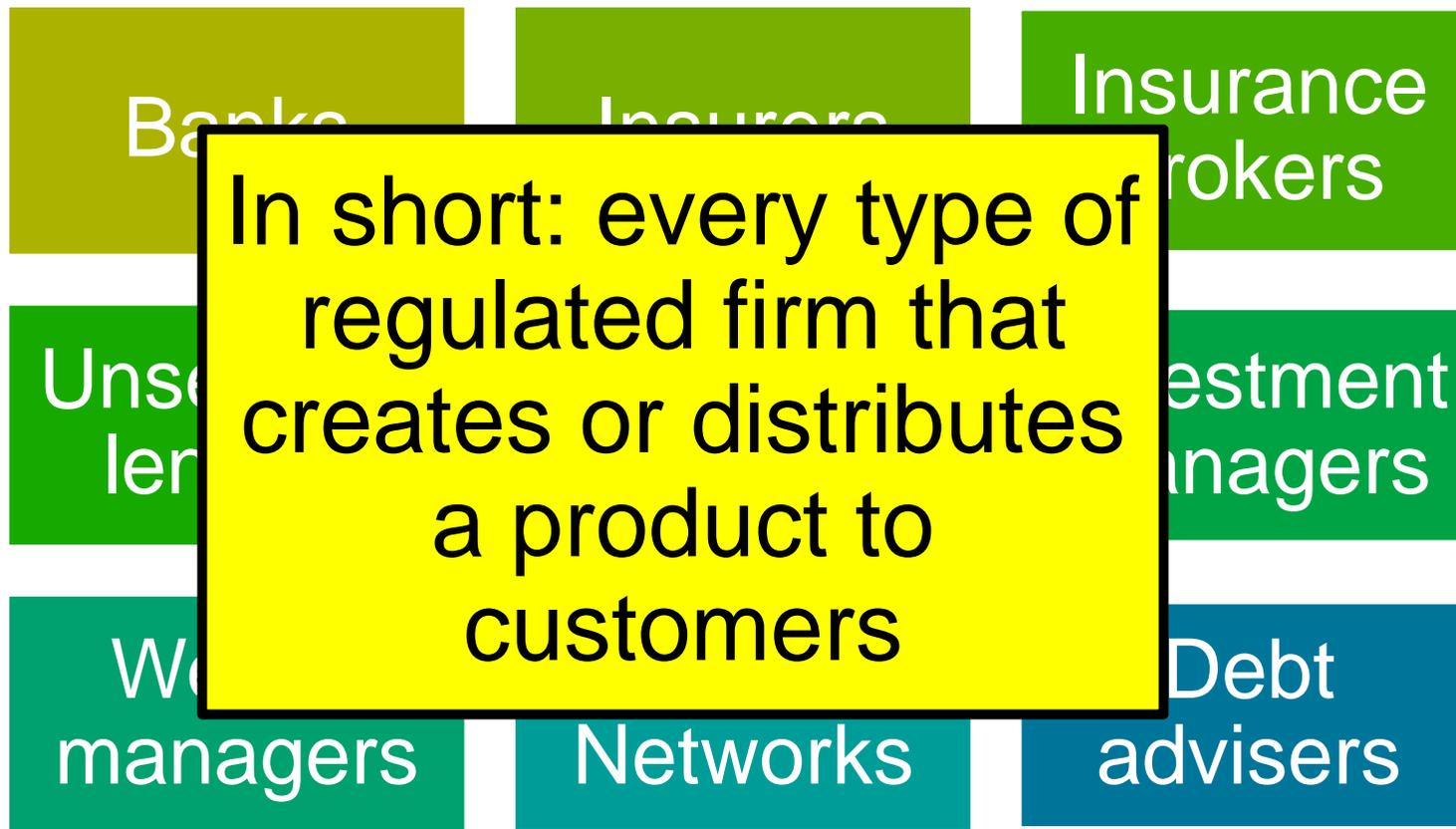


Past Business Reviews

Why do firms find themselves facing a PBR?



The types of firms affected

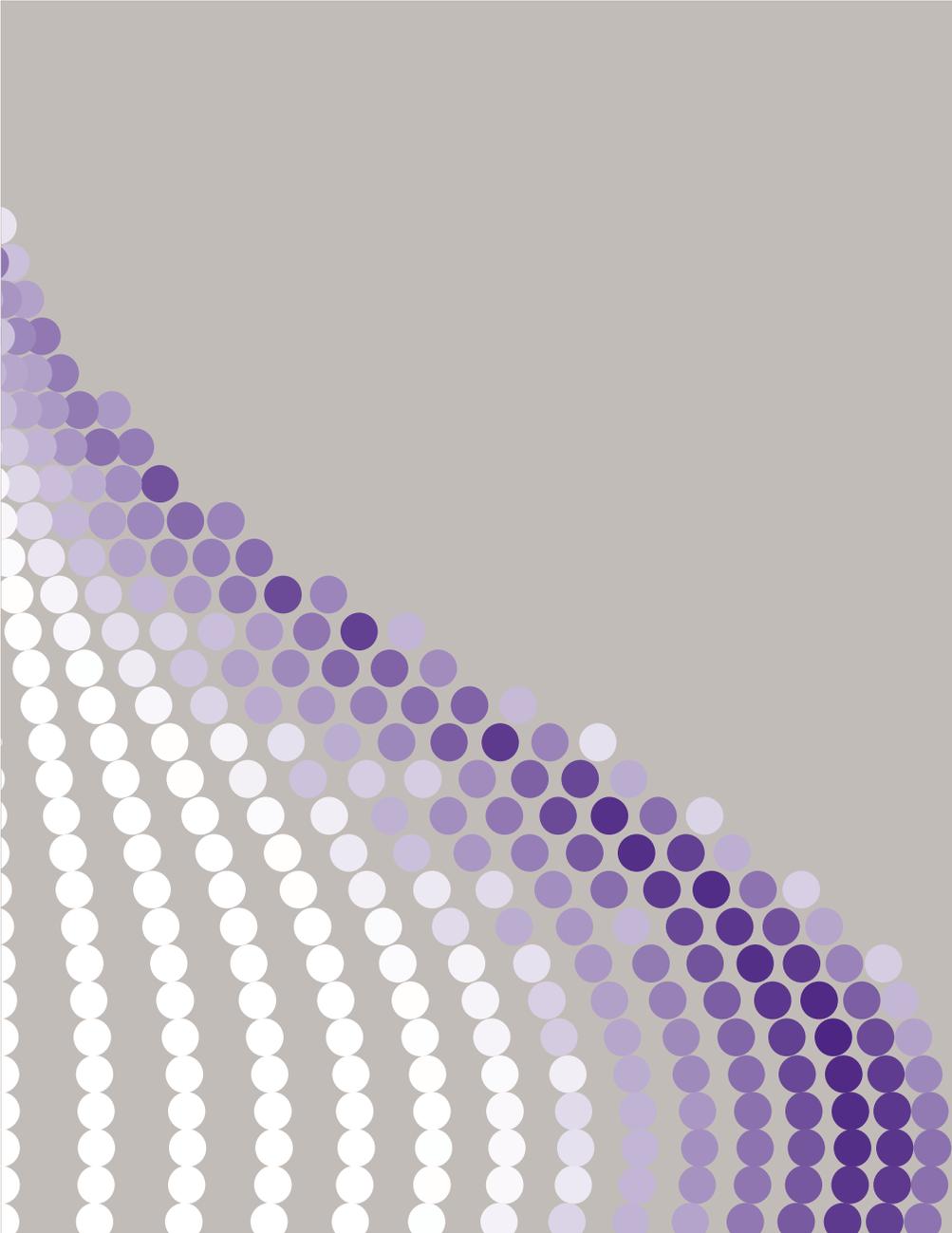


The types of products



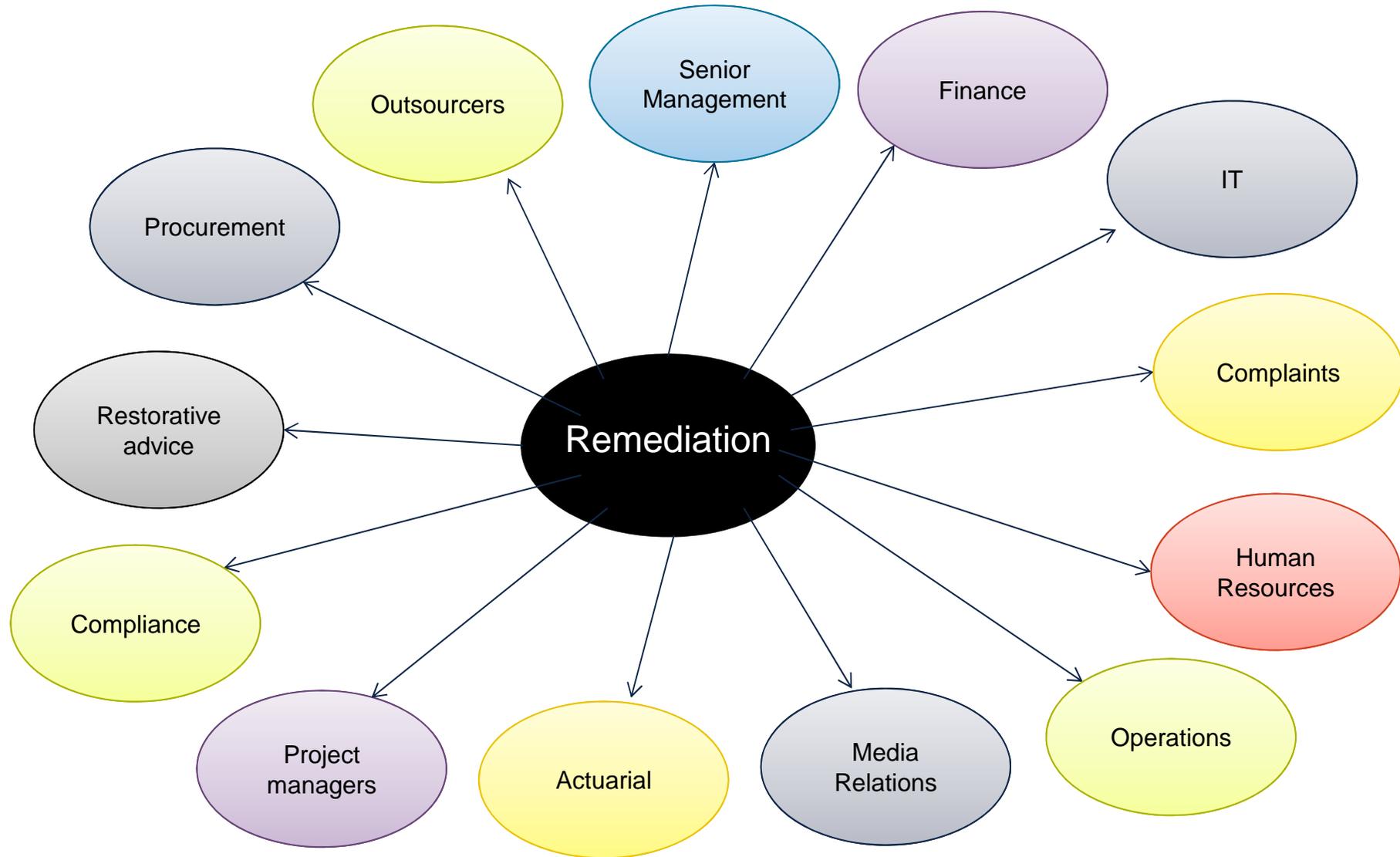
Product lifecycle events

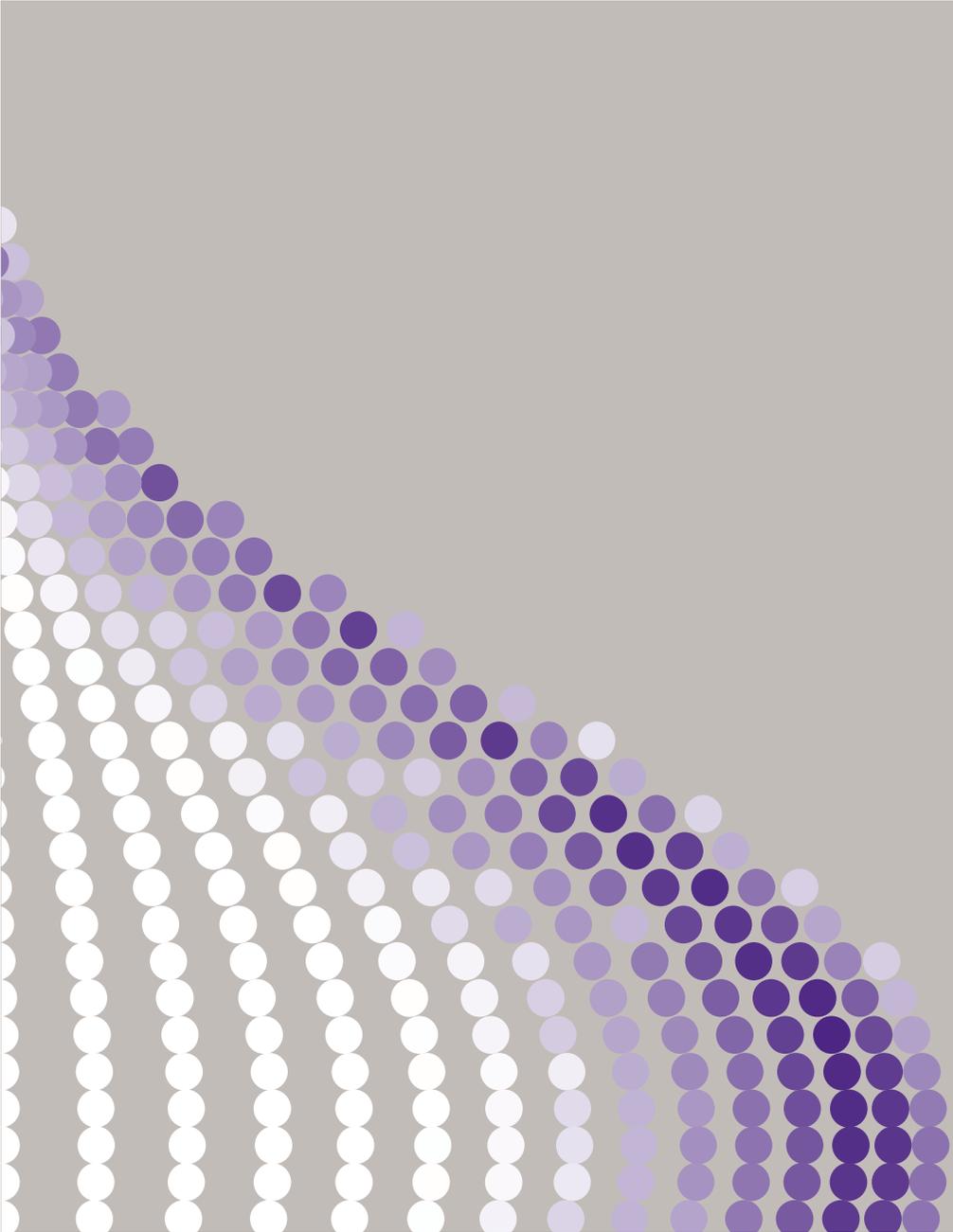




What parts of the business does the PBR affect?

How a PBR affects your business





Key aspects of a remediation project lifecycle

To deliver a successful PBR.....

Governance arrangements

A suitable project governance structure to ensure that the PBR is subject to appropriate senior management oversight and challenge

Project management

A detailed project plan with realistic deadlines and milestones, using effective and well established project management methodologies

Population identification

A methodology and process to effectively and appropriately identify the review population

Review methodologies

A robust review methodology to ensure that the same decision making process is adopted for all customers and that they all receive fair outcomes

Redress calculations

From very simple to extremely complex calculations designed to put customers into the position they would or should have been

To deliver a successful PBR.....

The review team

A team of experienced, sometimes specifically qualified, and always well trained case reviewers

Complaint handling

Policies and procedures in place for dealing with customer complaints in relation to the PBR and adequately trained staff

Audit trail

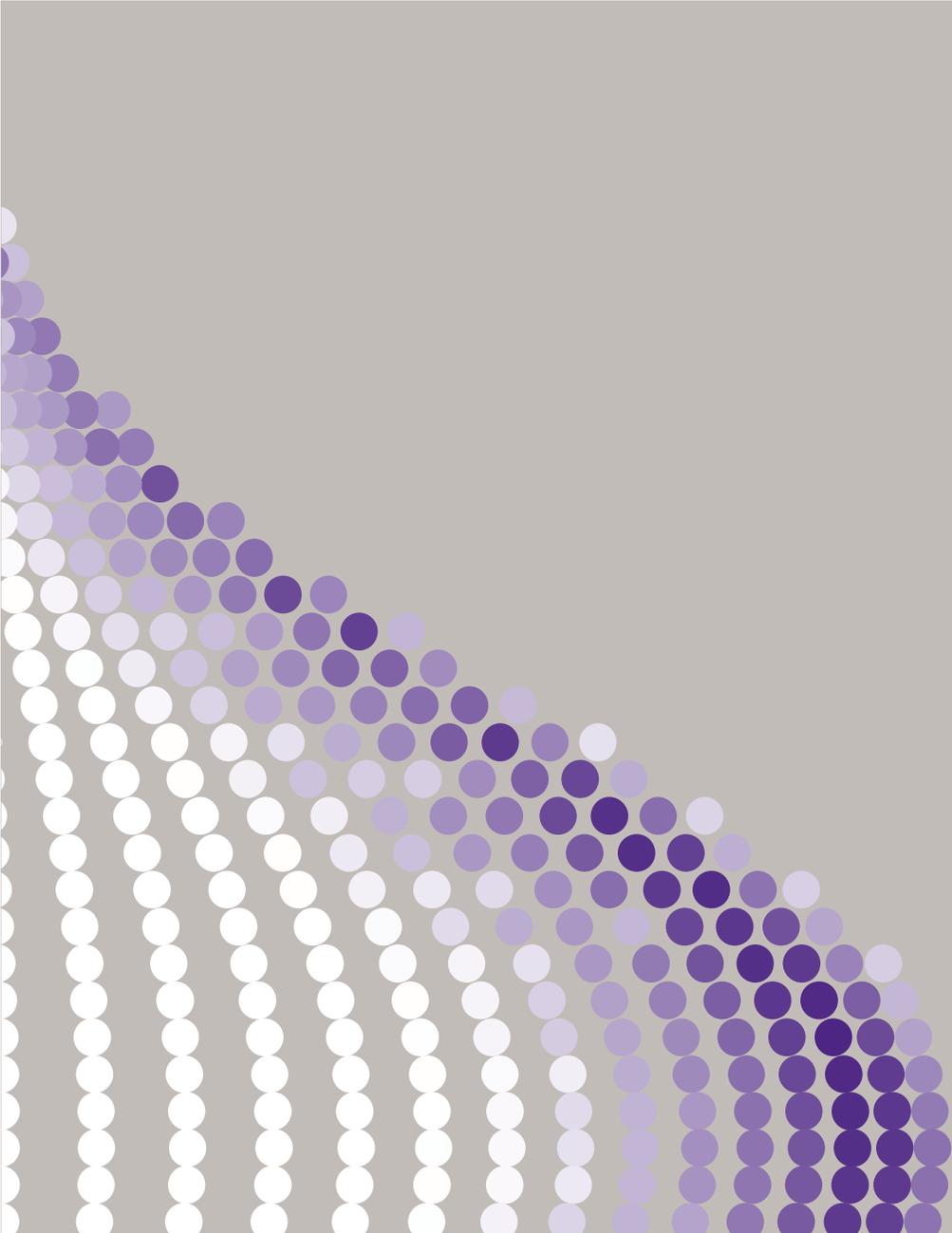
A process to ensure a robust audit trail is kept capturing key decisions, what was done and why. Should allow PBR to stand up to future challenge and scrutiny

Project closedown

A process to ensure that the review is closed in a robust and timely manner, late responders are treated fairly and lessons learned are captured

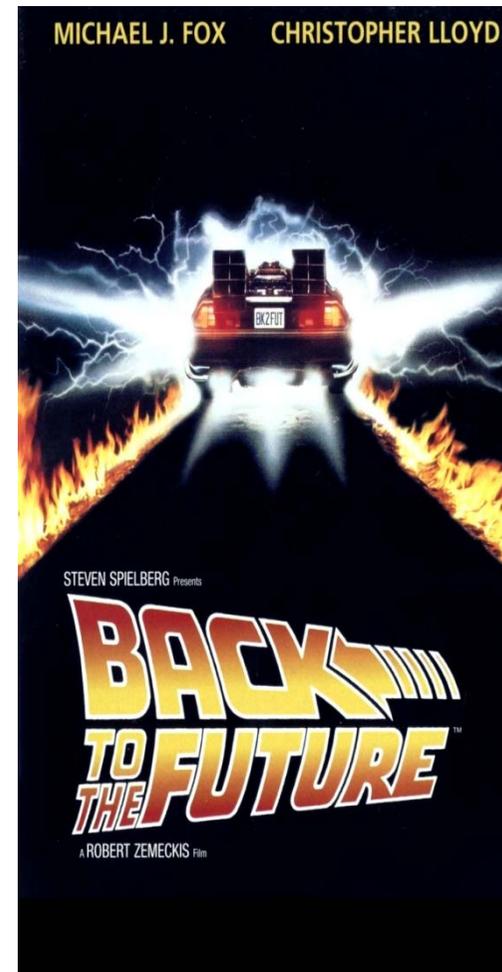
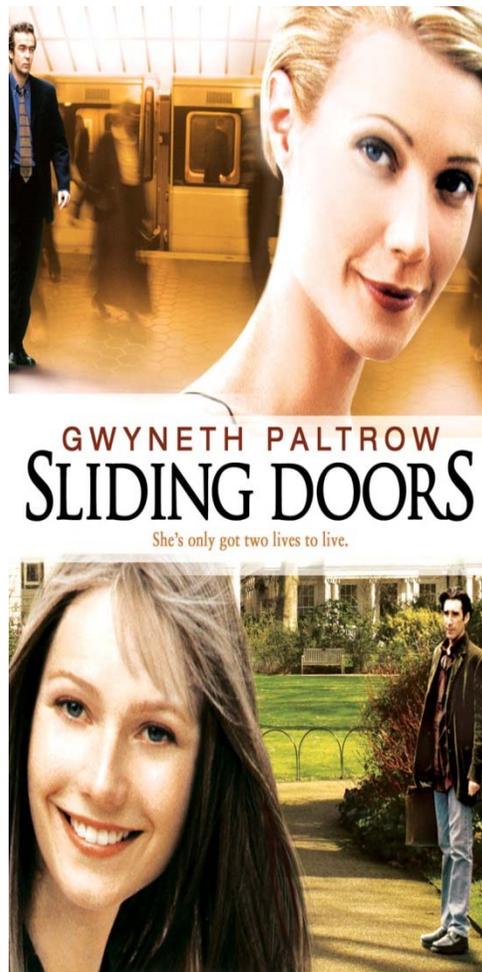
Regulatory relationship management

Principle 11 considerations. Depending on whether a s166 or not, updates to the regulator and close-out meeting



Redress calculation: building a parallel universe

So, what would have happened if...



Key considerations relating to redress

Initial Diagnosis

- What are the different elements requiring redress?
- Which customers are affected?
- Is the population divided into cohorts?
- Do we understand the secondary impacts?

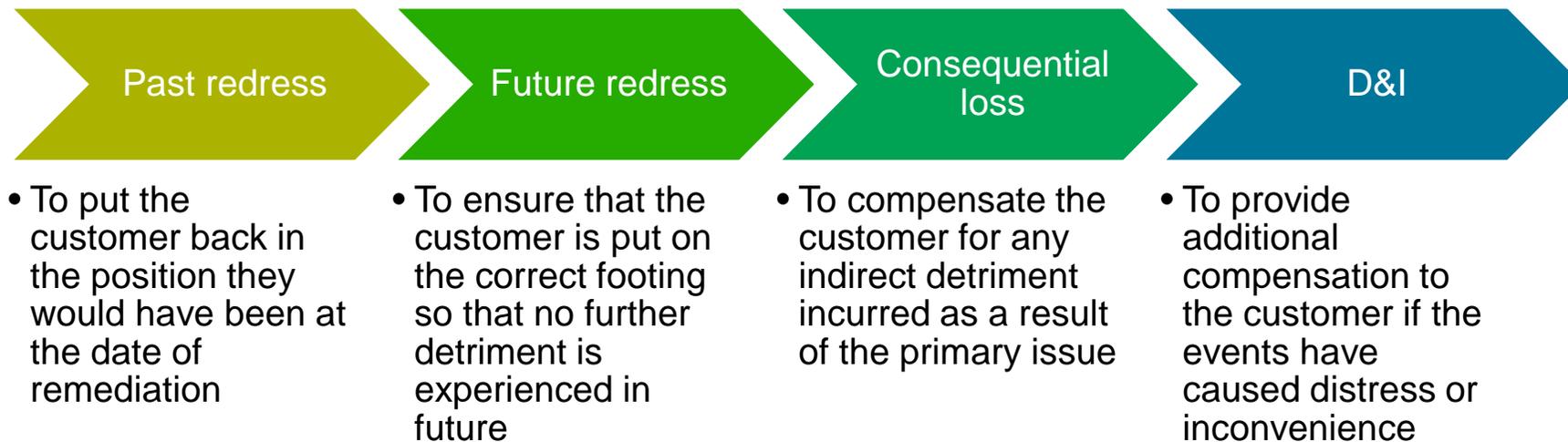
Methodology

- What calculation tools do we need?
- How does this exercise interact with other remediation activity?
- Automated v manual redress calculation
- What happens if / when things change

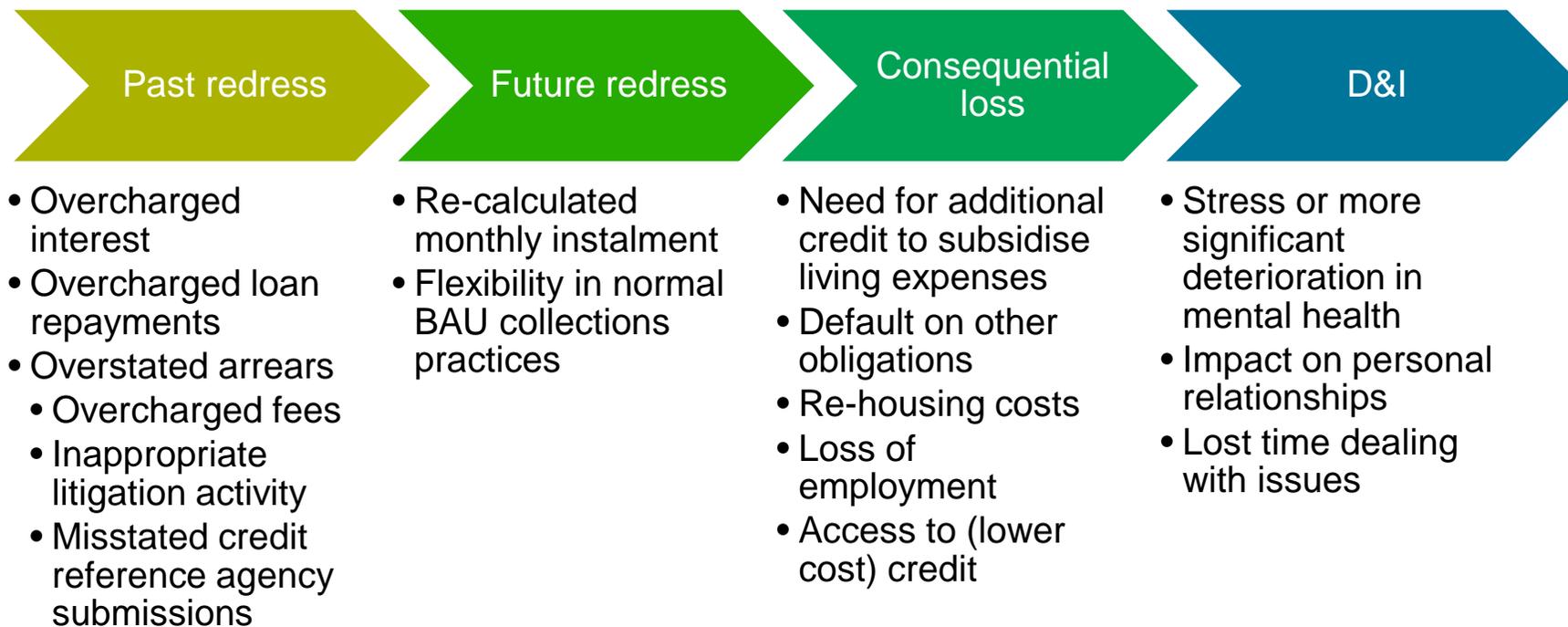
Project Management

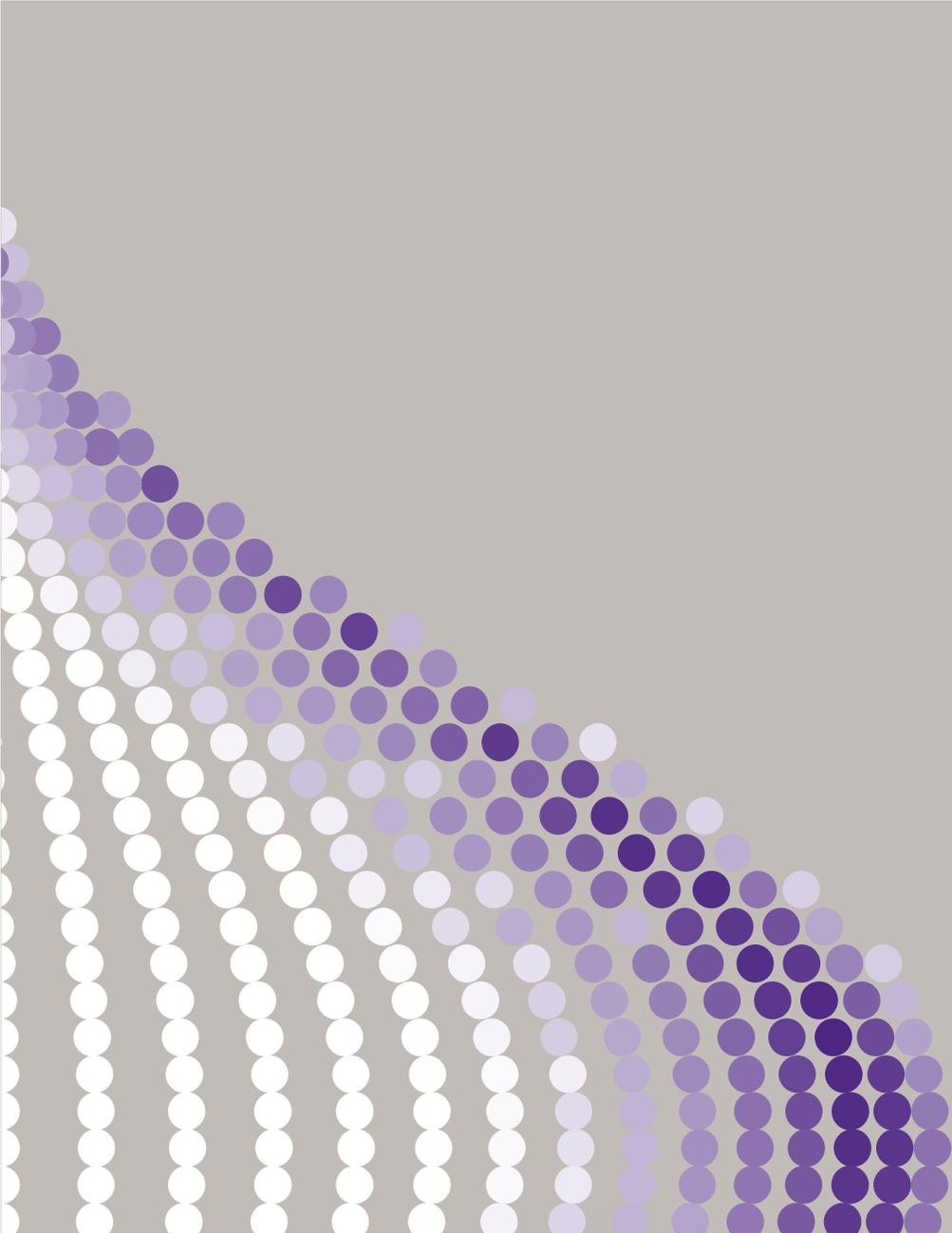
- How knowledgeable is the project manager?
- Will there be sufficient access to SMEs?
- Do timescales realistically allow for:
 - Calculator testing and assurance
 - Manual reviews
 - Customer tracing

Where does the detriment stop?



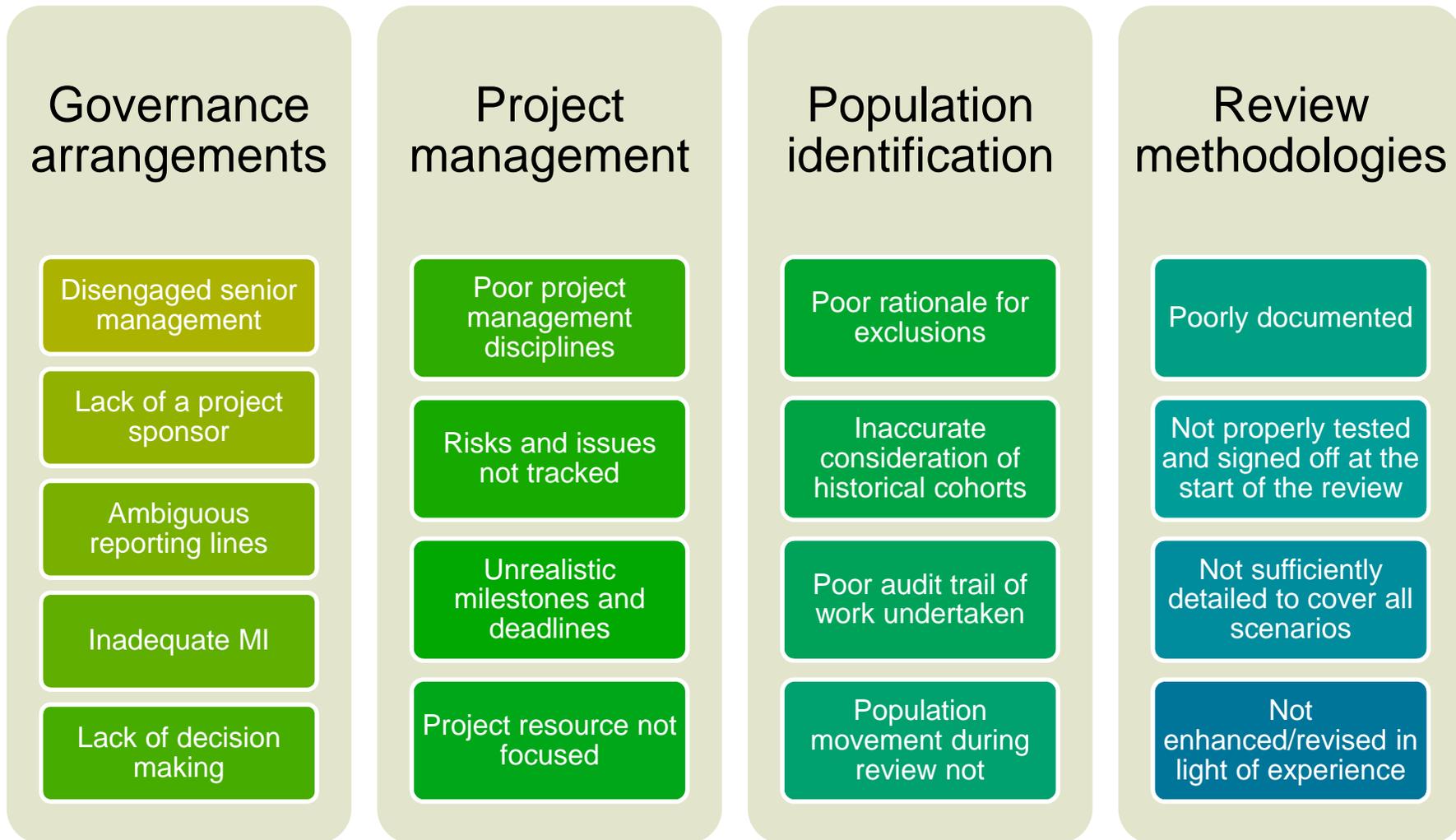
Where does the detriment stop? Example Remediation of secured loan portfolio





Common pitfalls

Common pitfalls.....



Common pitfalls.....

Complaint handling

Failure to anticipate complaints

Failure to identify or refer complaints

Inadequate training of staff

Inconsistent treatment of customers

Lack of lessons learned

The review team

Inadequately skilled review staff

Inadequate training and accreditation process

Poor quality assurance controls

Unrealistic expectations on delivery

Failure to think ahead

How to treat 'unsuitable but no loss' customers

Multiple issues - multiple letters or single letter

Plan for customers that need restorative advice

Timing of assurance activity

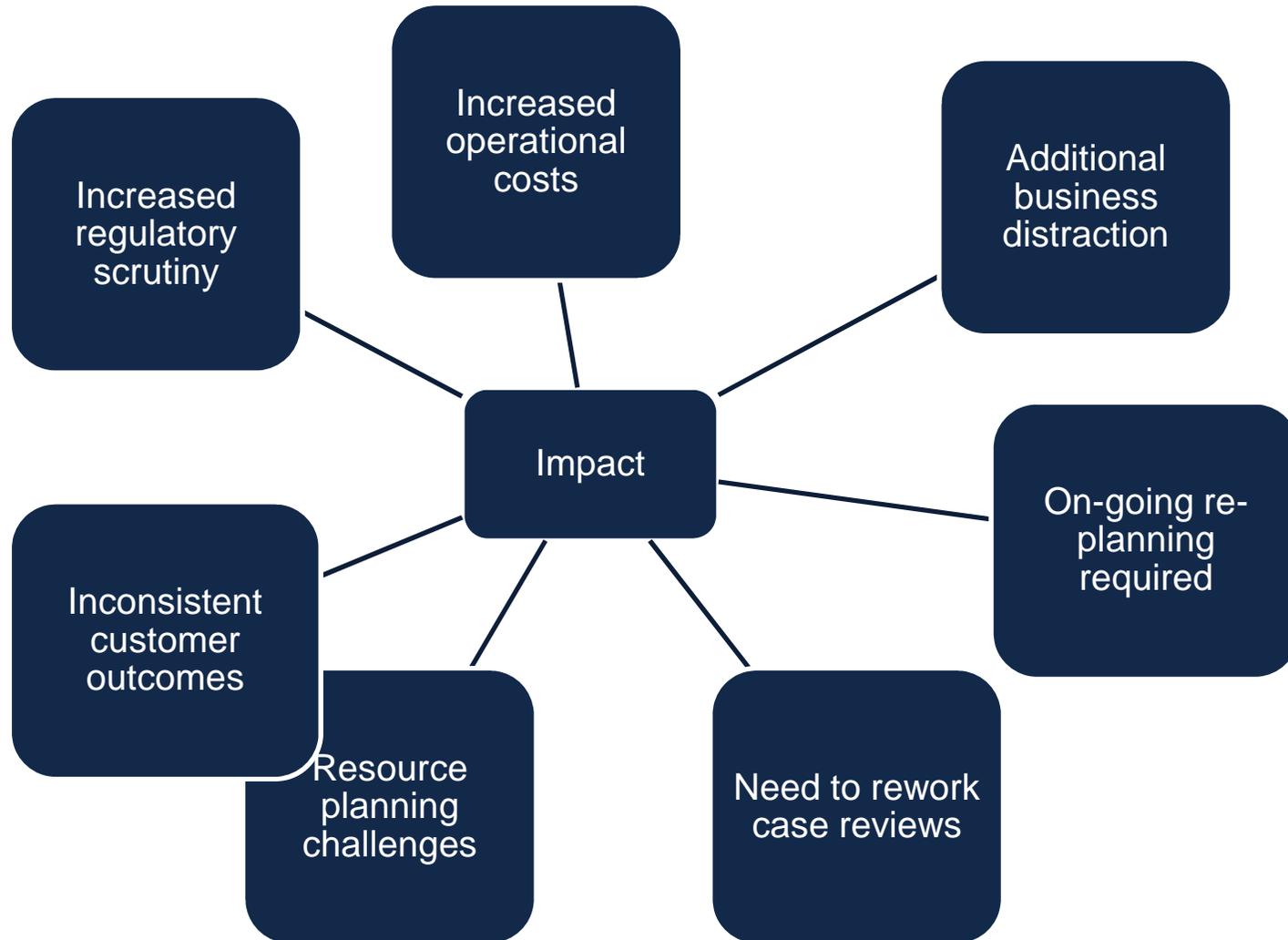
Regulatory relationship management

Inappropriate initial disclosure

Lack of open and effective engagement with the regulator

Inaccurate progress updates

Which could result in.....





The future landscape...



The future landscape.....

- History over the last 25 years tells us that PBRs are here to stay
- The FCA is continuing to drive an agenda focused on consumer protection and consumer outcomes. It is also paying increasing regard to behavioural economics and value for money
- FCA regulation of claims management companies
- Where are the next PBR bodies buried....?
- Pension freedom rules, packaged bank accounts, fair treatment of long term legacy customers, enhanced and impaired annuities, dormant bank accounts and repatriation of funds, automatic capitalisation of mortgage arrears.....

Questions





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