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### **Compensation Scheme of Last Resort: exceeding sub-sector levy caps**

We thank the Treasury for compiling a detailed consultation paper on this matter and appreciate the opportunity to make a submission.

From initial consultation around the creation and implementation of the CSLR and onwards, the FBAA has stressed the need for the scheme to operate transparently and fairly. We have been steadfast in voicing concerns around the potential risks created by the structure and rules governing the CSLR. In particular, we have expressed concern that if the CSLR were to have easy access to call on industry and industry sub-sectors as an uncapped source of funding that it could lead to maladministration, inefficiency and excessive compensation awards.

Unfortunately, after little over 12 months of operation, the CSLR is already in a position to have to call on its extraordinary processes to raise additional funding to cover a forecast 350% blowout in a subsector cap. What was positioned as a measure to be called upon only in 'black swan' events; has already been triggered. With the rising number of complaints and complainants<sup>1</sup>, the architecture of the financial advice industry and the enthusiasm of AFCA to compensate consumers for any manner of inconvenience or disappointment, we can only see this happening on a more frequent basis looking forward.

This was the outcome we and many others who have contributed to earlier rounds of consultation feared would result from the Scheme. Government cannot keep taking without doing long-term, irreparable harm to industry.

We acknowledge the importance of consumers having avenues of recourse where they are unable to claim compensation directly from those who have wronged them. We remain concerned with the process whereby AFCA is completely in control of these determinations. AFCA has no oversight, is not bound to follow laws and legal process, is not bound by precedent, has decision makers who are not members of the judiciary yet they have a higher monetary jurisdiction than the District Court and a mandate to make decisions that are fair – in the eyes of the complainant. We have no transparency as to what the CSLR is funding.

Members who have been part of the AFCA complaints process are despondent. They bear all of the cost and responsibility and frequently find themselves being encouraged to pay off complainants to stop matters progressing. Almost 95% of AFCA complaints are resolved at

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<sup>1</sup> [AFCA receives more than 100,000 financial complaints in 2024-25 | Australian Financial Complaints Authority \(AFCA\)](#)

or before case management. Just 5% of AFCA complaints proceed to determination, and 72% of those matters are determined in the financial firm's favour<sup>2</sup>. Financial firms that successfully defend a complaint are awarded an AFCA bill often exceeding \$10,000<sup>3</sup>. These statistics are not to be celebrated. They tell a damning story of imbalance and lack of bipartisan fairness.

It could never have been the intention of Government to create an autocratic, consumer-biased compensation authority which can hand down millions of dollars in compensation orders which if are not satisfied by the parties to the dispute or their insurers will be funded from whichever industry sectors or individual businesses the Government chooses. Yet here we are.

For this present situation, we strongly support a solution that involves participation from Government. We note the Consultation Paper identifies that the legislative framework does not contemplate the Commonwealth making a financial contribution however that is exactly what it should do. If not by way of a direct contribution, Government has other alternatives including:

1. Providing a loan to the CSLR to be repaid from future years' sub-sector payments. This approach would demonstrate Government's confidence in the architecture of the CSLR. If Government does not have confidence that future years' subsector levies will see it repaid, then we truly are at the beginning of an enduring problem.
2. Redirecting fine and penalty revenue collected through court actions. This money is currently flooding into the coffers of Government departments that are already funded by industry fees and levies.

Industry cannot simply be told to put their hands in their pockets every time one of these messes emerges while industry is already paying fees, levies and fines to Government departments that are tasked with preventing these events.

Payments out of the CSLR are paying the fees and costs of various Government administrators and the AFCA Scheme. We have previously flagged our concerns with the various administrators paying themselves first and then looking to industry to contribute more money to cover shortfalls. Why should Government and statutory authorities be able to recover expenses or even turn a profit from their involvement while industry pays?

### **1. What principles should the Minister have in mind when considering high-level options for dealing with an excess estimate?**

The Minister should prioritise an approach that delivers against the promised operation of the CSLR, namely that any payments from the CSLR are funded by the relevant sub-sector from which the compensation payments derive.

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<sup>2</sup> AFCA Data Cube 2023-2024 results

<sup>3</sup> We recognise and appreciate that members are not charged fees on their first 5 AFCA matters per annum. This is extremely beneficial for smaller licensees, however for licensees of any material size, this limit is quickly exhausted.

As a secondary priority, the approach must be fair to all parties impacted by the CSLR and its processes. Being fair includes:

- insulating sub-sectors that have no part of creating this situation from any requirement to pay more into the Scheme;
- expecting consumers to adjust their timeframes and expectations to allow compensation to be paid out at a pace that matches collection.

The solution must come from the relevant sub-sectors and the discomfort of this situation must be borne by all involved parties namely Government, the AFCA Scheme, the CSLR operator, affected consumers and relevant sub-sectors.

To consider overriding the reassurance provided to all affected industries on the creation of the CSLR after just 12 months of operation sends worrying messages about the Scheme rules and provides no confidence to the market that there will be any future integrity in the manner in which the Scheme will operate. The Scheme will become that which we feared it would – namely a free-for-all slush fund that is administered with indifference because if there is ever not enough money, the Scheme can simply take it from wherever it wishes.

## **2. Are there any matters the Minister should not have regard to (including any outlined in the text above) when considering these options?**

The Minister should not be restricted from offering direct Government support. While the consultation paper says s1069 of the Corporations Act does not contemplate the Commonwealth making a financial contribution, neither does it preclude such action on other grounds.

## **3. Is 'repeatability' an important consideration?**

In this situation, we do not believe repeatability should be a heavily weighted consideration. This consultation deals with specific events that have caused the cap to be exceeded. Further failures are almost inevitable although the quantum of such failures is completely unknowable. Each will have its own attributes that may impact the correct solution for that given event. The FBA A does not support an approach that involves levying unrelated sub-sectors.

## **4. Which one or more of the high-level options would be most appropriate for dealing with the excess in the 2025-26 financial year?**

We support spreading compensation over time as the most suitable option. What is not known is what rate of interest might be applied to deferred payments. Interest rates should not be punitive.

Paragraph 29 of the consultation paper states that spreading payments over time "chiefly" shifts the burden to on to people who would otherwise receive compensation in this year. We disagree with this statement. In actuality, the relevant industry subsectors paying the levy are "chiefly" shouldering the burden and they have played no part in the circumstances leading up to the compensation award other than being unfortunate enough to be in the relevant sub-sector. As noted earlier, if Government believes persons waiting on

compensation should have access to payments sooner, Government could accelerate payments by contributing funds either by way of loan or permanent contribution.

Compensation payments to investors/consumers should be prioritised ahead of AFCA, CSLR or ASIC taking their fees.

Slowing compensation payments and prioritising payments to investors rather than administrators is a sensible approach.

### **5. Who bears the burdens – financial and non-financial – of your preferred option, and what is their capacity to bear it? Would your preferred option impact the viability of a sub-sector?**

Slowing compensation payments results in all parties impacted by this situation sharing some of the discomfort. Clearly any consideration of a person's 'capacity' to bear the impact of any decision will turn on their individual circumstances. Government must not presume that every business operating in particular industry subsectors has capacity to meet additional financial demands.

Businesses operating in industry subsectors fuel the Australian economy. They employ staff, consume resources and services, pay levies, fines and copious fees and they pay taxes. They are not a blank chequebook. Leaving aside the few very largest operators making super profits of billions, for most other impacted businesses, the imposition of the original CSLR levy was a material figure. Another special levy will have many questioning why they bother to be in business if all they exist to do is pay fees and levies and underwrite the consequences of the very small percentage of poor actors operating in their subsector.

Partial payments could be made to all eligible investors with instalments scheduled to align with collection of future levies. Authorities can seek to recover their fees from future year's levies after investors are paid. This approach also acknowledges there is no transparency relating to how compensation amounts are determined for investors. Many questions arise relating to the composition of each investor's compensation sum. Are investors recovering capital, are they also being reimbursed for lost capital gains, how are these accounted for where the investors reinvested earnings over years rather than taking money out etc.

This option best supports the viability of the sub-sector and spreads the load across all stakeholders. Imposing a special levy on industry results in only industry bearing the additional brunt (already being the stakeholder bearing the brunt) while all other stakeholders pay themselves freely and fully.

### **6. Is your preferred option repeatable if necessary in the future?**

Yes because it spreads the burden of responding to abnormal circumstances across the largest group of relevant stakeholders. Ultimately, the only group that endures irredeemable consequences are those paying levies under the industry subsector because they are paying while everyone else (consumers awaiting compensation and various bodies) is paying themselves from the Scheme.

**7. If your preferred option is a combination of a special levy with a determination to spread compensation over time (or taking no action), how much of the excess should be left unrecovered by the special levy? Why?**

Should a special levy also be considered, it should only be against the relevant sub-sector. This was the very premise upon which the CSLR was promoted and the reason why there are industry sectors and subsectors. If other unrelated sectors are hit with a special levy it simply turns the CSLR into an unfunded, limitless liability for any business thinking to participate in the financial services or consumer credit industries. It has real potential to drive more people out of retail/consumer services which will have adverse consequences on the services consumers have access to in future. The financial advice industry has already suffered heavily from poorly prepared, heavy-handed reforms. Consumers have fewer choices and more difficulty accessing financial advice now than ever before. Government must factor the potential risk of further weakening the financial advice industry into its decision.

**8. Should a Minister consider imposing a special levy on a sub-sector because of its connection to the losses that have driven an excess? If so, what are the factors that should be taken into account in the Minister's consideration?**

If a special levy is required (and we maintain there are more sensible and sustainable options), it should be aligned with the sub-sector that is connected to the losses. Others may quite sensibly advance the position that a business within the subsector that has done nothing wrong is no more culpable than a business that is not in that sub-sector and therefore if Government is going to raise a levy against innocent businesses it should include them all and not just one sub-sector.

The Minister must take into account the irreparable harm that taking money from unrelated sub-sectors might cause to the integrity of the CSLR and what it represents. If there is no reason for which sub-sectors are called upon to pay an additional levy then the Scheme is no more than a slush fund.

If Government is minded to impose a special levy on an additional sub-sector then we say that sub-sector should be the one with the greatest financial capacity to absorb it. Clearly in our system that is the banking sector. While no fairer than choosing any other sub-sector, at the very least, those in the top end of the sub-sector are amongst the most profitable and have capacity to fund unanticipated liabilities more so than any other participants. The impact on companies making billions in NPAT is negligible.

There is no easy answer to this problem because every alternative is a grossly unfair outcome resulting from an undesirable act of taking money from hardworking businesses and handing it over to an anonymous group of victims through a bureaucratic conduit that pays itself handsomely on the way through.

**9. What evidence should a Minister require, or what process should be undertaken, before determining that there exists a subjective responsibility that should be reflected in a special levy?**

We make no response to this question.

**10. Should a Minister consider imposing a special levy on a sub-sector because of its capacity to pay? Is this approach supported by the legislation (is it 'most effective')? How would the Minister assess a sub-sector's capacity to pay?**

Following from our response to Q8, if Government is minded to raise additional funding from any subsectors, those with the greatest capacity to pay, as measured by EBITDA or NPAT, will be least impacted. Whether an amount of special levy is material or not should become readily apparent upon looking at the financial performance of particular businesses within specific subsectors.

**11. Is any of the ASIC IFM sub-sectors a good proxy for financial sector entities with the greatest capacity to pay?**

It is difficult reconcile the figures in the ASIC IFM subsectors data presented in Appendix A. Without attempting to further understand the figures, those entities with the highest EBITDA and NPAT would appear to have the highest capacity.

**12. Should the Minister consider specifying more than one sub-sector with 'large' entities? If so, how should the special levy amount be apportioned between them?**

We make no submission to this question.

**13. Should a Minister consider imposing a special levy on all retail-facing sub-sectors? Is this approach supported by the legislation (is it 'most effective')?**

No. We do not support a blanket levy impacting all retail-facing sectors. This creates a terrible precedent that effectively makes every retail industry sector and subsector liable for every other. Advice to retail clients regarding investments could not be more dissimilar to credit assistance provided to consumers by mortgage brokers. Complaints to AFCA involving mortgage brokers represent only around 0.1% of AFCA claims.

Consumer loss must be examined objectively. While everyone is sympathetic with consumers who suffer loss because of misconduct, significant losses can be incurred by retail clients who are taking risk, investing and seeking higher returns. We must be careful to not be using CSLR payments to compensate consumers for missed opportunity or disappointment at losing profits. Given the lack of transparency or consistency from AFCA, industry has no way to know what is being funded by the levies.

**14. If so, what is the best method for apportioning the special levy among retail-facing sub-sectors? To what extent is capacity to pay relevant, and what is the best means of assessing this? What data are available to inform this assessment?**

We refer to our response to Q13. Imposing a levy on a group solely because they are retail-facing subsectors has no merit at all.

It may well be the case that Government cannot formulate a valid justification for which entities and which sub-sectors it decides to levy. At the end of the day, the process involves taking money from a group of businesses in one or more sub-sectors that have had nothing to do with the failures that have led to circumstances giving rise to the special levy.

Any decision to levy any sector will come across as grossly unfair. Because this process is grossly unfair. On that basis, those with the greatest capacity to pay should be the ones who pay. Those groups being Government and listed entities with the highest EBITDA and NPAT.

**15. Are the data and methodologies used by Treasury in calculating illustrative estimates of these options reliable and appropriate? What alternative approaches exist?**

We make no submission on this question.

**16. Are there options outside the current legislative framework that may be a more effective way of dealing with excess cost estimates in future?**

As previously indicated, we see Government having a primary role to play here. Government drove the creation of the CSLR and has the financial means to cover funding shortfalls. Government agencies are responsible for policing the conduct of advice entities. Government is responsible for creating the AFCA Scheme in the form that it is today.

We strongly encourage Government to sit at the table to be part of the solution in a meaningful and financial way. This goes well beyond consulting on which non-Government sources of funding are going to be approached to cover any potential special levy.

Yours faithfully

**Peter J White AM MAICD**  
Managing Director of the FAMNZ  
& FBAA in Australia

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