Australian Banking Association

13 August 2021

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via email: CSLR@treasury.gov.au

Dear Mr Lyon

Compensation Scheme of Last Resort

The Australian Banking Association (**ABA**) welcomes the opportunity to provide feedback on the exposure draft legislation that would establish the Compensation Scheme of Last Resort (**CSLR**).

Our position

The draft legislation is intended to enact Recommendation 7.1 of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (**Royal Commission**), which found that a CSLR should be established in line with the prior findings of the *Supplementary Final Report of the Review of the financial system external dispute resolution and complaints framework* (**Ramsay Review**).

The ABA is supportive of establishing a forward-looking CSLR that is industry-funded, operated by the Australian Financial Complaints Authority (**AFCA**), is initially limited to personal advice failures and is scalable, and has design features consistent with the recommendations of the Ramsay review.

However, we harbour serious reservations concerning the design of the scheme as proposed. The scheme fails to meet the mandate set out by Ramsay that a CSLR should only be established to the extent that it was "limited and carefully targeted at the areas of the financial sector with the greatest evidence of need".[1] This is especially concerning given the recent experience of overseas schemes. The ABA also considers that further action is required to prevent the harm caused by parties who have failed to compensate customers in the first place.

Need for concurrent reforms

Ramsay noted that it was important to strengthen other regulatory requirements in conjunction with the establishment of the scheme, so that "there may be fewer claims made on a CSLR."[2]

These reforms should include:

1. imposing enhanced capital adequacy requirements for non-prudentially regulated financial firms
2. addressing information imbalances by enabling consumers to make more informed choices as to which firms to use

[1] The Australian Government, *Review of the financial system external dispute resolution and complaints framework – Supplementary Final Report*, September 2017
[2] The Australian Government, *Review of the financial system external dispute resolution and complaints framework – Supplementary Final Report*, September 2017, p. 117.

3. reforming the monitoring of financial firms to ensure adequate levels of professional indemnity (**PI**) insurance are held, and
4. strengthening the powers of the Australian Securities and Investments Commission (**ASIC**) to prohibit responsible persons of insolvent firms with unpaid determinations from being able to obtain another Australian Financial Services Licence (**AFSL**) in the future.

Key design features

To ensure the success and viability of the CSLR, the ABA recommends that the Government revise its current proposal to adopt a scheme with the following design features:

1. The CSLR should initially be restricted to financial advice failures where a financial adviser has provided personal and/or general advice on 'relevant financial products' to a consumer or small business.
2. The CSLR should be designed for the future and accordingly be scalable, which means it can be expanded over time to cover other types of financial and credit services should evidence of significant problems of uncompensated losses emerge.
3. The CLSR should generally exclude prudentially regulated firms from its scope, except in relation to services where they provide Tier 1 financial advice.
4. The Government should fund the unpaid determinations that have accumulated prior to the commencement of the scheme.
5. The special levy cost-recovery mechanism must be subject to parliamentary approval, given the potential magnitude and effect of a black swan event on consumers and industry.
6. The CSLR should be required to produce an annual report disclosing its operating and financial activities over the past year.
7. The CLSR should not impose a minimum levy threshold of $1,000. Instead, there should be an annual fee that all leviable firms must pay, regardless of size.
8. To prevent further consumer losses and harm, ASIC should be required to suspend or cancel a financial firm's licence where the CLSR has compensated the firm's customer in relation to an unpaid AFCA determination, or where the firm has failed to pay the CSLR levy or any other outstanding AFCA fee.

In addition, we request that the Government publish the underlying data on the volume and value of cases that it has used to support the cost estimates associated with the CSLR, so that stakeholders can carefully assess the costs and benefits of the scheme.

Further comments on the consultation materials are provided in Appendices A and B to this letter. Please contact us if you would like to discuss any aspects of this submission.

Kind regards

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Australian Banking Association

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Appendix A: Need for reform

This appendix outlines the underlying need for reform, including the case for a compensation scheme of last resort alongside other amendments to financial regulation and supervision.

Case for a compensation scheme of last resort

Recommendation 1:

The CSLR should initially be restricted to financial advice failures where a financial adviser has provided personal and/or general advice on 'relevant financial products' to a consumer or small business.[3]

The CSLR should be designed for the future and accordingly be scalable, which means it can be expanded over time to cover other types of financial and credit services should evidence of significant problems of uncompensated losses emerge.

The banking industry is mindful of the very real social impacts of monetary loss and unpaid determinations on consumers. The impacts on the wellbeing of individuals, and the effects on broader consumer trust and confidence in financial services are well understood.

With the above context, it is important to understand that:

1. Most unpaid determinations arise due to failures in the financial advice sector. For example, in 2017 the Financial Ombudsmen Service (**FOS**) advised that 92 per cent of the value of its unpaid determinations were attributable to financial planners and advisers.[4]
2. The track record of comparative overseas schemes is not promising. For example, the UK Financial Services Compensation Scheme (**FSCS**) has faced rising costs since its inception. On 15 July 2021, the Financial Conduct Authority (**FCA**) announced that it would undertake a review of the scope and coverage of the FSCS, with a view towards moving to a 'polluter pays' system.

For this reason, the ABA endorses the position held by Ramsay in his final report that the CSLR "should be limited and carefully targeted at the areas of the financial sector with the greatest evidence of need".[5]

The ABA suggests that the Government should adopt Ramsay's recommendation that the CLSR should initially be restricted to financial advice failures where a financial adviser has provided personal and/or general advice on 'relevant financial products' to a consumer or small businesses. Relevant financial products include, for example, financial advice on investments in managed investment schemes, superannuation and banking products that are not basic banking products.

Moving immediately to a CSLR where a broader set of claims would be eligible for compensation could expose a CSLR to a significant financial liability which has the potential to undermine the sustainability of the scheme. Instead, we submit that the CSLR could be designed to be scalable, which means it can be expanded over time to cover other types of financial and credit services should evidence of significant problems of uncompensated losses emerge in the future.

Concurrent reforms are required

It is the ABA's firm view that the CSLR should only be implemented if it is done so concurrently with policy and regulatory reforms aimed at the underlying cause of unpaid determinations. Implementing broader reforms will not only lead to less unpaid determinations but will also mean that the CSLR is more effective and sustainable over the longer term.

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[3] Section 910A of the Corporations Act 2001 defines 'relevant financial products' as financial products other than: basic banking products; or general insurance products; or consumer credit insurance; or a combination of any of those products.
[4] The Australian Government, *Review of the financial system external dispute resolution and complaints framework – Supplementary Final Report*, September 2017, p. 64.
[5] The Australian Government, *Review of the financial system external dispute resolution and complaints framework – Supplementary Final Report*, September 2017

It is important to remember that every person that will utilise the compensation scheme will have suffered a poor outcome that it would have been much better to avoid. A CSLR will not fix the underlying causes of unpaid determinations and may, in some cases exacerbate those causes. For example, the existence of such a scheme, may result in the following adverse incentives or 'moral hazard' for market participants:

- Smaller, less-capitalised financial firms could adopt less risk-averse approaches and behaviours in the expectation that if something goes wrong, a CSLR will compensate the client.
- A financial firm in financial difficulty might worry less about trying to salvage its position if it knows that its customers will not be left entirely out-of-pocket.
- A CSLR could reduce the incentive for compliance with existing compensation arrangements.

We recommend that the Government must therefore concurrently pursue reforms that are likely to reduce the volume of unpaid determinations. These reforms should include:

- imposing enhanced capital adequacy requirements for non-prudentially regulated financial firms
- addressing information imbalances by enabling consumers to make more informed choices as to which firms to use
- reforming the monitoring of financial firms to ensure adequate levels of professional indemnity insurance are held, and
- strengthening the powers of ASIC to prohibit responsible persons of insolvent firms with unpaid determinations from being able to obtain another AFSL in the future.

Capital adequacy

Recommendation 2:

The Government should strengthen advice licensee arrangements to reduce the risk of unpaid determinations and ensure the CSLR operates as a genuine compensation scheme of last resort.

The *Corporations Act 2001* (**Corporations Act**) and the *National Consumer Credit Protection Act 2009* (**National Consumer Credit Protection Act**) impose obligations on licensees to have arrangements for providing compensation where certain losses are suffered. However, these obligations do not prescribe minimum capital requirements for advice licensees.

In 2012, the *Compensation Arrangements for Consumers of Financial Services Report* (**St John Report**) considered the causes of unpaid determinations and proposed that financial requirements for non-prudentially regulated licensees and financial advisers should be strengthened. This recommendation was prompted by a view that "there is a need to strengthen the regulator's hand to deal effectively with licensees and key individuals who, having left the industry with outstanding compensation obligations to consumers, re-emerge in another guise."[6]

The review suggested that licensees might be required to hold an additional form of financial security as a general condition of licence, such as a capital holding or a security bond or guarantee from a financial institution or related entity. The aim would be to give the licensee more capacity to meet awards of compensation that are not covered by professional indemnity insurance.

It was not suggested that licensees should be subject to anything approaching the capital adequacy standards required of financial institutions that are prudentially regulated by APRA. The idea was that some form of financial security would practically reduce the risk of a licensee being unable to meet a claim for compensation, whilst balancing the risks of introducing barriers to entry in the market. In line with the findings of the St John review, the ABA recommends that the Government strengthen the capital adequacy requirements for licensees with a financial advice authorisation.

[6] The Australian Government, *Review of compensation arrangements for consumers of financial services - Consultation on final report,* July 2012, p. 69

UK experience

As a point of comparison, the Financial Services Compensation Scheme is the United Kingdom's statutory compensation scheme of last resort for customers of financial services firms. It is an independent body established under the *Financial Services and Markets Act 2000 (UK)*. Individuals and small business are eligible to make claims to the FSCS. The FSCS will pay compensation when it is satisfied that a firm is unable, or likely to be unable, to pay claims against it and therefore deemed to be 'in default'.

The UK FSCS covers claims for deposits, investments, insurance mediation, general insurance, life insurance and pensions, home finance and debt management. The UK FSCS differs significantly in scope to the proposed CSLR, as the UK scheme encompasses all compensation schemes that pay eligible claims for both insolvency as well as misconduct. For example, the UK FSCS compensates for the same risks addressed by Australia's Financial Claims Scheme (**FCS**).

On 15 July 2021, the Financial Conduct Authority announced that it would undertake a review of the scope and coverage of the FSCS. [7] This review was motivated by rising costs associated with the scheme over recent years. In particular, the overall bill for redress within the advice market is very high, with the total forecast levy for 2021-22 amounting to £1.04 billion.

Several have noted that these rising costs are, in large part, due to the adverse incentives that the scheme introduces into the market. For example, Charles Randell, Chair of the FCA, recently noted that they needed to 'redesign the system to ensure that the polluting firms in the financial sector are the ones that pay, not those that have behaved well'.[8] To reduce the reliance on the FSCS for the future, regulators are advocating for firms to have appropriate liquidity and capital reserves to cover outstanding redress liabilities.

Information disclosures

Recommendation 3:

The Government should address information imbalances by enabling consumers to make more informed choices as to which firms to use. For example, it could require AFCA to publish a list of financial firms that have not paid their determinations within three or six months.

The Government should consider what additional information it could provide consumers to reduce information asymmetry in the financial industry and empower them to make informed financial choices. This could include new requirements, for example, for financial firms to disclose if they have an unpaid determination or if they have not paid their AFCA fees.

Professional indemnity insurance

Recommendation 4:

The Government should reform the monitoring of financial firms to ensure adequate levels of professional indemnity insurance are held.

The St John Review also considered the importance of the role of professional indemnity insurance in the regulation of financial services. It found that the current regulatory architecture poses a degree of systems risk that a licensee may be:

- uninsured at a point in time when cover is required
- underinsured
- covered by a professional indemnity insurance policy that excludes certain products or services provided by the licensee and in relation to which it is exposed to potential future claims of compensation, or

[7] FCA, *Business Plan 2021/22,* p. 22.
[8] Speech by Charles Randell, Chair of the FCA and PSR, to a virtual roundtable of bank chairs hosted by UK Finance, June 2020.

- under-resourced financially.[9]

ASIC Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees (**RG 126**) specifies that, in determining whether a licensee has appropriate financial arrangements in place, it should consider how it will cover the insurance excess and keep records of this assessment.[10] The St John review found that ASIC's general approach is to look to licensees to self-assess the adequacy of their professional indemnity cover, taking account of the guidance in RG 126. ASIC regards the requirements as self-executing with the onus on a licensee to comply as part of its overall risk management processes.

The St John final report made recommendations at improving the effectiveness of professional indemnity insurance, including by recommending ASIC take a more proactive role in monitoring whether licensees are complying with their professional indemnity insurance obligations. Those recommendations are yet to be acted upon and, if not addressed, will continue to be a major cause of unpaid determinations. The ABA suggests that ASIC should be undertaking regular risk-based reviews of licensees to ensure that they have adequate financial and insurance arrangements in place.

ASIC powers

Recommendation 5:

To prevent the risk of phoenixing, ASIC should be able to prohibit the responsible persons of insolvent firms with unpaid determinations from being able to obtain another AFSL in the future.

A significant issue around phoenixing that has arisen in relation to the UK FSCS. As the UK Personal Investment Management and Financial Advice Association (**PIMFA**) has noted:

> Because a claim on the FSCS only arises at the point at which a firm in unable to meet its obligation either through [personal indemnity insurance] or their capital reserves, we are seeing increasing evidence in the advice market that significant market distortion is occurring. By way of example, we are aware of a number of examples where firms have sought to fold in order to relinquish any tail liabilities they have on high risk markets and investments such as [defined benefit] transfers. Firms are then phoenixing without tail liabilities whilst these liabilities fall on to the FSCS…
>
> We have also received substantial feedback from firms whereby individuals or firms are 'phoenixing' as Claims Management Companies [CMCs]. In this construct, firms will 'dissolve' and resurface as a CMC advising and coaching former clients through the claims process. Due to the fact that the firm on which claims are levied will have been dissolved, in most cases these claims will fall onto the FSCS.[11]

In order to prevent the risk of similar issues arising in Australia if and when a CSLR is implemented, the ABA suggests that ASIC should be given the power to prevent responsible persons of insolvent firms with unpaid determinations from holding an AFSL in the future.

[9] The Australian Government, *Review of compensation arrangements for consumers of financial services - Consultation on final report,* July 2012, p. 71
[10] See page 14 of Regulatory Guide RG 126 Compensation and insurance arrangements for AFS licensees (asic.gov.au)
[11] PIMFA, A rising tide lifts all boats? A roadmap towards better consumer outcomes and lower levies, 2020.

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Appendix B: Key design features of the scheme

The ABA is supportive of establishing a forward-looking CSLR that is industry-funded, operated by the AFCA, is initially limited to personal advice failures and is scalable, and has design features consistent with the recommendations of the Ramsay Review.

However, we harbour serious reservations concerning the design of the scheme as proposed. To ensure the success and viability of the CSLR, the ABA recommends that the Government revise its current proposal to adopt a scheme with the following design features.

1. Governance

Levy to recover accumulated unpaid determinations

Recommendation 6:

The Government should fund the unpaid determinations that have accumulated prior to the commencement of the scheme.

The CSLR is proposed to fund the payment of eligible CSLR claims for unpaid AFCA determinations and fees (accumulated between 1 November 2018 and a prescribed day in advance of the start of the CSLR) that relate to in-scope financial products and services. The Government has proposed that this compensation will be funded through a one-off 'accumulated unpaid determinations' levy to be collected from the ten largest financial firms as determined by the Australian Taxation Office (**ATO**).

The ABA is concerned that the Government has not provided an estimate of the size of this one-off levy, nor any data on the value and volume of unpaid determinations that underpin it. Further, we note that, given the commencement of the scheme is yet to be determined and the levy is uncapped, the cost is subject to the risk of a 'black swan' event occurring before the CSLR commences. This poses an unacceptable risk to the shareholders of Australia's largest financial firms.

Moreover, ABA questions the appropriateness of attributing this amount to firms that are prudentially regulated, given that such firms face a higher level of regulatory supervision and are very unlikely to become insolvent. We note that, in May 2019, the Federal Government announced its intention to provide $30 million available to consumers and small businesses that had unpaid determinations dating back to 2010 due to the financial firm going bankrupt. It is not clear whether the entirety of this funding has yet been exhausted.

The ABA suggests that such an announcement was appropriate at the time given Ramsay's view that any scheme should be prospective in nature. We recommend that the Government should extend the funding to cover all unpaid determinations ahead of the commencement of the CSLR.

Special levies must be subject to parliamentary approval

Recommendation 7:

The special levy cost-recovery mechanism must be subject to parliamentary approval, given the potential magnitude and effect of a black swan event on consumers and leviable firms.

The Government has proposed that, where the CSLR operator considers, during a claim year, that expected or actual subsector outlays will exceed the subsector cap, the operator will be required to notify the Minister as soon as practicable. The proposed legislative framework confers a special power upon the Minister to issue directions related to recouping special levies as required.

As outlined in section 1069D, subdivision C of the Treasury *Laws Amendment (Measures for Consultation) Bill 2021: Compensation Scheme of Last Resort*, the Ministerial directions may include:

- A decision to issue a special levy to leviable firms relating to the subsector subject to the notification. The Minister may alternatively decide to levy additional funds only from a class of these leviable firms, such as larger firms, within the relevant subsector to fund the shortfall.

- A decision to levy additional funds from other subsectors to fund the shortfall, including a subsector relating to financial products and services that are not prescribed as being in-scope of the CSLR. The leviable firms in these other subsectors would be required to provide financial products or services to retail clients and thus be AFCA members.
- A decision that compensation for CSLR claims, or a class of CSLR claims, against the relevant subsector should be paid over multiple claim years.
- A decision to reduce the value of compensation to be paid for particular claims.

It is our understanding that the special Ministerial powers have been proposed to account for 'black swan' events; that is, a scenario where a financial firm fails, and a large number of unpaid determinations need to paid out at once. The ABA is of the view that the risk of a black swan event, while already very low, would be negligible if the scheme was to be applied only to personal advice failures (given the structure of that sector is dominated by smaller operators). As such, it is our position that these new powers are not be warranted.

In the event that the scheme remains wider in scope, the ABA submits that this proposed governance framework is not fit for purpose. This is because it essentially empowers the Minister to decide to levy an unspecified amount on any firm or to reduce customer's compensation without consultation, an explanation of the decision or a right of redress. This is not appropriate for a scheme that has the explicit objective of supporting ongoing confidence in the financial system's dispute resolution framework.

The ABA submits that the special levy powers should be removed from the draft legislation, and that any additional funds above the $10 million annual subsector caps should be subject to parliamentary scrutiny when, and if, the occasion arises. We consider that this is an appropriate governance mechanism, given that black swan events are (by definition) rare events, and that the public is likely to expect a high level of government scrutiny in the sector following the failure of a large firm.

Rigour should be imposed on regulators to minimise scheme costs

Recommendation 8:

The CSLR should be required to produce an annual report disclosing its operating and financial activities over the past year.

The ABA is concerned about the projected costs of the scheme, as disclosed in the proposal paper. We respectfully ask for Government to impose rigour on ASIC and AFCA to ensure that these costs are efficient.

Establishment costs

The Government's proposal paper estimates that the scheme will cost a total of $16 million in the first year (excluding the one-off levy for accumulated unpaid determinations). This includes establishment costs of $6.3 million for the scheme operator and ASIC to, amongst other things, fit out office spaces, employ staff and develop operational arrangements.

The CSLR is proposed to be a subsidiary of AFCA, with AFCA assisting the scheme operator with administrative matters and services where it is efficient to do so. The ABA is supportive of this organisational structure. However, we question whether the $6 million figure is warranted given that the CSLR should be able to leverage the existing assets and expertise of AFCA.

The estimates provided are particularly large when compared with the costs that were presented to Ramsay as part of the consultation process to recommend the establishment of a CSLR. In November 2016, the Financial Ombudsmen Service, and the ABA commissioned Oliver Wyman to conduct a cost-benefit assessment of a CLSR for financial services consumers in Australia.[12] This analysis concluded that establishment costs for such a scheme would be limited to approximately $400,000.

[12] Oliver Wyman, *Last Resort Compensation Scheme – Design Proposal*, 6 February 2017

Given the disparity between these two figures, the ABA calls upon the Government to justify the 4,000 per cent increase in this cost estimate since the Ramsay report was finalised in 2018.

Ongoing costs

The proposal paper estimates the CLSR will cost $8.05 million per annum ongoing, with $3.7 million of this allotted towards administrative costs (i.e., approximately 45 per cent).[13] These proposed figures far exceed the cost estimates put forward by Oliver Wyman in 2017 of $850,000. At the time, Oliver Wyman noted that "the operating budget is much smaller and less volatile than the estimated annual compensation budget" and that a future increase in operating cost would be unlikely.[14]

The ABA considers that the proposed proportion of the levies expected to be set aside for administration is startling and calls into question the cost-benefit ratio of the scheme. We ask the Government to impose rigour on the regulators to curb the running costs of the scheme where possible, including by relying on existing infrastructure.

Prudentially regulated firms should only contribute to the extent they provide Tier 1 financial advice

Recommendation 9:

The CLSR should generally exclude prudentially regulated firms from its scope, except in relation to services where they provide Tier 1 financial advice.

The CSLR should ensure services and products that give rise to the greatest risk of unpaid determinations are included within the scope. To the best of our knowledge, no prudentially regulated firm has yet had an unpaid determination with AFCA or its predecessor scheme.

Such firms are already required to manage their prudential risks in accordance with standards set by the Australian Prudential Regulation Authority (**APRA**). This includes meeting stringent capital requirements and the implementation of risk management frameworks, including for operational risks related to non-prudentially regulated activities of the banking group.[15] In this regard, it is an extremely remote possibility that a customer of a prudentially regulated firm will require access to the CSLR.

If the CLSR includes prudentially regulated firms this may have a broader negative effect on investor confidence in the Australian prudential system. This risk is particularly acute if the design of the CSLR risks the potential transmission of losses from the CSLR to the prudentially regulated sector.

2. Levy framework

All leviable firms should be required to contribute funding

Recommendation 10:

The CLSR should not impose a minimum levy threshold of $1,000. Instead, there should be an annual fee that all leviable firms must pay, regardless of size.

The Government has proposed that only leviable firms whose levy in relation to each in-scope financial product or service is above a minimum levy threshold of $1,000 will be required to fund the scheme.[16] The intent of this proposal is to "limit the administrative costs of the CSLR and … prevent the imposition of small levy amounts on the smallest leviable firms within a subsector."[17]

[13] The Government estimates that annual administrative costs, including costs for the CSLR operator and the costs for ASIC to administer the CSLR levy, will amount to $3.7 million.
[14] Oliver Wyman, *Last Resort Compensation Scheme – Design Proposal*, 6 February 2017, p. 37.
[15] 1Australian Prudential Regulation Authority*, Prudential Standard CPS 220, Risk Management*.
[16] The levies that would have been paid by the leviable firms whose levy is below the $1,000 minimum levy threshold will be re-allocated to firms whose levies are above the threshold.
[17] The Australian Government, *Compensation Scheme of Last Resort: Proposal Paper, Financial Services Royal Commission Recommendation 7.1*, July 2021 p. 16

The ABA is opposed to this proposal on principle. All leviable firms should be required to contribute to the costs of the CSLR, in the same way that all members of AFCA are required to contribute to the costs of the external dispute resolution body. This is on the basis that doing so will:

- promote equity amongst the firms subject to the scheme
- ensure that any financial firm which engaged in misconduct is, to the maximum extent possible, required to make a contribution (albeit indirectly) to the compensation paid to the consumer or small business, and
- reduce the burden placed on any one firm.

We understand the Government's rationale is that it wishes to minimise the impost of the scheme on the smallest firms in the sector. However, our firm view is that, if a firm is not in the position to fund a levy of less than $1000 per annum, then it is not likely to be adequately capitalised (and hence poses a greater risk to its customers). Excluding such firms from the scheme on this basis will only perpetuate the problem of poorly resourced and/or inadequately insured businesses in the sector.

In addition, we note the concern that administrative costs may be higher if the levy is attributed to a wider variety of firms. To mitigate costs, the ABA suggests that the levy is initially added to the annual cost per advisor under the ASIC industry funding model. Once individual adviser registration commences under the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021*, the annual levy could then be transitioned as an add-on to the cost of registration (removing the need for a separate invoicing system).

3. Integrity measures

ASIC should be required to suspend or cancel the licence of a relevant firm

Recommendation 11:

To prevent further consumer losses and harm, ASIC should be required to suspend or cancel a financial firm's licence where the CLSR has compensated the firm's customer in relation to an unpaid AFCA determination, or where the firm has failed to pay the CSLR levy or any other outstanding AFCA fee.

The Government has proposed that, if the CSLR compensates a claimant in relation to an eligible unpaid AFCA determination, ASIC will be given the power to suspend or cancel the financial firm's Australian financial service licence (AFSL) and/or Australian credit licence. This is to ensure that licensees meet their obligations in relation to AFCA determinations and do not consider the CSLR as an opportunity to avoid meeting those obligations.

The ABA is supportive of this proposal. However, we consider that this integrity measure could be strengthened by requiring (rather than permitting) ASIC to use its powers in these cases and in cases where firms have not paid the fees required by the CSLR and AFCA. We appreciate that cancelling a licence is a significant penalty. However, in our view, the penalty matches the severity of the conduct failure. This is a vital step that the Government can take to prevent future cases of consumer harm arising from unpaid determinations.