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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Committee's inquiry into the *Financial Accountability Regime Bill 2021*, the *Financial Services Compensation Scheme of Last Resort Levy Bill 2021* and related bills.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team. At any one time we provide legal assistance to approximately 3500 to 4000 clients.

A major part of this work involves providing comprehensive advice and representation in cases involving often egregious and negligent behaviours on the part of financial service providers. We witness first-hand the ramifications and impacts of poor corporate behaviours by financial service providers, which can create significant financial hardship in our clients' lives.

Maurice Blackburn has been a regular contributor to public policy discussions related to the development and implementation of the Compensation Scheme of Last Resort (CSLR) since the conclusion of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission). We believe that the model presented in the Bill is, across the board, sound and robust, and a good reflection of the feedback received following Treasury's consultation processes over 2020 and 2021.

There are a number of areas where we believe the model and, therefore the Bill could be enhanced, and importantly, made more focused on the victims of poor corporate behaviours. We offer suggestions below for modest adjustments that would ensure fairness for consumers who, through circumstances not of their making, may end up reliant on a CSLR.

All of our feedback to the Committee relates to the contents of Chapter 2 of the overarching Explanatory Memorandum (EM) document[1] - the chapter dedicated to the financial services compensation scheme of last resort.

Paragraph 2.11 tells us that:

> *Where AFCA has made a determination under which a complainant is owed an amount from a financial firm and the financial firm has failed to pay the complainant, the complainant may apply to the operator of the CSLR for payment. If the eligibility criteria are met, the operator of the CSLR must compensate the complainant, up to $150,000.*

Maurice Blackburn submits that the stated cap risks grossly undercompensating many victims of poor corporate behaviour.

We believe that any cap should be expressed in terms directly related to the compensation cap available to consumers through AFCA.

It is worth noting that Commissioner Hayne, in his final report, suggested that the cap for the scheme should be "aligned to AFCA's".[2]

The Senate Legal and Constitutional Affairs References Committee, in the report from their inquiry into the resolution of disputes with financial service providers within the justice system, made the following recommendation:[3]

> *The committee recommends that the Australian Government:*
>
> - *increase the current compensation cap available to consumers through the Australian Financial Complaints Authority (AFCA) to $2 million, including for credit, insurance and financial advice disputes; and*
>
> - *remove the sub-limit on compensation available to consumers through AFCA for indirect financial loss and for non-financial loss.*

Maurice Blackburn agrees that the recommended compensation cap for AFCA decisions of $2 million per consumer is appropriate. We suggest that the CSLR cap should be expressed as a sliding scale, embedded in the regulations, using the AFCA cap as its comparison point.

Utilising a flat rate cap means that the most profoundly impacted victims of poor corporate behaviour will be impacted most by the cap – especially if that cap is set as low as $150,000 (13% of what they may have received if circumstances did not force them to rely on the CSLR).

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[1] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6805_ems_4928feaf-f9f0-4a07-947d-6f8c08acb830/upload_pdf/JC003897.pdf;fileType=application%2Fpdf: from p.59

[2] https://www.afr.com/companies/financial-services/tight-fisted-compo-scheme-undercuts-victims-20210816-p58j45

[3] Recommendation 7: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/banksandlegalsystem/Report/b01

Paragraph 2.19 tells us that:

> *The organisational requirement is that the CSLR operator must not charge a fee to any applicant seeking compensation, nor require the applicant to pay a fee or charge to any other entity if it is in relation to their application.*

Maurice Blackburn fully supports this provision. We believe that the policy intention that the scheme should be free for consumers is the correct one. We are pleased to see this embedded in the Bill.

Paragraph 2.22 tells us that:

> *The operator's constitution must also provide that, within six months after the Minister authorises the company as the operator, the board must include as a member:*
>
> - *the Chair of the board of AFCA; and*
> - *a person who is a fellow of the Institute of Actuaries of Australia and has at least five years' experience in actuarial analysis.*

We are concerned that the consumer/victim voice is lacking in the proposed governance structures.

The membership of the Board, as detailed in the EM, is skewed in favour of the industry. For a scheme whose sole purpose is compensating victims for wrongs committed against them, it is vital that the consumers' voice is at least equal, if not the most prominent, in the governance structure.

Paragraphs 2.30 to 2.37 set out the eligibility criteria for a compensation payment under the CSLR.

Clearly, an AFCA determination is the gateway to achieving compensation through the scheme.

Maurice Blackburn reminds the Committee that AFCA determinations only bind AFCA members. The pathway to compensation is unclear for a consumer who has been the victim of a financial service provider (FSP) who is not a member of AFCA – for example, a FSP which has been expelled from AFCA membership before the AFCA complaint is lodged.

We encourage the Committee to ensure the scheme's eligibility criteria contains sufficient flexibility to allow for such circumstances.

Maurice Blackburn further notes that by limiting eligibility to those consumers who have achieved an AFCA determination, it effectively excludes consumers who have achieved a court or tribunal outcome on their matter. AFCA rule C.1.2 (d)[4] states that AFCA must exclude:

> *A complaint that has already been dealt with by a court, dispute resolution tribunal established by legislation or a Predecessor Scheme, unless the Complainant has requested a stay on the execution of a default judgment on the basis of financial difficulty, difficulty assistance request, and the request has not previously been dealt with.*

[4] https://www.afca.org.au/media/1111/download: p.32

Hence, if the CSLR is limited only to consumers with AFCA determinations, a consumer who elected to pursue court proceedings rather than go through AFCA would be irredeemably prejudiced from accessing the CSLR.

This is an inherently unfair outcome, particularly for those who made the choice to bring court/tribunal proceedings prior the finalisation of the CSLR framework.

To remedy this, and provide a fair compromise, Maurice Blackburn submits that the CSLR should respond to court and tribunal decisions, up to the standard jurisdictional cap set for the CSLR applying to AFCA matters, where the consumer would have been eligible for AFCA coverage at the time the court or tribunal proceedings were commenced.

No prejudice can be alleged by the FSP's funding the CSLR as one can be confident that a court and tribunal decision would be no less robust and just than that of an AFCA determination.

By limiting the CSLR to only respond to unpaid AFCA determinations, consumers will be understandably less inclined to pursue litigation whilst their AFCA matter is processed for fear that their access to the CSLR will be denied or prejudiced.

This will inevitably cause some consumers to run out of time to pursue their matter through the courts for any amount exceeding the CSLR cap, or at all (for example, most time limitation statutes require a court action to be commenced within 6 years of the conduct which has led to the complaint)[5].

While the Proposals Paper developed by Treasury earlier this year[6] contemplated subsequent court action, noting *'a claimant retains their right to pursue compensation through other avenues for any compensation owed that is not met by the CSLR'*, that will not be a possible option for a consumer who has run out of time to sue whilst they were exercising their AFCA/CSLR rights in good faith. In that respect, most consumers engaged in an AFCA process are legally unrepresented and are therefore frequently oblivious to court time limits until it's too late.

Maurice Blackburn therefore submits that time limits under the various limitations statues should be paused while the consumer is engaged in the AFCA process.

The first dot point under **Paragraph 2.34** tells us that a relevant AFCA determination:

> *Relates to a complaint made by the consumer against a financial services entity which, at the time the complaint was made, was an AFCA member*

Maurice Blackburn submits that the scheme would be enhanced if the relevant AFCA determination related to a FSP which was an AFCA member *at the time of the conduct complained of*, not *at the time the complaint was made*.

This is because, often, consumers cannot know they have suffered any loss for months or even years after the FSP's misconduct, by which time the FSP may have been expelled from AFCA or otherwise ceased membership.

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[5] e.g. *Limitation Act 1969* (NSW) - Sect 14: http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/la1969133/

[6] https://treasury.gov.au/sites/default/files/2021-07/186669_compensationschemeoflastresort-proposalpaper.pdf: p.28

This can occur because, for example:

- In the case of inappropriate personal financial advice on an investment strategy, the firm has misled the consumer as to the performance of the investment, or the retainer otherwise continued based on the FSP's representations that the consumer ought to 'ride it out', thereby delaying the crystallisation of losses;[7] or

- In the case of life insurance churning by a financial adviser, the insured event (death or disablement) which results in a claim being declined due to the negligent sale of the policy, does not occur until after the FSP has ceased to operate.

We appreciate that this would require an amendment of the AFCA Rules (A.4.2[8]) and submit it is appropriate to do so given the aforementioned unfairness faced by consumers under the proposed arrangements.

Paragraph 2.35 lists the products or services to which an AFCA determination must relate in order to be eligible for compensation under the scheme.

Maurice Blackburn believes that the CSLR would be further enhanced by expanding the second dot point to include cover for general as well as personal advice.

The Bill, as it stands, describes a scheme which excludes advice variations that may fall outside the strict definition of personal advice (for example general advice, execution only or limited/scaled advice).

Given this, we advocate for the CSLR to apply a liberal, consumer-centric test of whether personal advice has been offered. We note that neither the Bill nor the EM currently articulates the test for how '*providing financial product advice that is personal advice'* is determined.

Maurice Blackburn submits that the CSLR rules should specify that the test for determining whether a personal advice retainer exists is whether the consumer reasonably believed that the adviser took their personal information into account in providing his/her advice - rather than testing the adviser's formal position around the scope of the retainer.

This is because, in assisting consumers who have suffered losses due to poor advice, we often see FSPs argue, wrongly, that they were not providing personal advice as defined under the *Corporations Act 2001*. To support their position, they have relied upon the dearth of proper personal advice documentation such as risk profiling documents like fact find questionnaires, or a compliant Statement of Advice.

The use of the abovementioned test was bought into focus in the case of *Evans v Branelly*.[9] The consumer's reasonable belief, rather than the adviser's intent that the advice was

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[7] See: *Bankier v HAP2 Pty Ltd* [2019] QSC 101; *Commonwealth of Australia v Cornwell* (2007) 229 CLR 519; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. A compelling exemplar of this was *Robert Gordon Shawyer & Anor V Professional Investment Services Pty Limited & Anor* (NSWDC unreported 16/10/2017) where Judge Robinson stated:

> *"But one has to also consider the period of time that they were acting in accordance with that advice as well as the assertions made by Mr Marshall, effectively urging them to stay with the strategy/ scheme and it would seem reasonable to assume, I would have thought, that the plaintiffs were open to accepting that position adopted by Mr Marshall in the hope and the expectation that things may improve over time."*

[8] https://www.afca.org.au/media/1111/download

[9] *Evans & Ors v Brannelly & Ors* [2008] QDC 269

provided, was the key determinant for deciding whether advice was provided. In that case. It was found that:

> *Where advisers provide general advice to retail clients, they have an obligation to warn the client that their advice does not take account of the client's relevant personal circumstances (their objectives, financial situation, or needs) and that the client should not act on the advice before considering their own personal circumstances (s 949A(2) CA). A failure to do so, in the absence of a legitimate offence, may attract a penalty of $10,000 and/or 2 years in prison.*

It is important that the adviser, who is responsible for clearly setting the parameters of the retainer does so, and ensures the nature of the advice is properly documented. The failure of FSPs to appropriately document the context in which the advice was offered should not be held against the consumer, including a consumer seeking recourse under the CSLR.

A related problem occurs where financial advisers classify clients as wholesale investors in order to circumvent personal advice legal requirements. We encourage the Committee to ensure that, under the CSLR, such consumers remain eligible where the classification was based on their net wealth/income rather than their properly assessed level of financial sophistication.

In that regard, our experience confirms that a consumer's wealth/income is not necessarily a good indicator of financial literacy. For example, a recipient of a large personal injuries settlement who is classified as a wholesale client by their adviser due to their net assets, should not be excluded from the CSLR where the advice was unlawful and they would otherwise be eligible.

Many of the findings of the Royal Commission spoke of the need to adopt a more consumer-centred approach to the provision of financial services, and that the best interests of consumers are to be prioritised over other considerations. The adoption of a test, based on the understanding of the consumer, is more in keeping with these findings.

We are pleased to see that 'credit activity' has been included in the Bill, as described in paragraphs 2.35 and 2.36. We believe that having lending disputes that fall under the *National Consumer Credit Protection Act 2009* as part of the scheme will be of great benefit to a large number of consumers who might otherwise miss out.

Paragraph 2.37 tells us that:

> *A relevant AFCA determination may relate to an unpaid determination made before or after the commencement of the CSLR. This means that compensation under the CSLR is available in relation to relevant AFCA determinations since the beginning of the AFCA scheme on 1 November 2018*

Maurice Blackburn believes that this is appropriate.

Paragraphs 2.60 to 2.63 detail the provisions related to the limited subrogation of rights commensurate with the payment made by the CSLR. Maurice Blackburn is pleased to see that this has been included, and we submit that the model outlined in this section is appropriate and welcome.

Thank you for the opportunity to provide input on these Bills.

Please do not hesitate to contact me and my colleagues on [redacted] or at [redacted] if we can further assist with the Committee's important work.

Yours faithfully,

[redacted]

Josh Mennen
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Maurice Blackburn