

10 October 2022

Senate Standing Committee on Economics
PO Box 6100
Parliament of Australia
Canberra ACT 2600

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

Dear Committee Secretary,

FSC Submission to Senate Economics Legislation Committee Inquiry into Financial Accountability Regime (FAR) Bill 2022, Financial Sector Reform Bill (FSRB) 2022, Financial Services Compensation Scheme of Last Resort Levy (CSLR) Bill 2022 and Financial Services Compensation Scheme of Last Resort Levy (Collection) (CSLR Levy Collection) Bill 2022 (collectively referred to as Bills)

The FSC welcomes the opportunity to make a submission to the Senate Economics Legislation Committee Inquiry into the abovementioned Bills.

We note the comments included in our submission to the Senate Economics Legislation Committee in December 2021 (**attached**) which, regarding FAR and CSLR Bill provisions, are largely in the same form as the Bills presently being considered by the Committee. Those Bills were referred to the Senate Economics Legislation Committee for further review and the committee recommended the Bills proceed. In relation to the CSLR the committee also expressed the view that:

“the scheme, broader than initially envisaged by both the Ramsay Review and Royal Commission, is based on prior extensive evidence, consultation, and recommendations of the Royal Commission, which concluded that a targeted and scalable scheme covering financial advice was the most appropriate response. The committee believes that the proposed compensation cap and levy will ensure the long-term sustainability of the scheme. Importantly, that it correctly balances the liabilities for industry, the provision of just compensation to claimants from scheme contributors and, restoring consumer confidence in the financial services sector as a whole.”¹

Whilst we make a number of further comments below in relation to the FAR and CSLR related Bills, overall we are broadly comfortable with the design of the last resort compensation scheme in the CSLR related Bills and the scope of the FAR and recommend that these Bills pass Parliament.

¹ Senate Economics Legislation Committee (February 2022) Financial Accountability Regime Bill 2021 [Provisions], Financial Sector Reform (Hayne Royal Commission Response No.3) Bill 2021 [Provisions], Financial Services Compensation Scheme of Last Resort Levy Bill 2021 [Provisions], and Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2021 [Provisions] Report, Paragraph 2.123 on Page 44.

1. Compensation Scheme of Last Resort

Support for Scheme Scope and Claims Caps

The Ramsay Review made three recommendations on the establishment of a CSLR, including that the CSLR should be “limited and carefully targeted at the areas of the financial sector with the greatest evidence of need”²; that the “CSLR be limited to financial advice failures but scalable in the future;” and the third Ramsey recommendation related to design features of the scheme.

The scope of the scheme extends beyond the Ramsay Review and Royal Commission recommendations to cover financial advice, also covering credit intermediation, securities dealing and credit provision. The FSC is supportive of the targeted scope of the scheme as well as the \$150,000 claims caps which is proportionate to the UK Financial Services Compensation Scheme which can pay up to 85,000 pounds for eligible claims.

Having a suitably targeted scheme with appropriate claims caps is essential to supporting a sustainable compensation scheme of last resort.

Establishing a genuine scheme of last resort

The FSC supports a CSLR that is genuinely last resort and sector-specific funding to the greatest extent possible. The scheme design envisages that the Minister can make a special levy determination calling on other sectors to fund an estimated scheme shortfall, the FSC strongly recommends the adoption of a *broad-based funding approach to cross-subsidisation so that all sectors* and activities that are *required to hold AFCA membership* are required to contribute to fund the shortfall. Further, the \$20million sub-sector levy cap, should also be applied to *any sector* that is not liable to pay the annual levy and called upon to cross-subsidise the scheme via a special levy. This would appropriately ensure that all relevant sectors are subject to the same cap, thereby also providing assurance to those sectors about the maximum amount expected to be levied and minimising the risk of significant unexpected costs being imposed.

To ensure the scheme is genuinely last resort and help ensure that the scheme operator’s subrogation rights operate effectively, the scheme operator should use reasonable endeavours (not just have the right) to pursue recovery under subrogation rights to reduce overall scheme costs. This should also apply to backdated claims prior to the Financial Sector Reform Bill 2022 being introduced to Parliament – any funds recovered under subrogation rights should be returned proportionately to the 10 banking and insurance groups funding the backlog of accumulated unpaid claims. There should be a legal requirement for financial services providers to provide a copy of their professional indemnity insurance policy to the scheme operator where the AFSL has unpaid determinations. If implemented, these suggested measures would operate to maximise the effectiveness of the subrogation rights and the scheme operator’s ability to recover compensation funds to the benefit of consumers and the scheme.

2. Financial Accountability Regime

With regard to the FAR and accompanying we make the following comments.

² Recommendation 1 (2017) Page 13, Supplementary Final Report to the Review of the financial system external dispute resolution and complaints framework ([available here](#)).

- **Significant related entities of RSE Licensees.** We recommend that the scope of FAR is limited to onshore entities with direct operational control of the RSE licensee. Without providing this clarification within the legislation, the Bill could raise significant uncertainty and/or unintended consequences for foreign entities connected to an RSE licensee.
- **Foreign executives.** We recommend that, unless they are holding a prescribed responsibility or position in relation to an Australian branch or other operations in Australia of an entity (or otherwise have some nexus and significance to the operations of the accountable entity) foreign executives not be covered. For example where a senior executive in an accountable entity in Australia can be considered an AP based on the prescribed roles and the nature and extent of their management and control responsibilities, there should not be any expectation to designate a more senior executive in an offshore group company just because the AP has a reporting line to that more senior executive.
- **Accountable persons.** FAR appears to have a potentially wide reach numerically in terms of persons capable of being characterised as accountable persons (APs) by way of ministerial discretion. We recommend that instead it should be set out in the legislation, as was the case with BEAR.
- **Deferred remuneration obligation.** The FSC recommends that APRA provide further clarity regarding the commencement of FAR on the one hand, and CPS 511 on the other, in respect of deferred remuneration.
- **Designated business unit.** FSC recommends that the legislation or guidance makes it clear which persons working in the independent office of the superannuation trustee or “designated business unit” of an RSE Licensee would be classified as APs and under what circumstances.
- **Regulator approach.** We would recommend that the single portal be tested with industry before it enters full operation and the FSC would also welcome early release of draft guidance so that timely discussion and feedback from members can be obtained.
- **Complexity and double jeopardy.** The FSC recommends that the FAR should be aligned as much as possible with other legislation, such that for example the breach reporting regime under FAR is not inconsistent with other breach reporting requirements and that further guidance is provided on how these obligations will interact and the extent to which the rules will clarify any longer or shorter periods.
- **Civil penalties.** The FSC recommends that an example of when a civil penalty would apply and how this would be administered by APRA and ASIC is included in the EM. Ideally however, we would prefer to see the relevant principles to the extent possible, expressed in the Bill.

Kind regards,

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