Compensation Scheme of Last Resort and insolvency practitioners

This fact sheet outlines what insolvency practitioners should be aware about the Compensation Scheme of Last Resort (CSLR) and its information gathering power. This is relevant where a financial firm which is licensed to provide financial services in Australia is impacted by insolvency and the firm is a member of the Australian Financial Complaints Authority (AFCA).

What is the CSLR?

The CSLR pays compensation to eligible claimants where they have an unpaid AFCA determination in their favour. Compensation payments of up to $150,000 can be made.

While it is neither a regulator nor a government agency, the CSLR was created and exists under an Act of the Australian Parliament. It was created following recommendations from the Ramsay Review and Financial Services Royal Commission. The CSLR commenced operation in April 2024.

Before the establishment of the CSLR, compensation options were limited and challenging for consumers if the financial firm was impacted by insolvency. Huge sums were simply written-off with no safety net to fall back on, and no other options to recoup the losses.

CSLR requests for information

As part of the claims assessment process, CSLR must confirm whether an eligible claimant has received, or will receive, a payment in relation to an AFCA determination. To do that, CSLR requires financial firms (or insolvency practitioners appointed to an insolvent financial firm) to provide the following information:

- Confirmation that a claimant is, or has been, a customer of the financial firm.

- Acknowledgement of the AFCA determination and subsequent contact from AFCA to take appropriate steps in regards to payment of the award listed in the determination.

- Confirmation that the financial firm either does or does not intend to make future payment(s) regarding the relevant AFCA determination (i.e. by way of dividends paid by insolvency practitioners).

- If future payments are intended to be made, information regarding any future payments (i.e., estimated amounts, including expected payment dates), and

- Evidence of prior payments made to the claimant regarding the AFCA determination including amount(s) and date(s) of payment.

CSLR understands there may be challenges for an insolvency practitioner to be precise (noting financial firm records may not always be clear). In those circumstances it is appropriate for insolvency practitioners to provide responses to the best of their knowledge.

Where an insolvency practitioner cannot provide the above information, it will be necessary for the insolvency practitioner to provide a detailed explanation as to why they are not able to comply with CSLR's request. The response should include:

- the limitations (technology, resources, personnel, information access) the insolvency practitioner has encountered when attempting to respond to the request and any supporting reasons; and

- the estimated time and cost required to comply with the request (including any licensing or subscription costs that may be involved) together with supporting documentation.

If the request relates to a former appointment and the insolvency practitioner is no longer in control or possession of a financial firm's relevant records, those details should be made clear to CSLR including relevant dates of appointment and cessation together with details of the appropriate contact person for further information.

If an insolvency practitioner is in control and possession of a financial firm's relevant records, it is unlikely that costs associated with individuals reviewing and extracting relevant information will be considered a sufficient reason to not comply with a request from CSLR.

Consequences of not complying with CSLR requests

Section 1069D(1) of the *Corporations Act 2001* (Cth) (Act) provides that if CSLR has "reason to believe that a person is capable of giving information or producing documents relevant to an application for compensation under this Part, the CSLR operator may, by written notice to the person" requiring them to give the information or produce the documents.

Failure to comply with the notice within the time required (minimum of 14 days) without reasonable excuse is a strict liability offence[1] punishable by a fine of up to 30 penalty units (currently $9,390 for an individual or $46,950 for a corporation by virtue of section 4B(3) of the *Crimes Act 1914* (Cth)).[2] If a person fails to comply with section 1069D(1) without a reasonable excuse, CSLR is required to notify ASIC of the person's failure to comply.[3]

Balancing CSLR requests and other obligations of insolvency practitioners

Section 545 Corporations Act

Section 545 of the Act has effect that a liquidator is not required to incur an expense unless there are sufficient assets available to meet that expense, unless directed by the court or ASIC to do so. The decision in *Australian Sawmilling Co Pty Ltd (in liq) v Environment Protection Authority* (2021) 64 VR 523 clarifies that section 545 is concerned with active decisions made by liquidators as to whether it is appropriate to 'incur' a liability in the light of the available funds. It is not concerned with liabilities arising independently of the liquidator, and by operation of law (i.e. clean up costs imposed under the *Environmental Protection Act 1970* (Vic)).

Section 486 Corporations Act

Section 486 of the Act allows the Court to order the inspection of a company's books by creditors and contributories. Creditors and contributories can examine these books if the Court deems it just, but no further or otherwise.

The decision in *Commissioner of Taxation v Warner* [2015] FCA 659 clarifies that the operation of section 486 of the Act restricts access to the books and records of a company in both court ordered and voluntary liquidations. It recognises the operation of section 486 is different to investigative powers of regulators or similar bodies, whose rights are broader than that of an ordinary creditor by operation of other statutory provisions.

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[1] 1069D(5)

[2] 1069D(4)

[3] 1069D(7)

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COMPENSATION SCHEME OF LAST RESORT