



1 December 2022

Email: financial.services@alrc.gov.au

The Hon. Justice S C Derrington
President
Australian Law Reform Commission
Financial Services Legislation
PO Box 12953, George Street Post Shop
Queensland 4003

Dear Justice Derrington

ALRC REPORT 139 – INTERIM REPORT B: FINANCIAL SERVICES LEGISLATION

The Stockbrokers and Investment Advisers Association (SIAA) (formerly the Stockbrokers and Financial Advisers Association) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

The history of the stockbroking profession in Australia can be found [here](#).

SIAA members represent the full range of advice providers from full-service and online brokers to execution-only participants and they provide wealth advice and portfolio management services.

Thank you for the opportunity to provide feedback on the Interim Report B (the Report).

Overview

SIAA supports the work of the ALRC in its reform of financial services legislation. SIAA provided a submission on Interim Report A in which we highlighted the impact that the current laws are having on our members.

We have been arguing for some time that the added layers of regulation imposed on the financial advice industry over some years, particularly in response to the recommendations of both the Parliamentary Joint Committee on Corporations and Financial Services inquiry into professional and education standards for financial advisers and the Hayne Royal Commission, have increased both the costs of doing business and the regulatory risk, and have made the provision of advice to retail clients more costly and less accessible. We agree with industry commentators that the pendulum of regulation has swung too far.

We also welcome the Quality of Advice Review which has highlighted the policy issues that have

made financial advice a ‘luxury good’ available to only 10% of Australians. We consider that the Commission’s work will be of great assistance to government if and when it decides to implement the Quality of Advice Review recommendations. We consider that both reviews complement each other.

We support the recommendations and proposals of the Commission.

Our detailed feedback is set out below.

Detailed comments

Technical Simplification

Chapter 7

Recommendations 14 to 16

SIAA supports recommendations 14 to 16. We agree with the ALRC that a ‘tidying up and de-cluttering’ of the Corporations Act is well overdue and will assist in navigability and comprehension of the law.

Simpler Law Design

Chapter 8

Recommendations 17 and 18

SIAA supports recommendations 17 and 18. In particular, we strongly support the recommendation to replace notional amendments with textural amendments to the notionally amended legislation. We agree with the Commission that notional amendments make the law deeply inaccessible and has the result that a person reading the Corporations Act cannot be confident that the provision they are examining has effect as it is written.

Enhancing Navigability

Recommendation 19

SIAA supports the recommendation that ASIC publish freely available electronic materials designed to help users navigate financial services legislation.

The proposed legislative model

Chapter 2

Proposals B1 to B11

SIAA supports proposals B1 to B11 outlining the proposed legislative model whereby the:

- primary legislation addresses key obligations and prohibitions and the consequences of non-compliance, serious offence and other key provisions
- Scoping Order contains the exclusions and class exemptions and other detail that is used to adjust the scope of the regulatory regime
- rule books accommodate much of the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors and circumstances that Chapter 7 of the Corporations Act presently regulates.

We make the following additional comments:

The establishment of an independent ‘Rules Advisory Committee’

SIAA strongly supports the establishment of an independent Rules Advisory Committee that would act as an enhanced consultation mechanism compared to the standard consultation regime. SIAA considers that the current method of consultation is not working well with abridged consultation times that have resulted in poor legislative outcomes.

We referred to an example of this in our submission on Interim Report A - the new reportable situations regime in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*. As previously noted, SIAA provided a submission to Treasury on the exposure draft of the bill on 28 February 2020 expressing concerns about the changes to the breach reporting regime around the ‘significance’ threshold. We pointed out that the proposals ‘deeming’ a contravention of a civil penalty provision a significant breach would result in a large increase in breach reports for minor, technical or inadvertent breaches that would not otherwise be significant. This is due to the fact that the Corporations Act is littered with civil penalty provisions. Regulations were later passed that ‘carved out’ certain civil penalty provisions from the breach reporting regime (thereby adding to regulatory complexity and opacity). Notwithstanding this carve out, the long list of civil penalty provisions in the Corporations Act, the breach of which triggers a reportable situation, is causing significant implementation challenges. Significant resources are being expended to comply with provisions that result in reports of matters that are of limited importance. A better legislative outcome would have been for the original legislation to have been more thoughtfully drafted to only include those breaches that the government considered were important enough to be reported.

It would be hoped that the establishment of a Rules Advisory Committee comprised of technical expertise would effectively assist with the drafting of important scoping provisions and would prevent the type of issues that are exemplified by the reportable situations regime.

It is important that the proposed Rules Advisory Committee represents the entire financial services industry and does not apply the ‘one-size-fits-all approach’ that has created undesirable and unintended consequences for the stockbroking and investment advice sector. We have previously pointed out in our discussions with the Commission’s review team and in our submission on Interim Report A that one of the most egregious examples of a ‘one-size-fits-all’ approach to financial advice impacting the stockbroking and investment advice industry was the approach by the Financial Adviser Standards and Ethics Authority (FASEA) to the education standards and Code of Ethics (which were administered by FASEA until 1 January 2022). FASEA’s lack of understanding about how stockbroking and investment advice differs from financial planning provided significant challenges to the stockbroking and investment advice profession and continues to do so while ever the Legislative Instruments developed by FASEA remain in place. It is an important example of the damage that can be done to an industry when those imposing standards upon it do not fully understand the way the industry works or take a narrow view that excludes sections of the industry.

We note the proposal is that the Rules Advisory Committee could comprise representatives of industry groups, consumer groups and legal experts such as practitioners and academics. While we understand the importance of legal experts and industry groups being represented on the Rules Advisory Committee due to their technical and subject matter knowledge and expertise, we have significant concerns about the inclusion of consumer groups on such a body.

Consumer groups have had significant influence over the policies which have shaped the financial

advice profession over the last two decades. While it may be appropriate for the consumer voice to be considered at the policy level (and consumer groups have had significant influence over the policies which have shaped the financial advice profession over the last two decades, one could argue to the detriment of both those providing and seeking financial advice), there is no benefit in including consumer groups on a body that is dealing with technical legal and drafting issues. We would recommend that consumer groups not be included on the Rules Advisory Committee for this reason.

Prototype legislation

We have reviewed the prototype legislation and note with concern that the exemption for issue or sale to a professional investor or sophisticated investor (contained in proposed section 116) omits the provisions dealing with high-net worth investors with net assets of at least \$2.5 million or gross income for each of the last two financial years of at least \$250,000. While we note that the prototype legislation is merely an example of how the proposed legislative model would operate, we query why this important category of wholesale investor is not included.

What goes where

Chapter 3

Proposals B12 and B14 and Question B13

SIAA supports Proposals B12 and B14 that consolidated guidance on the delegation of legislative power should be published and maintained by the Attorney-General's Department in consultation with the Office of Parliamentary Counsel, and that the Office of Parliamentary Counsel should establish and support a community of practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments and associated roles. These proposals seem to us to reflect a common-sense approach.

SIAA has reviewed the Draft guidance contained in Appendix E of Interim Report B. We consider that the draft guidance:

- adequately captures the principles that should guide to design of provisions that delegate legislative power
- adequately captures the extent to which it is appropriate for delegated legislation to specify the content of offences or civil penalty provisions otherwise created by an Act
- expresses the applicable principles with sufficient clarity.

It is a helpful and clearly written document.

Offences and penalties

Chapter 5

Proposal B15 and question B16

SIAA supports the proposal that offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

We consider that, at the moment, offence and penalty provisions are scattered throughout the legislation and are difficult to find. As mentioned above, the new reportable situations regime 'deems' a breach of civil penalty provisions to constitute a reportable situation. Consolidation of civil penalty provisions will greatly assist compliance with this new regulatory regime.

We consider that evidential provisions that may evidence contravention of or compliance with specified rules or provisions of primary legislation would be very helpful in assisting with the understanding of and compliance with financial services law. In SIAA's submission to the Quality of Advice Review Proposal Paper, we argued that the industry would benefit from the Quality of Advice Review providing additional examples that 'flesh out' how licensees and advisers would develop and assess advice that satisfies the proposed best interests duty alongside the proposed 'good advice' duty. We suggested that the legislation would also need to include examples that clarifies the parameters of these duties. If there was a rulebook on financial advice, it could contain 'evidential provisions' that clearly elucidates what is required to satisfy the proposed best interests duty and good advice duty.

Simpler Law Design

Chapter 7

Proposal B17 to 18

SIAA supports the proposal that each offence and civil penalty provision and the consequences of any breach be identifiable from the text of the provision itself. We also support the proposal that offence provisions in corporations and financial services legislation be amended to specify any applicable fault element. These proposals complement Proposals B15 and 16 and will improve the readability and navigability of the legislation.

Conclusion

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SIAA's policy manager, Michelle Huckel, at

[REDACTED].

Yours sincerely

[REDACTED]

Judith Fox
Chief Executive Officer