



25 February 2022

**SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION (ALRC) INTERIM
REPORT A ON THE REVIEW OF THE LEGISLATIVE FRAMEWORK FOR
CORPORATIONS AND FINANCIAL SERVICES LEGISLATION**

BACKGROUND

The Queensland Consumers' Association (the Association) is a non-profit organisation established over 40 years ago and which exists to advance the interests of Queensland consumers. The Association's members work in a voluntary capacity and specialise in particular policy areas.

The Association is a member of the Consumers' Federation of Australia, the peak body for Australian consumer groups, and works closely with many other consumer and community groups.

The Association has a particular interest in consumer financial issues and is a member of ASIC's Queensland Regional Liaison Committee.

The Association is particularly interested in reducing the significant consumer detriment caused by the current definitions of, and provisions relating to, "retail" and other types of clients/investors in the Corporations Act 2001 and the Corporations Regulations 2001 and provided the ALRC with views on this prior to the release of its Interim Report A.

The Association welcomes the opportunity to participate in this important consultation and the contact person is Ian Jarratt OAM, email [REDACTED]

The submission deals only with Chapter 12. Definitions of "Retail Client" and "Wholesale Client".

GENERAL COMMENTS

Given the significant consumer detriment occurring with the current definitions of “Retail Client” and “Wholesale Client” etc. in the legislation, plus the considerable time since previous reviews (and their failure to result in any significant changes to the legislation, for example the 2011 Treasury Options Paper) we **strongly welcome** the ARLC’s decision to include these issues in the Interim Report and hope that its work on them will result in beneficial legislative change.

We **very strongly agree** with the following statements in the Report:

The distinction between ‘retail clients’ and ‘wholesale clients’ is pivotal to the operation of Chapter 7 of the Corporations Act. (12.1)

The distinction between ‘retail clients’ and ‘wholesale clients’ is of critical importance from a policy perspective as it determines when particular protections are available (to ‘retail clients’) and when a less protective regime applies (to ‘wholesale clients’). (12.2)

The presumption that wholesale clients have the means to seek appropriate advice may be correct in theory but it does not necessarily lead to the obtaining of appropriate advice in practice. (12.3)

The introduction of these additional protections in part reflects a recognition of the inherent limits on the ability of individuals to understand and appropriately account for risk when making financial decisions. It also reflects the increased range and complexity of financial products that are now being offered to retail clients such as derivatives and exchange traded funds. Of further relevance are the higher potential returns (and consequential higher risk) on some complex products as compared with basic financial products such as bank deposits. (12.10)

As a result of these reforms, the classification of a client as retail or wholesale is of greater consequence now than it was at the time of the FSR Bill, from the perspective of both clients and financial service providers. (12.11)

When a critical definition, which enlivens key statutory protections, is so long and can only be fully understood by reading multiple sources, its useability is questionable. (12.30)

Previous reviews and preliminary feedback to the ALRC from stakeholders suggest that:

- *the asset and income thresholds for the purposes of the ‘investor wealth’ test (which have not been updated since 2001) are out of date in view of increasing asset values;*
- *there is hesitation on the part of AFS Licensees to apply the ‘sophisticated investor’ exception; and*
- *providers are often incentivised to characterise a client as a wholesale client in view of the compliance requirements associated with providing products or services to a retail client, the greater ease with which providers can sell complex products to wholesale clients, and the opportunity for providers to generate greater returns with complex products or investments. (12.33)*

Case law has also identified challenges with the interpretation and application of the definitions of ‘retail client’ and ‘wholesale client’. (12.34)

The statements highlight very well the magnitude and importance of the problems caused by the current definitions of “retail” and other types of clients/investors in financial legislation and the need for reforms designed to reduce the consumer detriment arising from these problems.

However, while we support the achieving more simplicity and consistency in this area, this should not be at the expense of achieving the better outcomes for consumer protection and the reductions in consumer detriment that are urgently needed and which should be the highest priority.

SPECIFIC COMMENTS

In relation to Question A16

Should the definition of ‘retail client’ in s 761G of the Corporations Act 2001 (Cth) be amended:

a. to remove:

i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and

ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or

b. in some other manner?

We do not have any comments on the removal of:

i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services;

Our comments on the removal of:

ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c);

are:

While we recognize the many problems with current provisions (including that the value, etc. levels have not been adjusted to reflect changes in incomes, wealth, etc.) if the concepts of “wholesale investor” and “professional investor” are retained we have major concerns about how these people will be identified and by whom in the absence of any product value, asset and income levels.

We oppose businesses being able to make these decisions without there being any legally enforceable criteria. Furthermore, we consider there is great merit in requiring that whenever a product is only available to non-retail clients that providers effectively advise such clients of their or the product’s classification AND that therefore the client does not have same protections as “retail clients”.

Also, if any any product value, asset and income values are retained for defining wholesale and professional investors there should be a mechanism for regular automatic changes in their levels to reflect changes in inflation, incomes, wealth, asset values, etc.

However, importantly we question the need to continue with the concepts of “wholesale investor” and “professional investor”. We suggest that the following alternative approach be considered:

- **Consider all consumers as “retail clients” unless they are businesses and then have separate definitions for types of business (e.g. one for a small business) if it is considered desirable for some business to have the protections available to “retail clients”.**

We also suggest that consideration be given to:

- **Replacing the definition of “retail client” with the definition of ‘consumer’ under the ASIC Act and the scope of coverage of the National Consumer Credit Protection Act (NCCPA) i.e. where ‘services are of a kind ordinarily acquired for personal, domestic or household use or consumption’.**

We consider that this would be very beneficial for consumers and greatly increase simplicity and consistency.

In relation to Question A17

What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the Corporations Act 2001 (Cth)?

Consistent with our response to Question 16 re “wholesale investor” and “professional investor”, we question the need to continue with the concept of “sophisticated investor”. We suggest that the following alternative approach be considered:

- **To consider all consumers as “retail clients” unless they are businesses and then have separate definitions for types of business (e.g. one for a small business) if it is considered desirable for some business to have the protections available to “retail clients”.**

Furthermore, if the concept of “sophisticated investor” is retained, in addition to meeting the current legislative requirements, an AFS licensee should be required to specifically advise the client that their classification means that they do not have same protections as “retail clients”.