

24 February 2022

By Email: financial.services@alrc.gov.au

The Advisers Association Ltd - Submission

ALRC Interim Report A

Thank you for the opportunity to provide a submission on behalf of The Advisers Association Ltd.

BACKGROUND

The Advisers Association Ltd (TAA) represents over 500 small businesses and over 850 advisers authorised by the Hillcross and AMP Financial Planning licensees.

TAA is a non-profit member-based organisation with a long history. TAA changed its name in 2020 when the AMP Financial Planners Association (established 1925) merged with The Hillcross Advisers Association (established 1987).

As a member-based association, we partner with our members, their licensees and other professional associations. TAA provides a range of benefits for our members.

TAA supports changes that improve consumer understanding and confidence and provides them with better financial outcomes. We advocate the benefits of financial planning and financial advice for consumers and encourage consumer awareness and education on the benefits of financial planning.

TAA has prepared this submission on behalf of our members in response to the Australian Law Reform Commission (ALRC) Interim Report A. TAA has participated in several workshops, with other associations, on this important topic. TAA's feedback is at a high level from a financial advisers' viewpoint and not legal professionals. Other professional associations will provide much more detailed responses.

TAA values the consultative approach being taken by the ALRC. We commend ALRC for extensive work completed to date to identify the issues and the complexity of the current legislation and instruments. We like the approach and direction being taken.

Comments

We note the recommendations in Interim Report A (the Report) relate to 'matters of consensus' and 'are in a form that may be implemented prior to the conclusion of this Inquiry'. While ALRC has not asked for feedback on the recommendations, TAA broadly supports them.

We also note ALRC's intent to consider any recommendations from Treasury's 'Quality of Advice' review and strongly encourage you to consider them carefully before implementing significant changes.

TAA is aware of the high level of recent legislation, regulation and other changes impacting advisers. We are concerned that there may be unintended consequences of implementing

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further changes to simplify and rationalise the Corporations Act and Corporations Regulations without adequate consultation with key stakeholders at each stage, including detailed stakeholder impact statements.

References to page numbers in this document refer to the page numbers in Report A: Summary Financial Services Legislation, ALRC Report 137, November 2021. References to the Report relate directly to Interim Report A.

Empirical Data Chapter 3

A1. What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand:

- a. legislative complexity and potential legislative simplification;***
- b. the regulation of corporations and financial services in Australia; and***
- c. the structure and operation of financial markets and services in Australia?***

With regard to A1a, we note that ALRC is consulting with consumer bodies. If ALRC has not already done so, we encourage you to consult with a broad cross-section of different types of consumers by age, with and without experience of financial product advice, through product providers and more holistic advice from professional financial advisers etc.

Our experience suggests that clients of financial advisers have different expectations and needs to consumers who have only experienced product solutions or have never received advice.

When to Define Chapter 4

A2. Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to define (Chapter 4):

- a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition should enhance readability and facilitate comprehension of the legislation.***
- b. To the extent practicable, words and phrases with an ordinary meaning should not be defined.***
- c. Words and phrases should be defined if the definition significantly reduces the need to repeat text.***
- d. Definitions should be used primarily to specify the meaning in words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.***

Yes, it would. TAA agrees that the consistent application of the principles related to 'when to define', 'Consistency of definitions' and the 'Design of Definitions' would reduce complexity in the corporations and financial services legislation.

Definitions of 'financial product' and 'financial services' Chapter 7

A3. Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms 'financial product' and financial service'.

TAA supports these proposed changes.

A4. In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to:

- a. **remove specific inclusions from the definition of ‘financial product’ by repealing s 764A of the Corporations Act 2001 (Cth) and omitting s 12 BAA(7) of the Australian Securities and Investments Commission Act 2001 (Cth);**
- b. **remove the ability for regulations to deem conduct to be a ‘financial service’ by omitting s 766A(1)9f) of the Corporations Act 2001 (Cth) and omitting s 12 BAB(1)(h) of the Australian Securities and Investments Commission Act 2001 (Cth);**
- c. **remove the ability for regulations to deem conduct to be a ‘financial service’ by omitting ss 766A(7) of the Corporations Act 2001 (Cth) and s 12 BAB(2) and (10) of the Australian Securities and Investments Commission Act 2001 (Cth);**
- d. **remove the incidental product exclusion by repealing s 763E of the Corporations Act 2001 (Cth);**
- e. **insert application provisions to determine the scope of Chapter 7 of the Corporations Act 2001 (Cth) and its constituent provisions, and**
- f. **consolidate, in delegated legislation, all exclusions, and exemptions from the definition of ‘financial product’ and from the definition of ‘financial service.’**

TAA supports all the proposed changes listed in A4a-f above.

TAA’s view is that there has been too much focus on financial product advice in the past, to the detriment of financial service. As ALRC has identified, consumer and client expectations and needs are evolving quickly. The role of a financial planner/ financial adviser has also raced from being a ‘distributor of products’ less than five years ago to a professional adviser with a ‘Best Interest’ obligations, Code of Ethics, etc.

A5. The Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to remove the definitions of:

- a. **‘makes a financial investment’ (s 763B Corporations Act 2001 (Cth) and s 12BAA(4) of the Australian Securities and Investments Commission Regulations 2001 (Cth));**
- b. **‘manages financial risk’ (s 763C Corporations Act 2001 (Cth) and s 12BAA(5) Australian Securities and Investments Commission Regulations 2001 (Cth)); and**
- c. **‘makes non-cash payments’ (s 763D Corporations Act 2001 (Cth) and s 12BAA(6) Australian Securities and Investments Commission Regulations 2001 (Cth)).**

TAA supports these proposed changes.

A6. In order to implement Proposal A3:

- a. **Reg 7.1.06 of the Corporations Regulations 2001 (Cth) and reg 2B of the Australian Securities and Investments Commission Regulations 2001 (Cth) should be repealed;**
- b. **A new paragraph ‘obtains credit’ should be inserted in s 763(1) of the Corporations Act 2001 (Cth) and in s 12BAA(1) of the Australian Securities and Investments Commission Regulations 2001 (Cth); and**
- c. **a definition of ‘credit’ that is consistent with the definition contained in the National Consumer Credit Protection Act (Cth) should be inserted in the Corporations Act 2001 (Cth) and in the Australian Securities and Investments Commission Regulations 2001 (Cth).**

TAA supports these proposed changes.

Disclosure Chapter 9

A7. Sections 1011B and 1013A(3) of the Corporations Act 2001(Cth) should be amended to replace ‘responsible person’ with ‘preparer’.

TAA supports this proposed change.

A8. The obligation to provide financial product disclosure in Part 7.9 of the Corporations Act 2001 (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.

In principle, TAA agrees with this proposal. ALRC comments in the Report at 9.124 that this change would require a significant investment of time and money. TAA agrees, so consultation at each stage, stakeholder impact statements, timing and change management will be essential.

One concern TAA has is how and when to assess client outcomes. This is especially so with long term products, where on-going advice may not be provided, e.g., the proper outcomes are delivered at inception, but if assessed later over the longer term, the outcomes may have changed, possibly due to changes in the client's circumstances and not related to the initial transaction.

Exclusions, Exemptions, and Notional Amendments Chapter 10

A9. The following existing powers in the Corporations Act 2001 (Cth) should be removed:

TAA broadly agrees with this proposal. We expect different views from other stakeholders about these proposed changes as regulation and legislative instruments have been used to make changes relatively quickly. Hindsight shows sometimes with significant downstream issues and unintended consequences.

A10. The Corporations Act 2001 (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

TAA agrees with this proposal. As above, we expect some other stakeholders to have different views on these proposed changes.

A11. In order to implement Proposals A9 and A10:

a. Should the Corporations Act 2001 (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?

Yes, on the basis that it will support a better principled legislative hierarchy and a shorter Corporations Act, making it easier to understand and navigate. TAA notes that this will be given more detailed consideration in Interim Report B.

b. Should any such power be granted to the Australian Securities and Investments Commission?

TAA does not have a strong view on this. Granting ASIC powers should be considered in the broader context of the changes proposed. ASIC has particular experience and powers that may be relevant to the proposed shift to thematically based rules and assist with any transition.

A12. As an interim measure, the Australian Securities and Investments Commission, the Department of Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the Corporations Act 2001 (Cth) made by delegated legislation.

TAA agrees with this proposal.

Definition of 'Financial Product Advice' Chapter 11

A13 The Corporations Act 2001 (Cth) should be amended to:

a. Remove the definition of 'financial product advice' in s 766B;

TAA has no objection in principle to this change. However, we would prefer to consider any changes after Treasury's 'Quality Advice Review' report has been delivered later in 2022. This would potentially avoid two sets of changes within a relatively short timeframe.

b. Substitute the current use of that term with the phrase ‘general advice and personal advice’ or ‘general advice or personal advice’ as applicable; and

TAA strongly believes the use of the term ‘general advice’ confuses consumers and raises false expectations and assumptions that they have received advice. TAA would prefer to consider any changes after Treasury’s ‘Quality Advice Review’ report has been delivered in late 2022 to avoid two sets of changes occurring within a relatively short timeframe.

TAA has made submissions to Treasury, ASIC and the Financial Services Council (FSC), calling for the separation of advice and product to better align with consumer expectations, reduce the risks of vertical integration and recognise the changing operating environment of professional advisers. In our experience, few advisers provide ‘general advice’ due to Code of Ethics obligations, etc. In many cases, consumers were provided with this advice by product providers.

The Financial Services Council (FSC), White Paper Recommendation 10 aligns with TAA’s view, i.e.,

"The Government should reform or remove the definition of ‘financial product advice’ in Section 766B in the Corporations Act and legislate definitions of ‘personal advice’ and ‘general information’."

TAA also had similar concerns with using terms ‘intrafund advice’ and ‘roboadvice’ and recommended they are also changed.

c. Incorporate relevant elements of the current definition of ‘financial product advice’ into the definitions of ‘general advice’ and ‘personal advice’.

Whilst these changes appear to be relatively minor, they are not aligned with the overall intent of making the legislation more accessible for consumers to navigate and understand their rights and obligations. TAA is concerned they will have unintended consequences if changes are rushed through without due process being followed.

A14 Section 766A(1) of the Corporations Act 2001 (Cth) should be amended by removing from the definition of ‘financial service’ the term ‘financial product advice’ and substituting ‘general advice’.

TAA does not agree with this proposal at this time for the same reasons outlined under A13.

A15 Section 766B of the Corporations Act 2001 (Cth) should be amended to replace the term ‘general advice’ with a term that corresponds intuitively with the substance of the definition.

TAA supports this change. However, we would prefer to consider any changes after Treasury’s ‘Quality Advice Review’ report has been delivered in late 2022. This would potentially avoid two sets of changes within a relatively short timeframe, adding unnecessary cost and potential confusion about the changes.

TAA’s view is that any ‘advice’ should consider the client or consumer’s personal circumstances and be provided by a licensed, professional adviser; anything else is general information, product information or marketing/ sales materials as noted in the Report.

TAA notes that ALRC sees some benefit in changing the name for general advice and little downside, but is still to consider the alternative name.

Definitions of ‘Retail Client’ and ‘Wholesale Client Chapter 12

A16. Should the definition of ‘retail client’ in S761G of the Corporations Act 2001 (Cth) be amended...

A16a to remove:

- i. Subsections (5), (6), and (6A), being provisions in relation to general insurance 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*

TAA does not agree with these changes at this time. TAA would prefer this to be considered after the 'Quality of Advice Review release.

Definitions of retail or wholesale clients based on the assumption of their ability to seek appropriate advice, or based on some monetary value, whether an asset, income or product valuation, are not good indicators of a consumer's level of understanding or their financial awareness or levels of sophistication. They have done little to protect consumers in the past.

We are concerned that raising or removing monetary limits in isolation in the short term would also have unexpected and unintended consequences.

A16b. in some other manner?

TAA prefers this approach but does not have a solution as to what this manner is at this time.

A17. What conditions or criteria should be considered in respect of the sophisticated investor exception in s761G of the Corporations Act 2001 (Cth)?

As mentioned above, definitions based on asset or income are not good indicators of sophistication; an accountant's certificate confirming a consumer meets those criteria is an ineffective control.

TAA has not had enough time to explore and consider alternative criteria. At a high level, we believe a combination of subjective and objective assessments of the consumer's level of sophistication that demonstrate they are 'better informed and better able to assess the risks involved in financial transactions are better metrics. This could be achieved using technology, independent assessments, their levels of risk tolerance, previous experience and behaviours, which are probably the best indicators, along with the professional judgement of a professional adviser. None of these in isolation is perfect but would provide better outcomes than tinkering with the current levels alone.

Conduct Obligations Chapter 13

A18. Should Chapter 7 of the Corporations Act 2001 (Cth) be amended to insert certain norms as an objects clause?

TAA agrees in principle that norms be added as an objects clause. Depending upon the norms included, there may be some cross over and duplication with the Code of Ethics that apply to financial advisers.

A19. What norms should be included in such as objects clause?

TAA broadly has no objection to the norms identified by the Financial Services Commission being included.

We recognise and acknowledge the concerns raised in the Report about the consultation process, particularly related to the term 'fairly', which is addressed in other ALRC questions and recommendations.

A20 Section 912A(1)(a) of the Corporations Act 2001 (Cth) should be amended by:

- a. Separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs;***

TAA has no objection to this proposal.

- b. Replacing the word 'efficiently' with 'professionally'; and***

TAA has no objection to adding 'professionally'.

TAA disagrees with the proposal to replace and remove the word 'efficiently'. TAA is of the firm view that previous licensees' lack of focus on 'efficiently' has led to sub-optimal outcomes, and in some cases, poor processes and procedures that have resulted in significant manual workarounds, additional costs to product providers, advisers, suppliers and ultimately the costs to the end consumer and clients.

c. Inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

TAA supports this proposal.

A21 Section 912A(1) of the Corporations Act 2001 (Cth) should be amended by removing the following prescriptive requirements...

TAA supports these proposals, subject to the established meaning of 'efficiently'.

Conduct Obligations Chapter 13

A22 In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s991A of the Corporations Act 2001 (Cth) and s 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed.

TAA agrees with this proposal.

A23 In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be consolidated into a single provision.

TAA agrees with this proposal to consolidate at least six separate legislative provisions, assisting with consistency and interpretation.

A24 Would the Corporations Act 2001 (Cth) be simplified by:

a. Amending s 961B(2) to re-cast paragraphs (a)-(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligations in sub-s (1) has been satisfied: and

TAA supports these changes after the 'Quality of Advice' review is issued as a step towards a more principled and straightforward legislative regime.

b. Repealing ss 961C and 961D?

TAA supports the repealing of 961C and 961D and then relies upon the Best Interests obligations and, eventually, the professional judgement of financial advisers.

Thank you for the opportunity to provide a submission to this Interim Report A. We are happy for the submission to be made public.

If you have any questions, please do not hesitate to contact us.

We look forward to consulting further on these important changes.



Yours sincerely

For The Advisers Association Ltd



Neil Macdonald

Chief Executive Officer