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REPORT A: SUMMARY FINANCIAL SERVICES LEGISLATION

The FBAA as the leading professional association in Australia for finance and mortgage brokers submits the following on behalf of our national membership.

At the outset we note this consultation covers a large amount of information and deals with some extremely complex issues. In our role as a representative body we seek to raise issues that are drawn from observations of the challenges facing participants in the credit industry and conveyed to us through our member base.

We support and agree with the observations of the ALRC that the financial services legislation is unnecessarily complex and also agree with the reasons advanced for why this has come about. Much of it is through a piecemeal approach and the compounding effect of poor drafting being used in an attempt to repair or improve upon previous poor drafting.

One of the most fundamental considerations of this consultation is the parallel but overlapping regimes of consumer credit and financial services. Over many years the FBAA has raised concerns through consultation papers about inconsistency of definitions, interpretation and application of legislative provisions. We have observed a rising use of drafting whereby certain obligations are not stated in the primary legislation relevant to our industry but introduced by reference to other legislation. We have always maintained that such drafting makes it much more difficult for licensees and participants in particular industries to understand their obligations which in turn increases the risk of inadvertent non-compliance.

In this abridged submission we address only select questions from the consultation paper, noting there will be further rounds of consultation to come.

A2 - When to Define

We support the definitional principles identified under question A2. In particular, each word or phrase used in financial services legislation should have only one meaning and that should be consistent across all legislation. One that causes most difficulty at present is the inclusion of credit in the definition of financial product adopted by the ASIC Act where the

Corporations Act expressly excludes credit. This has resulted in significant inconsistency in the treatment of licensees when assessing their conduct under the *National Consumer Credit Protection Act* and the ASIC Act.

Under the issue of design of definitions, we support a recommendation that the primary legislation that applies to the activities of a particular group (for example NCCP Act applying to credit providers and credit service providers) should contain all of the obligations and important definitions that apply. Drafting such as "this obligation applies in the same way as it applies to financial services entities under section xx of the Corporations Act" should be avoided.

A3-A4 Definitions of financial product and financial service

The FBAA wishes to be part of ongoing consultation on the work around redefining financial product and financial service. In particular, we are concerned with how credit is treated.

We have seen first-hand how the inclusion of credit in the definition of financial product under the ASIC Act has created inconsistency with decision makers and at EDR. In recent years AFCA has been drawing on the ASIC Act to increase the scope of its determinations against financial firms involved in the provision of unregulated (non-consumer) credit. As commercial credit is not covered by the NCCP Act, there are no prescriptive obligations of record keeping, assessing capacity or providing specific disclosure. AFCA, using the expanded definition of financial product in the ASIC Act began making determinations against commercial credit entities under s12ED of the ASIC Act, asserting a failure to maintain certain records or make certain disclosure to commercial customers amounted to a breach of the implied warranties in s12ED of the ASIC Act.

Arguably the time to consider whether financial services and credit should be regulated conjointly passed with the introduction of the NCCP regime in 2009. We are not fully across the submissions made by parties at the time the credit regime was being mooted however the submissions were clearly strong enough to prevent 'credit' being added as a financial product under Ch7 of the Corporations Act which would have retained a singular licensing and regulatory regime for all financial services and credit businesses and would have been the most efficient approach to initiate the credit regime.

The definition of credit has itself become more complex than it perhaps was under the first publication of the NCCP Act.

A6 – definition of credit

In response to the proposed definition of credit in s9 of the prototype legislation, the definition is not consistent with the existing definition in the NCCP Act and Code as the definition in s3 of the Code is reliant on s5 of the Code to establish the extent of its application. Using only s3 of the Code, the definition would fundamentally change the regulation of credit in Australia. The definition needs to maintain the distinction between consumer and commercial credit. It also no longer requires that a charge be made for providing credit which is the provision that entities rely on to remain exempt from the credit regime (e.g. buy now, pay later).

Licensing

We submit another area to consider in relation to licensing is the use of the responsible manager (RM). Part of the complexity of licensing (aside from the very large list of potential activities under the AFSL application) is that the requirements are distributed across legislation and Regulatory Guidance. Presently the RM is critical to the success of any licence application yet they are not identified in the legislation, only in Regulatory Guidance.

At the commencement of the consumer credit regime, the licensing structure was extremely simple and only contained two authorisations. An applicant could only seek one or both of *credit provider* and *credit assistance provider* (other than credit provider) authorisations. This was a refreshing change to the AFSL regime. In recent years we see credit licence applications becoming more complex and the range of activities and authorisations is beginning to grow. We support moves to keep the licensing regime simple. This would be unlikely if credit were to merge with AFSL as it is more likely that the complexity of credit applications would increase to be brought closer to an AFSL application than it would be for AFSL applications to become as simple as credit licence applications.

Conduct Obligations

We will monitor discussions regarding the removal of prescriptive provisions from the legislation. Presumably if they are removed from s912A of the Corporations Act they would also be removed from the relevant/equivalent NCCP Act provisions.

The prescriptive provisions serve to give certainty to entities regarding their obligations. It is likely that removing all prescriptive provisions and leaving only the broader concept of engaging in activities “professionally, honestly and fairly” would make it more difficult for entities to understand their specific obligations and leave them more vulnerable to actions against them for falling short of obligations or standards of conduct that are not clearly

defined. Licensees benefit from having a defined set of obligations around which they can structure their business and compliance frameworks.

We thank you for the opportunity to make a submission.

Yours faithfully

[redacted]

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