25 February 2022

Financial Services Legislation
Australian Law Reform Commission
PO Box 12953
George Street Post Shop, QLD 4003

Email: financial.services@alrc.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – FINANCIAL SERVICES LEGISLATION: INTERIM REPORT A (ALRC REPORT 137)

The SMSF Association welcomes the opportunity to provide this submission in response to the Australian Law Reform Commission's ("ALRC") *Financial Services Legislation: Interim Report A.* We thank the ALRC for their detailed and considered first interim report and extensive consultation process.

We greatly appreciate this inquiry and the comprehensive and considered work the ALRC is doing to achieve more meaningful compliance with the substance and intent of the law.

We support the ALRC's recommendations and broadly support the proposals put forward. Additional feedback in response to some of the proposals and questions are set out below.

A1 Empirical Data

We acknowledge the detailed analytical work the ALRC has undertaken in mapping, documenting, and understanding the financial services legislative ecosystem. Definitions contained in the *Corporations Act 2001* have a wider reach and application than just the provision of financial services. We see the crossover of definitions into other legislation and associated regulations. Examples include the *Superannuation Industry (Supervision) Act 1993, Income Tax Assessment Act 1936 and 1997*, and the *Tax Agent Services Act 2009.* These all contain defined terms that directly cross reference to the *Corporations Act 2001*.

Care is therefore required to ensure that the broader impacts of any amendments, removal or relocations are clearly mapped, assessed, and addressed.

Consumer and industry surveys and focus groups on how the legal framework affects their understanding of and dealings with financial markets plus the impact on the costs involved would be beneficial.

A2 When to Define

We support the proposed definitional principles which address when to define, consistency of definitions and design of definitions.

We have seen an increasing number of 'unnatural' terms appearing in the legislation. They are not engageable, relatable and do not align with the intended meaning or use. Terms need to be simple and clear.

Recent examples are seen in the Better Advice Bill where we saw the introduction of the term 'qualified relevant tax provider'. For a consumer, this term has no relevance or direct meaning. This was the term chosen to replace the tax (financial) adviser definition when tax registrations for financial advisers moved from the Tax Practitioners Board remit under the *Tax Agent Services Act 2009* to ASIC under the *Corporations Act 2001.*

Any new terms must be simple and not protracted or complex in nature.

It is essential that terms and definitions are properly considered as part of the core design and regulatory impacts assessment.

A8 Disclosure

We fully support the shift to an outcomes-based standard of disclosure regime. The use of an appropriate level of language is essential to ensure that the messages are clear, and consumers can engage with and understand the information presented.

A9 - A12 Exclusions, Exemptions, and Notional Amendments

In principle, we support proposals A9 to A12. However, care is needed to ensure that the right balance is struck.

Government and regulators need to retain the ability to respond quickly to amend or provide additional guidance when needed. However, the use of modification powers must be accompanied with a 'regulation impact statement' (RIS) or something similar, to avoid the addition of unnecessary clutter and legislative complexity.

A RIS and Small Business Impact Statements are critical elements in developing and assessing the impact of proposed legislation and regulation. These impact statements need to be properly considered and assessed and not simply treated as a box-ticking exercise. They are a vital component in delivering best practice outcomes for the industry.

All too often, the RIS process is undertaken as an afterthought, or in some cases, not at all. For example, in the case of the Hayne Royal Commission report, there was a lack of adequate analysis of how the implementation of the recommendations might affect small practices, individuals or other relevant stakeholders. We believe that it would have been preferable for adequate RIS to be undertaken on the Royal Commission recommendations rather than the adoption of a blanket justification that it wasn't necessary.

The RIS process should be applied more broadly to the drafting of regulations, legislative instruments, and regulator guidance. This will ensure that the underlying policy objectives and outcomes are being achieved in an effective and efficient manner. This should be considered within the context of the whole of the ecosystem and not just within a particular source of law. It is vital that we don't see a resumption of current practices, resulting in the addition of unnecessary complexity and that the clarity of purpose is preserved.

A13 – A15 Definition of 'Financial Product Advice'

We agree that the use of the term 'financial product advice' is not appropriate and is not representative of many of the advice services that are provided by licensed advisers. In our sector we have a number of licensed advisers who provide strategic advice. Some of those are full service financial advisers who may provide both strategic and financial product advice. Others may hold a limited licence that expressly prohibits specific product advice, limiting advice to class of product advice only.

Significant confusion arises around the use of the term 'general advice'. Consumers will often interpret general advice as advice that does have regard to their personal circumstances. Adding to that confusion is the nuanced differences between the provision of factual information and general advice.

To provide clarity, the term 'general advice' should be removed.

Advice should be advice, whether it is simple, scaled, or comprehensive advice. This should be clear and distinct from the provision of 'factual information'.

Providing clarity around these terms and moving away from solely product-based definitions and frameworks is more representative of the diversity of service providers across the sector. It also provides an opportunity to reshape and simplify the definitions and provisions, with a best interest duty and client first, outcomes driven approach.

This then paves the way for a broader policy review on how advice can be given or delivered to clients. We note that this sits outside the scope of the ALRC review and look forward to continuing this discussion with the proposed Quality of Financial Advice Review.

A16 - A17 Definition of 'Retail Client' and 'Wholesale Client'

The framework for the wholesale investor tests needs urgent review and reform. There are segments of the market that apply the overall provisions appropriately and as intended. However, we also have concerns that the current complexity and increasing compliance obligations have triggered an increased use of the wholesale investor regime.

The current framework is complex and requires the review of several sections of the *Corporations Act 2001* and multiple regulations. As noted in the Interim Report, how the rules apply in the context of a self-managed superannuation fund are unclear. Appropriate guidance is severely lacking. Indeed, there are differing legal opinions on the operation of these rules where an SMSF is involved.

The use of accountants' certificates does not align with the core principles that apply to the provision of financial advice. An unlicensed accountant is unable to provide financial advice and is unable to provide any advice in relation to the proposed investment. However, an adviser can rely upon a certificate from an unlicensed account to classify a client as a wholesale investor, thus removing significant consumer protections.

Accountants are being placed in an untenable position. They must comply with the law and at the same time meet their professional and ethical obligations under APES 110.

We have observed a significant increase in enquiries from members regarding the use of accountants' certificates. It would appear the use of these certificates is the preferred option of many licensees due to the perceived shifting of risk away from the licensee and adviser.

The use of the term 'sophisticated investor' is often misunderstood and viewed as being in addition to the wholesale investor regime rather than being a component of it.

We concur that the current policy settings are not appropriate. These provisions need to be revisited as part of a broader policy review. Full and open consultation with industry is essential to ensure that the right policy settings are struck.

We note that item 3.2 of the draft terms of reference for the Quality of Financial Advice Review proposes to review *'the processes through which investors are designated as sophisticated investors and wholesale clients, and whether the consent arrangements are working effectively.'* We look forward to participating in the consultation process.

A18 – A21 Conduct Obligations

We support the inclusion of an objects clause in Chapter 7 of the *Corporations Act 2001*. The adoption of a principled style approach would be appropriate. However, the language that is used and how the objects clause is intended to be applied must be carefully considered.

Significant issues arose for the sector with the *Financial Planners and Advisers Code of Ethics 2019.* The use of strict, prescriptive language meant that aspects of the code had an appearance of black letter law application.

Correct framing and language will be vital in achieving the underlying intent. The objects or norms should be easily understood, practical to apply in practice, and provide necessary consumer protection.

The underlying intent of the code of ethics should be considered in conjunction with professional associations' codes of conduct.

Moving away from a prescriptive framework to a principles-based approach is appropriate. The proposal under A21 is reasonable when considered in the context of proposals A18 to A20. The separation of *Corporations Act 2001* section 912A(a) into three parts and replacing the word 'efficiently' with 'professionally' creates the right environment.

A24 Conduct Obligations - Best Interests Duty

Currently there is an unresolved conflict between the application of the ethical and legislative best interest duties. The two measures are not complementary. The friction created has been a significant concern for licensees and advisers and has been challenging to navigate.

The harmonisation of these measures would be welcomed. Recasting paragraphs (a) – (f) of section 961B(2) as indicative behaviours of compliance is appropriate. This would allow advisers and licensees to use their ethical and professional judgement in the context of the engagement and client's circumstances.

However, any recasting of these provisions should ensure that any red tape reduction does not result in any significant dilution of consumer protections.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than $800 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.