

**FINANCIAL SERVICES LEGISLATION**  
**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION**

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February 2022

## INTRODUCTION

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1. ANZ thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to comment on Interim Report A (**Report**) of the ALRC's inquiry into financial services legislation (**Inquiry**).
2. We welcome the Inquiry and its overarching objective of improving the financial services law. This law should be clear, consistent, easy to navigate, and appropriately designed to achieve its policy intent and enable compliance.
3. Simplification of the legislation is an appropriate approach to achieving these objectives. Businesses must, however, be able to be certain of their obligations. As referred to in the Report, a principles-based approach to legislation may be simpler, more flexible and help avoid 'tick a box' compliance, but may sacrifice precision and certainty.<sup>1</sup> The law must strike an appropriate balance to be most workable for its users.
4. To assist the ALRC to develop its recommendations, we have set out below some observations on selected proposals and questions from the Report.

## DETAILED POINTS

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### Definitions of 'financial product' and 'financial service' (Proposals A3 to A6)

5. Proposal A3 is to create uniform definitions of 'financial product' and 'financial service'. Proposals A4 to A6 are proposals to simplify these and other interrelated definitions, predominantly by removing them or some of their detail.
6. We support the development of uniform definitions. These will improve consistency and remove unnecessary complexity. Uniform definitions should, in our view, also be adopted for other terms not mentioned in the proposals, including 'small business' (referred to in Appendix C5 of the Report).
7. We generally support the measures contained in Proposals A4 and A6. We note, however, that the specific inclusions of section 12BAA(7) of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) include 'credit facilities'. We had understood that Parliament used the ASIC Act definition of financial product for the purposes of Part 7.8A of the *Corporations Act 2001* (**Corporations Act**) because of this specific inclusion. We also note that, by removing the inclusions, it will be important to

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<sup>1</sup> See Interim Report A, pp 57, 69-82.

consider how the consumer protections continue to apply to credit facilities, if this is the policy intent.

8. With respect to Proposal A5, the removal of the Corporations Act definitions in sections 763B ('makes a financial investment'), 763C ('manages financial risk') and 763D ('makes non-cash payments') may require further consideration.<sup>2</sup> The removal of these definitions would, in effect, leave these terms with their natural meanings for the purposes of the definition of 'financial product' in s 763A.<sup>3</sup> These meanings may not always be intuitive or clear. Users of the legislation would need to resolve any ambiguities through case law, or by referring to the repealed definitions.
9. The change may also have the effect, perhaps unintentionally, of broadening the definition of 'financial product'. This would be changing the law, rather than simply removing drafting clutter.
10. We note the suggestion made in the Report that the subject matter of Chapter 7 of the Corporations Act and the *National Consumer Credit Protection Act 2009* (**NCCPA**) could be consolidated into what is currently the ASIC Act (and that Act renamed).<sup>4</sup> This could be intuitively appealing, particularly if it involves rationalisation of the licensing, disclosure and suitability regimes. Such a change would, however, involve significant transition cost and the policy benefits and mechanisms would need to be carefully considered.

### Financial products disclosure (Proposal A8)

11. Proposal A8 is to reframe the obligation to provide financial product disclosure in Part 7.9 of the Corporations Act as an outcomes-based standard.
12. As discussed in the Report, outcomes-based regulation is supported by the logic that businesses are often better placed than regulators to determine the processes and actions required to achieve regulatory outcomes.<sup>5</sup> An outcomes-based standard for financial products disclosure could, in theory, provide more flexibility and facilitate innovation. This could benefit consumers and industry.
13. Over time, however, disclosures could become homogenised as industry attempts to create consistency and certainty. We note that the approach would involve considerable

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<sup>2</sup> And equivalents at *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) ss 12BAA(4), 12BAA(5), 12BAA(6).

<sup>3</sup> Or s 12BAA ASIC Act.

<sup>4</sup> Above n 1 p 292.

<sup>5</sup> Ibid p 78.

transition costs associated with reviewing and updating existing product disclosure statements.

14. There may also be the risk that the standard set for the outcomes demands more disclosure content and complexity than the current prescriptive approach. This is because the question of whether disclosure achieves the appropriate outcome would be a factual one that involves more variables than the essentially legal question of whether disclosure contains the prescribed content. These variables could include the degree of financial literacy of the audience, the complexity of the financial product being offered and changing understandings of how people interpret and respond to information.

### Financial products disclosure (Proposals A9, A10 and A12 and Question A11)

15. These proposals and this question relate to ASIC's powers to grant exemptions from obligations in Chapter 7 of the Corporations Act or to omit, modify or vary (or 'notionally amend') Chapter 7 by regulation or other legislative instrument.
16. We acknowledge that the power of a regulator to notionally amend legislation is not common internationally, and gives discretion to the regulator to alter the regulatory regime.<sup>6</sup> However, we think it is important that there be a mechanism for the legislation to be amended promptly should the need arise. Such a mechanism should be retained in some form.

### Advice definitions (Proposals A13 to A15)

17. Proposals A13 to A15 relate to financial advice definitions. These include the removal of the definition of 'financial product advice' and incorporating its contents into definitions of 'personal advice' and 'general advice', and replacing the term 'general advice' with one that intuitively corresponds with its definition. These proposals merit further consideration. We note that Treasury's Quality of Advice Review is currently being initiated. This process may be the forum for these matters to be considered.

### Definitions of 'retail client' and 'wholesale client' (Questions A16 and A17)

18. Question A16 relates to changing the definition of 'retail client' to remove specificity as to certain products that are and are not included within it, and to remove its product value and asset and income exceptions. Question A17 seeks input on conditions or criteria for the sophisticated investor exception.

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<sup>6</sup> Above n 1 p 137.

19. We would be concerned about the removal of the product value exception. The current exception is clear and relatively simple for businesses to administer. Removing it may mean we have difficulty providing certain products to customers that we cannot clearly classify as wholesale clients. We agree, however, that dollar thresholds for the exception should be reviewed and updated periodically.
20. We also note that adding an objective test to the sophisticated investor concept may be beneficial. The subjectivity of the current concept makes it difficult to rely upon.
21. The term 'small business' is specifically defined at s 761G(12) of the Corporations Act for the purposes of defining retail client and wholesale client. As mentioned above in paragraph 6, we support the use of a consistent definition of 'small business' across financial services legislation.

### 'Efficiently, honestly and fairly' (Proposals A20 and A21)

22. Proposal A20 is to separate the words of the 'efficiently, honestly and fairly' standard into individual paragraphs, to replace 'efficiently' with 'professionally', and to provide examples of conduct that fail to meet the standard of 'fairly'.
23. We agree with the separation of the terms. This will help clarify that they are not to be read compendiously and will help resolve the judicial tension on this point.<sup>7</sup>
24. We agree with the replacement of 'efficiently', but think the term 'competently' would be a more appropriate substitute than 'professionally'. While professionalism implies competence, it also suggests belonging to a profession, with a body of training, a barrier to entry and a system of ethics, together with a form of self-regulation. Many holders of Australian financial service licences (and their representatives) would not formally be 'professionals' in this way. We think 'competent' more accurately reflects the intent of the provision.
25. The inclusion of examples relating to the term 'fairly' could be useful, particularly they provide guidance on the meaning of the term. We acknowledge the need, referred to in the Report, to strike a balance between providing clarity and over-prescriptiveness in defining fairness.<sup>8</sup> Still, there remain some key issues. For example, it is unclear whether the term is intended to mean distributional fairness, procedural fairness, or both (or

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<sup>7</sup> Contrast Young J's views in *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 with Allsop CJ and O'Bryan J's in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170.

<sup>8</sup> Above n 1 p 520.

something else). If it does include distributional fairness, there is no guidance as to what distribution of resources would be 'fair' or 'just'. More specification would facilitate greater understanding of the obligation and, in turn, compliance.

26. Proposal A21 is to remove the general obligations of a financial licensee set out at section 912A of the Corporations Act relating to management of conflicts of interest, maintaining competence, ensuring adequate training, and having adequate risk management systems. While these could arguably already be covered by the 'efficiently, honestly and fairly' standard, we think it is preferable for them to be retained in their current form. As discussed in part above, elements of the 'efficiently, honestly and fairly' standard are unsettled or vague. In this context, the articulation of specific expectations remains useful.

### Unconscionable conduct/misleading and deceptive conduct (Proposals A22 and A23)

27. Proposals A22 and A23 are to consolidate the Corporations Act and ASIC Act provisions for unconscionable conduct into a single provision, and to do the same for false and misleading representations and misleading or deceptive conduct.
28. These proposals could remove unnecessary duplication, complexity and inconsistency. We think the ALRC's suggestion to adopt the formulation of the provisions with the broadest application (s 12CB ASIC Act for unconscionable conduct, s 12DA for misleading and deceptive conduct) is sensible.
29. We do not think that unconscionable conduct should be incorporated in the 'efficiently, honestly and fairly' standard due to the lack of clarity on the meaning of 'fairly', discussed above with respect to Proposal A20.

### Indicative behaviours of compliance for advisors (Question A24)

30. Question A24 relates to the re-casting the list of actions a provider of financial advice must take to satisfy the best interests duty to indicative behaviours of compliance for a court to consider in determining whether the duty has been satisfied.
31. The suggested amendment is a move away from prescription and towards a more flexible standard. This could have the effect of reducing 'tick a box' compliance, but could also create statutory uncertainty as to the scope of the duty and how it can be complied with. As with Proposals A13 to A15, Treasury's Quality of Advice Review may be the appropriate forum for these issues to be considered.

**ENDS**