IG

FROM SHORT-TERM TRADING TO LONG-TERM INVESTMENT

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Interim Report A - Financial Services Legislation ALRC 137

IG Australia and IG Group

By way of brief background, IG Australia Pty Ltd (IG) deals in securities and over-the-counter (OTC) contracts for difference (CFDs) on a broad array of financial instruments, to a retail and wholesale client base.

In Australia, IG is regulated by the Australian Securities and Investments Commission (ASIC) and is a wholly owned subsidiary of an ultimate parent company, IG Group Holdings plc (IG Group), which is a market leader in on-line trading. IG Group has a primary listing on the London Stock Exchange where it is an established member of the FTSE 250. Around the world, IG Group companies are regulated by:

- UK's Financial Conduct Authority;
- Monetary Authority of Singapore;
- US Commodity Futures Trading Commission;
- US National Futures Association;
- US Financial Industry Regulator Authority, Inc.;
- Swiss Financial Market Supervisory Authority;
- Japanese Financial Services Agency;
- Japanese Ministry of Finance;
- New Zealand's Financial Markets Authority;
- Germany's BaFin;
- Dubai Financial Services Authority;
- South African Financial Sector Conduct Authority; and
- Bermuda Monetary Authority

IG Group is the world's No. 1 CFD provider[1]. To meet the high expectations of our global regulators, promote a strong culture and mitigate the risk of poor conduct, we have a developed framework which focuses on our clients. We strive to ensure our products and services result in good outcomes for both our clients and the financial markets. We firmly believe and support proportionate regulation that delivers good client outcomes as we feel this leads to a better, long-term sustainable industry. To meet these regulatory requirements, we ensure that we have at all times: (i) a robust governance structure, (ii) products that are designed to meet the needs of IG's target market, (iii) marketing that is appropriately targeted and (iv) dealing practices that deliver best execution.

[1] Based on revenue excluding FX (published financial statements, October 2021)

Questions & proposals

Question 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?

We are concerned that several of the proposals within the Report may be progressed as significant policy law reform in isolation. We do not support the view that the ALRC review can produce financial services policy reform proposals on a standalone exercise - this would result in a substantive policy change and therefore goes beyond the ALRC's mandate under the Terms of Reference. In particular, we believe that the proposals which extend to the financial product advice and retail / wholesale client definitions are matters of significant public policy importance which should be subject to a comprehensive policy review process, co-ordinated by Treasury as the appropriate policy department. To this end, we support the Australian Financial Markets Association's recommendation that an objective and systematic approach of a body modelled on the former Corporations and Markets Advisory Committee (CAMAC) is needed to progress the ALRC's findings.

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

When to define:

(a) In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would 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 of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

Consistency of definitions

(e) Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.
(f) Relational definitions should be used sparingly.
(g) To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

Design of definitions

(h) Interconnected definitions should be used sparingly.
(i) Defined terms should correspond intuitively with the substance of the definition.
(j) It should be clear whether a word or phrase is defined, and where the definition can be found

We are supportive of the principles set out in Question A2.

Proposal 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'.

We are supportive of Proposal A3.

Proposal 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 12BAA(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)(f) of the Corporations Act 2001 (Cth) and s 12BAB(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 amending ss 766A(2) and 766C(7) of the Corporations Act 2001 (Cth),
(d) and ss 12BAB(2) and (10) of the Australian Securities and Investments Commission Act 2001 (Cth);
(e) remove the incidental product exclusion by repealing s 763E of the Corporations Act 2001 (Cth);
(f) insert application provisions to determine the scope of Chapter 7 of the Corporations Act 2001 (Cth) and its constituent provisions; and
(g) consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'

We do not have any comments in response to this proposal.

Proposal 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) Australian Securities and Investments Commission Act 2001 (Cth));
(b) 'manages financial risk' (s 763C Corporations Act 2001 (Cth) and s 12BAA(5) Australian Securities and Investments Commission Act 2001 (Cth)); and
(c) 'makes non-cash payments' (s 763D Corporations Act 2001 (Cth) and s 12BAA(6) Australian Securities and Investments Commission Act 2001(Cth)).

We do not have any comments in response to this proposal.

Proposal 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 763A(1) of the Corporations Act 2001 (Cth) and in s 12BAA(1) of the Australian Securities and Investments Commission Act 2001 (Cth); and
(c) a definition of 'credit' that is consistent with the definition contained in the National Consumer Credit Protection Act 2009 (Cth) should be inserted in the Corporations Act 2001 (Cth) and in the Australian Securities and Investments Commission Act 2001 (Cth).

We do not have any comments in response to this proposal.

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

We do not have any comments in response to this proposal.

Proposal 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.

As this proposal has substantive policy implications, we believe the proposal requires a holistic policy process co-ordinated by Treasury as the responsible policy department.

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

(a) powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and
(b) powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

We do not have any comments in response to this proposal.

Proposal 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.

We support AFMA's recommendation that a new policy body based on the CAMAC model would assist to maintain a consolidated legislative instrument.

Question 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'?
(b) Should any such power be granted to the Australian Securities and Investments Commission?

We support AFMA's recommendation that a new policy body based on the CAMAC model should be established. The policy body could review rule proposals by ASIC and recommend whether they should proceed under a delegated ministerial authority. The delegate could be a senior executive Treasury official.

Proposal A12: As an interim measure, the Australian Securities and Investments Commission, the Department of the 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.

We agree that a control and oversight mechanism is needed, which could be a new policy body based on the CAMAC model. It could play a role in scrutinising delegated legislation.

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

(a) remove the definition of 'financial product advice' in s 766B;
(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

(c) incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.

This proposal has significant and widespread implications and we do not believe it is appropriate to deal with this matter as a technical definitional issue. As explained our response to Question A1 we are concerned that the proposals which include policy modifications require a comprehensive policy review process, co-ordinated by Treasury as the appropriate policy department.

Proposal 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'.

We refer to our response to Proposal A13.

Proposal 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.

We refer to our response to Proposal A13.

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

in some other manner?

This proposal raises fundamental questions about the way that Chapter 7 operates and the scope of retail investor protection laws. We believe it is essential that any proposed amendments to the definition of a retail client should be subject to a comprehensive policy review process, co-ordinated by Treasury as the appropriate policy department.

Notwithstanding this view, we believe that an individual should be categorised as a retail client and therefore subject to the relevant investor protections afforded by Chapter 7, unless the individual is a high net worth individual who has strong financial literacy and thorough knowledge of the financial product (or service), which thereby enables the individual to adequately evaluate: (1) the features and risks of the financial product (or service) without the assistance of regulated disclosure documents such as a PDS; and (2) the consequences of forgoing the investor protections afforded to retail clients by Chapter 7. Objectively, we believe that financial literacy and experience of financial products, particularly complex financial products, is a better determinant of an individual's appropriateness to be categorised as wholesale and forgo retail client protections than the value of the financial product or the individual's wealth alone.

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)?

Similar to Question 16, this question raises fundamental questions about the way the Chapter 7 operates and the scope of retail investor protection laws.

Notwithstanding our view that such proposals should be subject to a comprehensive policy review process, we believe the sophisticated investor exception provides an important mechanism for individuals who do not satisfy the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c), but have strong financial literacy and experience of financial products, to achieve wholesale status in order to access certain products and services only available to wholesale clients.

As explained in our response to Question 16, objectively financial literacy and experience of financial products, particularly complex products, is a better determinant of an individual's appropriateness to forgo certain retail investor protections than wealth or the value of the financial product alone. Under the existing exception, to qualify as a sophisticated investor an individual's experience must be sufficient for a licensee to determine that the individual has the requisite understanding to assess the merits, risks and value of a product. The licensee must determine how much information each individual investor needs to enable them to decide whether to acquire the financial product. However, as the sophisticated investor exception is based entirely on subjective criteria, without supporting guidance on what constitutes sufficient, it is challenging for licensees to administer the exception with regulatory certainty.

In determining what criteria should be considered in respect of the sophisticated investor exception, we believe it is important to look to global regulatory precedence for regimes which have a similar concept - i.e., where a natural person may elect to a regulated status which affords less investor protection in order to access products, features or services that are otherwise unavailable. For example, in the European Union MiFID II enables an individual to be categorised as an elective professional client whereby the individual satisfies the following criteria:

(1) a qualitative test which involves an assessment of the expertise, experience and knowledge of the individual that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the individual is capable of making investment decisions and understanding the risks involved; and

(2) a quantitative test whereby in the course of the above assessment, at least two of the following are satisfied:
   a. the in individual has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
   b. the size of the individual's *financial instrument* portfolio, defined as including cash deposits and *financial instruments*, exceeds EUR 500,000;
   c. the individual works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

We believe the MiFID II approach to assessing an individual's eligibility to forgo retail client projections is sufficiently prescriptive to create regulatory certainty as to its intended practical application (unlike Australia's sophisticated investor exception), while providing firms sufficient clarity to determine how best to: (1) assess an individual's expertise, experience and knowledge of the financial product; and (2) define the significant size of a transaction based on the specific features of the type of financial product(s) offered by the firm.

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

We agree that the norms that underpin existing conduct regulation could be given clearer expression, and thereby serve to guide conduct more effectively towards compliance.

Question A19: What norms should be included in such an objects clause?

We agree with the inclusion of the six norms identified by the Financial Services Royal Commission.

Proposal 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;
(b) replacing the word 'efficiently' with 'professionally'; and
(c) inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

Consistent with our views on the other policy proposals, we believe reform of this obligation should be subject to a comprehensive policy review process.

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

(a) to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa));
(b) to maintain the competence to provide the financial services (s 912A(1)(e));
(c) to ensure representatives are adequately trained (s 912A(1)(f)); and
(d) to have adequate risk management systems (s 912A(1)(h)).

We refer to our response to Proposal 20.

Proposal A22: In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the Corporations Act 2001 (Cth) and s 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed.

We do not have any comments in response to this proposal.

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.

We support this proposal.

Question 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 obligation in sub-s (1) has been satisfied; and
(b) repealing ss 961C and 961D?

Consistent with our views on the other policy proposals, we believe reform of this obligation should be subject to a comprehensive policy review process.