SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION

RESPONSES TO THE FINANCIAL SERVICES LEGISLATION INTERIM REPORT A

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The authors would like to thank the Australian Law Reform Commission (ALRC) for this opportunity to comment on the proposals set forth in the Financial Services Legislation: Interim Report A (ALRC Report 137). This submission however reflects our views as researchers and not that of Monash University.

We have stated elsewhere that "the safe harbour arguably cannot eliminate the legal risk of non-compliance because of the open-ended nature of s 961B(2)(g)."[1] S 961B(2)(g)—as it is today—seems to take an objective approach—*i.e.*, the vibe of the industry approach. In general, we support the ALRC's proposal by amending s 961B (2) of the *Corporations Act* (Cth) to re-cast paragraphs (a)–(f) as indicative behaviors of compliance. This would, in theory, create a non-exhaustive list to help retain discretion of the courts—which are required to "have regard to" the factors listed in s 961B(2) when determining whether the primary duty in sub-s (1) has been met.[2] The proposed amendment would potentially impose a subjective approach or an objective approach or a combination of both which would account for the varying degree of aptitude possessed by financial advisers. The subjective approach speaks to the specific circumstances of a particular case and the objective approach the industry standards.

Ultimately, the operation of the proposed changes would be subject to judicial interpretation; whether the subjective approach should operate as a requirement in addition to the objective one with the latter sets up the minimum objective threshold. The proposed changes would potentially require financial advisers to do their best to fulfil the duty to act in the best interest of the clients; courts would be in a position to consider standards that exceeds the minimum industry standards. To some degree, it would be a concern of the industry that the "have regard" list might operate as a moving target, making it more difficult to challenge a claim that the adviser failed to meet the primary obligation in sub-s(1).

From a long-term perspective, the policymakers may wish to consider two issues of systemic importance. First, the ALRC Report aptly remarked that the expression "best interests duty" could

[1] Han-Wei Liu et al, 'In Whose Best Interests? Regulating Financial Advisers, the Royal Commission and the Dilemma of Reform' (2020) 42(1) *Sydney Law Review* 37, 49.

[2] Such a legislative intent must be made clear. It is not unthinkable, in practice, that the reading of the best interests duty should be guided by these indicative factors per ejusdem generis rule, thus arguably narrowing down the scope of inquiries on the part of the courts.

be found elsewhere—*e.g.* the one recently introduced in the *National Consumer Credit Protection Act* (Cth). The way in which the best interests duty is formulated in the context of mortgage brokers is, however, in a sharp contrast with s 961(B) of the *Corporations Act* (Cth)—and such a different treatment seems lacking a compelling reason. While we agree that at this point, it may not be a good idea to remove the indicative factors entirely so as to help financial advisers comply with their primary obligation under s 961 (B), a more holistic approach would seem necessary when it comes to "best interests duty" across the broad *i.e* the financial service industry.

The other related issue is the role of the best interests duty. By recasting the elements of the safe harbour provision as indicative factors of compliance, the proposed amendment seems move away from the prescriptive approach. However, the legislative intent is not clear as to whether to consider the best interests duty as a high-level principle. If this is the case, what needs to be examined carefully is the relationship between the best interests duty and other provisions—for instance, would a financial adviser' breach of the appropriateness/suitability rule under s 961G of the *Corporations Act* trigger the non-compliance of the best interests duty automatically? In some jurisdictions, notably, the United Kingdom, the best interests duty is conceptually considered as an overarching principle and serve as a gap-filler to hold the financial advisers accountable. Such a regulatory model, as we have argued elsewhere,[3] could inform the Australian government when considering yet another reform in the future.

[3] Weiping He & Han-Wei Liu, 'Regulating financial advisers in the UK: lessons for Australia', (2021) *University of New South Wales Law Journal*. 44, 1.