



CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

2 March 2022

Australian Law Reform Commission
PO Box 12953
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Queensland 4003

By email: financial.services@alrc.gov.au

Submission – Financial Services Legislation: Interim Report A

Thank you for the opportunity afforded to Chartered Accountants Australia and New Zealand (CA ANZ) to comment on the recommendations, proposals and questions to the reform of the corporations and financial services legislation.

CA ANZ has long advocated for industry reform to ensure that more consumers are able to access high quality, ethical and professional financial advice. Equally, when consumers become victims of untrustworthy advisers, the law must enable regulators to take swift and effective action to remove such advisers from the market.

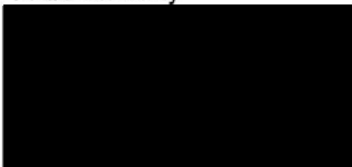
We support work the Australian Law Review Commission (ALRC) is doing in recommending changes to simplify the Corporations Act and its associated Regulations which is too complex.

We endorse and appreciate the interaction the ALRC is having with professional associations such as CA ANZ, so that any reforms made include practical market intelligence which will be to the benefit of consumers.

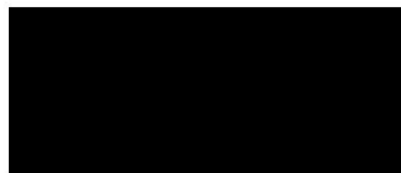
CA ANZ's detailed responses to the ALRC's proposals and questions are attached.

If you would like to discuss our submission, please do not hesitate to contact Bronny Speed (Leader, Financial Advice) on [REDACTED]

Yours sincerely



**Tony Negline CA CA SMSF Specialist
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Attachment

Introduction and background information

Scope of Inquiry

The Inquiry is set against the background of the Australian Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ("Royal Commission") and, in particular, the Government's acceptance of the Royal Commission's call for simplification of the law so that its intent is met¹. The Royal Commission emphasised in its Final Report that the 'more complicated the law, the harder it is to see unifying and informing principles and purposes'².

The Terms of Reference for this current ALRC Inquiry require the ALRC to survey the gamut of corporations and financial services legislation and make recommendations for simplification, with the aim of promoting meaningful compliance with the substance and intent of the law, and laying the foundations for an adaptive, efficient, and navigable regulatory framework.

We note that the ALRC is not permitted to make policy recommendations about the law.

Unnecessary complexity

The Corporations Act together with the Australian Securities and Investments Commission Act 2001 (Cth) ('ASIC Act'), which provide much of the consumer protection framework in relation to financial services, are core to the financial services regulatory ecosystem. In addition, the regulation of consumer credit — including in relation to licensing, disclosure and conduct — occurs pursuant to its own separate regime, contained in the National Consumer Credit Protection Act 2009 (Cth) ('NCCP Act').

This legislation is supplemented by numerous additional statutes.

CA ANZ's summary:

CA ANZ wholeheartedly supports the premise that the ALRC's task is not simply to 'tidy up' the legislative framework in service of theoretical objectives. At the core of this current ALRC Inquiry is the importance of ensuring the law is fit for purpose for industry, recognising the dynamic nature of the financial services sector and its significant contribution to the Australian economy.

Further, we agree that the regulatory framework must meet the needs of consumers of financial products and services in understanding and navigating the law to protect their legal entitlements.

Finally, legislative simplification could reduce the amount of time and money this overarching legislative framework places on consumers, and that if simplification is achieved, many more Australians may be able to access high quality financial advice at an affordable cost.

¹ [Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#), 4 February 2019.

² The [Final Report](#) of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 1 February 2019.

Responses to proposals and questions

A1 Empirical data – Chapter 3

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?**

CA ANZ's position:

At a recent ALRC Webinar 'Reducing Complexity: Why? Where? How?' held on Thursday 10 February 2022, the ALRC spent considerable time outlining the facts that:

1. The number of definitions the Corporations Act contains, and the frequency with which it uses defined terms, make it the second-most definition-dense Commonwealth Act
2. It has over 14,500 internal cross references which means that readers are often led through a lengthy maze of provisions in seeking answers to basic questions
3. The legislation contains a large number of exclusions and exemptions, which can contribute to complexity and obscure policy goals. It also contains a large number of exceptions to those exclusions and exemptions
4. The ALRC has found that the Corporations Act, particularly Chapter 7 is the most complex on the Commonwealth statute book including a vast and constantly changing body of law. This Chapter is particularly pertinent to the provision of financial advice
5. The sheer scale of the existing legislative framework is voluminous and includes a complex and diverse legislative regime including a large number of legislative instruments, regulatory guides instruments and reports made by ASIC
6. When comparing comparable jurisdictions (the United Kingdom and New Zealand), it would appear that Australia's complexity is self-inflicted. We should learn from those two jurisdictions to see how simplification can be achieved

We are keen to see a new regulatory framework which will simplify many of 'the basics', make user compliance with the law easier, and reduce compliance costs. We'd like to see a move to a more principles-based drafting approach rather than the current prescriptive style. The Income Tax Assessment Act 1997 sought to do this by using clear headings, guides, general provisions followed by specific provisions, improved section references, tables, cross-references and examples.

In our view, this will be difficult to achieve without two things:

1. A wholesale move to individual licensing of advisers, whereby they take responsibility for their own advice, ongoing training and ethical conduct. With the current situation of the AFSL controlling their advice thus acting as a further layer of regulation, with powers interspersed right throughout the Corporations Act and Regulations, including effective client 'ownership', it will be difficult if not impossible to gain significant simplicity without this nexus being broken
2. ASIC's power to make notional amendments to the Act is removed, thus ensuring a new legislative framework stays 'clean' and makes application of it simpler.

We acknowledge this is a substantial project and therefore support the ALRC recommending to government that implementation should be in a staged manner enabling the efficacy of the proposed solutions to be tested and refined in target areas of corporations and financial services legislation with industry feedback being sought and added along the way where necessary. A panel of external experts should support the re-drafting work of government officials.

Importantly, this ALRC review *must* take into consideration the findings of Treasury's Quality of Advice Review, which is being conducted concurrently. As financial advisers are being impacted by these two reviews, many CA ANZ members find it hard to comprehend why the ALRC review has a three-year timeframe, yet the Quality of Advice Report is due for completion this December 2022. Correlation of the two reviews would seem to make sense if true industry-wide reforms are to be achieved.

Lastly, this extensively complex part of the law is currently having a significant impact on the costs of producing financial advice, thus making advice expensive and unreachable for many Australian businesses and individuals. Simplification of this complexity will lead to lower costs of advice making high quality advice more affordable to more Australians – a key Federal Government commitment.

A2 When to define – Chapter 4

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

When to define (Chapter 4):

- 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 (Chapter 5):

- 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 (Chapter 6):

- 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.

CA ANZ's position:

CA ANZ agrees with the above definition design principles.

We support simplifying the law and attempts to simplify it including trying to establish a level of consistency and common approach. This will serve to help reduce confusion and unnecessary duplications. Focusing on the substance of the definitions will also be helpful towards better compliance.

A3, A4, A5 and A6 - Definitions of 'financial product' and 'financial service' – Chapter 7

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'.

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.

A5: The Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to remove definitions.

A6: Outlines the requirements to implement proposal A3

CA ANZ's position:

Text

A3: We strongly support the proposition that legislation must provide certainty and clarity requiring definitions to be consistent across all instruments of legislation pertaining to a particular term.

A4: We support simplifying the definitions of 'financial product' and 'financial service' to a functional definition with a single list of exclusions. Particularly, that a financial service should capture the common understanding of a 'service' and include the 'service' of providing financial advice on financial matters irrespective if that advice relates to a defined financial product. Building upon the recently enacted Better Advice Act 2021 (which from 1 January 2022 removes tax (financial) advisers from Tax Practitioners Board oversight) the simplified definitions should demarcate the line with tax services.

The way the legislation is currently based (in that the definition of a 'financial product' is pivotal as to whether financial advice has been provided), is out of line with consumer expectations. See: [AFS licensing requirements for accountants who provide SMSF services](#)

Additionally, what constitutes a 'financial' product has been the source of intense disagreement for many years, with Self-managed Super Funds (SMSFs) being an excellent example.

This is an ideal opportunity for the law to be simplified to rid itself of the control that a 'financial product' currently has.

A5: Agree with proposed amendments,

A7 and A8 – Disclosure – Chapter 9

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

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.

CA ANZ's position:

A7: We do not support diluting the term 'responsible person' to 'preparer'. Firstly, we consider the generally accepted ordinary meaning of 'preparer' by retail clients would be a person with no accountability for the information provided.

Calling on the same sources used elsewhere in Report A, the Oxford Dictionary definition of a preparer is: 'A person or thing that makes something ready for use or consideration'. There is no definition in the Macquarie Dictionary. As cited in Report A, the Wallis Inquiry determined that effective disclosure must be more than merely the production of information.

Conversely, 'responsible' is defined by the Oxford Dictionary as having an obligation to do something, and by the Macquarie Dictionary as having capacity for moral decisions and therefore accountable and reliable in business or other dealings. We suggest that the accepted ordinary meaning of a 'responsible person' by retail clients is a person that has obligations to be accurate and can be held accountable. Information prepared by a responsible person provides a degree of confidence to a retail client that the information can be relied on to make an informed choice.

We consider the accepted ordinary meaning of 'regulated person' to be a person that has even higher obligations as they are regulated by a law.

We strongly believe a regulated person should be an advice professional who takes responsibility for their personal client advice, who maintains a high level of skills and knowledge and practices under a robust and enforceable code of ethics. However, how this person is defined should be open for discussion, but we re-iterate proposal A3 that a term be defined once and applied in a uniform manner within and across the Commonwealth's statute of law.

A8: We agree with the findings that current disclosure requirements are exhaustively prescriptive and lead to lengthy disclosure documents that have limited utility for consumers. We support moving to a outcomes-based standard of disclosure with the caveat that such a change follows extensive industry engagement.

Changes to financial product disclosures is an area that must place the consumer as the driver of change and prioritise harnessing technology. On pages 11 and 12 in our response to ASIC CP 332: Promoting access to affordable advice for consumers³, we outlined nine changes we would like to see in advice documents.

These changes can only be made if financial advisers move up the professionalism curve and advisers become individually accountable, rather than being shielded by an AFSL. Individual licensing will enhance accountability which in turn will lead to less need for excessive disclosures in advice documents, very few of which help consumers to make informed decisions regarding their personal financial situation.

Allowing information that is not material to be made available in a digital form would further assist in the simplification of disclosures.

Each of the changes outlined above will assist potential clients and their advisers to access only the information they actually require, further reducing the financial advice production costs and making it more affordable to more Australians.

³ CA ANZ, [Affordable advice for consumers](#), 15 January 2021.

A9, A10, A11 and A12 – Exclusions, Exemptions, and Notional Amendments – Chapter 10

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

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.

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?

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.

CA ANZ's position:

As outlined in A1 above, there is a substantial need to simplify the Corporations Act and we believe once that is complete, it would be wise to limit ASIC's powers to make amendments by way of legislative instruments, regulatory guides, instruments and/or reports. If the law is clear and easy to comply with, then there will be less need for ASIC to issue any of these documents.

However, in general, we support the need to have an exemption facility following appropriate consultation with the industry and with professional associations.

We agree there may be a need to deal with urgent issues to amend certain provisions of Chapter 7 by way of regulation or legislative instrument, but the use of legislative instruments should be considered as the rare exception rather than the norm.

CA ANZ endorses the need to ensure consistency and have workable regulations, so we support prospective changes or amendments to go through a robust consultation process including genuinely listening to the industry and the profession's concerns regarding the impact of such changes.

A13, A14 and A15 – ‘Financial Product Advice’ – Chapter 11

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’.

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’.

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.

CA ANZ’s position:

A13: We strongly support decoupling general and personal advice definitions. As per community expectations, the words ‘general advice’ be just that - general to the public, and not being a licensed activity. On the flipside, consumers believe that ‘personal advice’ relates solely to their circumstances.

Additionally, CA ANZ’s view is that consumers believe that ‘personal advice’ should be provided by a qualified professional in order to provide such a service. This is in line with public expectations of doctors, lawyers, engineers and many other professions.

A14: We disagree with the recommendation that the definition of ‘financial product advice’ be substituted with ‘general advice’ for the reasons previously outlined. A provider of ‘personal advice’ must be a qualified licensed professional who has the requisite skills and expertise to provide such advice.

As an addition to our recommendation, registered liquidators who have detected phoenix activity which is creditor defeating, this proposal should empower ASIC to take action against an unlicensed person that provided such advice.

A15: We disagree with the conclusion of the ALRC that ‘general advice’ should remain a defined term within the Corporations Act.

A16 and A17 – Definitions of ‘Retail Client’ and ‘Wholesale Client’ – Chapter 12

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. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c);
- or
- b. in some other manner?

A17: What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the Corporations Act 2001 (Cth)?

CA ANZ's position:

We agree that the definitions of 'retail client' and 'wholesale/sophisticated investor' clients should be examined. We do not believe that the current differentiation meets consumer expectations whereby protections for 'wholesale/sophisticated investor' clients are, in some cases inappropriately, less than those of retail clients, with the delineation factor being related to level of income and/or assets.

The FASEA Code of Ethics has sought to address this issue, yet the FASEA Code of Ethics only applies to licensed financial product advisers to retail clients, an anomaly the government needs to address at their earliest convenience.

A group of professional member associations is currently reviewing these definitions and how they should apply in practice.

In addition, CA ANZ is embarking on an internal review of how 'wholesale/sophisticated investor' clients should be defined, the results of which we will be happy to share with the ALRC once complete.

A18, A19, A20, A21, A22, A23 and A24 – Conduct Obligations – Chapter 13

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

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

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.

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)).

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.

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.

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?

CA ANZ's position:

CA ANZ has strong and robust disciplinary processes and therefore thoroughly supports the simplification of Chapter 7 of the Corporations Act 2001 (Cth) to provide better clarity for those who rely on the conduct clauses within it.

We consider this to be a very important area of the Interim Report A and will therefore look forward to working with the ALRC on conduct obligations separately from this submission.

Appendix A

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 128,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

In summary:

Across the country, in local communities and large cities, CAs are seen as a trusted and educated group of financial professionals who are working every day to serve the interests of individual and businesses in the Australian economy.

Being highly qualified

As well as relevant degree-level study, all our members have completed a minimum of three years approved and mentored relevant work experience. CAs have an Australian or New Zealand approved degree at AQF7, or an overseas equivalent, and a TEQSA approved AQF8 post-graduate qualification which requires rigorous study.

Significant continuing professional development obligations

Significant ongoing professional development requirements ensure CAs skills and knowledge remain current and relevant. Members are required to complete a minimum of 120 hours of relevant training during a three-year period. This is monitored through audits for a selection of members as well as annual declarations from all members.

Broad experience

Our members are accountants who can offer far more than technical knowledge. CAs are broadly experienced in dealing with business and financial issues across a diverse range of management and advisory roles. This bigger picture, holistic perspective enables them to work flexibly to positively impact businesses, organisations and communities.

Fully accredited

Our members have all met, and are bound by, internationally recognised technical and ethical standards. CA ANZ is part of the Global Accounting Alliance - the coalition of the world's premier accounting bodies.

Future-focussed

Whether working in business or practice, CAs are uniquely positioned to offer advice that can be trusted. Through deep understanding they have the skills to examine the past and guide organisations into the future.

Highest ethical and professional standards

Members are required to adhere to a strict code of ethics included in the Accounting Professional & Ethical Standards Board's Code of Ethics for Professional Accountants (including Independence Standards) (APESB 110). They are also required to comply with detailed CA ANZ regulations which maintain high levels of professional standards.

Protection to consumers and members through the Professional Standards Scheme

All members in public practice must meet the requirements of the CA ANZ Professional Standards Scheme. This includes having minimum levels of professional indemnity insurance and appropriate disclosure of the limitation of liability under the scheme. This offers protection to both our members and their clients.

Quality Review Program

The CA ANZ Quality Review Program reviews practices on a cyclical basis and examines each practice's compliance with technical and professional requirements, including compliance with the professional standards scheme. The programme monitors whether our members in public practice have quality control systems in place to ensure they comply with the Code of Ethics, professional standards, and legal and regulatory requirements. All members offering services to the public are eligible for review. This helps maintain a consistently high standard of quality and service to their clients.

Conduct and disciplinary processes

There are robust disciplinary processes to hold members to account who may not comply with high professional and ethical standards. This includes investigating and resolving complaints made against members. Sanctions imposed on members can include termination or suspension of membership, a censure, training and costs.