

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

Attention: Professor Andrew Godwin

4 March 2022

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

Dear Professor Godwin

REVIEW OF THE LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION (THE REVIEW)

The Mortgage and Finance Association of Australia (**MFAA**) welcomes the opportunity to make a submission in relation to the Review and specifically in relation to the proposals contained in the Financial Services Legislation Interim Report A (**Interim Report A**).

As context to this submission, the MFAA is Australia's leading professional association for the mortgage and finance broking industry, with over 14,000 members. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. Brokers play an important role in intermediated lending, providing access to and promoting choice in both consumer and business finance. Brokers facilitate almost two thirds of all new residential home loans¹ and four in ten small business loans² in Australia.

The MFAA's role, as an industry association, is to provide leadership and to represent its members' views. We do this through engagement with governments, financial regulators and other key stakeholders on issues that are important to our members and their customers. This includes advocating for balanced legislation, policy and regulation and encouraging policies that drive competition and improve access to credit products and credit assistance for all Australians.

OUR SUBMISSION

The MFAA appreciates the invitation to meet with you and your team last month to discuss Interim Report A and the Review generally. As noted in our meeting, we welcome and support the ALRC's initiative to look at ways to simplify the laws that regulate financial services in Australia.

¹ [MFAA Industry Intelligence Service Report 12th Edition](#) pg 4

² Productivity Commission research paper [Small business access to finance: The evolving lending market](#) pg 44

The mortgage and finance broking industry has experienced many years of intense reform, implementing several key regulatory reform programs through the COVID-19 global pandemic while continuing to support consumers and businesses to access critical finance. While these regulatory reform programs ultimately, in our view, drive good customer outcomes, as identified by the ALRC, there is significant opportunity to simplify and modernise what we consider has become an unnecessarily complex, duplicative and often-times impenetrable legislative framework. We particularly welcome the ALRC's whole-of-framework approach – that it is reviewing not just the Corporations Act, but also its inter-relation with other parts of the financial services legislative regime including the ASIC Act and the National Consumer Credit Protection Act (**NCCP**).

Our submission focusses on how the financial services law can be simplified and streamlined for the benefit of the mortgage and finance broking industry. As the mortgage and finance broking industry is largely regulated by the NCCP and ASIC Act, not the Corporations Act, we have made limited comment on the consultation specific questions within Interim Report A.

Our responses to the consultation specific questions can be found in **Annexure A**.

We also make the key recommendations below to support the ALRC in its work.

RECOMMENDATION 1: REMEDIATE GAPS IN THE CURRENT REGULATORY FRAMEWORK

Trust and confidence in the mortgage and finance broking industry has been strengthened through a powerful combination of both self-regulatory and legislative reforms including the unrivalled mortgage broker best interest duty, remuneration reforms and the information sharing and reporting of misconduct reforms including the reference checking protocol and the breach reporting regime.

As highlighted above, the implementation of the post-Royal Commission's significant and complex regulatory reform program has had unintended consequences for the mortgage and finance broking industry. These unintended consequences, in our view, have arisen partially because of the already complex financial services legislative framework.

While we understand the ALRC is currently seeking submissions in relation to the proposals it makes and questions it asks within Interim Report A, we believe that there are also further opportunities for Government to enhance the efficiency of some of the recent reforms that affect the mortgage and finance broking industry.

Reference checking protocol³

Whilst a robust reference checking protocol goes some way to managing the movement of those responsible for misconduct, we believe there is the opportunity to further strengthen the protocol by ensuring that aggregators always form part of the process. At present the reference checking legislation and protocol requires that a reference be provided to the broker's licensee. It is important to recognise that aggregators perform an important gatekeeper compliance function within the mortgage and finance broking industry.

Aggregators will be involved in the reference checking process when brokers are credit representatives or will become credit representatives of an aggregator. However, many small business mortgage brokers have their own license and do not operate under the license of the aggregator. That means that in a very large number of cases, the aggregator is excluded from the reference-checking process entirely, and in many instances the broker is – in effect – providing their own reference.

³ MFAA Submission on CP 333 Reference Checking and Information Sharing dated 28 January 2021

Breach reporting⁴

Whilst licensees are required to report a breach to ASIC, they are not required to share the report with the aggregator in circumstances where the aggregator is not the licensee. Similar to our recommendations with respect to reference checking, we believe there is an opportunity to strengthen the legislation to ensure that aggregators have greater visibility of breaches reported to ASIC on brokers that hold their own licenses. For transparency we also believe it is important to share breach reports made about a broker with that broker if the sharing of that report does not jeopardise any ongoing investigation.

Design and Distribution Obligations (DDO)

Mortgage brokers are subject to a best interest duty in the same way as financial advisers. Financial advisers are exempt from meeting several obligations under DDO when providing personal advice to clients. While the legislative and policy intent⁵ is to similarly exempt mortgage brokers from these obligations, because personal advice is not a concept in the NCCP, the law in this area needs to be amended.⁶

We continue to engage with Treasury and ASIC in relation to these matters of importance to the mortgage and finance broking industry. The simplification work undertaken by the ALRC will assist in alleviating similar unintended consequences in future.

RECOMMENDATION 2: PRIORITISE DIGITISING THE CORPORATIONS ACT AND ASSOCIATED REGULATIONS

We understand the Review is vast and multi-year and many of the recommendations and proposals made by the ALRC will likely not be implemented for some time. The pace of change in the post-pandemic environment has obviously accelerated the trend to digitisation – some use the term ‘quantum leap’. To remain competitive, organisations are doing things better, more quickly and in smarter more innovative ways. The current environment presents a great opportunity for the ALRC and for the Government to achieve some ‘quick wins’ by utilising available technology to drive accessibility and readability of the Corporations Act and associated legislation.

While we understand that the focus on regulatory design will occur in the second phase of the Review, regtech offers an almost immediate solution to make the Corporations Act vastly more effective and efficient at the same time. Digitised rulebooks are increasingly being implemented both in Australia and overseas, moving rules into digital formats, adding electronic tags to regulatory texts to enable these to be machine-readable and facilitating automated regulatory searches. One example is the NSW Government initiative to create a digital version of its Community Gaming Regulation 2020 on its new rules-as-code platform which now allows industry to navigate the regulation quickly and easily. Other state-based jurisdictions are also well advanced in this area.

We understand the conversion from its current from to a machine-readable format is already currently being considered and investigated by the ALRC.⁷ As part of progressing the Federal Government’s Deregulation Agenda, the move from HTML to XML should be a matter of priority at the Commonwealth level.

⁴ MFAA Submission on CP 340 draft RG 78 and Information Sheet dated 2 June 2021: [918fbd76090cdef3a3e26985f1fd47d495a93e09.pdf \(sanity.io\)](https://www.sanity.io/918fbd76090cdef3a3e26985f1fd47d495a93e09.pdf)

⁵ [Update on the Design and Distribution Obligations \(DDO\) regime | Treasury.gov.au](https://www.treasury.gov.au/updates/2021/03/update-on-the-design-and-distribution-obligations-ddo-regime)

⁶ MFAA Submission to Consultation Paper 325: Product Design and Distribution Obligations dated 11 March 2020 [df8bc9e4f223647d035b560e3a4539a897b3d268.pdf \(sanity.io\)](https://www.sanity.io/df8bc9e4f223647d035b560e3a4539a897b3d268.pdf)

⁷ [FSL3-Navigability-of-Legislation.pdf \(alrc.gov.au\)](https://www.alrc.gov.au/consultation/2021/03/fsl3-navigability-of-legislation)

RECOMMENDATION 3: CONSOLIDATE REGULATION OF CREDIT INTO A SINGLE ACT

The NCCP provides a useful example of legislation like the Corporations Act which has become more complex because of 'add ons' over time. The NCCP initially was usefully split into two parts ie the Credit Code which generally dealt with matters relating to documenting and managing credit products and the main part of the NCCP which dealt with licensing matters.

Recently, the accessibility of the law has been lessened by the introduction of a suite of financial services reforms in October 2021 including the breach reporting and the 'notify, investigate and remediate' obligations, design and distribution obligations, deferred sales model for add-on insurances, anti-hawking and the reference checking and information sharing requirements. These laws were introduced by way of simultaneous amendments to the NCCP and the Corporations Act without clear separation into individual schedules within each statute.

There is opportunity to streamline laws relating to credit through a single consolidated instrument with subject specific schedules. As an extension of our recommendation to consolidate the regulation of credit within one single statute, we also support Proposal A6 to have a single definition of credit. In doing so, the definition of credit may need to extend to the types of financial accommodation covered by the Corporations Act and ASIC Act regulations that are not captured in the NCCP. These include hire purchase agreements, finance leases, pawnbroking, guarantees, leases of real or personal property and letters of credit.

Conclusion

The MFAA extends its thanks to the ALRC for the opportunity to provide this submission. We look forward to continuing to engage throughout this Review. If you wish to discuss this submission or require further information, please contact me at [REDACTED] or Naveen Ahluwalia at [REDACTED]

Yours sincerely



Mike Felton
Chief Executive Officer
Mortgage & Finance Association of Australia

Annexure A - MFAA Responses to ALRC Questions

We support the proposals put forward by the ALRC subject to the comments we make in the main body of this submission and below.

ALRC Question No	MFAA Response
A1	As part of its second phase focusing on regulatory design and hierarchy, the ALRC could consider collating and analysing financial services industry codes (both mandatory and voluntary).
A2	Yes. We consider the list of definitional principles proposed by the ALRC in Interim Report A sensible. Please note our comments in relation to the definition of 'credit' above.
A16	The definition of 'retail client' within the Corporations Act is not of particular relevance to the mortgage and finance broking industry, therefore we have no view.
A17	The sophisticated investor exception is not of particular relevance to the mortgage and finance broking industry, therefore we have no view.
A18	We reserve our views noting that the ALRC intends to give further consideration to the insertion of norms as objects clauses in Interim Reports B and C. It would be helpful for the ALRC to provide examples of norms as objects clauses for consideration.
A19	As above.
A20	While these specific provisions do not apply to mortgage and finance broker licensees, there are corresponding provisions within the NCCP. We have had the benefit of reviewing certain submissions made to the ALRC and would suggest that the use of the word 'competently' instead of 'efficiently' as opposed to the ALRC's proposal of 'professionally' is more appropriate. ⁸ We also suggest that the ALRC's proposal to introduce examples within the legislation may add to rather than reduce complexity. In our view, examples more appropriately sit within regulatory guidance rather than in primary legislation.
A21	Whilst these specific provisions do not apply to mortgage and finance broker licensees, there are corresponding provisions within the NCCP. We note the ALRC will consider this proposal further in Interim Reports B and C. Other than to note that financial firms have built compliance systems and processes around these obligations and careful consideration must be given to the impact of the removal of these obligations on industry, we reserve our views until those later stages of consultation.
A24	While these specific provisions do not apply to mortgage brokers, there are similar provisions within the NCCP (the mortgage broker best interest duty). Any proposed change to the best interest duty for mortgage brokers is a matter of policy, must be carefully considered and we suggest not within the scope of this Review.

⁸ [Draft- HSF submission in response to ALRC interim report on fin services- 25.02.22 \(hsfnotes.com\)](#)