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Review of the Legislative Framework for Corporations and Financial Services Regulation – Interim Report A (Interim Report)

We welcome the opportunity to respond to the Interim Report and appreciate the extension granted to make our submission.

Kit Legal is a specialist financial services law firm. We act for over 100 financial services firms around Australia, assisting them to comply with their regulatory obligations. Most of our clients are SME enterprises that hold their own AFSL.

In our experience, financial advisers want to comply with their obligations and have the best interests of their clients at the forefront of their activities. However, the regulatory framework is complex, layered and ambiguous, making compliance an overwhelming burden for many firms.

The Corporations Act provisions, as they apply to financial advisers, are in many cases unclear. They are amended by the Corporations Regulations and then further amended by ASIC class order relief. ASIC guidance goes some way to assist on some topics. However, it's a difficult maze to navigate for businesses that want to do the right thing and just want to know what they need to do. Lawyers across Australia have different interpretations of the provisions which indicates the lack of clarity and drives compliance costs up.

This complexity starts with the definitions used throughout the Corporations laws and particularly in chapter 7 of the Corporations Act. The way various definitions are structured is not only conceptually challenging, but also results in an arduous user experience. In effect, this complexity acts as a barrier to compliance.

A person seeking to understand a definition must often not only consult multiple sections within the Corporations Act, but also other legislative instruments. It's a case of not only going down the rabbit hole, but exploring the entire rabbit warren in order to find an answer.

We agree with many of the simplification measures proposed and recommended in the Interim Report. We've provided further comments where we disagree or can share some our experience as lawyers or from a client's perspective.

Chapter 4: When to define

	Principle	Kit Legal comments
A2	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.	Agree.
	To the extent practicable, words and phrases with an ordinary meaning should not be defined.	Agree. This is an important corollary to the discussion of non-intuitive labels in chapter 6. Giving words their ordinary meaning, without further definition, allows readers (particularly non-lawyers) to trust their understanding of the words in front of them, rather than having to question whether every ordinary word is in fact defined to mean something quite specific.
	Words and phrases should be defined if the definition significantly reduces the need to repeat text.	Agree.
	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.	Agree. This is a key principle for improving user experience and reducing complexity.

Chapter 5: Consistency of definitions

	Principle	Kit Legal comments
A2	Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.	Agree.
	Relational definitions should be used sparingly.	Agree. The use of context and the conjunction 'if' provides a more readable way to explain the relationship between the defined term and other circumstances.

	Principle	Kit Legal comments
	To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.	Agree.

Chapter 6: Design of definitions

	Principle	Kit Legal comments
A2	Interconnected definitions should be used sparingly.	Agree.
	Defined terms should correspond intuitively with the substance of the definition.	Agree. A recent experience of this is the use of the defined term 'existing provider' in the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021*. A client recently applied the ordinary English meaning to this term to understand the education requirements for one of their advisers under these amendments. The defined term is very specific, providing a restricted timeframe when the so-called existing provider had to have been registered with ASIC. As a result, the client incorrectly interpreted the obligations.
	It should be clear whether a word or phrase is defined, and where the definition can be found.	Agree. This principle implemented in conjunction with the use of XML would greatly improve user experience.

We also support the implementation of recommendations 1–12 made under question A2.

Chapter 7: Definitions of 'Financial Product' and 'Financial Service'

	Summarised proposal	Kit Legal comments
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'.	Agree. These terms should have one meaning across corporations and financial services legislation. This is a big step in the right direction towards simplification. As noted, this would facilitate merging of Ch 7 of the Corporations Act and Part 2 Div 2 of the ASIC Act, and possibly also the subject matter

	Summarised proposal	Kit Legal comments
		of the NCCP Act. This is to be considered further in Interim Report C.
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 as provided in (a)–(f).	Agree that existing inclusions, exclusions and other variations to the two definitions has effectively created several different definitions. Agree that this proposal (specifically (a)–(c)) would reduce the current unnecessary complexity and enhance clarity, coherency and effectiveness of the legislation. Removing the incidental product exclusion would assist in reducing complexity and make the journey to determining if a product is a financial product more efficient! Agree with the use of application provision, rather than changes to definitions, to allow for exclusions for certain products, services etc from the scope of certain substantive provisions (A4(e)). Agree with the consolidation of exclusions as this would greatly simplify understanding of the terms (A4(f)).
A5	Remove definitions of 'makes a financial investment', 'manages financial risk' and 'makes non-cash payments' from the Corporations Act and ASIC Act.	Agree that this will reduce the complexity of the definition of 'financial product' by reducing the number of detailed related definitions, and is consistent with the proposal to use a broad, simplified functional definition.
A6	Include a general definition of 'credit' as part of the functional definition of 'financial product'. Proposed that this new definition of 'credit' could be based on definition in NCCP Act.	We support laying the foundation for consolidating the licensing of AFS and Credit licensees.

Chapter 9: Disclosure

	Summarised proposal	Kit Legal comments
A7	Replace 'responsible person' with 'preparer' in sections 1011B and 1013A of the Corporations Act.	Agree that the change in terms from 'responsible person' to 'preparer' will more accurately reflect the substance of the definition. It will then assist in clarifying the

	Summarised proposal	Kit Legal comments
		roles and responsibilities in the preparation of the PDS. Agree that the term 'preparer' would better reflect the role of 'responsible person' as the person by whom, or on whose behalf, a PDS for a financial product is to be prepared.
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.	Agree that greater consistency would be achieved if the provisions that require that require 'carve-ins' were relocated to a different Part of the Corporations Act. Agree that if Division 5A were removed from Part 7.9 there would be no need for different definitions of 'disclosure document or statement' so the purposes of Subdivs A and B of Div 7. Agree that the simplification and subsequent implementation of Part 7.9 could facilitate tailoring of product-specific disclosure requirements underlying the general standard for disclosure within consolidated delegated legislation.

Chapter 10: Exclusions, Exemptions, and Notional Amendments

	Summarised proposal	Kit Legal comments
A9	The following existing powers in the *Corporations Act 2001* (Cth) should be removed: 1. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and 2. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.	Agree. The powers to grant exemptions and omit, modify or vary provisions of Ch 7 will need to be removed from the Corporations Act and instead replaced with a single power to make "rules" in a consolidated legislative instrument. This would make it much easier to find, follow and apply any exemptions, modifications or variations to the obligations set out in Chapter 7.
A10	The *Corporations Act 2001* (Cth) should be amended to	As above – agree.

	Summarised proposal	Kit Legal comments
	provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.	

	Summarised question	Kit Legal comments
A11	In order to implement Proposals A9 and A10: Should the *Corporations Act 2001*(Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?	Yes. Agree that having thematically consolidated rules (i.e. "Rules on Financial Services Advice or "Rules on Disclosure") would simplify Chapter 7 and would lead to Chapter 7 being much easier to follow and administer.
	Should any such power be granted to the Australian Securities and Investments Commission?	Yes – ASIC would be best placed and have the greatest knowledge/understanding/skills to have the power to make any such rules. However, we agree that ASIC should be supported by an Advisory Body which would be able to contribute industry knowledge and to advise on significant development. It is critical to get industry input. We also agree that any such powers given to ASIC should be subject to Ministerial Consent (except in emergencies).

	Summarised proposal	Kit Legal comments
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.	Yes – given any amendments to the Corporations Act would take years to implement, it would be beneficial if there was an interim solution to make all amendments/exclusions to the obligations in Chapter 7 easy to find and follow. There should be hyperlinks and easy searchability.

11. Definition of 'Financial Product Advice'

	Summarised proposal	Kit Legal comments
A13	Section 766B – replace 'financial product advice' with 'general advice and personal advice'.	Our view is that general advice (usually product advice) should be removed from the definition of financial advice. Financial advice should be limited to personal advice only with a separate category for product information/advice. This would make it clearer to consumers as to what they are receiving. Many advice firms are now no longer providing general advice because their clients assume they are taking into account their circumstances, needs and objectives.
A14	Section 766A(1) – remove 'financial product advice' and insert 'general advice' in the definition of 'financial service'.	The Report notes the substantive differences between personal advice and other financial services under the existing regulatory framework (see Figure 11.1 at 11.53). For example, there are a number of provisions that only apply to personal advice, such as the special licensing requirements, BID and conflicted remuneration prohibitions, and the obligation to provide an SOA. As such, the ALRC proposes to separate personal advice out from the definition of financial service. As above, our view is that product information (typically general advice) should be clearly separated from the concept of financial advice (personal advice). It should be very clear which obligations apply to the relevant service provided. We agree with the proposal to further consider aggregating aspects of regulation that are specific to personal advice. We agree that it is currently not clear on the face of Chapter 7 that certain aspects are only applicable to personal, not general, advice. The Report notes possible future reforms outside the ALRC's current remit, including relating to clarifying general advice to consumers by amending the general advice warning and the move towards professionalising of financial advice. Our view is that there should be a clear distinction between product information and financial advice. It will be interesting to watch developments in these areas.
A15	Section 766B – replace 'general advice' with a term	The ALRC notes that there are concerns arising from the use of 'advice' in 'general

	Summarised proposal	Kit Legal comments
	that corresponds intuitively with that definition.	advice' as this may be seen to imply that a person's individual circumstances have been taken into account. Also, general advice includes advertising/promotional materials and these are arguably not 'advice' in the ordinary meaning of the word. We agree with these concerns. We agree that the term should be replaced with a term that accurately reflects the substance of the definition, mindful that the new term should not negatively impact on consumer understanding. We agree with the ALRC that the term suggested by the Joint Parliamentary Committee 'product sales information' is inapt as it does not cover all of the material that falls within this category. However, a distinction between product-based advice/information (no personal circumstances taken into account), vs actual advice should be clear. We agree that 'non-personalised recommendation' or 'non-tailored recommendation' are more consistent with the definition. However, we are not sure about the ability for consumers to understand this in practical terms, particularly when they have an ongoing relationship with the entity providing it.

Chapter 12: Definitions of 'Retail Client' and 'Wholesale Client'

	Summarised question	Kit Legal comments
A16	Should the definition of 'retail client' in s761G of the Corporations Act be amended to remove the provisions relating to general insurance products, superannuation products, RSA products and traditional trustee company services; and the product value and income exceptions, *or* in some other manner	We agree with removal of the superannuation product exclusion as there is much confusion about when a product or service 'relates to' superannuation. A simple, consistent and objective approach should be applied. We don't agree with removing the product and value objective tests as the financial services industry needs absolute certainty in treating clients as wholesale. Objective tests exist in other jurisdictions at similar thresholds to Australia. There should be a clear objective test that is applied and it should be very clear which assets are included or excluded. The US Accredited

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		Investor net worth tests are clear to follow and clearly explain which assets can be excluded or included and clearly state that assets can be held jointly with a spouse whereas we have a complicated method under the control test. In our view, most of the complexity and confusion with the wholesale tests revolves around the above complication of 'relating' to a superannuation product (vs investments etc) and also in how assets are brought in under control tests for SMSFs and trusts where more complex family wealth structures exist – this is often the case for wholesale clients. Clients should not be penalised by the way they choose to hold or structure their wealth. The test should be very clear as to how it applies to these structures. If these objective tests are removed entirely there would be a huge amount of disruption to the entire industry after a very prolonged period of legislative uncertainty and compliance costs. This would result in a restructure of the industry. Many wholesale advisory firms would have to obtain AFSL variations or potentially lose a large proportion of their client base. In applying for a variation, they are unlikely to have the required responsible managers available. Wholesale funds that have an established client base of happy clients getting solid returns would be entirely disrupted. The disruption from this course of action should not be underestimated. Clients that wish to, should be entitled to have a more streamlined investment and advice process and wider investment options. Unfortunately, treating clients as retail clients has not always offered them protection and creates a great deal of red tape and complex documentation and cost. In many cases wealthy clients wish to be treated as wholesale, not to avoid disclosure or be put into more complex products, but to allow a more user-friendly advice experience not bogged down with red tape and bureaucracy and access to

	Summarised question	Kit Legal comments
		investments that are not available to retail clients. Financial advisers are bound by ethical duties in avoiding the classification of clients as wholesale clients in order to avoid disclosure. We believe the superannuation product exclusion causes significant confusion and should be removed from all wholesale client tests. It does not make sense that a client can be treated as wholesale for advice on their investments within superannuation but then retail when they want to make a superannuation contribution. An alternative, could be to require issuers of superannuation products to treat members or prospective members as retail clients to ensure the client is afforded protections around rights to complain to AFCA, conflicted remuneration and disclosure for superannuation products. However, for all other advice and dealing services, a basic and objective test should apply regardless of product (although see below). In our view, the test should be simple and objective but the ALRC could consider: • a basic level of regulation and protection for wholesale clients with some additional protections for retail clients, rather than the 'all or nothing' approach we see at present • a requirement to assess a client's level of sophistication for a limited pool of very complex financial products.
A17	What conditions or criteria should be considered in respect of the sophisticated investor exemption in s761GA of the Corporations Act.	Again, these should be as objective as possible. For instance, people in certain professions such as finance professionals etc should qualify automatically. There should be protections for the AFSL holder if they have acted reasonably in making the assessment (i.e. having a 'reasonable belief').

Chapter 13: Conduct Obligations

	Summarised question	Kit Legal comments
A18	Should Chapter 7 of the Corporations Act 2001 (Cth) be amended to insert certain norms as an objects clause?	Agree. While norms for the interpretation of chapter 7 may be a useful interpretative tool (and should be preferred over principles, or legislated norms that aren't expressed as objects), they would need to be considered carefully alongside the standards and values set for advisers. For example, the adoption of the Eggleston approach that 'when a person acts for another, the person must act in the best interests of that other' introduces different language to that used in the fairness value and standards 2 and 3.
A19	What norms should be included in such an objects clause?	While we support the inclusion of norms, we would reserve our opinion on what norms should be included until the ALRC has issued its report on Topic C of the terms of reference.

	Summarised proposal	Kit Legal comments
A20	Section 912A(1)(a) should be amended to: separate the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs; replace the word 'efficiently' with 'professionally'; and insert a note containing examples of conduct that would fail to satisfy the 'fairly' standard.	We don't see great value in separating efficiently, honestly and fairly. In our view, the use of 'and' makes it clear that if one of the requirements is not complied with, then the provision overall is not complied with. In relation to changing 'efficiently' to 'professionally', we agree that 'efficiently' is problematic because the court's interpretation of its meaning diverges from the ordinary English usage. An adviser's idea of doing something 'efficiently' is much more likely to relate to business and/or administrative process than it is to competence and capability as per O'Bryan J's interpretation. Whether 'professionally' is an appropriate replacement is debatable as it also seems to be have a wide ranging definition, but as noted by the ALRC it is in keeping with the objects clause at s 760a of the Act (along with fairness and honesty). We would prefer "competent" as a simpler and less ambiguous term.

	Summarised proposal	Kit Legal comments
		We agree that a definition of 'fairly' is unnecessary. We also agree that including a note to help clarify the dimensions of 'fairly' (including a list of factors to have reference to) would be useful and that this is something better considered under Topics B and/or C.
A21	Section 912A(1) – remove requirements to: have in place arrangements for the management of conflicts of interest; maintain the competence to provide the financial services; ensure representatives are adequately trained; and have adequate risk management systems.	We don't think it's necessary to remove these requirements. While they are prescriptive and could arguably come under the requirement to act fairly, we see these three specific requirements as more about the process of compliance, rather than norms of conduct.
A22	To facilitate consistent use of terminology, s 991A of the Corporations Act and s 12CA of the ASIC Act should be repealed.	We agree with the proposal to repeal s 991A. We suggest more analysis is needed to support repealing s 12CA. Our understanding is that s 12CA is intended to capture specific common law unconscionable conduct, and that s 12CB picks up systemic, harder-to-capture conduct. While s 12CB could potentially cover both types of conduct, we suggest this issue needs further consideration.
A23	To facilitate consistent use of terminology, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act and the ASIC Act should be consolidated into a single provision.	We agree with the overall proposal to consolidate the various provisions that cover false, misleading and deceptive conduct. However, we think s 12DA would require substantial modification if this section was chosen as the single provision. We note, for example, that s 12DA is not a civil penalty provision, while s 12DB (false or misleading representations in particular circumstances) is.

	Summarised question	Kit Legal comments
A24	Would the Corporations Act be simplified by amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance; and repealing ss 961C and 961D?	Yes – re-casting s 961B(2) (a) – (f) as indicative behaviours of compliance would simplify the Act. Yes – s 961 and s 961D should be repealed. We agree that these sections don't provide

	Summarised question	Kit Legal comments
		meaningful guidance and instead introduce long defintions for ordinary words. We agree that s 961J overlaps with s 961B. We suggest the content of s 961J could be included as one of the 'indicators' of compliance in conjunction with the best interest duty instead.

Concluding comments

We look forward to reading and responding to the next interim report. We see the hierarchy of laws and their corresponding complexity as one of the biggest compliance hurdles for our clients. A rigorous review including proposals for simplification is long overdue and will be welcomed by the industry.

Kind regards

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