Insurance Council of Australia

Australian Law Reform Commission
To (email): financial.services@alrc.gov.au

11 March 2022 *(as per granted extension)*

To whom it may concern,

Financial Services Legislation 'Interim Report A' submission

The Insurance Council of Australia (Insurance Council[1]) welcomes the opportunity to provide a response to Interim Report A of the Australian Law Reform Commission (ALRC) inquiry into the Review of the Legislative Framework for Corporations and Financial Services Regulation (*Report 137, 2021*).

The inquiry Terms of Reference consider whether the Corporations Act 2001 ('Corporations Act') and the Corporations Regulations 2001 ('Corporations Regulations') could be simplified and rationalised. Given the technical nature of financial services regulation, we welcome the focus of Interim Report A on definitions in corporations and financial services legislation.

The Insurance Council supports the reduction of complexity in the system. With the last similar review of financial services regulation almost a decade ago[2], throughout its report the ALRC must reflect on what previous system reform has occurred, the outcomes of those reforms, and the need for a future-proofed and efficient regime that maintains strong consumer protections and at the same time enables providers to continue to innovate and serve the needs of Australian consumers.

Reflection post-reform and the need for a principled framework

While the focus of this inquiry is technical in nature, particularly the focus on definitions in Interim Report A, we support the Inquiry's broader objectives which seeks to facilitate a more adaptive, efficient, and navigable framework of legislation within the context of existing policy settings. While technical in nature, it poses questions of reform.

The insurance industry operates amongst multiple layers of legislation, some of which date back to the early 1980's. Each tranche of reform adds layers to this regulatory environment, increasing complexity for insurers, impacting on the efficiency of processes and ultimately on the pricing of our products and services.

The industry continues to navigate a significant period of regulatory change, most notably from implementation of recommendations made by the Financial Services Royal Commission. Insurers, their customers, and regulators need time to assess the impact of these far-reaching changes before any further regulatory changes are considered. This is visually represented at **Attachment A**.

As outlined in our submission to the Financial Regulator Assessment Authority (FRAA) Review into the Australian Securities and Investments Commission on 1 February 2022[3], and referred

[1] The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 95% of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of $57.4 billion per annum and on average pays out $164.2 million in claims each working day ($42.7 billion per year)
[2] Financial System Inquiry Final Report | Treasury.gov.au
[3] Assessment of the Australian Securities and Investments Commission (insurancecouncil.com.au)

to further below, the articulation of strategic goals for the financial services industry is needed to serve as a guidepost for financial services regulation and the industry's regulators, as well as for data gathering and to allow for strategic planning and prioritisation.

Given the pace and complexity of the recent reforms, it is crucial that post-implementation reviews are undertaken in a timely way and guided by clearly articulated principles for financial services regulation. This would provide an opportunity for policymakers to repeal outdated regulation or de-prioritise any policy that may have been superseded by recent reforms based on an agreed framework.

Clearly articulated expectations and a transparent policy framework for financial services regulation would result in greater efficiency, consistency and clarity for policymakers, regulators, and insurers. For example, in the UK[4] the Financial Services Regulatory Initiatives Forum (FSRIF) is comprised of the UK's financial regulators and develops a regulatory pipeline with a 24-month horizon (published as a 'Regulatory Initiatives Grid'), providing financial services sectors and stakeholders with the ability to understand and plan for initiatives that could have a significant operational impact.

In consultation with financial services sectors and under the auspices of the Council of Financial Regulators, the Government should develop a set of objectives and principles for financial services regulation and abide by these principles for any current and future regulation and for the post-implementation review of Hayne regulatory reforms. Further, inclusion of the Australian Competition and Consumer Commission in the Council of Financial Regulators would bring a valuable competition focus to this body, which would also meet one of the recommendations of the 2018 Productivity Commission review into Competition in the Australian Financial System.[5]

In the Insurance Council's view, the setting of appropriate objectives and principles for financial services regulation is an essential element to ensure that the ALRC's substantive proposals are implemented in accordance with a considered and holistic approach.

Consultation periods

The insurance industry continues to navigate the cumulative burden of regulation both at the state and federal level. We recommend that industry is provided sufficient time to embed the reforms (at least three years), with data gathered over that period to inform a post-implementation review in October 2024. It is submitted that regard should be had to that review in setting revised strategic goals for financial services and in determining how the substantive recommendation of the ALRC should be implemented.

Going forward, we also recommend the adoption of longer consultation periods by Government and its agencies, noting that the UK standard is around two months. This could be reflected in the Office of Best Practice Regulation's guidance. Further, it will generally take around one year for insurer's to implement changes and then other year to advance these through the renewal cycle.

Regardless, given the points raised in this submission, the Insurance Council's position remains that post-implementation reform review and stocktake is a critical first step.

[4] www.fca.org.uk/publications/corporate-documents/regulatory-initiatives-grid
[5] Inquiry report - Competition in the Australian Financial System Productivity Commission (pc.gov.au)

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Competition for customers

Competitive markets and well-informed consumers offer the best prospect for meeting community needs without government intervention.

As part of our feedback on the draft Regulatory Performance Guide, the Insurance Council supported the need for greater emphasis on economic competition in driving consumer outcomes within financial services. This is in line with the Productivity Commission's (PC) findings as part of its 2018 inquiry, Competition in the Australian Financial System. While the focus of Australia's policy and regulatory settings has primarily been stability, the PC noted that policy settings should also foster competition within financial services. Competitive markets and well-informed consumers offer the best prospect for meeting community needs without government intervention.

The PC further supported the need for a designated competition champion within financial services, noting that none of the regulators within the Council of Financial Regulators (CFR – the primary forum for cooperation between financial regulators) specifically have competition within their objectives. The Australian Competition and Consumer Commission (ACCC) is not included within the CFR. In contrast, the role of competition in enhancing the welfare of Australians is clearly articulated for the ACCC as part of the Object[6]of the Competition and Consumer Act 2010.

Data strategy

In line with our suggestions in relation to planning and prioritisation, we support the publication of a clear data strategy by Australian regulators. Regulators' and policymakers' data strategy and needs should be guided by the Government's strategic goals for the financial services industry, including insurance. As part of this, data requests of the industry should be co-ordinated where possible, for example, in relation to catastrophe events where different Government agencies may be after similar data.

Insurers welcome the Australian Law Reform Commission's examination of potential simplification of laws that regulate financial services in Australia and suggest the adoption of a similar policy prioritisation process and development of a data strategy to that undertaken in the UK, through the Regulatory Initiatives Grid.

Detailed response to Interim Report A

In addition to these broader observations, the Insurance Council welcomes the detailed analysis undertaken by the ALRC and the carefully considered recommendations, questions and proposals in Interim Report A. These recommendations and proposals will be extremely valuable in establishing simpler and strategically aligned financial services regulation into the future.

In the context of our broader observations, the Insurance Council's detailed response to Interim Report A is set out in **Attachment B**.

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[6] Competition and Consumer Act 2010, "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"

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Family violence definition

In addition to the issues raised directly by Interim Report A, the Insurance Council is strongly of the view that a uniform definition of family violence needs to be adopted as a matter of priority.

A uniform definition has been recommended by the Standing Committee on Social Policy and Legal Affairs[7] in order to require policymakers and regulators to consider any implications for survivors of family violence when making new regulation as at times, the lack of thought can lead to unsafe financial system processes and ASIC having to consider legislative relief – which is currently only available for the Corporations Act 2001.

This is further detailed in the Insurance Council's election platform[8], released 22 February 2022.

Summary

Complexity must be reduced in a considered and strategic way that future-proofs regulation of financial services, while ensuring that providers are able to continue to innovate and meet customers' needs. In the context of the two further interim reports to come as part of this Inquiry, it is vital that ALRC considers the broader context within which the specific definitions considered in Interim Report A would operate. This strategic focus is vital to achieve the objective of reducing complexity and improving the efficiency of regulation.

The general insurance industry continues to navigate a period of significant regulatory change, as well as significant changes in the economic environment and the increasingly severe impact of our changing climate. These changes, particularly those related to climate, highlight the need for a strong and robust general insurance industry able to protect against the economic and human costs of these events.

The convergence of technological advances and unprecedented access to data, combined with the digital revolution and changing expectations of consumers, has the potential to transform the insurance industry. The industry supports regulation that will facilitate and improve consumer outcomes by encouraging competition, flexibility, and innovation.

The Insurance Council submits that the ALRC should carry out its valuable review of financial services regulation with these broader issues in mind. The Insurance Council and its members would be pleased to assist the ALRC's ongoing review in any way that will be of value.

Contact

Should you wish to discuss this further, please contact General Manager Policy and Regulatory Affairs, Ms Aparna Reddy at [redacted] or [redacted]

Regards

[redacted]

Andrew Hall
Managing Director and Chief Executive Officer

[7] Standing Committee on Social Policy and Legal Affairs, 2021, 'Inquiry into Family, Domestic and Sexual Violence Report'
[8] Building a more resilient Australia: Policy proposals for the next Australian Government (insurancecouncil.com.au)

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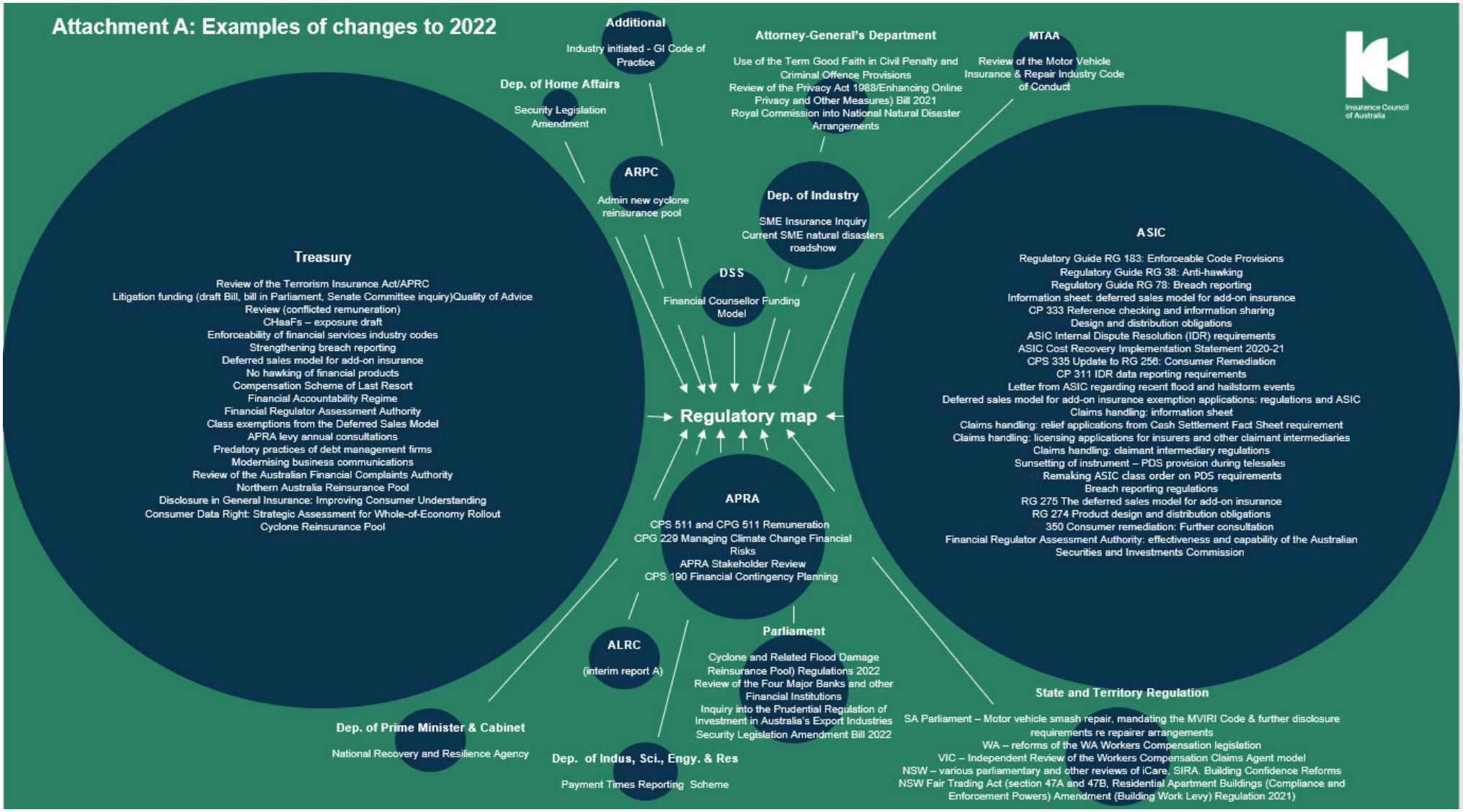

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Attachment B – detailed submissions

1. Recommendations

The Insurance Council supports each of the ALRC's Recommendations 1 to 12, and the definitional principles in Question A2, in Interim Report A (**Interim Report**). Steps taken to improve the clarity, consistency, design and navigability of definitions in the *Corporations Act 2001 (Cth)* (**Corporations Act**) and *ASIC Act 2001 (Cth)* (**ASIC Act**) will benefit their accessibility and consistent interpretation.

It will, however, be very important to ensure that any changes made to definitions in this legislation do not have unintended impacts on the operative provisions in which they are used. We appreciate that is recognised by the ALRC.

Scope of legislation being considered

In addressing its Terms of Reference, the ALRC should not only have regard to the interaction of definitions and regulation between the Corporations Act and the ASIC Act, but also between that legislation and the *Insurance Contracts Act 1984 (Cth)* (**Insurance Contracts Act**). For those in the general and life insurance industries, the overlap between these different legislative regimes can be complicated and inefficient. Accordingly, where appropriate, this submission also refers to the Insurance Contracts Act.

Potential merger of financial services regulation

The Insurance Council supports consideration being given to the merger of at least Chapter 7 of the Corporations Act and Part 2 Division 2 of the ASIC Act, as mentioned in paragraph 4.54 of the Interim Report. This would bring together the core elements of financial services regulation into one piece of legislation, reducing the complexity, inconsistency and regulatory overlap that currently exists.

2. Definitions of financial product and financial service – Chapter 7 and Proposals A3 to A6

The ALRC has proposed that each Commonwealth Act relevant to the regulation of corporations and financial services be amended to enact a uniform definition of the terms "*financial product*" and "*financial service*" (Proposal A3). The Insurance Council agrees with this proposal in principle but suggests that close regard would need to be given to the uniform definitions used.

In Proposals A4 to A6, the ALRC sets out the actions that it considers will be needed to be taken to implement uniform definitions. The Insurance Council and its members are of the view that this measure raises several issues, which are discussed below.

2.1 Financial Product - removal of inclusions (A4(a) and A5)

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The ALRC has proposed that section 764A of the Corporations Act and section 12BAA of the ASIC Act, which currently set out specific inclusions for the definition of "*financial products*", be repealed. Instead, it is proposed that the term "*financial product*" would be defined by reference to a functional definition in section 763A and through express exclusions only. In support of this, the ALRC also proposes that the definitions of "*makes a financial investment*", "*manages a financial product*" and "*makes non-cash payments*" in sections 763B, 763C and 763D of the Corporations Act, and in sections 12BAA(4) to (6) of the ASIC Act, be removed. The ALRC describes this approach as "*it's in, unless it's out*".

While the Insurance Council does not anticipate that this proposed approach will give rise to any uncertainty as to whether insurance is a "*financial product*", we wish to highlight the following important considerations:

- *Future proofing*

  It is very important that any changes made to these definitions have regard to, and allow sufficient flexibility to appropriately regulate, innovative financial products in the future. While it is not directly relevant to general insurance, a recent high-profile example is the buy-now pay-later products offered by providers such as Afterpay. Those products offer customers a product that is similar in nature to a credit product, but which does not fall within the definition of a "*credit contract*" in the *National Consumer Credit Protection Act 2009 (Cth)*, principally due to the payment arrangements put in place.

  Another example can be found in the developing area of robo-advisers, which use machine-learning to determine where to invest client funds.

  For insurance, there is also the potential for substitute products to be developed which, if they do not fall within the definition of a financial product, will be subject to less regulation and not subject to the various consumer protection regimes that apply to financial services and products.

  The inconsistent application of regulation to products such as these can result in considerable customer detriment, especially if a lack of regulation also gives the product provider a competitive advantage in marketing the product (thus enhancing its sales). Future-proofing financial services regulation requires an approach that includes flexible mechanisms to promptly implement policy decisions in relation to innovative financial products.

- *Australian Securities and Investments Commission Act 2001 – revise section 127*

  We request amendment to the above legislation to allow ASIC to share confidential information with the Code Governance Committee (CGC) (and the Code Monitoring Team –

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the outsourced service provider who supports the CGC with Code compliance and monitoring services).

Ability to share confidential information, will permit ASIC to inform the CGC/Code Monitoring Team when it is investigating a general insurer for the purposes of taking enforcement action and/or requiring compensation be awarded to customers. This will be necessary if ASIC is unable to use its section 12A, ASIC Act incidental powers to do all things necessary to perform its functions. The revision will facilitate ASIC taking the lead regulator role for the purposes of industry Codes and Enforceable Code Provisions in the broader financial services eco-system. It will also facilitate the efficient use of resourcing between ASIC and the CGC/Code Monitoring Team, as well as minimise the potential for double jeopardy.

- *Two or more covers or assets*

  While section 764A is predominantly concerned with specifying products that are "*financial products*", it also carries out an important function of clarifying that insurance products that provide two or more kinds of cover (for instance in a bundled product), or provide cover for two or more kinds of asset, are to be treated as separate financial products. That distinction is essential to the effective application of the retail client requirements to general insurance, particularly regarding compliance with the Product Disclosure Statement requirements and the Product Design and Distribution Obligations. Without this provision, those requirements could apply to insurance covers or cover for assets which, if they were provided in separate contracts, would not be subject to them.

  As stated in the Explanatory Memorandum to the *Financial Services Reform Amendment Bill 2003 (Cth)*, these items "*provide a consistent basis for determining when general insurance products are provided to retail clients, irrespective of whether the products are provided individually through separate contracts of insurance or are provided in a 'bundled' contract*" (at 3.45). In practice, they are relied on by insurers in a number of contexts. Accordingly, in the absence of any sound policy basis for their removal, these provisions need to be retained.

- *Uncertainty*

  If the inclusions in section 764A are to be removed, it is submitted that close consideration should be given to whether any uncertainty will be created with respect to products which sit at the edge of the functional definition and, if so, how that should be minimised. Any such uncertainty could lead to poor outcomes if it results in:
  - products being drawn into the financial services regime which should not appropriately be there (where, for instance, that is based on a conservative application of the functional definition to the product);
  - other products which should appropriately fall within the financial services regime, not being treated as such (where, for instance, that is based on a plausible application of the functional definition to the product); or

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- an inconsistent approach being taken to the application of the functional definition by different product providers.

- *Additional definitions*

  Many provisions in the Corporations Act, *Corporations Regulations 2001 (Cth)* (**Corporations Regulations**) and associated legislative instruments are defined by reference to the inclusions in section 764A. For instance, the term "*general insurance product*" is used extensively in the legislation, including:
  - to identify the financial products for which an AFS Licensee is authorised to provide financial services under the terms of their AFS Licence;
  - to define when products are provided to retail clients (section 761G(5));
  - the application of product disclosure requirements (regulations 7.9.15D, 7.9.15E and 7.9.15F);
  - the best interests duty (regulation 7.7A.06); and
  - dealings with unauthorised foreign insurers (section 985D).

  If those inclusions are removed, it will be necessary to replace them with appropriate definitions for those provisions. That should be done in a way which does not increase complexity in the legislation.

2.2 Financial Service – removal of deeming provisions (A4(b) and (c))

The ALRC has proposed amendments to sections 766A and 766C of the Corporations Act and section 12BAB of the ASIC Act to remove the ability for regulations to deem conduct to be included within the definition of a "*financial service*".

The Insurance Council does not anticipate that this proposal would give rise to any uncertainty regarding whether services provided in relation to general insurance are "*financial services*" but notes the importance of retaining a general power to exclude services from that definition.

2.3 Financial Product - incidental product exclusion (A4(d))

The ALRC has proposed that the incidental product exclusion be removed, through the repeal of section 763E, due to its complexity and the uncertainty surrounding its application.

While this would have no direct impact on general insurance, because the incidental product exclusion is not available for insurance products (although that position would change if the inclusions in section 764A are removed, as ALRC has proposed). However, this exclusion can be relied on by some other financial products that can be substituted for insurance, in particular some contract warranty products.

Accordingly, the Insurance Council suggests that a considered review should be carried out prior to making any changes to this provision, examining:

- the types of products that would be drawn into the definition of a "*financial product*" by removal of the exclusion;

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- whether the application of financial services obligations to those products is appropriate;
- whether the amendment could cause any adverse impacts, for instance to the availability of the products concerned or the terms on which they are provided; and
- if it is determined to retain the exclusion, whether any changes should be made to it, including to respond to any changes made to other provisions that define a "*financial product*".

2.4 Financial Product and Services – consolidation of exclusions and exemptions (A4(e) and (f))

The Insurance Council supports the proposal to consolidate existing exclusions and exemptions from the definitions of "*financial product*" and "*financial services*" in delegated legislation. That would reduce complexity and improve navigability in relation to these important concepts.
It is also submitted that the use of application provisions, which alter the manner in which financial services obligations apply to certain types of "*financial product*" or "*financial services*" may also be appropriate, depending on the obligations concerned.

3. Licensing – Chapter 8

While Chapter 8 of the Interim Report, *'Licensing'*, has not resulted in any specific proposals, the Insurance Council agrees that the current licensing regime is complex and, in some respects, uncertain. Much of that is due to the layering of regulation in Chapter 7, so that the full scope of its application to a licensee is dependent on a proliferation of factors. In our members' experience, that can lead to complication and unexpected outcomes.
The following sections provide brief summaries of five issues affecting the general insurance industry that illustrate the complexity and unexpected outcomes arising from these layers of regulation.

3.1 Application to Compulsory Third Party insurance

As the first example, the Insurance Council points to the challenges involved in applying the licensing regime to compulsory third party (**CTP**) insurance, which in some jurisdictions is privately underwritten by general insurers (ie. rather than by State governments, as in other states).

CTP insurance provides compensation for the death of or injury to people involved in a motor vehicle accident. As such, there is a view that CTP insurance is a "*financial product*" for the purposes of Chapter 7 of the Corporations Act – it "*manages financial risk*" under section 763A(1)(b), falls within the definition of general insurance in section 764A(1)(d), and is not excluded by the terms of section 765A, any ASIC declarations made under section 765A(2) or any regulations made under section 765A(3).

If that is right, a general insurer that carries on a business of providing financial services in relation to CTP insurance will need an AFS Licence, unless one of the exemptions apply.

The relevant exemption is set out in section 911A(2)(g), which exempts providers from the requirement to hold an AFSL for a financial service if all of the following apply:

- the person is a body regulated by APRA;
- the service is one in relation to which APRA has regulatory or supervisory responsibilities; and
- the service is provided only to wholesale clients.

If CTP insurance is a "*financial product*", it is provided to persons as "*wholesale clients*". This is because it is a general insurance product that does not fall within any of the definitions set out in the regulations made for section 761G(5). Most of those regulations, for instance, expressly carve out "*insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to … compulsory third-party compensation*". It follows that a general insurer, which *is* a body regulated by APRA, will only be exempted from needing an AFS Licence to provide financial services in relation to CTP insurance if "*the service is one in relation to which APRA has regulatory or supervisory responsibilities*" (section 911A(2)(g)(ii)).

The application of this requirement is uncertain, both with respect to the "*service*" being referred to and whether APRA has "*regulatory or supervisory responsibilities*" in that regard. APRA is responsible for the prudential regulation of the *insurers* that provide CTP insurance, but it is State agencies that are responsible for the regulation of the "*services*" provided in relation to CTP insurance (and APRA recognises that in a number of Memorandum of Understanding with those agencies).

The uncertainty with respect to CTP insurance is not limited to the wording of the exemption in section 911A(2)(g). As the ALRC observes, an AFS Licence also acts as a "*hook or switch*" that enlivens a range of obligations for the AFS Licence holder. There is also uncertainty as to whether those obligations apply to financial products for which a licence is not required, where the person providing the financial product is an AFS Licence holder.

With respect to CTP insurance, even if the exemption in section 911A(2)(g) applies, most insurers that provide CTP insurance will hold an AFS Licence for the purpose of providing financial services in relation to other insurance products (and all six of the insurers that currently provide CTP insurance do hold a licence). The obligations that the insurer needs to comply with as an AFS Licence holder arguably apply to all "*financial services*" provided by it. There is nothing in the Corporations Act that limits those obligations, for instance, to financial services for which an AFS Licence is required. For a general insurer that holds an AFS Licence, therefore, the obligations that attach to the licence potentially extend to dealing in, advising on and handling and settling claims in relation to CTP insurance.

If, on the other hand, a general insurer only provided CTP insurance and relied on the exemption in section 911A(2)(g) not to obtain an AFS Licence, no such "*hook or switch*" would apply and, accordingly, the CTP insurance would not be subject to the obligations that attach to an AFS Licence.

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The Insurance Council has recently raised these issues with ASIC, in relation to the application of the new claims handling and settling services to CTP insurance (though the issue is broader than that).

3.2 Breach Reporting

The ALRC makes observations regarding the "*complex*" new breach reporting obligations, which have been applicable to AFS Licensees since 1 October 2021, in paragraphs 8.25 to 8.30 of its report.

While those obligations were made with the intent of clarifying and removing ambiguity from the breach reporting requirements[1], it is questionable whether that purpose has been achieved.

By way of illustration:

- *Deemed Significant breaches*

  The new breach reporting obligations include a provision, in section 912D(4)(a) to (c), which deems the breach of certain obligations to be "*significant*" for determining their reportability. That approach was introduced in order to reduce the uncertainty that existed under the previous breach reporting regime regarding when a breach is "*significant*" and therefore reportable.

  While the Insurance Council supports that purpose, and appreciates that it was expected to result in an increase in reports being lodged with ASIC[2], our members advise that the application of the new deemed significance provisions is resulting in:
  - a significant increase in the number of breaches being reported to ASIC, including minor and technical breaches; and
  - uncertainty regarding whether some breaches are deemed significant or not.

  The increase in the number of reported breaches arises from the large number of obligations to which the deemed significant provisions apply. Even having regard to the exemptions provided in Regulation 7.6.02A of the Corporations Regulations, the Insurance Council has identified 161 separate obligations for which breaches need to be reported *in all cases* – in other words, where an AFS Licensee is required to report a breach of those provisions, regardless of whether they have any impact on customers, have been immediately resolved, or reflect on the Licensee's provision of financial services generally.

  It follows that some of those reportable breaches may be minor and technical in nature, which is unlikely to assist ASIC with detecting "*significant non-compliant behaviours*" and which places a disproportionately heavy administrative burden on the AFS Licensee and

[1] Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020*, paragraphs 11.1 and 11.7

[2] Treasury "*ASIC Enforcement Review Taskforce Report*", December 2017

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subsequently ASIC. This additional administrative burden ultimately impacts *all* consumers through the costs of products and services, through both additional direct costs incurred by AFS Licence holders and their payment of levies to ASIC under its Industry Funding Levies regime. Further, it remains unclear how ASIC itself will report on or use this data, resulting in questions over what the ultimate benefit of this regime may be, let alone justification for the significant costs involved and the resulting impact on affordability of financial products.

These concerns are demonstrated by breaches of section 12DA(1) of the ASIC Act, which prohibits a person from engaging in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. An AFS Licensee could breach that provision through conduct involving just a single individual, for instance by mis-stating an aspect of cover or the price of an insurance product during a telephone call. Even if that is promptly corrected, for instance through insurance documentation, and identified by the AFS Licensee through its supervisory systems, it will be reportable as a deemed significant breach. There is also no threshold regarding the materiality of the AFS Licensee's conduct, before a breach is realised. It is not necessary, for instance, for the affected customer/s to experience loss as a result.

It is submitted that this may not have been the intent. The Explanatory Memorandum refers, for instance, to an intent that ASIC should not receive "*a large number of largely unproblematic breach reports for minor, technical or inadvertent breaches of civil penalty provisions*"[3].

There are a large number of other obligations subject to the deemed significant reporting requirements which could also result in AFS Licensees having to report minor and technical breaches. These include the following, all of which could be breached with respect to a single interaction:

- section 12DB of the ASIC Act (making a false or misleading representation);
- section 948C (failure to give a Cash Settlement Fact Sheet);
- section 949A (failure to give a General Advice Warning);
- section 1015D (failure to lodge a Product Disclosure Statement notice with ASIC);
- section 1017F (failure to confirm a specified transaction); and
- a failure to report a minor and technical breach under section 912DAA itself.

- *Complexity*

The application of the deemed significance provisions in section 912D(4)(a) to (c) to breaches can be complicated and uncertain in some circumstances. Where an act or omission gives rise to the breach of more than one obligation, for instance, the potential arises for one breach to be deemed significant and another not.

[3] Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020*, paragraphs 11.29

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By way of example, a failure to give a compliant Financial Services Guide to a retail client could result in breaches of:

- sections 941A and 941B, which are civil penalty provisions excluded from the deemed significance provisions by Regulation 7.6.02A; and
- section 952C, which is an offence provision and therefore subject to the deemed significance provisions.

It is unclear whether such a failure should be properly characterised as a deemed significant breach, and therefore reportable. Given that the provisions referred to above relate to the same underlying obligation, to give a compliant Financial Services Guide to a retail client, and that Regulation 7.6.02A expressly excludes the civil penalty provisions relating to it, it seems unlikely that that was the intent.

Similar issues arise in relation to other obligations, for instance with respect to obligations to give a Product Disclosure Statement to retail clients, which is subject to an excluded civil penalty provision in section 1012B and an offence provision in section 1021C(3).

- *Efficient, honest and fair*

If an act or omission results in a breach of more than one core obligation, the matter needs to be assessed against the deemed significant provisions in section 912D(4)(a) to (c) for each breach[4]. It is submitted that that approach gives rise to a particular challenge with respect to the potential breadth and uncertainty associated with the obligation in section 912A(1)(a) to do all things necessary to ensure that the financial services covered by the AFS Licence are provided efficiently, honestly and fairly.

A breach of that obligation constitutes a contravention of a civil penalty provision (section 912A(5A), which is not excluded by Regulation 7.6.02A, and so is deemed significant. It follows that, in any situation where the AFS Licensee has breached a core obligation and also has reasonable grounds to believe it has breached section 912A(1)(a), the breach will be deemed significant and therefore reportable. That will be the case, even if the more specific breach does not fall within the scope of the deemed significant provisions.
It is submitted that this requirement to report all breaches of section 912A(1)(a) could significantly increase the reporting of breaches which, but for that section, would otherwise have fallen outside the scope of the reporting requirements.

- *Serious fraud*

Finally, while the Insurance Council supports the new obligation to report "*serious fraud*" (section 912D(2)(b)), it is submitted that the obligation has an unduly broad scope.

[4] Refer to the Explanatory Statement to *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*, page 5 and ASIC Regulatory Guide 78, example 5(a).

That obligation is not limited to situations relating to financial services. As such, it applies irrespective of whether any such connection exists. This has a number of consequences.

The absence of a connection to financial services means that the obligation can arise in relation to "*representatives*" of the AFS Licensee which have no involvement with the provision of financial services. That group, as defined in section 910A of the Corporations Act, is a broad one. It will include, for instance, all employees and directors of "*related bodies corporate*" of the AFS Licensee. For an international insurer, this would include the employees and directors of related companies, with common ownership by the ultimate holding company, based in countries all around the world. Those companies, and their employees, may have no connection with the AFS Licensee at all, and yet be caught by this reporting obligation.

The obligation could also extend to employees of businesses that have only a very limited connection to the AFS Licensee. For instance, having regard to the new obligations relating to a "*claims handling and settling service*", it could include employees of a commercial enterprise that acts as a "*fulfilment provider*" for the AFS Licensee, such as a motor repairer, builder or retail provider of electronic goods.

The term "*serious fraud*" itself is also a broad one. Based on the definition in section 9 of the Corporations Act, it includes not only most incidences of fraud in Australia and overseas, but also offences involving dishonesty which fall short of fraud.
It is an offence for an AFS Licensee to fail to report serious fraud where there are reasonable grounds to believe it has arisen, with the potential for significant penalties to apply where it fails to do so. The apparent breadth of the obligation which, it is submitted, may have been contributed to by the complexity of law in Chapter 7 of the Corporations Act rather than by design, is of significant concern to the Insurance Council's members.

3.3 AFS Licensee appointments

Where one AFS Licensee appoints another AFS Licensee to provide financial services on its behalf, the responsibilities of each party in relation to those services is complex. For instance:

- While the second AFS Licensee will be principally responsible for compliance with Chapter 7 of the Corporations Act in relation to the financial services provided by it, the first AFS Licensee is obliged to take reasonable steps to ensure it does so (section 912A(1)(ca)). The first AFS Licensee could also be responsible for any activity by the second AFS Licensee in which it was "*involved*" within the meaning of section 79 of the Corporations Act.
- The first AFS Licensee will remain responsible for the Product Disclosure Statement, as the product issuer, and compliance with Insurance Contracts Act requirements.
- Both AFS Licensees could be responsible for misleading and deceptive conduct, or unconscionable conduct, of the second AFS Licensee in connection with its provision of financial services.

This overlap in responsibilities can create significant challenges in practice, for instance where the two AFS Licensees have different systems and processes for meeting their compliance obligations.

3.4 Giving a Product Disclosure Statement

Obligations that attach to AFS Licence holders need to:

- provide sufficient flexibility to enable ready amendment to reflect changes in external circumstances; and
- be monitored for the need for such change.

By way of example, for general insurance products, a Product Disclosure Statement need not be given to a customer at or before providing advice or an offer, or issuing the product, in certain time-critical situations. In those cases, the regulated person must provide certain verbal information to the customer at the time and then give the Product Disclosure Statement to the customer "*as soon as practicable*" after that time and in any event within five business days (section 1012G as modified by regulation 7.9.15H).

In practice, general insurers rely upon this provision in relation to call centre sales and other situations where it is impractical to provide a Product Disclosure Statement at that time. While the requirement for a Product Disclosure Statement to be given to the customer within five business day may have been appropriate when these provisions were put in place, it is submitted that that is no longer the case. Where a Product Disclosure Statement needs to be given to the customer by mail, Australia Post's performance standards do not always result in the timeframe being met. It is submitted that a ten business day period would be more appropriate, however that has not been accommodated.

3.5 Retail and wholesale obligations

Finally, it is worth noting the complexity in how obligations attach to the holding of an AFS Licence, depending on the type and/or nature of the financial product concerned, the characteristics of the person to whom it is being provided and, in some cases, other factors.

For example, in relation to general insurance:

- the Product Disclosure Statement, Design and Distribution Obligation, anti-hawking and Confirmation requirements all need to be complied with for products provided to retail clients, which are defined by section 761G(5) based on the customer's characteristics and the kind of product;
- the unfair contract term provisions in the ASIC Act apply to products that fall within the definition of a "*consumer contract*" or "*small business contract*" in section 12BF, based on the customer's characteristics, and the price and use of the product;
- the insured's duty to disclose information to the insurer in relation to the product varies depending on whether the product is a "*consumer insurance contract*" as defined in section 11AB of the Insurance Contracts Act, which is based on the product's use;

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- the Deferred Sales Model needs to be applied to "*add-on insurance*" products that are offered or sold to "*consumers*", which is defined in section 12BC of the ASIC Act based on the price for and use of the product, and subject to the product exemptions set out in Part 2A of the *ASIC Regulations 2001 (Cth)* (which for "*business-related*" insurance products is dependent on the price of the product and whether the principal product or service to which it relates was acquired by a consumer in the course of carrying on a business);
- the newly commenced financial services obligations relating to "*claims handling and settling services*" apply to all insurance products, irrespective of whether they are provided to retail or wholesale clients and yet, the Cash Settlement Fact Sheet and Confirmation of claim transaction documents only need to be given to retail clients; and
- complaint handling and dispute resolution requirements arising from section 912A(1)(g) of the Corporations Act and ASIC's Regulatory Guide 271 apply to products provided to retail clients, based on the definition in section 761G(5), but using a modified definition of "*small business*" to align with the definition in the AFCA Rules.

This complexity, which has largely grown out of amendments to financial services legislation over the years, does not benefit customers and creates an unnecessary compliance burden (and risk) for the Insurance Council's members and other AFS Licensees.

4. Disclosure – Chapter 9 and Proposals A7 and A8

4.1 Definition of Responsible Person (A7)

The Insurance Council supports proposal A7, to replace references to "*responsible person*", as defined in sections 1011B and 1013A(3), with "*preparer*".

4.2 Outcomes based disclosure (A8)

In making its proposal A8, to reframe financial product disclosure requirements to incorporate outcomes-based disclosure, the ALRC recognises that implementation of the proposal would require a significant investment of time and resources by the government and industry.
The Insurance Council agrees that the current product disclosure regulation is complex and raises significant challenges, in particular due to that regulation being set out in separate pieces of legislation (ie. for insurers, the Corporations Act, ASIC Act and Insurance Contracts Act, as well as related subordinate legislation).

The Insurance Council has given considerable focus itself to addressing those challenges, for instance:

- in its 2015 report "*Too Long; Didn't Read, Enhancing general insurance disclosure*";
- in its 2016 submissions to Treasury on "*Facilitating electronic disclosure in the insurance sector*", which addresses regulatory limitations on the use of electronic disclosure for insurance; and
- by publishing a "*Guide on best practice disclosure*" for use by Insurance Council members.

The Insurance Council would, accordingly, welcome steps to reduce complexity and add flexibility into the regulation relating to product disclosure.

Any changes to disclosure requirements, though, could have a material impact on the insurance industry, both with respect to the products offered and their terms, and the associated compliance costs.

Accordingly, any review of financial product disclosure requirements should:

- only be carried out after clear policy objectives for financial product disclosure for insurance have been established and, then, taking a strategic approach to its implementation;
- have regard to changes that need to be made to other legislation, including the Insurance Contracts Act and *Electronic Transactions Act 1999 (Cth)*, for the outcomes-based disclosure requirements to be made more effective;
- critically assess the continuing need for and appropriateness of existing disclosure requirements, including Financial Services Guides when provided by insurers and Key Fact Sheets (under section 33C of the Insurance Contracts Act);
- consider carefully whether disclosure requirements should vary by reference to different kinds of retail insurance product;
- have regard to the needs of vulnerable customers, including appropriate exclusions for family violence victims – for instance, where the sending of notices/disclosure documents could lead to a victim's safety being under threat (an issue that is unfortunately all too common across the insurance industry and other financial services sectors); and
- pay close regard to the benefits and costs associated with any proposed changes.

5. Exclusions, Exemptions and Notional Amendments – Chapter 10 and Proposals A9 to A12

5.1 Consolidation and powers (A9 and A10)

The Insurance Council supports the consolidation of all exclusions, exemptions and notional amendments to provisions in Chapter 7 of the Corporations Act into a single legislative instrument, or a small number of thematic legislative instruments, provided those documents can be kept current and presented in a way which enables ease of navigation.
The Insurance Council also supports the replacement of existing powers to exclude, exempt and make notional amendments in relation to Chapter 7 with a sole power to make exclusions and exemptions, provided the power allows sufficient flexibility to appropriately apply financial services legislation to the wide range of industries, products, services and channels to which it applies.

It is noted that the ALRC envisages that this sole power would allow for the use of "*conditional*" exemptions and exclusions, which could achieve similar outcomes as notional amendments. While the Insurance Council agrees with the ALRC that such conditions add complexity and should be minimised where possible, it submits that in many cases such

conditions are an essential element of the exemption or exclusion being granted. Where the conditions are reasonably needed, the power should allow for their use.

ASIC Act and Insurance Contracts Act exclusion and exemptions

It is submitted that ASIC should also be given a power to create appropriate exclusions and exemptions from the ASIC Act and the Insurance Contracts Act.

While ASIC's powers have allowed Chapter 7 of the Corporations Act to be adapted to a wide range of circumstances, the lack of similar powers in the ASIC Act and the Insurance Contracts Act has resulted in a rigid application of those pieces of legislation.
For example, the recent application of unfair contract terms to insurance and the newly commenced Deferred Sales Model have been implemented through amendments to the ASIC Act, rather than the Corporations Act, meaning that ASIC has not been provided with the opportunity to use its powers to provide clarity on how these broad-brush regimes should apply to particular products and contexts.

It is a perverse outcome that ASIC's ability to ensure efficient and appropriate operation of legislative regimes can be hamstrung by the government's decision to implement a reform through amendments to one piece of corporations' legislation rather than another. A broader power to create appropriate exemptions across the regulatory landscape would not only benefit regulated providers, but also improve ASIC's ability to ensure efficient and proportionate regulation of financial services.

Consolidation into Regulations
It is also submitted that careful consideration should be given to moving some exclusions, exemptions and notional amendments that are currently recorded in legislative instruments into the Corporations Act or Corporations Regulations themselves. That is likely to be appropriate where an exclusion, exemption or notional amendment is material in nature, was established for reasons that were unlikely to change and where its permanent nature has been assessed over a reasonable period of time. For instance, regulation 7.9.15H has the effect of entirely replacing section 1012G with the text in the regulation. That regulation was made in 2005 and yet section 1012G remains in the legislation. Section 1012G should be amended to simply reflect the text of the regulation, in which case the regulation could then be repealed.

It is submitted that the incorporation of such provisions into the Corporations Act or Corporations Regulations will improve the clarity and navigability of those documents. It will also remove the need to regularly review and re-make provisions recorded in legislative instruments, having regard to sunset-dates set for those instruments.

By way of example, general insurers have relied on a legislative instrument since 2011 to provide insurance quotes to retail clients over the telephone, which is a common channel used by retail clients to make enquiries about general insurance. Without that instrument, section 1012B(3) arguably prevents the insurer from providing a quote (at least where that includes an offer) until they have given the customer a Product Disclosure Statement which, as a practical

matter, cannot normally be done during the course of a telephone call. Class Order CO 11/842 was recently replaced with *ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66* to allow for quotes to be given in those circumstances. While those instruments are effective, it is submitted that such an important qualification to section 1012B should not be left to a legislative instrument which is scheduled to sunset in a few years' time (in this case on 1 March 2027).

5.2 Rules (A11)

The Insurance Council supports the use of "*Rules*", at an appropriate level within the legislative hierarchy, to add clarity to broader obligations set out in financial services legislation. Rules could provide an additional, positive vehicle for setting out detailed requirements relating to those obligations which, currently, are addressed in exclusions, exemptions and notional amendments. It is submitted, however, that Rules should not be used in a way which just adds to the existing complexity in regulation, for instance by providing another source of potential modifications.

5.3 Interim improvements (A12)

The Insurance Council supports the proposal to develop, as an interim measure, a mechanism to improve the visibility and accessibility of notional amendments to the Corporations Act.
It is submitted that Option C, which involves the Corporations Act and Corporations Regulations being published with references and hyperlinks to any delegated legislation that notionally amends its provisions, would be optimal and should be explored as a matter of priority. While that option will not reduce the existing complexity in the legislation or the need to jump between different levels of regulation to determine how a particular product or service is regulated in the relevant circumstance, as an interim measure this would improve the transparency and navigability of the regulatory landscape (at least when in digital format).

6. Definition of Financial Product Advice – Chapter 11 and Proposals A13 to A15

6.1 Financial Product Advice (A13)

Having regard to the Insurance Council's submissions set out sections 6.2 and 6.3 below, it does not consider there to be a sufficiently good reason for replacing the definition of "*financial product advice*" in section 766B of the Corporations Act with relevantly amended references to "*general advice*" and "*personal advice*". The term "*financial product advice*" is currently used extensively in Chapter 7 of the Corporations Act. The proposed amendment would therefore result in a need to make many other changes, which are unlikely to simplify the regulation.

6.2 Decoupling Personal Advice from a Financial Service (A14)

The Insurance Council is concerned that the proposal to remove "*personal advice*" from the definition of a "*financial service*" could have the potential to increase, rather than reduce, complexity in relation to the operation of the advice provisions in the Corporations Act. The

delineation between general advice and personal advice is a fine one[5]. Amendments that remove personal advice from the definition of financial service, while leaving general advice within that definition, may not be helpful in that context.

The ALRC provides some useful commentary on the delineation between "*general advice*" and "*personal advice*", though without proposing any amendments in this regard[6]. It is submitted that the definitions of those terms, and the delineation between general advice and factual information, warrant further consideration by the ALRC as part of its Interim Report C. Recent judicial interpretation of the terms illustrates a significant level of uncertainty regarding their application in practice. Given the quite different regulatory requirements that apply to "*personal advice*", it is essential that the distinction between it and "*general advice*" (and factual information) is clear.

The financial advice definitions can also create practical challenges. In the insurance context, for instance, on-line calculators designed to assist customers with their purchase of insurance, have had to rely on relief[7] from ASIC to avoid an impractical application of the financial advice requirements. Any consideration of the definitions of "*personal advice*" and "*general advice*" should also have regard to those practical impacts.

6.3 General Advice definition (A15)

The Insurance Council has no objection in principle to the proposal to review the name of "*general advice*", though notes ASIC's findings in 2021[8] that that is unlikely to have a material effect on consumer understanding of the concept. The term "*general advice*" has also been used with customers now for nearly 20 years, so there is likely to be at least some level of understanding of the term. The "*Review of the quality of financial advice*" being carried out by Treasury this year may produce findings relevant to this proposal and, if so, regard should be had to those. Subject to that, care should be taken to ensure that any change to that name, or subsequently to the name of "*personal advice*", enhances clarity to the concept of financial advice.

7. Definitions of Retail Client and Wholesale Client – Chapter 12 and Proposals A16 to A17

7.1 Definition of Retail Client (A16)

The Insurance Council submits that the removal of section 761G(5), which identifies when general insurance products are provided to a person as a retail client, would result in a significant and inappropriate expansion to the application of retail client requirements to general insurance. There is no evidence to suggest such a change is warranted.

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[5] *Westpac Securities Administration Ltd v ASIC* (2021) 270 CLR 118

[6] Paragraphs 11.107 to 11.117 of the Interim Report

[7] ASIC Corporations (Generic Calculators) Instrument 2016/207

[8] ASIC "*Findings from Consumer Research on General Advice label*", 4 May 2021

The existing terms of section 761G(5), and associated Regulations, have been carefully defined having regard to the particular nature of general insurance products and, in particular, those kinds of product that require the regulatory protections afforded to retail clients. There are many provisions in Chapter 7 of the Corporations Act that apply to general insurance provided to retail clients on that basis. It is submitted that a definition of "*retail client*" which refers only to whether a person is an individual or "*small business*" would significantly alter that application and would not, alone, be appropriate for general insurance.

A large proportion of general insurance products are sold to individuals or "*small business*" in at least some circumstances. Those include insurance for management liability, professional indemnity, crime, commercial property, cyber insurance, medical indemnity and other commercial classes. Many of these products have multiple variants for different industry classes or are tailored to individual customers through endorsements. The application of "*retail client*" regulation to all of those products, including with respect to Product Disclosure Statement requirements, Design and Distribution Obligations, anti-hawking and confirmation requirements, and other conduct obligations, would have a significant impact on the products, their distribution and associated costs.

In addition, some general insurers currently do not provide any general insurance to retail clients. Those insurers would need to develop the systems and processes required to meet those requirements with respect to all general insurance products provided to individuals or "*small business*", or exit the market, which could exacerbate existing challenges for insurance availability and affordability for small business.

The proposed changes to the "*retail client*" definition may also not benefit, or even be adverse to, customers. The imposition on business customers, for instance, of retail client protections could be obstructive, for instance if the anti-hawking prohibitions prevented or delayed a discussion about insurance products. Many business customers also use insurance brokers, that have a fiduciary duty to act in those customers' best interests. Brokers provide specialist advice to their customers as well as detailed reports on cover which are tailored to the customer's specific circumstances. This makes a Product Disclosure Statement of limited value to broker customers.

Those brokers could also be impacted by an expanded "*retail client*" definition, for instance if they have to comply with Design and Distribution Obligation and anti-hawking requirements in relation to business insurance products.

Finally, we note that there is currently a close alignment between the "*retail client*" definition used for general insurance in the Corporations Act and the "*eligible contracts*", "*prescribed contracts*" and "*prescribed events*" used in the Insurance Contracts Act. Given the impact of those provisions on insurance product wordings, for instance in relation to the overlap in disclosure requirements, it will be important to maintain consistency between them.
For these reasons, the Insurance Council submits that it will be very important not to move away from the current definition of "*retail client*".

Medical Indemnity insurance

While medical indemnity insurance is a form of professional indemnity insurance, it is currently classified as a product which is provided to retail clients (section 761G(5) and regulation 7.1.17A). That approach was put in place in 2003 for reasons which largely do not now apply. While the different nature of medical indemnity insurance has subsequently been recognised through express exclusions for a number of retail client requirements, including the Design and Distribution Obligations (regulation 7.8A.20(4)), anti-hawking requirements (regulation 7.8.21A(f)) and unfair contract terms (section 12BL(1A) of the ASIC Act), its classification as a retail product remains. It is submitted that medical indemnity insurance should be removed from the list of general insurance products that are provided to persons as retail clients. Consistent with this submission, the proposed removal of section 761G(5) would be inappropriate for medical indemnity insurance (ie. as it would for other professional indemnity insurance products).

Retail clients and consumers

The use of different definitions and factors for determining whether legislative obligations apply to insurance products, in particular circumstances, creates significant complexity for insurers. Those factors can include the kind of insurance product and its price, the customer's characteristics (including, if they are a business, the number of their employees) and the proposed use of the product (see section 3.4 above for more detailed submissions on this point). In practice, this complexity results in the need for detailed systems and procedures for determining and applying the relevant regulation.

Further, it is common for the various consumer protection regimes that are included in the financial services regulatory regime to apply to retail clients, but not wholesale. This replicates the approach taken in consumer protection regimes applying to other sectors (namely, in the Competition and Consumer Act 2010), with a similar policy intent – to protect smaller and less sophisticated customers, who are less likely to have engaged skilled advisers or may be less familiar with financial terminology or documentation, but not to extend those protections to larger or more sophisticated customers.

The Insurance Council is not aware of any reason based in sound public policy to change this approach, let alone to implement this approach in a manner that results in a different approach for financial services compared to other sectors of the economy.

8. Conduct Obligations – Chapter 13 and Proposals A18 to A24

8.1 Norms (A18 and A19)

The Insurance Council supports the proposal to insert "*norms*" as an object clause or clauses for Chapter 7 of the Corporations Act. While it also broadly supports the use of the six norms identified by the Financial Services Royal Commission for that purpose, it is submitted that

careful consideration should be given, at the appropriate time, to whether any changes should be made to those norms having regard to other proposed changes to financial services legislation (including in the ALRC's Interim Reports B and C).

8.2 Efficient, honest and fair (A20)

The Insurance Council supports the need to clarify the scope and operation of section 912A(1)(a). It is submitted that careful consideration should be given to whether that clarity would be most effectively achieved through the proposed amendments in Proposal A20 or otherwise.

In that regard, it is submitted that:

- While the requirement for financial services to be provided "*honestly*" is relatively clear, the scope of the requirements to do so "*efficiently*" and "*fairly*" would greatly benefit from further guidance. Whether that is most effectively done through the inclusion of examples, or some other method, should be carefully explored. As to the content of that guidance, the Insurance Council's members generally found ASIC's Information Sheet 253 to provide useful guidance regarding how the obligation to act "*efficiently, honestly and fairly*" applies in the context of insurance claims handling.
- The Insurance Council does not object to replacement of the word "*efficiently*" with "*professionally*", having regard to the meaning given to the word by the courts[9], however notes that the word "*efficiently*" can also have an appropriate application in many contexts (for instance, systems for the online distribution of insurance, without any customer service interaction). In either case, clarity regarding the underlying obligations will be most important.
- Whether the term "*efficiently, honestly and fairly*" will continue to operate as a single compendious obligation or three separate obligations, and the practical implications of that, should also be clarified[10]. As a general observation, it is submitted that the treatment of the requirement to act "*honestly*" as a separate obligation is uncontroversial. However, the obligations to act "*efficiently*" and "*fairly*" can be interdependent, for instance if an increase in efficiency might result in poorer customer outcomes (and therefore reduced fairness in some cases) or an increase in fairness could only be achieved at significant cost and inconvenience (thereby reducing efficiency).
- Clarification of the meaning of the term "*efficiently, honestly and fairly*" should have regard to other similar concepts, such as the duty to act with the utmost good faith (section 13 of the Insurance Contracts Act) and the obligation not to engage in unconscionable conduct.
- Any changes to this provision should also have regard to the points made in relation to the reporting of breaches in section 3.2 above, particularly regarding the current requirement that any breach of a core obligation which is also a breach of section 912A(1)(a) needs to be reported as a deemed significant breach.

[9] For instance, in *ASIC v Westpac Securities Administration Ltd* (2019) 272 FCR 170

[10] Noting the inconsistent views on this issue *ASIC v Westpac Securities Administration Limited* [2019] FCAFC 187, *ASIC v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208 and *ASIC v RI Advice Group Pty Limited (No 2)* [2021] FCA 877

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8.3 Other changes to section 912A(1) (A21)

The Insurance Council submits that the proposal to remove specific obligations in section 912A(1) relating to conflicts of interest, competence, the training of representatives and risk management systems will not improve clarity in the legislation. Any simplification achieved by doing so would be outweighed by a reduction in clarity, unless the requirements are moved to another prominent part of the legislation.

8.4 Unconscionable Conduct (A22)

The Insurance Council supports the proposal to repeal section 991A of the Corporations Act and section 12CA of the ASIC Act, so as to reduce the provisions currently dealing with unconscionable conduct to one, in section 12CB of the ASIC Act. This, and the following Proposal A23, could also be addressed by merging Chapter 7 of the Corporations Act with Part 2 Division 2 of the ASIC Act into a separate piece of legislation. It is submitted that that would improve consistency across a number of concepts, such as these.

8.5 False or misleading representations and misleading and deceptive conduct (A23)

The Insurance Council supports the proposal to consolidate the current prohibitions on false or misleading representations and misleading and deceptive conduct into a single provision.

8.6 Best Interests Duty (A24)

The proposed amendment of section 961B(2) and repeal of sections 961C and 961D would introduce considerable uncertainty as to whether a person providing personal advice has met their best interests duty. That change would be particularly pronounced for persons advising on general insurance products, assuming the general insurance specific requirements in section 961B(4) are also removed. Given the consequences of a breach of the best interests duty, these proposed changes would likely discourage some providers from continuing to give personal advice to their customers.