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Australian Law Reform Commission
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Dear Commissioners

Submission on ALRC Financial Services Legislation: Interim Report A

We appreciate the opportunity to make a submission in relation to the Australian Law Reform Commission (**ALRC**) *Financial Services Legislation: Interim Report A* released on 30 November 2011 (**Report**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

We agree that the financial services legislative framework is unnecessarily complex and would benefit from reform.

We support all of Recommendations 1 to 13 in the Report. Subject to our comments in this submission, we also generally support the objectives of the proposals made in the Report. In particular, we support:

(a) the use of the definitional principles proposed by the ALRC to reduce complexity and improve consistency of terminology (Question A2);

(b) the use of consistent definitions of 'financial product', 'financial service' and 'credit' in financial services regulation (Proposals A3 and A6(c));

(c) including fundamental norms of conduct in the legislation and simplifying the conduct obligations (Question A18 and Proposal A20) and we have set out our proposals in this regard in our more detailed submissions below; and

(d) consolidating the misleading and deceptive conduct provisions (Proposal A23).

We have set out in this submission how we believe these objectives could be achieved.

However, we believe the removal of certain terms and definitions as suggested in the Report would outweighed by the loss of certainty and clarity.

Our detailed submissions in response to the proposals and questions raised in the Report are set out below.

1. Additional data

Question A1: What additional data should the ALRC generate, obtain, and analyse to understand:
a. legislative complexity and potential legislative simplification;
b. the regulation of corporations and financial services in Australia; and
c. the structure and operation of financial markets and services in Australia?

1.1 The question of evidence to support regulation, regulatory reform or simplification is always a challenging one. The research undertaken by the ALRC's research to date seems to have been very extensive and appropriate to identify legislative complexity and potential legislative simplification. The ALRC has also done significant work to identify issues relating to the existing financial services regime and to identify approaches in other jurisdictions.

1.2 As will become apparent in this submission, we strongly support an approach which combines principles-based legislation with the capacity for an appropriately mandated regulator to make more detailed rules to supplement, expand on or clarify the application of the principles in specific situations and for specific activities. We therefore submit that a good use of the ALRC's resources in this area would be explore in more detail the strengths and weaknesses of this approach where it has been employed whether that be in an overseas financial services regime or a domestic regulatory system in a different sector of the economy.

2. When to define

Question A2: Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to define (Chapter 4):
a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.
b. To the extent practicable, words and phrases with an ordinary meaning should not be defined.
c. Words and phrases should be defined if the definition significantly reduces the need to repeat text.
d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

2.1 We agree that the above definitional principles are appropriate and have the potential to reduce complexity as we believe that a principles-based approach to legislation is more effective in developing the law in a more consistent and navigable manner. This is because a principles-based approach redirects focus on the intent and objects outlined by the principles.

2.2 We also agree that definitions should not be used to impose obligations as this practice does add to complexity and confusion.

Consistency of definitions (Chapter 5):
a. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.
b. Relational definitions should be used sparingly.
c. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

2.3 We strongly support these principles. There is no doubt that much of the complexity of the current regime results from different definitions applying in different parts of the *Corporations Act 2001* (Cth) (**Corporations Act**) and across different related statutes, in particular the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

2.4 An additional principle which we believe should be applied is that consistent terminology should be used throughout financial services legislation, including delegated legislation, where a similar concept is being referred to. This principle may be inferred from the principles articulated by the ALRC but we believe it should be explicitly stated. Using consistent terminology and definitions

would significantly simplify not only the interpretation of financial services regulation but also its application and understanding.

2.5 For example, the Corporations Act, the ASIC Act, AFCA and industry codes use either the term 'retail client', 'consumer' or a variation of these terms to identify those that require consumer protection.

2.6 All of these terms have the same purpose: to identify when additional protections should apply to interactions between financial service providers and their customers. However, each Act has a different concept to determine when consumer protection measures should apply and creates different standards based on arbitrary differences in definitions. This leads to complexity without any corresponding benefit for either consumers or financial service providers. It does in fact mean that some consumers will not receive some consumer protections that apply to other consumers.

2.7 Therefore, terms should be used consistently, where they capture the same concept, as this ensures that consumer protections are delivered consistently.

Design of definitions (Chapter 6):
a. Interconnected definitions should be used sparingly.
b. Defined terms should correspond intuitively with the substance of the definition.
c. It should be clear whether a word or phrase is defined, and where the definition can be found.

2.8 We agree with these principles.

2.9 We also believe that definitions should be found in one place to the extent that this is practicable.

3. Definitions of 'financial product' and 'financial service'

Proposal 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'.

3.1 We agree with this proposal. As set out in our response to Question A2 above (section 2), consistent definitions should be used throughout financial services legislation.

Proposal A4: In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the Corporations Act and the ASIC Act should be amended to:
a. remove specific inclusions from the definition of 'financial product' by repealing s 764A of the Corporations Act and omitting s 12BAA(7) of the ASIC Act;
b. remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the Corporations Act and s 12BAB(1)(h) of the ASIC Act;
c. remove the ability for regulations to deem conduct to be a 'financial service' by amending ss 766A(2) and 766C(7) of the Corporations Act, and ss 12BAB(2) and (10) of the ASIC Act;
d. remove the incidental product exclusion by repealing s 763E of the Corporations Act;
e. insert application provisions to determine the scope of Chapter 7 of the Corporations Act and its constituent provisions; and
f. consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'.

3.2 We understand that the proposal to remove the specific inclusions from the definition of 'financial product' (Proposal A4(a)) and returning to the functional definition of the term is intended to reduce complexity. However, we query how effective this would be in practice as the specific inclusions (and the related exclusions) provide clarity to financial service providers about whether and how known and well understood categories of financial products are captured by the financial services regime. The specific inclusions also ensure that certain products that do not clearly fall within the functional definition (e.g. derivatives or foreign exchange contracts which are not used for a risk management purpose) are subject to regulation. Therefore, we are concerned about the uncertainty created by removing specific inclusions.

3.3 If there is a concern about including this level of complexity in principles-based legislation, then an alternative possibility would be to include the specific inclusions and exclusions in the regulations

which would then also create greater flexibility to adjust the boundary settings for financial regulation and enable a more responsive regulatory system. Of course, this approach would retain the regulation making powers contrary to the ALRC proposals.

3.4 We also strongly disagree with the proposal to remove the incidental product exclusion (Proposal A4(d)). The incidental product exemption performs an important role where a product is not specifically included in the financial services regime – it is then subject to general consumer protection law regulated by the ACCC rather than the financial services consumer protection regime regulated by ASIC. We submit that this is an appropriate outcome and in fact we believe that the incidental product exemption should also apply under the ASIC Act for that reason.

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

a. 'makes a financial investment' (s 763B Corporations Act and s 12BAA(4) ASIC Act);
b. 'manages financial risk' (s 763C Corporations Act and s 12BAA(5) ASIC Act); and
c. 'makes non-cash payments' (s 763D Corporations Act and s 12BAA(6) ASIC Act).

3.5 We understand that the proposal to remove these definitions seeks to facilitate better understanding of the concept of 'financial product' by removing its nested definitions. However, we are cautious about its implications. The definitions of these terms have received some judicial consideration and we are concerned that repealing the definitions may increase uncertainty. The definitions themselves are principles-based and not unduly complex. If they are repealed, careful consideration should be given to whether the terms themselves need any adjustment to ensure they capture what is intended to be caught. It may also be appropriate to include the definitions in regulations or rules made by the relevant conduct regulator (e.g. ASIC) or enable that to occur.

Proposal A6: In order to implement Proposal A3:

*a. reg 7.1.06 of the Corporations Regulations 2001 (Cth) (**Corporations Regulations**) and reg 2B of the Australian Securities and Investments Commission Regulations 2001 (Cth) (**ASIC Regulations**) should be repealed;*
b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the Corporations Act and in s 12BAA(1) of the ASIC Act; and
*c. a definition of 'credit' that is consistent with the definition contained in the National Consumer Credit Protection Act 2009 (Cth) (**NCCP Act**) should be inserted in the Corporations Act and in the ASIC Act.*

3.6 As set out in our response to Question A2 above (section 2), we agree that terms should have the same meaning throughout financial services legislation. Therefore, we agree that a consistent term should be used for 'credit' and that this term should have the same meaning across the Corporations Act, ASIC Act and NCCP Act. As the ALRC notes, care will need to be taken to ensure that this does not have any unforeseen consequences and that particular activities related to credit continue to be regulated in an appropriate manner. However, we acknowledge that this could be done through the use of application provisions and the use of appropriate terminology for these activities.

4. Disclosure

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

4.1 While we understand the logic of this proposal, we are concerned that use of the term 'preparer' has its own confusion when it is intended to mean the person responsible for the Product Disclosure Statement (**PDS**) rather than the person who did in fact prepare it on their behalf. The simplest approach may in fact be to refer to the 'issuer' or 'seller' of the product as that is the person who is responsible for preparing the PDS and liable for its contents..

Proposal 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.

4.2 We believe that there is merit is considering an outcomes-based standard for disclosure. However, we note that the current regime started with an outcomes based approach which can still be found in the following locations in the statute:

(a) in the introductory words of section 1013D(1):

> *... a Product Disclosure Statement must include the following statements, and such of the following information* ***as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product*** ... (emphasis added)

(b) in section 1013E:

> *... a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.*

4.3 The original intention of the PDS regime when it was introduced was to *'provide consumers with sufficient information to make informed decisions in relation to the acquisition of financial products, including the ability to compare a range of products'*.[1]

4.4 Despite the approach and objective of Chapter 7 of the Corporations Act when it was first enacted in its current form, time, the consistent demand for greater certainty and the desire to ensure issuers incorporated certain information in PDSs in a particular form has led to the complex and confusing state of PDS regulation that we have today.

4.5 We therefore support inclusion of a broad based disclosure requirement that should apply to all financial service providers, along the lines of requiring providers to provide the information that consumers could reasonably be expected to require when deciding whether to acquire a service or product from the provider. However, the reality is that regulators, consumer groups and industry will require greater certainty and specificity for disclosure document requirements in particular cases. We therefore believe that it is important for the conduct regulator to have the power to make rules that prescribe the form of disclosure required in specific circumstances.

5. Exclusions, exemptions and notional amendments

Proposal A9: The following existing powers in the Corporations Act should be removed:

a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and

b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

5.1 We agree in principle with the ALRC's assessment that removing powers to create exclusions, grant exemptions, and notionally amend Chapter 7 of the Corporations Act would largely reduce the overall landscape of the financial services regulatory ecosystem, which in turn would be an effective tool in reducing overall complexity, resulting in greater transparency and coherence of the legislative regime.

5.2 We agree with the ALRC's proposal in the Report that all powers to omit, modify, or vary provisions of Chapter 7 through notional amendments should be replaced by the ability of the conduct regulator make 'rules' to specify the specific requirements that financial services providers are required to meet in the circumstances specified in the rules. The rules should have the ability to specify what a provider is required to do to meet one or more of the principles set out in the statute and create an exhaustive regime or 'safe harbour' in appropriate specified circumstances. However, in all cases (i.e. whether the rules are exhaustive or not), the rules should be interpreted in light of the principles and objectives set out in the legislation.

5.3 We believe that the rule maker should be subject to appropriate oversight in the rules they make. The oversight role could be undertaken, for example, by the Financial Regulator Assessment

[1] Revised Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth), [14.18].

Authority (**FRAA**). Providers and consumers should have the ability to appeal against rules to the FRAA and the FRAA should have the ability to require rules to be reconsidered or to be replaced by rules made by the FRAA. The rules would be a legislative instrument and therefore also capable of disallowance by Parliament.

5.4 Of course, these proposals proceed on the basis that the Act only contains principles-based regulation and does not contain prescriptive requirements. Otherwise, there will still need to be a power to make exemptions and modifications to the Act.

Proposal A10: The Corporations Act should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

5.5 We agree that the rules should be required to be made in a single consolidated legislative instrument. Of course, that does not guarantee the navigability of the instrument. The *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* is a single consolidated legislative instrument. However, it is not always organised in a clear or consistent manner. We recommend principles be developed for drafting and maintaining the body of rules so they are organised in a manner that is easy to follow and to find relevant requirements.

Question A11: In order to implement Proposals A9 and A10:
a. Should the Corporations Act be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?
b. Should any such power be granted to ASIC?

5.6 As we have stated above, we believe that the Corporations Act should be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'.

5.7 We believe that the power to make rules should be given to the conduct regulator for the financial services sector which is currently ASIC. We do question whether ASIC's mandate is too broad currently and believe that there is merit in considering the establishment of a separate financial services conduct regulator.

Proposal A12: As an interim measure, ASIC, 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.

5.8 We agree with this proposal.

5.9 We agree that all of the options provided by the ALRC to achieve this proposal would assist with navigability of the legislation and relevant instruments. It is important to note that it is not just ASIC which can make exemptions and modifications and thereby notionally amend the Act. This can be done by regulation too. So it is important that any solution incorporate not only ASIC instruments, but also the regulations. For this reason, we favour Options B to D above Option A.

6. Definition of 'Financial Product Advice'

Proposal A13: The Corporations Act should be amended to:
a. remove the definition of 'financial product advice' in s 766B;
b. substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and
c. incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.

6.1 There is no doubt that the legal framework relating to financial product advice is complex and the distinction between general advice and personal advice is not understood by consumers and frequently challenges financial services providers and their advisers. However, the ALRC's proposal does not seem to address this problem which primarily results from the complexity of the concepts.

6.2 The labels themselves are also confusing:

(a) 'personal advice' suggests that it can only be given to individuals but can in fact be given to wholesale clients, such as corporate trustees;

(b) 'general advice' is not advice in the sense that term is normally used by consumers.

6.3 We do believe that there is merit in retaining the general concept of 'financial product advice' as an activity that is regulated, requires a licence and is subject to the licensing obligations. We suggest replacing the two categories of advice with:

(a) 'tailored advice': this would be personal advice but uses an expression that is equally relevant in the retail and wholesale market; and

(b) 'promotional statements': this would be general advice but recognises that general advice is primarily only given in the context of promoting certain products or services. Alternatively, if a more neutral term is to be preferred, consideration could be given to using 'product guidance'.

6.4 Of course, the great difficulty with the definition of personal advice is that it is defined so broadly as to potentially apply whenever a provider is dealing with a customer individually whether or not they have fully considered the customer's individual circumstances to any great degree or at all or would have been expected to by the customer. The problem is that the statute prescribes a set of requirements whenever personal advice is given without sufficient flexibility to address the nuances of the degree of personal advice that is in fact given or expected.

6.5 In our view, this conundrum is best addressed by not including prescriptive requirements for the provision of advice in the statute but rather giving the conduct regulator the ability, after appropriate consultation, to make rules setting the requirements when different forms of advice is given. In doing this, the regulator should have the power to identify and define the different types of advice to which specific rules apply. There should then not be any need to differentiate between the different types of advice in the statute.

Proposal A14: Section 766A(1) of the Corporations Act should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.

6.6 For the reasons discussed above in relation to Proposal A13, we have concerns with this proposal. In particular, the primary reason to include 'financial product advice' as a financial service is to require an Australian financial services licence to provide it. If only 'general advice' is included in the definition of financial service, then that would suggest that general advice requires a licence but personal advice does not. We therefore believe that financial product advice (or in fact financial advice – it is not clear why product advice is regulated but advice regarding financial services is not) should continue to be a financial service.

Proposal A15: Section 766B of the Corporations Act should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

6.7 As discussed above, we agree with this proposal and suggest the term 'promotional statement' or 'product guidance' may be more appropriate.

7. Definitions of 'Retail Client' and 'Wholesale Client'

Question A16: Should the definition of 'retail client' in s 761G of the Corporations Act be amended:

a. to remove:
   i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and
   ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or

b. in some other manner?

7.1 We agree with the proposal to remove the superannuation-specific definitions of retail client. It is quite anomalous to require financial services providers to treat the same person as a retail client

in relation to their superannuation investments and a wholesale client in respect of their other investments. In our experience, this also causes some significant difficulties which easily trip up even sophisticated financial services providers.

7.2 We do not however agree with the proposal to remove the general insurance retail client definitions. The general insurance industry has a clear and long-lasting delineation between domestic and commercial insurance products and the protections that should be available in the case of the former which broadly corresponds with the definition of retail client in the Corporations Act.

7.3 Consistent with the ALRC's proposals that consistent terminology should be used across the financial services regime, we believe that a consistent approach should be adopted in relation to 'retail client', 'consumer' and similar terms in the Corporations Act, ASIC Act and sector specific legislation. These concepts are all aimed at identifying consumers who should receive a higher level of protection and we submit that the same approach, definitions and terminology should be used across financial services regulation.

7.4 We also note the observations made in the Report regarding the definition of 'small business'. We believe that consistent definitions of this term should be used across the financial services regulatory regimes. If there is a need for a different definition to apply in a particular context (we are not convinced that this is the case), then a different term should be used to reduce confusion. For example, 'small enterprise' could be used in place of 'small business'. We believe that a principle that should be adopted by those drafting legislation and instruments is that a term should be given the same meaning in the various contexts in which it is used or different terms should be used.

7.5 However, we do not believe that using different terms the best solution for small business protection. In our view, careful consideration should be given to the reason for treating small businesses different from other businesses and that should inform the definition of term and that a consistent approach should be taken in this regard.

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

7.6 There is no doubt that there are problems with the current sophisticated investor test. As the ALRC has noted the subjectivity of the requirement for a licensee to certify that a client has the requisite understanding means that licensees are reluctant to use it given liability concerns and potentially insurance implications. Another problem is that it is only a licensee who can certify whether a person is a sophisticated investor. This means that those who are legitimately relying on a wholesale client licensing exemption are not able to use the sophisticated investor exemption. For example, this means the following cannot rely on the exemption:

(a) overseas providers relying on the current sufficient equivalence exemption[2] and overseas providers who will rely on the proposed comparable regulator exemption;[3] and

(b) product issuers relying on a licensed intermediary exemption.[4]

7.7 We therefore support reforming the sophisticated investor exemption and making it more objective to remove the need for a licensee to certify clients for the exemption to apply. The option of enabling clients to obtain a wholesale qualification by undertaking a course seems attractive, although of course it would be important to ensure that the course was appropriately designed and that the risk of certificate being obtained fraudulently is appropriately managed. We believe that the certificate should be available for classes of financial products and that part of the approval process for the course should determine which classes of products it is suitable for. Courses should be required to be recertified on a regular basis to ensure they remain current and appropriate for the classes of products they are certified for.

[2] ASIC Class Orders 03/1099, 03/1100, 03/1100, 03/1101, 03/1102, 03/1103, 04/829 and 04/1313 and ASIC Instrument 2016/1109 as continued by ASIC Instrument 2016/396.
[3] *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022,* Sch 1.
[4] For example, s 911A(2)(b) of the Corporations Act or reg 7.6.01(1)(n) of the Corporations Regulations.

8. Conduct Obligations

Question A18: Should Chapter 7 of the Corporations Act be amended to insert certain norms as an objects clause?

8.1 We support the inclusion of norms of conduct in the financial services regulatory regime as the foundation of a principles-based regulatory regime. In our view, these norms should have two roles:

(a) they should be enforceable standards which financial services providers are required to comply with as is currently the case with, for example, the prohibition on misleading and deceptive conduct;[5] and

(b) they should be taken into account when interpreting more prescriptive requirements imposed by the relevant regulator.

8.2 We do not therefore believe that the norms of conduct should only take the role of an objects clause for the financial services regulatory regime.

8.3 We support a broader approach being taken with the legislation being redrafted to remove prescriptive requirements and instead becoming principles-based regulation. This approach would be supported by giving the regulator the ability to make rules to supplement or codify how particular principles are to be applied in particular cases.

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

8.4 We suggest that consideration be given to incorporating the following norms of conduct in principles-based regulation applying to all financial services providers. We have based these norms on:

(a) the existing obligations of financial services licensees in section 912A of the Corporations Act;

(b) the norms of conduct identified in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; and

(c) the principles for business identified by the UK Financial Conduct Authority.

Suggested norms of conduct

1.	Skill and competence	A firm must provide services and conduct its business competently and with due skill and care and ensure that its representatives are appropriately trained and competent.
2.	Fit and proper	A firm must ensure that its officers and representatives are fit and proper persons to undertake the roles they perform.
3.	Act fairly	A firm must act fairly in its dealings with consumers,[6] having regard to the interests of both consumers and the provider. Special care must be taken for vulnerable consumers.
4.	Market conduct	A firm must observe proper standards of market conduct.
5.	Information needs of customers	A firm must ensure that consumers[6] have the information they can reasonably be expected to need to make decisions relating to the services provided by the firm and must communicate information to them in a way which is clear, fair and not misleading.

[5] We do however believe that it should be possible for the regulator to make rules which specify how a provider must comply with a particular norm or principle in a particular situation and that the regulator should have the ability to make such a rule an exhaustive regime in that regard. Where that occurs, the provider would only be required to comply with the rule and the norm would only be relevant in interpreting that rule.

[6] By consumer, we mean consumers or retail clients as defined in the financial services regime: see our comment in section 7 of this submission.

6.	Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its clients[7] and between a client and another client.
7.	Suitable services	A firm must take reasonable care to ensure the suitability of the information, advice and services it provides to consumers.[6]
8.	Prioritising consumer interests	When acting for or advising a consumer,[6] a firm must give priority to the consumer's interests.
9.	Client assets	A firm must take reasonable care to ensure adequate protection for the assets of clients[7] it is responsible for.
10.	Complaints	A firm must manage complaints received from consumers[6] fairly, appropriately and expeditiously.
11.	Compliance and risk management	A firm must take reasonable steps to ensure compliance with its obligations and to manage risks relating to its business and the services it provides appropriately.

Proposal A20: Section 912A(1)(a) of the Corporations Act 2001 (Cth) should be amended by:
a. separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs;
b. replacing the word 'efficiently' with 'professionally'; and
c. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

8.5 We agree that the phrase 'efficiently, honestly and fairly' is inherently uncertain and this is reflected in the case law. It is a phrase that seems more relevant to financial markets and market participants than financial services providers generally. The concept of efficiency originated in the context of stock exchanges where securities dealers were required to execute orders efficiently and promptly.[8] It is not appropriate for most financial products and financial services, as distinct from market conduct.

8.6 Efficiency is an inherently commercial concept and difficult to judge in particular circumstances without having to consider all of the relevant business' circumstances and the decisions made in the course of conducting that business all of which not only affect the 'efficiency' of the services provided, but also the cost and availability of products and services. Neither courts nor regulators are well placed to make judgements about these matters which should be left to the marketplace to determine.

8.7 The question is then what duty is would be appropriate for the sector as a whole. We have suggested some norms of conduct or principles which could be considered for inclusion in the financial services regulatory regime. It is our expectation that the norms of conduct adopted in principles-based legislation would replace the need for the licensing obligations in section 912A of the Corporations Act. The norms we have suggested do not include the cognate expression in section 912A(1)(a). We have suggested a number of separate principles which cover a similar territory, in particular:

(a) Skill and competence – A firm must provide services and conduct its business competently and with due skill and care and ensure that its representatives are appropriately trained and competent.

(b) Act fairly – A firm must act fairly, having regard to the interests of both consumers and the provider. Special care must be taken for vulnerable consumers.

8.8 We therefore agree that there should be a separate obligation to act fairly.

8.9 We do not however believe that it is appropriate to impose an obligation to act professionally. The use of the term 'professional' may import fiduciary obligations which would not be appropriate for all parts of the financial services sector. In our view, fiduciary obligations should be confined to those relationships where they currently arise such as superannuation trustees and responsible

[7] By 'client', we mean both consumers and wholesale clients.
[8] Anderson J, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37(7) *Company and Securities Law Journal* 450, p 463.

entities of registered schemes. It should not be extended other types of relationships such as banks and insurance companies.

8.10 We believe that a more appropriate duty to impose on financial services providers generally would be a requirement to provide services competently as we have suggested. Financial services and credit licensees are required to maintain the competence to provide the financial services they are authorised to provide and ensure that their representatives are adequately trained and are competent to provide those financial services.[9] These obligations are expressed in a manner that speak to the organisational measures the licensee has in place. They do not directly apply to the services provided by licensees. We believe it would be appropriate for financial service providers to be required to provide services to consumers with skill and competence.

8.11 As the ALRC notes, the use of the term 'competent' is supported by at least one commentator and it is the term used in place of 'efficiently' in the Hong Kong legislation.[10]

8.12 We also believe that there is no need to impose an obligation to act honestly. It is difficult to conceive how a financial service provider could provide a financial service fairly and with skill and competence and yet act dishonestly. Commissioner Hayne did not identify acting honestly as one of the six norms of conduct which apply to financial service conduct, presumably on the basis that it is implicit in the other norms identified.

8.13 It is also worth noting that there is a separate prohibition on engaging in dishonest conduct in relation to a financial product or financial service,[11] making dishonest conduct an offence[12] subject to a penalty of up to 15 years imprisonment.[13] There is no need to impose this obligation twice.

Proposal A21: Section 912A(1) of the Corporations Act should be amended by removing the following prescriptive requirements:

a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa));
b. to maintain the competence to provide the financial services (s 912A(1)(e));
c. to ensure representatives are adequately trained (s 912A(1)(f)); and
d. to have adequate risk management systems (s 912A(1)(h)).

8.14 We do not agree with this proposal. We do not regard these requirements as 'prescriptive'. Rather, we view them as being principles-based norms of conduct which are expressed in general terms and appropriately express the expectations of licensees and financial services providers. We have suggested rewording these requirements in the norms of conduct we have suggested in section in our response to Question A19.

Proposal A22: In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the Corporations Act and s 12CA of the ASIC Act should be repealed.

8.15 We agree that the consumer protection provisions, including the prohibitions on unconscionable conduct found in the Corporations Act and the ASIC Act, are overlapping and create unnecessary complexity.

8.16 Multiple regimes achieving similar or identical ends adds cost by increasing compliance costs and creates confusion and complexity.

8.17 Further, overlapping regimes give rise to the risk that the same conduct gives rise to multiple offences under the Corporations Act and the ASIC Act.

8.18 Therefore, we agree with the ALRC's proposal to consolidate the prohibitions on unconscionable conduct.

[9] Corporations Act, s 912A(1)(e)-(f); *National Consumer Credit Protection Act 2009* (Cth), s 47(1)(f)-(g).
[10] Interim Report A, [13.72].
[11] Corporations Act, s 1041G.
[12] Corporations Act, s 1311.
[13] Corporations Act, sch 3.

Proposal A23: In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be consolidated into a single provision.

8.19 As set out in our response to Proposal A22, we agree with the ALRC's proposal to consolidate the prohibitions relating to false or misleading representations and misleading or deceptive conduct in the Corporations Act and ASIC Act into a single provision.

Question A24: Would the Corporations Act be simplified by:

a. amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and

b. repealing ss 961C and 961D?

8.20 The difficulty with the ALRC's proposal in relation to the best interests duty is that it risks misconceiving the purpose of the best interests duty in section 961B. The concept of a 'best interest duty' has a mixed history in case law but is generally understood to be a duty owed by a trustee to beneficiaries as a group. It is not a phrase that is well suited to explain the duty owed by professional advisers to their clients on an individual basis.

8.21 The key substantive elements of the duty owed by a professional adviser is encapsulated by the following obligations:

(a) the duty to give priority to client interests which can be found in statutory form in section 961J of the Corporations Act; and

(b) the duty to provide appropriate advice which can be found in section 961G of the Corporations Act.

8.22 The best interests duty in section 961B was only ever intended to be an obligation about the way in which an adviser performs when providing advice. It is therefore intended to be a process-based duty. The 'safe harbour' in section 961B(2) therefore understandably and appropriately sets out the process that an adviser is required to undertake to satisfy this process-based duty.

8.23 It is true that the effect of section 916B(2)(g) undermines the effectiveness of the 'safe harbour' in section 961B(2) by including a general catch-all requirement to take any other step that would reasonably be regarded as being in the best interests of the client. It is however significant that this 'catch-all' provisions uses the term 'step' which evidences the purpose of the best interests duty in section 961B.

8.24 We do not therefore support the ALRC's proposal and we do not believe that section 961J should be repealed if the current regime is to be retained.

8.25 However, we do believe that legislation governing the provision of financial product advice should be principles-based. We have suggested the following norms of conduct which would be relevant to the provision of advice:

(a) Suitable services – A firm must take reasonable care to ensure the suitability of the information, advice and services it provides to consumers.

(b) Prioritising consumer interests – When acting for or advising a consumer, a firm must give priority to the consumer's interests.

8.26 If norms such as these were adopted, there would be no need to include the more prescriptive requirements of Division 2 of Part 7.7A of the Corporations Act.

8.27 We do believe that the more prescriptive requirements for personal advice should be reformed and clarified. However, we believe that this should be done in rules made by the relevant regulator after appropriate consultation with industry participants and consumer groups.

We look forward to continuing to engage with the ALRC as it develops the financial services legislative framework. Please contact us if you have any questions about any aspect of our submission. We would

be very happy to participate on any discussions on proposals or recommendations for changing the framework.

Yours faithfully
MinterEllison

Richard Batten
Partner

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