



Interim Report C Financial Services Legislation

Submission to the Australian Law Reform Commission

July 2023

King Irving

Sydney
Level 9, Bligh House
4-6 Bligh Street
Sydney NSW 2000
P +61 2 9098 9140

Melbourne
Level 27
101 Collins Street
Melbourne VIC 3000
P +61 3 9123 1140

Brisbane
Level 22
215 Adelaide Street
Brisbane QLD 4000
P +61 7 2111 4888

W kingirving.com
E info@kingirving.com
P +61 2 9098 9149

King Irving Pty Limited ABN 73 160 482 137
Limited Liability by a scheme approved under Professional Standards Legislation

AUTHOR

King Irving delivers integrated legal and consulting solutions for financial services through the provision of exceptional advice to our clients. We are a dynamic and inclusive team of lawyers and financial professionals who are active partners in our clients' success. Our firm prides itself on our collaborative spirit both internally and as an extension of our clients' team.

At King Irving, we align our advice with a deep understanding of our clients' businesses, including their changing goals and legislative obligations. We invest in our long-term relationships and offer more than legal insights, accelerating growth for our clients.

King Irving is at the nexus of the financial services regulatory environment. We offer an entrepreneurial approach, underpinned by our deep understanding of financial regulatory regimes. This allows us to offer contextualised and customised advice.

We have long identified the complexity and intricacies of the legislative regime as a key concern for our clients from both an operational and a compliance perspective. The expansive legislative framework and its innumerable amendments make it near impossible for Australian Financial Service (AFS) Licensees to fully understand the full content and scope of their rights and obligations without dedicated advice.

BACKGROUND

This submission has been prepared in response to the Australian Law Reform Commission's (ALRC) Interim Report C: Financial Services Legislation (**Report**).

CONTENTS

SUMMARY	4
RESTRUCTURING AND REFRAMING EXISTING FINANCIAL SERVICES LEGISLATION	4
Part (a) – Providing an effective framework for conveying how the law applies to consumers and regulated entities and sectors	4
Part (b) – Making the law clearer, more coherent and effective	5
Part (c) – Giving effect to the fundamental norms of behaviour being pursued by financial services regulation	6
Part (d) – Ensuring that the intent of the law is met	7
CONCLUSION	9

SUMMARY

The following addresses specific questions proposed by the ALRC in the Report.

Question C11, addresses whether restructuring and reframing existing financial services legislation in the manner outlined in the illustrative Financial Services Law Schedule included in the Report assists in doing any or all of the following:

- (a) providing an effective framework for conveying how the law applies to consumers and regulated entities and sectors;
- (b) making the law clearer, more coherent and effective;
- (c) giving effect to the fundamental norms of behaviour being pursued by financial services regulation; and
- (d) ensuring that the intent of the law is met.

On our analysis, we conclude that the proposed structure of the Financial Services Law Schedule would achieve all of the above results. The reasons for our position are set out below.

RESTRUCTURING AND REFRAMING EXISTING FINANCIAL SERVICES LEGISLATION

1. RESPONSE – QUESTION C11

In our opinion, the restructuring and reframing of existing financial services legislation through the proposed structure outlined in the Financial Services Law Schedule would achieve the targets set out in part (a), (b), (c) and (d) of Question C11.

Part (a) – Providing an effective framework for conveying how the law applies to consumers and regulated entities and sectors

Part (a) of the proposed reform emphasises the need for an effective framework to convert how the law applies to consumers and regulated entities in the financial services sector. The central goal is to introduce a more intuitive structure that enables readers to readily develop their own ‘mental models’, enhancing their understanding of the overarching concept of how financial services legislation works. This approach ensures that whenever individuals need to consult the law, they can readily access and comprehend it, facilitating better decision-making and compliance.

The proposed structure of the legislation includes the following key components:

Chapter 1: Introduction and Application

At the outset, Chapter 1 provides a general introduction to the legislation, acting as a primer for readers. This introductory section helps readers understand the overall scope and purpose of the schedule. This allows the reader to determine whether the legislation they seek is contained within this framework, streamlining the search process for relevant information.

Chapter 2: Consumer Protections

Chapter 2 is placed at the forefront of the schedule, immediately following the general introduction. This deliberate positioning ensures that even less sophisticated consumers can readily access the relevant section without having to peruse the schedule in its entirety. By clearly defining and elaborating consumer protections, this chapter empowers consumers to understand their rights and safeguards available to them.

Chapter 3: Obligations of Financial Service Providers

Chapter 3 focuses on the obligations of financial service providers and enables financial service providers to understand their duties and responsibilities to their clients.

Chapter 4: Required Disclosures by Financial Service Providers

Chapter 4 delves into the required disclosures that financial service providers must make. This section addresses the importance of transparency and information-sharing in the financial services industry. By organising this topic as a separate chapter, the framework highlights the significance of clear and comprehensive disclosures in maintaining trust between consumers and financial service providers.

Chapter 5 and Beyond: Specific Topics and Regulations

Subsequent chapters proceed with more specific topics, such as financial advice and other relevant aspects. These chapters delve deeper into particular areas of financial services, creating a structured and organised flow of information that readers can easily navigate.

The proposed framework seeks to create ‘mental models’ for consumers, regulated entities, and sectors. This concept is inspired by Charlie Munger’s idea of “latticework of theory”. According to Munger, merely memorising isolated facts without connecting them to a broader conceptual framework is insufficient for effective understanding. By organising financial services law within a coherent structure, the proposed reform enables stakeholders to create *mental models* that facilitate deeper comprehension and application of the law.

The consolidation of financial services within the schedule effectively connects currently isolated provisions. This logical flow ensures that readers can grasp the relationships between different sections, making it easier to understand and remember complex pieces of legislation such as those taken from the *Corporations Act 2001*(Cth) (**Corporations Act**).

By fostering mental models and providing a clear, coherent framework, the proposed changes will enhance accessibility and understanding for all stakeholders involved. Consumers will be better equipped to identify their rights and protections, while financial service providers readily comprehend their obligations, ultimately leading to a more comprehensive and intuitive grasp of financial services law. Additionally, the logical flow and consolidation of provisions ensure that complex regulations are easier to navigate, fostering compliance and trust in the financial services industry.

Part (b) – Making the law clearer, more coherent and effective

The proposed reform focuses on making the financial services law clearer, more coherent, and ultimately more effective by re-grouping existing legislation in one place. This approach ensures that all relevant provisions are consolidated in a single location, the *Financial Services Schedule*, rather than being scattered across multiple pieces of legislation as is the case in the current structure. This consolidation offers several advantages for readers, legal professionals, consumers or financial service providers.

Enhanced Accessibility and Navigability

By encapsulating all parts of the relevant financial services legislation within a separate schedule, the proposed reform simplifies the process of locating and accessing information. This particularly benefits less sophisticated readers, enabling them to easily find relevant provisions without the need to cross-reference various pieces of legislation. The improved accessibility and navigability empowers consumers to understand their rights and protections more readily, fostering transparency and consumer confidence in the financial services industry.

Efficiency for Legal Professionals and Sophisticated Readers

The separate schedule also offers significant advantages for legal professionals and other more sophisticated readers. With all financial services legislation conveniently grouped in one place, legal professionals are enabled to quickly access the relevant provisions they require. This efficiency expedites the process of legal research and advice. As a result, clients benefit from cost-effective and timely legal services when dealing with financial services matters.

Coherence and Clarity of the Legal Framework

The proposed consolidation creates a more coherent and streamlined legal framework. By centralising financial services law, the schedule eliminates potential confusion caused by searching for scattered provisions. This clarity is crucial, given the complexities of financial services regulation. As a result, all stakeholders can more easily understand the interplay between different provisions, enhancing their ability to interpret and apply the law accurately.

Facilitating Future Updates and Amendments

Having a separate schedule dedicated to financial services legislation also facilitates future updates and amendments. When legislative changes are required, policymakers can focus on the schedule rather than navigating multiple pieces of legislation, making the process more efficient. This ease of updating ensures that financial services laws remain current and responsive to the evolving needs of the industry and consumers.

Promoting Consistency and Uniformity

Consolidating financial services legislation within the Corporations Act fosters consistency and uniformity. With all relevant provisions housed in one place, potential discrepancies and contradictions are minimised, reducing the risk of misinterpretation. This consistency reinforces the effectiveness of the legal framework, providing a stable and reliable foundation for all stakeholders.

The proposed reform represents a crucial step in making financial services law clearer, more coherent, and ultimately more efficient. The consolidation of existing legislation within the Corporations Act, specifically in the Financial Services Schedule, improves accessibility for all readers. Consumers will benefit from easy access to their rights and protections, while legal professionals can provide quick and cost-effective advice and services to their clients. The coherence and clarity of the legal framework enhances the understanding and application of financial services legislation while promoting compliance and trust in the financial industry. Overall, the proposed changes lay the groundwork for a more robust and efficient financial services regulatory landscape.

Part (c) – Giving effect to the fundamental norms of behaviour being pursued by financial services regulation

The proposed new structure for financial services regulation focuses on giving effect to the fundamental norms of behaviour pursued by the regulation. It aims to assist not only consumers in understanding their rights, but also Australian Financial Services Licence (AFSL) and Australian Credit Licence (ACL) holders in identifying and complying with the essential standards and obligations of the financial services industry.

The current situation reveals that many AFSL and ACL holders are facing significant challenges in meeting compliance requirements. A survey involving over 200 Australian AFSL and ACL holders demonstrated that compliance has become a costly and resource intensive endeavour for many firms. This has led to an increasing reliance on external and internal compliance resources to ensure adherence to the complex regulatory landscape.

Financial burden

Licensees are incurring substantial costs to meet their compliance obligations. Firms with fewer than 100 staff and representatives are spending considerable amounts on employing compliance staff and seeking external help for legal matters. For some firms, these costs exceed \$1 million annually, placing significant financial strain on their operations.

Reliance on legal advice

The survey reveals that a large majority, 75 percent, of firms seek external legal advice on compliance matters. This reliance on external resourcing highlights the complexity of the current legislative framework, leading to a high demand for specialised legal expertise to navigate compliance issues.

The proposed structure aims to address these challenges and alleviate the financial burden on AFSL and ACL holders by simplifying the navigability of financial services legislation. By introducing a more intuitive and organised framework, licensees will have a clearer understanding of their compliance obligations without the need for extensive legal advice. This, in turn, is expected to lead to the following benefits:

Reduced compliance costs

A simplified structure of the legislation will enable licensees to determine their compliance obligations more easily and independently. As a result, they will be less reliant on external legal assistance, reducing their overall compliance costs. This cost reduction will be particularly significant for smaller firms, which are currently facing the most considerable financial strain.

Increased compliance levels

By providing licensees with a clearer and more accessible framework, the proposed structure is likely to improve overall compliance levels. When licensees have a better understanding of their obligations, they are more likely to comply with the rules and regulations, ensuring better protection for consumers and fostering trust in the financial services industry.

Streamlined operations

With a simplified structure, AFSL and ACL holders can focus on understanding and implementing compliance requirements effectively. This streamlining of operations allows licensees to allocate resources more efficiently and concentrate on providing quality financial services to consumers.

The proposed new Financial Services Law Schedule aims to enhance compliance in the industry by making it easier for AFSL and ACL holders to identify and adhere to the fundamental norms of behaviour. The reduction in compliance costs and the increased understanding of compliance obligations are expected to lead to a more robust and trustworthy financial services sector for the benefit of consumers and regulated entities alike.

Part (d) – Ensuring that the intent of the law is met

The proposed restructuring and reframing of existing financial services legislation emphasises the importance of ensuring that the intent of the law is met while simultaneously promoting navigability, coherence and clarity. The objective is to simplify the legislation without compromising its purpose and effectiveness. By streamlining the structure and presentation of the law, the proposed changes will facilitate understanding and application of the law for both consumers and financial services providers.

Clarity for consumers

The proposed restructuring and reframing will enhance consumer protection by making it easier for financial service providers to understand the rights and the protections available to consumers. With a more intuitive framework in place, consumers will be able to identify relevant sections of the legislation that pertain to their particular financial transactions and situation. This increased clarity will empower consumers to make informed decisions and safeguard their interests in the financial services market.

Facilitating compliance for financial service providers

Financial service providers will benefit from the proposed changes as well. By presenting the legislation in a clear and organised manner, the restructuring will enable providers to readily identify their obligations and responsibilities. This will minimise the risk of inadvertent breaches and reduce the need for financial service providers to seek legal advice continually. Consequently, compliance with the law will become more straightforward, ensuring that the intent of the law is met while streamlining the operations of financial service providers.

Ease of understanding of all stakeholders

The current financial services legislation often requires cross-referencing from multiple pieces of legislation, leading to complexity and confusion for legal professionals and other stakeholders. The proposed restructuring aims to alleviate this burden by creating a more cohesive and integrated framework. As a result, legal professionals, regulators and other industry participants will be able to comprehend new regulations more easily. The less onerous cross-referencing will foster a better understanding of the law, which ensures that the intent of the law is effectively met.

Enhanced rulemaking processes

The proposed changes will not only benefit existing financial services legislation but also facilitate the creation of new regulations. With a more logical and streamlined structure, the process of drafting and implementing new rules and regulations will become more efficient. The clarity and coherence of the framework will enable policy makers to design regulations that align with the overarching objectives of financial services regulation, ensuring that the intent of the law is effectively carried in any additions to the legislation.

The proposed restructuring and reframing of financial services legislation emphasises the importance of maintaining the intent of the law while improving its accessibility and understandability. By creating a more navigable and coherent framework, the proposed changes will benefit consumers, financial service providers, as well as other stakeholders, by facilitating compliance, protecting consumers' rights, and supporting the ongoing evolution of financial services regulations.

CONCLUSION

The proposed restructuring and reframing of existing financial services legislation will in our view offer significant benefits to all stakeholders. By enhancing navigability, coherence and clarity, the proposed changes aim to create a more accessible and comprehensive framework without compromising the intent of the law.

For consumers, the revamped structure will provide a clear understanding of their rights and protections. This increased clarity will enable consumers to make informed decisions, fostering trust and confidence in financial services legislation and the broader financial services industry.

Financial service providers will also reap advantages as they will be able to easily identify their obligations and minimise the risk of breaches, improving compliance levels. The reduced need for legal consultation will also streamline operations and alleviate compliance costs.

Additionally, the proposed changes will facilitate a better understanding of the legalisation among stakeholders, including legal professionals and regulators. This enhanced clarity will improve the rulemaking process, ensuring that new regulations align more effectively with the fundamental norms of behaviour pursued by financial services regulations.

The proposed restructuring does not undermine the intent of the legislation, rather it enhances its implementation by creating a more user-friendly and efficient framework. With its simplified and logical organisation, the new structure will serve as a valuable tool for consumers, financial service providers and regulators alike, enabling them to navigate the financial services landscape with greater ease and confidence.

Overall, the proposed changes represent a pivotal step towards a more robust and trustworthy financial services sector, characterised by heightened compliance, improved consumer protection, and greater clarity for all participants. By fostering a comprehensive and intuitive understanding of financial services legislation, the reforms aim to strengthen the foundations of the industry.