AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

The Hon Justice Mark Moshinsky
A/g President
Australian Law Reform Commission

By Website and Email: financial.services@alrc.gov.au

26 July 2023

Dear Judge,

Financial Services Legislation: Interim Report C (ALRC Report 140)

Thank you for the opportunity to provide a submission in response to the Interim Report C as part of the ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation (the Review).

The Australian Retail Credit Association (ARCA) is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as all of the major credit reporting bodies (CRBs) and, through our Associate Members, many other types of related businesses providing services to the industry. ARCA's Members collectively account for well over 95% of all consumer lending in Australia.

ARCA has previously provided submissions in response to Interim Reports A and B as part of the Review.[1] In broad terms we support the proposition that the financial services law be restructured and reframed to reduce complexity and increase the likelihood that those laws achieve their policy objectives. However, we wish to provide feedback to the ALRC (and Government) on the following matters:

- The scope of the proposals and the ALRC's Review, including the need for other financial services laws to be considered in a similar manner;
- The detailed policy and practical considerations that will need to be taken into account when deciding what laws should be restructured and reframed and in what ways; and
- Some specific comments about licensing obligation(s) in the proposed Financial Services Law (FSL).

[1] ARCA's submissions in response to Interim Report A (here) and Interim Report B (here) are available online.

Issue 1 – Other financial services laws have similar issues

As highlighted in our earlier submissions to the Review, the issues identified with the provisions of the *Corporations Act 2001* (Corporations Act), *Australian Securities and Investments Commission Act 2001* (ASIC Act) and National Credit Act are not limited just to those pieces of legislation. Conversely, issues with the complexity and lack of overall architecture/framing of legislation are common across subject-matter-specific laws that apply to financial services businesses.

Parts of the financial services sector must comply with several other legal frameworks which are very complex and lack clear structure and framing. We urge policymakers to consider whether those other frameworks – such as the rules governing credit reporting in Part IIIA of the *Privacy Act 1988* (Privacy Act), Privacy Regulation 2013, National Credit Act and the Privacy (Credit Reporting) Code 2014 – should also be subject to the principles the ALRC has identified and the outcomes of the Review. The law governing credit will soon be reviewed (see s25B of the Privacy Act); such a review presents an important opportunity for considering these matters.

While we note that the ALRC is not proposing that other legislation be incorporated in the FSL, we do consider that the ALRC and policymakers should carefully consider whether:

- Additional benefits would flow from restructuring and reframing other provisions in other acts within the FSL; and
- Whether the benefits of the exercise – such as lessening the burden of complying with and administering the law, and increasing the likelihood that the law achieves its policy goals – are reduced or not realised because some or all relevant provisions remain in other complex legislative schemes.

In relation to the second point, we note that our experience has been that the presence of multiple legislative schemes, with their own structures, terminologies and definitions of regulated conduct, impose a substantial degree of complexity on industry participants. By way of example, we refer to the design and distribution obligations in Part 7.8A of the Corporations Act, which apply to both financial products and services (of the kinds regulated under that Act), as well as conduct typically regulated under the National Credit Act. Because of those design choices, the threshold for whether the DDO regime applies is ultimately based on Corporations Act concepts (such as 'dealing' and 'providing advice') which differ from concepts that typically trigger conduct regulation for credit products and services.[2] Despite the comment at paragraph 2.54 of Interim Report C, the consolidation of these obligations, imposed complexity on all parties and increased the likelihood of the risks identified by the Review. For this reason, care should be taken with:

- decisions not to incorporate certain laws within with FSL (as this could add complexity);

[2] For example, regulation under the National Credit Act applies to conduct such as 'assisting' and 'suggesting'. These terms are similar to, but different from, the Corporations Act concepts. We also note that the discussion at paragraphs 2.60 and 2.61 (in the context of ASIC's product intervention regimes) covers another example of issues with, and complexity arising from, consolidating obligations in one place where the underlying regulatory regimes have substantially different terminology.

- decisions to split laws across multiple acts, especially where different concepts and terminologies apply;[3] and
- decisions to defer aspects of the implementation of the FSL (e.g. because of the risks mentioned in Chapter 7 of Interim Report C).

At a minimum, the design of the FSL should contemplate the potential future incorporation/re-writing of other laws that apply to financial services providers.

Recommendation 1: When designing the structure and framing of the Financial Services Law, care should be given to allow for the future incorporation of other laws as warranted. Policymakers should consider whether incorporating other legal requirements would reduce the complexity of, and enhance the regulated population's ability to comply with, laws relevant to financial services and products.

Issue 2 – Additional practical considerations relevant to restructuring the law

As stated above, we support measures to make the law about financial services less complex and increase the likelihood that those laws achieve their policy objectives. However, in practice, this will require careful, detailed consideration of each provision to be re-structured, re-framed and/or consolidated, including its underlying policy settings.

For example, Proposal C3 suggests that the proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act and the ASIC Act should be replaced by a consolidated single proscription. However, we do not believe that replacing multiple provisions relating to one topic with a single new law will always make the situation clearer or the law more communicative or effective. Rather, the process of giving effect to such a proposal, or similar proposals in respect of other provisions, should take into account the following matters:[4]

- At present, the consumer protections in the ASIC Act largely replicate the protections in the Australian Consumer Law, which applies throughout the rest of the economy. Therefore, substantial change to the ASIC Act provisions could mean that:
    - The standard of base level consumer protection is different for financial services as opposed to other goods and services;
    - Jurisprudence in respect of section 18 and 29 of Sch 2 to the *Competition and Consumer Act 2010* (the Australian Consumer Law) may no longer be relevant to determining what is prohibited in respect of financial services, increasing the cost and uncertainty of administering the law;
    - The legislation may be more difficult to administer. At present, where it is uncertain whether a situation involves financial products or services, the ACCC and ASIC may delegate their powers to one another to allow for the smooth operation of the law. This means that, for instance, one regulator

[3] In light of the example above, in some cases it may actually reduce the overall complexity of complying with the law to duplicate certain obligations in different pieces of legislation, with the requirements applying based on the triggers for regulation specific to those areas/sectors. Care should be taken to avoid these obligations overlapping.

[4] These matters are in addition to, and on occasion in replacement of, the methodology proposed at paragraphs 2.38 to 2.40.

might institute proceedings claiming the laws they administer have been breached and, in the alternative, plead that the conduct breaches the other regulator's laws should the court conclude that there are/are not financial products and services involved.[5] Changes which mean the prohibitions against misleading and deceptive conduct/false and misleading representations differ between the Australian Consumer Law and the FSL may make this process substantially more complicated.

- The reasons why the law contains similar provisions dealing with similar underlying conduct,[6] including differences described in the explanatory materials, exposure draft legislation and policy development/consultation documents, as well as subsequent judicial considerations of any differences between the laws.
- Care should be taken with removing matters prescribed in the law or to which a court's attention is directed.[7] In the case of the former, the status quo is that such matters are clearly prohibited, so any move to a simpler provision could, if not done correctly, create additional doubt. In the case of the latter, lists of factors to consider or examples could be indicative of past undesirable conduct that Parliament has tried put beyond doubt as prohibited – and consolidation should not have the unintended consequence of removing the effect of such legislative aids.

Recommendation 2: Where it intends to propose the consolidation of, or specific changes to, certain laws, the ALRC should ensure it conducts and documents its detailed analysis of the status quo and its surrounding policy context (including historic analysis which may provide insight into why certain policy and law design decisions were made).

Recommendation 3: In its roadmap for implementation of proposals relating to the re-structuring or reframing of the financial services law, the ALRC should outline in detail the types of matters that may be relevant to decisions about whether, or how, to re-write those specific laws.

Issue 3 – FSL Schedule and licensing obligations

Finally, we note that it may be preferable for the licensing obligations within the FSL to sit *before* any obligations which apply only to licensees or licensed products and services. Notwithstanding the ALRC's general comment at paragraphs 6.31-6.35 that putting the consumer protections first will highlight their importance, we consider it may be conceptually

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[5] For a recent example, see the ACCC's action against Meta Platforms, Inc. and Meta Platforms Ireland Limited in the Federal Court (NSD 188/2022). The ACCC's media release announcing the proceedings is here.

[6] In this regard, we note the analysis contained in the ALRC's Background Paper FSL9. We also note the discussion in various documents released by Treasury in the lead-up to the Financial Services Reform Bill 2001, including *Financial Products, Service Providers and Markets - An Integrated Framework* (available here) and the commentary on the draft provisions of the FSR Bill (available here). These two documents suggest the original intention of what became s1041H was for it to also replace s12DA of the ASIC Act; this approach was changed before the Financial Services Reform Bill 2001 was finalised.

[7] For example, in the context of unconscionable conduct, s12CB lists matters that a court may consider which could, in some cases, be relevant to whether certain conduct is prohibited. In the context of unfair contract terms, s12BH lists examples of terms which are unfair.

simpler for readers of the legislation for any obligations *on* licensees and their products/services to sit after the threshold description of what is regulated.

More generally, for the reasons described above, although it may be desirable to consolidate other licensing regimes within the FSL (as referred to in paragraph 6.14 of Interim Report C), this may cause additional complexity relative to the status quo unless the obligations that apply to licensees (and their products and services) are also moved to the new Schedule.

Thank you once more for the opportunity to make this submission. If you have any questions, please feel free to contact me at [redacted]

Yours sincerely,

Richard McMahon

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