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Australian Law Reform Commission
Review of the Legislative Framework for
Corporations and Financial Services Regulation
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Website submission

ALRC Report 140 Report C on Financial Services Legislation

The Australian Financial Markets Association (**AFMA**) is providing comment on Interim the Australian Law Reform Commission's (ALRC) Report C on Financial Services Legislation – ALRC Report 40 (Report C).

AFMA is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets, including the capital, credit, derivatives, foreign exchange, energy, carbon, and other specialist markets. Our membership base is comprised of over 125 of Australia's leading financial market participants, including Australian and foreign banks, securities companies, state government treasury corporations, fund managers, energy firms, as well as other specialised markets and industry service providers. AFMA's membership basis represents the major infrastructure and participants of Australia's financial markets and are therefore all within scope for reporting requirement.

General Observations

AFMA has been strongly supportive of the ALRC's review of the Financial Services Legislation and the recommendations made in the previous interim reports and their translation into legislation, which has been passed or which is currently before Parliament.

AFMA agrees with the problem analysis set out in Report C and considers that legislative reform is required to address these problems. AFMA agrees with the ALRC's problem analysis and the resulting three key findings:

- Chapter 7 lacks coherence and does not have an intuitive flow
- Chapter 7 fails to prioritise key messages
- Chapter 7 makes it difficult for users to find relevant law

While the general theme of restructuring into more rational groupings is sound and supported, we consider that the ALRC's focus on form and structure, necessarily reflecting the constraints imposed by Terms of Reference, has meant that the ALRC has been restricted from giving sufficient contemplation and weight to the substantive policy consequences of the proposed grouping and the functions of Chapter 7; with resulting emphasis on form over function.

AFMA's experience since the Financial Services Reforms of 2001 put in place Chapter 7 and related laws, is that changes focused on one objective normally have other policy effects which need to be factored into work being done on amendments. It is essential to take these broader policy aspects into account. Accordingly, AFMA does not support these proposals being taken forward in the form proposed in the Financial Services Law Schedule (FSL Schedule), contemplated by Proposals C9 and C10.

The FSL Schedule is not intended to cover the regulation of financial markets (such as the licensing of market operators, and market supervision by ASIC) or the regulation of disclosure for securities. While recognising the need and desire to limit the scope of changes into manageable project sizes, the analytical grouping proposed in Report C for the legislative provisions set out in FSL Schedule into: Consumer protection; Disclosure; Financial Advice; and General Regulatory Obligations, does not give appropriate weighting to the Market Integrity functions of Chapter 7 which are a core conceptual pillar of it, along with Consumer Protection; and are intimately related to General Regulatory Obligations.

It is noted that Report C states that some provisions of the FSL Schedule would still apply in relation to financial market participants. For example, when preparing prospectuses and issuing securities (as regulated by Chapter 6D of the Corporations Act), companies would have to comply with the consumer protections in Chapter 2 of the FSL Schedule — such as the prohibitions on misleading or deceptive and unconscionable conduct. Report C correctly observes that the continued application of these provisions reflects the breadth of the definition of 'financial service' in the ASIC Act on consumer protections. Importantly to AFMA's members, the definition includes dealing in a financial product, making a market for a financial product, and operating a financial market. More broadly, the concept of 'dealing in a financial product' is also expansive. Any person dealing in a financial product, including on a financial market, would need to be aware of provisions of the FSL Schedule, including the consumer protection provisions. While most financial markets provisions are grouped in Parts 7.2–7.5B, the generally applicable provisions of the FSL Schedule, such as the prohibition on misleading or deceptive conduct, would still be relevant to financial markets.

In summary, AFMA is concerned about the appropriateness of grouping of provisions in the FSL Schedule and their impact on financial market regulation and the guiding concept and purpose of Chapter 7 in relation to Market Integrity. Further policy work is required on this matter.

Given AFMA's strong commitment to seeing improvement to financial service legislation to ease the regulatory burden that the complexity of the current law, gives rise to and the desire to bring about solutions to a range of longstanding substantive law drafting problems. Our objections to the FSL Schedule going ahead without further policy work being done should not be interpreted as just conservatism and resistance by those familiar with the regulatory environment status quo, but from long practical experience with

previous financial services reform efforts resulting in partial fixes and the considerable amount of industry effort, cost and resources involved with implementing changes to the law.

Importance of Proposal C12

Given that the ALRC will make its Final Report in November this year and its work on this topic will be finished, with much more substantive policy work needed to be done, AFMA views Proposal C12 on Implementation as the most important one from a practical solutions point of view. AFMA has strongly advocated, including in our 2023/24 Pre-Budget Submission, for continued sufficient resourcing by the Government of an ongoing process to take the needed legislative reforms to the financial services legislation forward, and advise on substantive policy issues that will necessarily arise in the course of such work.

In this regard, we have previously suggested that a body inspired by the defunct Corporations and Markets Advisory Committee (CAMAC) as a form for a taskforce to be created as proposed in Proposal C12, to assist Treasury in advising the Government on the details of the reforms.

AFMA commends the ALRC team who have prepared Report C on the high quality of their work. The Proposals in Report C set a dependable course to be followed in improving Australia's financial services legislation.

Please contact David Love either on [REDACTED] or by email [REDACTED] regarding this letter.

Yours sincerely

[REDACTED]

David Love
General Counsel

Attachment

AFMA Summary Views on ALRC Report C

ALRC Numbering	ALRC View	AFMA view
<i>Penalty Provisions</i>		
Recommendation 20	Offence provisions in corporations and financial services legislation should include the prescribed wording at the foot of each provision.	Supported
Recommendation 21	The definition of 'civil penalty' in the <i>Corporations Act 2001</i> (Cth) and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be amended to be based on s 79(2) of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> (Cth).	Supported
Recommendation 22	Civil penalty provisions in the <i>Corporations Act 2001</i> (Cth) and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should include the following at the foot of each provision: <ul style="list-style-type: none"> a. the words 'maximum civil penalty'; b. any applicable penalty, expressed as one or more amounts in penalty units; and c. a note referring readers to any additional rules for calculating the applicable penalty. 	Supported
Recommendation 23	Offence provisions in corporations and financial services legislation should specify any applicable fault element, unless the provision creates an offence of strict or absolute liability	Supported
<i>Consumer Protection</i>		
Proposal C1	The <i>Corporations Act 2001</i> (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating: <ul style="list-style-type: none"> a. Part 2 Div 2 of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth); b. Part 7.6 Div 11 of the <i>Corporations Act 2001</i> (Cth); c. sections 991A, 1041E, 1041F, and 1041H of the <i>Corporations Act 2001</i> (Cth); d. Part 7.8A of the <i>Corporations Act 2001</i> (Cth); and sections 1023P and 1023Q of the <i>Corporations Act 2001</i> (Cth).	Grouping and consolidation is supported. Subject to AFMA broader view on further work being required on the policy consequence of the proposals.
Proposal C2	Section 991A of the <i>Corporations Act 2001</i> (Cth) and s 12CA of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should	Supported

	be repealed, and s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.	Subject to broader AFMA view on moving consumer protection out of the ASIC Act.
Proposal C3	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 replaced by a consolidated single proscription.	Supported
Proposal C4	The <i>Corporations Act 2001</i> (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating: <ul style="list-style-type: none"> a. Part 7.7 Divs 1, 2, 3A, 6, and 7; b. section 949B; and c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C. 	Rationalisation and consolidation are supported in principle. However, more work is required on the substantive policy consequences of such restructuring. Further work and thinking needs to be done around capital fundraising disclosure in Chapter 6D of the Corporations Act and its relationship to certain types of financial product disclosure, such as for hybrids.
General Regulatory Obligations		
Proposal C5	Disclosure regimes in Chapter 7 of the <i>Corporations Act 2001</i> (Cth) that require disclosure documents to ‘be worded and presented in a clear, concise and effective manner’ should be amended to require that disclosure documents also be worded and presented ‘in a way that promotes understanding of the information’.	Proposal is substantive change. The additional requirement would be a substantive compliance change. ‘ <i>Effective manner</i> ’ currently connotes concept of understanding. It would be reasonable to substitute ‘ <i>in a way that promotes understanding of the information</i> ’ for ‘ <i>effective manner</i> ’, but this is a substantive change that requires further policy work.
Financial Advice		

<p>Proposal C6</p>	<p>The <i>Corporations Act 2001</i> (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating:</p> <ul style="list-style-type: none"> a. sections 912EA and 912EB; b. Part 7.6 Divs 8A, 8B, and 8C; c. Part 7.6 Div 9 Subdivs B and C; d. Part 7.7 Div 3; e. section 949A; f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and g. sections 1012A and 1020AI. 	<p>Reserved support</p> <p>More work is required on the substantive policy consequences of such restructuring.</p>
<p>General Regulatory Obligations</p>		
<p>Proposal C7</p>	<p>The <i>Corporations Act 2001</i> (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:</p> <ul style="list-style-type: none"> a. Part 7.6 Divs 2, 3, and 10; b. section 963K; c. Part 7.7A Div 5 Subdiv A, and Div 6; d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and sections 991B, 991E, 991F, 992A, and 992AA. 	<p>Reserved support</p> <p>Further work is required on the substantive policy consequences of such restructuring.</p>
<p>Proposal C8</p>	<p>The <i>Corporations Act 2001</i> (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 5, 6, and 8.</p>	<p>Rationalisation and consolidation are supported in principle.</p> <p>However, further work is required on the substantive policy consequences of such restructuring.</p>
<p>A Financial Services Law</p>		
<p>Proposal C9</p>	<p>The <i>Corporations Act 2001</i> (Cth) should include a Financial Services Law comprising restructured and reframed provisions relating to the regulation of financial products and financial services, including:</p> <ul style="list-style-type: none"> a. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the <i>Corporations Act 2001</i> (Cth); b. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the <i>Corporations Act 2001</i> (Cth); c. Part 7.10 of the <i>Corporations Act 2001</i> (Cth), excluding provisions that relate more closely to the regulation of financial 	<p>Not Supported</p> <p>The restructuring needs much more work before it is fit for legislation and need to take into account substantive policy issues which arise as a result of restructuring.</p>

	<p>markets.</p> <p>d. Part 7.10A of the <i>Corporations Act 2001</i> (Cth);</p> <p>e. Part 7.12 of the <i>Corporations Act 2001</i> (Cth), excluding provisions that relate more closely to the regulation of financial markets;</p> <p>f. Part 2 Div 2 of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth); and a list of terms defined for the purposes of the Financial Services Law.</p>	
Proposal C10	The Financial Services Law should be enacted as Sch 1 to the <i>Corporations Act 2001</i> (Cth).	<p>Not Supported</p> <p>See the general accompanying commentary for reasons.</p>
Proposal C11	<p>Would restructuring and reframing existing financial services legislation in the manner outlined in the illustrative Financial Services Law Schedule included in this Interim Report help to do any or all of the following:</p> <p>a. provide an effective framework for conveying how the law applies to consumers and regulated entities and sectors;</p> <p>b. make the law clearer, and more coherent and effective;</p> <p>c. give effect to the fundamental norms of behaviour being pursued by financial services regulation; and</p> <p>d. ensure that the intent of the law is met?</p>	<p>Partly</p> <p>See the general accompanying commentary for the reserved answer.</p>
Proposal C12	The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.	Supported
Proposal C13	As part of implementing Proposals C9 and C10, the <i>Corporations Act 2001</i> (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.	Periodic review is supported
Proposal C14	<p>The following working principles should be applied when structuring and framing corporations and financial services legislation:</p> <p>a. Provisions should be designed in a way that minimizes duplication and overlap (Consolidation).</p> <p>b. Related provisions should be proximate to one another (Grouping).</p> <p>c. Provisions should have thematic and conceptual coherence (Coherence).</p> <p>d. The most significant provisions should</p>	Supported

	<p>precede less important provisions or more technical detail (Prioritisation).</p> <p>e. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (Intuitive flow).</p> <p>f. The structure and framing of legislation should help users develop and maintain mental models that enhance navigability and comprehensibility (Mental models).</p> <p>g. Legislation should be as succinct as possible (Succinctness).</p>	
<p>Proposal C15</p>	<p>Infringement notice provisions in corporations and financial services legislation should be identifiable on the face of the provision.</p>	<p>Supported</p>

