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By email: [financialservices@alrc.gov.au](mailto:financialservices@alrc.gov.au)

Christopher Ash  
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Australian Law Reform Commission  
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Dear Mr Ash

## Financial services legislation inquiry – Interim Report C

Thank you for the opportunity to provide feedback on the proposals in the Australian Law Reform Commission's (ALRC) Interim Report C of its corporations and financial services legislation inquiry (**Report C**). We appreciate the ALRC's recommendations aimed at simplifying the financial services law and hope its work will be used to help achieve better industry conduct and consumer outcomes.

Our comments in this submission address proposals C<sub>1</sub>, C<sub>2</sub>, C<sub>3</sub>, C<sub>5</sub>, C<sub>9</sub>, C<sub>10</sub>, C<sub>12</sub> and C<sub>13</sub>. A summary of recommendations is available at **Appendix A**.

### About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

### About Consumers' Federation of Australia

The Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations.

### About Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

## Proposal C2 – unconscionable conduct

We agree that there appears to be overlap between unconscionable conduct provisions throughout the *Corporations Act 2001 (Corporations Act)* and *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.

It appears the ALRC has undertaken considerable analysis of the existing case law on unconscionable conduct and the provisions Proposal C2 would impact. The ALRC's Background paper FSL9 suggests that the ALRC is satisfied that the proposed amendments would not have unintended consequences.<sup>1</sup> Provided this is the case, we support this proposal. However, considering the courts' reading down of prior attempts by Parliament to expand the scope of unconscionable conduct, we urge the ALRC to ensure this process has been exhaustive and considered all possible implications the courts may read into the change. Possible examples could include:

- Any risk the proposal could reduce the scope of unconscionable conduct if the courts treat the equitable doctrine of unconscionable conduct and the statutory provision in s 12CB ASIC Act as a single test. The High Court treated the two tests as separate in *Stubbings v Jams 2 Pty Ltd*, with different standards. Could the courts still take this approach if the equitable doctrine was incorporated into s 12CB ASIC Act?<sup>2</sup>
- Ensuring there is no risk that the courts may be less inclined to expand the interpretation of statutory unconscionable conduct if s 12CB ASIC Act is amended to also include the definition of unconscionable conduct explicitly at unwritten law. It is largely now settled that statutory unconscionable conduct is conduct that is marked by 'a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience'.<sup>3</sup> Norms of acceptable commercial behaviour will naturally change over time and be identified in good industry practices or codes of conduct and the like. The law must be able to recognise that these norms will change as business practices change in response to community expectations.
- Whether any higher standard may be lost by removing s 991A Corporations Act, considering this provision specifically applies to Australian Financial Service Licence (AFSL) holders. Could this provision, considered in combination with specific AFSL obligations, impose a more comprehensive prohibition for activities that require a licence?

While consistent with the goals of ALRC's inquiry, it appears that the benefit achieved by Proposal C2 would be minor, so we urge the ALRC to ensure it is reasonably certain it will not reduce the practical application of the law when making this recommendation. We think this is particularly important because despite efforts to expand the definition of unconscionable conduct over time, the courts have regularly read it down.<sup>4</sup>

Should the ARLC proceed with this recommendation, it needs to also consider the implications for the equivalent provisions in the Australian Consumer Law. The law would not be made simpler if the general consumer protection provisions are different in relation to financial products and services compared to other areas of trade and commerce.

**RECOMMENDATION 1.** Only make Proposal C2 into a formal recommendation if the ALRC is extremely confident the change would not risk causing the courts to reduce the breadth of unconscionable conduct prohibitions in financial services in any way.

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<sup>1</sup> Particularly paragraphs 81 and 82

<sup>2</sup> [2022] HCA 6; at [52]; [94]

<sup>3</sup> *ACCC v Quantum Housing* [2021] FCAFC 40, [92]

<sup>4</sup> As recounted by Edelman J in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, [286]-[295]

### **Proposal C3 – misleading representations and misleading or deceptive conduct**

We support Proposal C3 and the simplification of the provisions relating to misleading and deceptive conduct, provided (again) that the ALRC is satisfied that the Proposal would not unintentionally reduce the scope of these provisions. In confirming this, we urge the ALRC to engage with ASIC specifically about this proposal (if it has not already done so) to ensure that there it would not cause valuable differences between the provisions to be lost. As the relevant regulator we expect ASIC would have the best insights about whether particular provisions deliver any additional value not already identified, particularly when preparing pleadings for enforcement action.

Making s 12DA of the ASIC Act an offence provision that can carry pecuniary penalties is an essential part of the proposal. It is vital that all available remedies are available to the court for breaches of this provision so the prohibition remains an effective tool that can deliver consumer remedies and sufficiently incentivise industry to avoid engaging in the conduct.

The absence of civil penalties currently under s 12DA ASIC Act is a problem that can complicate enforcement action relating to this conduct at present. For example, some conduct that is misleading pursuant to section 12DA will not necessarily breach section 12DB, as the latter is limited to false or misleading representations in specified services (such as services are of a particular standard, quality or value). An example of such conduct is debt collection conduct where debt collectors make misrepresentations to people about the possible consequences of non-payment of debts.<sup>5</sup> Given this does not breach section 12DB, there is no civil penalty for breach, and the regulator is limited to seeking injunctions, adverse publicity orders, non-punitive community orders or orders to redress loss or damage suffered by non-party consumers.

Again, we consider that if ARLC proceeds with consolidating prohibitions regarding misleading and deceptive conduct in the ASIC Act and the Corporations Act, it needs to similarly consider consolidating equivalent provisions in the Australian Consumer Law. It does not assist the simplification of the law if there are different general consumer protection provisions and standards governing financial products and services compared with other areas of trade and commerce.

**RECOMMENDATION 2.** Engage closely with ASIC to ensure that Proposal C3 would not risk any unintended consequences that would restrict the regulator's ability to enforce laws relating to misleading and/or deceptive conduct, or similar provisions.

### **Proposal C5 – disclosure and promoting understanding**

We generally support efforts to improve the operation of disclosure documents, however we reiterate comments made in our submission to Interim Report A that we should not be relying on disclosure for consumer protection.

Moreover, we are concerned that changing the existing standard which require disclosure documents to 'be worded and presented in a clear, concise and effective manner' to requiring that disclosure documents also be worded and presented 'in a way that promotes understanding of the information' will have limited effect. As described in our previous submission, this is because the root cause of complex disclosure documents relates to conservative or risk-adverse compliance postures, and it's unclear how the proposed change will address that.

We support outcomes based legislation as a rule however, and so agree that Proposal C5 warrants consideration by Government. We encourage the ALRC and lawmakers reviewing the ALRC's report to consider more directly clarifying how the proposed amendment will change industry disclosure practices. The commentary in Interim Report C contemplates a number of ways this change could have a positive impact. We would support specific clarification in legislation around the intent of the change, such as by explicitly stating:

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<sup>5</sup> The most obvious recent example being in relation to conduct by debt collectors uncovered by the Robodebt Royal Commission

- the amendment is intended to require disclosure documents to be designed with proactive consideration of the ways different people (and particularly vulnerable people) interpret information, ensuring documents cater to a wider range of consumers, rather than just a 'reasonable' standard
- the provision is linked to the design and distribution regime, by also clarifying that disclosure should specifically promote understanding of the information by groups of people within the designated target market for the product or service
- the change would incorporate consumer testing into the regime. However, we are not convinced safe harbour provisions would be the best way to achieve this. An alternative could be to empower ASIC to undertake consumer testing of disclosure documents, and impose regulatory sanctions should there be systemic failure of consumers to understand key aspects of the information.

Significant changes to disclosure laws are needed if it is going to deliver good consumer outcomes. We encourage the ALRC to consider recommending direct and substantial improvements to the existing law.

### **Proposals C9, C10 and C1 – a consolidated Financial Services Law in the Corporations Act**

The proposed Financial Services Law at Appendix E (**Draft FSL**) of Interim Report C does appear to set out relevant consumer protection provisions more clearly and appears easier to understand. We can see the logic in grouping these provisions and the possible benefit this would deliver, however our support is subject the important concerns outlined below.

#### Broader ASIC Act definitions of financial services and financial products must apply

Our primary concern is that these proposals would considerably reduce the scope of the provisions that are currently contained in the ASIC Act, unless the broader definitions of 'financial product' and 'financial service' from that Act are adopted in the Corporations Act. While we recognise that Interim Report C refers to this change, it only does so in passing, by reference to Interim Report A – and it has not been a formal recommendation of the inquiry yet.

There is always a real risk that recommendations can be misinterpreted or taken out of context. If the ALRC decides that it is unable to recommend that the ASIC Act definitions of financial product and financial service are used in the Corporations Act due to the policy scope constraints of its inquiry, then we urge the ALRC to reconsider recommending Proposals C9, C10 and C1.

Without this change, moving these provisions to the Corporations Act would have negative consequences, such as removing the application of the ASIC Act provisions to unregulated credit products – a high risk area where few other laws apply, and significant harm is caused.

**RECOMMENDATION 3.** Make it clear that Proposals C9, C10 and C1 are conditional on the Corporations Act also being amended to adopt the broader ASIC Act definitions of financial service and financial product.

#### Ensure no provisions are missed or lost

We also urge the ALRC to take significant care to ensure that no provisions would be lost as part of this change. While we appreciate it may just be an example, the Draft FSL appears to be missing a number of provisions that we assume would be included in such a schedule. Examples of this include existing provisions in the ASIC Act relating to unsolicited conduct – including sections 12DL, 12DM, 12DMA, 12DMB. Section 12DMC is also missing which relates to cap on motor vehicle add-on products. If these specific provisions are being removed, a close analysis needs to be undertaken to confirm nothing will be lost, just like the process for unconscionable conduct and misleading and deceptive conduct.

**RECOMMENDATION 4.** Ensure no consumer protections are lost (or restricted) from either the ASIC Act or Corporations Act if combining them into a single source of consumer protections.

### Online accessibility of Schedules to Acts remains a problem

As touched upon by the ALRC's Background Paper FSL<sup>3</sup><sup>6</sup> there are challenges with currently accessing Commonwealth legislation, and particularly Schedules to Acts.

Generally, Schedules are not broken down into separate sections on legislation.gov.au or Austlii. This makes accessing long Schedules like the ACL and the National Credit Code (Schedule 1 to the *National Consumer Credit Protection Act 2009*) extremely difficult. Unless Recommendation 12 from Interim Report A, and/or Recommendation 19 from Interim Report B were acted upon and generally accessibility to legislation is improved, moving the relevant provisions to a Schedule to the Corporations Law could create more practical problems than any benefit it could deliver.

**RECOMMENDATION 5.** Clarify that Proposal C10 should only be adopted if changes are first made to ensure the navigability of Schedules to legislation is improved.

### Other potential inconsistencies

We also query if the development of the FSL may create further confusion around the laws applicable to credit products. As with unregulated credit, some of these ASIC Act provisions apply to credit products, but they are generally excluded from consumer protections that apply to financial products/services in the Corporations Act. We urge the ALRC to consider whether the proposed grouping of consumer protection provisions and the introduction of the FSL would make interpretation of relevant provisions for credit laws more complex.

More broadly, we repeat our commentary in our submission to Interim Report B that the ARLC needs to consider simplification in relation to the *National Consumer Credit Protection Act 2009* and National Credit Code. The latter in particular is complex and needs updating and simplification. It would be a lost opportunity if this review only considered financial services products regulated by the Corporations Act, and not credit services and products.

### **Proposal C12 and C13 – implementation**

We strongly support the proposal for financial services laws to be periodically independently reviewed. We support this regardless of whether the FSL is combined as proposed. There are longstanding issues in all areas of law where provisions do not deliver the outcomes intended by legislation, and this is particularly the case in an area as complex as financial services.

Regular independent reviews would provide a mechanism by which problems and gaps in the law could be identified and highlighted to the Government of the day so they can be addressed. We anticipate that the cost of the review process would be money well spent for the Government.

Similarly, we support the establishment of a taskforce or taskforces dedicated to implementing reforms relating to financial services legislation. We think it is particularly important that consumer representation be included on such a taskforce.

### **Further information**

Please contact us on 03 9670 5088 or at [tom.a@consumeraction.org.au](mailto:tom.a@consumeraction.org.au) should further information be helpful for the ALRC's work.

Yours faithfully,

**CONSUMER ACTION LAW CENTRE**

**CONSUMERS' FEDERATION OF AUSTRALIA**

**FINANCIAL RIGHTS LEGAL CENTRE**

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<sup>6</sup> And which could be addressed by Recommendation 12 from Interim Report A, and Recommendation 19 in Interim Report B

## APPENDIX A - SUMMARY OF RECOMMENDATIONS

**RECOMMENDATION 1.** Only make Proposal C2 into a formal recommendation if the ALRC is extremely confident the change would not risk causing the courts to reduce the breadth of unconscionable conduct prohibitions in financial services in any way.

**RECOMMENDATION 2.** Engage closely with ASIC to ensure that Proposal C3 would not risk any unintended consequences that would restrict the regulator's ability to enforce laws relating to misleading and/or deceptive conduct, or similar provisions.

**RECOMMENDATION 3.** Make it clear that Proposals C9, C10 and C1 are conditional on the Corporations Act also being amended to adopt the broader ASIC Act definitions of financial service and financial product.

**RECOMMENDATION 4.** Ensure no consumer protections are lost (or restricted) from either the ASIC Act or Corporations Act if combining them into a single source of consumer protections.

**RECOMMENDATION 5.** Clarify that Proposal C10 should only be adopted if changes are first made to ensure the navigability of Schedules to legislation is improved.