



4 August 2023

Australian Law Reform Commission  
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## Australian Law Reform Commission, Financial Services Legislation, Interim Report C

### Background

The Australian Banking Association (ABA) welcomes the opportunity to provide feedback to the Australian Law Reform Commission (ALRC) on the Financial Services Legislation, Interim Report C.

The ABA notes that, in September 2020, the ALRC was requested to undertake an inquiry into simplification of the legislative framework for corporations and financial services regulation (the Inquiry). The Inquiry's terms of reference requested the ALRC to consider 'whether, and if so what, changes to the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be made to simplify and rationalise the law', with Interim Report C, released in June 2023, focusing on 'how the provisions contained in Chapter 7 of the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- is clearer, coherent and effective;
- ensures that the intent of the law is met;
- gives effect to the fundamental norms of behaviour being pursued; and
- provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.

The ABA also notes that Interim Report C makes sets out 14 proposals and one question on which stakeholder submissions are sought.

### Key Points

The ABA makes the following key points in relation to the focus areas of Interim Report C:

#### 1. No Substantive Changes to the Law

The ABA agrees in principle with the nature of the ALRC's proposals in Interim Report C – namely, that Chapter 7 of the *Corporations Act* and *Corporations Regulations* should be restructured or reframed so that all users can navigate and understand the legislation – but the actual legislative changes that are ultimately to be made will require careful scrutiny. The ABA notes that, under the Inquiry's terms of reference, the ALRC is not required to consider reform of the substantive law, but rather the 'reform of the existing regulatory framework... within the context of existing policy settings'.<sup>1</sup>

However, any legislative amendments that are made may result in changes to the accepted meanings of certain words, phrases, or obligations, even if inadvertent.

In particular, much case law has developed to interpret certain words and phrases currently used within the existing regime, and legislative changes may inadvertently result in new meanings being ascribed to previously understood concepts.

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<sup>1</sup> ALRC, Interim Report C, [1.16].



As a result, the ABA and its members will need an opportunity to carefully consider and make submissions on whether any resulting legislative amendments, once drafted, will impact on the nature or extent of the rights and obligations imposed on those members or their customers, or are likely to lead to any substantive changes to the state of the law, whether inadvertent or otherwise.

## 2. Other Regulatory Changes, Reviews and Reforms

The Inquiry takes place at a time when there are other concurrent regulatory changes occurring in the banking and financial services industry.<sup>2</sup> While the implementation of recommendations from the Inquiry may not be intended to lead to substantive changes to the law, substantive changes are likely to result from the other reviews and reform processes.

The ABA notes the ALRC's suggestion that it may be appropriate to implement the proposed reforms from the Inquiry in advance of other substantive reforms,<sup>3</sup> but the ABA considers this to be a matter which should be the subject of ongoing discussion, in order to ensure that overlapping reforms in the banking and financial services industry are implemented in a cohesive manner.

## 3. Impact of Implementation and Transition Arrangements

There will clearly be significant direct and indirect transition and implementation costs incurred as a result of the adoption of a new legislative model. The ABA wishes to reinforce the need for a substantial lead time for the implementation of any reforms, in order to allow all stakeholders the opportunity to assess and address the resulting regulatory and operational impacts of change.

A carefully staged process for the implementation of all reforms is essential, and the ABA notes and supports in principle the 'reform roadmap' incorporating six reform pillars proposed by the ALRC in Chapter 7 of Interim Report C – Consumer Protection, Disclosure, Financial Advice, Other Regulatory Obligations and Licensing, Miscellaneous, and Policy-Evolving Provisions.

Given that the proposed taskforces dedicated to implementation will likely need to consider not just the proposed reforms from the Inquiry, but additional industry reforms which are likely to involve substantive changes to law and policy, the ABA believes that consultation on the scope and intended membership of such taskforces will be very important.

## 4. Ongoing Consultation

The ABA has welcomed the opportunities which have been provided for consultation to date and wishes to highlight the need for ongoing discussion in the Inquiry's final year, as well as throughout the ongoing implementation and transition processes which is likely to follow.

## Recommendations, Proposals and Questions from Interim Report C

The ABA supports recommendations 20, 21, 22 and 23 in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation. We also comment on the Proposals and Questions in Interim Report C as follows.

**Proposal C1 - The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:**

- a. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth);
- b. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth);
- c. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth);
- d. Part 7.8A of the *Corporations Act 2001* (Cth); and
- e. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).

<sup>2</sup> This includes those likely to result from the Quality of Financial Advice Review, and the implementation of remaining reforms arising from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, such as those contained in the *Financial Accountability Regime Act 2023* (Cth). This occurs against a background of significant industry reform in recent years, including those resulting from the *Financial Sector Reform Act 2022* (Cth) and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth).

<sup>3</sup> ALRC, Interim Report C, [7.37].



The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C2 - Section 991A of the *Corporations Act 2001 (Cth)* and s 12CA of the *Australian Securities and Investments Commission Act 2001 (Cth)* should 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.**

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**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.**

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C4 - The *Corporations Act 2001 (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:**

- 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.

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C5 - Disclosure regimes in Chapter 7 of the *Corporations Act 2001 (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'.**

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C6 - The *Corporations Act 2001 (Cth)* should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating:**

- 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 1020A1.

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C7 - The *Corporations Act 2001 (Cth)* should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:**

- 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
- e. sections 991B, 991E, 991F, 992A, and 992AA.

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C8 - The *Corporations Act 2001 (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.**

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C9 - The *Corporations Act 2001 (Cth)* should include a Financial Services Law comprising restructured and reframed provisions relating to the regulation of financial products and financial services, including:**

- a. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the *Corporations Act 2001 (Cth)*;
- b. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the *Corporations Act 2001 (Cth)*;
- c. Part 7.10 of the *Corporations Act 2001 (Cth)*, excluding provisions that relate more closely to the regulation of financial markets;
- d. Part 7.10A of the *Corporations Act 2001 (Cth)*;
- e. Part 7.12 of the *Corporations Act 2001 (Cth)*, excluding provisions that relate more closely to the regulation of financial markets;
- f. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001 (Cth)*; and
- g. a list of terms defined for the purposes of the Financial Services Law.

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C10 - The Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001 (Cth)*.**

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

While the ABA understands the constitutional difficulties that would likely arise from the creation of a standalone Commonwealth Act, as noted in the ABA's submission on Interim Report B, it remains our preference that Chapter 7 of the *Corporations Act* be consolidated with other relevant provisions into a standalone "financial services" act separate from the *Corporations Act*.

**Question C11 - 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:**

- a. provide an effective framework for conveying how the law applies to consumers and regulated entities and sectors;
- b. make the law clearer, and more coherent and effective;
- c. give effect to the fundamental norms of behaviour being pursued by financial services regulation; and
- d. ensure that the intent of the law is met?

The ABA supports, in principle, appropriate reframing and restructuring of the current legislative framework in the manner indicated in the illustrative Financial Services Law Schedule, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C12 - The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.**



The ABA supports this proposal in principle, subject to appropriate consultation on the intended membership of such a taskforce or taskforces.

**Question C13 - As part of implementing Proposals C9 and C10, the Corporations Act 2001 (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.**

The ABA supports this proposal in principle, subject to appropriate consultation on the process for selection of the independent reviewer.

**Proposal C14 - The following working principles should be applied when structuring and framing corporations and financial services legislation:**

- a. Provisions should be designed in a way that minimises duplication and overlap (Consolidation).
- b. Related provisions should be proximate to one another (Grouping).
- c. Provisions should have thematic and conceptual coherence (Coherence).
- d. The most significant provisions should precede less important provisions or more technical detail (Prioritisation).
- e. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (Intuitive flow).
- f. The structure and framing of legislation should help users develop and maintain mental models that enhance navigability and comprehensibility (Mental models).
- g. Legislation should be as succinct as possible (Succinctness).

The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

**Proposal C15 - Infringement notice provisions in corporations and financial services legislation should be identifiable on the face of the provision.**

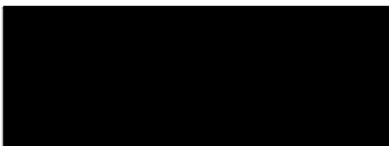
The ABA supports this proposal in principle, subject to appropriate opportunities for review and consultation on the resulting draft legislation.

## Concluding Remarks

The ABA is grateful for the opportunity to provide feedback on Interim Report C.

**This submission was prepared with the assistance of Associate Professor Juliette Overland of the University of Sydney Business School.**

Yours sincerely



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