

25 August 2023

Financial Services Legislation
Australian Law Reform Commission
PO Box 12953
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BRISBANE QLD 4003

By email: financial.services@alrc.gov.au

Dear Sir/Madam

Financial Services Legislation Interim Report C

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) thanks the Australian Law Reform Commission (the **ALRC**) for the opportunity to provide this submission in response to ALRC Report 140 titled "Financial Services Legislation Interim Report C" (**Interim Report C**), which was released on 22 June 2023.
2. Interim Report C is the third and final interim report of the Review of the Legislative Framework for Corporations and Financial Services Regulation, which commenced in September 2020 (the **Inquiry**).
3. The Committee thanks the ALRC for the consultative and inclusive approach it has taken throughout the Inquiry. The Committee considers that the broad formal and informal stakeholder engagement processes have added considerable value to the output of the Inquiry.
4. The Committee also thanks the ALRC for allowing further time to provide this submission, and apologises for its delay in responding.
5. The Proposals, Questions and Recommendations from Interim Report C, and the Committee's responses, are set out below.
6. The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Corporations Committee**) has contributed to this submission and previous submissions made in response to the Inquiry.

Chapter 2—Consumer Protection

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:

1. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth);
2. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth);
3. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth);
4. Part 7.8A of the *Corporations Act 2001* (Cth); and
5. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).

7. The Committee agrees with the principle of arranging provisions that cover similar subject matter in close proximity with one another.
8. However, the Committee notes that, in doing so, it is important to be aware that the scope of application of the provisions referred to in Proposal C1 is not uniform. For example, Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and Part 7.8A of the *Corporations Act 2001* (Cth) apply to products and services which are not currently regulated as “financial products” and “financial services” for the purposes of Chapter 7 of the *Corporations Act* (see, for example, section 994AA of the *Corporations Act*).
9. Therefore, if this proposal were to be adopted, it would be important to ensure that the proposed reorganisation of material did not cause unintended confusion.
10. Subject to the above comments, the Committee is supportive of Proposal C1.

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.

11. The Committee supports Proposal C2 because the Committee considers that:
 - (a) duplication should be avoided (and, where it is identified, removed); and
 - (b) it is helpful to provide clarity of meaning.
12. The Committee notes that Proposal C2 is one which, if implemented, would involve amending existing legislative provisions, and presumably could be implemented relatively promptly.

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.

13. The Committee supports Proposal C3 on the basis that it is logical and sensible. The Committee also refers the ALRC to the submission dated 5 April 2023, which the Corporations Committee provided in response to Background Paper FSL9: All Roads Lead to Rome. That submission dealt with the subject matter of Proposal C3 in greater detail.
14. The Committee further notes that Proposal C3 is one which, if implemented, would involve amending existing legislative provisions, and presumably could be implemented relatively promptly.
15. The Committee also recommends that conformity be maintained with the equivalent provisions in the *Competition and Consumer Act 2010*.

Chapter 3—Disclosure

16. The Committee considers that disclosure-related provisions for financial products and financial services could be usefully set out in one disclosure chapter.
17. However, the Committee considers that the exclusion of disclosure for securities from this reform may represent a missed opportunity. Securities disclosure has its own complex history, and the Committee submits that efforts should be made to develop harmonised disclosure rules and principles across all types of financial products.
18. The Committee supports the concept of having a chapter on disclosure, structured and framed around core, generally applicable, obligations and principles, with delegated legislation containing the more detailed rules necessary to give effect to primary legislation provisions in different regulatory contexts.
19. The Committee considers that, in re thinking the rules regarding financial product disclosure, the ALRC should bear in mind the behaviours of consumers towards financial product disclosure and reliance on disclosure. The Committee notes that, in October 2019, in a joint report published with the Dutch Authority for the Financial Markets, the Australian Securities and Investments Commission (**ASIC**) took the view that there are limits on disclosure, and ASIC stated “[i]t’s time to ‘call time’ on disclosure as the default consumer protection” and that “[i]t’s not the ‘silver bullet’ once thought, nor should it be relied upon as one.”
20. Further, the Committee notes that, since the introduction of the design and distribution obligations in Part 7.8A of the Corporations Act, the emphasis in regulatory policy has shifted from being predominantly focused on financial product disclosure to now also requiring issuers to take reasonable steps in designing and distributing products to persons in the relevant target market. Given that there has been a shift away from heavy reliance on financial product disclosure as a consumer protection measure, the Committee queries whether there should also be a shift away from some of the burdensome prescriptive financial product disclosure requirements.

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:

1. Part 7.7 Divs 1, 2, 3A, 6, and 7;
2. Section 949B; and
3. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

21. The Committee supports Proposal C4 because the Committee considers that it would be appropriate to simplify and consolidate the existing disclosure regimes.
22. The Committee agrees that the disclosure regime for the provision of financial product advice should be dealt with in a separate chapter.
23. The Committee generally supports the design principles for the structuring and framing of a disclosure chapter, including the proposals to consolidate provisions that cover the same subject matter.

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'.

24. The Committee supports Proposal C5. The Committee notes that this proposal is similar to the ASIC disclosure principle, which states that 'disclosure should promote product understanding' in ASIC Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (**RG 168**). Further, the Committee considers that the ALRC should, to the extent it has not already done so, have regard to the other 'good disclosure principles' in RG 168 in forming the basis for the 'core principles' of a revised disclosure structure.
25. The Committee considers it important that the rules about the interplay between a general or 'core' disclosure principle—such as the one described in Proposal C5—and specific disclosure principles are made clear. The Committee submits that, where there is a conflict between the general disclosure principle and a specific disclosure requirement, the general disclosure principle should prevail to the extent of any inconsistency. This should be the case with all disclosure requirements, including those relating to the disclosure of fees and costs in a disclosure document of any kind (including Product Disclosure Statements and periodic statements), or the additional disclosure requirements for specific types of financial products.

26. For example, the current requirements for fees and costs disclosures in Product Disclosure Statements are set out in numerous sections and subordinate legislation—including sections 1013D, Schedules 10, 10A, 10BA, 10C, 10D, 10E and 10F to the *Corporations Regulations 2001* (Cth), and ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070. The experience of Committee members is that:
- (a) these requirements are complex, granular and difficult to follow; and
 - (b) further complication is added by the expectations communicated by ASIC in Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements*.
27. For some financial products—such as hedge funds, unlisted property funds, mortgage funds, debentures, and agribusiness-managed investment schemes—ASIC has imposed a number of ‘disclosure principles’ and ‘disclosure benchmarks’ (see respectively ASIC Regulatory Guides 240, 46, 45, 69 and 232). These have no legislative force as they are in ASIC regulatory guides only, but they represent ASIC’s strong expectations. The Committee considers that they also add to the level of complexity and granularity of disclosure.
28. In fees and costs disclosures, or other detailed disclosure requirements for specific financial products, the Committee considers that product issuers would welcome an approach that allows the issuer to make a judgment call on the utility of strict disclosure requirements against an overriding principle of providing clear, concise and effective disclosure, and disclosure which promotes the understanding of information.
29. The Corporations Committee notes that the disclosure requirements for securities are currently set out in Chapter 6D of the Corporations Act and considers that, if changes to the financial product disclosure regime are to be made, then the provisions of Chapter 6D ought to be considered contemporaneously and, where appropriate, amended to ensure that there is broad consistency between Chapter 6D and Part 7.9.

Chapter 4—Financial Advice

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:

1. sections 912EA and 912EB;
2. Part 7.6 Divs 8A, 8B, and 8C;
3. Part 7.6 Div 9 Subdivs B and C;
4. Part 7.7 Div 3;
5. section 949A;
6. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and
7. sections 1012A and 1020AI.

30. The Committee supports Proposal C6 because it appears sensible and logical for those provisions of the legislation that relate only to the provision of financial advice, and not to other kinds of financial services, to be grouped together and consolidated where appropriate.

Chapter 5—General Regulatory Obligations

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:

1. Part 7.6 Divs 2, 3, and 10;
2. section 963K;
3. Part 7.7A Div 5 Subdiv A, and Div 6;
4. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and
5. sections 991B, 991E, 991F, 992A, and 992AA.

31. The Committee supports Proposal C7 because it appears to be sensible and logical for the above provisions to be grouped together and consolidated where appropriate.

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.

32. The Committee supports Proposal C8 for the same reasons that it supports Proposal C7.

Chapter 6—A Financial Services Law

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:

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

33. The Committee supports Proposal C9 because the Committee considers that it would be helpful to place the above content in a more logical order.

34. The Committee acknowledges that creating a separate Act for these provisions is practically difficult, given the existing arrangements with the States and Territories. In the circumstances, the Committee is of the view that placing the relevant provisions in a schedule to the *Corporations Act* would be an acceptable compromise.

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

35. For the reasons given above relating to Proposal C9, the Committee also supports Proposal C10.

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:

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

36. In response to Question C11, the Committee is of the view that these proposals would make the financial services laws more clear, coherent and effective. The Committee also believes the proposals should therefore assist in making the laws more accessible and comprehensible to consumers and regulated entities, and thereby better enable compliance. Ultimately, however, the Committee is of the view that there are compliance challenges with the existing financial services laws which arise due to their excessively prescriptive nature, rather than the order in which they are currently arranged.
37. Appendix D to Interim Report C contains an FSL Schedule with a suggested outline of the structure of the FSL Schedule. The Committee understands that Appendix D is for illustrative purposes only and, if the proposal for an FSL Schedule is adopted, more work will need to be done to refine the structure.
38. Generally speaking, the Committee considers that the outline in Appendix D is more sensible and would be easier to follow than the current laws. However, the Committee would like to raise the following matters relating to the structure.
39. Firstly, the Committee considers that the combining of consumer protections and generally applicable offences in Chapter 2 may not be the best formulation, and that Part 2.5 (Generally applicable offences) and Part 2.6 (Enforcement, remedies and other powers) ought to be placed toward the end of the FSL Schedule.
40. Secondly, the Committee suggests that in Chapter 6 (Financial services licensees and representatives), it would be more logical to start with proposed Part 6.5 (Australian financial services licensees) rather than proposed Part 6.2 (Representatives of financial services licensees).

Chapter 7—Implementation

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

41. The Committee supports Proposal C12 because the Committee is of the view that the nature of the changes that the ALRC proposes will require a concerted effort and dedicated resources of a suitable skill set.
42. The Committee notes that the provisions in Part 2 Division 2 of the ASIC Act also cover products that are not financial products under the Corporations Act, and so the Financial Services Law will therefore need to provide for how those provisions apply to those other products.

Proposal 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.

43. The Committee does not object to the independent review of legislation. The Committee notes that instruments made by ASIC currently have a sunset date and are revisited prior to the expiry of the sunset date to consider whether or not they should be remade (and if so, whether any amendments are necessary or desirable).

Chapter 9—Principles for Structuring and Framing Legislation

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

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

44. The Committee concurs with the working principles articulated in Proposal 14.

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

45. Subject to the comments made below, the Committee supports Proposal C15, because the Committee believes that it would, if implemented, provide users with increased clarity as to the consequences of breaching the relevant provisions in the legislation.
46. The support expressed above with respect to Proposal C15 is not intended to be, and should not be construed as, a departure from the view that the Committee and the Corporations Committee have consistently expressed on a number of occasions opposing the use of infringement notices on the basis that:
- (a) as a general principle, in civil penalty schemes, an infringement notice should apply only to minor contraventions in which no proof of a fault element or state of mind is required; and
 - (b) it is not appropriate for an infringement notice to be issued in circumstances where a complex assessment of facts is required to evaluate whether the alleged misconduct contravened the law. In such circumstances, there should be an opportunity for the court to properly consider the evidence.¹
47. While the Committee does not support the use of infringement notices for the reasons outlined above, to the extent that there are infringement notices provisions located within the legislation, the Committee endorses the greater clarity that Proposal C15 would, if implemented, provide to users of the legislation.

Recommendation 20 Offence provisions in corporations and financial services legislation should include the following at the foot of each provision:

- 1. the words 'maximum criminal penalty';
- 2. any applicable monetary or imprisonment penalty, expressed as one or more amounts in penalty units or terms of imprisonment; and
- 3. a note referring readers to any additional rules for calculating the applicable penalty.

48. The Committee supports Recommendation 20 because the Committee believes that it would, if implemented, assist users of the legislation to better understand the potential consequences of breaching criminal penalty provisions.

¹ For example, see Law Council of Australia, Submission to Treasury, Climate-Related Financial Disclosure – Consultation Paper (2 March 2023), 27 <https://lawcouncil.au/resources/submissions/climate-related-financial-disclosure>.

Recommendation 21 The definition of ‘civil penalty’ in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to be based on s 79(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

49. The Committee supports Recommendation 21 because the Committee considers that it would make sense to have greater consistency between the Corporations Act, the ASIC Act and other Commonwealth legislation.

Recommendation 22 Civil penalty provisions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should include the following at the foot of each provision:

1. the words ‘maximum civil penalty’;
2. any applicable penalty, expressed as one or more amounts in penalty units; and
3. a note referring readers to any additional rules for calculating the applicable penalty.

50. The Committee supports Recommendation 22 because the Committee believes that it would, if implemented, assist users of the legislation to better understand the potential consequences of breaching civil penalty provisions.


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.

51. The Committee supports Recommendation 23 because the Committee believes that it would, if implemented, improve users’ understanding of the operation of the offence provisions.

General observations

52. In this submission the Committee has sought to identify some of the changes that could be readily made on an isolated basis, so that some proposals can be actioned promptly to improve the existing regime.
53. The Committee generally agrees with the proposal to de-clutter and reorganise the Corporations Act’s Chapter 7 “cupboard”, but (with this metaphor in mind) notes that care should be taken:
- (a) to clearly inform users of the cupboard space where items (legislative provisions) have been moved to;
 - (b) to take care not to inadvertently discard items that are needed and/or useful;
 - (c) not to pile too many items on to one shelf in case important items become obscured and/or the shelf collapses because it is bearing too much weight; and
 - (d) to keep in mind new items that others may be adding to the cupboard while the various existing shelves are being put in order—one example being the

proposed new licensing exemptions for foreign financial service providers, which are currently the subject of a Treasury consultation process.

54. The Committee would also like to see the principles for improved drafting practices recommended by the ALRC being embraced for any new provisions that are introduced into the Corporations Act and related legislation going forward.
55. As noted earlier, the Committee appreciates the ALRC's depth of stakeholder engagement in conducting the Inquiry. The Committee would be very happy to have further discussions with the ALRC about this submission or any other relevant topic. Please do not hesitate to contact Pip Bell, Chair of the Committee


Yours faithfully



Philip Argy
Chairman
Business Law Section