15 March 2022

FINSIA SUBMISSION ON ALRC REPORT A FINANCIAL SERVICES LEGISLATION

Introduction

FINSIA (the Financial Services Institute of Australasia), welcomes the opportunity to make a submission to Report A Financial Services Legislation.

FINSIA's purpose is to deepen trust in financial services by raising standards of professionalism. It is a not-for-profit professional membership body for individuals working across the full spectrum of financial services industry in Australia.

As a connector between finance professionals and industry, FINSIA is keen to support the financial service industry's commitment to earn back trust and create an enduring customer focussed culture.

FINSIA's approach which informs our responses

FINSIA believes that relying upon sound professional judgement guided by professional standards in the application of principles, rather than driving rigid compliance with detailed prescriptive regulation, has three significant advantages

- Consistently better customer outcomes across the industry and over-time being more flexible to changing circumstances

- Lower conduct risk through the implementation of professionalism structures that adds personal accountability and accountability to one's peers to the expectations of their employer and regulators

- Lower compliance costs and reduced penalties for non-compliance with a shift in emphasis to accountability for outcomes rather than inputs.

A prescriptive approach can never anticipate every circumstance. FINSIA suggests that frequently the cause of customer harm and dissatisfaction is the application of rigid policies when the application of professional judgement is needed. However, a principles-based approach requires a professional framework of skills, experience and conduct rules which supports the application of sound judgement.

FINSIA has recently raised this issue in the context of the Independent Review of the Banking Code of Practice 2021 and suggested that the Code is currently driving an over-reliance upon rigidly prescribed rules which has been shown to diminish self-accountability and resulting in higher levels of risk incidents and inferior community outcomes. We are delighted to see the positive solutions we advocated have been emphatically adopted in Recommendation 30 of the Final Report.

Nor is FINSIA the only financial services association expressing these views. The Financial Services Council has also done so in its White Paper on Financial Advice which advocates for principles bases regulation noting "for example, guidance should provide examples of what an ethical or professional advice provider looks like, how they approach their work and in what manner. This would be more suitable to a profession than specific directions on what to do topic-by-topic, which implies a prescribed advice process."

We agree with the ALRC's comment in its background paper, Complexity and Legislative Design, that complexity in legislation "is likely to be excessive and unjustified where the prescription is disproportionate when measured against the capacity of the regulated community to understand, and comply meaningfully with, the legislation". In addition, we would suggest that sound judgement, within a professional framework of skills, experience and conduct rules, are an important part of the capacity of the regulated community to understand and comply meaningfully with the legislation.

Having said that, FINSIA acknowledges that some areas of prescription in the legislation have been made in response to industry concerns about uncertainty in the interpretation of more broadly expressed obligations. While FINSIA supports a principles-based approach, FINSIA's view is that reducing words does not necessarily equate to 'simplification', and we do not necessarily support removing specific or prescriptive provisions that assist interpretation particularly where they may have been introduced to address uncertainty or lack of clarity in a broadly expressed obligation. The financial services industry does require a reasonable degree of certainty about conduct that will or will not comply with the law, and we believe this also needs to be a guiding principle in assessing proposed changes to the law.

Overview of response

FINSIA notes submissions are not sought as to the Recommendations (1-13).

FINSIA makes submissions in relation to Proposals and Questions in the attached table.

Conclusion

FINSIA's Council, leadership team and members are eager to engage with the ALRC in its work to support professionalisation of the industry, professional education, and professional standards, all of which deliver the best community outcomes.

We would be delighted to discuss the important issues raised in further detail at your convenience.

John Corcoran

Chair
Financial Advice & Services Council

Chris Whitehead
CEO & Managing Director

QUESTION	DESCRIPTIONS	FINSIA'S RESPONSE
A1	What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand: a. legislative complexity and potential legislative simplification; b. the regulation of corporations and financial services in Australia; and c. the structure and operation of financial markets and services in Australia?	Some additional data the ALRC could consider could be: • consult NZ Law Reform Commission under the Closer Economic Relations. • research and data on customer harm and dissatisfaction arising from the application of rigid policies and prescriptive regulation when instead the application of professional judgement was needed. • notification of serious compliance concerns as this may indicate aspects of the law that are not clear or where there are issues with compliance with the law. • data from the FOS in addition to the data they have considered from AFCA • the policy intent of legislation as captured in second reading speeches to Parliament compared to decisions and outcomes led by regulators such as AFCA and ASIC • In examining the complexity of the law - the average number of pages a licensee has to pull together for an adviser to understand their obligations.
A2	Would application of the following definitional principles reduce complexity in corporations and financial services legislation? When to define (Chapter 4): a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would	• *When to define* – We agree with the definitional principles put forward for 'when to define'. • *Consistency of definitions* – We agree with the principles proposed • *Design of definitions* - We agree with the principles proposed.

	enhance readability and facilitate comprehension of the legislation. b. To the extent practicable, words and phrases with an ordinary meaning should not be defined. c. Words and phrases should be defined if the definition significantly reduces the need to repeat text. d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes. *Consistency of definitions (Chapter 5):* e. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act. f. Relational definitions should be used sparingly. g. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation. *Design of definitions (Chapter 6):* h. Interconnected definitions should be used sparingly. i. Defined terms should correspond intuitively with the substance of the definition. j. It should be clear whether a word or phrase is defined, and where the definition can be found.	
A3	Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms 'financial product' and 'financial service'.	FINSIA agrees with this proposal.
A4	In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to: a. remove specific inclusions from the definition of 'financial product' by repealing s 764A of the Corporations Act 2001 (Cth) and omitting s 12BAA(7) of the Australian Securities and	FINSIA suggests the ALRC might start from a position that the definition in the Acts to be as consistent, complete and self-contained as possible. We do not support the removal of specific inclusions from the definitions – we believe that the specific inclusions are generally easier for a reader to understand than a broader definition.

	Investments Commission Act 2001 (Cth); b. remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the Corporations Act 2001 (Cth) and s 12BAB(1)(h) of the Australian Securities and Investments Commission Act 2001 (Cth); c. remove the ability for regulations to deem conduct to be a 'financial service' by amending ss 766A(2) and 766C(7) of the Corporations Act 2001 (Cth), and ss 12BAB(2) and (10) of the Australian Securities and Investments Commission Act 2001 (Cth); d. remove the incidental product exclusion by repealing s 763E of the Corporations Act 2001 (Cth); e. insert application provisions to determine the scope of Chapter 7 of the Corporations Act 2001 (Cth) and its constituent provisions; and f. consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'.	We suggest that the exclusions and exemptions should be consolidated within the relevant Act. However, we acknowledge there would then still need to be a power for delegated legislation in order to allow for further exclusions to be added in a timely manner. An approach could be that on a regular basis e.g. annually, exclusions specified in delegated legislated are reviewed with a view to absorbing them in the Act, which would mean delegated legislated does not become unwieldy and also gives appropriate parliamentary oversight.
A5	The Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to remove the definitions of: a. 'makes a financial investment' (s 763B Corporations Act 2001 (Cth) and s 12BAA(4) Australian Securities and Investments Commission Act 2001 (Cth)); b. 'manages financial risk' (s 763C Corporations Act 2001 (Cth) and s 12BAA(5) Australian Securities and Investments Commission Act 2001 (Cth)); and c. 'makes non-cash payments' (s 763D Corporations Act 2001 (Cth) and s 12BAA(6) Australian Securities and Investments Commission Act 2001 (Cth)).	FINSIA supports this proposal. We assume no change in substantive law is intended.
A6	In order to implement Proposal A3: a. reg 7.1.06 of the Corporations Regulations 2001 (Cth) and reg 2B of the Australian Securities and Investments Commission Regulations 2001 (Cth) should be repealed;	FINSIA agrees that a definition of 'credit' that is consistent with the definition contained in the *National Consumer Credit Protection Act 2009* (Cth) should be used in the *Corporations Act 2001* (Cth) and in the *Australian Securities and*

	b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the Corporations Act 2001 (Cth) and in s 12BAA(1) of the Australian Securities and Investments Commission Act 2001 (Cth); and c. a definition of 'credit' that is consistent with the definition contained in the National Consumer Credit Protection Act 2009 (Cth) should be inserted in the Corporations Act 2001 (Cth) and in the Australian Securities and Investments Commission Act 2001 (Cth).	*Investments Commission Act 2001* (Cth). We think the preferred approach for readability is that the definitions are specified separately in each Act and are the same in each Act. It is acknowledged that when a definition is changed, there would be a need to change the definition across multiple legislation. However, this happens with other legislation, and simultaneous amendment of three Acts when this is required should not be an unduly complex task. We do not however support adding credit to the definition of a financial product. Credit activities are subject to a separate regulatory regime, and although there is cross over there are also significant divergences. The appropriateness of the divergences will require separate assessment, having due regard to the different nature of credit products. We agree that it would be worthwhile to explore the scope to harmonise the regulatory regimes, however this would require a separate substantive law review. If credit is added as a financial product in the Corporations Act, then to maintain the current regime further exclusions will need be incorporated to other parts of the Corporations Act e.g. the requirement to provide a SOA, which does not achieve the goal of reduced complexity.
A7	Sections 1011B and 1013A(3) of the Corporations Act 2001 (Cth) should be amended to replace 'responsible person' with 'preparer'.	FINSIA agrees with this proposal, and we assume no change in substantive law is intended.
A8	The obligation to provide financial product disclosure in Part 7.9 of the Corporations Act 2001 (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.	FINSIA supports this proposal in principle, however we suggest that care is required to ensure a feasible framework is designed. An outcomes-based disclosure regime would need to carefully research the history of the current regime and assess any issues with previous principles-based disclosure regimes.

A9	The following existing powers in the Corporations Act 2001 (Cth) should be removed: a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.	FINSIA supports this proposal, subject to the adoption of proposal A10.
A10	The Corporations Act 2001 (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.	FINSIA supports the proposal to implement a general power to create exclusions and grant exemptions from Chapter 7, subject to our comments in A4. This power should be exercisable either by the Minister or by ASIC. Historically ASIC's direct relationship with industry has meant that ASIC is better placed to respond to industry developments in a more timely manner than is possible for Treasury or other Government Departments, and some legislative provisions have been unworkable in the absence of ASIC exemptions. We therefore believe that ASIC should continue to be able to grant exemptions. In either case they should be disallowable by Parliament.
A11	In order to implement Proposals A9 and A10: a. Should the Corporations Act 2001 (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'? b. Should any such power be granted to the Australian Securities and Investments Commission?	a. **Should the *Corporations Act 2001* (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?** FINSIA supports this proposal. b. **Should any such power be granted to the Australian Securities and Investments Commission?** Yes, for the reasons explained in A10.
A12	As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the Corporations Act 2001 (Cth) made by delegated legislation.	We support this. We also propose it would be further helpful to have a 'marked up' version of changes, or a full comparison provided of the former wording, and new wording publicly distributed in advance.

A13	The Corporations Act 2001 (Cth) should be amended to: a. remove the definition of 'financial product advice' in s 766B; b. substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and c. incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.	FINSIA supports this proposal. FINSIA's view is that, conceptually, the dividing line between "information" and "advice" and between "general advice" and "personal advice", are counter intuitive and a full review of the parameters of regulated "advice" is warranted. These issues are particularly important now, in circumstances where • technology is expected to have a significant role in providing financial information and advice in the community and • investment decisions in respect of that technology are hampered by legal uncertainty. This will require a substantive law review which may well be outside the scope of this review. We agree however that the proposals will assist in alleviating the confusion arising from the terms themselves.
A14	Section 766A(1) of the Corporations Act 2001 (Cth) should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.	
A15	Section 766B of the Corporations Act 2001 (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.	
A16	Should the definition of 'retail client' in s 761G of the Corporations Act 2001 (Cth) be amended: a. to remove: i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or b. in some other manner?	As to (5), (6) and (6A), we suggest that there are sound policy reasons why the rules for general insurance products, superannuation / RSA products and traditional trustee company services are different from other products. Care needs to be taken with the asset and income tests as neither is in reality a real measure of financial sophistication. Would a test approach or an objective framework serve the purposes of the legislation better? If asset and income exceptions are to remain we suggest that the "assets" that count towards the exception should be limited to "investable assets" which would exclude, for example, a principal place of residence and possibly also an inheritance. We also suggest that navigability could be improved by separating the definitions for businesses and individuals.

A17	What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the Corporations Act 2001 (Cth)?	FINSIA believes it is not appropriate for an adviser to determine if a person is not a retail client and far more appropriate for a framework to be used to determine this. In relation to the content of such a framework we suggest an opt in 12-month period, following objective testing of sophistication which might vary depending on the nature of investment, and with the testing determined by (e.g.) ASIC or an industry body not by the client's adviser.
A18	Should Chapter 7 of the Corporations Act 2001 (Cth) be amended to insert certain norms as an objects clause?	FINSIA is not convinced that inserting a general objects clause with stated norms would assist in readability of the legislation and may raise more questions than it answers. The recommendation made by Commissioner Hayne in the Royal Commission report as to the effect that *"As far as possible, legislation governing financial services should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter."* We do not think the recommendation is met by having a general objects clause applicable to the entirety of Chapter 7. The recommendation would be better achieved if norms are linked to legislative provisions about particular subject matters. A review of each provision against the norms listed in the Report could form part of a general review of Chapter 7.
A19	What norms should be included in such an objects clause?	See comments on A18.
A20	Section 912A(1)(a) of the Corporations Act 2001 (Cth) should be amended by: a. separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs; b. replacing the word 'efficiently' with 'professionally'; and c. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.	FINSIA supports the proposals to separate the terms and replace "efficiently" with "professionally", subject to our comments below. Case law on the interpretation of this section has had to consider whether the words import separate obligations or define a single combined obligation, and there have been differing judicial approaches. We think that making clear that separate obligations are intended would assist in certainty of interpretation.

		It is noted the consequence would be that conduct which contravenes any of the limbs would attract the relevant penalty. We also support specifying that the relevant obligation is to "take reasonable steps".
A21	Section 912A(1) of the Corporations Act 2001 (Cth) should be amended by removing the following prescriptive requirements: a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa)); b. to maintain the competence to provide the financial services (s 912A(1)(e)); c. to ensure representatives are adequately trained (s 912A(1)(f)); and d. to have adequate risk management systems (s 912A(1)(h)).	FINSIA does not support this proposal. FINSIA's view is that reducing words may not necessarily equate to 'simplification', and that this may be one instance where specific obligations can assist in understanding. We suspect that removal of these specific obligations would result in changes to ASIC regulatory guides which would state ASIC's view that these obligations are inherent in the in the general obligation in s 912A(1)(a). Removal of the specific obligations also potentially allows for Licensees to have their own interpretation, which can result in different standards across the industry.
A22	In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the Corporations Act 2001 (Cth) and s 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed.	FINSIA supports this proposal. We think that s 12CB of the Australian Securities and Investments Commission Act 2001 adequately covers the subject matter.
A23	In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, 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 consolidated into a single provision.	FINSIA supports this proposal
A24	Would the Corporations Act 2001 (Cth) be simplified by: a. amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the	We understand that the ALRC intends to consider any outcomes of the Quality of Advice Review before making recommendations concerning these provisions, and we support consideration of further evidence about the operation of the safe harbour provisions.

	primary obligation in sub-s (1) has been satisfied; and b. repealing ss 961C and 961D?	FINSIA suggests that as financial advice continues to move to a profession, the focus needs to be on meeting best interests duty and related obligations in line with an adviser's obligations as a professional supported by individual standards and professional education. FINSIA suggests that it is counterproductive, and may lead to customer harm, for the regulatory framework to have only one set of conditions under which the best interest duty will be met. However having indicative behaviours of compliance would be useful. We acknowledge of course that there is also merit in ensuring that all advisers within the industry are taking a consistent approach towards the best interest duty and in providing clarity for compliance audit purposes but the current approach in 961B(2) is not the only way to support this outcome. As to 961C and 961D, we suggest these probably reflect a common-sense interpretation of the words in any case. While an explicit definition has benefits, it also of course ads length and practical imposts to understanding. FINSIA suggests a better approach is to complete the journey to professionalisation, supported by individual standards and professional education.