Australian Banking Association

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Australian Law Reform Commission
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Australian Law Reform Commission, Financial Services Legislation, Interim Report A

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 A.

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'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' in relation to three topics, the first being the 'use of definitions in corporations and financial services legislation, including:

- the circumstances in which it is appropriate for concepts to be defined, consistent with promoting robust regulatory boundaries, understanding and general compliance with the law;
- the appropriate design of legislative definitions; and
- the consistent use of terminology to reflect the same or similar concepts.'

The ABA also notes that Interim Report A, released in November 2021, sets out the ALRC's initial recommendations, proposals, and questions in relation to this first topic and that submissions are sought on 16 proposals and 8 questions.

The ABA's approach to financial services regulation reform

The ABA acknowledges that the Inquiry was constituted to address concerns about the financial services regime raised by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**). As stated in the Final Report of the Royal Commission, 'the more complicated the law, the harder it is to see unifying and informing principles and purposes'.[1]

The ABA supports reforms to financial services legislation which will simultaneously reduce the regulatory burden and clarify expected behaviours within the financial services industry. To the extent that the current regulatory framework can be made 'clear, coherent, effective, and readily accessible',[2] reform will benefit all stakeholders and best serve the interests of consumers.

[1] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, February 2019, 44, as noted in Interim Report A, 32.

2 Consistent with Principle One of the five 'overarching principles' set out in Interim Report A – 'It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible': Interim Report A, 38.

It is clearly in the interests of consumers that financial services providers are able to navigate the many obligations which are placed upon them, so that there is clarity for all rather than opacity.

Finally, the ABA supports a detailed and structured consultation process going forward, especially where any proposed change to the financial services regulatory regime may lead to a substantive change in the law. The need for substantial lead time for implementation and the impacts of transition costs should be considered to allow all stakeholders the opportunity to address resulting regulatory and operational impacts.

Key Points

In addition to specific feedback provided in this submission on the questions and proposals put forward by the ALRC in Interim Report A, the ABA would welcome clarification and further discussion / engagement on the following issues as the Inquiry continues:

1. The potential to create a single Act

As noted in Interim Report A, the *Corporations Act 2001* (Cth) (***Corporations Act***) is the second longest Commonwealth Act[3] and has more chapters than any other, at 33,[4] which suggests that 'it covers a remarkably wide subject matter even relative to other broad regulatory Commonwealth Acts'.[5] It is also noted that the *Corporations Act* is 'the third most cited Commonwealth Act in Federal Court judgments.'[6] It would also be of interest to the ABA to know how many of those citations relate to Chapter 7 of the *Corporations Act*.

Of course, as set out in the Interim Report, 'elements of corporations and financial services regulation are found within other Commonwealth Acts' not merely the *Corporations Act.*[7] Indeed, the Final Report of the Royal Commission sets out an extensive list of legislation relevant to financial services regulation.[8] Even excluding overseas acts, State acts, amending acts, and regulations, there are 24 pieces of relevant Commonwealth legislation listed.

This information highlights the already lengthy, extensive, and complex nature of the regulation of financial services, which is complicated further by the addition of a succession of regulations, orders, and other legislative tools. It has become increasingly difficult for financial services providers, consumers, and regulators to find and understand the law as it relates to the duties, obligations, and rights of those who seek to provide or receive financial services, and those difficulties create significant tangible and intangible costs and barriers for all parties.

Ideally, the creation of a single Act to regulate financial services in Australia will significantly reduce the complexity that exists within the current regulatory framework.

However, constitutional restrictions and legislative limitations prevent a full consolidation, as highlighted in Interim Report A.[9]

The possibility of least consolidating the content of Chapter 7 of the *Corporations Act*, the *National Consumer Credit Protection Act 2009* (Cth) (***NCCP Act***), and the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) into a single Act, to be renamed the *Financial Services and*

[3] Interim Report A, 110.

[4] Chapter 7 represents 28% of the *Corporations Act*: Interim Report A, 113.

[5] Interim Report A, 116.

[6] Interim Report, 110.

7 Interim Report A, 30. Examples listed include the Australian Securities and Investments Commission Act 2001 (Cth); the Australian Consumer Law; the National Consumer Credit Protection Act 2009 (Cth); the Superannuation Industry (Supervision) Act 1993 (Cth); the Banking Act 1959 (Cth); the Insurance Contracts Act 1984 (Cth); the Insurance Act 1973 (Cth); and the Marine Insurance Act 1909 (Cth).

[8] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, February 2019, xxxi-xxxiii.

[9] Interim Report A, 292.

Markets Act (or similar),[10] would significantly improve navigability, and would benefit consumers, regulators, and all participants in the financial services industry, as well as reducing the length and complexity of the *Corporations Act* itself. Of course, this form of consolidation would also lead to significant transition costs for financial services providers and other stakeholders and, as a result, a detailed and structured consultation would be necessary, as highlighted above.

The ABA notes that the next two stages of the Inquiry, to be addressed in Interim Reports B and C, will focus on, respectively:

- the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards; and
- how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured,

and that 'whether the regulation of credit and of financial products and financial services should be consolidated' will be the focus of Interim Report C.[11]

The ABA would like to see the ALRC pursue the possibility of consolidating Chapter 7 of the *Corporations Act,* the *NCCP Act*, and the *ASIC Act* into a single Act, as part of its consideration of the most appropriate ways in which to reframe and restructure of the *Corporations Act,* and to continue to explore ways in which the total number of relevant regulatory instruments can be further consolidated and reduced, with the intention of improving navigability, reducing the length and complexity of the legislation, while minimising resulting transition costs for all stakeholders.

2. The alignment of definitions with those in other legislation

Adding to the complexity of financial services regulation in Australia is the fact that a number of terms which are defined and used in the *Corporations Act* are also used in other relevant legislative instruments, with definitions and usage that are not identical. This variation makes it unnecessarily confusing and difficult for consumers, as well as financial services providers, to have confidence and certainty as to the intended meaning of certain terms. In particular, the differing definitions of 'credit' in Chapter 7 of the *Corporations Act* and the *NCCP Act* create unwarranted confusion and uncertainty.

In addition to ensuring the consistency of definitions within the *Corporations Act,* the Interim Report suggests that 'the usage of key terminology should be the same across financial services legislation'.[12] Question A2g asks whether it would reduce complexity in corporations and financial services legislation to apply a definitional principle that, 'to the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.' The ABA agrees that it would.

In particular, Proposal A3 is that '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'', and Proposal A6c is that 'a definition of 'credit' that is consistent with the definition contained in the *NCCP Act* should be inserted in the *Corporations Act* and in the *ASIC Act*.'

Subject to the acceptable finalisation of the relevant definitions and further comments below, the ABA supports these proposals, and would like to see uniform definitions proposed for all relevant terms across financial services legislation, not just those set out above. This process would be facilitated by the consolidation of Chapter 7 of the *Corporations Act,* the *NCCP Act*, and the *ASIC Act,* as noted above, which would also address the issue of overlapping definitions between the *Corporations Act* and

[10] As briefly discussed in Interim Report A, 292.

[11] Interim Report A, 37.

[12] Interim Report A, 458.

the *ASIC Act.*[13] However, care will need to be taken to ensure this process does not operate to expand the ambit of the various regimes which currently regulate financial services.[14]

3. The impact of 'outcomes-based' disclosure and 'design and distribution' obligations

The ALRC has sought feedback on Proposal A8, which is that the 'obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act* should be reframed to incorporate an outcomes-based standard of disclosure.'

The Federal Government introduced Design and Distribution Obligations (**DDO**) in 2017 to ensure financial products were targeted at the right people and from the perspective that disclosure documents are not effective tools for consumer engagement. Despite this, public policy reform has not been made to disclosure requirements in the *Corporations Act* to ensure consistency for customers. Consequentially, there are now two regimes in place with conflicting objectives; one that places the onus entirely on the financial provider to determine whether a product is appropriate and one that relies on consumers educating themselves through disclosure.

Further, as noted in the Interim Report, the existing disclosure requirements are 'overly complex and fail to facilitate effective disclosure to consumers'.[15] The ALRC has suggested that an 'outcomes-based standard' may increase 'cost efficiency of disclosure by enabling providers to tailor the steps taken to meet the obligation on the basis of, for example, the relative complexity and risk of the product, and the types of persons to whom the product will be marketed.'[16] However, while the current regime does necessitate costly disclosure and compliance by financial services providers, there is no evidence that this is likely to be reduced under an 'outcomes-based' disclosure regime.

As stated in the Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth), disclosure requirements need to 'balance the need for the purchaser to have sufficient information to make an informed decision and compare products against the concern that they may be provided with more information than they can comprehend'.[17] Disclosing 'excessive or complex' information may 'confuse consumers and discourage them from using disclosure documents'.[18]

Indeed, an 'outcomes-based' standard may be more likely to increase, not decrease, the cost and complexity of compliance, and will not necessarily reduce the volume of information required to be provided to consumers or make it more likely that they will use or read disclosure materials.

The ABA recommends a review of the effectiveness of the DDO regime and its relationship with the broader financial services regulatory framework before creating new 'outcomes-based' disclosure obligations, which have the potential to add significant complexity.

In summary, while the ABA supports a careful rationalisation of disclosure regimes, it is the ABA's view that there is no clear case for additional 'outcomes-based' disclosure obligations until benefits for both consumers and financial services providers can be demonstrated.

4. The implications for emerging markets and products

An issue not specifically addressed in Interim Report A is the adaptability of the current regulatory regime to emerging markets and products.

The ABA notes that Principle Five of the Inquiry is that 'the legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory

[13] As highlighted in Interim Report A, 169-170.

[14] For example, the current definition of 'financial product' in the *ASIC Act* extends to credit, but the definition in the *Corporations Act* does not. It would not be appropriate for regimes which do not currently apply to credit, such as 'hawking' under the *Corporations Act*, to be imposed on credit products as a result of a uniform definition of 'financial product'. Distinctions which apply to business lending should also be retained.

[15] Interim Report A, 364.

[16] Interim Report A, 395.

[17] Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth), [14.71], referred to in Interim Report A, 367.

[18] Financial System Inquiry, Final Report, 1997, 261.

arrangements',[19] and that the Inquiry's terms of reference emphasise 'the importance, within the context of existing policy settings, of having an adaptive, efficient and navigable legislative framework for corporations and financial services'.[20]

In this context, it is important not just that laws be drafted in a technology-neutral manner, but also to acknowledge that technology can lead to the development of new products and services which may or may not be considered to be 'financial products' or 'financial services' depending on how they are structured. Indeed, the ways in which such products are developed and structured may be motivated by a desire to avoid classification as a financial product or financial service. 'Buy Now Pay Later' services, and a variety of technology-enabled products such as crypto-currencies, have become popular in recent times, and, as technologies evolve, it should be anticipated that such trends will continue.

The ABA would encourage the ALRC to consider these issues in the context of the proposed changes to the definitions of financial products and financial services. While it is desirable that legislative instruments be drafted sufficiently broadly that their application is not limited to existing products and services, it should also be acknowledged that revision may be required in the future in order to close loopholes and ensure that emerging products and services are not inappropriately or unfairly favoured or preferenced over existing products and services. This issue is likely to be most relevant in the next stages of the Inquiry, particularly when considering 'how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured' in Interim Report C, and the ABA would welcome the opportunity to engage with the ALRC at that time.

Questions from Interim Report A

Question 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?

Interim Report A asserts in a number of contexts that certain reforms might reduce compliance costs or improve cost efficiency,[21] but states that the ALRC 'does not have the expertise or data available to estimate the financial cost of existing legislation or proposed legislative reforms'.[22]

The ABA suggests that the ARLC could commission a voluntary qualitative survey of a number of financial services providers to gather information about their direct and indirect costs incurred in complying with the current regulatory regime, which would be useful as a baseline for determining whether costs are likely to be reduced as a result of proposed reforms. Such direct and indirect costs may include expenditure on necessary internal compliance, risk and in-house legal staff, and obtaining advice from external lawyers and compliance consultants.

Question 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 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

[19] Interim Report A, 38.

[20] Interim Report A, 5.

[21] See for example, Interim Report A, 367 and 395.

[22] Interim Report A, 55.

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.

The ABA is generally supportive of these definitional principles, particularly A2j, as it is highly desirable that it be clear where definitions can be found.

However, in relation to A2b, while most words do have an 'ordinary meaning', that meaning may vary according to context, in which case a definition is useful in order to avoid ambiguity. For example, s 766C of the *Corporations Act* concerns the meaning of 'dealing' and s 766C(2) sets out when 'arranging' for a person to engage in certain conduct is also a 'dealing'. Prior to the introduction of this provision, 'arranging' had a well-understood meaning in an insurance context but not otherwise, which necessitated substantial ASIC guidance concerning its interpretation of the meaning of this term (now found in ASIC Regulatory Guide 36).[23] Such confusion may have been avoided with an appropriate definition of 'arranging'.

The ABA feedback in relation to A2g, concerning the consistent meaning of key defined terms across all Commonwealth corporations and financial services legislation, has been provided above. As noted, care will need to be taken to ensure that the creation of 'key defined terms' does not operate to expand the ambit of the various regimes which currently regulate financial services.

Question A11 - In order to implement Proposals A9 and A10:
a. Should the *Corporations Act* 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 ASIC?

The ABA supports an amendment to the *Corporations Act* that would enable thematic consolidation of legislative instruments. Such power could be appropriately granted to either the Treasury or ASIC, so long as it is accompanied by mandatory consultation requirements and a mechanism for disallowance by Parliament. However, certain instruments are used to 'plug holes and gaps' in legislation where the more preferable solution would instead be for deficiencies to be addressed in legislation itself.

Question A16 - Should the definition of 'retail client' in s 761G of the Corporations Act 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?

The ABA does not consider it necessary to remove subsections (5), (6) and (6A) from section 761G of the *Corporations Act,* but would welcome amendment of s 761G(6) to provide more clarity. It is not

[23] ASIC Regulatory Guide 36, Licensing: Financial Product Advice and Dealing, June 2016.

clear when a financial service provided to an SMSF trustee 'relates to a superannuation product' and therefore when an SMSF trustee should be considered to be a wholesale client.[24]

The ABA does not consider it necessary to remove the product value exception in s761G(7)(a), or the asset and income exceptions in s 761G(7)(c), which are widely relied upon, but supports indexation of the relevant amounts in both subsections. However, s 761G(7)(ca), which takes effect as a result of *Corporations Regulation* 7.6.02AB, lacks certainty[25] due to the definition of 'control' which applies,[26] and could be improved by amendment.

Question A17 - What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the *Corporations Act*?

The ABA does not propose new criteria at this stage, but notes that the relevant tests in s 761GA are highly subjective, which reduces the practical utility of this exception. In this context, it would be useful for further consideration to be given to the applicability of the concepts of 'general advice' and 'personal advice' to sophisticated investors.

Question A18 - Should Chapter 7 of the *Corporations Act* be amended to insert certain norms as an objects clause?

The inclusion of certain norms as an objects clause could aid in statutory interpretation but, given the very wide ambit of Chapter 7 of the *Corporations Act,* the application of norms may be of limited utility and have unforeseen and unintended consequences. The ABA would support a consideration of certain norms as an objects clause as part of an ongoing consultation process.

Question A19 - What norms should be included in such an objects clause?

Given the issues raised, above, the development of appropriate norms to be included in an objects clause would require ongoing consultation and discussion. In particular, of the six norms identified by the Royal Commission:[27]

(i) obey the law;
(ii) do not mislead or deceive;
(iii) act fairly;
(iv) provide services that are fit for purpose;
(v) deliver services with reasonable care and skill; and
(vi) when acting for another, act in the best interests of that other,

the ABA notes that a norm to 'obey the law' is redundant within a legislative context, and that a norm to 'act fairly' may be exceedingly broad within the context of the broad ambit of Chapter 7 of the *Corporations Act.*

Question A24 - Would the *Corporations Act* 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 primary obligation in sub-s (1) has been
satisfied; and
b. repealing ss 961C and 961D?

While the ABA supports simplification of the *Corporations Act*, the ABA has concerns that this proposal would increase the complexity of the law. In particular, by recasting the requirements of s 961B as 'indicative behaviours' of compliance, ambiguity and subjectivity will be introduced.

[24] This issue is highlighted in ASIC Media Release 14-191MR, Statement on wholesale and retail investors and SMSFs, 8 August 2014.

[25] Section 761G(7)(ca) of the *Corporations Act* allows the wholesale client exception to apply if a financial product or financial service is acquired by a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii), meaning they meet the requirements for a qualified accountant's certificate.

[26] 'Control' is based on the s50AA definition in the *Corporations Act*, which is fact-specific and difficult to apply in practice.

[27] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, February 2019, 9.

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Proposals from Interim Report A

Proposal 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'.

As noted above, the ABA supports the adoption of uniform definitions of all relevant terms across financial services legislation, which would be facilitated by the consolidation of Chapter 7 of the *Corporations Act,* the *NCCP Act*, and the *ASIC Act.*

The ABA would like to see further consultation with industry before the proposed new definitions of 'financial product' and 'financial service' are settled. As noted above, care will need to be taken to ensure that the creation of 'key defined terms' does not operate to expand the ambit of the various regimes which currently regulate financial services. Further analysis of the practical effects of the proposed new definitions would be helpful in order to ensure that unnecessary complexity is reduced as much as possible, while maintaining necessary certainty.

Proposal A4 - In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the *Corporations Act* and the *ASIC Act* should be amended to:
a. remove specific inclusions from the definition of 'financial product' by repealing s 764A of the *Corporations Act* and omitting s 12BAA(7) of the *ASIC Act*;
b. remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the *Corporations Act* and s 12BAB(1)(h) of the *ASIC Act*;
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*, and ss 12BAB(2) and (10) of the *ASIC Act*;
d. remove the incidental product exclusion by repealing s 763E of the *Corporations Act*;
e. insert application provisions to determine the scope of Chapter 7 of the *Corporations Act* 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'.

The ABA generally supports Proposal A4, but in relation to A4a the ABA has concerns that the removal of specific inclusions (e.g, 'credit facilities') which currently provide clarity and reduce complexity will be at the cost of certainty.

The ABA supports Proposals A4b, A4c, and A4d.

The ABA supports the general principle of Proposal A4e, subject to the appropriate positioning of the relevant application provisions.

The ABA supports Proposal A4f, which is consistent with the ABA's view that, to the extent possible and appropriate, the number of regulatory instruments relating to the financial services industry should be consolidated and reduced. As noted above in relation to Question A11, the ABA supports an amendment to the *Corporations Act* which would enable thematic consolidation of legislative instruments.

Proposal A5 - The *Corporations Act* and the *ASIC Act* should be amended to remove the definitions of:
a. 'makes a financial investment' (s 763B *Corporations Act* and s 12BAA(4) *ASIC Act*);
b. 'manages financial risk' (s 763C *Corporations Act* and s 12BAA(5) *ASIC Act*); and
c. 'makes non-cash payments' (s 763D *Corporations Act* and s 12BAA(6) *ASIC Act*).

The ABA has concerns in relation to this Proposal, as these provisions clarify the scope of s 763A rather than create complexity.

Proposal A6 - In order to implement Proposal A3:
a. reg 7.1.06 of the *Corporations Regulations* and reg 2B of the *ASIC Regulations* should be repealed;
b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the *Corporations Act* and in s 12BAA(1) of the *ASIC Act*; and

c. a definition of 'credit' that is consistent with the definition contained in the *NCCP Act* should be inserted in the *Corporations Act* and in the *ASIC Act*.

As noted above in the context of the alignment of definitions with those in other legislation, the ABA supports Proposal A6c, subject to the acceptable finalisation of the definition of 'credit', noting that care will need to be taken to ensure this process does not operate to expand the ambit of the various regimes which currently regulate financial services. However, the ABA cannot currently support Proposals A6a and A6b, because they would have a significant impact on the meaning of 'credit'. As noted above, the differing definitions of 'credit' in Chapter 7 of the *Corporations Act* and the *NCCP Act* (as well as in the *Privacy Act 1988* (Cth), and various regulations) create unwarranted confusion and uncertainty – this results in unnecessary complexity, and there is no clear rationale for the varying positions. The ABA would like to see further consultation with industry before a new definition of 'credit' is settled.

Proposal A7 - Sections 1011B and 1013A(3) of the *Corporations Act* should be amended to replace 'responsible person' with 'preparer'.

The ABA does not support this Proposal, as it not clear that it resolves any uncertainty.

Proposal A8 - The obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act* should be reframed to incorporate an outcomes-based standard of disclosure.

The ABA recommends a review of the effectiveness of the DDO regime and its relationship with the broader financial services regulatory framework before creating new 'outcomes-based' disclosure obligations, which have the potential to add significant complexity.

Proposal A9 – The following existing powers in the *Corporations Act* 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.

Proposal A10 – The *Corporations Act* 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.

Together, Proposal A9 and Proposal A10 would both operate to support a consolidated regime. In principle and, as noted above in relation to Question A11, the ABA supports amendments to the *Corporations Act* that would enable thematic consolidation of legislative instruments. The ABA also considers that any changes to powers in the *Corporations Act* should be appropriate and designed for the benefit of all industry stakeholders and customers.

Proposal A12 - As an interim measure, ASIC, 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* made by delegated legislation.

The ABA supports this proposal.

Proposal A13 - The *Corporations Act* 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'.

As noted above, the ABA would like to see further consultation with industry before proposed new definitions of 'financial product' and 'financial service' are settled, as well as a consideration of the outcomes of the current 'Review of the Quality of Financial Advice' being undertaken by Treasury.

Proposal A14 - Section 766A(1) of the *Corporations Act* should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.

The ABA is unable to support this proposal at this time and, as noted above, the ABA would like to see further consultation with industry before proposed new definitions of 'financial product' and 'financial service' are settled.

Proposal A15 - Section 766B of the *Corporations Act* should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

The ABA is supportive of this proposal.

Proposal A20 - Section 912A(1)(a) of the *Corporations Act* 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.

The ABA notes that the industry has grown accustomed to the practical application of these terms and consideration needs to be given as to whether further change would achieve the objective of simplification.

On this specific proposal, in relation to A20a, the ABA has concerns about the impact of any change to the compendious nature of the 'efficiently, honestly and fairly' test in section 912A, and considers that it should form part of the detailed consultation.

A separation of the obligations may create a lower threshold for each of the obligations, rather than allowing a holistic consideration of a licence holder's conduct.

In relation to A20b, the ABA does not support the replacement of the word 'efficiently' with the word 'professionally', and suggests that 'competently' is a more appropriate substitution to better capture the proposed intent. The word 'professionally' has an accepted meaning at general law and may imply fiduciary-like obligations.

The ABA supports proposal A20c subject to the broader consultation as mentioned above.

Proposal A21 - Section 912A(1) of the *Corporations Act* 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)).

While the ABA considers there is scope to review these obligations, there is benefit in maintaining some prescriptive requirements as legislated minimum standards, which clearly articulate expectations of financial services licensees.

Proposal 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* and s 12CA of the *ASIC Act* should be repealed.

The ABA supports this proposal.

Proposal 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* and the *ASIC Act* should be consolidated into a single provision.

The ABA supports this proposal.

Concluding Remarks

The ABA is grateful for the opportunity to provide this feedback on Interim Report A, and would welcome the opportunity to engage in further consultation and discussion with ALRC representatives about the issues raised in this submission, and on the topics which will be the subject of Interim Reports B and C.

This submission was prepared with the assistance of the University of Sydney Business School.

Yours sincerely

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.