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Australian Law Reform Commission
By email: financial.services@alrc.gov.au

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

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 B.

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 B, released in late September 2022, focusing on 'the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards' and:

- 'how legislative complexity can be appropriately managed over time;
- how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and
- how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.'

The ABA also notes that Interim Report B sets out 16 proposals and two questions on which stakeholder submissions are sought.

The ABA's approach to financial services regulation reform

The ABA agrees that financial services regulation 'has become unmanageably and unnecessarily complex',¹ and supports appropriate reforms to financial services legislation which will simultaneously reduce the regulatory burden and clarify expected behaviours within the banking and financial services industry, in order to benefit all stakeholders and best serve the interests of consumers. The ABA continues to support a detailed and structured consultation process going forward, especially if there is the prospect that any proposed change to the financial services regulatory regime may lead to a substantive change to the law.

The objects of Chapter 7 include confident and informed decision making by consumers of financial products and fairness, honesty and professionalism by those who provide financial services². The ABA proposes that these objects, in particular should remain a focus of the inquiry.

The ABA is grateful for the opportunity to provide this feedback on Interim Report B, and appreciates the opportunities for consultation which have been afforded by the ALRC.

¹ ALRC, Interim Report B, 27.

² S760A (a) – (b), *Corporations Act 2001* (Cth).



Key Points

In addition to specific feedback provided in this submission on the questions and proposals put forward by the ALRC in Interim Report B, the ABA would particularly welcome clarification and further discussion on the following issues:

1. The Status of Chapter 7 of the *Corporations Act*

The ABA notes that the question of whether Chapter 7 of the *Corporations Act* should be consolidated with other relevant provisions into a standalone act separate from the *Corporations Act* is being deferred until Interim Report C.³ It is the ABA's strong 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*, supported by a single subordinate instrument, and we would welcome the opportunity to discuss the advantages and disadvantages of this approach.

Importantly, the consolidation into one "financial services" act has the benefit of focussing the legislation's objects, to focus on consumer outcomes and protections, as well as managing risk in the financial services markets.

2. Transition and Implementation

As is noted by the ALRC, there will be significant transition and implementation costs associated with the proposed regulatory reforms,⁴ particularly for regulated entities. While the ABA acknowledges that some reform is both necessary and desirable, we wish to reinforce the need for a substantial lead time for implementation of any reforms, in order to allow all stakeholders the opportunity to address the resulting regulatory and operational impacts of change. The current Inquiry takes place at a time when other concurrent regulatory changes are occurring in the banking and financial services industry.⁵ As a result, the ABA urges a carefully staged process for the implementation of the reforms resulting from this Inquiry, and would welcome a moratorium on further regulatory change in the interim, as well as an opportunity to comment on the proposed order and timing for implementation in the future.

3. Need for 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 as the Inquiry approaches its final year. We have highlighted throughout this submission some key topics on which we believe further consultation will be critical.

Proposals and Questions from Interim Report B

Proposal B1 - The legislative hierarchy of Chapter 7 of the *Corporations Act 2001* (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:

- a. an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;**
- b. a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and**
- c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.**

Subject to the feedback provided throughout this submission, the proposed legislative model would, in general, be a significant improvement on the current model, under which it is increasingly difficult to

³ ALRC, Interim Report B, 30.

⁴ ALRC, Interim Report B, 27.

⁵ Such as the Quality of Advice Review, the Banking Code of Practice Review, and other reforms resulting from the Banking Royal Commission.



determine the precise nature and extent of the law without examining multiple legislative instruments and related materials. We note that under the proposed model, it will still be necessary to refer to three separate documents (the Act, the Scoping Order, and the Rules) to fully understand and interpret a provision of the Act.

While the ABA supports this proposal in principle, we question whether there is a necessity to create and maintain a Scoping Order and thematic Rulebook as separate legislative instruments. Given that the powers to make the Scoping Order and Rules are both proposed to be vested in the Minister and ASIC, the ABA would prefer that the legislation be supported by a single subordinate instrument, combining the contents of the proposed Scoping Order and Rules, to aid accessibility, readability, and certainty for all stakeholders.

Additionally, we consider that some of the contents of the proposed Scoping Order relating to the application of the Act should be dealt with in primary legislation and should not be delegated.⁶ We would welcome greater clarity on the reasons for the proposed delegations.⁷ As noted above, it is the ABA's 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*, supported by a single subordinate instrument, but we understand that the question of whether a standalone act should be adopted is being deferred until Interim Report C.

Proposal B2 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to:

- a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and**
- b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act; in the Scoping Order.**

The ABA notes that these powers are proposed to be jointly vested in the Minister and ASIC, to be exercised in accordance with a protocol discussed in Proposal B8. The ABA supports this proposal, subject to the comments made above and in relation to Proposal B8, and the inclusion of clearly mandated consultation requirements, a defined process for the exercise of these discretionary powers, and appropriate mechanisms for Parliamentary disallowance. In addition, the ABA also recommends that a mechanism be included to address any unintended consequences resulting from an exclusion or modification, and to temporarily fix other deficiencies.

Proposal B3 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as 'individual relief').

The ABA supports this proposal – it is important that individual relief can continue to be granted by ASIC.

Proposal B4 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to require that:

- a. every legislative instrument made under the power set out in Proposal B2; and**
 - b. every notifiable instrument made under the power set out in Proposal B3;**
- must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.**

⁶ We note that the guidance contained in Appendix E of Interim Report B states that there 'must be good reasons to delegate a power of exclusion or exemption' and that 'the scope (or perimeter) of a statutory regime is an important policy decision that should be made by Parliament and generally contained in an Act,' at page 258.

⁷ We also note that, under the proposed model, the existence of an exemption to the Act's application would not be apparent on the face of the Act itself.



The ABA supports this proposal. In order to provide greater clarity, and increased accessibility and ease of understanding by all stakeholders, the ABA would also like this requirement to be extended, so that the accompanying statement for each instrument must also include a version of the relevant legislative provisions as modified, to enable the modifications to be clearly identified, as well as a clear statement which sets out the circumstances in which the modifications will apply.

Proposal B5 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to make ‘rules’.

While the ABA supports this proposal generally, as noted in relation to Proposal B1 above, we question whether there is a necessity to create and maintain a Scoping Order and thematic Rulebook as separate instruments. Given that the powers to make the Scoping Order and Rules are both proposed to be vested in the Minister and ASIC, the ABA would prefer that the legislation be supported by a single subordinate instrument, combining the contents of the proposed Scoping Order and Rules. As is also noted above, it is the ABA's 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*, supported by a single subordinate instrument, but we understand that the question of whether a standalone act should be adopted is being deferred until Interim Report C. We also note that it is proposed that the Rules will contain ‘much of the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors and circumstances’.⁸ In this context, it is not clear which details will be contained in the Act and which will be contained in the Rules. These boundaries will need to be set appropriately and clearly articulated, so that matters which should be contained in primary legislation are not delegated.

Proposal B6 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to require that the explanatory statement accompanying every legislative instrument made under the power in Proposal B5 must address explicitly how the instrument furthers relevant objects within Chapter 7.

The ABA supports this proposal.

Proposal B7 - Rules made under Chapter 7 of the *Corporations Act 2001* (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:

- a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;**
- b. administrative penalties; and**
- c. powers enabling regulators to take discretionary administrative action.**

The ABA supports this proposal.

Proposal B8 - The powers set out in Proposal B2 and Proposal B5 should be vested in:

- a. the Minister; and**
- b. the Australian Securities and Investments Commission.**

A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.

The ABA supports this proposal generally, subject to an opportunity to comment on the terms of the protocol (noting that the powers would be overlapping and give equal capacity to both the Minister and ASIC to create the relevant Scoping Order and Rules). The ABA also recommends that the co-ordination of the exercise of the powers be dealt with in the Act rather than in an independent protocol, in order that it be subject to Parliamentary processes, and to ensure it is publicly available, with the

⁸ ALRC, Interim Report B, 69.



relevant drafting to be undertaken by the Office of Parliamentary Counsel. As previously noted, the ABA also has the following concerns:

- (a) We question whether there is a necessity to create and maintain a separate Scoping Order and thematic Rulebook. Given that the powers to make the Scoping Order and Rules are both proposed to be vested in the Minister and ASIC, the ABA would prefer that the legislation be supported by a single subordinate instrument, combining the contents of the proposed Scoping Order and Rules.
- (b) The exercise of such powers must be subject to clearly mandated consultation requirements, a defined process for the exercise of these discretionary powers, and appropriate mechanisms for Parliamentary disallowance. In addition, the ABA also recommends that a mechanism be included to address any unintended consequences resulting from an exclusion or modification, and to temporarily fix other deficiencies.

Proposal B9 - Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to:

- a. establish an independent ‘Rules Advisory Committee’; and**
- b. require the Minister and ASIC to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.**

The ABA supports this proposal, subject to appropriate consultation on the intended membership of such a committee.

Proposal B10 - As part of the staged implementation of the proposed legislative model, existing powers to omit, modify, or vary relevant provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.

The ABA supports this proposal.

Proposal B11 - As part of the staged implementation of the proposed legislative model, relevant existing powers to:

- a. exclude products or services; and**
 - b. exempt a person or class of persons;**
- from the operation of all or specified provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.**

The ABA supports this proposal, but would like clarification on the following issues:

- (a) What impact will the implementation of the new legislative model have on existing relief and legislative instruments which were created under the existing model?
- (b) How will sunset provisions in existing legislative instruments operate once those instruments form part of the new Rules or Scoping Order?

Proposal B12 - The Attorney-General’s Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power.

The ABA supports this proposal, subject to further consultation.

Question B13 - Does the Draft Guidance included in this Interim Report:

- a. adequately capture the principles that should guide the design of provisions that delegate legislative power;**
- b. adequately capture the extent to which it is appropriate for delegated legislation to specify**



**the content of offences or civil penalty provisions otherwise created by an Act; and
c. express the applicable principles with sufficient clarity?**

While the ABA is generally supportive of the nature of the draft guidance provided, appropriate consultation on the resulting legislative instruments will be necessary to determine their effectiveness.

Proposal B14 - In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles.

The ABA supports this proposal.

Proposal B15 - In order to implement Proposal B1, offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

The ABA supports this proposal.

Question B16 - Should rulebooks contain ‘evidential provisions’ that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation?

The ABA questions the usefulness of this approach, as it is likely to create uncertainty as to the degree of compliance which is required. Regardless of whether the Rules are combined with the Scoping Order or not, as suggested above, the ABA considers that Rulebooks should contain Rules, not guidelines. Additionally, it is not clear how this proposal would facilitate “the effective legislative expression of the relationship between fundamental obligations and prescriptive detail.”⁹ The ABA would like to see some more definitive examples of how such an approach might operate.

Proposal B17 - The *Corporations Act 2001* (Cth) should be amended so that each offence and civil penalty provision, and the consequences of any breach, are identifiable from the text of the provision itself.

The ABA supports this proposal.

Proposal B18 - Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

The ABA supports this proposal.

⁹ ALRC, Interim Report B, 45.



Recommendations from Interim Report B

The ABA notes that the ALRC has not expressly sought feedback on the recommendations set out in Interim Report, but provides the following comments:

Recommendation 14 - Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

- a. spent transitional provisions;
- b. spent legislative instruments;
- c. redundant definitions;
- d. cross-references to repealed provisions; and
- e. redundant regulation-making powers.

The ABA supports this recommendation.

Recommendation 15 - The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

- a. identify and facilitate the repeal of redundant and spent provisions; and
- b. prevent the accumulation of such provisions.

The ABA supports this recommendation.

Recommendation 16 - Corporations and financial services legislation should be amended to address:

- a. unclear or incorrect provisions;
- b. outdated notes relating to 'strict liability'; and
- c. outdated references to 'guilty of an offence'.

The ABA supports this recommendation.

Recommendation 17 - Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:

- a. the prescribing of forms and other documents;
- b. the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds;
- c. the publication of notices and instruments;
- d. conditional exemptions;
- e. infringement notices and civil penalties;
- f. terms defined as having more than one meaning;
- g. definitions containing substantive obligations; and
- h. definitions that contain the phrase 'in relation to'.

The ABA supports this recommendation.

Recommendation 18 - Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

The ABA supports this recommendation.

Recommendation 19 - The Australian Securities and Investments Commission should publish additional freely available electronic materials designed to help users navigate the legislation it administers. Such materials should include annotated versions of the *Corporations Act 2001* (Cth), *National Consumer Credit Protection Act 2009* (Cth), and *Australian Securities and Investments Commission Act 2001* (Cth).

While the ABA supports the production of such materials, examples such as *ASIC v Westpac* (the ‘Wagyu and Shiraz’ case)¹⁰ have demonstrated that regulatory guidance provided by ASIC does not necessarily accurately represent the law.¹¹ The ABA considers that it would be more appropriate for navigation resources to be included in a detailed Explanatory Memorandum which, at a minimum, cross-references the amended Act, Scoping Order, and Rules, against the existing legislation and related instruments.

Prototype Legislation

The ABA provides the following feedback on the Prototype Legislation produced by the ALRC in connection with Interim Report B:

1. The ABA notes that the definition of ‘financial product’ in section 763A of the Prototype Legislation has been extended to include ‘obtaining credit’. However, credit facilities remain exempt under the Prototype Scoping Order. Accordingly, we seek clarification as to whether this is intended, as we do not consider that credit facilities should be regulated beyond the extent to which they are currently regulated under the *Corporations Act*. As noted in the ABA’s feedback on Interim Report A, the ABA also has concerns about the removal of specific inclusions in the definition of ‘financial product’ as a result of the proposed repeal of s 764A (such as ‘credit facilities’).¹²
2. The ABA notes that the Prototype Legislation does not contain definitions of the following terms: ‘makes a financial investment’, ‘manages a financial risk’, and ‘makes non-cash payments’, even though they currently are set out in section 763B, 763C and 763D of the *Corporations Act*. We seek clarification as to whether there is an intention to remove these definitions altogether. As noted in the ABA’s feedback on Interim Report A, the ABA has concerns about the removal of these definitions, as they clarify the scope of the current s 763A rather than create complexity.¹³
3. The ABA notes that the definition of ‘financial service’ in section 766A of the Prototype Legislation does not include references to Corporate Collective Investment Vehicles (CCIV) which were recently inserted in the *Corporations Act* pursuant to the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth). While it is assumed that this has occurred as a result of the drafting of the Prototype Legislation prior to relevant amendment taking effect, we seek clarification that it is intended that the CCIV provisions will be included in the definition of ‘financial service’.
4. The ABA has observed that many of the Notes currently contained within various sections of the *Corporations Act* are no longer contained in the Prototype Legislation. For example, the definition of ‘issuer’ set out in section 9 of the Prototype Legislation does not contain the Notes which are currently contained in s 761E(5) of the *Corporations Act*, which are useful in determining the extent of the application of this provision in relation to disclosure obligations. The ABA would appreciate clarification as to whether the content of the existing Notes will be captured elsewhere. The utility of the content of the existing Notes will likely be reduced if not retained in close proximity to the relevant provisions.
5. The ABA notes that the proposed definition of ‘credit’ in the Prototype Legislation is broader than that under the National Credit Code, by virtue of the proposed definition of ‘arrangement’. We seek clarification as to whether this is the intended result.

¹⁰ *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111.

¹¹ In the ‘Wagyu and Shiraz’ case, the Full Court of the Federal Court found that ASIC’s interpretation of responsible lending obligations was incorrect, upholding the earlier decision of Perram J of the Federal Court.

¹² As noted in the ABA submission on Interim Report A, in relation to Proposal A5.

¹³ As noted in the ABA submission on Interim Report A, in relation to Proposal A4.



Prototype Scoping Order

The ABA provides the following feedback on the Prototype Scoping Order produced by the ALRC in connection with Interim Report B:

1. The ABA notes that some, but not all, of the Non-Cash Payment (NCP) facilities exemptions from Legislative Instrument 2016/211 have been moved into the Prototype Scoping Order.¹⁴ The ABA seeks clarification as to whether there is an intention to remove existing NCP exemptions.
2. The ABA notes that the list of 'financial products to which Chapter 7 (except parts 7.8A and 7.9A) does not apply' set out in 3-5 of the Prototype Scoping Order is more prescriptive in relation to credit and NCP products than the current provisions of s 765A of the *Corporations Act*. Could some greater clarification on the source of the relevant provisions in the Prototype Scoping Order please be provided?
3. The ABA notes that some provisions of the Prototype Scoping Order retain gender-specific language, and suggests that gender-neutral language would be preferable.¹⁵
4. The ABA suggests that previously existing numbering protocols can be updated in the Prototype Scoping Order.¹⁶
5. The ABA would prefer that the Scoping Order contain an operative provision to the effect that 'words and expressions used in this Scoping Order which are defined in the Act have the same meaning as that given in the Act', rather than the general interpretative note set out at the beginning of the 2-5 Dictionary.

Concluding Remarks

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

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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¹⁴ For example, there is no reference in the Prototype Scoping Order to the existing gift facility exemption.

¹⁵ See, for example, 3-80(3)(a), 3-87(3)(b)(ii) and (iii), and 3-95(9)(a)(i) and (ii) of the Prototype Scoping Order, which refer to 'his or her', rather than 'their'.

¹⁶ For example, references to paragraphs (ca), (ha), (hb) in 3-5 and (ba), (bb), (ca) in 3-95 are no longer necessary, and the use of ordinary, singular, alphabetic references would increase readability.