Level 6, 179 Queen Street
Melbourne, VIC 3000

info@consumeraction.org.au
consumeraction.org.au
T 03 9670 5088
F 03 9629 6898

Wednesday, 30 November 2022

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

Australian Law Reform Commission
PO BOX 12953
George Street Post Office QLD 4003

Dear Commissioners

Financial Services Legislation Inquiry – Interim Report B

We write to respond to the Interim Report B of the Australian Law Reform Commission's (**ALRC**) Financial Services Legislation Inquiry.

Consumer representatives broadly endorse the legislative model for financial services set out in Interim Report B. We agree that reform to the legislative model will aid transparency and ease-of-understanding of the law. We provide support, however, on the basis that the scope of legislation is broad so as to address avoidant business models and that any exemptions and exclusions are as limited as possible.

In addition, this submission:

- Considers that the ALRC should also examine the legislative model and hierarchy for consumer credit;
- Supports measures to ensure any exemptions for legislated norms and obligations serve to promote the object of the legislation;
- Makes recommendations about improving the objects of financial services legislation;
- Welcomes improved consultation and transparency around the making of legislative instruments (termed 'scoping order' and 'rules') in the Interim Report;
- Supports ASIC being provided rule-making powers independent to any rule-making powers provided to the Minister;
- Urges care in any consolidation of offences and penalties, and makes some suggestions regarding the operations of the penalties regime; and
- Endorses the recommendation that ASIC publish freely available electronic materials designed to help users navigate the legislation.

A legislative model for financial services

We broadly support Proposal B1 and the proposed legislative hierarchy for Chapter 7 of the *Corporations Act 2011* (Cth) (**Corporations Act**), being (1) an Act legislating fundamental norms and obligations; (b) a Scoping Order containing exclusions and exemptions adjusting the scope of the Act; and (c) thematic 'rulebooks' containing rules giving effect to the Act in different regulatory contexts.

We support Proposal B1 on the basis that the scope of the Act is cast as broadly as possible. That is, the scope of the legislation (that might be circumscribed by the proposed scoping order) should be wide and able to capture 'innovation' and new types of products and services. It is important that the regulator perimeter takes an 'all in' approach at the outset, so as to reduce the risk for consumer harm. Activity that falls outside the reach of a regulator has been shown to unreasonably risk consumer protection. This is because there is an incentive for business to avoid regulatory oversight, particularly businesses that do not have a strong focus on consumer protection. We provided examples of avoidant business models and examples of harms caused to vulnerable consumers in our submission to Interim Report A.

We also support Proposal B1 on the basis that the use of exemptions and exclusions is as limited as possible. This should be made clear in the legislation itself. This would give effect to recommendation 7.4 of the Final Report of the Financial Services Royal Commission (**FSRC**) which stated, "as far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated". Commissioner Hayne said that this would simplify and improve understanding of the law. We repeat our concerns that the plethora of exemptions by regulation in the existing framework is largely as a result of lobbying by vested interests, a point acknowledged by Treasury.[1] We should not allow this to be repeated in any new regime.

Significant consideration will be needed to be given to what goes into the legislation, and what goes into the scoping order and into rulebooks. Appendix E of the Interim Report B provides some useful Draft Guidance to help with this task. We do not make comment on all of the guidance, but note the following:

- Proposed principle – 'There must be good reasons to delegate a power of exclusion or exemption'.

  We endorse this principle and note Proposals B4 and B6 of Interim Report B that any scoping order or rulebook must be accompanied by a statement explaining how the instrument furthers the relevant legislative objectives. We support this but recommend that the objects of Chapter 7 of the Corporations Act be updated to specifically reference consumer protection, including the protection of consumers experiencing disadvantage or vulnerability. We comment further on legislative objects below.

- Proposed principle – 'The person or body delegated a power to make delegated legislation must be appropriate, having regard to the subject matter and importance of the relevant issues'

  We consider that as part of this consideration, particular attention must be paid to the decision-maker's subject matter expertise and also the ability of the decision-maker to insulated from political influence. As set out in our submission to Interim Report A, we consider that there has been greater transparency and explanation of regulatory decisions where ASIC makes regulatory decisions, compared to where

[1] EG https://treasury.gov.au/consultation/c2021-190728; https://www.legislation.gov.au/Details/F2020L01277

Treasury (or the Minister) makes regulations. We comment further on this in relation to consultation processes below.

Updating the legislative model and hierarchy for consumer credit

Chapter 2 of the Interim Report, and the legislative model for financial services put forward by the ALRC, appears to solely relate to financial services regulated by Chapter 7 of the Corporations Act. Consumer representatives consider that the ALRC should also give consideration to consumer credit, particularly the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), including the National Credit Code (**NCC**) at Schedule 1.

We are uncertain whether the ALRC intends the proposed legislative design to be applied to consumer credit. We note that, pursuant to consumer credit laws, both ASIC and regulations can make exemptions from licensing,[2] responsible lending provisions,[3] as well as the NCC.[4] There does not seem to be any provisions that circumscribe the discretion to make exemptions, for example, by reference to legislative purpose.

We also consider that there are significant limitations in the scope of the consumer credit regime (including section 5 of the NCC), and the operation of various exemptions (e.g., section 6 of the NCC), which have enabled the proliferation of avoidant business models that are causing significant consumer harm. These are referenced in our submission to Interim Report A. The consumer credit laws would greatly benefit from a targeted review that examined the underlying policy and intent of these limitations and exemptions in detail. If policy considerations like this are outside the scope of the ALRC's review, we strongly encourage you to recommend that Treasury prioritise a suitable review.

Updating legislative objects for financial services and consumer protection: importance of vulnerability

As noted, Proposals B4 and B6 propose to safeguard the use of a scoping order and rulebooks by virtue of a public statement explaining how the instrument is consistent with the objects of the legislation. While we welcome this, our concern is that the legislative objects have not kept up with community expectations.

The objects of Chapter 7 of the Corporations Act are found at section 760A, which states:

The main object of this Chapter is to promote:

- *(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and*
- *(aa) the provision of suitable financial products to consumers of financial products; and*
- *(b) fairness, honesty and professionalism by those who provide financial services; and*
- *(c) fair, orderly and transparent markets for financial products; and*
- *(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.*

ASIC also has objects found in section 1 of the *Australian Securities & Investments Commission Act 2001* (Cth), but we note that the NCCPA does not have an objects or purpose clause.

[2] Section 109 and 110, NCCPA
[3] Section 163 and 164, NCCPA
[4] Sections 203A and 203B, National Credit Code.

While there are some important aspects in these objectives, we consider that they need to be updated to reflect modern consumer protection objectives in financial services. This would include the protection of the interests of consumers, particularly those experiencing vulnerability or disadvantage.

We consider that any decision to allow for exemptions or exceptions, or to make rules, with respect to financial services law needs to not just promote 'confident and informed decision-making' of consumers, but explicitly recognise consumer vulnerability. This would recognise that consumers experiencing vulnerability may be less able to protect or represent their interests, engage effectively, and/or are more likely to suffer detriment. This may be because they experience barriers to accessing or engaging in services, or engaging in 'confident and informed decision-making'. Barriers may include event-based circumstances (e.g., job loss, family breakdown, bereavement) as well as systemic factors (e.g., employment insecurity, lack of digital literacy) or market-based factors (e.g., information is too complex or misleading). Our submission to Interim Report A provided commentary on the limits of disclosure in financial services as an effective mechanism for deliver consumer protection. Those shortcomings of disclosure are felt by all consumers, but are particularly pronounced for consumers experiencing vulnerability.

Regulators and industry sectors in Australia and the UK are increasingly adopting vulnerability objectives or strategies. This includes the Essential Services Commission[5] and the Australian Energy Regulator[6] in Australia, as well as the Financial Conduct Authority[7] and the Competition and Markets Authority.[8] While ASIC has undertaken some regulatory work with respect to vulnerability[9], it has not developed a strategy regarding consumer vulnerability, nor has it articulated vulnerability as core to its decision-making approach. This may be unsurprising given vulnerability is not part of the regulatory objectives.

Without an objective relating to consumer vulnerability, we consider that the regulator and the regulatory regime will not be able to make effective decisions regarding regulatory scope and exclusions. This is because decision-making will place too much of an emphasis on other objectives like efficiency or assume that all people can easily engage with market information and processes. The temptation will be to take a narrow cost-benefit approach, rather than consider the impact on particular cohorts, such as people experiencing vulnerability. We have seen such an approach in other processes that assess 'public benefit', that is, there can be a tendency to focus on an economic cost-benefit analysis at the macro level.[10] Regulatory decision-making must recognise that public benefits are achieved when *all* consumers are protected and empowered, not just those that are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them.

---

[5] ESC, Regulating with consumer vulnerability in mind, https://www.esc.vic.gov.au/other-work/regulating-consumer-vulnerability-mind.
[6] AER, Towards energy equity, a strategy for an inclusive energy market: https://www.aer.gov.au/retail-markets/guidelines-reviews/towards-energy-equity-a-strategy-for-an-inclusive-energy-market
[7] FCA UK, Guidance for firms on the fair treatment of vulnerable customers, https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers
[8] CMA UK, Consumer vulnerability: challenges and potential solutions, https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions/consumer-vulnerability-challenges-and-potential-solutions
[9] Sean Hughes, Speech, ASIC's expectations for protecting vulnerable consumers: https://asic.gov.au/about-asic/news-centre/speeches/asic-s-expectations-for-protecting-vulnerable-customers/
[10] See our analysis of the public benefit assessment under the Competition & Consuemr Act: https://consumeraction.org.au/report-our-response-to-the-new-energy-tech-consumer-code/

The ALRC states that the purpose of an explanatory statement for any scoping order or rule demonstrating consistency with legislative objects is to 'create transparency and normative guidance' regarding the creation of exceptions to generally applicable legislation and the development of rules. It is essential that the norm for regulatory decision-making meets community expectations by explicitly considering consumer vulnerability.

Power to make orders and rules

We endorse the proposal that ASIC be empowered to make rules and note that this aligns with the principle: "The person or body delegated a power to make delegated legislation must be appropriate, having regard to the subject matter and importance of the relevant issues". ASIC has specialist expertise and knowledge about financial services markets and consumer outcomes, is closer to market participants, and also has formal consultative and feedback procedures to seek consumer group feedback. It is thus well-placed to understand the effectiveness of the design of rules to achieve a particular market outcome.

The ALRC proposes that the Minister and ASIC will have concurrent roles as a rule-maker. It notes that this is not unusual, and that there are other regulatory schemes where a Minister and a delegated special body have overlapping power to make rules. The ALRC also proposes a protocol would be published as to how each are to exercise rule-making powers. This would be essential if the concurrent roles approach were taken—particularly to be crystal clear that ASIC can make the rules itself and is not specifically required to seek approval of any rule by the Minister before they are made. Our observation with the use of Product Intervention Orders, a form of rules made by ASIC, is that there can be delays in making such orders, including due to delays in obtaining Ministerial approval. While of course it would be appropriate for ASIC to consult with and cooperate with the Minister and Treasury, there shouldn't be unnecessary barriers to the making of rules that are necessary to deliver on the regulator's mandate and legislative purposes.

However, as mentioned in our submission to Interim Report A, we still hold doubts about the need to also provide the Minister with rule and exemption making powers. It has been our experience in recent years that similar existing Ministerial powers are extremely susceptible to industry lobbying, and decision-making processes have lacked transparency. An independent regulator with resources available to conduct transparent investigations and consultations should be sufficient to wield this power alone. Additionally, the provision of concurrent powers can risk creating confusion and double handling, which would seem directly contradictory to this review's focus on simplification and disentangling.

Consultation and transparency for the development of Scoping Orders and Rulebooks

Robust consultation processes are necessary in the development of any rules. We welcome the ALRC proposal that a Rules Advisory Committee be established, including with representation from consumer groups. To garner the effective input of consumer groups, any involvement would have to be resourced. Unlike other sectors (energy, telecommunications, health), there is no specifically funded consumer advocacy organisation to provide input into financial services policy processes.[11]

To ensure effective consultation beyond the Rules Advisory Committee, however, we consider that ASIC and Treasury should be required to develop Charters of Consultation which set commitments and ensure

[11] Super Consumers Australia is a consumer organisation focused on superannuation, however it does not currently receive recurrent government or other funding.

transparency as to consultation. Charters of Consultation are found in other sectors, for example, the Essential Services Commission Victoria has a Charter of Consultation[12] that covers matters like:

- transparency, accountability and inclusivity;
- ensuring engagement is considered, planned and genuine; and
- clarity on the approach to timeframes and submissions.

A Charter of Consultation would support the operation of a Rules Advisory Committee. It should be followed in all instances of consultation on rule-making powers of ASIC, including any applications of relief from rules.

If the ALRC decides to confirm the Ministerial role contemplated in Proposal B8 as a recommendation, would consider that the Minister and Treasury should be subject to the above measures regarding consultation, not just ASIC.

Offences and penalties

The ALRC proposes that offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct. We urge caution with respect to this recommendation, particularly in ensuring that any consolidation does not result in gaps.

The ALRC points to data from ASIC and the Commonwealth Department of Public Prosecutions to suggest that many offence and penalty provisions are not used in court enforcement actions. We do not think that this means that the provisions are unnecessary. Much of ASIC's compliance action occurs outside court action, including in informal engagement with businesses. We would expect ASIC to be using many of the existing provisions in its engagement with businesses, whether or not they are formally used in prosecutions. The existence of the provisions creates deterrence itself.

We are also wary of the approach to placing offences and penalties in the legislation versus rules. We understand that where civil penalties are placed in rules, the maximum penalty is significantly below that which applies in legislation. In 2019, the ASIC Enforcement Review Taskforce reviewed penalties, recommending substantial increases,[13] which has since been implemented. Changes to the architecture to the offence and penalty regime should not result in reductions in levels of penalties.

While it is perhaps outside the scope of this review, we also strongly suggest that civil penalties should be redirected to consumer benefit rather than placed in consolidated revenue. An example of this Victorian Consumer Law Fund, which is established by virtue of the ACL application legislation in that state.[14] Pecuniary penalties and various other amounts, including non-party consumer redress, can be paid into this Fund. Grants can be subsequently paid out of the fund for the purposes of improving consumer wellbeing, consumer

[12] ESC, Charter of Consultation, https://www.esc.vic.gov.au/about-us/charter-consultation-and-regulatory-practice/charter-consultation-and-regulatory-practice-review-2018.
[13] Treasury, ASIC Review Taskforce, https://treasury.gov.au/review/asic-enforcement-review/r2018-282438
[14] *Australian Consumer Law & Fair Trading Act 2012* (Vic), division 5.

protection or fair trading. We consider that this approach would contribute to community confidence in the penalty regime.

We also encourage consideration of consumers of financial products and services being empowered to seek civil penalties for breach where failure to comply does not easily give rise to any loss or compensation. This would aid the efficiency of the regulatory regime, by increasing the prospect of action resulting in deterrence. An example of this model is section 112 of the National Credit Code which provides that a party to a credit contract or a guarantor or ASIC may apply to the court for pecuniary penalty for a failure of a credit provider to comply with a 'key requirement' (which relate to disclosure and information). This is separate and additional to any claim for compensation.

Evidentiary provisions

The ALRC proposes use of 'evidentiary provisions' which appear to operate in a similar way to 'safe harbour' provisions in relation to general obligations or provisions. We caution against the widespread use of such provisions. Our concern is that such provisions are likely to result in 'tick-a-box' approaches to regulatory obligations, rather than consideration as to whether the conduct expected meets the underlying purpose of a general provision.

Disclosure: testing what works

The prototype legislation published by the ALRC is focused on the topic of disclosure. It is useful to have this focus because we agree that disclosure provisions can be complex and create ineffective information for consumers.

As part of Recommendation 17, the ALRC proposes changes to the prescribing of forms and other documents, suggesting that provisions that prescribe the form and content of documents should be made consistent and less prescriptive, with a preference for principled obligations, delegated legislation, or non-legislative templates. While we don't disagree with this, and agree that there is often unnecessary prescription, it is essential that any required standards for prescribed information focus on their effectiveness, rather than just content. To be effective in providing essential information to consumers, disclosure needs to be 'consumer tested' to ensure it is understandable to a wide array of consumers. The principled obligation referred to by the ALRC should require that information be consumer tested for effectiveness for its target audience. In many contexts, this will reveal a need to simplify information and even require translation into community languages.

Enhancing navigability

We strongly support the recommendation that ASIC develop freely available electronic materials designed to help users navigate the legislation it administers. As stated in our submission to Interim Report A, a one-stop-shop for legislation, rules, amendments etc (including with notations and commentary) should not be solely the domain of commercial legal publishers. These services are often out of reach of community legal services, let alone individuals who are trying to understand their rights. To assist with accessibility and navigability, we encourage:

- the use of diagrams and summaries, to aid understanding of legislative provisions;

- the creation of Easy Read fact sheets to assist consumers with disabilities and fact sheets translated in community languages;
- the use of hyperlinks between legislation, the scoping order and rulebooks; and
- links to regulatory guidance, whether explanatory memorandum produced through parliamentary processes or specific guidance created by the regulator.

We consider that this approach would aid the ALRC's objectives to enhance navigability.

Further information

Thank you for the opportunity to provide feedback to this process. Please contact Tom Abourizk on 03 9670 5088 or at tom.a@consumeraction.org.au if you would like to discuss this further.

Yours faithfully,

- **CONSUMER ACTION LAW CENTRE**
- **REDFERN LEGAL CENTRE**
- **FINANCIAL RIGHTS LEGAL CENTRE**