

11 February 2022

Our ref: BT-B&amp;FS

Mr Michael Tidball  
Chief Executive Officer  
Law Council of Australia  
19 Torrens Street  
Braddon ACT 2612

By email: [REDACTED]

Dear Mr Tidball

**Australian Law Reform Commission review of complexity in legislation regulating corporations and financial services**

Thank you for the opportunity to provide feedback on the Australian Law Reform Commission's (ALRC) review of complexity in legislation regulating corporations and financial services.

This response has been compiled by the Queensland Law Society's (QLS) Banking and Financial Services Law Committee, whose members have substantial expertise in this area. These views are made solely from the perspective that there is a need for better administration of the law and the ALRC should, of course, continue to extensively consult with and consider submissions from both industry and consumer groups, who may wish to articulate the views of their constituencies upon both the technical and philosophical aspects of the proposed changes.

We have been asked to consider the 16 proposals and 8 consultation questions as set out in the ALRC's first interim report, released on 30 November 2021. We have provided our responses to each of these proposals and questions in the **attached** document titled 'Interim Report A: QLS Responses'.

The Society broadly supports the ALRC in its objective to facilitate a more adaptive, efficient, and navigable framework of legislation within the context of existing policy settings. Streamlining the relevant legislation and achieving further consistency in definitions and terminology will result in the law being more easily understood by those to which it applies. Nonetheless, we stress that the ALRC must ensure any restructuring of the legislation or changes to the definitions and terminology will still accurately reflect the current legislative settings, unless changed as a result of a considered shift in policy settings the subject of ALRC consultation.

Additionally, while the ALRC's inquiry generally intends to streamline the legislation as opposed to altering its substantive content, transitioning provisions will nonetheless be vital to provide industry with sufficient time to effect any changes in detailed processes and computer programming that arise from the final legislative changes. Even small legislative changes may require a substantial period of transition due to the significant "behind the scenes" consequences for financial services institutions. Further, these systems may still have legacy streamlining and remedial scheduled changes in the pipeline that arise from the recent significant and multiple legislative changes impacting the financial services industry. These scheduled changes may well still require reconsideration, amendment and actioning, as well as any changes arising out of the ALRC's inquiry.

## Australian Law Reform Commission review of complexity in legislation regulating corporations and financial services

Accordingly, we suggest that a generous transition period be provided and the ALRC recommends the Commonwealth Government consults with both industry and consumer groups, to ensure a realistic transition period is ultimately adopted. Further, any transitioning provisions should prioritise and depend upon the timely and early availability of regulatory guidance in final form.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully



Kara Thomson  
**President**

## Interim Report A: QLS Responses

Question/ Proposal	No.	Proposal/Question	QLS Response
Question	A1	<p>What additional data should the ALRC generate, obtain, and analyse to understand:</p> <ol style="list-style-type: none"> <li>legislative complexity and potential legislative simplification;</li> <li>the regulation of corporations and financial services in Australia; and</li> <li>the structure and operation of financial markets and services in Australia?</li> </ol>	No specific suggestions. QLS commends the continuance of the ongoing consultations with stakeholders.
Question	A2	<p>Would application of the following definitional principles reduce complexity in corporations and financial services legislation?</p> <p><i>When to define</i> (Chapter 4):</p> <ol style="list-style-type: none"> <li>In determining whether and how to define words or phrases, the overarching considerations should be whether the definition would enhance readability and facilitate comprehension of the legislation.</li> <li>To the extent practicable, words and phrases with an ordinary meaning should not be defined.</li> <li>Words and phrases should be defined if the definition significantly reduces the need to repeat text.</li> <li>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.</li> </ol> <p><i>Consistency of definitions</i> (Chapter 5):</p> <ol style="list-style-type: none"> <li>Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.</li> <li>Relational definitions should be used sparingly.</li> <li>To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.</li> </ol>	Yes.



		<p><i>Design of definitions</i> (Chapter 6):</p> <ol style="list-style-type: none"> <li>Interconnected definitions should be used sparingly.</li> <li>Defined terms should correspond intuitively with the substance of the definition.</li> <li>It should be clear whether a word or phrase is defined, and where the definition can be found.</li> </ol>	
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'.	QLS supports this proposal.
Proposal	A4	<p>In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the <i>Corporations Act 2001</i> (Cth) and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be amended to:</p> <ol style="list-style-type: none"> <li>remove specific inclusions from the definition of 'financial product' by repealing s 764A of the <i>Corporations Act 2001</i> (Cth) and omitting s 12BAA(7) of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth);</li> <li>remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the <i>Corporations Act 2001</i> (Cth) and s 12BAB(1)(h) of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth);</li> <li>remove the ability for regulations to deem conduct to be a 'financial service' by amending ss 766A(2) and 766C(7) of the <i>Corporations Act 2001</i> (Cth), and ss 12BAB(2) and (10) of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth);</li> <li>remove the incidental product exclusion by repealing s 763E of the <i>Corporations Act 2001</i> (Cth);</li> <li>insert application provisions to determine the scope of Chapter 7 of the <i>Corporations Act 2001</i> (Cth) and its constituent provisions; and</li> <li>consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'.</li> </ol>	Yes, however care must be taken to ensure that all of the current exemptions and modifications are accurately replicated without substantive change. Alternatively, if there is substantive change as a result of the amendments, there must be a sound policy reason for doing so.

Proposal	A5	<p>The <i>Corporations Act 2001</i> (Cth) and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be amended to remove the definitions of:</p> <ul style="list-style-type: none"> <li>a. 'makes a financial investment' (s 763B <i>Corporations Act 2001</i> (Cth) and s 12BAA(4) <i>Australian Securities and Investments Commission Act 2001</i> (Cth));</li> <li>b. 'manages financial risk' (s 763C <i>Corporations Act 2001</i> (Cth) and s 12BAA(5) <i>Australian Securities and Investments Commission Act 2001</i> (Cth)); and</li> <li>c. 'makes non-cash payments' (s 763D <i>Corporations Act 2001</i> (Cth) and s 12BAA(6) <i>Australian Securities and Investments Commission Act 2001</i> (Cth)).</li> </ul>	Yes, however care must be taken to ensure that all of the current exemptions and modifications are accurately replicated without substantive change. Alternatively, if there is substantive change as a result of the amendments, there must be a sound policy reason for doing so.
Proposal	A6	<p>In order to implement Proposal A3:</p> <ul style="list-style-type: none"> <li>a. reg 7.1.06 of the <i>Corporations Regulations 2001</i> (Cth) and reg 2B of the <i>Australian Securities and Investments Commission Regulations 2001</i> (Cth) should be repealed;</li> <li>b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the <i>Corporations Act 2001</i> (Cth) and in s 12BAA(1) of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth);</li> <li>c. a definition of 'credit' that is consistent with the definition contained in the <i>National Consumer Credit Protection Act 2009</i> (Cth) should be inserted in the <i>Corporations Act 2001</i> (Cth) and in the <i>Australian Securities and Investments Commission Act 2001</i> (Cth).</li> </ul>	Yes, however care must be taken to ensure that all of the current exemptions and modifications are accurately replicated without substantive change. Alternatively, if there is substantive change as a result of the amendments, there must be a sound policy reason for doing so.
Proposal	A7	Sections 1011B and 1013A(3) of the <i>Corporations Act 2001</i> (Cth) should be amended to replace 'responsible person' with 'preparer'.	QLS supports this proposal.
Proposal	A8	The obligation to provide financial product disclosure in Part 7.9 of the <i>Corporations Act 2001</i> (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.	QLS supports this proposal.
Proposal	A9	<p>The following existing powers in the <i>Corporations Act 2001</i> (Cth) should be removed:</p> <ul style="list-style-type: none"> <li>a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and</li> <li>b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.</li> </ul>	QLS supports this proposal.



Proposal	A10	The <i>Corporations Act 2001</i> (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.	QLS supports this proposal.
Question	A11	In order to implement Proposals A9 and A10: a. Should the <i>Corporations Act 2001</i> (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?	Yes.
Proposal	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 <i>Corporations Act 2001</i> (Cth) made by delegated legislation.	QLS supports this proposal.
Proposal	A13	The <i>Corporations Act 2001</i> (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'.	QLS supports this proposal, subject to the outcomes of the <a href="#">Quality of Advice Review</a> that is currently being undertaken by Treasury.
Proposal	A14	Section 766A(1) of the <i>Corporations Act 2001</i> (Cth) should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.	QLS supports this proposal, subject to the outcomes of the Quality of Advice Review that is currently being undertaken by Treasury.
Proposal	A15	Section 766B of the <i>Corporations Act 2001</i> (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.	QLS supports this proposal, subject to the outcomes of the Quality of Advice Review that is currently being undertaken by Treasury.

Question	A16	Should the definition of 'retail client' in s 761G of the <i>Corporations Act 2001</i> (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?	Yes.
Question	A17	What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the <i>Corporations Act 2001</i> (Cth)?	QLS does not consider any of the alternative definitions of "sophisticated investor" proposed at 12.72-75 of Interim Report A to be appropriate. However, we acknowledge that this is a difficult and sensitive issue which requires negotiation between industry and consumer representatives to avoid the possibility of abuse and clients being miscategorised.
Question	A18	Should Chapter 7 of the <i>Corporations Act 2001</i> (Cth) be amended to insert certain norms as an objects clause?	Yes.
Question	A19	What norms should be included in such an objects clause?	QLS supports the six norms identified by the Financial Services Royal Commission as set out at 13.36 of Interim Report A.
Proposal	A20	Section 912A(1)(a) of the <i>Corporations Act 2001</i> (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.	QLS supports this proposal, and agrees that the note as suggested at (c) should be informed by the findings of The QLS agrees that the note in c should also be informed by the findings of the Australian Financial Complaints Authority's <a href="#">Fairness Project</a> .

Proposal	A21	<p>Section 912A(1) of the <i>Corporations Act 2001</i> (Cth) should be amended by removing the following prescriptive requirements:</p> <ul style="list-style-type: none"> <li>a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa));</li> <li>b. to maintain the competence to provide the financial services (s 912A(1)(e));</li> <li>c. to ensure representatives are adequately trained (s 912A(1)(f)); and</li> <li>d. to have adequate risk management systems (s 912A(1)(h)).</li> </ul>	<p>QLS does not support the removal of these provisions. These prescriptive requirements oblige licensees to proactively turn their mind to these specific aspects of their license obligations, and to document and track progress against their desired outcomes in these areas. QLS considers that their removal may lead to the downplaying of the ongoing importance of these specific aspects. We also refer to 13.119 of Interim Report A, which expresses similar concerns.</p> <p>If the ALRC ultimately recommends the removal of these requirements, we suggest that their subject matter still be noted as examples of how licensees can demonstrate they are meeting their licence and conduct obligations.</p>
Proposal	A22	In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the <i>Corporations Act 2001</i> (Cth) and s 12CA of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be repealed.	QLS supports this proposal, and agrees with the reasoning in 13.119 of Interim Report A.
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 <i>Corporations Act 2001</i> (Cth) and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be consolidated into a single provision.	QLS supports this proposal.
Question	A24	<p>Would the <i>Corporations Act 2001</i> (Cth) be simplified by:</p> <ul style="list-style-type: none"> <li>a. amending s 961B(2) to re-case 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</li> <li>b. repealing ss 961C and 961D?</li> </ul>	Yes.