

SUBMISSION

Submission to the
Australian Law Reform
Commission – Financial
Services Legislation:
Interim Report C - ALRC
Report 140

26 July 2023

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Australian Law Reform Commission
PO Box 12953
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via the consultation portal

26 July 2023

Dear Sir / Madam,

Financial Services Legislation: Interim Report C – ALRC Report 140

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this feedback in response to your consultation on the *Financial Services Legislation: Interim Report C – ALRC Report 140* (Interim Report C).

ABOUT ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 17 million Australians with superannuation.

GENERAL COMMENTS

ASFA's superannuation fund member organisations generally are supportive of the proposed reforms contained in Interim Report C.

Our members support measures to simplify and streamline the *Corporations Act 2001 (Cth)*, especially Chapter 7. Members have noted that, until further details are provided with respect to how these sections will be grouped and consolidated, it is difficult to provide specific comments about these provisions.

ASFA members have observed that any legislation to give effect to policy proposals emanating from the Quality of Advice Review would need to dovetail into the proposed new structure, such as the proposed creation of a new financial advice chapter and the consideration being given to the reallocation of provisions between primary and delegated legislation.

Our members have identified that there will be a need to give consideration as to how the transitional risk, arising as a result of moving to the newly structured provisions, will be managed and have asked for some information and guidance as to how this would be done.

ASFA members have recommend that a separate, specific, consultation process be undertaken to enable more detailed commentary to be provided on the specifics of the proposed changes. This would afford an opportunity for stakeholders to be able to analyse the effects of the changes and to provide feedback, include any potential unintended consequences that may have been identified.

SPECIFIC COMMENTS WITH RESPECT TO INTERIM REPORT C

1. Recommendation 20

Recommendation 20 is that offence provisions in corporations and financial services legislation should include the following at the foot of each provision:

- a. the words ‘maximum criminal penalty’
- b. any applicable monetary or imprisonment penalty, expressed as one or more amounts in penalty units or terms of imprisonment; and
- c. a note referring readers to any additional rules for calculating the applicable penalty.

ASFA members agree with and support this recommendation.

2. Recommendation 21

Recommendation 21 is that the definition of ‘civil penalty’ in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to be based on sub-section 79(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

In a similar fashion to Recommendation 20, the maximum civil penalty would also be disclosed.

If this approach were to be adopted (i.e. the words ‘civil penalty’ and ‘criminal penalty’ are specified at the foot of each relevant provision, ASFA member organisation have recommended that, for clarity, sub-divisions setting out ‘reportable situations’ to the Regulator, such as a breach of a core obligation (sub-section 912D(3)) and the significance test (sub-section 912D(4)), be earmarked in a similar fashion.

By way of example, even if a breach does not constitute a breach of a criminal penalty provision or a civil penalty provision in paragraphs 912D(4)(a) or 912D(4)(b), nevertheless it may still be a reportable breach under another paragraph of sub-section 912D(4), 912D(5) or may constitute another reportable situation, for example where there has been material loss or damage.

3. Specific proposals

1.1. Chapter 3 Disclosure – Proposal C5 ‘Worded & presented in a clear, concise & effective manner’

Proposal C5 is that disclosure regimes in Chapter 7 of the *Corporations Act 2001* (Cth) that require disclosure documents to ‘be worded and presented in a clear, concise and effective manner’ should be amended to require that disclosure documents also be worded and presented ‘in a way that promotes understanding of the information’.

ASFA members have identified that it is unclear whether the suggested wording works to clarify the existing requirement for disclosure to be clear, concise and effective, as ‘promotes understanding’ contains a subjective element with respect to whose understanding is being promoted, for example, the consumer. Members are concerned that the use of the word ‘understanding’ would create too high a bar and produce a test that would prove difficult to satisfy, as trustees/financial services providers would not be able to ensure that a member/consumer understands what has been written.

1.2. Chapter 7 Implementation – Proposal C12 Taskforce(s)

Proposal C5 is that the Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

ASFA members agree with and support this proposal.

1.3. Chapter 7 Implementation – Proposal C13 Periodic review by independent reviewer

Proposal C13 is that, as part of implementing Proposals C9 and C10, the *Corporations Act 2001* (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.

ASFA members agree with and support this proposal.

1.4. Chapter 9 Principles for Structuring and Framing – Proposal C14

Proposal C14 is that the following working principles should be applied when structuring and framing corporations and financial services legislation:

- a. Provisions should be designed in a way that minimises duplication and overlap (**Consolidation**)
- b. Related provisions should be proximate to one another (**Grouping**)
- c. Provisions should have thematic and conceptual coherence (**Coherence**)
- d. The most significant provisions should precede less important provisions or more technical detail (**Prioritisation**)
- e. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (**Intuitive flow**)
- f. The structure and framing of legislation should help users develop and maintain mental models that enhance navigability and comprehensibility (**Mental models**).
- g. Legislation should be as succinct as possible (**Succinctness**).

ASFA members strongly agree with and support this proposal.

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Should you have any queries with respect to this submission, please do not hesitate to contact me on (03) 9225 4021 or via fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith
Director, Policy