

25th February 2022

Australian Law Reform Commission
Level 40, MLC Centre,
19 Martin Place,
Sydney, 2001
By email: financial.services@alrc.gov.au

NIBA Submission: Review of the Legislative Framework for Corporations and Financial Services Regulation

As the peak representative body for the intermediated insurance industry, the National Insurance Brokers Association (**NIBA**) represents more than 15,000 brokers all around Australia. Our members include major international broking firms, large Australian-owned firms and over 400 medium and small insurance broking firms operating in the cities, towns and regions across the length and breadth of Australia.

Insurance brokers perform a number of valuable services for their clients including;

- Helping clients to understand, manage and minimise their risk exposure,
- Identifying and arranging appropriate insurance or other risk financing mechanisms, and
- Acting as the client's advocate when an insured event occurs.

In performing these duties, insurance brokers act as agents of their client and have statutory, common law and professional obligations to act in the best interests of their client at all times.

Insurance brokers represent the interests of the purchasers of insurance, the policyholders, and not those of insurance companies. Consequently, comments made by NIBA and its members are made on behalf of its members and the public that purchases insurance not on behalf of insurance companies.

Introduction

NIBA welcomes the opportunity to provide feedback on the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation Interim Report A.

As noted in the report, the legislative framework governing Australia's financial services is unnecessarily complex for both practitioners and consumers. This complexity increases compliance costs which are ultimately passed on to clients.

The complexity also increases the risk clients will be negatively impacted as financial services providers struggle to understand their obligations under the *Corporations Act 2001* (the Act).

NIBA notes that the ALRC has raised a number of significant policy issues throughout the report. Many of these issues will also be considered as part of the Treasury Quality of Advice review. Given the potential implications of any decision for financial services practitioners and consumers, and the breadth of the Terms of Reference of the Quality of Advice Review, NIBA believes that the Quality of Advice Review is the appropriate forum for the discussion of any such policy changes.

Recommendations

NIBA supports all of the recommendations made in Interim Report A.

Proposals and Questions

Question A1:

The ALRC's interim report A has already identified a significant number of laws and provisions that have added to the complexity those in the financial services industry face. However, NIBA notes that it is not clear what industry data, relevant to the insurance industry had been sourced in regard to '*soft laws*', such as industry Codes of Practice.

Question A2:

NIBA supports the application of the listed definitional principles. However, notes that proper application will require consideration of the context and clarity of policy and relevant provisions, and evidence of issues prior to making any change to ensure those affected are not worse off.

NIBA agrees that the working relationship between drafters and instructors is an area worthy of review and reform, as it ultimately has greater implications for the quality of the legislation that is produced.

Consideration of how to better record the policy objectives as conceived by the legislature at the time, is in NIBA's view crucial. A recent example of where issues have arisen in this regard is the complexity of legislative reform introduced following the Royal Commission, that has not resulted in the intended policy outcomes.

Proposal A3:

NIBA supports the amendment of relevant Acts to enact a uniform definition of the term '*financial service*'. In NIBA's view the definition of '*financial service*' as contained in s7766A(1) of the *Corporations Act 2001* is a suitable basis for such amendment.

Proposal A4(d):

NIBA supports the proposal to repeal s763E of the Act, provided that specific exclusions and exemptions that industries currently rely upon are identified and applied, for example exemptions relating to discretionary arrangements.

Proposal A4(e) & (f):

NIBA supports both proposals provided the exclusions and exemptions that industries currently rely upon will be consolidated in delegated legislation.

Proposal A5:

NIBA supports this proposal, provided existing qualifications are properly made in application provisions in delegated legislation.

Proposal A7:

NIBA supports this proposal.

Proposal A8:

NIBA supports this proposal generally, however significant consultation on the detail in terms of the general requirement described in the Act applicable to all products and those to apply in the rules will be required, to ensure the end result is workable for the intermediated insurance industry.

Of the options listed, Option 2 is the preferable approach i.e., reframe the existing obligation to provide a Product Disclosure Statement (PDS) as a more general obligation to provide disclosure, which could apply to both a prospectus and PDS. The provision of either a PDS or a prospectus could be prescribed by rules in the legislative instrument relating to disclosure, as the means by which disclosure must be provided, in regard to particular products. Further rules could prescribe the contents of a PDS or prospectus, including default and tailored rules.

Proposal A9:

NIBA supports this proposal.

Proposal A10:

NIBA supports this proposal.

Question A11:

NIBA supports the amendment of the Act to include a power to make thematically consolidated legislative instruments in the form of 'rules'. NIBA believes it is important for the Act to contain a rule-making provision where required beyond the parliamentary process.

This could be achieved via a rule-making power granted to the Minister which permits the Minister to delegate that power to ASIC. Alternatively, this power could be granted to ASIC, subject to appropriate oversight or a Ministerial ability to reverse any rule made under that power.

NIBA's primary concern is to ensure that the end result does not give rise to unreasonable delay in the process and that appropriate consultation is conducted with those who are likely to be affected prior to any changes being made.

Proposal A12:

NIBA supports the introduction of such an interim mechanism. Of the four options proposed, Option D is preferred.

Proposal A13(a) & (b):

NIBA supports these proposals.

Proposal A13(c)

NIBA supports this proposal. As a general comment further to those made above, NIBA notes that the ALRC's summary of the existing structure does not identify the important fact that different rules are applied relevant to personal advice between "relevant providers" (financial advisers) on "relevant financial products" and those who only provide personal advice in relation to general insurance products (general insurance brokers).

Proposal A14:

NIBA supports the proposal generally however notes that there will be a significant number of flow-on changes required as a result of provisions that will need to apply to both the newly created "financial services" and "personal advice".

Grouping the personal advice requirements together as licensing requirements for personal advice providers, and labelling them as such, will in NIBA's view enable users of the legislation to more readily identify whether or not these provisions are relevant to them.

However, the proposal does not appear to take into consideration that within the personal advice provisions a further distinction will be required to distinguish between provisions applicable to *'relevant providers'* providing personal advice to retail clients on *'relevant financial products'*, and those who provide personal advice to retail clients but are not *'relevant providers'* as defined in s910A (i.e., general insurance brokers).

Proposal A15:

General advice/personal advice distinction

NIBA supports changing the term *'general advice'* to a term that more closely reflects the nature of the information being provided. In NIBA's view the term *'general advice'* misleading to consumers and should be amended to better communicate the important difference between general and personal advice to consumers.

NIBA notes that the concepts of general and personal advice will be considered as part of the Treasury's Quality of Advice Review. In our view this is the most appropriate forum for considering such issues.

In regard to the ALRC's suggestion that consideration should also be given to renaming personal advice, NIBA believes that the current terminology is clearly understood by consumers and does not require change. NIBA also does not believe that using the term *'financial advice'* to refer to what is now *'personal advice'* is appropriate in the context of insurance and risk advice and is likely to cause confusion for consumers (especially having regard to the "financial adviser" and "financial planner" terminology restrictions in s923C).

Furthermore, given the issues that were identified during the Royal Commission and the resulting brand damage and loss of consumer trust that many in the financial services sector experienced, NIBA is concerned that the good reputation of the general insurance broking industry will be affected by such a general term.

Professionalising financial advice

NIBA notes that during the discussion on professionalizing financial advice, no distinction is made between the different treatment in the legislation of "relevant providers" (as mentioned above) and general insurance brokers regarding the matters raised.

The discussion suggests that the legislative obligations noted (and the recommendations of the Financial Services Royal Commission) apply to both, which is both factually incorrect and incredibly detrimental to the insurance broking industry and the clients they serve.

Increasing professionalism across all areas of the financial services industry is an incredibly important matter that will be carefully considered as part of the Quality of Advice Review. NIBA requests that in future reports, this distinction be made clearer and is considered in any commentary regarding future change.

Question A16:

NIBA supports the simplification of the retail client definition, especially with regard to the varying definitions of ‘small business’ that exist across legislation. However, detailed consultation will be required on the proposed simplified definition so as to avoid repetition of the issues that have arisen to date.

In particular, there are a number of general insurance products that should not be subject to the retail client protections, even when provided to a small business as proposed and exemptions for these products will need to be agreed upon and clearly communicated within the legislation.

This issue is currently being considered by ASIC and industry associations such as the Insurance Council of Australia and NIBA. For example, there is a current lack of clarity regarding whether incidental minor components of retail type insurance in a non-retail type insurance cover in a policy are caught or not. There is also a lack of clarity on when certain covers such as strata insurance may or may not be provided to a retail client.

NIBA notes that the ways in which retail and wholesale clients are distinguished will be considered as part of the Treasury’s Quality of Advice Review. In our view this is the most appropriate forum for considering such an issue

Question A18

NIBA supports the inclusion of norms as an objects clause where they;

- are clearly expressed;
- will serve to guide conduct more effectively towards compliance; and
- assist courts when considering the interpretation of ambiguous provisions, and thereby give better effect to fundamental purposes in this area of law.

NIBA notes that the ALRC intends to give further consideration in Interim Reports B and C to the appropriate balance between general law and statutory regulation, and as to whether greater clarity or expressive power can be provided by either codifying or signposting the existence of some general law obligations.

Proposal A20:

NIBA supports the ALRC's view that the separate articulation of the individual norms of 'efficiently, honestly and fairly' would provide greater expressive power, remove the existing uncertainty, and permit a simpler assessment of whether conduct had contravened the provision or not.

NIBA also supports the other amendments proposed by the ALRC including replacing the term '*efficiently*' with a more suitable term such as '*professionally*' and the inclusion of examples to provide greater as to the types of behaviour that would contravene the requirement to act '*fairly*'.

In terms of the examples provided, NIBA makes the following comments;

- **Conduct that exploits another person's vulnerability or is otherwise unconscionable.** A qualification should be made that requires the conduct to be carried out knowingly or that the person was reckless in their knowledge of such.
- **Conduct that substantially and adversely affects the interests of another, undertaken in the pursuit of self-interest.**
Greater clarity is required, for example, conduct may substantially affect a person's interest but only in a non-substantially adverse way.
- **Conduct that indicates a lack of reciprocity, including a lack of fair or agreed value, such as by the making of misleading or deceptive representations.**
Greater clarity is needed, for example what is "fair value"? The concept of a lack of fair value or agreed value arising from the making of misleading or deceptive representations is not entirely clear to NIBA.

Concepts relevant to the unfair contracts terms provisions in the *Australian Securities and Investment Commission Act 2001* may be worth considering to the extent they are considered to be clear.

Proposal A21:

NIBA supports the removal of the proposed provisions for simplification purposes but notes that providing examples including such matters as a reminder of what is caught by the broader concept may be a worthwhile exercise.

NIBA notes that the ALRC will consider in Interim Reports B and C whether the 'efficiently, honestly and fairly' obligation and other obligations, should remain limited in their application to Credit Licensees and AFS Licensees, or should apply more broadly to those involved in the provision of financial products and services (as is the case for numerous obligations in Part 2 Div. 2 of the ASIC Act) in relation to prohibitions of unconscionable conduct, false or misleading representations, and misleading or deceptive conduct which would necessitate an expansion in the application of the 'efficiently, honestly and fairly' obligation.

Proposal A22:

While NIBA supports both options provided by the ALRC, NIBA believes that the second option is preferable.

Proposal A23:

NIBA supports both options, however, believes the second option is preferable. NIBA also supports the simplification of a number of other provisions that prescribe the giving of defective disclosure documents, the communication of defective information, and the giving of false or misleading documents.

Question A24:

Any change to the best interest duty is a policy matter that should be carefully considered by the Quality of Advice Review given the likely adverse impact of the proposed change on financial services practitioners.

NIBA notes that different obligations currently apply to providers of financial advice and the proposed change would remove this existing distinction. See also NIBA's earlier comments regarding the Financial Services Royal Commission in light of the fact that it did not review the conduct of general insurance brokers.

Other issues for consideration

Use of the term 'financial adviser'

NIBA notes that throughout its report the ALRC makes reference to "*financial advisers*" but it is not clear from the context in which the term is used whether the ALRC is referring to the concept in a general sense i.e., anyone that provides advice or a "*financial adviser*" as defined by s923C of the Act.

Many of NIBA's members provide only provide personal advice to retail clients in relation to general insurance and thus are not considered "*financial advisers*" under s923C of the Act as they are not "*relevant providers*" as defined in s910A. The distinction between these different types of personal advisers was deliberately made in the Act to provide for the various industries the Act covers and the issues they face.

NIBA notes that a similar issue arose within the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report and the Government's response to the same. During the Royal Commission the term '*financial adviser*' was used in the generic sense however given the Royal Commission did not consider any case studies relating to the conduct of general insurance brokers or issues regarding the same, the intent can only reasonably have been to refer to those '*relevant providers*' able to refer to themselves as '*financial advisers*' under s923C of the Act. ¹

In future it would be helpful to make the intent clear regarding use of the term '*financial advisers*' or adopt alternative terminology to avoid confusion, especially where suggestions are made regarding possible changes to legislation. This difference should be carefully considered when referring to Royal Commission recommendations as support for a proposition relevant to all providers of financial advice.

Please do not hesitate to contact me if you wish to discuss any aspect of this submission further.

Yours sincerely,



Philip Kewin
CEO
National Insurance Brokers Association

¹ Please refer to NIBA's submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (25 October 2018) on policy questions arising from Module 6 for more information.