



Interim Report B: Financial Services Legislation

Submission to the Australian Law Reform Commission

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King Irving delivers integrated legal and consulting solutions for financial services through the provision of exceptional advice to our clients. We are a dynamic and inclusive team of lawyers and financial professionals who are active partners in our clients' success. Our firm prides itself on our collaborative spirit both internally and as an extension of our clients' team.

At King Irving, we align our advice with a deep understanding of our clients' businesses, including their changing goals and legislative obligations. We invest in our long-term relationships and offer more than legal insights, accelerating growth for our clients.

King Irving is at the nexus of the financial services regulatory environment. We offer an entrepreneurial approach, underpinned by our deep understanding of financial regulatory regimes. This allows us to offer contextualised and customised advice.

We have long identified the complexity and intricacies of the legislative regime as a key concern for our clients from both an operational and a compliance perspective. The expansive legislative framework and its innumerable amendments make it near impossible for Australian Financial Service ("AFS") Licensees to fully understand the full content and scope of their rights and obligations without dedicated advice.

BACKGROUND

This submission has been prepared in response to the Australian Law Reform Commission's ("ALRC") Interim Report B: Financial Services Legislation ("the Report").

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SUMMARY

The following answers address the proposed questions and changes by the ALRC in the Report.

The first question considered (B13), addresses delegated legislative power and the extent to which guidance should be exercised through four overarching principles and through specification on how the content of offences and civil penalties should be expressed within delegated legislation.

Upon analysis, it is concluded that the overarching principles expressed in the Draft Guidance do adequately guide the provisions in which delegated legislative power should be expressed and are provided with sufficient clarity. Be that as it may, additional clarity could be provided in terms of what effects certain principles are attempting to protect against, as well as additional detail on the content of offences within delegated legislation.

The second question considered (B16), addresses the role of evidential provisions within the proposed thematic rulebooks to provide coherence, navigability, clarity, predictability, flexibility and durability within the law.

Upon analysis, it is concluded that the proposed provisions do provide additional support to these concepts provided that the included content does not lose meaning or predictability in what it attempts to prohibit.

DELEGATED LEGISLATIVE POWER

1. THE QUESTION

This submission has been prepared in response to Question B13.

2. RESPONSE - QUESTION B13

Question B13 asks whether the Draft Guidance included in the 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?

In addition to the ALRC proposing the consolidation of Chapter 7 of the *Corporations Act 2001*(Cth)¹ (“Corporations Act”) within thematic rulebooks, guidance has also been proposed in terms of how delegated legislative power should be maintained and expressed.

This guidance is expressed as four overarching principles which include: democratic accountability and legitimacy of delegated legislative power (principle one); durability and flexibility in the law (principle two); clarity and predictability in the law (principle three); and coherence and navigability in the law (principle four).

Part (a) of Question B13 proposes the question of whether these principles adequately capture the ideals that should guide delegated legislative power.

Delegated legislative power is an essential aspect of our legal system as it facilitates “adjusting administrative detail without undue delay”² and benefits from flexibility and adaptability for certain

¹ Corporations Act 2001 (Cth), Ch. 7.

² Wright B, Fowler P (eds), *House of Representatives Practice*, 2012, 6th ed, p 410.

measures. This delegated power allows Parliament to save time on certain issues which may require additional scrutiny due to exceedingly technical or complex details.

However, this delegated power is often described as a “necessary evil”³ due to the arguably reduced accountability and occasional vagueness in the power delegated. Therefore, the principles that guide delegated power must be adequately captured to sufficiently uphold the rule of law.

Our view is that the principles proposed within the Draft Guidance in the Report achieve this outcome. Principle one must be upheld to prevent delegated lawmakers from abdicating or deflecting their responsibility and accountability.

Principle two addresses the durability and flexibility of the law, which to a certain degree, is supported but also undermined by delegated power. This is because delegated powers allow flexibility in the law, but this flexibility should not be used to change the law and undermine the durability of the law that the primary legislation provides.

Principle three is arguably the most essential in the Draft Guidance, as a vague or unpredictable use of delegated power can cause issues in terms of how the law will be executed and who will be affected.

Finally, this delegated power should be coherent and easily found, which is shown through principle four and in conjunction with principle three, further stresses how important clarity and predictability is within these delegated powers.

Part (b) of Question 13 proposes the question of whether the Draft Guidance in the Interim report adequately captures the extent to which delegated legislation should specify the content of offences or civil penalty provisions otherwise created by an Act.

The Draft Guidance considers the *AGD Guide to Framing Offences* which states that the content of an offence or civil penalty within delegated legislation should “be clear from the provision itself.”⁴ The Draft Guidance does adequately capture the extent to which civil penalty provisions should be set out by providing a specific provision for delegated legislation, in which the contravention of certain regulatory rules or conduct should be highly visible and easily identifiable.

Additionally, the Draft Guidance recognises that delegated legislation should not generally impose certain obligations on individuals or organisations regarding offences as these matters should be implemented through primary legislation. This includes activities such as providing information or prohibiting an activity⁵ but the ALRC also notes that the Corporations Act already contains numerous examples of creating these forms of provisions that are provided in delegated legislation.

The ALRC takes the position that justifying the delegation of civil penalty provisions is generally easier than the delegation of criminal offences. This is because civil penalties do not lead to a criminal conviction or imprisonment. Be that as it may, the Draft Guidance could provide further detail into the extent to which offence provisions are delegated in the same detail that has been afforded to civil penalty provisions to provide further clarity.

Part (c) of Question B13 enquires into whether the applicable principles within the Draft Guidance have been set out with sufficient clarity.

³ Argument S, Delegated legislation, in Groves M and Lee H (eds), *Australian Administrative Law*, 2009, p 135.

⁴ ALRC FSL Interim Report 139, 5.42.

⁵ Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017), 1.10(d).

This is indeed an important question, due to fact that many of the principles are attempting to reduce unclear delegated powers and therefore, must be clear themselves. The applicable principles that the ALRC has primarily focused on regarding this question are principles one and four.

This once again relates to the lack of accountability and vagueness that can be associated with delegated power. Therefore, it is of our opinion that, due to the importance of these principles within the Draft Guidance, additional information should be given on the effects that these issues can have on the rule of law. Specifically, the issues that a lack of accountability, legitimacy, coherence and navigability would cause for upholding the rule of law within delegated legislation and power.

Overall, the ALRC principles provide an adequate guide for how delegated legislative power should be exercised. These principles are set out with sufficient clarity; however, it may be appropriate to provide additional detail into why these principles exist, especially in terms of principles one and four and the effects of not having these principles in place.

Finally, the Report does express to a certain extent the way in which delegated legislation should specify the content of offences and civil penalty provisions. The report focuses heavily on the extent of civil penalty provisions, and we would recommend affording the same amount of detail to criminal offences.

A ROLE FOR EVIDENTIAL PROVISIONS

1. THE QUESTION

This submission has been prepared in response to Question B16.

2. RESPONSE - QUESTION B16

Question B16 asks whether rulebooks should contain 'evidential provisions' that are not directly enforceable but may provide evidence of contravention of, or compliance with, specified rules or provisions of primary legislation.

The ALRC has proposed a legislative model, under much of which the prescriptive detail of the obligations to which regulated individuals are subject to would be found in thematic rulebooks. The current financial services regulatory model suffers from significant complexity as the prescriptive detail is spread across the legislative hierarchy, notional amendments in regulations, ASIC legislative instruments and the creation of alternative regulatory regimes by way of exemptions contained in regulations.

The ALRC have proposed consolidating Chapter 7 of the Corporations Act⁶ which currently regulates the financial services and markets industry in Australia into the above model. By consolidating into rules, it allows those that fall under the regulatory regime to have greater understanding of their requirements for the products or services they offer.

The thematic rulebooks will provide further clarity, as they permit the creation of self-contained legislative instruments that can be understood without the need to be read alongside the Act or alternative legislative instruments. This will assist in resolving the issues associated with the complexity of the financial services regime.

The creation of these rulebooks creates potential consequences for the rules to be complied with. The ALRC has suggested the adoption of 'evidential provisions', which are not themselves enforceable, however if an individual were not to comply with these provisions it may evidence a

⁶ *Corporations Act 2001*(Cth), Ch. 7.

breach. Offences and penalties resulting from a breach would then be found predominantly in primary legislation due to the impact on individual rights and liberties.

The purpose of the 'evidential provisions' whilst not enforceable themselves, do allow for those interpreting these rules to be able to provide evidence of compliance or a breach with the enforceable rule.

Taking this into account, the ALRC has questioned whether the inclusion of 'evidential provisions', like those that are used within the *Financial Services and Markets Act 2000* (UK)⁷ should be utilised. To understand whether the inclusion of 'evidential provisions' should be expressed within rulebooks, an analysis should be made as to whether they meet the principles outlined by the ALRC, specifically principles two, three and four.

Principle two refers to the "durability and flexibility" of the law. Evidential provisions create the ability to reference other sections of past and current legislation, which fulfils the principle of durability by allowing the law to be constantly relevant, no matter what changes have been made elsewhere.

Furthermore, flexibility lies in the ability to show whether these evidential provisions or sections of legislation are still applicable and current.

As shown in UK law, these provisions can provide a summarised easily accessible form of legislation but additionally, can provide awareness of law reform and if so, provide additional reference to new legislation. This allows for greater flexibility than traditional methods, as an individual can be informed of various changes in legislation, as well as what laws are applicable without the need to review other sections.

Evidential provisions also allow for delegated legislation to be considered alongside primary legislation or vice-versa, creating additional durability and flexibility within all areas of the law.

Principle three refers to the 'clarity and predictability' of the law. Evidential provisions can successfully support this principle as an evidential provision does not lose clarity nor predictability in what it attempts to convey.

In terms of clarity, evidential provisions allow for pieces of legislation to be viewed while also considering the potential requirements and consequences that may arise if a breach occurs. This provides clarity to not only the rule of law, but also to the reasoning behind these requirements that may not normally be perceivable without reference to various sections of legislation.

However, although clarity would arise in terms of why these potential consequences can occur, it should be noted that the conditions entailed within the provision, such as a reasonable standard of conduct, must not lose any meaning in this new form. This is to ensure predictability in terms of what would occur if the conditions and exceptions are complied with or breached.

Taking this into account, when creating an evidential provision, ALRC should still maintain clarity on when these provisions would apply to avoid any misinterpretation or confusion surrounding breaches of the law. If this can be achieved, then the principle of predictability would also be sufficiently supported.

Finally, principle four refers to the "coherence and navigability" of the law. If certain sources of law are spread across different legislative instruments or a multitude of sections, it can create a fractionalised

⁷ *Financial Services and Markets Act 2000* (UK).

viewpoint of the overarching concept, leading to confusion through the complexity. Evidently, this is the issue that the thematic rulebooks are attempting to solve.

Evidential provisions attempt to achieve this through providing the specific methods of compliance creating coherence, which in doing so, will provide a better understanding of the rule of law that is being enforced.

Navigability is the ease in which readers can find and review the law. Evidently, coherence and navigability are mutually supportive principles, as a reduced need to navigate the law will create greater coherence in the subject matter. Taking this into account, evidential provisions greatly reduce the need to navigate the law, and in doing so supports both principles.

Overall, evidential provisions if used correctly, will provide easily accessible detail on compliance and breaches within the relevant legislative instrument. As discussed above, these provisions will create greater clarity, coherence and navigability surrounding the law but in doing so, give rise to a risk of a 'tick-the-box approach' to compliance.

Although this risk exists, the financial service sector can be extremely complex through the variety of legislation including the Corporations Act⁸ as well as multiple ASIC instruments and regulatory guides. Therefore, the effect of these evidential provisions within the thematic rule books should not be understated, as they will provide an essential understanding of the fundamental norms,⁹ behaviours and conditions of compliance that surround this constantly evolving industry.

⁸ *Corporations Act 2001*(Cth).

⁹ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Rec. 7.4.