Submission to Australian Law Reform Commission

Interim Report B: Financial Services Legislation

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Introduction

This submission addresses the proposals and recommendations put forward by the Australian Law Reform Commission (ALRC) regarding the legal design choices attached to Ch 7 of the *Corporations Act 2001* (Cth). The Interim report details a very ambitious design that is a mix between simplification and technical change.

If any of the responses require further explanations, please contact Associate Professor Marina Nehme at the University of New South Wales, Sydney, Faculty of Law and Justice at [redacted].

General Observation

The observations made in this submission can be summarised in the following manner:

- Recommendation 14 and 16 are to be commended as they are designed to remove redundant and outdated provisions from our laws. Recommendation 15 touches on an important issue: who should oversee an ongoing program to remove redundant and obsolete rules? While the Australian Securities and Investments Commission (ASIC) may be perfect for the role, its resources are limited and, as such, may not be able to complete this task efficiently without diverting its existing resources. It is unfair to ask an agency that is heavily scrutinised to do more with less. This submission recommends the establishment or revival of a body akin to the Corporations and Markets Advisory Committee (CAMAC): such a body is more than equipped to complete the task. Its members will have expertise in legal drafting and will be able to consult widely with the community.
- The legislation should be simplified by removing duplication and by consolidating similar offences.
- A number of Recommendations and Proposals that allocate more tasks to ASIC are only feasible if ASIC has more resources at its disposal.
- simplifying and mainstreaming rules and removing duplicative regimes is encouraged.
- Reliance on 'individual relief' should be used with care as it may have non-intended consequences.

- The proposed legislative hierarchy is interesting and may have some potential. If a thematic rulebook is used, such use should be limited to technical matters only.
- The power to make 'rules' should be limited to technical matters. Substantial matters should be dealt with by the legislator.
- Sanctions should be found in the primary legislation only and not in the 'rulebook'.
- If the current proposals proceed forward, having a Rules Advisory Committee will increase accountability and public confidence.
- Irrespective of whether these proposals go forward or not, it is highly recommended that the Australian government supports the establishment of a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments.

Recommendation 14 – Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

a. spent transitional provisions;

b. spent legislative instruments;

c. redundant definitions;

d. cross-references to repealed provisions; and

e. redundant regulation-making powers.

Recommendation 14 is a step toward the right direction. It is time to properly review Ch 7 (and later on the whole *Corporations Act 2001* (Cth)) to remove redundant transitional provisions, definitions, irrelevant cross references and obsolete regulation and legislative instruments. This is highly recommended as those provisions serve no purpose. They only clutter the existing regime and make it more complex to navigate.

Recommendation 15 – The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

a. identify and facilitate the repeal of redundant and spent provisions; and

b. prevent the accumulation of such provisions.

Recommendation 15 is to be commended as it ensures that an agency is monitoring the relevance of the laws that we have in place. However, I question whether the Department of the Treasury and ASIC have the resources to establish such an ongoing ambitious program. ASIC is already stretched thinly on the ground and is being heavily scrutinised at Federal level. Furthermore, its budget is limited. Accordingly, while ASIC may be ideal for this role, this corporate and financial services regulator will need extra resources to be able to complete this task. Without extra resources, they should not be asked to do more with less. ASIC should not be put in a position where it will have to convert its existing funds focused on enforcement or surveillance for example to boost its research budget to complete this task.

If the government cannot commit extra resources to the regulator, ASIC should not be in charge of the program. Instead, a body like the repealed Corporations and Markets Advisory Committee

(CAMAC) would be perfect to conduct this role as it can consult with Treasury, ASIC and other stakeholders and provide recommendations regarding redundant provisions.

Recommendation 16 – Corporations and financial services legislation should be amended to address:

a. unclear or incorrect provisions;

b. outdated notes relating to 'strict liability'; and

c. outdated references to 'guilty of an offence'.

Recommendation 16 is great and should be supported.

Recommendation 17 – Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:

a. the prescribing of forms and other documents;

b. the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds;

c. the publication of notices and instruments;

d. conditional exemptions;

e. infringement notices and civil penalties;

f. terms defined as having more than one meaning;

g. definitions containing substantive obligations; and

h. definitions that contain the phrase 'in relation to'.

Recommendation 17 is to be commended. Furthermore, simplifying and streamlining rules and removing duplicative regimes should focused on. For instance, in the scope of fundraising, having two separate but almost identical regimes for misleading or deceptive conduct (one applying to traditional fundraising[1] and one relevant to Crowd sourced funding[2]) creates unnecessary complexity and confusion within the legislation.

Recommendation 18 – Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation

Recommendation 18 will once again simplify the legislative regime.

[1] *Corporations Act* (Cth) 2001, ss 728 & 729.
[2] *Corporations Act* (Cth) 2001, s 738U.

Recommendation 19 – The Australian Securities and Investments Commission should publish additional freely available electronic materials designed to help users navigate the legislation it administers. Such materials should include annotated versions of the Corporations Act 2001 (Cth), National Consumer Credit Protection Act 2009 (Cth), and Australian Securities and Investments Commission Act 2001 (Cth).

As Interim Report B has noted, 'ASIC would likely need additional resourcing to undertake some of the more ambitious efforts to improve navigability discussed in this section.'[3] Accordingly, this recommendation will only be feasible with more resources given to the regulator.

One quick fix is for ASIC to work on the navigation of its website to make it easier to access already existing resources. Currently you can find them if you know:

a- what you are looking for exactly; and/or
b- are aware of how ASIC's website work.

As part of its educational role, ASIC may provide more guidance regarding the way the system operates but once again it needs to be provided with extra resources to do so. Having an approach similar to the one used by the Office of the Registrar of Indigenous Corporations may be helpful.

Proposal B1 – The legislative hierarchy of Chapter 7 of the Corporations Act 2001 (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:

a. an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;

b. a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.

The proposed legislative hierarchy is interesting and may have some potential. As noted by the ALRC, the law should be 'clear, coherent, effective and readily accessible.'[4] Having a single consolidated legislative instrument is a step forward in this direction. It would facilitate accessibility and coherence of the system and will provide it with more clarity.

The thematic rulebook is also a good position to start from. However it is important to ensure that it only includes technical matters such as what disclosure information may be needed in a particular document, a list of items that can clearly be expressed and understood by stakeholders. Accordingly, integrating the disclosure regimes as represented in Figure 2.2 of the Interim report is a good approach

However, substantial matters such as the duties of financial services licensees under s 912A, or the interpretation of these duties should not be part of a rulebook (as suggested in Figure 2.4 of the interim report). Those matters should be discussed in the legislation. Accordingly, while the legislation may set the fundamental norms and obligations, substantial details attached to these norms should be in the legislation to ensure that accountability is in place. Technical matters that are not subject to

[3] ALRC, *Interim Report B – Financial Services Legislation* (ALRC Report 139, September 2022), 218.
[4] Ibid 29.

debate or interpretation may find their way to the thematic rulebook. If the explanation of the law is fragmented in different places, accessibility of the law will be lowered. It is best to express the law in the legislation in a concise and clear way. Civil Law jurisdictions have been known to do that quiet effectively and it would be good to emulate their processes in that regard.

Proposal B2 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power to:

a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and

b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act;

in the Scoping Order.

Providing a one stop shop for the exclusions and exemption will facilitate access to the public. It will also provide a level of transparency that is currently lacking as it is challenging for stakeholders, including consumers, to fully grasp the system.

Proposal B3 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as 'individual relief').

A provision such as s 1099 of the Prototype Legislation B may ensure that the legislative regime is flexible and does not stifle innovation. It would provide a formal way to deal with situations when exemptions are required on individual basis. However, it is also important to remember how this power may impact on other people more generally as noted in *ASIC v DB Management Pty Ltd*:[5]

> The new rights and liabilities created by such a declaration cannot be confined in their operation so as to affect no person other than the applicant for the declaration. It is difficult to understand how, in practice, the power could be limited so that its exercise did not affect, directly or indirectly, the rights of third parties.

This statement needs to be taken into account when considering individual relief powers. Consequently, no action letters may be more appropriate to deal with individual relief instances.

Proposal B4 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to require that:

a. every legislative instrument made under the power set out in Proposal B2; and

b. every notifiable instrument made under the power set out in Proposal B3;

must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.

[5] *ASIC v DB Management Pty Ltd* (1999) 199 CLR 321, 341.

Proposal B6 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to require that the explanatory statement accompanying every legislative instrument made under the power in Proposal B5 must address explicitly how the instrument furthers relevant objects within Chapter 7.

These two proposals will ensure that the legislative instruments remain consistent with the objectives of Ch 7. It will raise a level of transparency to stakeholders by providing them with justification behind the use of the legislative instruments.

Proposal B5 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power to make 'rules'.

This proposal should be limited to technical issues. Otherwise, a range of matters may need to be considered including:

- How will public accountability be ensured?[6] Just providing a justification to stakeholders regarding the manner in which changes fit within the object of Ch 7 is not enough. More is needed as the current regime's checks and balances do not support public accountability properly;
- The Draft Guidance included in the Interim Report B notes: 'The empowering Act should define the content, purpose and scope of a delegated law-making power as clearly and precisely as possible'.[7] One may ask how does proposal B5 and s 1098 of the Prototype Legislation B really fit within this principle. The terms of s 1098 may be viewed as providing unconstrained powers to the minister and ASIC with the only caveat being an explanatory statement; and
- Questions of separation of powers should also be considered especially when giving a blanket power to make rules regarding a whole chapter. Unintentional overreach may take place.

A narrowing of the scope of rule-making is needed to ensure boundaries are in place between legislative and administrative powers. This is despite the fact that such rule-making is an 'intrinsic' part of administrative state.[8]

Proposal B7 – Rules made under Chapter 7 of the Corporations Act 2001 (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

Sanctions should be found in the primary legislation only and not in the 'rulebook'. The non-compliance with the principles set up within the legislative framework can reference the technical

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[6] Stephen Bottomley, "The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39 *Federal Law Review* 1, 17.
[7] ALRC, n 1, 254.
[8] Edward Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369, 391.

aspect of the rules (eg. Non-compliance with the disclosure obligations set out in the rule books under provision xx would attract a strict liability offence (xx penalty unit). A reference to this may be made in the rulebook to ensure visibility of the misconduct. Having penalties (even minor ones) spread over two different documents may lower awareness of the penalty regime. Simplification is needed where all penalties can be found in one document.

If penalties are divided between legislation and rulebook, an explanatory document consolidating the penalty regime is needed for accessibility and greater transparency of the system. The fact that the current regime allows for penalties to be included in delegated legislations is not good practice and should be discontinued. It may also negatively affect general and personal deterrence especially when people are not aware of the consequences of a breach due to opaqueness of the legislative framework.

Proposal B8 The powers set out in Proposal B2 and Proposal B5 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission. A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.

See comment regarding Recommendation 15.

Proposal B9 – Chapter 7 of the Corporations Act 2001 (Cth) should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. require the Minister and ASIC to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.

Having an independent body that can provide a voice to different stakeholders should be encouraged. If ASIC is guaranteed more resources to be able to amend provisions of the Scoping Orders or the rules, having a Rules Advisory Committee will increase transparency, accountability and public confidence in the system.

Proposal B10 – As part of the staged implementation of the proposed legislative model, existing powers to omit, modify, or vary relevant provisions of Chapter 7 of the Corporations Act 2001 (Cth) by regulation or other instrument should be repealed.

Proposal B11 – As part of the staged implementation of the proposed legislative model, relevant existing powers to:

a. exclude products or services; and

b. exempt a person or class of persons;

from the operation of all or specified provisions of Chapter 7 of the Corporations Act 2001 (Cth) by regulation or other instrument should be repealed.

If the proposed system goes ahead, a repeal of provisions noted in proposals B10 and B11 is appropriate. Without it, the legislation will be retaining redundant provisions that will add to its complexity.

Proposal B12 – The Attorney-General's Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power.

This proposal highlights the complexity of setting up the proposed regime. The development of expertise and awareness of the limitation of delegated legislative power is needed before ASIC, Treasury or the Minister are intrusted with such power. The proposal also raises a broader point that is linked to how Australia is dealing with delegated legislation. Consequently, a holistic rethink of the use of delegated legislation (not just linked to the *Corporations Act 2001* (Cth)) is required.

Question B13 – Does the Draft Guidance included in this Interim 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?

The Draft Guidance touches on very important principles. However, offences should always be in the legislation and not the legislative instruments. Otherwise, the visibility of the offence may be lessened.

Proposal B14 – In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles. Chapter 5 Offences and Penalties

This would promote good practice and would ensure that people are equipped to do their role. In many instances, legislative drafting is poor in Australia due to lack of skills or as a result of rushing legislation through the parliament. Additionally, awareness of the importance of consultation when drafting legislation is key. Lastly, this proposal, once again, highlights that, to be able to achieve the proposed system, ASIC will need to expand its expertise and will require a range of resources to succeed – resource it currently does not have.

Proposal B15 – In order to implement Proposal B1, offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

Consolidation of similar offences is recommended as it will ensure a more streamlined system of rules and penalties.

Question B16 – Should rulebooks contain 'evidential provisions' that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation?

No comment.

Proposal B17 – The Corporations Act 2001 (Cth) should be amended so that each offence and civil penalty provision, and the consequences of any breach, are identifiable from the text of the provision itself.

Proposal B17 is recommended as it will make the consequences attached to a breach of the section more visible.

Proposal B18 – Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

No comment.

Conclusion

The ALRC review of the financial services regime is welcomed. The Interim Report B provides a sound foundation for the simplification of the regime. However, some of the proposals need further consideration as they have implications in term of resources and ability, including skills, to achieve the ambitious program put forward by the ALRC.

Associate Professor Marina Nehme

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