[redacted]

11 February 2022

The Manager
Australian Law Reform Commission

Dear Manager

I would like to make the following comments on some of the 16 proposals and eight questions set out in ALRC Report 137 relating to financial services legislation.

A1 I do not think that the ALRC needs any additional data to understand the complexity of the financial services legislation itself, because the complexity is obvious to everyone. It would however be a good idea if the ALRC had in place a system where stakeholders who had concerns about particular provisions in the legislation or about how any of those provisions were being interpreted or administered by the regulatory bodies, particularly ASIC, could bring those concerns to the attention of the ALRC. In my experience, ASIC always has a battery of excuses for not taking any action about anything, and is content to muddle along in a quagmire of legislation without any concern at all about the complexity of it. For example, ASIC has done nothing in 14 years to address the issues raised by Robson J in *Re Dyno Nobel Limited* [2008] VSC 154 (particularly at [37]) as to how the "fairness" of a scheme of arrangement should be dealt with in RG 111, and has done nothing in 11 years to address the criticism of Ferguson J in *Elkington v CostaExchange Limited* [2011] VSC 501 at [13] - [19] of how ASIC deals with the expression "fair and reasonable" in RG 111. I have no doubt that any stakeholder can already bring their concerns about some of these matters to the attention of the ALRC, but it would be nice if there was some formal system where stakeholders could do this, and where they knew they would at least be listened to.

A2 Yes. These are excellent and well thought-out principles.

A3 I agree with this.

A4 I agree with all this. I would however like to make one or two comments on the drafting of Chapter 7.

Section 760B includes a table setting out an outline of Chapter 7. The table includes three columns, of which the first column is completely unnecessary. The second column is headed "Part...", but I cannot see why the heading is not just "Part". The third column is headed "Covers...", but what it should really say is "Content". Headings of columns should always be nouns, and not verbs or parts of sentences. In any event headings should be self-contained, and putting ellipses into headings suggests that they are incomplete. Compare the table here with the table in section 761E.

Section 761B is headed "Meaning of arrangement – 2 or more arrangements that together form a derivative or other financial product". Given that this is supposed to be prose, and not an accounting statement, I think that the word "two" should be used instead of the symbol "2". I know it is becoming common practice to write this sort of thing, but it is much easier to read something in prose if words and symbols are not all jumbled together.

Each of subsections (1), (4) and (5) of section 761E is followed by a "Note" or "Notes". These "Notes" either give examples of what particular definitions are supposed to include, they add to or qualify definitions, or explain how different subsections are supposed to work. All this is very inelegant, and it is clear that the "Notes" are being used as a substitute for making sure that the subsections themselves are clearly and properly drafted. Similar "Notes" are scattered through the Act, and they make the Act look a bit like a student's lecture notes. Notes like this should not be used in Acts of parliament.

There is a reference in subsection (10) of section 761EA to "A declaration made under subsection (8) or (9). There is no such thing as "subsection (8) or (9)", and what the draftsman should have said is "A declaration made under subsection (8) or subsection (9)". One would no more say "a declaration made to Mr Smith or Brown" than say "a declaration made under subsection (8) or (9)". The word "section" is not distributive over the word "or". Contrast this to the reference in subsection (3) of section 761F to "[s]ubsections (1) and (2)" of that section, which is properly comparable to a reference to "Messrs Smith and Brown" when the word "and" is used.

And you might like to look at paragraph (aa) of subsection (6) of section 761G, which has been just thrown in between paragraphs (a) and (b) without any thought being given to the meaning of what is being said, or the grammar. It is astonishing how bad some of this drafting is.

A5 I agree with this.

A6 I agree with this.

A7 I agree with this.

A8 I do not know what is meant by "an outcomes-based standard of disclosure". It seems to me that special care needs to be taken in deciding whether the "outcomes" referred to should be "intended outcomes" or "required outcomes".

A9 I agree fully with this. I have looked at some of the provisions which confer power on ASIC to exempt bodies from provisions of the *Corporations Act* and to vary or modify other provisions, and these seem to be all over the place. They include sections 669, 798D, 907D, 907E, 908EB, 926A, 926B, 992B and 992C, and some of these sections appear to overlap. It is not clear how section 669 interacts with section 798D.

I have had recent cause to look fairly carefully at a modification granted by ASIC under section 669, and although this section appears in Chapter 6 of the Act rather than Chapter 7, it is likely that some of the issues with section 669 may also be issues with other similar sections in Chapter 7.

A copy of the instrument granting the modification is attached, and the first thing I should say about it is that it is not self-contained as I think it should be. Clause 5 of the instrument refers to "the compulsory acquisition by Jindal of the ordinary shares in Wollongong under Part 6A.2 of the Act", but it does not explain what compulsory acquisition it is referring to.

Clause 4 of the instrument purports to set out the exemption which is being granted, but it is not expressed in terms of an exemption. What it says is that "Jindal does not have to comply with subsection 664C(6) of the Corporations Act", but that is not "an exemption" unless subsection 664C(6) imposes an obligation to do something. What subsection 664C says however is that "[t]he 90% holder may not ... withdraw a notice under this section", which is not an obligation to do something, but a prohibition

against doing something, and I do not think it is at all clear that ASIC can grant an exemption from a prohibition.

Subsection (2) of section 669 says that an exemption may apply to or relate to specified provisions, persons, securities or other matters. Clause 5 of the instrument does not say which of these things it applies to, but it tries instead to explain "[w]here this instrument applies", by setting out a number of complicated matters which almost look like conditions, even although they are not expressed as conditions.

It is certainly the case that subsection (3) of section 669 says that an exemption may apply subject to specified conditions, and if we allow ASIC the benefit of the doubt, and accept that they have really granted an exemption (from a prohibition) on specified conditions, then Jindal has got the benefit of the exemption immediately, but the conditions are all to be satisfied in the future, and the fulfilment of some of the conditions depends on various things some of which are outside of Jindal's control. One would have thought that if an exemption which conferred a benefit was given subject to certain conditions, care should have been taken to ensure that those conditions were conditions precedent.

In any event this is all far too complicated, and it leaves one with the impression that ASIC is just making up the law as it goes along. This is the way that the law operates in China, and the sooner that ASIC's power to grant exemptions from obligations (as Proposal A9 says) in Chapter 7 (and in Chapters 6, 6A, 6B, 6C and 6CA) is taken away from them, the better.

A10 I agree with this.

A11 I broadly agree with this. It seems to me that the best way for anyone to be able to find their way through a complicated system of corporations law like this is to try to have everything nested, starting with the *Corporations Act* at the top. The Act itself should be reasonable concise (and I know this is easy to say). It should certainly set out some broad principles in the areas that ALRC is presently looking at, and should not try to work its way through all this complicated detail that nobody can possibly understand. The first level of detail can be set out in the regulations (which is how things used to be). And then there can be a second level of detail at the rule-making level. If all this is done properly and if everything is neatly

nested, there is less chance of complications and inconsistencies creeping in where everything is mixed in together.

A12 I do not know whether by "notional amendments" you are referring to what are commonly known as "virtual sections", but I do not think there is any place at all for some shadowy body to be competing with Parliament in drafting up regulatory provisions which have all the appearance of being parts of Acts of parliament. I think it is a complete disgrace that this has been allowed to happen without apparently any effort having been made to make these provisions visible and accessible, and I do not think that ASIC should be given any encouragement by interim measures to continue drafting "notional amendments".

A13 I agree with this.

A14 I agree with this.

A15 I agree with this.

A16 I have no comment on this.

A17 I do not think that there is any place in the legislation for the use of the term "sophisticated investor". Just about everyone these days is "a sophisticated investor" for the purposes of the legislation, but it does not help for anyone to think that they are "a sophisticated investor" when they are not sophisticated at all, and it is quite offensive to tell a reasonably competent investor who happens to be poor that they are not "a sophisticated investor". I have not looked in detail at what the difference is between "a sophisticated investor" and "a wholesale investor", but it is ridiculous to have all these different classes of investors.

There may well be a case for a lesser level of disclosure to be made to persons who really know something about investments, and Mr Geoff Wilson AO, the chairman and chief investment officer of Wilson Asset Management, has suggested that persons who wish to be able to take advantage of general investment opportunities without being mollycoddled should be able to do so provided that they have taken an appropriate course of instruction and have obtained a formal certificate or diploma which shows that they have passed the course and that they know something investment risks. I have not looked at the detail of all this, but it sounds like a very good idea to me.

A18 I do not know what norms you are referring to.

A19 In relation to a, I do not think there is any need to put the words 'efficiently', 'honestly' and 'fairly into separate paragraphs in section 912A(1)(a). There is no likelihood of their being interpreted together as a *hendiadys*.

I agree about b.

I strongly disagree with inserting notes in Acts of parliament, for the reasons I set out in paragraph A4 above.

A21 I have no strong views about this.

A22 I agree with this.

A23 I certainly agree with this.

A24 I agree with a. Section 961B(2) is presently very clumsily drafted, because it says the provider must prove he has done all of the things in paras (a) through (g) in order to satisfy the duty in subsection (1). I cannot see why he has to prove that he has done all these things, because if he has in fact done them then he has clearly acted in the best interests of his client. A court should be able to take into account any difficulties a provider has in proving that he has done some of these things.

I agree with b.

I hope that some of these comments are helpful.

I might add that I think that the Commission is doing a very good job with all this. It is very refreshing to have someone doing something sensible at last about the tidal wave of definitions in this legislation that has been of no benefit to anyone except the persons who dreamt them up.

Yours sincerely

Gordon Elkington

22-0058

Australian Securities and Investments Commission
Corporations Act 2001 – Paragraph 669(1)(a) – Exemption

Enabling legislation

1. The Australian Securities and Investments Commission (**ASIC**) makes this instrument under paragraph 669(1)(a) of the *Corporations Act 2001* (the **Act**)

Title

2. This instrument is ASIC Instrument 22-0058.

Commencement

3. This instrument commences on the date it is signed.

Exemption

4. Jindal does not have to comply with subsection 664C(6) of the *Corporations Act 2001* (**Act**).

Where this instrument applies

5. This instrument applies in relation to the compulsory acquisition by Jindal of the ordinary shares in Wollongong under Part 6A.2 of the Act where:

   (a) Jindal withdraws the Original Notice by publishing, as soon as possible and no later than the date Jindal would otherwise be required to comply with s666A of the Act but for the exemption in paragraph (4) of this instrument, the Withdrawal Notification in a prominent place on a website maintained by Jindal or Wollongong;

   (b) following the withdrawal of the Original Notice, Jindal:

      (i) within seven days of withdrawal of the Original Notice, sends the Withdrawal Notification to each Wollongong shareholder who was sent the Original Notice, by way of:

         (1) where known to Jindal, the respective recipient's elected means of receiving communications from Wollongong; or

         (2) in each other case, in hard copy to the respective recipient's address;

      (ii) issues the New Notice in relation to the Wollongong shares that it does not already own; and

(iii) encloses a revised independent expert's report which ASIC considers satisfactorily addresses the matters stated in the Undertaking provided by BDO; and

(c) Jindal does not proceed to compulsory acquisition under the Original Notice.

Interpretation

6. In this instrument:

BDO means BDO Corporate Finance (WA) Pty Limited

Jindal means Jindal Steel and Power (Mauritius) Limited (Mauritius company registration number C068618)

New Notice means a notice of compulsory acquisition pursuant to section 664C of the Act prepared by Jindal in relation to the ordinary shares of Wollongong that it does not already own.

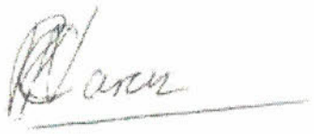
Original Notice means the notice of compulsory acquisition pursuant to section 664C of the Act lodged by Jindal with ASIC on 17 December 2021 in relation to the ordinary shares of Wollongong that it does not already own.

Undertaking means the undertakings provided by Jindal and BDO to the Takeovers Panel dated 20 January 2022 as referred to in the Takeovers Panel media release of 24 January 2022 titled '*Wollongong Coal Limited 02 – Panel Accepts Undertakings and Declines to Conduct Proceedings*'

Withdrawal Notification means a communication by Jindal which explains, amongst other things, the effect of the relief provided by ASIC in this instrument, that Jindal withdraws the Original Notice and the compulsory acquisition contemplated under this notice will not proceed and that all objections received in respect of the Original Notice will no longer have effect.

Wollongong means Wollongong Coal Limited ACN 111 244 896

Dated this 3rd day of February 2022



Signed by Roxton Narcis
as a delegate of the Australian Securities and Investments Commission