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Australian Law Reform Commission

Submission Regarding - ALRC Interim Report A: Financial Services Legislation (ALRC Report 137)

Thankyou for the opportunity to make a submission in response to the Interim Report A of the ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation.

I am a Senior Lecturer in Law at the School of Law and Society, University of the Sunshine Coast. I have taught in the areas of corporations law since 2011 as well as in financial services law and competition and consumer law. I am a critical and cultural legal scholar and currently the recipient of an Australian Research Council Discovery Early Career Researcher Award (DE200100881) examining 'New Approaches to Corporate Legality: Beyond Neoliberal Governance'. Prior to becoming an academic I worked in financial services for four years.

I am supportive of the aims of the Inquiry and endorse the much-needed work of simplifying our corporations and financial services law. My submission is focused on a few key areas (in particular A8, A18, A19, A20 and A24), however I also support the following proposals:

- **Question A2 and Proposals A3-A6** – I support all efforts to apply more consistent definitions in the corporations law, including the making consistent of the definitions of 'financial product' and 'financial service' and the consolidation of the exclusions and exemptions from definitions into a single instrument.
- **Proposals A22-A23** consolidating the provisions dealing with unconscionable conduct and misleading and deceptive or false or misleading representations.

The focus of my submission, however, is in regard to Proposal A8, Questions A18 and A19, and some brief comments on Proposal A20 and Question A24.

Proposal A8: The obligation to provide financial product disclosure in Part 7.9 of the Corporations Act 2001 (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.

I strongly support the shift in the obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act 2001* (Cth) to an outcomes-based standard of disclosure. In my time in financial services before becoming an academic I was involved in due diligence committees on the preparation of disclosure documents for financial products. The level of prescription required, as

well as the guidelines on how it was to be met, resulted in forms of disclosure that were convoluted, tick-a-box and which did not appropriately match the product in question. That is, the level of disclosure was inferior to what, as a risk manager, I was recommending should be provided (and which would have been much clearer for the intended end-users of the document).

In addition, I support the increased flexibility of an outcomes-based approach which will allow for more innovative and effective approaches to disclosure. This is particularly the case for online, digital and interactive provision of disclosure information, as well as encouraging the provision of useful information for the end-user in making their decision, rather than a compliance-based approach focused on protecting the preparers from potential liability.

Disclosure documents that are fit-for-purpose, less descriptive and more outcomes orientated are essential.

Question A18: Should Chapter 7 of the *Corporations Act 2001* (Cth) be amended to insert certain norms as an objects clause?

Question A19: What norms should be included in such an objects clause?

I support the ALRC's taking-up of the recommendations from the Financial Services Royal Commission that norms should be embedded in the law. The suggested approach of inserting the six norms set out by the Royal Commission (or a variation of them) as an objects clause in Chapter 7 would, alongside the substantive conduct provisions such as the duty of licensees to act 'efficiently, honestly and fairly', appear to present a certain hierarchy in which the overarching norms are embedded as objects clauses, with the substantial conduct provisions being separately captured.

Given this implicit hierarchy, I would suggest that an even broader approach should be considered, in which the *Corporations Act* itself sets out norms of conduct in objects clauses that would apply to *all* corporations. This would recognise that the fundamental issues raised by the Financial Services Royal Commission relating to the overriding concerns with both profit and individual gain are not restricted to companies providing financial products and financial services.¹

Further consideration would need to be given to the nature of those norms, whether the six outlined by the Royal Commission are appropriate or need adjustment, or whether a broader set similar to the 11 foundational 'Principles for Business' in the UK should be incorporated. Given the proceduralisation of corporate law that has occurred in recent years noted by the ALRC,² and the aims of the ALRC's Inquiry focused on simplification of corporate law, the inclusion of a set of

¹ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 1.

² Australian Law Reform Commission, 'Interim Report A: Financial Services Legislation' (ALRC Report 137, November 2021), [2.117] pp78-79; Ross Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43(2) *Federal Law Review* 233.

norms that spoke directly to the users of the Act (i.e. those carrying on commercial enterprises in a corporate form), would appear both appropriate and needed.

Such an approach would also sit within broader concerns about corporation's social responsibility and needing to fulfil a broader social purpose than simply the pursuit of profit above all else. Whilst there are debates about both whether corporations should engage in a pursuit of broader purposes and, if so, the best ways of going about this,³ including the expected norms of conduct of corporate entities and those that carry on their business would help to clarify and focus expectations without affecting current policy settings (as per the current Terms of Reference).

In addition, the Interim Report refers to arguments that the fundamental norm of 'obey the law' is implicit in *all* law. However, given the misconduct revealed by the Financial Services Royal Commission, it would appear that this is a fundamental norm that has consistently been disregarded. Emphasising this as a requirement and expectation of not only financial services entities, but all corporations, would highlight that accepting the penalties for a breach of the law is *not* an acceptable 'cost of doing business'.

Proposal A20(b) Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by:
b. replacing the word 'efficiently' with 'professionally'

As highlighted by the ALRC, given the non-lay interpretation of 'efficiently' in s912A(1)(a) it would be appropriate to replace the term. Acknowledging the consideration of both 'competently' and 'professionally' by the ALRC, I support the change to 'professionally'. In addition to this aligning with the judicial interpretation of the existing term, it also highlights and encompasses a broader notion of professionalisation that the provision of financial services should encompass.

Importance of corporations grappling with their obligations and the expected standards of the community:

- **Proposal A20(c) Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by:**
 - c. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.
- **Question A24. Would the *Corporations Act 2001* (Cth) be simplified by:**
 - a. amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and
 - b. repealing ss 961C and 961D?

³ For consideration of these debates in the Australian context, see: Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43 *University of New South Wales Law Journal* 954; Ross Grantham, 'People, Planet, and Profits: Re-purposing the Company' (2021) 38 *Company & Securities Law Journal* 250.

As noted in Interim Report A, there are concerns regarding the ambiguity of the word ‘fairly’ and the potential for there to be uncertainty as to what are the obligations of financial services entities. Whilst I am generally supportive of providing some clarification as to what conduct would fail to satisfy the ‘fairly’ standard (such as those outlined in the Interim Report), it is important that such clarification does not diminish the principled-based nature of these obligations.

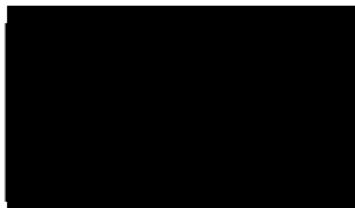
The ongoing need for a shift in the culture of corporate enterprise, highlighted by the Financial Services Royal Commission in particular, requires from corporations a substantive engagement with both ethical and legal obligations that go well beyond a straightforward or ‘certain’ articulation of what conduct is wrong or illegal. That is, corporations and their management need to grapple with the concept of ‘fairly’ themselves and question whether their approaches to economic activity fit within that concept. Limiting acting ‘fairly’ to simply conduct that is *not* unconscionable or *not* misleading is an insufficient standard or expectation of these institutions.

This point aligns with the suggested re-casting of the elements of s961B(2) as indicative behaviours of compliance, rather than a safe-harbour checklist. Such a re-casting would emphasise the importance of substantive engagement with, and adopting of, the best interests duty set out in s961B(1).

The above approach aligns with the proposed inclusion of fundamental norms within objectives clauses in the legislation that, again, highlight what the expected conduct of corporations is.

I thank the ALRC for the opportunity to make this submission. Please contact me if you require any further information or clarification.

Yours faithfully,



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