THE UNIVERSITY OF WESTERN AUSTRALIA

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1st March 2022

Australian Law Reform Commission
119 North Quay,
Brisbane QLD 4000
Attention: William Isdale, Senior Legal Officer

Dear Mr Isdale,

Submission re Interim Report A (ALRC Report 137, 2021) - Financial Services Legislation

I am an academic at the Law School of the University of Western Australia. My primary research area is the legislative process and statutory interpretation.

Thank you for the opportunity to provide input on proposals and questions in the Australian Law Reform Commission, *Interim Report A - Financial Services Legislation* (ALRC Report 137, November 2021) ('Interim Report'). Below are some comments on a number of the proposals/questions. The views expressed in this submission are my own.

A2. Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to Define

The four principles focus on readability and understanding, which are the 2 key reasons for use of defined terms in statutes. Further, I strongly endorse the principle that definitions should not contain substantive provisions.

Consistency of Definitions

I suggest adding a further principle that – "Where possible, definitions in the *Acts Interpretation Act 1901* (Cth) should be relied upon." One of the key objectives of the AIA is that "The definitions and many of the interpretation rules are aimed at making Commonwealth legislation shorter, less complex and more consistent in operation." (s 1A AIA). This principle is a natural consequence of, and consistent with, **Recommendation 5** that s 5C of the *Corporations Act 2001* (Cth) and s 5A of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed" and **Recommendation 6** that "definitions that duplicate existing definitions in the *Acts Interpretation Act 1901* (Cth) should be removed."

Design of definitions

Agreed, though note that in some instances an 'intuitive' relationship between a label and the substance of the definition may be challenging, especially where the label is generic (e.g. 'general advice'), or the definition is "to create a special concept that does not have an ordinary meaning."[1]

[1] NSW Parliamentary Counsel's Office, *DP5: Legislative definitions* (1st ed, September 2017) 1.

A9. The following existing powers in the *Corporations Act 2001* (Cth) should be removed:

a) powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and

b) powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

From the Interim Report, I understand that the main purpose of this proposal is to reduce complexity of the legislative scheme by removing the need to navigate the hundreds of legislative instruments and to identify from them exemptions and notional amendments.[2] This proposal would certainly help simplify the scheme. But while this proposal may have merit with respect to exemptions (subject to below), it is highly questionable whether there should be any power to notionally amend Chapter 7 provisions. I fully endorse the ALRC's statement in the Interim Report that all powers to make "[n]otional amendments should be eliminated."[3] These are, in effect, a type of Henry VIII clause which effectively permits amendment of a statute, without the appropriate parliamentary scrutiny required for statutory amendment. As the Interim Report notes, this presents challenges for the rule of law and the doctrine of separation of powers, as well as practical difficulties.[4]

A10. The *Corporations Act 2001* (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

The notion of all exclusions and exemptions in one consolidated instrument would greatly enhance accessibility and navigability for the user. Following are some suggestions regarding the scope of this proposal:

a) Careful consideration needs to be given to exemptions and prescriptive rules reflecting or effecting policy being placed in delegated legislation. They should be as limited as possible and, where feasible, it is preferable that they be contained in the *Corporations Act 2001* (Cth). Legislation effecting policy is better placed in a statute, as this undergoes the more rigorous parliamentary scrutiny warranted for policy instruments.
b) As noted in my submission to the ALRC dated 14th August 2021, there is likely to be concern expressed about exemptions to the Act being placed in a legislative instrument. One of the principles by which the Senate Standing Committee for the Scrutiny of Delegated Legislation scrutinises legislative instruments is (j) "matters more appropriate for parliamentary enactment."[5] The Committee's Guidelines on (j) state that the committee will be concerned with instruments that modify the operation of primary

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[2] Australian Law Reform Commission, *Interim Report A - Financial Services Legislation* (ALRC Report 137, 2021) ('Interim Report A') 408-9.
[3] Ibid 409.
[4] Ibid 412.
[5] Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate* (July 2021) O 23(3)(j).

legislation, or exempt persons from the operation of primary legislation.[6] These are matters considered by the Committee as more appropriate for primary legislation. To this extent, I note that the Interim Report states that "exclusions and exemptions should not be simply re-located within the legislative hierarchy, but rather should be avoided where possible."[7]

c) It should be made clear in the *Corporations Act 2001* (Cth) and in any legislative instrument made under that Act containing exemptions and exclusions (including amending instruments to that instrument) that the instrument **is** subject to disallowance (ie it is not exempt) (*Legislation Act 2003* (Cth) s 44). Significant concerns about legislative instruments being exempt from disallowance for numerous reasons were raised in a 2021 Report of the Senate Standing Committee for the Scrutiny of Delegated Legislation.[8] Instruments should only be exempt from disallowance in "exceptional circumstances."[9] Further, the Committee has recommended that instruments that override or modify primary legislation "should not be exempt from disallowance or sunsetting."[10]

A11. In order to implement Proposals A9 and A10:

a) Should the *Corporations Act 2001* (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?

As noted in my submission to the ALRC dated 14th August 2021, there are challenges with legislative instruments being rules rather than regulations. Regulations must be drafted by the Office of Parliamentary Counsel as drafting them is 'tied' work.[11] In contrast, the drafting of rules is not 'tied' to the OPC and so can be performed by non-professional drafters in Commonwealth departments and agencies. The "variable quality of drafting" of legislative instruments by non-OPC drafters has been the subject of comment, including in a 2019 report of the Senate Standing Committee for the Scrutiny of Delegated Legislation (then known as the Senate Standing Committee on Regulations and Ordinances).[12] One consequence of that report was that a new scrutiny principle was added to Senate Standing Order 23, and the

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[6] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines* (1st ed, February 2020), 27. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines

[7] Interim Report A, 410.

[8] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated legislation from Parliamentary Oversight* (Final Report, 16 March 2021).

[9] Ibid xi. See also 102-107. See also Australian Government, *Response to the Senate Standing Committee on Regulations and Ordinances report: Parliamentary Scrutiny of delegated legislation* (November 2019) 5.

[10] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated legislation from Parliamentary Oversight* (Final Report, 16 March 2021) 115.

[11] *Legal Services Directions 2017* (Cth) App A, cl 3.

[12] Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of Delegated Legislation* (Report, 3 June 2019) 50. See also 48-9 and Stephen Argument, "The Use of 'Legislative Rules' in Preference to Regulations: A 'Novel' Approach" (2015) 26 *Public Law Review* 4.

Committee is now required to scrutinise each instrument as to whether ''its drafting is defective or unclear."[13]

The drafter of the instrument is relevant when the instrument is being interpreted. The courts may adopt a more flexible approach to interpreting delegated legislation that has been drafted by persons other than parliamentary counsel. The author being a non-professional drafter is regarded as a relevant contextual factor.[14]

The Interim Report notes some of the above concerns and responds, at least in part, by stating that "The ALRC does not propose introducing a 'general instrument-making power' ... Any powers in the *Corporations Act* to make rules on a particular subject matter should be appropriately circumscribed."[15] With respect, while this provides some confidence that the 'rules' will be as specific as needed and no more, it does not address the concern about drafting quality.

The Interim Report states that the "nomenclature of 'rules' may be useful in communicating to the regulated population (and to those with whom they transact) that these legislative instruments contain *rules* that have the force of law and must be followed."[16] Absent empirical evidence, it is not clear that 'rules' have any more communicative value about legal weight than 'regulations,' a long existing and well-established form of delegated legislation.

A12. As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the *Corporations Act 2001* (Cth) made by delegated legislation.

I strongly endorse this proposal as an interim measure. Accessibility of the law is fundamental to the principle of the rule of law.[17] This proposal is consistent with the ALRC's overarching 'Principle One.'[18]

Further, practically speaking, it would be expected that the significant and substantial empirical work already done by the ALRC to identify instruments containing notional amendments should facilitate these bodies being able to efficiently and promptly improve the visibility and accessibility of those instruments using the Federal Register of Legislation.

A15. Section 766B of the *Corporations Act 2001* (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

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[13] *Senate Journals*, Parliament of Australia (No 30, 27 November 2019) 933-5, amending Standing Order 23.
[14] See, e.g., *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, 610 [79] (Leeming JA, McColl and McFarlan JJA agreeing at 597 [1] [2]); *City of Swan v West Australian Shalom Group Inc* [2017] WASC 217, [37] (Banks-Smith J).
[15] Interim Report A, 417.
[16] Ibid 415.
[17] Tom Bingham, *The Rule of Law* (Penguin Books2011) ch 3.
[18] Interim Report A, 38.

In theory, and given the history to this issue, this is a welcome proposal. But as the ALRC has intimated in its Interim Report, it is difficult to identify in practice what term would correspond "intuitively with the substance of the definition."

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

Objects clauses can be useful as they go to the purpose of an Act (or Part) and both the interpretation Acts of each Australian jurisdiction and the Australian common law require purpose to be considered in the interpretative process. To the extent that an objects provisions does contain express statements about goals or intended aims, they can be a useful starting point in the purposive analysis. As well, they can give "practical content" to protean expressions or general words, which may be useful for substantive provisions using general principles based drafting.[19]

Caution needs to be exercised with this proposal. First, objects clauses are limited in the work that they can do. These clauses can assist as interpretative aids in the task of determining the meaning and scope of a substantive provision, but they are not conclusive. See, for example, the explanation given by Justice Edelman:

> In circumstances where a statute expressly sets out its own objects or purposes, that express statement will almost always be relevant to identifying the objects and purposes of a particular provision. But a court should not blindly accept that the high-level, abstract purposes of the whole Act must be the exhaustive statement of the purposes of a single provision.[20]

They might be of limited probative value for another reason. As Justice Edelman indicates, an objects provision may be at such a 'high-level' or so general that it is not helpful for a particular interpretative task. The classic example is that given by Chief Justice Gleeson about the lack of utility of a purpose to raise revenue when construing a tax Act.[21] More specific purposes, usually of the provision the subject of the interpretation, must often be identified for 'purpose' to be useful for attributing meaning to statutory text.

Second, it is difficult to see how the norms as expressed in the Interim Report (p508) are 'objects' or 'purposes' that lend themselves to being an aid to interpretation for Chapter 7 provisions. The object of an Act should be distinguished from the *means* of achieving it and its *effect*. The norms are:

1. Obey the law;
2. Do not mislead or deceive;
3. Act fairly;
4. Provide services that are fit for purpose;
5. Deliver services with reasonable care and skill; and

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[19] See, e.g., *Russo v Aiello* (2003) 215 CLR 643, 645 [5] (Gleeson CJ) referring to the objects of Part 5 of the *Motor Accidents Act 1988* (NSW).
[20] *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [172]. Cf Gageler J, 627 [79].
[21] *Carr v The State of Western Australia* (2007) 232 CLR 138, 143 [6].

6. When acting for another, act in the best interests of that other.

As the ALRC states, these six norms are "reflective of the key financial services conduct *obligations.*"[22] Apart from number 4, which could be regarded as an object or goal, the other norms are, in effect, operative rather than aspirational. They are not representative of a desired outcome - but a means of achieving that outcome.

By way of example of the distinction between object and means, consider the *Fuel Security Act 2021* (Cth):

> **3 Objects**
>
> (1) The objects of this Act are the following:
>
> (a) to improve security and confidence in Australia's fuel supplies;
>
> (b) to support sovereign capability to maintain fuel supplies;
>
> (c) to contribute to meeting Australia's obligations under the International Energy Agreement;
>
> (d) to assist in preventing disruptions in fuel supplies.
>
> (2) The objects are to be achieved by:
>
> (a) requiring the holding of minimum quantities of stocks of certain fuels in Australia; and
>
> (b) making payments for production of refined fuels to support the contribution made by refineries in Australia to the security of Australia's fuel supplies.

An example of the distinction between objects and effect was given by Justice Edelman in *Unions NSW v New South Wales*.[23] The court was required to construe a statute that places caps on political donations. His Honour explained that:

> ...the distinction can be seen in a law that places caps on political donations for the *purpose* of reducing corruption but with the *foreseeable effect* or *consequence* of restricting the funds available to political parties and candidates to meet the costs of political communication.[24]

The 'norms' as expressed might be characterised as ways of achieving the objects or goals or policy of chapter 7, but it is difficult to characterise them as *goals* of the legislation. Indeed, they read as principles in the same manner as the UK 'Principles for Business' which are intended to have substantive effect. The Interim Report states that "the inclusion of the norms as an objects clause may assist in any transition to a more principles-based approach (at least in relation to conduct obligations)"[25], but the norms as currently expressed are obligations themselves drafted in a general principles style.

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[22] Interim Report A, 508 (emphasis added).
[23] (2019) 264 CLR 595.
[24] *Unions NSW v New South Wales* (2019) 264 CLR 595, 656-7, [170] (Edelman J).
[25] Interim Report A, 507.

I agree that the norms are not suited to placement in something like a simplified outline. The function of a feature such as a simplified outline is to give background information and a general understanding of what the legislation is about.[26] The norms are not of this nature; they go beyond mere description.

More importantly, there is difficulty with the proposition in the Interim Report that, for the third approach, a provision might be included that purports to exclude a component of an Act from being used for the purposes of interpretation.[27] First, if it does not have any interpretative value, then query its relevance or function in the context of understanding the Act. Further, it is highly contestable whether the legislature (through a legislative provision) can direct the court as to what it can and cannot use for statutory interpretation. In the context of the separation of powers doctrine, the High Court has emphasised that the attribution of meaning to statutory text is "emphatically" the province and duty of the judiciary.[28]

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

See above comments re A18.

A20. Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by:

a) separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs;

This structure would provide a stronger textual indicator to the interpreter, including the judiciary, that the three words are not a composite phrase and are standalone obligations.

b) replacing the word 'efficiently' with 'professionally';

It may be accepted that the word 'efficiently' is not used in s 912A in its 'ordinary' sense. But even accepting that, there is a risk in replacing a word where the courts have settled on the meaning. A change in text will usually be presumed by the courts to signal a change in meaning is intended by the legislature, especially where that word has an established judicial meaning.[29] If this proposal is adopted, then there must be clear evidence available to the courts that the new word is substituted as a matter of clearer drafting only and is not intended to change the meaning (*Acts Interpretation Act 1901* (Cth) s 15AC). For example, there would need to be clarity in the explanatory memorandum to the relevant amending legislation and/or possibly in a Note to the provision itself.

and

c) inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

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[26] Office of Parliamentary Counsel (Cth), *Drafting Direction 1.3A* 'Simplified Outlines,' (November 2016) 4.
[27] Interim Report A, 507.
[28] *Brown v Tasmania* (2017) 261 CLR 328, 480 [486] (Edelman J in dissent, but not as to this principle, citing *Marbury v Madison* 5 US 137, 177 (Marshall CJ) (1803).
[29] *Baini v The Queen* (2012) 246 CLR 469, 484-5 [43] (Gageler J). This is the logical converse of the re-enactment presumption: *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 754 [51] (Gageler, Gordon and Steward JJ).

I note that the proposal contains the word 'note' but that the Interim Report refers to the inclusion of "nonexhaustive examples of conduct that may, or is likely to be, unfair."[30] First, it would be helpful in considering this proposal if it were more clear whether the 'examples' were to be part of the substantive provision of s 912A, or whether they are to be a 'readability aid'.[31] If a readability aid, they are only examples of the operation or application of the substantive provision. If the former (part of the substantive provision), then the examples should be drafted to ensure that the examples will not be regarded as contextual indicators that favour a limited reading of the substantive obligation to provided financial services 'fairly' (for example, by using 'including but not limited to' wording.) If inserted as a readability aid example, s 15AD of the *Acts Interpretation Act 1901* (Cth) is relevant to the drafting.

Yours sincerely

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[30] Interim Report A, 520.
[31] Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) 33.