WEBINAR: What goes where? A comparative discussion of the legislative puzzle

TUESDAY 24 MAY 2022

TRANSCRIPT

00:00:06:06 - 00:00:44:06
The Hon Justice Colvin

Good afternoon, everyone. On behalf of the Australian Law Reform Commission, it's my pleasure to welcome you to today's webinar. Our topic for today is 'What goes where? A comparative discussion of the legislative puzzle'. It's pleasing to see the level of interest in the seminar with hundreds of registrations and participants joining us from around Australia and beyond. For those of us here in Perth, we acknowledge the Whadjuk people of the Noongar nation as the longstanding traditional custodians of the land in this place.

00:00:45:07 - 00:01:32:11
The Hon Justice Colvin

We pay our respects to all elders past, present and emerging, and acknowledge the standing of all First Nations peoples. This webinar is part of an ongoing series to explore matters relevant to our inquiry into the simplification of financial services laws in Australia. Recordings of previous webinars can be found on the ALRC website. We're always happy for traffic on our website. May I begin with a brief background of the work that the ALRC is doing in this area. In 2020 the Commission received Terms of Reference to inquire into the simplification and rationalisation of the regulation of financial services in Australia.

00:01:34:04 - 00:02:06:04
The Hon Justice Colvin

Since then, we've completed our Interim Report A which is now available. It dealt with the use of definitions and terminology, particularly the key concepts that set regulatory boundaries. Later this year we will publish Interim Report B which will address regulatory design and the appropriate approach to the overall legislative hierarchy. This is what we refer to as the question of 'what goes where?'.

00:02:06:04 - 00:02:54:09
The Hon Justice Colvin

Next year we will complete the reference with a third interim report, which will consider how Chapter 7 of the Corporations Act might be reframed for greater clarity, coherence and effectiveness. Background papers relating to our work in this area can be accessed on the ALRC website. The task, of course, is considerable. We've estimated that it would take an average reader 40 days and nights continuously reading to complete the task of going through all of the existing regulation. The scale and complexity of the law means that there can be difficulty for those to whom it applies and those who benefit from its protections to find the relevant law. They need a way to understand the laws architecture.

00:02:55:06 - 00:03:27:09
The Hon Justice Colvin

It should be well structured and signposted, but it also should be adaptable. So it can deal with ever changing financial markets. These requirements give rise to complex questions as to the way in which different parts of the overall regulation may be amended and updated over time, how appropriate exemptions might be provided for, and the best way to allocate those responsibilities to make sure the law is coherent and effective.

00:03:29:01 - 00:03:57:14
The Hon Justice Colvin

But today, we are looking outside of Australia to other jurisdictions for insight and possible inspiration. We are seeking to learn from the approach to financial regulation in other places. Our panel of four esteemed speakers are each experts with experience in the design and operation of relevant legislation in their respective jurisdictions. It's my very sincere pleasure to introduce them today.

00:04:00:00 - 00:04:36:13
The Hon Justice Colvin

Professor Julia Black, will join us from London, where she is the Strategic Director of Innovation and Professor of Law at the London School of Economics and Political Science. Professor Black has written over 50 books, articles and policy reports on issues of regulatory design and dynamics and was awarded a CBE in 2020 for her contributions to the field. She is also an external member of the Bank of England's Prudential Regulation Committee, a fellow of the British Academy and an honorary fellow of Lincoln College, Oxford.

00:04:38:12 - 00:05:28:10
The Hon Justice Colvin

Mr Ross Carter is a member of the New Zealand Parliamentary Council Office with extensive experience in drafting government bills and secondary legislation. Previously he worked for the New Zealand Law Commission. Ross is also an adjunct lecturer at Victoria University of Wellington. And co-author of the leading texts: Subordinate Legislation in New Zealand and Statute Law in New Zealand. Ross is also Secretary of the Commonwealth Association of Legislative Council. We also have Professor Hans Tjio, who is the CJ Koh Professor at the National University of Singapore, where he teaches regulation and trust law. Professor Tjio is published widely on company law, securities regulation and trust law.

00:05:29:10 - 00:05:43:00
The Hon Justice Colvin

He's previously undertaken secondments with the monetary authority of Singapore and the Ministry of Law. He also serves on the Security Industry Council of Singapore and the SGX Listing Advisory Committee.

00:05:45:06 - 00:06:15:08
The Hon Justice Colvin

Professor Wai Yee Wan is the Associate Dean of Research and Internationalisation at the City University of Hong Kong. Professor Wan's main areas of research include corporate law, mergers and acquisitions, securities regulation and financial consumer regulation. She has previously worked as a partner at Allen and Gledhill in Singapore, where she practiced in mergers and acquisitions and capital markets and also at the Singapore Management University as Dean of Postgraduate Research Programs and Professor of Law.

00:06:15:08 - 00:06:47:00
The Hon Justice Colvin

I extend a warm welcome to our four speakers today and those brief descriptions of their CVs indicate that we are in for well-informed discussion and presentation today. One of the big questions for today's seminar is what is the right framework for the laws that regulate financial services?

00:06:47:11 - 00:07:16:14
The Hon Justice Colvin

Can it be done without clutter and obscurity? Is there a better way in Australia of expressing the laws to encourage compliance and understanding of the obligations? One issue is how to deal with offences and penalties. To what extent should they be in the main legislation given their coercive character? When is it appropriate to use delegated legislation to impose penalties and how should that work, if that is done.

00:07:17:06 - 00:07:31:08
The Hon Justice Colvin

With that introduction, I come now to introduce Julia Black to start our discussion. So over to you, Julia.

00:07:32:14 - 00:07:59:01
Professor Julia Black CBE

Thank you so much and good evening. Good afternoon, everybody. Good morning for me. But thank you so much, Justice Colvin, for your introduction and your very kind words. I'm delighted to be able to speak with you this morning. And I'm going to talk about two things. I'm going to talk about generally what we might think of in technical, functional terms of the best design for a rule system.

00:08:00:04 - 00:08:25:08
Professor Julia Black CBE

Rule system is only obviously part of the regulatory system, but is a key part. And then I'm going to just move on briefly to discuss the experience that we're having in the UK having been part of the EU and their rule system for financial services and how that itself changed post the financial crisis. And then just to introduce to you a little, very, very briefly the very complex situation we have at the moment and what I call the great sorting out.

00:08:26:11 - 00:08:58:11
Professor Julia Black CBE

Once we had on shored that EU legislation into our UK law. So I'm just now going to share my screen, which as we know, all presenters have a little moment to panic at this point, hoping that they will actually be able to find their slides. Let me just find those for you. Needless to say I can't find my slides, so I'm just going to carry on and hope that you can hear me and they will be available for distribution.

00:08:59:14 - 00:09:31:00
Professor Julia Black CBE

My apologies for that. So choices in designing rule systems, you have we have a range of choices when deciding how to design our rules. They are about the rules themselves. But also about the systems that we are looking at in terms of the overall institutional design of those systems. So in terms of the rules themselves, then you have rule choices. You've got in terms of their linguistics structure.

00:09:31:11 - 00:10:06:06
Professor Julia Black CBE

You can think about how detailed the rules are. You can think about how general they are. You can think about how they're simple or complex. OK, here we go, and we can also think about their overall certainty that they might be giving in the way that they're phrased. You also think about their overall status in terms of whether they are legally binding.

00:10:06:13 - 00:10:38:14
Professor Julia Black CBE

Obviously, we're talking here about legally binding rules, whether they're going to be criminal, strict liability offences or other requirement of intent, and if they're civil or administrative or what role that's going to be played by non-legally binding rules. And if its guidance, does it have evidential status? So in the UK, for example, we have certain pieces of guidance or highway codes is always a very good example whereby breach of the code itself doesn't necessarily mean that you've broken a rule, but it does provide evidence of breach of a rule.

00:10:39:13 - 00:11:05:07
Professor Julia Black CBE

Or rather that guidance can be simply entirely non-binding through codes. And then we have to think about so that's rule type and I think what we forget sometimes in the discussion is that there's a separate set of considerations about the institutional framework where we think about who's going to be the author of those rules. Is it the legislature, is it the executive in a federal system?

00:11:05:07 - 00:11:28:11
Professor Julia Black CBE

What's the distribution of responsibilities between federal, state or in regional, such as the EU between the EU institutions and member states? Is it also going to be a regulatory agency, again, federal or state, at what level? Is it going to be private actor or organisation? And it's worth bearing in mind that in terms of the linguistic structure of the rules any of those authors can write rules of any type.

00:11:29:10 - 00:11:56:06
Professor Julia Black CBE

So there's no necessary reason why, for example, a legislature has to write specific or detailed rules. There's no necessary reason why private actors or organisations are writing general rules. Obviously, private actors may actually be given powers to write law rules, which will have legal effect. So there's no necessary line up, as I said, rule type and author, but we also then need to think about the enforcer.

00:11:56:10 - 00:12:20:12
Professor Julia Black CBE

Penalties has been raised already. What right of private action is going to be given? We're going to be relying on people taking actions in court against the person that they think has breached the rules. We're going to have a public actor, a regulatory agency, for example, whose roles it is to enforce. Are we in a more private system thinking about rules of contract, membership of self-regulatory bodies, supply chain conditions, et cetera?

00:12:21:08 - 00:12:41:06
Professor Julia Black CBE

And then what's the adjudicatory body going to be? Is it going to be a court, a specialist tribunal, a regulatory agency? Where they have powers to impose sanctions? And if so, with what kind of appeals and what kind of guarantees around the independence of the process et cetera and others? So that's the choices in designing our rule system.

00:12:41:06 - 00:13:08:11
Professor Julia Black CBE

So that's really what's in issue here in the Australian context. In terms of the 'what goes where', then I think it's worth thinking about those different aspects of both rule type and institutional framework. So then if we move on to think about, okay, well, a lot of things to think about, so how are we going to think about them? I think about factors to consider in making choices on rule system design. I've just bunched them broadly into three categories.

00:13:08:11 - 00:13:28:00
Professor Julia Black CBE

So we've started talking about the functional, which is obviously, you know, what do we want the rule system to do? Ultimately, we want it to be able to achieve the social goals that we're setting out to try and achieve and how is it going to do that? And the first thing you have to remember about rules they are instruments of communication.

00:13:28:02 - 00:13:49:01
Professor Julia Black CBE

We don't think about this as lawyers necessarily. We think about them as instruments to hold people to account, drive enforceability, et cetera. But if you're in a regulatory context then what's really important is you communicate very clearly to people the behaviours that are expected of them. Whether that or the model, what it is that they need to do.

00:13:49:09 - 00:14:08:03
Professor Julia Black CBE

And I think we lose sight of that but I think that's something that's coming up very strongly in the Australian context at the moment, which is, well, the rules aren't communicating anything because the system is so complex. So I've put communication as the first thing that rules really have to be able to achieve. Then, as has been mentioned, the need for adaptability.

00:14:09:00 - 00:14:38:00
Professor Julia Black CBE

And that comes both in the rule type and the institutional framework. And again, important not to conflate those two things. You can have lots of detail and complex rules if you've got an institutional framework which requires easy adaptability of those rules. Where it's difficult to be changing the rules, those particular rules, then I would argue for the sake of adaptability, you need more general rules, more framework type rules, so that goes very much to the 'what goes where' discussion.

00:14:38:04 - 00:15:05:01
Professor Julia Black CBE

How easy is it to change this rule, given its author and author's position in that institutional framework, and how difficult it is going to be to change that particular rule? Enforceability, referenced before, again goes to rule type and goes to the need for people to understand the behaviours which are expected of them. If those behaviours in particular are going to be, if they don't follow that, it will be a legal offence.

00:15:06:05 - 00:15:45:12
Professor Julia Black CBE

So again, you've got to think about the rule type and the institutional framework, also got to think about the capacity of the actors to make the rules, and that is their expertise and their authority and their legitimacy. And this is obviously, always comes into discussion in the regulatory context. Where does that expertise lie? And usually to be honest, that expertise lies in an expert regulatory agency rather than in government or in a civil service, particularly, for example, the UK model of the civil service, which are generalists who rotate around on three or four years across different departments, and so are always less expert in the area than the regulator of people who spend their entire lives, either in private practice or in the regulator, working in the field.

00:15:45:12 - 00:16:11:01
Professor Julia Black CBE

And then there are other considerations that come into play, particularly in federal systems, about coordination across states about harmonisation. And those became very, very much to the fore in the EU context which drove a lot of the other decisions about rule type and rule system design, in a way I'll go on to explain.

00:16:11:01 - 00:16:42:09
Professor Julia Black CBE

So then we can also think about constitutional values, incredibly important, already referenced to rule of law values. Should whether the fact that laws should be open, accessible, certain, predictable, et cetera? Need to think about democratic values, democratic engagement, the accountability to legislative, executive, courts, comes very much into play in our decisions as to regulatory bodies and the roles that they have in rule making. Things about distribution of powers of federal, regional, et cetera.

00:16:43:06 - 00:17:10:08
Professor Julia Black CBE

And then finally, last but certainly not least, is just political. Political power and control, how much power or control does the political, the political principles, those in power, want over the ex-ante determination of the rules? What engagement do they want during the regulatory process, for example, powers to give directions? To what extent our regulatory agencies are going to be independent from political influence?

00:17:11:09 - 00:17:36:06
Professor Julia Black CBE

And how do we draw the line between legitimate accountability concerns, which are often ex-post , and an unacceptable politicisation of the regulatory process? And that's a very difficult boundary to draw on, is usually not one which is actually can be drawn so much in law has to be one which is more determined by behaviour. And there's all of these considerations which feed into the 'what goes where' debate.

00:17:36:06 - 00:17:58:03
Professor Julia Black CBE

So thinking purely functionally, we'd have a rule system which combines rule types, with a clear institutional framework. So, for example, enabling legislation sets out the key provisions, including the goals of the system, the powers and duties of the other actors, the key elements of the regulatory provisions, define the perimeter, stipulation of the framework, overall framework, specification of defences. But that could be quite general.

00:17:58:08 - 00:18:40:14
Professor Julia Black CBE

It could say for example, it is an offence to breach a regulatory rule, and that's the system we have in the UK. So that is a way then of not requiring everything to be written in your primary legislation, but you are doing quite a significant delegation to your independent regulatory agency. If you're given the powers to write laws, which they are being given and any breach of those laws, those rules will be some kind of offence, even if it's just an administrative action will follow. If it's criminal offence that will be written in the statute, but administrative offences that is specified in the statute.

00:18:41:01 - 00:19:10:11
Professor Julia Black CBE

But the detail is obviously laid out in the regulatory rules and then obviously specification of the enforcement processes, including rights of appeal. And then what you would have in new secondary legislation will detail provisions and those adaptability mechanisms. So powers and processes to enable the adaptability of the system, for example, to extend the regulatory perimeter. Now in the UK, we have two modes of secondary legislation, and Parliament's involvement varies with each.

00:19:11:01 - 00:19:37:00
Professor Julia Black CBE

We have a type of secondary legislation which passes by what's called negative resolution. So that is that as long as Parliament doesn't object the rule comes into force, the delegated legislation statutory instrument comes into force, or positive resolution or affirmative resolution procedures, whereby it requires Parliament to actually affirm and agree to the statutory instrument before it comes into force.

00:19:37:00 - 00:20:02:06
Professor Julia Black CBE

The latter obviously gives more parliamentary control and is used for more important changes and adaptations. And then the regulation rules contain actually statements of principle. So again, going back to my different types of author can write rules of all sorts of different types. Statements of principle which elaborate the statutory goals and there is have regards that might be set out in the legislation and contained the detailed and technical provisions.

00:20:02:06 - 00:20:38:00
Professor Julia Black CBE

And then there's regulatory guidance which elaborates on how to comply. So that's, if you like, as a sort of rule pyramid. So you've got different things happening at different levels of the institutional framework with your more general sort of framework in the legislation, because that's very hard to change. And then the more you're coming down the framework, you've got the more detailed provisions in the regulation rules, so including statements of principle but they are much easier to change, but functional considerations are never the sole driver.

00:20:38:00 - 00:21:03:08
Professor Julia Black CBE

And just talk briefly in the last couple of slides about the EU and UK experience. So in the EU there's been a drive for a single capital market, which is a work still in progress. But back in 2001 there was something called the Lamfalussy reforms, which started to sort out, as it were, that the rule hierarchy in a way that actually looked quite similar to the British system, which you have directives and regulations agreed at the political level.

00:21:03:11 - 00:21:27:04
Professor Julia Black CBE

So in the EU system you may or may not be aware, but directives are to be implemented as to intent in the Member States and regulations are directly applicable and then the detail provisions be made by the Commission at level two, and then the Member State regulators will give guidance on implementation and the Commission then monitors implementation by the Member States.

00:21:28:00 - 00:21:51:01
Professor Julia Black CBE

Then the crisis comes along. And one of the issues that quickly arose in the crisis was the issue of both, of regulatory arbitrage and of the weakest link, a recognition that a system of rule, a rule system as part of a regulatory system is only as strong as its weakest link. And so there was a great and swift use, to much greater use, of regulations which are directly applicable.

00:21:51:11 - 00:22:20:12
Professor Julia Black CBE

No amendment or elaboration by Member States they were directly applicable, and for directives a stipulation of maximum harmonisation measures. So in other words, you basically to just write out the directive. Nobody could go above it, nobody could go below it, and that was to ensure uniform adoption across Member States. Then at level two, you have the creation of three committees to draft technical standards which are approved by the Commission and again are directly applicable in Member States.

00:22:21:01 - 00:22:52:08
Professor Julia Black CBE

So the point being we had post-crisis significant, because it was basically a wholesale reform, significant parts of the EU legislation was directly applicable to Member States. So they were then, to the extent they were directly applicable, they didn't need incorporating in any UK law. And to the extent that they needed incorporation that was mainly done through regulatory rules because the regulators were national competent authorities for the implementation.

00:22:52:13 - 00:23:19:14
Professor Julia Black CBE

So what happened then as Brexit starts looming, then there's a recognition that there's a whole pile literally, literally a lot of law, not only in financial services, which is sitting on the EU rule books, which is not sitting in the UK rule books or statutes anywhere because it was directly applicable. And so under the EU Withdrawal Act, that whole body of EU law had to be incorporated absolutely wholesale.

00:23:19:14 - 00:23:52:02
Professor Julia Black CBE

Lift and shift into primary or secondary legislation which is called ‘on-shoring the acquis’. So it was literary a lift and shift, lift it, take it out, and just put the UK in front of it, take out, literally do a control and replace, on anything mentioning EU or recognition of reciprocity across Member States and as I just refer to the UK instead and in some cases the FCA and the PRA were given powers to amend some rules in some areas and when the financial services has the international framework as well, so we have that to consider.

00:23:52:02 - 00:24:26:06
Professor Julia Black CBE

So now what we have to do is the great sort out, as I say, so Financial Services Act 2021 started that, provided for the adoption of in-flight EU financial services law. So those which are being negotiated in greed,and if fact quite heavily influenced by the UK, in some cases, but not yet formally enacted Basel III and prudential regulation of investment firms in particular to be brought in and the Treasury to amend some of those in the FCA and PRA to amend and implement some of those in-flight rules themselves.

00:24:26:06 - 00:24:56:13
Professor Julia Black CBE

And now what we have had is that consultation on the future regulatory framework review which I call the great sorting out. We now have provisions scattered across our regulatory rule books, secondary legislation, and primary legislation. We’ve got enabling provisions in the regulatory rules where the detail of those is actually now in the statute. Everything is upside down. And so we’ve got to have a reorganisation of the rule system, which means going back to that institutional framework, there’s a big revisit of the issues of regulatory independence and accountability.

00:24:57:10 - 00:25:22:06
Professor Julia Black CBE

And so we’re revisiting the discussions that we had back in 2000 when the Financial Service Markets Act was being formed around the nature of the independence of all regulatory agencies, the nature of their powers and the nature of accountability control arrangements that should surround them. So I’m going to stop there. But just to give you a little flavour of the types of debates we’re having in the UK right now, Thank you.

00:25:27:04 - 00:26:18:05
The Hon Justice Colvin

Thanks so much, Julia. That presentation frames perfectly the discussion for today, which focuses on legislative hierarchy and the issues which it raises. I was struck by the significance of expertise for those actors, but also what can happen if you have to turn upside down all of your laws in this particular area. Our next speaker is Ross Carter. As we’ve seen, the law in this area relies ordinarily on delegated legislation it also can depend upon, needs to depend upon, soft law instruments and formal guidance from the regulator.

00:26:19:10 - 00:26:55:07
The Hon Justice Colvin

These approaches provide detail and adaptability within the legislative scheme. So effective delegation is appropriate but its oversight and who is entrusted with that power is critical, as is maintaining coherence within the layers of the legislative hierarchy. So these are matters that were commenced through our Interim Report A. Ross, of course, is at the practical end of this, drafting these matters in the Parliamentary Counsel Office on a regular basis.

00:26:55:07 - 00:26:58:00
The Hon Justice Colvin

And we now look forward to your thoughts Ross.

00:26:58:00 - 00:27:27:05
Ross Carter

Well, thank you very much Justice Colvin. E ngā mana, E ngā reo, E ngā karangatanga maha, Tēnā koutou. All authorities, all voices, the many affiliations, greetings to you all. Hello I'm very honoured to take part in this webinar with Justice Colvin and Professors Black, Tjio and Wan. My views are not views of New Zealand's government or parliamentary counsel office.

00:27:27:05 - 00:28:06:10
Ross Carter

They are my personal views as a full time New Zealand legislative drafter for nearly 25 years. New Zealand drafters collaborate to try to achieve great law for New Zealand, which means law that is accessible, fit for purpose and constitutionally sound. Dividing material well between Acts and secondary legislation is a core design issue. Most Acts involve secondary legislation, especially large and complex ones like Acts for corporations and financial services, income tax or social security.

00:28:07:04 - 00:28:50:10
Ross Carter

New Zealand's large Acts use a lot of secondary legislation, and here are some examples. Our Financial Markets Conduct Act of 2013 replaced all or part of six former Acts and it weighs in at 497 pages. There's one main set of regulations under it that is longer again at 655 pages. Our Income Tax Act of 2007 is 3744 pages and is accompanied by a Tax Administration Act of 828.

00:28:51:10 - 00:29:35:12
Ross Carter

There are under these two Acts at least 21 sets of secondary legislation. Our Social Security Act of 2018 is 465 pages and one main set of regulations under it is half as long again at 233 pages. But those are quantities, not quality. So what should Parliament delegate to whom and why? These are great design questions and a full review certainly helps to allow good answers to them.

00:29:35:14 - 00:30:20:10
Ross Carter

Amendments over many years for many different policies can increase in coherence. New Zealand has established principles and practices for delegating powers to make secondary legislation. Key general principles and practices are set out in New Zealand's Legislation Design Advisory Committee or LDAC Guidelines of 2021 and New Zealand's Regulations Review Committee or RRC Digest of 2020. And similar in the UK, of course, is the House of Lords delegated powers and regulatory reform committee's compendium of legislative standards for delegating powers in primary legislation.

00:30:22:01 - 00:31:21:06
Ross Carter

These sort of design principles informed the Bill for New Zealand's Financial Markets Conduct Act. For example, they informed use of regulations to supplement or modify the Acts express transitional provisions. They also ensured that exemptions are linked to and constrained by the purposes of the legislation. Secondary legislation, perhaps because its use was principled, was apparently not controversial in that reform. A principled legislative hierarchy, the Australian Law Reform Commission has said, would likely involve the core attributes of a regulatory regime being outlined in the Act, with detail added by regulations and potentially exemptions or administrative minutia provided for by legislative instruments that as a useful general summary.

00:31:22:03 - 00:32:41:02
Ross Carter

But because of its generality, it does not show in detail exactly 'what goes where'. In a principled hierarchy, the legislature not its delegate decides core attributes. Also, the legislative scheme is legitimate, it's durable, it's flexible, certain and accessible. Now there can be tension in these important aims, so they are to be balanced. The principled hierarchy follows and shows a clear and principled plan for delegation.

Core attributes, for example, key purposes, principles and concepts are in the Act, but secondary legislation can add detail and cover, flexibly, exceptional situations. For example, New Zealand's secondary legislation can only proscribe minor offences for breaching regulations or infringement, more minor fixed penalty offences. Statutes should generally set out the policy and substance of the law, even if emergency laws like those for COVID-19 are limited exceptions to that proposition.

00:32:42:13 - 00:33:15:00
Ross Carter

Our 2018 Social Security Act moved 17 groups of provisions in the former 1964 Act to secondary legislation. Our Regulations Review Committee said this was "a major rebalancing" but also "in general a balanced approach". The bill's rebalancing was accepted to be principled, balanced and moderate.

00:33:15:00 - 00:33:53:01
Ross Carter

The Bill followed a clear and principled plan for delegation influenced by Legislation Advisory Committee or LAC Guidelines and the work of Professor John Burrows, QC. Main benefit eligibility provisions are in the Act, but rates are adjustable by regulations. For supplementary assistance broad parameters are in the Act and details are in regulations. The Act also allows for hardship and emergency assistance by conferring discretions to allow flexibility and responsiveness with further details and regulations and ministerial welfare programs.

00:33:54:01 - 00:34:26:00
Ross Carter

The Act also has simpler and more general administrative provisions to allow more detail to be in regulations. There remain five main different types of secondary legislation under the Act. Most are both drafted and published by PCO, but ministerial directions and notices are drafted and published by the Department. All the secondary legislation is subject to scrutiny and disallowance under the Legislation Act of 2019.

00:34:26:00 - 00:35:01:08
Ross Carter

Some of it, now happily excluding mandatory orders increasing rates of benefits, has also revoked unless earlier confirmed by Act. In time nearly all secondary legislation is to be published on one legislation website. This will help users access all relevant pieces of the puzzle. New Zealand reformed in 2021 all its secondary legislation powers. The reform was prompted by various reviews and reports.

00:35:01:11 - 00:35:43:04
Ross Carter

One was a December 2013 report on an inquiry into a big food safety scare, an incident of possible contamination of dairy whey protein concentrate which caused concern about safety of infant formula and other dairy products. The inquiry was led by Mariam Dean QC and its report showed major concerns about fragmentation and accessibility of legislation regulating dairy factories. The inquiry noted the lowest layer of regulation by itself was about 12,000 pages taking up more than three meters of shelf space.

00:35:43:12 - 00:36:27:08
Ross Carter

That said, submitters noted this layer is "difficult to navigate", "inaccessible" and "a bit of a nightmare". The inquiry recommended consolidating and rationalising with expert drafting help from a centralised drafting office, the PCO, starting with design and planning of enabling provisions in the primary legislation. It added, "creating a set of simple rules of general application for the creation, amendment and publication of all secondary legislation, would also result in order, continuity and better accessibility".

00:36:27:12 - 00:37:13:02
Ross Carter

In New Zealand statute book, as a whole as at the end of 2021, there were just under 2000 empowering provisions for PCO published secondary legislation and just over 900 where a different agency drafts and

publishes. So a little over a two to one ratio of PCO published versus agency drafting and publication. Of those 900 non-PCO published secondary legislation powers about 42% do not require publication on any website. Using secondary legislation too much to alter core attributes or to clarify interaction with other regimes shows core policy is not worked out well.

00:37:13:08 - 00:38:01:03
Ross Carter

And that core attributes of a durable and flexible scheme are not in the Act. The Act and secondary legislation are complex and conflicting, not simple and coherent. Simplicity and accessibility can suffer. New Zealand has good safeguards for secondary legislation. They include clear principles, detailed powers, preconditions, for example, consultation, affirmative resolutions in some cases, PCO certification, exposure drafts, regulations review committee scrutiny and judicial review. Sunsetting and confirmation either by Act or by resolution of Parliament can also apply.

00:38:02:04 - 00:38:35:09
Ross Carter

Generally, this works well. Judicial reviews of COVID-19 legislation show the duty to legislate consistently with the New Zealand Bill of Rights Act of 1990 is a meaningful duty. An example is the recent case of Yardley against a Minister for Workplace Relations and Safety, where a vaccination order was set aside as limiting rights unjustifiably. And the order was not needed for the specified purpose of ensuring the continuity of and trust in public services.

00:38:36:11 - 00:39:05:01
Ross Carter

But design has to be careful, collaborative and principled. A few recent examples show some areas of particular scrutiny and possible demonstrable improvement. An order modifying immediately for COVID-19 reasons. General employment law was held to be subject to an implicit duty to review the need for the order and the case of Idea Services Ltd and Attorney General.

00:39:05:01 - 00:39:33:03
Ross Carter

It was held there was an unlawful failure to review the need for the order. The empowering Act should arguably also have included an express duty to review regularly the need for the order, just as it requires the triggering epidemic notice to be kept under review. The order has since been revoked.

00:39:33:13 - 00:40:09:04
Ross Carter

New Zealand's Review Committee has also criticised recently New Zealand's COVID-19 Protection Framework Order for its complexity and for containing provisions that are not activated or applied to any area at any time. This drafting approach was taken to optimize flexibility and speed of drafting. The Regulations Review Committee's work in this area is ongoing, and others such as our Law Commission are also reviewing these laws. The empowering Act may not contain enough core attributes of the scheme, but emergency legislation must also be flexible and responsive to changing facts.

00:40:09:08 - 00:40:43:01
Ross Carter

Hindsight is a wonderful thing, the view that secondary legislation contains matter more appropriate for the Act often also involves regret about overbroad delegation. Accessibility is certainly improved by making all relevant secondary legislation findable on or through one website. It is also improved by minimising items of secondary legislation under an Act and making very clear how they interact with the relevant provisions of the Act.

00:40:43:12 - 00:41:12:13
Ross Carter

If secondary legislation overrides an Act and some does, then arguably the secondary legislation should also amend the Act to make this clear, so helping users. As UK Legislative Counsel Daniel Greenberg notes, the real question should be what substance is it appropriate to delegate, not the form of the secondary legislation modifying an Act.

00:41:13:06 - 00:42:04:12
Ross Carter

As Western Australian Legislative Counsel Lee Harvey adds, we should also be on alert for developments that undermine the effective operation of legislation without proper analysis of principles. As the High Court of Australia, Justice Stephen Gageler said in 2014 in the Goudappel case, empowering provisions of this kind "reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislative balance between flexibility and accountability in the working out of the detail of replacing one modern, complex statutory scheme with another". Complexity and fragmentation is also apparent in recent COVID-19 modifications and protocols relating to New Zealanders Juries Act and Jury Rules.

00:42:05:02 - 00:42:52:11
Ross Carter

The modifications and protocols override temporarily that Act and those Rules. The parliamentary committee that scrutinised the Bill for the empowering provisions clarified how the new protocols interact with the Juries Act. As published at the legislation website the Act and the Rules will indicate that they are affected by the modifications and the protocols that are issued by judges and published on the website of the Courts of New Zealand, even though the secondary legislation is COVID-19 related and is temporary while in place it involves a complex set of provisions in different places for users to piece together.

00:42:52:12 - 00:43:04:05
Ross Carter

In practice, I suspect people summoned for jury service and jurors will rely heavily on guidance. So that concludes my remarks and back to you now Justice Colvin.

00:43:05:07 - 00:43:37:09
The Hon Justice Colvin

Thank you so much, Ross, for that presentation. I was struck by your use of the term 'findable'. I think we might pick up on this idea of findability and the use of websites and practical technology as a way of gaining access to legislation. But I sense from your presentation that these issues have been considered quite carefully in New Zealand and they were lots of great insights in there.

00:43:37:09 - 00:44:19:00
The Hon Justice Colvin

So thank you. Our next speaker is Professor Hans Tjio. By way of introduction, a recent background paper published by the ALRC highlights the way that the regulatory approach to disclosing risk has changed over time, and the result has been the addition of new layers of regulation. The old has tended to remain with the new making for a confused mosaic in which the foundations don't always neatly fit with later extensions and additions.

00:44:19:00 - 00:44:51:04
The Hon Justice Colvin

New rules become added without addressing existing ones and this adds to complexity and uncertainty. Singapore, I think, in this area has a reputation for reviewing and updating its approach to regulation in a considered way. So I look forward now Hans to your insights with the perspective from Singapore. So over to you, Hans.

00:44:53:04 - 00:45:18:09
Professor Hans Tjio

Thank you. Justice Colvin, for this opportunity to present the view from Singapore. There's usually a price taker. As our first Prime Minister, Lee Kuan Yew, is reputed to have said we should not reinvent the legislation wheel especially if it works well. Good afternoon everyone. I'll share my PowerPoint. The reality is that many aspects of our laws are based on the UK and Australia – our Companies Act 1967.

00:45:19:03 - 00:45:43:07
Professor Hans Tjio

We recently went back to renumber them based on the original year of enactment. It's actually based on the UK Companies Act 1948, which was then the 1961 Victorian Companies Act. Similarly our present Security and Futures Act 2001 which merged the previous securities industry and Futures Trading Acts were actually drawn from the New South Wales Security Industry Code 1980 and the Futures Trading Code 1986.

00:45:44:10 - 00:46:17:05
Professor Hans Tjio

We have of course added things substantially along the way. I hope to highlight some areas which may be of interest. If we review corporate and financial legislation from enactment until after the Asian Financial Crisis in 1997-98, there were few, if any, earlier systemic shocks that required it. After that in the years 1999 to 2001, there were many consultation papers, which suggested substantive changes. The philosophy behind those papers and the change, two later reviews ten years apart.

00:46:17:06 - 00:46:43:02
Professor Hans Tjio

This included the need for company legislation to focus on small companies, the simplification and modernisation and the building on that UK heritage, rather than moving towards US laws, to the needs of capital. See for one exception which are the Insolvency Rules that we have amended since 2017 which have aspects of Chapter 11 woven into them.

00:46:44:02 - 00:47:11:04
Professor Hans Tjio

The third philosophy was that listed company provisions would come under the Securities and Futures Act where these were possible. So unlike in Hong Kong, prospectus requirements are found not in the Companies Act but in Security Futures Act. Then there is a separate omnibus insolvency and bankruptcy legislation. And then finally, the greater use of civil penalties, even if not civil liability. Where delegated legislation is concerned all papers were clear, that for that purpose,

00:47:11:05 - 00:47:50:07
Professor Hans Tjio

that important matters such as technical, procedural and operational details, as well as administrative sanctions. It's the position then in 2000 was still that most of primary legislation was backed by criminal sanctions. The first point regarding the substantive consequences of delegated legislation is still true except in areas where the market changes rapidly. Some substantive provisions have been moved to subsidiary legislation. The examples that we have from our Securities and Future Act with respect to the conduct of business rules such as license persons having to give priority to a customer's order as well as trading as principle. These were moved out of the Act.

00:47:51:00 - 00:48:11:03
Professor Hans Tjio

And are now found in delegated legislation largely because market factors changed so fast. Also that keeping the provisions in the Act required too many more actions letters and this could eventually erode the meaning of the statutory provisions. The principles remain in the provisions in our securities and futures regulations, i.e. subsidiary legislation, so from the overarching ones, the Act.

00:48:12:10 - 00:48:34:11
Professor Hans Tjio

But in this latter concerning the divide between criminal and civil sanction, that we have seen the largest changes, even the Securities and Futures Act itself, allowing greater use of civil penalties. This has become the most popular sanctions for insider trading and other forms of market fraud. For empirical studies, civil penalties are used even more so than in Australia and Hong Kong

00:48:36:01 - 00:49:07:11
Professor Hans Tjio

for insider trading and market fraud. Many of these are settled directly out of court with the Monetary Authority of Singapore, in contrast, company legislation does not provide the corporate regulator, our Accounting and Corporate Regulatory Authority, how to obtain civil penalties even in court. And so much of the enforcement remains in the criminal domain only. The result of having worked with the public prosecutor means that the number of actions comparatively lower than on the Monetary Authority of Singapore.

00:49:08:02 - 00:49:37:12
Professor Hans Tjio

For example, like in Australia, all breaches of director's duties and can only be enforced by the state by way of criminal action. There's no ability to pay in civil penalties for less serious breaches. For us, the problem may be not just with moving less serious matters into delegated legislation, but also decriminalising more of our primary legislation. This would then also allow people to practice to start seeing our corporate legislation as more facilitative than mandatory in nature.

00:49:38:03 - 00:49:59:11
Professor Hans Tjio

At the moment, there's still many that believe as a starting point that you cannot derogate from the Companies Act, even if for example, you provide even greater protection in the Corporate Constitution than the Act provides. So an academic view from Singapore is that there should, in fact, be greater delegation to administrative agencies as opposed to relying too much on the legislature and courts.

00:50:00:06 - 00:50:25:09
Professor Hans Tjio

This is still concern with overreach as the regulators are clearly more in tune and sensitive to the markets. In any case, all subsidiary legislation must be presented to the Presidential Council of Minority Rights within 14 days of publication. Judicial review should also be possible in respect of any exercised powers granted to the agency which would include making subsidiary legislation that may be ultra vires to the empowering Act.

00:50:26:03 - 00:51:11:06
Professor Hans Tjio

So for a small jurisdiction like Singapore, I believe that the benefits outweigh the costs. The benefits of delegation outweigh the costs. For example, with respect to one area which the Australian Treasury is looking at, which are the insolvency and restructuring of business trusts. The Securities Industry Council which is housed in the MAS. This is the equivalent of the UK Takeover Panel. They looked at this issue some ten years before the first court judgment on the matter in 2017. The High Court, in fact, relied on the practice statement issued by the council in 2008 in deciding that it was possible for the corporate scheme of arrangement be used for the trust restructuring, for the trust to be restructured as an entity, as opposed to individual trustees being wound up or being restructured at that level.

00:51:11:06 - 00:51:43:01
Professor Hans Tjio

At the moment, however, it seems that is more regulated administrative deference to the Monetary Authority of Singapore, which is an independent statutory board. This is with respect to financial regulation. In contrast, corporate legislation is still overseen officially by the Ministry of Finance rather than the specialist at the

Accounting and Corporate Regulatory Authority, i.e. ACRA. Consequently both to public prosecutor and the courts do not provide them with much leeway in respect to the legislation they oversee.

00:51:44:01 - 00:52:12:12
Professor Hans Tjio

There's always a tension between generalists and specialists. When things change so quickly, it is necessary to trust in regulatory discretion and that may be true, not just of financial, but also increasingly corporate legislation. This is necessary as a divide between securities and financial regulation and corporate legislation, as it's not altogether clear. For example, there was much debate after the 2011 major corporate law reform exercise in Singapore.

00:52:13:02 - 00:52:57:04
Professor Hans Tjio

This was ten years after the first and we are now undergoing our third. There was much debate as to where to move provisions in the Companies Act relating to listed companies. The suggestion was that they should be moved to the Securities Futures Act which concerned largely securities on exchanges. Eventually, however, only a few were moved. The government realised that provisions relating to listed company matters, like the audit committee or capital maintenance and on market buybacks and listed companies, had to remain in the Companies Act. Due to such costs involved for practitioners and the complexity of duplicating definitions it could be argued that this share repurchase provisions, for example, should continue to be located where similar provisions are located in equivalent legislation around the world.

00:52:57:04 - 00:53:23:03
Professor Hans Tjio

This would usually be in the Companies Act with these exceptions of how much can be bought back in the year, for example, even if there are other provisions in securities legislation are more likely exchange rules which provide safe harbors for buybacks from the insider trading and market manipulation rules. While you do not have this problem in Australia, I'm wondering which piece of legislation to look at. I guess we are gathered here today to look at the problem from the other extreme.

00:53:23:09 - 00:53:55:01
Professor Hans Tjio

Which is that there's too much in fact consolidated in the Corporations Act overseen by ASIC. This is only said with great deference as I've always been admirer of Australian company legislation with its carve out for securities and derivatives legislation as in Singapore, Hong Kong or slightly more broadly financial regulation that's in New Zealand and perhaps even more that's in the UK. Insolvency and restructuring has also become standalone legislation in many countries due to the complexity and links with personal bankruptcy.

00:53:55:08 - 00:54:18:11
Professor Hans Tjio

And Singapore, as I said, this has also been infused with some Chapter 11 provisions from the US. But this should all be driven by pragmatism rather than any dogmatic view of what is probably seen as financial, corporate or insolvency legislation, as there will always be overlaps. These overlaps are what I imagined has resulted in Corporations Act as it is today.

00:54:19:01 - 00:54:44:04
Professor Hans Tjio

But the question now is that the use of technology which was mentioned previously, for example, hyperlinks to definitions, online subsidiary legislation, statements or interpretative notes can do the trick. It may be that no one actually relies on a physical rule book or statute any more, but things can be improved even in cyberspace. I love the AUSLII website, but a few years ago I wrote to them to tell them that in the Corporations Act,

00:54:44:10 - 00:55:07:00
Professor Hans Tjio

They had references there to Part 5.7 body throughout the Act was unfortunately hyperlinked to the definition of body in the Section 9 definition, and this is quite different from Part 5.7 body, which it should have been hyperlink to. Now it seems that there's hyperlink to either body or Parts 5.7 body. So in a sense you are victims of your own success, in Australia.

00:55:07:07 - 00:55:36:09
Professor Hans Tjio

I'm not sure on the cost benefit analysis given the expertise built up with ASIC, whether it should split the legislation up. In Singapore, as I've said, our companies legislation comes under ACRA in the Ministry of Finance, securities and derivatives under Monetary Authority of Singapore and insolvency restructuring under the Ministry of Law. Although this lessens the load for any institution there will be coordination issues when an issue cuts across different regulators.

00:55:37:01 - 00:56:05:02
Professor Hans Tjio

One example of this in Singapore, so I mentioned earlier, was with the business trust. A recent example is with a special purpose acquisition vehicle and it is less of a problem in Singapore given its small size. But Australia has enormous geographical needs. There's a great deal of regulatory deference and administrative deference given by your courts to your regulators as in the US, whereas places like Singapore, UK and Hong Kong have perhaps less of it.

00:56:05:10 - 00:56:37:11
Professor Hans Tjio

So we in Singapore will be seeing the problem from a different perspective altogether as we are not looking so much at safeguards but more efficiency. I think we need to be clear in our minds different questions asked by the ease of searching for the law, i.e. coherence and navigability, for which too much delegation may create problems and dealing with complexity efficiently with more delegation would help. The ideal might be more clearly defined and delineated legislation that's administered by a single agency. We look forward in Singapore to what the next steps in Australia are.

00:56:38:05 - 00:56:39:01
Professor Hans Tjio

Thank you very much.

00:56:40:00 - 00:57:27:09
The Hon Justice Colvin

Thank you very much, Hans. It's very interesting to hear how civil penalties are being used by an expert regulator as a means of ensuring appropriate market behaviour. But I think the discussion about the demarcation between companies and securities regulation and to regulators is of course very interesting in relation to how our law is structured here. Even if you have one regulator, there are reasons why you may have a demarcation expressed in the interests of providing clarity to those matters.

00:57:28:05 - 00:57:31:03
The Hon Justice Colvin

So I'm sure we can have further discussion about that.

00:57:33:11 - 00:58:28:14
The Hon Justice Colvin

Our final speaker is Professor Wai Yee Wan. Some of the previous speakers, as I've indicated, have been talking about offences and penalties, Australia's civil penalties regime for financial services is something that has grown in detail. It's become quite long winded and complex. It can be difficult to comprehend what's

required to be done to obey the law and difficult to formulate appropriate compliance measures to deal with all of the provisions that come within that kind of regime.

These are particular challenges for those who are being regulated. So with those thoughts by way of introduction, we look forward to your thoughts Wai Yee, over to you.

00:58:30:00 - 00:59:10:12
Professor Wai Yee Wan

Thank you, Justice Colvin for the introduction. What I'm going to do is that I will proceed to share my slides. So thank you again to the Australian Law Reform Commission for inviting me to this webinar. In this webinar I will be referring to the history of the companies and securities legislation in Hong Kong. The way that I've approached it is to look at the rationale for the rewrite of the companies legislation, the hierarchy of laws, relevance of the rewrite exercise, offences and penalties, and some reflection. I follow a similar structure in relation to securities regulation in Hong Kong.

00:59:11:10 - 00:59:53:02
Professor Wai Yee Wan

So let me just explain the history of the companies legislation rewrite exercise. The Companies Ordinance first found in Chapter 32 was enacted in 1865. Hong Kong was a British colony before it reunited with China in 1997. So the legislation, especially the companies legislation, has followed very closely to developments in the UK and the major impetus for reform came in 1997 where there was a recommendation to confine companies legislation to what the consultant regarded as core company law.

00:59:53:12 - 01:00:20:04
Professor Wai Yee Wan

The Standing Committee was not so much in favour but in mid-2006 the decision was made to rewrite the companies legislation for the main reason to modernise the company law in order to enhance Hong Kong's future as an international business and financial centre. There were five rounds of public consultations and the Bill was introduced to Legislative Council in 2021.

01:00:20:04 - 01:00:54:04
Professor Wai Yee Wan

It was finally approved and it came into force in March 2014. Now the way that the Companies Ordinance rewrite had taken place was that what is regarded as company law went into a new piece of legislation Companies Ordinance Chapter 622 but provisions relating to prospectuses, disqualification of directors and winding up were written in Chapter 32. So in terms of the core objectives of the revised exercise, there were four.

01:00:54:12 - 01:01:34:04
Professor Wai Yee Wan

One was to enhance corporate governance. The second was to improve the disclosure of the company information. Third to regulate protection of shareholders, in particular through a number of prescriptive provisions on directors' conflict of interests, and the fourth was to enhance the minority shareholder protection, especially in relation to voting in privatisation exercises. So the key impetus, when we look at the period of time in question, we are looking at situations where there was a downturn in the stock market and there were a number of privatisations largely carried out by controlling shareholders.

01:01:34:04 - 01:02:13:04
Professor Wai Yee Wan

And there was felt the need to be able to protect the minority shareholders. The second broad overarching objective of regulation was to ensure better regulation. This empowers the registrar of companies to have some powers to rectify documents in public registry and to improve the way that the charges registration regime works. So that objective was to facilitate the business by doing away with unnecessary requirements, allowing capital reduction to take place outside of court and to simplify the reporting for the small and private companies.

01:02:13:12 - 01:03:09:02
Professor Wai Yee Wan

The fourth objective was to modernise the law by the use of plain English, abolish memorandum of association, and provide clarifications in relation to when directors can be indemnified against liabilities to third parties. So, how does the hierarchy of laws work in relation to company law? So we have the broad legislation, the Companies Ordinance. We also have the subsidiary legislation. The subsidiary legislation in the context of the Companies Ordinance Chapter 622 the court regulations, there are 12 pieces to support the main legislation. They include provisions relating to accounting standards, the form of reporting that is required for directors' reports, how information relating to directors benefits are to be disclosed.

01:03:09:02 - 01:03:40:08
Professor Wai Yee Wan

The subsidiary legislation is dedicated to the Financial Secretary. The reason and rationale for having subsidiary legislation, as can be predicted, is to allow for easier amendments and updating into the future to take into account advances in technology and any new requirements in the market. So, for example, the subsidiary legislation on the companies directors' report regulations contain provisions on how the directors reporting should take place in the format of the report,

01:03:40:10 - 01:04:17:12
Professor Wai Yee Wan

what needs to be disclosed. That was drawn up with in consultation with the Securities and Futures Commission and Hong Kong Stock Exchange. These provisions on reporting, I expect it to change over the time and it will be extremely cumbersome to have to put these provisions into the main legislation. What has been useful, particularly to the practice, is that the Companies Registry also publishes briefing notes. The briefing notes provide some general information and the rationale for the subsidiary legislation on how to implement the main companies legislation.

01:04:18:10 - 01:05:08:12
Professor Wai Yee Wan

So in addition up to the briefing notes, the Companies Registrar does issue guidelines indicating as to how the registrar performs the function of exercise of any power and provides guidance on how the companies legislation works. The Companies Ordinance explicitly provides that the guidelines are not part of the subsidiary legislation though is admissible in evidence. So the way that it works is that you have the main legislation, you have the subsidiary legislation, you have a series of briefing notes, as well as some guidance from the Registrar of Companies as to how the Registrar can exercise his powers that the Registrar has been conferred to.

01:05:08:12 - 01:06:02:02
Professor Wai Yee Wan

The rewrite exercise was considered a major one in recent history. The consultation papers remain available on the Companies Registry website. The website contains short papers as to how the new, well now not so new, but the Companies Ordinance provisions that came into force in 2014 and what has changed from the position immediately preceding the law, as well as the rationale for the changes. The FAQs are also on the website with key changes on the topics and as well as explaining why some of these changes have taken place. Now in terms of the offences and penalties for the companies legislation, the way that is structured is that the offences and penalties are found in the primary legislation.

01:06:03:05 - 01:06:32:14
Professor Wai Yee Wan

Any noncompliance can lead to fines. Where they lead to monetary fines is classified into one of the six levels, but somewhat confusingly, the fine that was not found in the Companies Ordinance. They are found in a separate legislation called the Criminal Procedure Ordinance Schedule 8. So, when we look at the primary legislation it was an offence.

01:06:32:14 - 01:07:02:05
Professor Wai Yee Wan

You see the punishment and the penalty that's involved. Now where the regulations that is the subsidiary legislation that can be promulgated by the Financial Secretary, that in such a case, the regulations do contain provisions for noncompliance but the way that it works is that the primary legislation explicitly provides the scope of the power of the Financial Secretary to issue regulations relating to the offence.

01:07:02:11 - 01:07:32:13
Professor Wai Yee Wan

So in other words, if the regulations allow or provide provisions on the offences, there are caps on to how the punishment or the type of punishment that can be imposed by the Financial Secretary because the primary legislation will set out the power of the Financial Secretary as to issue regulations dealing with this offence together with the punishment that cannot exceed a certain level of fine.

01:07:33:07 - 01:08:03:14
Professor Wai Yee Wan

So the scope of the power of the Financial Secretary in this regard is quite circumscribed. The advantage is that when one looks at the main legislation, one can have a very good idea as to what happens when there is an offence committed at the subsidiary legislation level and the consequences that follows. So what are some of the remaining points for consideration?

01:08:04:03 - 01:08:41:14
Professor Wai Yee Wan

The prospectus disclosure requirements, is a similar position that happened in Singapore a few decades ago, prospectus requirements were contained in a companies legislation. Now in Hong Kong, what has happened is that when there was a rewrite exercise, it was anticipated that the prospectus disclosure requirements, which were in Chapter 32, will not migrate to Chapter 622 because they thought they don't should relate to ordinarily company law issues, but they will migrate to the Securities and Futures Ordinance.

01:08:43:05 - 01:09:21:09
Professor Wai Yee Wan

However, this hasn't taken place yet. So instead the prospectus disclosure requirements continue to remain in Chapter 32 and the Companies Registrar issues guidance on the requirements on how prospectuses are to be registered. Now prospectuses are also, in addition, subject to the dual filing requirements under the Securities and Futures Stock Market Listing Rules. This is a framework where listing applicants and listed companies are required to file applications and disclosure material with the Securities and Futures Commission, as well as with the Stock Exchange of Hong Kong.

01:09:22:04 - 01:09:59:01
Professor Wai Yee Wan

The reason for the dual filing is to enable both the Securities and Futures Commission and the Stock Exchange of Hong Kong to be able to exercise their respective enforcement powers. So on a question that has arisen in the previous presentations, there is no merger of the insolvency provisions for corporate and personal insolvency. So instead the Chapter 32 contains the provisions in relation to winding up, as well as all the provisions connected to winding up such as actions by that preference as well as for undervalued transactions.

01:10:00:14 - 01:10:33:11
Professor Wai Yee Wan

So I move on to the Securities Regulation. So, in 1999 a consultation exercise was carried out on having an omnibus securities legislation. The view was to be able to consolidate and modernise a total of ten pieces of legislation on financial services, securities and futures markets, as well as on investor protection. This is also the framework that introduces the dual filing by both the listing applicants and the listed companies to the Stock Exchange as well as to the Securities and Futures Commission.

01:10:33:14 - 01:11:02:11
Professor Wai Yee Wan

And both authorities can investigate if there's false and misleading statement found. The disclosure, or rather, offences relating to disclosure of false information was introduced. There's a new private right of action to seek compensation for losses arising from reliance on false and misleading statements and auditors of listed companies have immunity from civil liability if they report suspected corporate misconduct of this to the Securities and Futures Commission.

01:11:03:11 - 01:12:01:10
Professor Wai Yee Wan

So initially there was 36 sets of subsidiary legislation in order to operationalise the Securities and Futures Ordinance or the SFO. And just a quick note that the prospectus disclosure requirements are still contained in Chapter 32. So SFO is the overarching legislation on regulating securities and futures industry. The power to issue subsidiary legislation, and in this context the court rules on licensing, for example, fall with the SFC. In certain specified areas, for example, on which kinds of schemes can be designated as collective investment schemes, the power lies of the Financial Secretary. The SFC issues a number of codes and guidelines which are explicitly not stated as subsidiary legislation.

01:12:02:02 - 01:12:46:01
Professor Wai Yee Wan

As in the case of the companies legislation, when it comes to offences and penalties, these are all mostly found in the primary legislation where the subsidiary legislation, also known as rules, contain provisions on offences. The primary legislation explicitly provides that the SFC has the power to issue rules dealing with both the offence and the punishment. And the punishment of this, the scope of that discretion to issue the punishment, again also is listed in the primary legislation. So in that sense, when one is looking through the main legislation, you would have a good idea as to what happens when there is a breach, not just of the main legislation, but also of the subsidiary legislation because it states the consequences which cannot exceed a certain number of years or certain

01:12:46:01 - 01:13:13:11
Professor Wai Yee Wan

level of fine. Now, just some reflection, the way that securities regulation is enforced in Hong Kong is primarily with the public regulator. In theory, you can have private enforcement because the SFO provides for it, but that is extremely rare. And often breaches can lead to several potentially overlapping offences.

01:13:14:02 - 01:13:52:05
Professor Wai Yee Wan

So, in the work which I've done on the comparative enforcement of securities regulation in Hong Kong, I just take two examples. The first one relates to the misrepresentation or the making of false or misleading statements to the securities market. So this chart here shows the consequences. You can have civil remedies. You can have criminal sanction. There is no civil penalty orders. The civil penalty orders are largely confined to offences relating to insider trading and other market misconduct.

01:13:52:07 - 01:14:24:01
Professor Wai Yee Wan

For false and misleading statements, what you have is the civil remedies, criminal sanction and, of course, also disqualification of the directors. When it comes to civil remedies, there is compensation upon the breach if you can establish all the elements are being met in the specified requirements. But the reality is that when it comes to the actual enforcement, there are actually very, very few actions which are brought by the aggrieved individual investors.

01:14:24:10 - 01:14:53:00
Professor Wai Yee Wan

A lot of the enforcement that happens outside is brought by the Securities and Futures Commission. So in that sense, the SFC has some similarities with ASIC in that a lot of the breaches of these securities regulation relate to false and misleading statements. They are carried out by the public regulator. Now, for prospectuses, what I've stated earlier is in relation to false and misleading statements to the market.

01:14:53:00 - 01:15:20:02
Professor Wai Yee Wan

So for prospectus, that's the setting document which is used to initiate a sales. In such a case you also have civil remedies, you also have criminal sanctions, and it also has a statutory compensation which occurs upon breach. Now in such a case, so these are what I would term the IPO related situations, where there are false and misleading statements in theory you have a statutory compensation order.

01:15:20:02 - 01:15:36:09
Professor Wai Yee Wan

But in reality, the enforcement also lies largely with the regulator. So that concludes my presentation. I would now hand the presentation over to Justice Colvin.

01:15:38:03 - 01:16:15:10
The Hon Justice Colvin

Thank you Wai Yee. I was interested to see in that presentation as well as a comprehensive understanding of how matters are dealt with in relation to hierarchy and structure, particularly concerning penalties, the way guidelines can be used as a kind of form of soft law, but with possible consequences in the event that there is a contravention raised, something also raised in the context of the UK approach.

01:16:16:02 - 01:16:48:08
The Hon Justice Colvin

So thank you very much for that presentation. We have some time now to put questions. The interests being considerable and we not be able to get to all of the questions obviously. But I should say that we value all of the questions and issues that have been raised. This seminar is as an opportunity for the ALRC to understand what sort of questions are being asked and what issues are being raised and we will review all of those materials following the seminar.

01:16:49:05 - 01:17:35:10
The Hon Justice Colvin

So there is considerable assistance to us, and we thank you for taking the time to raise them. I'll put my first the first question to Julia, if I may, about the principle based regulatory approach and the fact that the UK is often held up as having successfully pushed a lot of detail down into the delegated legislation, particularly the way in which the regulator can make those rules. I wonder how well that has really worked in your view and whether Brexit is changing any of that approach or post-Brexit, I should say?

01:17:36:03 - 01:18:13:01
Professor Julia Black CBE

Yeah, absolutely. Thank you so much. I think the first thing to say is we've got two things going on in the UK. So we have the enabling framework legislation, so, which provides, some overarching, the overarching goals of the regulator and then a list of things to which they have to have regard, some procedural like accessibility, proportionality, some a substantive. Then what we have is quite a significant delegation of powers to the regulators to then formulate their own rules.

01:18:13:06 - 01:18:36:09
Professor Julia Black CBE

Then what the regulator have done on both sides is themselves set out principles and then a series of detailed rules. So we have two things the enabling framework which sets out the perimeter, core obligations, et cetera, and significant delegation. And then within the rule framework, the rule system that the regulators have produced that principles followed by detailed rules.

01:18:36:09 - 01:19:05:05
Professor Julia Black CBE

Now that was the, that then in terms of a framework, a sort of overarching design set, as it were, did get sort of knocked sideways a little bit by the EU legislation coming in because of course that came in sideways as being directly applicable. So we had our UK framework and then the bits that were taken over, as it were, by the EU. We had a different sort of dynamic going on, but the regulators still had their principles and detailed rules.

01:19:05:05 - 01:19:41:07
Professor Julia Black CBE

So now what we've had, this is a complete, as I say, a lift and shift of all that EU detail directly applicable regulation into all sorts of bits of our legislative, sort of rule hierarchy, such that it is all kind of topsy turvy and, and frankly, quite a mess at the moment. It's certainly not accessible. So the regulators are keeping their principles and then what we're doing is, as I say, that great sorting out to go back to that enabling framework idea, the sorting out, the more detail in delegated legislation, which is where you have more details about the regulatory perimeter, for example, and then leaving the bulk of the heavy lifting to the regulators.

01:19:41:07 - 01:20:12:04
Professor Julia Black CBE

What we have now is our financial regulators resuming a quite active policymaking role, which they had back in 2000, but then gradually lost as more as that competence went over to the EU. So we're revisiting debates we had about 20 years ago, to be honest. So that's what's going on in terms of the overall success of the principles based regime, it is worth bearing in mind that, although there are these ten principles, 11 principles, out that day, they are supplemented by vast reams of detailed rules.

01:20:12:04 - 01:20:44:01
Professor Julia Black CBE

So we don't just rely on principles alone, but what they do is, is that role of communication. Kind of communicating quite clearly to firms, you know, treat your consumers fairly, engage with the regulator, you know, act with integrity. And they are very important for enforcement, because what they enable you to do is have those overarching standards. So when someone hasn't necessarily breached a detailed rule, but you've gone against the kind of the spirit of it or it's not covered by the rule, then you do have these principles against which you can enforce.

01:20:44:09 - 01:20:58:13
Professor Julia Black CBE

And so they have been very useful, both as a means of communication, things at board level, people at board level can get hold of, who are never going to go down to the level that lawyers are going to go down into, and also as a way of driving enforcement action.

01:21:00:07 - 01:21:23:04
The Hon Justice Colvin

It would seem also to be a matter that you referred to earlier, a way in which the expertise of the regulator can be harnessed by having that broad principles approach and then the rule making power. Provided you've got a good, well-informed, resourced regulator. You should get a good outcome through that process.

01:21:24:07 - 01:21:49:05
Professor Julia Black CBE

No, absolutely you should. You should. Exactly. But as you say, has been well-informed and well-resourced regulator to enable you to have that calibre of expertise. And then I know the issue always comes up with lobbying in relation to firms, but I think it's worth bearing in mind that, you know, regulators who engage with firms on a day-to-day basis know their business very well, know the business, those firms very well, and they know the detail very well and they know the technical provisions very well.

01:21:49:05 - 01:22:02:11
Professor Julia Black CBE

Politicians who don't engage with firms on a business level have a different relationship with firms. I'm not saying they're potentially more susceptible to lobbying, but they might not necessarily know what kind of questions to ask or how to understand the answers that they then give them.

01:22:03:02 - 01:22:35:02
The Hon Justice Colvin

Yes, yes. I'll switch gears now and ask a question of Ross. I must say, looking across the ditch to New Zealand, there seems to have been quite a lot of work put into the structure around getting good legislative design and the guidelines that have been prepared and adopted by the Legislation Design and Advisory Committee appears to have had a positive effect upon the way, the approach to legislation.

01:22:35:11 - 01:22:45:14
The Hon Justice Colvin

Do you think that has worked because of things peculiar to New Zealand, or do you think it's something that might be adopted in Australia, in a similar sort of vein?

01:22:48:03 - 01:23:31:09
Ross Carter

Well thank you, Judge. I think New Zealand Legislation Design Advisory Committee or LDAC is a good model. That's an expert committee that can assess proposals as they develop and it can record and and make known principles and best practice and, certainly, that it's had a role in the Social Security rewrite that I mentioned. I know that Australia's constitutional arrangements are much more complex than New Zealand's, but good design principles, I think, most probably can be developed and applied within a constitution's heads of power or jurisdictional limits.

01:23:31:09 - 01:24:11:12
Ross Carter

I'm aware that the Australian Government Office of Parliamentary Counsel under first parliamentary counsel Meredith Ley has a lot of online drafting resources and drafting manuals and in my experience is very careful to consider design concerns when developing schemes. So I think that like other centralised law drafting offices, the Australian Government works with others to frame legislative proposals.

01:24:12:05 - 01:24:46:10
Ross Carter

And that's most probably like New Zealand's Parliamentary Counsel Office in that OPC's goal must also be to promote high-quality legislation that's, that's easy to find, use and understand and in that sense too to exercise stewardship of Australia's Commonwealth legislation as a whole. So, yes, our experience is that the design committee is very valuable and I would think if it were to be adopted on Australia, it might add value as well.

01:24:48:01 - 01:25:07:04
The Hon Justice Colvin

Is the proposal to migrate those authorities which have their own regulating-making power to, how does that fit in to they, are they going to migrate over to be within the structure or is that a bifurcation that's going to stay in place?

01:25:08:04 - 01:25:48:14
Ross Carter

So our Legislation Act of 2019 contemplates a move to centralised publication. The making arrangements will largely remain as they are, but the publication arrangements will be centralised over time. There's quite a long and complex transition contemplated there, but in time the objective is a single website which obviously assist accessibility a great deal and may also assist with uniformity of approach in terms of drafting in principle.

01:25:49:05 - 01:26:04:00
Ross Carter

So that is certainly the long term goal. But as those who are familiar with the detail of the transitional provisions and the Legislation Act 2019, it is a long term goal and there are a number of steps on the way.

01:26:05:13 - 01:26:26:14
The Hon Justice Colvin

You used the word accessibility there. I would encourage you to use the findability word which I embrace. I think it's a big issue with legislation finding body where it is particularly subsidiary kind of legislation, but thank you for your observations on that.

01:26:27:03 - 01:26:29:10
Ross Carter

Truly, thank you judge.

01:26:30:05 - 01:26:56:14
The Hon Justice Colvin

Hans, turning to Singapore, I know in Singapore the authority to make subsidiary legislation can include the authority to make offences and set penalties, much like in Australia, do you have any insights as to how that has worked in Singapore in the in the context of financial services legislation.

01:26:56:14 - 01:27:27:08
Professor Hans Tjio

Thank you, Justice Colvin. Yes. Part 3 of the Interpretation Act provides that offences can be created in subsidiary legislation that results in a fine of a maximum of $2,000 a jail sentence of one year. I think it has worked well with less serious offences. The Companies Regulations, but it can be a composition of fines. Just think of the settlement with ACRA, but given the complexity of things and also the continuing need to retain more serious matters in primary legislation, I wonder if actually more can be done by way of subsidiary legislation.

01:27:27:11 - 01:27:52:10
Professor Hans Tjio

The way it appears to be in the UK, and here I defer to Julia, who I think mentioned something along these lines. It seems that subsidiary legislation quite often can amend the Act. For example, the companies limited partnerships and partnerships amendment EU exit regulations of 2019 against the Companies Act of 2006 respect to the treatment of overseas companies.

01:27:53:05 - 01:28:15:00
Professor Hans Tjio

I'm not sure this was a Brexit sorting-out matter, but in Singapore, however, delegated powers can allow administrators to amend Acts or modify the application of Acts, but only these must be drafted with a sunset period of two years. So I'm not sure that's the case in the UK or if it's actually broader than that or in Australia as well.

01:28:15:05 - 01:28:30:03
Professor Hans Tjio

Again, I'm quite comfortable with delegating more power to administrative agencies in Singapore at the moment, but it's only in highly exceptional cases that the Principle Act may provide for it to be changed later by subsidiary legislation, but with these changes anticipated. Thanks, Judge.

01:28:30:09 - 01:28:50:09
The Hon Justice Colvin

Yes, thank you. Sounds like in Hong Kong is quite a clear limit on the consequences that can follow through delegated legislation, a type of penalty that might be imposed. So there's only a certain type of penalty that that can be imposed by delegated legislation. Is that right?

01:28:56:13 - 01:29:34:09
The Hon Justice Colvin

I think we've just lost the connection. So having asked that question Hans, I'm sorry if you can still hear this I will. I apologise, but we'll go to Wai Yee now in relation to the next question. I know you've done a lot of comparative work in the area of corporate insolvency and consumer finance. I wonder if there's any experience or insight from elsewhere in legislation that you think would be useful for Australia when it comes to the overall approach to legislative design for financial services legislation.

01:29:36:06 - 01:30:07:14
Professor Wai Yee Wan

Thank you, Judge, for the question. So in relation to the corporate insolvency laws, now Hong Kong doesn't have a formal corporate rescue regime as yet. There were a lot of discussions and possibly it might be introduced, it might be introduced sometime this year, but it doesn't have a formal corporate rescue. Now, unlike in Australia where there are several means or more in which a debtor company which is in financial difficulty can undertake a corporate rescue.

01:30:08:10 - 01:30:33:08
Professor Wai Yee Wan

So the question that often arises is where is the best place do we put these provisions? To put in legislation which states at the outset that it is bankruptcy related or insolvency related does carry some kind of a stigma. Whereas if you put it into a legislation relating to corporations law and you term it restructuring, it might carry less of that stigma in question.

01:30:33:11 - 01:31:00:14
Professor Wai Yee Wan

So this is always one of these issues as to the actual way that it is presented to the public does matter, because if we want to encourage more businesses to undergo rescue, if they're still economically viable, it might be more difficult to sell that process if you put it into insolvency legislation as opposed to a corporations type legislation.

01:31:01:10 - 01:31:47:01
Professor Wai Yee Wan

So in relation to the question on the consumer finance, so it gets back to how Hong Kong has done which, it has. We have the Securities and Futures Ordinance and it has several situations in which you can get

statutory compensation but a lot of it is on the basis of taking the existing legislation then and then adding new provisions, the result of which you have a number of overlaps. Now if there was a chance to be able to redesign it, I think it would be ideal to be able to sort out some of these overlaps, reduce them as much as possible so that the legislation becomes easier to understand and much cleaner to comprehend.

01:31:47:01 - 01:31:47:03
Professor Wai Yee Wan

Thank you judge.

01:31:48:00 - 01:32:04:01
The Hon Justice Colvin

Yes, thank you for that. I mean, the way our legislation is at present we have corporations and financial services melded together. So those observations are of relevance to whether that approach is an appropriate one.

01:32:06:03 - 01:32:31:04
The Hon Justice Colvin

It's my task now to bring our seminar to a close. We've been delighted to host such expert panellists, and I thank each of them for their careful presentation. Their thoughtful and valuable insights today. It's been a privilege to hear from each of them, even through this strange method of technology that we get used to more and more as time goes on.

01:32:32:02 - 01:32:54:11
The Hon Justice Colvin

I do feel that the absence of applause is always rather odd at this point, but the virtual applause is extended to you, and thank you for your presentations. I also thank all the attendees for their interest and for the questions. As I indicated, those which have not been addressed today will still be considered as part of our process in the ALRC is keen to hear from as many people as possible through this process of trying to deal with these, approached these questions.

01:32:55:01 - 01:33:32:03
The Hon Justice Colvin

Finally, a quick plug at the ALRC is hosting a webinar on the 17th of June at 11 a.m. Western Standard Time. It will address the feedback that's been received on our Interim Report A. The title is 'What We've Heard and Where to Next' and you can register on the ALRC's website. Attendance on that occasion will also be possible in-person at the number one Court in the Federal Court in Perth where I will be.

01:33:32:03 - 01:33:41:14
The Hon Justice Colvin

So I hope to see some of you there in-person. So with all of that, we conclude today's seminar. Thank you for your attendance and good evening.