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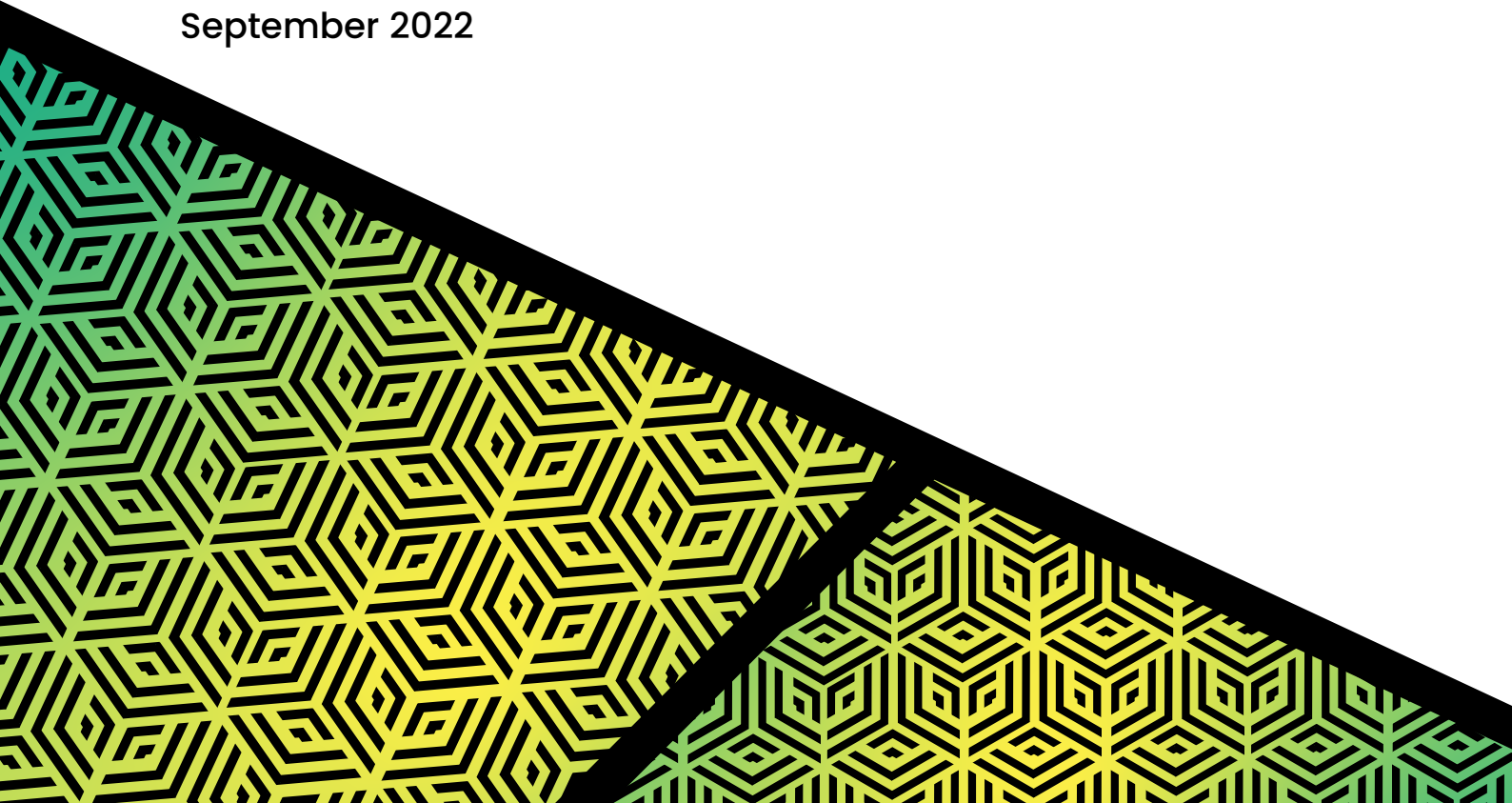
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Recommendation 16 – Drafting improvements note

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

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RECOMMENDATION 16 — DRAFTING IMPROVEMENTS NOTE

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Introduction

1. This note provides additional detail relevant to the implementation of Recommendation 16 contained in Chapter 7 of Interim Report B.¹ This note is intended to be read alongside that Interim Report. Abbreviations used in this note are defined in the Glossary for Interim Report B.

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

- a. unclear or incorrect provisions;
- b. outdated notes relating to ‘strict liability’; and
- c. outdated references to ‘guilty of an offence’.

Unclear or incorrect provisions

2. In addition to the more than 30 redundant cross-references identified for Recommendation 14, the drafting issues in Table 1 should be corrected.

Table 1: Drafting issues in the Corporations Act and Corporations Regulations²

Provision	Comments
Section 250PAA(3), CA 2001	Repeal. Instruments made under subsection (1) must be published as a legislative instrument, and s 56(1) of the <i>Legislation Act 2003</i> means that legislative instruments do not need to be published in the <i>Gazette</i> .
Section 708(13)(b), CA 2001	Chapter 6D does not cover managed investments schemes.
Section 710 item 1, CA 2001	Chapter 6D does not cover managed investments schemes.

¹ Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

² In this table, ‘CA 2001’ refers to the *Corporations Act 2001* (Cth) and ‘CR 2001’ refers to the *Corporations Regulations 2001* (Cth).

Provision	Comments
Section 710(2)(b), CA 2001	Chapter 6D does not cover managed investments schemes.
Section 711(3)(c), CA 2001	Chapter 6D does not cover managed investments schemes.
Section 720 items 1 and 1A, CA 2001	Chapter 6D does not cover managed investments schemes.
Reg 1.0.03A(1), item 2, CR 2001	Subsection 427(1) includes the obligation to lodge a notice, rather than paragraph 427(1)(a).
Reg 1.0.03A(1), item 4, CR 2001	Subsection 427(1B) includes the obligation to lodge a notice, rather than paragraph 427(1B)(a).
Reg 1.0.03A Item 3, CR 2001	Section 427(1A)(a) has been repealed. Reference should be to s 427(1A).
Schedule 10A, 5C.2, CR 2001	There are two identically numbered provisions numbered 5C.2.
Reg 7.6.07A, CR 2001	Section 923C has been amended since the notional amendments in reg 7.6.07A were made. The amendments to the <i>Corporations Act</i> and the notional amendments conflict, and raise questions as to which version of s 923C has the force of law. ³
7.7.10AG(2) item 3 column 3, CR 2001	Reference to s 952B(1)(b)(ii) should be reference to s 953A(1)(b)(ii).
Reg 7.9.09, CR 2001	Annuity products — should this be annuity policies?
Reg 7.9.13, CR 2001	Both strict liability and includes a fault element – difficult to reconcile.
Reg 7.9.14B, CR 2001	The Division-level application provision's scope is narrower than the scope of some provisions that appear in the Division. <ul style="list-style-type: none"> Reg 7.9.09 provides that Pt 7.9 Div 4 applies in relation to particular products. Reg 7.9.14B, which appears in Div 4, relates to a product that is not within the scope of reg 7.9.09.
Reg 7.9.16T, CR 2001	Reg 7.9.16T notionally replaces s 1015D(2)(b) to refer to 'the enhanced fee disclosure table'. The phrase 'enhanced fee disclosure table' is not used or defined anywhere else in the regulations or the <i>Corporations Act</i> , other than in a notionally inserted note that says: 'The templates for the enhanced fee disclosure table are set out in items 201 and 202 of Schedule 10 to the Corporations Regulations 2001'. Sch 10 has since been updated to include an item 202A, but the notionally inserted note has not been updated to refer to item 202A. The note should have been updated to refer to item 202A.

³ Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.36], Example 6.3.

Provision	Comments
Reg 7.9.17, <i>CR 2001</i>	<p>The Division-level application provision's scope is narrower than the scope of some provisions that appear in the Division.</p> <ul style="list-style-type: none"> • Reg 7.9.17 provides that Pt 7.9 Div 5 of the Regulations applies to: regulated superannuation funds; approved deposit funds; pooled superannuation trusts; RSAs. • Reg 7.9.30A provides that Pt 7.9 Div 5 Subdiv 5 of the Regulations applies in relation to 'the provider of a margin lending facility within the meaning of subsection 761EA(1) of the Act'.
Reg 7.9.69, <i>CR 2001</i>	<p>The provisions in the <i>Corporations Act</i> that authorise these regulations have been repealed (s 1020G(2)(a)–(b)). Reference should instead be to s 1020G(1).⁴</p>
Reg 7.9.70, <i>CR 2001</i>	
Reg 7.9.07A(2), <i>CR 2001</i>	
Reg 7.9.52, <i>CR 2001</i>	
Reg 7.9.85, <i>CR 2001</i>	<p>The Division-level application provision's scope is narrower than the scope of some provisions that appear in the Division.</p> <ul style="list-style-type: none"> • Reg 7.9.85 provides that Pt 7.9 Div 11 only applies to superannuation interests. • Various regulations in Pt 7.9 Div 11 apply to RSA products.

3. The ALRC has also identified instances where identically numbered notional provisions have been created for the same classes of financial product or financial service.

⁴ The Explanatory Memorandum to the Financial Services Reform Amendment Bill 2003, which repealed s 1020G(2), stated that the powers in s 1020G(2) were unnecessary given the scope of s 1020G(1): [3.83]–[3.85].

Table 2: Notional amendments with identical numbering and scope⁵

Provision	Notional amendments	Products and services
Reg 7.9.16O(1), <i>CR 2001</i>	Notionally inserts s 1017D(8) which authorises regulations to specify requirements as to the presentation, structure and format of a periodic statement	Managed investment products; foreign passport fund products; superannuation products other than those listed in reg 7.9.16J
Reg 7.9.24; Sch 10A item 7.1, <i>CR 2001</i>	Inserts notional s 1017D(8)–(9)	Regulated superannuation entity; approved deposit fund; RSA
Reg 7.9.27; Sch 10A item 8.1, <i>CR 2001</i>	Inserts notional s 1017D(8)	RSA
Reg 7.9.27; Sch 10A item 8.1, <i>CR 2001</i>	Inserts notional s 1017D(9)–(17)	RSA
Reg 7.9.60; Sch 10A item 13.1, <i>CR 2001</i>	Inserts notional s 1017D(8)–(9)	RSA

Outdated notes relating to ‘strict liability’

4. Corporations and financial services legislation should be amended to repeal all instances of the following note: ‘For strict liability, see section 6.1 of the Criminal Code’. OPC states that such a note ‘must not be included in new offence provisions and should, wherever practicable, be removed from existing offence provisions’.⁶ There are over 300 instances of this note in corporations and financial services legislation.

Outdated references to ‘guilty of an offence’

5. In addition to the above example, the *Corporations Act* should be amended to replace all references to a person being ‘guilty of an offence’ with, as the case may be, ‘commits an offence’ or ‘commit an offence’. Such amendments would be consistent with OPC guidance.⁷ Removing references to ‘guilty of an offence’ would promote consistency in drafting and support the identification of offence provisions across corporations and financial services legislation. The vast majority of offence provisions currently use the ‘commits an offence’ phraseology, with approximately 50 references to ‘guilty of an offence’ in the *Corporations Act*. The phrase appears in a limited number of provisions in other corporations and financial services Acts.⁸

⁵ In this table, ‘*CR 2001*’ refers to the *Corporations Regulations 2001* (Cth).

⁶ Office of Parliamentary Counsel (Cth), Drafting Direction 3.5, ‘Criminal law and law enforcement’ (Document release 4.0, June 2020) [18].

⁷ *Drafting Direction No 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers 2013* [15].

⁸ See, for example, the *SIS Act*, where ‘guilty of an offence’ appears on nine occasions.