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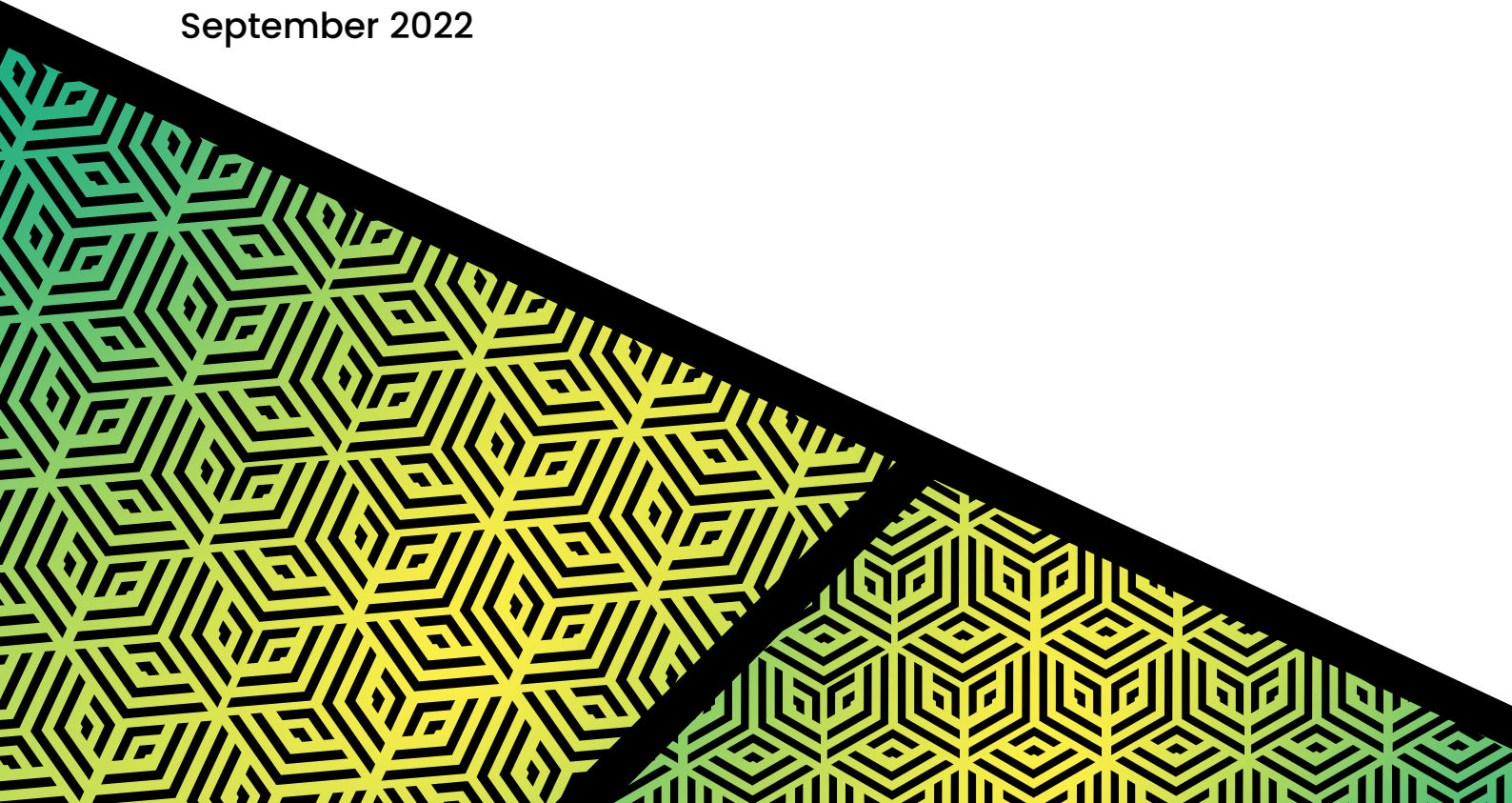
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Recommendations 14 and 15 – Redundant provisions 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.

[View Interim Report B and the Summary Report](#)

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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RECOMMENDATIONS 14 AND 15 — REDUNDANT PROVISIONS NOTE

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Introduction

1. This note provides additional detail to assist implementation of the related Recommendations 14 and 15 discussed 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 14: Repeal redundant law

2. This section provides additional detail to assist implementation of Recommendation 14.

Recommendation 14 Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

- a. spent transitional provisions;
- b. spent legislative instruments;
- c. redundant definitions;
- d. cross-references to repealed provisions; and
- e. redundant regulation-making powers.

ALRC database of redundant provisions

3. The ALRC has created and published on its website a database of potentially redundant provisions in corporations and financial services legislation, as well as in other Commonwealth Acts of Parliament.² The methodology used to create this database is described in the Appendix to this note. To implement Recommendation 14, Treasury could review the provisions listed in the database to confirm that they are redundant and can be repealed, and to identify any necessary consequential amendments.

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

² Australian Law Reform Commission, 'Recommendation 14 — Redundant Provisions Database' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Redundant-provisions-database.xlsx>.

Redundant regulation-making powers

4. The ALRC's database of redundant provisions also includes a list of regulation-making powers in the *Corporations Act* pursuant to which no regulations are currently in force. To implement Recommendation 14, Treasury could review the list and consider whether some of these powers could be repealed, particularly those powers that have never been used despite having been in the *Corporations Act* for over 20 years.

5. As the ALRC notes in Chapter 6 of Interim Report B, unused powers are a source of complexity because readers must spend time assessing whether powers have been exercised. Reducing the number of regulation-making powers would reduce this complexity.

Recommendation 15: Process improvements

6. This section provides additional detail to assist implementation of Recommendation 15.

Recommendation 15 The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

- a. identify and facilitate the repeal of redundant and spent provisions; and
- b. prevent the accumulation of such provisions.

ALRC processes

7. The Appendix to this note describes the ALRC's novel tools and methodology for identifying redundant provisions. A key innovation in this process was the creation and use of a computer program to search corporations and financial services Acts for provisions that:

- reference a date;
- reference a repealed provision; or
- reference a repealed Act.³

8. The ALRC also manually identified transitional, consequential, and savings provisions for potential redundancy.

Enhancing existing processes

9. OPC or Treasury could consider building on their existing law improvement processes to identify and repeal redundant provisions. In addition to greater use of technological tools, this could include maintaining an internal register of transitional provisions and time-limited legislative instruments and other provisions. For example, the following legislative instruments are time-limited, but no obvious process appears to exist to facilitate their repeal:

- *ASIC Corporations (AFCA Regulatory Requirement) Instrument 2021/0002* (Cth): Redundant since 15 January 2021.
- *ASIC Corporations (AFCA Regulatory Requirement) Instrument 2020/0433* (Cth): Redundant since 13 May 2020.
- *ASIC Credit (AFCA transition) Instrument 2018/448* (Cth): Redundant since 1 July 2019.

³ The search terms included the names of more than 8,800 repealed Acts of Parliament published on the Federal Register of Legislation.

10. Similarly, the time-limited provision in s 664AA(a) of the *Corporations Act* has been redundant since March 2001. An internal register of time-limited provisions could have facilitated its repeal and that of similarly redundant provisions.

11. Treasury and ASIC internal guidance could also include the principle that sunseting should not be treated as a replacement for maintaining the currency of legislative instruments. For example, even if an instrument is due to sunset within a few years, it should be repealed as soon as practicable after it becomes redundant/spent. The above legislative instruments suggest such a principle does not presently exist.

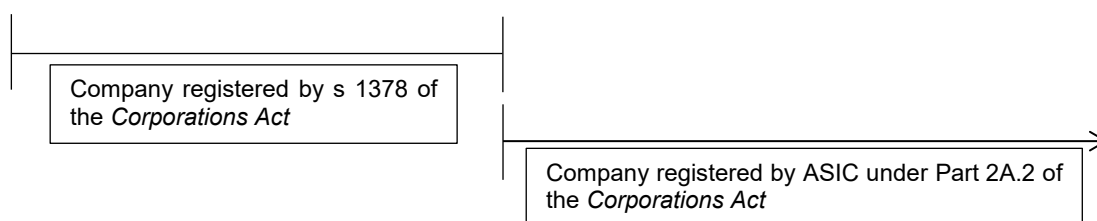
12. To promote easy identification and repeal, a provision's redundancy date should be clearly indicated. For example, reg 10.2.50A(3) of the *Corporations Regulations* provides that it 'ceases to apply at the end of 2 years after the FSR commencement.'

Drafting for redundancy

13. Some provisions, because of the way they are drafted, cannot be repealed without the use of savings provisions, or interim redrafting, to preserve their effect. Where possible, it is desirable to draft provisions, particularly transitional provisions, in a way that facilitates their eventual repeal. Drafting provisions in this way can avoid the use of savings provisions. Savings provisions can reduce the benefits of repeal, creating 'zombie law' that continues to have effect despite its repeal.

14. For example, s 1378 of the *Corporations Act* provides that for a company registered under the Corporations Law of a State or Territory whose registration was in force immediately before 15 July 2001, its registration has effect as if it were a registration of the company under the *Corporations Act*.⁴ The drafting of s 1378 arguably makes it impossible to repeal the provision without de-registering companies whose registration status depends on s 1378. A potentially better way to register companies may have been to enact s 1378 along with a power for ASIC to automatically register each company under the *Corporations Act* with the applicable class and type (for example, a proprietary company limited by shares).⁵ The ASIC power could have coexisted with s 117, and only applied to companies satisfying the criteria in s 1378(1)(a)–(b). Section 1378 could have applied until ASIC had registered each company under the *Corporations Act*, after which s 1378 would be spent. This model would have meant there was still no period during which companies were not registered under the *Corporations Act*.

Figure 1: Result of alternative law design



15. The *Corporations Act* could be amended to allow ASIC to register companies whose registration relies on s 1378 as a prelude to repealing s 1378 after all registrations are complete.

4 The date is based on the commencement of the *Corporations Act*, which was set by *Corporations Act 2001 – Proclamation (12/07/2001)* (Cth).

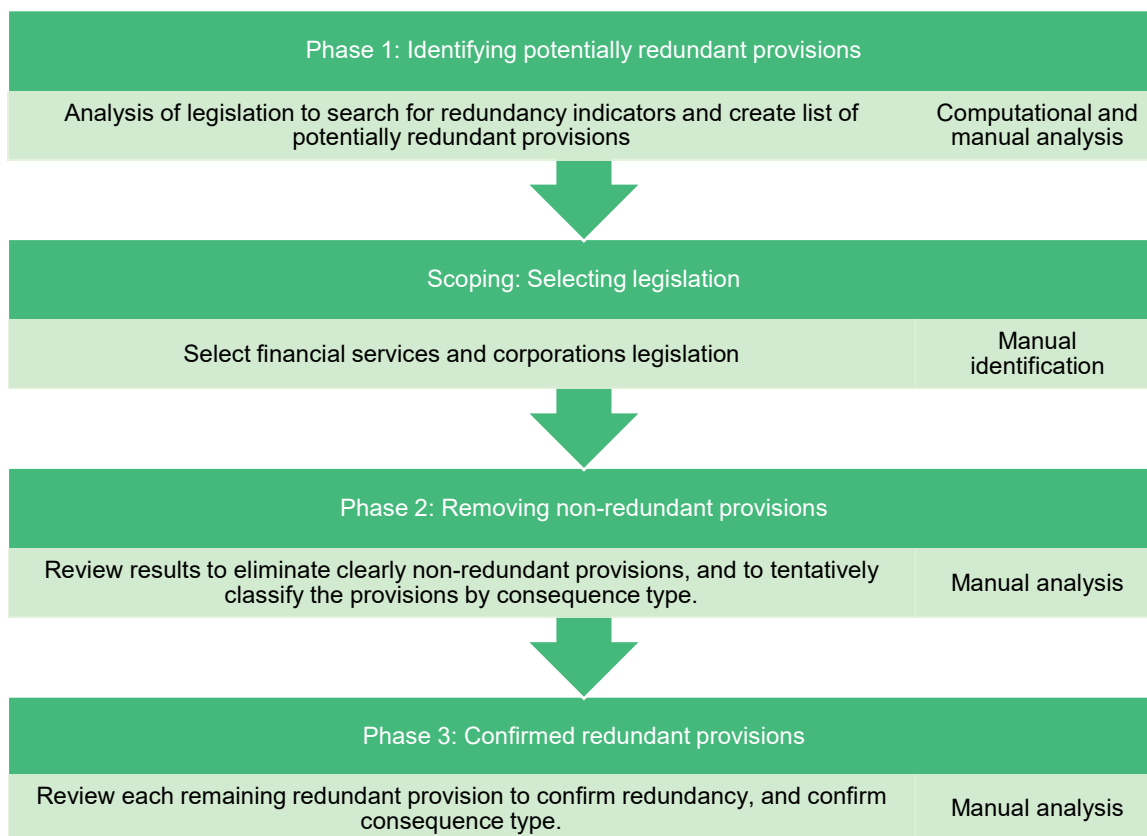
5 Section 1378(2) of the *Corporations Act* provides the applicable company types.

Appendix: ALRC methodology

1. The ALRC’s process for identifying redundant legislation is summarised in Figure A.1. The ALRC treated any of the following as a redundant provision:

- A spent provision, including transitional, consequential, and savings, that does not apply to conduct occurring after a cut-off date (whether an explicit cut-off date, or the potential period for reliance has passed).⁶
- A provision that amends a repealed Act.

Figure A.1: ALRC redundancy review process



Phase 1

2. Phase 1 of the redundancy review process identified potentially redundant provisions. An initial database was identified computationally by searching for redundancy indicators, namely provisions that:

- reference a date;
- reference a repealed provision; or
- reference a repealed Act.

3. The ALRC also manually identified transitional, consequential, and savings provisions for potential redundancy.

⁶ For example, arrangements to transfer assets from one entity to another, such as in Part 3 Div 3 of Schedule 19 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* do not have an explicit cut-off date. However, they clearly become redundant once the assets have been transferred.

4. The ALRC has written a computer program in the R programming language that identifies all legislation that refers to any year (for example, 2002), a repealed Act of Parliament, or, in the case of the *Corporations Act* and *Corporations Regulations*, repealed provisions of the Act (based on the endnotes). The ALRC has created a database of all repealed Acts and regulations (based on information contained on the Federal Register of Legislation) that was used as the basis for the search.

5. The computer program produced a database with each row containing one identified reference, and the provision number in which the reference appears. This database was used to identify relevant provisions, and eliminated the need to manually search for each date or reference to repealed legislation.

6. The ALRC ran this program across all in force principal Commonwealth Acts, not just corporations and financial services legislation. However, further analysis (Phases 2 and 3) was conducted in relation to corporations and financial services legislation only.

Phase 2

7. The ALRC used the Excel database generated in Phase 1 to review the text of each provision to identify whether it was potentially redundant. Provisions identified as not in fact redundant were removed. The remaining provisions were tentatively classified as one of the 'consequence types' listed below:

- Green: provisions which should be repealed and in respect of which there is unlikely to be any debate;
- Yellow: provisions for which relatively minor work would need to be done prior to repeal (in most cases simply the insertion of an overall general savings provision or a simple cross-reference change); or
- Orange: provisions for which the position is not as straightforward but which could be repealed subject to various qualifications or consequential actions.

Phase 3

8. Phase 3 involved a closer examination of provisions tentatively classified in Phase 2. The ALRC used the database to review again the text of each provision and to identify whether it is a redundant provision.

9. The ALRC examined each provision in detail. Drawing on the approach taken by the Board of Taxation,⁷ this involved:

- reading through the potentially redundant provision in its entirety to see if there is any continuing operation of the provision apparent from either the manner in which its cut-off is worded (if there is an explicit cut-off date) or any other aspects of the provision;
- if the provision is part of a relatively discrete set of related provisions, not all of which are redundant, reading the surrounding provisions to understand the context in which the provision operated and whether its presence is necessary for the operation of any of the surrounding provisions;
- if there is an explicit cut-off date, consulting the relevant amending legislation that inserted the cut-off date to check if it contains any savings provisions not apparent on the face of the principal legislation (that is, provisions that have a continuing transitional operation); and
- refer to the explanatory material for the amending legislation if necessary to clarify any aspect.

⁷ The Board of Taxation, *Identification and Possible Repeal of the Inoperative Provisions of the 1936 and 1997 Income Tax Assessment Acts: A Report to the Treasurer* (Report, October 2005) [2.14].

Phase 3 work not yet completed

10. Due to limited resources, the ALRC was unable to extensively review cross-references to redundant provisions. The cross-reference checking process is necessary to confirm whether each provision identified as redundant in Phase 2 is in fact redundant, and to determine whether any consequential amendments would be necessary if the redundant provision were repealed. Further Phase 3 work would involve:

- running a computer program in the R programming language to identify cross-references in Commonwealth legislation to potentially redundant provisions identified in Phase 1. This would produce a database ('cross-references report') with all potential references to each redundant provision, and the context in which they appear;⁸ and
- reviewing the results from the cross-references report and reading the provisions in other legislation that may refer to the redundant provisions to confirm that the relevant provisions are in fact redundant.

⁸ Identifying the most appropriate search terms would require experimentation, but would likely involve approaches such as searching across all legislation for the provision number and the name of the legislation in which it appears. This may be limited to proximate relations (for example, *Corporations Act* appearing within n words of the provision number), but a broader search without such proximity could also be conducted. However, a search not limited by proximity would likely generate an unmanageable number of results.