# SUBMISSION ON THE INTERIM REPORT B: FINANCIAL SERVICES LEGISLATION ALRC REPORT 139

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Thank you for this opportunity to participate in the ALRC Review of the Legislative Framework for Corporations and Financial Services Regulation. This submission responds to the Interim Report B (September 2022) on legislative hierarchy and design, by bringing to your attention our work, which contains findings relevant to the Inquiry:

- Zofia Bednarz, 'There and back again: how target market determination obligations for financial products may incentivise consumer data profiling' (2022) 36(2) *International Review of Law, Computers & Technology* 138 (available at: https://www.tandfonline.com/doi/abs/10.1080/13600869.2022.2060469)
- Zofia Bednarz, Chris Dolman and Kimberlee Weatherall, 'Insurance Underwriting in an Open Data Era - Opportunities, Challenges and Uncertainties' presentation to the Actuaries Institute 2022 All-Actuaries Summit 2-4 May 2022 (available at: https://actuaries.logicaldoc.cloud/download-ticket?ticketId=09c77750-aa90-4ba9-835e-280ae347487b)

We note that this submission is made in our personal capacities and not as representatives of any of the organisations with which we are associated.

In this submission we would like to point out that improvement of the design of financial law cannot focus on Chapter 7 Corporations Act in isolation, without taking into account other obligations to which financial entities are subject, and simplification of the law cannot be achieved without addressing clashes between financial law and other rules. Following the Terms of Reference, this stage of the Inquiry is concerned with the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, and examines in particular a question such as to how legislative complexity can be appropriately managed over time, as well as to how to best maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements. We submit that Chapter 7 of the *Corporations Act 2001* (Cth) can only provide fit-for-purpose regulation of financial services if it forms part of a coherent and well-organised legal and regulatory framework.

Our work listed above points out to significant clashes between financial law and regulation (including ASIC's Regulatory Guides) and other obligations of financial entities under *Privacy Act 1988* (Cth) or Part IVD of the *Competition and Consumer Act 2010* (Cth) (the Consumer Data Right, or 'CDR'). We provide the summary of the clashes we have identified below.

In particular, we are concerned with:

**1. Product design and distribution obligations, as set out in Part 7.8A of the Corporations Act, and ASIC Regulatory Guide 274 (issued 11 December 2020), imposing obligations on financial firms which are potentially incompatible with their obligations under the Privacy Act, especially in relation to collecting and using data of consumers of financial products for the purpose of preparing the Target Market Determination document and distributing the financial products within the specified target market.** For example, ASIC Regulatory Guide 274 invites distributors to rely on existing information they hold about consumers prior to commencing distribution, in order to determine a consumer's likely inclusion within the target market. While the mere fact of a product being purchased by a consumer not included within the target market does not automatically imply that the distributor breached their reasonable steps obligation (Corporations Act s994E(2)), the Regulatory Guide explains that selling a product to a consumer about whom the distributor *holds records* indicating this consumer is excluded from the product's target market, will effectively mean that the reasonable steps obligation has not been complied with (para. 247.182).

This shows that ASIC Regulatory Guide in practice *invites or even requires* financial entities to use consumers' information they already hold. However, leveraging of existing data to comply with product design and distribution obligations requires financial firms to *repurpose* the consumer information they hold, as at the moment they were collecting it, they were doing so with a different purpose, such as providing services to their clients. Repurposing of information held may be incompatible with the Privacy Act rules on the purpose of collection of information (sch 1 cl 6).

See: Zofia Bednarz, 'There and back again: how target market determination obligations for financial products may incentivise consumer data profiling' (2022) 36(2) *International Review of Law, Computers & Technology* 138 (https://www.tandfonline.com/doi/abs/10.1080/13600869.2022.2060469)

**2. Consumer Data Right scheme and its expansion to other industries, including insurance, is incompatible with certain provisions of the Insurance Contracts Act 1984.** The optional CDR is in tension with mandatory disclosure by insurance applicants, and 2020 reforms to insurance law removed limits on the kinds of information insurers can seek. This could operate to the disadvantage of consumers as the CDR is used in insurance markets. As explained in more detail in the paper linked: since reforms introduced in 2020, consumers are under a duty to take reasonable care not to make a misrepresentation in their disclosure to a prospective insurer. This could put pressure on insurance applicants to give access to CDR data when it is requested, lest

in choosing a manual questionnaire instead, they get things wrong and risk their coverage. At the same time, previously existing obligations on insurers to ask specific and relevant questions have been repealed – effectively on the assumption that insurers would not ask very broad questions that are hard for consumers to answer. CDR requests, however, are easy, making it more tempting for insurers to make broad requests for data, and conduct broad analysis in the hope of better assessing risk. The only constraint on what insurers could investigate is a relatively weak data minimisation constraint in the CDR rules. Insurers need only be able to say the information is *reasonably* necessary (say, to assess risk). And in the context of CDR requests, precisely *what* insurers are looking for will become more opaque to consumers, compared to the old questionnaires. This result emerges from the combination of CDR with the 2020 reforms, and we doubt it is intended.

See: Zofia Bednarz, Chris Dolman and Kimberlee Weatherall, 'Insurance Underwriting in an Open Data Era - Opportunities, Challenges and Uncertainties' presentation to the Actuaries Institute 2022 All-Actuaries Summit 2-4 May 2022 (available at: https://actuaries.logicaldoc.cloud/download-ticket?ticketId=09c77750-aa90-4ba9-835e-280ae347487b)

We hope that this brief submission, and linked papers are useful to the Inquiry. We are more than happy to discuss the content and its implications in further detail.

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