

FINANCIAL SERVICES LEGISLATION
SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

December 2022

INTRODUCTION

1. ANZ thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to comment on Interim Report B (**Report**) of the ALRC's inquiry into financial services legislation (**Inquiry**). We support the ALRC's objectives to create a more coherent and navigable legislative framework, and to address some of the complexity of the current *Corporations Act 2001* (**Act**).
2. The Report's key proposal (**Proposal B1**) is to amend the legislative hierarchy of Chapter 7 of the Act by implementing a new legislative model. The introduction of the model would give Chapter 7 a more organised hierarchy with a clearly defined place for each legislative norm. This could have several benefits, including a simpler Act, greater regulatory flexibility, a reduction in the total number of legislative instruments, and the avoidance of problems associated with notional amendments.
3. To assist the ALRC to develop its recommendations, we have set out below a number of observations on the Report's proposals. These relate to:
 - The delegation of legislative power over the matters proposed to be contained in the Scoping Order and rules.
 - The usability of the model.
 - Implementation issues, including implementation risk, transition costs and timing.

DETAILED POINTS

4. Proposal B1 of the Report is to implement a new model for Chapter 7 of the Act. The report's remaining proposals and questions give effect to, depend on or relate to this change.
5. The proposed model would comprise:
 - the Act, which would contain 'fundamental norms and obligations' and 'other provisions appropriately enacted only by Parliament'.
 - a Scoping Order, a single consolidated legislative instrument setting out exemptions and exclusions to the Act.
 - thematic rulebooks, legislative instruments containing rules 'giving effect to the Act in different regulatory contexts as appropriate'.
6. Power to make the Scoping Order and rules would be vested concurrently in the Minister and ASIC (**Proposals B2, B5 and B8**).

7. The proposed model has the potential to address several issues with the current framework. As the Report observes, the Act currently lacks a clear hierarchy for determining the placement of provisions across the Act, delegated legislation, administrative instruments or regulatory guidance.¹ There is a lack of a consistent approach to determining when a matter will be delegated to a particular party (such as Parliament, ASIC, or the Minister), and prescriptive detail is spread across different instruments.² The significant number of notional amendments to the Act also means that the Act can often not be fully understood on its face.³ As such, it is not always clear to users of the legislation who will make particular rules, how those rules will be made and where they will be located.⁴
8. The model could help users more clearly identify these things. It would define where each type of rule would belong, reduce the number of legislative instruments, and provide a better understanding of the allocation of legislative power to different parties. It would also, by having more of the law contained in delegated legislation, allow the law to be amended more flexibly without the need to rely on notional amendments.
9. To help the ALRC consider how to refine the model, we have some observations on some of its aspects, and the scale of the change required to implement it. These are set out below.

Delegating legislative power

10. The proposed model involves significant delegation of legislative power to the Minister and ASIC, including over several matters that are presently dealt with in the Act itself. These matters include the Act's application (in the Scoping Order) and 'much of the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors'⁵ (in the rulebooks).
11. Some of these matters could possibly be regarded as more properly dealt with by the Act. In particular, the application of the Act is a critical matter that would ordinarily be dealt with in primary legislation. The draft guidance note contained at Appendix E of the Report notes that there 'must be good reasons to delegate a power of exclusion or exemption' and that 'the scope (or perimeter) of a statutory regime is an important policy decision

¹ [6.3] of the Report.

² [2.42] Report.

³ [6.33]–[6.36] Report.

⁴ [6.31] Report.

⁵ [2.43] Report.

that should be made by Parliament and generally contained in an Act.’ It would be useful if the ALRC clarified the reasons why this would not apply to the Scoping Order.

12. It may also be the case that ‘much of the prescriptive detail’ that might be included in rulebooks includes matters better dealt with by the Act.
13. We think it could be beneficial for the Act implemented under the new model to set out clear boundaries for the scope of delegated power.
14. The proposed model, in addition to scrutiny measures applicable to all delegated legislation (for example, disallowance by Parliament), appropriately contains additional consultation and transparency requirements for the Minister and ASIC (**Proposals B4, B6, B9**).

The usability of the model

15. One the key intended benefits of the new model is to improve navigability and usability for users. Some aspects of the model may, however, affect its ability to do this.
16. For example, users of the legislation may need to have reference to three separate documents (the Act, the Scoping Order and rules) to properly understand a section of the Act. For example, a person reading a provision of Act will not be able to know that that provision does not apply to some products without referring to the Scoping Order, and will lack ‘much of the prescriptive detail’ of their obligations that relate to that provision. As such, the Act could become less cluttered, but lack meaning without reference to other documents.
17. Also, while under the model the Act may become simpler, this may not necessarily be true for the framework as a whole. The lengthiness of the combined content of the Act, Scoping Order and rules, for example, may not be notably less than the current Act and delegated legislation.

Implementation

18. The implementation of the model will involve the relocation and reframing of a large portion of Chapter 7 of the Act and its obligations. The nature and significant scale of the change means:
 - There will be considerable transition costs for all users of the legislation.
 - Implementation will need to take place in staged approach over a lengthy period, which carries the risk of the reform process starting but not being completed. This could result in an even less coherent framework than exists currently, with some of the costs already borne.

19. There is also a risk that, in fitting the current laws into the new model, the substance of those laws could unintentionally be changed.
20. We think these costs and risks should be balanced with the model's potential benefits prior to any decision being made to implement the model and, if that decision is made, they should be mitigated to the extent possible. In particular, we think it would be sensible for the entire reform project to be committed to prior to it commencing.
21. If the model is to be implemented, it would be useful if its timing was, so far as is practicable, aligned with any merger of Chapter 7 with the ASIC Act or Credit Act (if any such mergers continue to be contemplated), the implementation of the outcomes of Treasury's Quality of Advice review, and any other changes that arise from Interim Report C.

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