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Submission to the ALRC
on the Review of the Legislative Framework for
Corporations and Financial Services Regulation
Interim Report A

February 2022

25 February 2022

The Head
Financial Services Legislation Review
Australian Law Reform Commission

By online submission

Dear Sir/ Madam

**Review of the Legislative Framework for Corporations and Financial Services Regulation
Interim Report A**

The Institute of Public Accountants (IPA) welcomes the opportunity to provide comments on the review of the financial services legislative framework.

The IPA is one of the three professional accounting bodies in Australia, representing over 47,000 members and students in Australia and in over 80 countries. Approximately three-quarters of the IPA's members work in or are advisers to small business and SMEs.

Overall, the IPA strongly supports the work of the ALRC in this review. In particular, we support:

- A principles-based approach to the legislative framework.
- The removal of powers held by ASIC relating to exclusions, exemptions and so on.
- The critical need to address the impenetrability of the financial services legislative 'swamp', with ongoing reforms rather than waiting until the very end of the review period.
- The need to work closely with Treasury on the Quality of Advice Review to ensure that policy considerations and recommendations are incorporated into, or inform, the ALRC review. It is unfortunate that the timing of the two reviews could not have been more beneficially aligned.

We have had the benefit of viewing the submission of Chartered Accountants Australia and New Zealand, and generally support their comments.

IPA's additional comments are included below.

Please don't hesitate to contact Vicki Stylianou (vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733) if you require further information or have queries.

Yours faithfully

A handwritten signature in black ink, appearing to read 'V. Stylianou', with a stylized flourish at the end.

Vicki Stylianou
Group Executive, Advocacy & Policy
Institute of Public Accountants

The IPA makes the following comments on the proposals and questions:

Proposal A9

One of IPA's main concerns is that all the significant work being undertaken by the ALRC, and government could be easily undermined or compromised by inappropriate interpretation, execution and enforcement of the legislation and regulations. Given the various findings or conclusions in Interim Report A, we believe that the powers which ASIC has to grant exclusions, exemptions and so on, should be either removed or severely constrained. In our view, a major part of the legislative problems is caused by ASIC, and we do not want to wait for, or expect to see, cultural change which would alter their approach. Therefore, removing ASIC's ability to alter the law and to issue a seemingly endless stream of secondary and tertiary legislation, should be a priority and considered for earlier reform resulting from the ALRC review.

Chapter 10 Exclusions, exemptions and notional amendment powers

The following excerpts from Interim Report A are relevant to our position that ASIC should not continue to have the current suite of unfettered powers. If ASIC genuinely consulted government and other stakeholders, then the legislative quagmire would not be as impenetrable as it currently is.

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10.29 Comments by the Treasurer illustrate that there may be debate about the line that separates 'regulatory relief' from what some may consider matters of 'policy' or 'law reform'. The Treasurer acknowledged that regulators 'need to independently decide on individual matters and cases', but emphasised that regulators do not carry out their mandates in a vacuum. ... It is the Parliament who determines who and what should be regulated. It's the role of regulators to deliver on that intent, not to supplement, circumvent or frustrate it.²³ 10.30 This sentiment is also reflected in the Australian Government's 'Statement of Expectations' regarding ASIC, released in August 2021, which stated that the Government expects ASIC to consult with the Government and Treasury in exercising its policy-related functions, such as the use of its exemption and modification powers, other rulemaking powers, and guidance.

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10.35 There may also be methods of oversight or approval, in addition to the usual Parliamentary scrutiny and disallowance procedures, that involve various participants. Current examples, such as ministerial consent, are discussed further below. It is possible that other collective or representative bodies could play a role in the process of making, vetting, or approving a decision to create delegated legislation.

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In the interests of consistency and coherence, it would be preferable that a rule-making power be granted to only one rule-maker.

IPA totally supports having one rule-maker but does not support this being ASIC. We prefer the Minister (subject to Parliamentary oversight) with Parliament to 'draw the line', for the reasons provided in Interim Report A.

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10.95 Rules in thematic legislative instruments, and any amendments to those rules, would be subject to the consultation requirements contained in s 17 of the Legislation Act: the rule-maker must be satisfied that any consultation the rule-maker considers 'appropriate', and that is 'reasonably practicable', has been undertaken. Any new rule-making power could specify the required level of consultation in a more objective way.

We agree with the theory of the above excerpt, however, in practice and in reality, consultation can be a box ticking exercise, with a lack of accountability for the consultation process. ASIC has a history of inadequately considering stakeholder feedback and input. For example, we refer to various consultations by the Dept of Prime Minister & Cabinet on regulator performance; ASIC industry funding model; and the assessment of ASIC by the Financial Regulator Assessment Authority (FRAA). In fact, consider why it was even necessary to establish a whole new piece of bureaucracy to oversee ASIC (and APRA). The FRAA website states:

The Financial Regulator Assessment Authority (FRAA) is an independent statutory body tasked with assessing and reporting on the effectiveness and capability of the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA).

And,

The Financial Regulator Assessment Authority was established in response to recommendations 6.13 and 6.14 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Having attended the recent ALRC webinar on the twin peaks model of financial regulation, we are concerned at the future viability or effectiveness of this model, and the implications for reforming the financial services legislative framework.

Proposal A10

We strongly support this proposal to amend the Corporations Act to provide a sole power to create exclusions and grant exemptions from Chapter 7 in a consolidated legislative instrument.

Proposal A11

We agree with the proposal that in order to implement proposals A9 and A10, that the Corporations Act should be amended to insert a power to thematically consolidate legislative instruments in the form of 'rules'. However, we do not support this power being given to ASIC for the above reasons. Alternatives are the Minister or Treasury or an external oversight panel that could be established to oversight such processes if the power was given to ASIC.

IPA supports the use of the word 'rules', which is easily understandable for regulated entities and the public. We already informally refer to the collective of all legislative requirements as 'the rules'.

Proposal A12

We fully support this proposal with respect to notional amendments. However, we are mindful of regulatory capture due to the perceived expertise of ASIC. We recommend an external panel of experts, whether as a steering committee or expert advisory panel to guide the 'stock take' which is being suggested. We prefer either Options C or D on pages 433ff.

Proposals A16 and A17

Chapter 12 Definitions of 'retail client' and 'wholesale client'

IPA has been a long-standing advocate for the removal of the distinction between 'retail client', 'wholesale client' and 'sophisticated investor'. IPA members have continuously recounted incidences of how clients who have inherited large sums of money are technically considered to be wholesale or sophisticated but have very low levels of financial literacy. These clients, and in fact all clients, should be afforded the same level of protection by the law, no matter what their level of sophistication.

Removing these distinctions would add to the simplification of the legislation; and would be hugely beneficial for advisers in practice who are attempting to navigate the differences. We are hopeful that the Quality of Advice review will extensively consider this proposal.

Proposal A21

IPA agrees that prescriptions around managing conflicts of interest, competence, adequate training, and risk management, should be removed from legislation, as they can be adequately covered in standards or a code of practice, similar in nature to the professional and ethical standards (including the Code of Ethics) which govern accountants and registered tax agents.

Chapter 9 Disclosure

The disclosure requirements could be simplified as a 'policy experiment' with a sunset clause if necessary. Other industries and professions have far less regulation, however, they still manage to act in the best interests of their clients and have sufficient professional judgement to determine what client disclosures are necessary. We have previously advocated for a system of individual registration and responsibility, which would make it easier to simplify the legislative framework.

Chapter 13 Potential future directions: policy issues

It is critical to consider the relevant policy issues and to work closely with Treasury and other stakeholders on the Quality of Advice review (and more broadly) to ensure that reforms to the financial services legislative framework are not inconsistent with policy recommendations. As mentioned above, the timing is not ideal, and the two reviews need to progress in parallel.

IPA has been a long-standing advocate for individual licensing of advisers for the reasons described; and severing 'financial product' from 'financial advice'. The benefits from these two reforms would make a monumental difference on so many fronts.

Definition of 'small business'

Whilst we appreciate the need to have consistent definitions, the term 'small business' has eluded consistent definitions across many sectors, including taxation, fair work/ workplace relations, competition law, local government and much more. Regard to other sectors may help to inform further attempts to address the implications of inconsistent definitions.