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Dear Simplification Team

Observations on REP 813 Regulatory Simplification

Thank you for your work so far on the simplification project. It has my enthusiastic support and I am pleased to be able to contribute as part of the expert advisers' group.

The impact of complexity in the laws administered by ASIC on the economy is now crippling. As the Australian Law Reform Commission (ALRC) pointed out in November 2023, the existing legislative regime is no longer fit for purpose. This is not a new insight. While most of the complexity results from the design of the regulatory architecture and law itself (and is therefore a matter for Parliament rather than ASIC) there are significant changes that ASIC can make in its own practices and your renewed focus on administrative simplification (which I hope will be ongoing) is important. In particular, thank you for the recent improvements in electronic signatures and email form lodgement.

This letter contains some additional observations about matters we have previously discussed. They relate to ASIC's approach to regulatory information and legislative instruments. My two high-level observations are these.

- In providing regulatory information, there is no 'one size fits all' solution. Different parts of ASIC's regulatory remit need a different approach to communicating information. And information communicated for different purposes should be differently framed. The drafting approach in each different category of document should be shaped to its precise purpose and audience (and in many cases that is not a general or lay audience). No document can be all things to all people, and paraphrasing complex legal rules can be counterproductive. Regulatory Guides should be used for a narrow purpose and designed to meet the needs of the specific (often small) audience of each individual Guide. Information sheets should provide information, not guidance.
- As others have argued, ASIC Instruments should be reorganised by Chapter (or in the case of Chapter 7 of the Corporations Act, by Part) of the principal legislation.

This means that legislation can be viewed as a whole by consulting the relevant Chapter, the Regulations made for the purposes of that Chapter, and the (single) Instrument making modifications to that Chapter. With the law as it currently stands, navigability (rather than thematic coherence) should be the most important priority for ASIC.

Regulatory Guides

My first comment is about Regulatory Guides. You are correct at page 12 to say that ‘the role of each type of guidance has become less clear’. You are also correct to say that different audiences have different needs, and to distinguish between technical and general users.

In my view, Regulatory Guides have lost their way. I understand the reasons from moving from publishing policy statements to regulatory guides in the early 2000s, but I think it was counterproductive. Regulatory Guides should be used for a narrow purpose and drafted for each specific audience.

As to purpose, Regulatory Guides should be used only for the narrow purpose of making public the manner in which ASIC proposes to exercise a discretion given it by legislation (for example, to grant relief) or to exercise its statutory powers (for example, to grant a licence or issue a stop order). They should not be used to try to explain (or summarise or paraphrase) a person’s legal obligations or to provide an ASIC ‘gloss’ on what those obligations mean.

I understand, given my comment above about the unsustainable complexity of much of the law administered by ASIC, the temptation to assist regulated entities by explaining the law, but it creates more problems than it solves. There may be a role for information sheets or information guides (see below) in educating different cohorts about the law but, if so, that should be done outside Regulatory Guides and it should make clear that the information provided has no regulatory effect.

As to audience, I do not agree with way in which the three main audiences are described on page 12. Instead, I think is helpful to divide up ASIC’s audience by reference to its regulatory remit. Because its regulatory remit is (too) broad, ASIC is doing a number of different jobs that require different approaches, including to communicating information. It might be helpful to think of separate cohorts. Others have different views, but broadly I see these cohorts as:

Entities that are ‘really regulated’ by ASIC	This cohort is where ASIC’s regulatory engagement is most intense. It comprises all entities that are licenced by ASIC under the credit, financial services and financial markets laws, and all issuers of ED securities. A subset is coregulated with APRA.
Entities that engage with ASIC as a consequence of their corporate law or corporate reporting obligations	This includes entities that are required to lodge annual reports, or who engage with ASIC in the course of transactions (for example, under Ch 2E).

Individuals and entities that are subject to occupational registration with ASIC	This is registered financial advisers, authorised credit representatives, registered company and SMSF auditors, and registered liquidators.
Other entities and individuals to which laws administered by ASIC apply	This includes the vast majority of Australian companies and their officers. It also includes people who trade in financial markets.
Investors, financial consumers and the general public	

Bear with me - the argument is this. Most Regulatory Guides, if used only for the narrow purpose I propose, will have as their primary audience cohorts 1 to 3. Of those, most will apply to the first cohort, and as we know they relate to parts of the law that are extremely technical, obscure and complex.

In drafting for the first cohort, ASIC should expect that the entity and its officers are advised by specialist lawyers. Any suggestion that Regulatory Guides are a 'self-help' document for people in this cohort who choose to proceed without proper legal advice is very corrosive. I say this knowing that some AFS and credit licensees are small businesses, but it is a condition of their licence that they have proper resources to understand and carry out their legal obligations. The parts of the law that cover licensed entities and issuers of ED securities are highly technical. I repeat that, while I understand the temptation, it is unhelpful for ASIC to issue regulatory guidance that seeks gloss over that complexity. (Instead, consistent with its statutory functions under ASIC Act ss 11(2)(b) and 11(3), it should redouble its efforts to reduce complexity in the legislation itself.)

The problems with the current approach are evident in, for example, the recent Regulatory Guide 280 at 280.54 to 280.56, dealing with directors' duties in sustainability reporting. The primary audience for this Regulatory Guide is (or should be) highly sophisticated entities spending millions of dollars implementing the new regime, and not the recipients of the disclosure or the general public seeking to understand the new regime. I understand these paragraphs were included to address the information needs of 'strategic decision-makers' in those entities, but it is an incomplete statement of their legal responsibilities (including under Corporations Act ss 344, 1308 and 1309). This is therefore unhelpful and is confusing for boards who are being advised differently by expert counsel.

For cohorts 2 and 3, the expectation should be that the audience is reasonably engaged but that they may be advised by generalist lawyers or accountants (or, in the case of representatives of licensees, their licensee) rather than specialists. For these Regulatory Guides, it may be appropriate for ASIC to provide some 'context', including an explanation of the purpose of the Guide and direction to the legal obligations to which the Guide relates.

For cohorts 4 and 5, the assumption should be that they do not read Regulatory Guides. Regulatory Guides should not be drafted with them in mind.

Information documents

These can have two potential uses. The first is to explain a process or procedure that ASIC has adopted that it wants people to follow. The second is to educate people about what the

law requires of them, or what their rights are under the law. Different names would help to distinguish between them.

It is probably appropriate to pitch these types of documents at a general audience (that is, to assume they will be read and relied upon by all five cohorts). They should be as brief as possible and start with a clear statement of their purpose (for example, 'This information sheet explains the procedure you should follow to have a deregistered company reinstated' or 'This information sheet directs you to the main statutory obligations of registered financial advisers'). These documents are not intended to have regulatory effect (and note that I said 'directs you to' rather than 'explains').

As a general observation, I think there is a case for ASIC to develop information sheets that are much more targeted, particularly for the fourth cohort. As for the proposed roadmaps in REP 813, I understand the intention, but I am not convinced they take things very far. Perhaps they would work better if they were more targeted and linked to the law itself.

There are already almost three million company directors in Australia. In the SME space, many of them are directors of companies that are trustees. A helpful roadmap would assume they have already incorporated their company and direct them to where to find the requirements (and forms) to lodge things with ASIC, point to their duties while the company is solvent and if insolvency looms, and provide some next steps if relationships within the company break down. I would be inclined to have a separate one for single director/shareholder companies and a separate one for trustee companies, and there are probably other variations. Winding up companies should be a separate map. ASIC may wish to make more use of Corporations Act Part 1.5 in preparing these roadmaps.

As we have also discussed, I think a roadmap or guide covering the breakdown in relationships in family companies would be very helpful. This should include guidance for non-specialist lawyers and their clients dealing with ASIC when relationships within companies are affected by domestic violence or coercive control, or where fraud has occurred. I will continue to work on scoping this with the community legal centres and come back to you soon.

On balance, I think the proposed roadmap for financial advisers is unhelpful. I would reduce its scope by explaining only the issue of what activity is regulated, for an audience of people who need to know whether they are providing financial advice (eg on social media). However, remember they will not read something directed at financial advisers if they do not consider themselves to be in that category. Paraphrasing the obligations of advisers that are subject to regulation is unhelpful for the reasons I explained above (AFS licensees and their representatives should be properly advised on this complex area of law).

Communicating regulatory priorities

It is sometimes appropriate for ASIC to communicate its regulatory priorities or approach to a particular issue. For the first cohort, 'Dear CEO' letters can be appropriate. It may be possible (although I suspect the existing technology is not up to it) to communicate directly with cohort 3 by targeted alerts, for example sent by email. Otherwise, I think it is difficult for ASIC to communicate these messages – certainly it cannot assume that a general audience

regularly checks its website or follows the news. The recent changes to the website are helpful for those who do, but ASIC should always administer the law on the assumption that the person with whom it is dealing has not received these messages.

Instruments

I know others have written to you about this issue. I support the approach of consolidating and organising ASIC's legislative instruments by reference to the Part or Chapter of the law they amend. This would help with the problem of navigability identified by the ALRC, creating a single source of truth as to the applicable legislation. I realise this is a significant undertaking and that the resulting instruments will be very long, but with dedicated resourcing by ASIC it could be done. This approach is preferable to thematic instruments which are very difficult to locate and do not always coordinate well.

I am happy to discuss these comments further if that is helpful.

Yours sincerely

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