

**Adjunct Professor Kevin Lewis**  
**Faculty of Law**

25 August 2014

Mr David Murray AO  
Chairman  
Financial System Enquiry  
GPO BOX 89  
SYDNEY NSW 2000

By email: [fsi@fsi.gov.au](mailto:fsi@fsi.gov.au)

Uploaded to: <http://fsi.gov.au/consultation/submissions/>

Dear Mr Murray

### **Financial System Enquiry - Second Round Consultation**

I am writing in my capacity as a practitioner and teacher in financial services in response to the FSI's request for second round submissions, specifically on the topics of regulatory architecture and regulatory outcomes.

In August 2011, I delivered a paper to the 6th Annual Supreme Court Corporate Law Conference in Sydney entitled "*A Decade On - Reforming the Financial Services Law Reforms*" (copy attached and also available online at [http://www.inhouselegal.com.au/Compliance\\_Course/SupCourtPaper.pdf](http://www.inhouselegal.com.au/Compliance_Course/SupCourtPaper.pdf)). The paper identified a number of potentially serious problems with Chapter 7 of the Corporations Act, including:

- issues with the breadth and uncertainty of the definition of "financial product" in ss763A-763E;
- issues with the breadth and uncertainty of the definition of "derivative" in s761D and how that definition interplays with the definition of other financial products (including in particular the definition of "managed investment scheme");
- the inappropriate extension of the legislative provisions governing client segregated accounts and margins, and takeovers and relevant interests, that formerly applied to market-traded derivatives to over-the-counter derivatives;
- problems with the drafting of the client order precedence rules in r7.8.18;
- problems with the drafting of our continuous disclosure and insider trading laws highlighted by the decision in *R v Firms*;
- problems with the attribution of inside information to bodies corporate caused by drafting errors in the amendments to the definition of "officer" introduced by the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004;
- issues with the test for determining the materiality of information for the purposes of our continuous disclosure and insider trading laws;
- some major drafting flaws in the regime regulating short sales covered by stock lending agreements;

- the anomalies caused by ASIC's view that bills of exchange are not a financial product;
- the anomalies created by having different disclosure standards for listed companies (ie a prospectus that is required to meet the informational needs of both retail and wholesale investors and their professional advisers) and listed trusts (ie a product disclosure statement that is required to meet the informational needs of retail investors only);
- the befuddled disclosure regime for market-traded derivatives;
- the failure of the regulatory system to produce concise and effective product disclosure even though that is a specific requirement of the law;
- the unnecessary duplication and overlap created by having one licensing and disclosure system for financial products other than credit (Chapter 7 of the Corporations Act) and another for credit (the National Consumer Credit Protection Act); and
- the problems for industry participants and practitioners in trying to find and piece together the law given the hodgepodge that Chapter 7 has become of amending Acts, regulations and ASIC class orders piled one upon the other.

Further details of these issues, problems and anomalies can be found in the attached paper.

I would urge the FSI to recommend to the Government that chapter 7 be overhauled to address the issues identified above and in the attached paper.

I would further urge the FSI take up the suggestions in the attached paper and recommend to the Government that:

- the Corporations Act be split into two Acts – one regulating business organisations (companies, managed investment schemes and trustee companies) and the other regulating financial markets and services;
- chapter 7 of the Corporations Act and the National Consumer Credit Protection Act be brought together into one legislative framework that applies to all forms of financial services, including the provision of credit and credit related services, and that has a single licensing regime for all such services; and
- the myriad of amendments to Chapter 7 that currently sit in the regulations and in ASIC class orders be brought back to where they properly belong – in the Act.

I would be happy to answer any questions that the FSI may have in relation to any of the matters canvassed in this letter or in the attached paper. I can be reached at [kevin.lewis@bigpond.com](mailto:kevin.lewis@bigpond.com) or on 0414 593 948.

Yours sincerely



Kevin Lewis  
Adjunct Professor, Sydney Law School