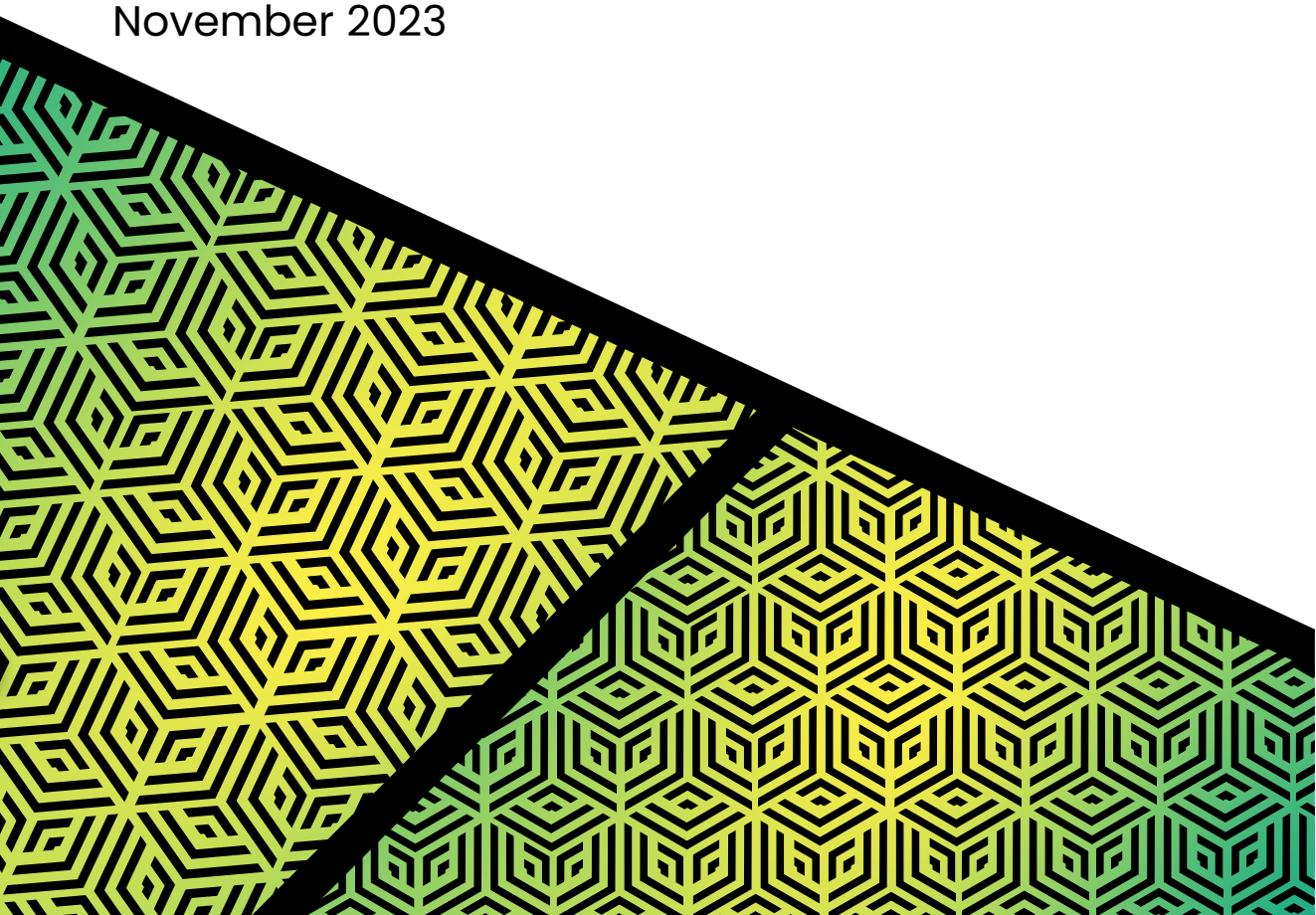
Australian Government
Australian Law Reform Commission

FINAL REPORT

CONFRONTING COMPLEXITY:
REFORMING CORPORATIONS AND FINANCIAL SERVICES LEGISLATION

ALRC Report 141
November 2023



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Unless otherwise stated, this Report reflects the law as at 1 July 2023.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

The Hon Mark Dreyfus KC MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 November 2023

Dear Attorney-General

Review of the Legislative Framework for Corporations and Financial Services Regulation

On 11 September 2020, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into simplification of the legislative framework for corporations and financial services regulation. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 141, 2023).

Yours sincerely

The Hon Justice Mordecai Bromberg

President

Contents

Terms of Reference

Review of the Legislative Framework for Corporations and Financial Services Regulation

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the Government's commitment in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to simplify financial services laws;
- the importance, within the context of existing policy settings, of having an adaptive, efficient and navigable legislative framework for corporations and financial services;
- the need to ensure there is meaningful compliance with the substance and intent of the law; and
- the continuing emergence of new business models, technologies and practices;

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, changes to the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be made to simplify and rationalise the law, in particular in relation to the matters listed below.

A. The use of definitions in corporations and financial services legislation, including:
    - the circumstances in which it is appropriate for concepts to be defined, consistent with promoting robust regulatory boundaries, understanding and general compliance with the law;
    - the appropriate design of legislative definitions; and
    - the consistent use of terminology to reflect the same or similar concepts.

B. The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine:
    - how legislative complexity can be appropriately managed over time;
    - how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and
    - how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.

C. How the provisions contained in Chapter 7 of the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- is clearer, coherent and effective;
- ensures that the intent of the law is met;
- gives effect to the fundamental norms of behaviour being pursued; and
- provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.

Scope of the reference

The ALRC should identify and have regard to existing reports and inquiries, and any associated Government responses, including:

- the 2019 Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry;
- the 2017 Report of the Treasury's ASIC Enforcement Review Taskforce;
- the 2015 Final Report of the Australian Government Competition Policy Review;
- the 2014 Final Report of the Financial System Inquiry;
- the 2014 Final Report of the Productivity Commission, Access to Justice Arrangements; and
- any other inquiries or reviews that it considers relevant.

Consultation

The ALRC should consult widely including with regulatory bodies, the financial services sector, business and other representative bodies, consumer groups, other civil society organisations, and academics. The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide a consolidated final report to the Attorney-General by **30 November 2023**, and interim reports on each discrete matter according to the following timeframes:

- **30 November 2021** for Topic A;
- **30 September 2022** for Topic B;
- **25 August 2023** for Topic C.

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The ALRC also acknowledges the significant contributions made by the Australian Securities and Investments Commission, including the provision of data, constructive discussions, and input regarding reform possibilities.

The ALRC is grateful to members of the Advisory Committee and Expert Readers for generously providing their expert insights at important stages of the Inquiry.

The ALRC thanks the Corporations Committee and the Financial Services Committee of the Law Council of Australia, for regular and generous support and engagement at their meetings and conferences.

The ALRC also thanks all consultees, stakeholders who provided submissions to the Inquiry, and other interested members of the public for their enthusiasm in engaging with the Inquiry and providing feedback that helped to shape the recommendations contained in this Report.

Finally, the ALRC acknowledges that its empirical analysis of legislation has been enabled by the use of open access standards on websites operated by the Office of Parliamentary Counsel (Cth).

Recommendations

Interim Report A

Recommendation 1 Section 5(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove reference to non-existent Part 1.3 of the *Corporations Act 2001* (Cth).

Recommendation 2 The definitions of all words and phrases that are not used as defined terms in the *Corporations Act 2001* (Cth) should be removed from that Act.

Recommendation 3 Section 9 of the *Corporations Act 2001* (Cth), and ss 5 and 12BA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), should be amended to remove all qualifications that definitions or rules of interpretation apply unless a 'contrary intention appears'.

Recommendation 4 Section 9 of the *Corporations Act 2001* (Cth) should be amended to remove the definitions of 'for' and 'of'.

Recommendation 5 Section 5C of the *Corporations Act 2001* (Cth) and s 5A of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.

Recommendation 6 All definitions that duplicate existing definitions in the *Acts Interpretation Act 1901* (Cth) should be removed from the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Recommendation 7 The *Corporations Act 2001* (Cth) should be amended to include a single glossary of defined terms.

Recommendation 8 Section 7 of the *Corporations Act 2001* (Cth) should be replaced by a provision that lists where dictionary provisions appear and the scope of their application.

Recommendation 9 The *Corporations Act 2001* (Cth) should be amended so that the heading of any provision that defines one or more terms (and that does not contain substantive provisions) includes the word 'definition'.

Recommendation 10 The Office of Parliamentary Counsel (Cth) should develop drafting guidance to draw attention to defined terms each time they are used in corporations and financial services legislation.

Recommendation 11 The Office of Parliamentary Counsel (Cth) should investigate the production of Commonwealth legislation using extensible markup language (XML).

Recommendation 12 The Office of Parliamentary Counsel (Cth) should commission further research to improve the user-experience of the Federal Register of Legislation.

Recommendation 13 Regulation 7.6.02AGA of the *Corporations Regulations 2001* (Cth) should be repealed.

Interim Report B

Recommendation 14 Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

a. spent transitional provisions;

b. spent legislative instruments;

c. redundant definitions;

d. cross-references to repealed provisions; and

e. redundant regulation-making powers.

Recommendation 15 The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

a. identify and facilitate the repeal of redundant and spent provisions; and

b. prevent the accumulation of such provisions.

Recommendation 16 Corporations and financial services legislation should be amended to address:

a. unclear or incorrect provisions;

b. outdated notes relating to ‘strict liability’; and

c. outdated references to ‘guilty of an offence’.

Recommendation 17 Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:

a. the prescribing of forms and other documents;

b. the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds;

c. the publication of notices and instruments;

d. conditional exemptions;

e. infringement notices and civil penalties;

f. terms defined as having more than one meaning;

g. definitions containing substantive obligations; and

h. definitions that contain the phrase 'in relation to'.

Recommendation 18 Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

Recommendation 19 The Australian Securities and Investments Commission should publish additional freely available electronic materials designed to help users navigate the legislation it administers. Such materials should include annotated versions of the *Corporations Act 2001* (Cth), *National Consumer Credit Protection Act 2009* (Cth), and *Australian Securities and Investments Commission Act 2001* (Cth).

Interim Report C

Recommendation 20 Offence provisions in corporations and financial services legislation should include the following at the foot of each provision:

a. the words 'maximum criminal penalty';

b. any applicable monetary or imprisonment penalty, expressed as one or more amounts in penalty units or terms of imprisonment; and

c. a note referring readers to any additional rules for calculating the applicable penalty.

Recommendation 21 The definition of 'civil penalty' in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to be based on s 79(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

Recommendation 22 Civil penalty provisions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should include the following at the foot of each provision:

a. the words 'maximum civil penalty';

b. any applicable penalty, expressed as one or more amounts in penalty units; and

c. a note referring readers to any additional rules for calculating the applicable penalty.

Recommendation 23 Offence provisions in corporations and financial services legislation should specify any applicable fault element, unless the provision creates an offence of strict or absolute liability.

Final Report

Recommendation 24 Corporations and financial services legislation should be structured and framed so as to enhance navigability and comprehensibility, and to communicate the fundamental norms of behaviour underpinning the legislation, by applying the following working principles:

a. Provisions should have thematic and conceptual coherence (**coherence**).

b. Related provisions should be proximate to one another (**grouping**).

c. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (**intuitive flow**).

d. The most significant provisions should precede less significant provisions or more technical detail (**prioritisation**).

e. Legislation should be as succinct as practicable (**succinctness**).

f. Provisions should be designed in a way that avoids duplication and minimises overlap (**consolidation**).

g. Legislation should be structured and framed to help users develop and maintain mental models that enhance navigability and comprehensibility (**mental models**).

Recommendation 25 In designing legislation, the following principles should guide decisions about when and how legislative power should be delegated:

a. Democratic accountability, via Parliament and its processes, is crucial to the law's legitimacy (**democratic accountability and legitimacy**).

b. Legislation should be durable and allow for flexibility where necessary (**durability and flexibility**).

c. Provisions that delegate legislative power should be clear and enable users to understand when and how the power may be exercised (**clarity and predictability**).

d. Delegated legislation should not undermine the law's coherence and navigability (**coherence and navigability**).

Recommendation 26 The Attorney-General's Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power consistent with Recommendation 25.

Recommendation 27 When defining words or phrases in corporations and financial services legislation, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.

Recommendation 28 The following working principles should be applied when designing and drafting definitions in corporations and financial services legislation:

When to define

a. Unless necessary, words and phrases bearing an ordinary meaning should not be defined.

b. Words and phrases should be defined if the definition significantly reduces the need to repeat text.

c. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

Consistency of definitions

d. Each word and phrase should be used with the same meaning throughout an Act, and in delegated legislation made under that Act.

e. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

f. Relational definitions should be used sparingly.

g. Where possible, definitions contained in the *Acts Interpretation Act 1901* (Cth) should be relied upon and identified.

Design of definitions

h. Interconnected definitions should be used sparingly.

i. Where practicable, defined terms should correspond intuitively with the substance of the definition.

j. It should be clear to users of legislation whether a word or phrase is defined, and where the definition can be found.

Recommendation 29 In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles.

Recommendation 30 The Department of Treasury (Cth), in consultation with the Office of Parliamentary Counsel (Cth), should review existing guidance relating to the design and drafting of legislation, with a view to producing and maintaining a consolidated guide to legislative design for corporations and financial services legislation.

Recommendation 31 Corporations and financial services legislation should be amended to enact a single, simplified definition of each of the following terms:

a. 'financial product'; and

b. 'financial service'.

These terms should be defined in the *Corporations Act 2001* (Cth) and cross-referenced in other legislation.

Recommendation 32 To implement Recommendation 31:

a. specific inclusions within the definitions of 'financial product' and 'financial service' should, so far as possible, be located in primary legislation; and

b. application provisions, exclusions, and exemptions (where relevant) should be used to limit the application of provisions to specific products, services, persons, and circumstances.

Recommendation 33 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:

a. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth);

b. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth);

c. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth);

d. Part 7.8A of the *Corporations Act 2001* (Cth); and

e. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).

Recommendation 34 Section 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed, and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.

Recommendation 35 Proscriptions concerning false or misleading representations and misleading or deceptive conduct in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be replaced by a single, consolidated proscription.

Recommendation 36 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating:

a. Part 7.7 Divs 1, 2, 3A, 6, and 7;

b. section 949B; and

c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

Recommendation 37 Disclosure regimes in Chapter 7 of the *Corporations Act 2001* (Cth) that require disclosure documents to 'be worded and presented in a clear, concise and effective manner' should be amended to require that disclosure documents also be worded and presented 'in a way that promotes understanding of the information'.

Recommendation 38 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating:

a. sections 912EA and 912EB;

b. Part 7.6 Divs 8A, 8B, and 8C;

c. Part 7.6 Div 9 Subdivs B and C;

d. Part 7.7 Div 3;

e. section 949A;

f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and

g. sections 1012A and 1020AI.

Recommendation 39 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:

a. Part 7.6 Divs 2, 3, and 10;

b. section 963K;

c. Part 7.7A Div 5 Subdiv A, and Div 6;

d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and

e. sections 991B, 991E, 991F, 992A, and 992AA.

Recommendation 40 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 4, 5, 6, and 8.

Recommendation 41 The *Corporations Act 2001* (Cth) should be amended to create a dedicated group of provisions known as the Financial Services Law. Consistent with Recommendations 31–40, the Financial Services Law should comprise restructured and reframed provisions relating to the regulation of financial products and financial services, including:

a. objects clauses identifying the fundamental norms of behaviour underpinning the legislation;

b. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the *Corporations Act 2001* (Cth);

c. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the *Corporations Act 2001* (Cth);

d. Part 7.10 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;

e. Parts 7.10A and 7.10B of the *Corporations Act 2001* (Cth);

f. Part 7.12 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;

g. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth); and

h. a list of terms defined for the purposes of the Financial Services Law.

Recommendation 42 The Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001* (Cth).

Recommendation 43 As detailed in Recommendations 44–52, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended, in a staged process, to implement a legislative model. The legislative model should comprise:

a. primary legislation containing provisions appropriately enacted only by Parliament, including key obligations and prohibitions;

b. a Scoping Order (a single, consolidated legislative instrument) dealing with inclusions, exclusions, class exemptions, and other detail necessary for adjusting the scope of the primary legislation, as appropriate for delegated legislation; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the primary legislation in different regulatory contexts as appropriate.

Recommendation 44 In a manner consistent with existing policy settings, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to create a power to:

a. include classes of products and services or classes of persons within the scope of relevant provisions of the Act;

b. exclude classes of products and services or exempt classes of persons from relevant provisions of the Act; and

c. set out detail that adjusts the scope of relevant provisions of the Act;

in the Scoping Order.

Recommendation 45 Consistent with existing policy settings, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to include a single power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as 'individual relief').

Recommendation 46 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to create a power to make 'rules' that may prescribe matters expressly authorised by provisions of the Act.

Recommendation 47 Rules made under the power described by Recommendation 46 should not deal with matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

Recommendation 48 In a manner consistent with existing policy settings, the powers described by Recommendations 44 and 46 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission.

A protocol should be used to coordinate the exercise of any concurrent power vested in the Minister and the Australian Securities and Investments Commission in respect of the same provisions or subject matters.

Recommendation 49 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. require the Minister and the Australian Securities and Investments Commission to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.

Recommendation 50 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to require that:

a. every legislative instrument made under the power described by Recommendation 44; and

b. every notifiable instrument made under the power described by Recommendation 45;

must be accompanied by a publicly available statement explaining how the instrument is consistent with relevant objects within Chapter 7 of the Act.

Recommendation 51 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to require that the explanatory statement accompanying every legislative instrument made under the power described by Recommendation 46 must address explicitly how the instrument gives effect to relevant objects within Chapter 7 of the Act.

Recommendation 52 Legislative instruments made under the powers described by Recommendations 44 and 46 should be disallowable by Parliament and subject to sunsetting.

Recommendation 53 As part of the staged implementation of the recommended legislative model, the following provisions should be repealed:

a. powers to omit, modify, or vary relevant provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument;

b. powers to include products, services, or persons within the scope of relevant provisions of Chapter 7 of the Act by regulation or other instrument; and

c. powers to exclude products or services, and exempt persons, from the operation of Chapter 7 of the Act by regulation or other instrument.

Recommendation 54 The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

Recommendation 55 As part of implementing Recommendation 41 (the Financial Services Law), the *Corporations Act 2001* (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.

Recommendation 56 Offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

Recommendation 57 Infringement notice provisions in corporations and financial services legislation should include the following at the foot of each provision:

a. the words ‘infringement notice’;

b. any applicable monetary sum, expressed as one or more amounts in penalty units; and

c. a note referring readers to any additional rules for calculating the applicable infringement notice amount.

Recommendation 58 The Australian Government should establish a publicly available data framework for monitoring the development of corporations and financial services legislation. At a minimum, this framework should track:

a. principal primary and delegated legislation in force and enacted annually, including with respect to the number of Acts and legislative instruments and their length in pages and words;

b. offence, civil penalty, and infringement notice provisions in force and enacted annually;

c. notional amendments in force and enacted annually, and the provisions and legislation affected by these notional amendments;

d. powers to make regulations and other legislative instruments in force and enacted annually, and the number of times the powers have been exercised; and

e. regulatory guidance in force and published annually by the Australian Securities and Investments Commission.

List of Background Papers

Background Paper Number	Title	Date
FSL1	**Initial Stakeholder Views**	June 2021
FSL2	**Complexity and Legislative Design**	October 2021
FSL3	**Improving the Navigability of Legislation**	October 2021
FSL4	**Historical Legislative Developments**	November 2021
FSL5	**Risk and Reform in Australian Financial Services Law**	March 2022
FSL6	**Reflecting on Reforms – Submissions to Interim Report A**	May 2022
FSL7	**New Business Models, Technologies, and Practices**	October 2022
FSL8	**Post-Legislative Scrutiny**	May 2023
FSL9	**All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law**	December 2022
FSL10	**Reflecting on Reforms II – Submissions to Interim Report B**	January 2023
FSL11	**Superannuation and the Legislative Framework for Financial Services**	May 2023
FSL12	**Reflecting on Reforms III – Submission to Interim Report C**	September 2023

Glossary

AFCA	Australian Financial Complaints Authority
AFS Licence	Australian financial services licence
AFS Licensee	Holder of an Australian financial services licence
AFSL regime	Australian financial services licensing regime
AGD	Attorney-General's Department (Cth)
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth) sch 2
Corporations Act	*Corporations Act 2001* (Cth)
Corporations Regulations	*Corporations Regulations 2001* (Cth)
Delegated Legislation Scrutiny Committee	Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly Senate Standing Committee on Regulations and Ordinances), Parliament of Australia
FCA (UK)	Financial Conduct Authority (UK)
Financial Services Law	The restructured and reframed provisions of primary legislation relating to the regulation of financial products and financial services recommended by the ALRC in **Chapter 5** of this Report (**Recommendation 41**)
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FSL Schedule	The recommended Sch 1 to the *Corporations Act 2001* (Cth) containing the Financial Services Law, discussed in **Chapter 5** of this Report (**Recommendation 42**)

Legislation Act	*Legislation Act 2003* (Cth)
NCCP Act	*National Consumer Credit Protection Act 2009* (Cth)
OPC	The Office of Parliamentary Counsel (Cth), the agency responsible for drafting Commonwealth laws, publishing the authorised and up-to-date version of Commonwealth laws, and maintaining the Federal Register of Legislation
PDS	Product Disclosure Statement
Prototype Legislation A	Prototype legislative drafting prepared for the purposes of Interim Report A, available on the ALRC website
Prototype Legislation B	Prototype legislative drafting prepared for the purposes of Interim Report B, available on the ALRC website
reformed legislative framework	The reformed legislative framework for financial services regulation that would be produced by implementing the Financial Services Law and the FSL Schedule (discussed in **Chapter 5** of this Report) together with the recommended legislative model (discussed in **Chapter 6** of this Report)
recommended legislative model	The legislative model recommended by the ALRC, discussed in **Chapter 6** of this Report (**Recommendation 43**)
SIS Act	*Superannuation Industry (Supervision) Act 1993* (Cth)
Treasury	Department of the Treasury (Cth)
UK	United Kingdom

Figures and Tables

Figures

Tables

1. Introduction

Contents

'Gaining an understanding of the relevant law … requires hours of study, reference to numerous sections and regulations, which themselves make no sense without reference to numerous definitions, often shrouded in obfuscation, and, needless to say, strewn throughout the *Corporations Act* and the *Corporations Regulations* in various places …'

Imperial Chemical Industries plc v Echo Tasmania Pty Ltd [2007] FCA 1731 [104]

'It might be remarked at this initial stage that Chapter 7 of the *Corporations Act* is drafted in the most obscure and convoluted manner. …

I know it is our job to make plain what is obscure, and I know that commercial lawyers are thought by the legislature to be so able to find loopholes that every possible eventuality must be thought of and covered. However, the main aim is to protect the investing public and the investing public gain little comfort from obscure legislation.'

International Litigation Partners Pte Ltd v Chameleon Mining NL (2011) 248 FLR 149 [152]–[153]

The current landscape

1.1 Corporations and financial services legislation has become unnecessarily complex. Regulated entities incur unnecessary costs when complying with their obligations. Consumers find it difficult to identify their rights. Lawyers struggle to advise their clients with sufficient certainty. Judges have become all too familiar with

confronting the 'usual labyrinthine provisions of the *Corporations Act*'.[1] The Financial Services Royal Commission and subsequent litigation have revealed the significant costs, both economic and human, that result from non-compliance with the law.

1.2 Against this background, the ALRC was given a seemingly straightforward task: simplify and rationalise corporations and financial services legislation.

1.3 The recommendations made in this Final Report are aimed at transforming corporations and financial services legislation from what one judge has described as 'porridge',[2] to a more adaptive, efficient, and navigable legislative framework.

Overview

1.4 This is the Final Report of the ALRC's Inquiry into the Legislative Framework for Corporations and Financial Services Regulation. In this Report, the ALRC makes 35 recommendations intended to simplify corporations and financial services legislation, thereby making it easier to navigate and understand. These recommendations are in addition to 23 recommendations already made by the ALRC in Interim Reports A, B, and C.

1.5 This Report responds to Terms of Reference received on 11 September 2020, which asked the ALRC to consider whether, within existing policy settings, the *Corporations Act* and the *Corporations Regulations* could be simplified and rationalised, particularly in relation to:

- the use of definitions in corporations and financial services legislation (**Topic A**);
- the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards (**Topic B**); and
- how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured (**Topic C**).

1.6 As recognised by the Terms of Reference, this Inquiry is set against the background of the Final Report of the Financial Services Royal Commission, published on 4 February 2019. Crucially, the Financial Services Royal Commission found that the existing legislative framework for corporations and financial services is unnecessarily complex, fails to communicate fundamental norms, and hinders compliance.[3]

1 *Sandys Swim Pty Ltd v Morgan* [2022] FCA 1574 [20].
2 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 [948].
3 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494–6.

1.7 The Terms of Reference are therefore underpinned by a focus on simplification.[4] This means designing legislation that can be more easily navigated and understood, and may therefore more efficiently and effectively achieve its policy objectives.

1.8 In responding to the Terms of Reference, the ALRC has been guided by five overarching principles. As explained in Interim Report A, these principles are based upon the Terms of Reference and are informed by the problems identified in the existing legislative framework.[5]

Principle One: It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible.

Principle Two: Legislation should identify what fundamental norms of behaviour are being pursued.

Principle Three: Legislation should be designed in such a manner as to promote meaningful compliance with the substance and intent of the law.

Principle Four: Legislation should provide an effective framework for conveying how the law applies.

Principle Five: The legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.

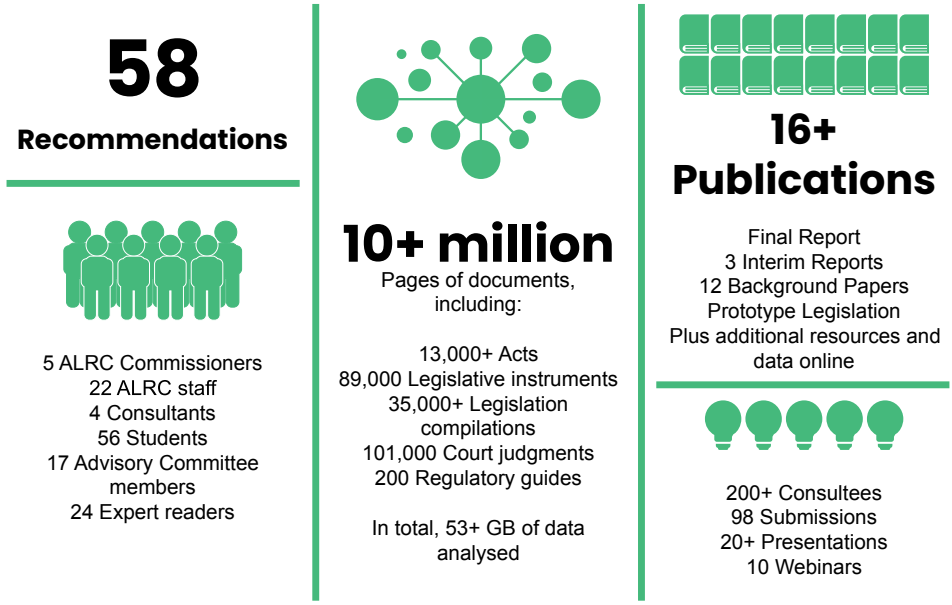
1.9 Key statistics relating to the Inquiry are summarised in **Figure 1.1** below. They underscore the substantial consultation and analysis that support the findings and recommendations in this Report and earlier Interim Reports.[6]

4 In this context, 'simplification' is wholly distinct from 'deregulation': see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.6]; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [26].

5 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]. For further discussion of the principles, see ibid [1.38]–[1.65].

6 A full list of consultees and events is contained in **Appendix A**.

Figure 1.1: Key Inquiry statistics



Focus of the Inquiry

1.10 The ALRC has adopted Chapter 7 of the *Corporations Act* as the primary focus for each topic considered in the Interim Reports.[7] As foreshadowed in Interim Report A, this has helped to achieve coherence and consistency across the three Interim Reports.[8] However, and wherever possible, the ALRC has analysed and sought to identify complexity in the broader legislative framework for corporations and financial services. This includes the *Corporations Act* in general (and not just Chapter 7), Part 2 Div 2 of the *ASIC Act* relating to financial services, the *NCCP Act*, and the *SIS Act* (among others).[9]

1.11 As a result, many of the recommendations made by the ALRC in this Report focus upon the provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* that relate to the regulation of financial products and financial services. The range of these provisions is explained in **Chapter 5** of this Report. Wherever possible, however, the ALRC has sought to make recommendations that could be applied to corporations and financial services legislation in general. This is particularly reflected in the recommendations relating to legislative design discussed

7 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.6], [1.22].
8 Ibid.
9 See, eg, Australian Law Reform Commission, 'Superannuation and the Legislative Framework for Financial Services' (Background Paper FSL11, May 2023).

in **Chapter 4** of this Report, and which underpin the more specific recommendations relating to financial services regulation.

1.12 Significantly, the Terms of Reference do not require the ALRC to consider whether the substantive law and policy settings by which corporations and financial services are regulated require reform. Rather, the focus of the Inquiry has been the extent to which reform of the existing regulatory framework (including Acts, regulations, class orders, other instruments, and guidance documents) can be undertaken within the context of existing policy settings. **Chapter 9** of this Report discusses how technical reform may help to accommodate the increasing pace and scale of policy developments affecting corporations and financial services legislation. During the Inquiry, the ALRC has also sought to identify areas where policy reform may help to further simplify existing legislation.

Interim Reports and this Report

1.13 In line with the Terms of Reference, this Inquiry has proceeded in three stages and produced three Interim Reports:

- Interim Report A examined the use of definitions in corporations and financial services legislation. Interim Report A was tabled in Parliament on 30 November 2021.[10]
- Interim Report B examined the design choices relevant to determining where material is located within the legislative hierarchy, who makes regulation, and how the content of regulation is organised and structured. Interim Report B was tabled in Parliament on 30 September 2022.[11]
- Interim Report C examined the structure and framing of legislation, and in particular how Chapter 7 of the *Corporations Act* may be restructured and reframed. Interim Report C was tabled in Parliament on 22 June 2023.[12]

1.14 Each Interim Report set out the ALRC's problem analysis in respect of Topics A, B, and C. Each Interim Report sought stakeholder feedback, by way of submissions and consultations, in response to the proposals and questions

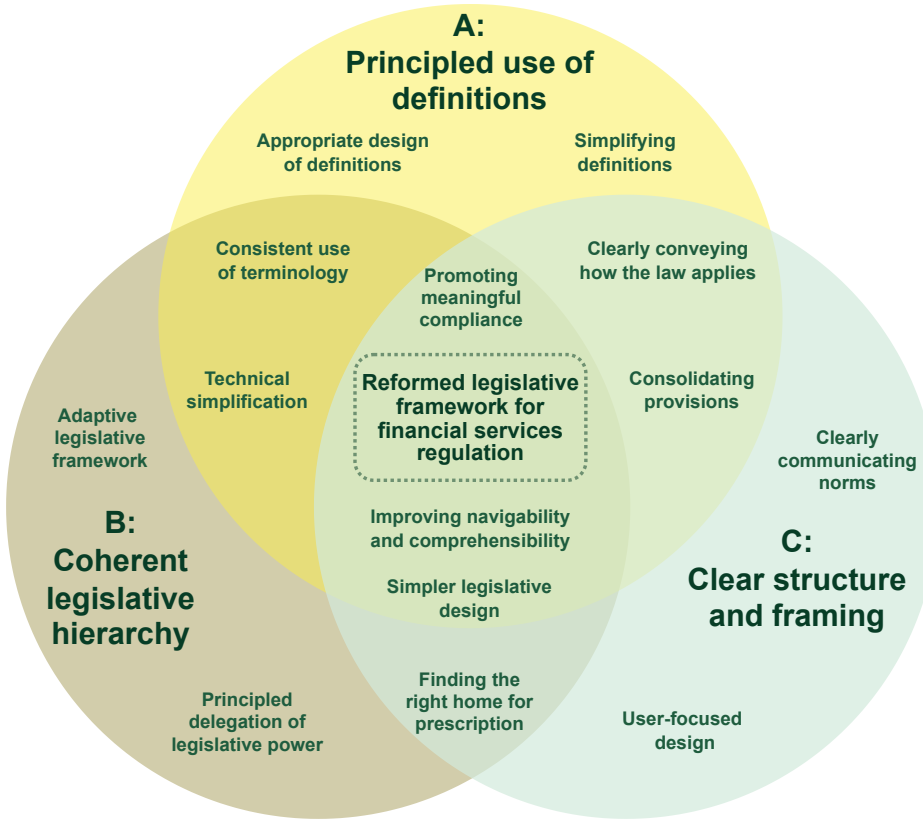
10 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021). For a summary of Interim Report A, see Australian Law Reform Commission, *Interim Report A Summary: Financial Services Legislation* (Report No 137, 2021).

11 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022). For a summary of Interim Report B, see Australian Law Reform Commission, *Interim Report B Summary: Financial Services Legislation* (Report No 139, 2022).

12 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023). For a summary of Interim Report C, see Australian Law Reform Commission, *Interim Report C Summary: Financial Services Legislation* (Report No 140, 2023).

contained in that Interim Report.[13] Where relevant, this Report summarises, and does not merely repeat, the analysis contained in earlier Interim Reports. The ALRC has drawn upon the Interim Reports and stakeholder feedback to inform the recommendations contained in this Report. Footnotes in this Report are used to indicate where relevant analysis can be found in Interim Reports A, B, and C. **Figure 1.2** below illustrates how the topics considered by each Interim Report overlap and correspond to key elements of the ALRC's recommendations.

Figure 1.2: Overlap between Interim Reports A, B, and C



13 The ALRC received 93 submissions in response to the Interim Reports. One submission was also received in response to Background Papers FSL5 and FSL6, and another was received in response to Background Paper FSL11. A further three submissions were received in response to Background Paper FSL9. All submissions are available on the ALRC website: Australian Law Reform Commission, 'Submissions', *Review of the Legislative Framework for Corporations and Financial Services Regulation* <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/submissions>.

1.15 The recommendations in this Report largely reflect proposals and questions contained in Interim Reports A, B, and C, as refined in light of stakeholder feedback. **Appendix C** contains a concordance table outlining how each proposal and question:

- has been incorporated in a recommendation (contained in this Report or an Interim Report) or superseded by a later proposal; or
- is otherwise discussed in this Report because it has not been converted to a recommendation.

1.16 This Report also draws upon:

- the series of 12 Background Papers published by the ALRC during the Inquiry, which have explored particular themes relevant to the Inquiry, as well as summarising stakeholder feedback received in response to each Interim Report;[14] and
- additional resources published on the ALRC website for the purposes of the Interim Reports, including legislative data and prototype legislation.

Recommendations made during the Inquiry

1.17 In addition to the proposals and questions set out in Interim Reports A, B, and C, the ALRC also made 23 recommendations for reform. This is why the first recommendation discussed in this Report is numbered 24. All 58 recommendations made by the ALRC appear in the consolidated list of **Recommendations** in the front pages of this Report.

1.18 Recommendations 1–23 related to issues of technical simplification that do not have significant policy implications and were not subject to divergent views among stakeholders. Recommendations made during the Inquiry were generally in a form capable of being implemented without awaiting delivery of this Report. **Table 1.1** below gives an overview of 13 recommendations that have been implemented in full or in part by legislation enacted before 1 October 2023.

14 The ALRC has published the following Background Papers: Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021); Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021); Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021); Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021); Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022); Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022); Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022); Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023); Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022); Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023); Australian Law Reform Commission, 'Superannuation and the Legislative Framework for Financial Services' (Background Paper FSL11, May 2023); Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023).

Table 1.1: Implementation of Inquiry recommendations

Recommendation number and brief description		Implementation
***Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth)**		
1	Amend s 5(3) of the *ASIC Act*	Complete
2	Repeal definitions that are not 'defined terms' from the *Corporations Act*	Partial
9	Amend the *Corporations Act* to have consistent headings for provisions that define terms	Partial
***Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Cth)**		
3	Amend s 9 of the *Corporations Act* and ss 5 and 12BA(1) of the *ASIC Act* to remove all qualifications that definitions or rules of interpretation apply unless a 'contrary intention appears'	Partial
5	'Unfreeze' the *Acts Interpretation Act 1901* (Cth)	Complete
6	Repeal definitions from the *Corporations Act* and *ASIC Act* that already exist in the *Acts Interpretation Act 1901* (Cth)	Complete
7	Amend the *Corporations Act* to include a single glossary of defined terms	Complete
8	Replace s 7 of the *Corporations Act*	Complete
9	Amend the *Corporations Act* to have consistent headings for provisions that define terms	Complete
14	Repeal redundant and spent provisions from corporations and financial services legislation	Partial
16	Address unclear or incorrect provisions in corporations and financial services legislation	Partial
17	Simplify unnecessarily complex provisions in corporations and financial services legislation	Partial
18	Replace generally applicable notional amendments to corporations and financial services legislation with textual amendments	Partial

A key finding

1.19 This Inquiry has shown that corporations and financial services legislation is unnecessarily complex. Interim Report A demonstrated how the existing use of definitions and defined terms in the *Corporations Act* creates complexity and impedes navigability.[15] Interim Report B demonstrated that the use of delegated legislation made under the *Corporations Act* is a significant source of complexity, particularly where delegated legislation makes notional amendments.[16]

1.20 Chapter 7 of the *Corporations Act*, relating to financial products, services, and markets, is particularly complex. On several measures, including those that relate to definitions and delegated legislation, Chapter 7 is more complex than other chapters of the *Corporations Act*, other financial services legislation, and Commonwealth legislation generally. Furthermore, as Interim Report C demonstrated, the structure and framing of Chapter 7 of the *Corporations Act* do not help users to navigate and understand the legislation or identify its fundamental norms of behaviour.[17]

1.21 Stakeholders have almost universally agreed with the ALRC that the existing legislation is complex and difficult to navigate. There is a widely held view among stakeholders that reform of the legislative framework is necessary to achieve the objectives set out in the Terms of Reference and to reduce the costs of complexity summarised in **Chapter 2** of this Report.

Key concepts

1.22 **Table 1.2** below collates and briefly outlines some of the key concepts explained in Interim Reports A, B, and C that are also used in this Report.

Table 1.2: Key concepts

Term	Meaning
defined term	A word, phrase, or expression that is given a specific meaning in legislation.[18]
definition	A defined term and the meaning given to that term.[19]

15 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.96]–[3.103], chs 4–6.

16 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.30]–[6.36]. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.136]–[3.141], [10.12]–[10.16], [10.52]–[10.67].

17 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) ch 8.

18 See also Australian Law Reform Commission, *Interim Report A: Financial Services* Legislation (Report No 137, 2021) [4.7].

19 See also ibid.

Term	Meaning
delegated legislation	Legislation made by a law-maker other than Parliament, pursuant to a delegation of legislative power (discussed below in this table). The ALRC has used 'delegated legislation' in preference to the synonymous expressions 'secondary legislation' and 'subordinate legislation'.[20]
exclusion	A 'carve-out' of particular products, services, categories of products and services, or circumstances, to change the scope of application of particular provisions.[21]
exemption	A 'carve-out' from an obligation. Obligations attach to persons, so a person or class of persons may be exempted from an obligation.[22]
legislative complexity	'Legislative complexity' principally refers to complexity in understanding legislation.[23] As discussed in Background Paper FSL2 and Interim Report A, all legislation involves at least some level of complexity.[24] The ALRC has therefore sought to distinguish between necessary complexity and unnecessary complexity when analysing corporations and financial services legislation.[25]
legislative hierarchy	Acts of Parliament (or primary legislation) are the original form of legislation and sit at the top of the legislative hierarchy in terms of the source of legislative power.[26] Acts of Parliament may permit the making of delegated legislation. Together, primary legislation and delegated legislation make up the legislative hierarchy. As explained in Interim Report C, the legislative hierarchy establishes the 'vertical' structure of legislation.[27]

20 See also Australian Law Reform Commission, *Interim Report B: Financial Services L*egislation (Report No 139, 2022) [1.33].

21 Australian Law Reform Commission, *Interim Report A: Financial Services L*egislation (Report No 137, 2021) [2.7], [7.7] n 1.

22 Ibid.

23 Ibid [3.25].

24 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [21]–[22]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.25].

25 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [22]–[27]; Australian Law Reform Commission, *Interim Report A: Financia*l Services Legislation (Report No 137, 2021) [3.25].

26 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.135].

27 Australian Law Reform Commission, *Interim Report C: Financial* Services Legislation (Report No 140, 2023) [1.24].

Term	Meaning
legislative power and **delegated legislative power**	'Legislative power' is the power to make statutory law. Under the *Australian Constitution*, this power is vested only in Parliament.[28] Parliaments generally, including the Australian Parliament, may delegate their ability to make laws by delegating legislative power to another body, generally the executive arm of government.[29]
primary legislation	This term is used synonymously with 'Acts of Parliament' to identify legislation that is passed by Parliament.
provision	Any structural element of legislation. For example, as defined in the *Corporations Act*, a 'provision' includes a subsection, section, Subdivision, Division, Part, Chapter, Schedule, or an item in a Schedule.
structure and framing of legislation	The 'structure' of legislation refers to the order in which material and concepts are introduced to users, and other aspects of presentation such as the use of white space and indentation.[30] The 'framing' of legislation refers to the broader task of constructing (or conceiving the design of) legislation to ensure it is most effective in communicating with its relevant audience and complies with accepted standards of legislative design.[31]

Navigating this Report

1.23 This Report comprises 10 chapters (including this Introduction).

1.24 **Chapter 2** of this Report summarises the ALRC's problem analysis and outlines why reform to the existing legislative framework for corporations and financial services is necessary. In particular, it outlines the key sources of unnecessary complexity in the existing legislative framework and the costs created by that complexity. It also discusses, at a high level, what reform should look like.

28 *Australian Constitution* s 1; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.28].

29 Australian Law Reform Commission, *Interim Report B: Financial* Services Legislation (Report No 139, 2022) [1.30]–[1.31].

30 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.25]. See also ibid [1.22]–[1.23], [1.26]–[1.30].

31 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.31]–[1.32]. See also ibid [1.22]–[1.23].

1.25 **Chapter 3** of this Report aims to provide a high-level overview of the key reforms recommended by the ALRC in this Report and explain how they fit together. In particular, it explains the reformed legislative framework for financial services regulation that would be produced by implementing the recommendations discussed in **Chapters 5** and **6** of this Report.

1.26 **Chapter 4** of this Report contains recommendations relating to legislative design, with a focus on principles that are most relevant to the design of corporations and financial services legislation. These principles underpin many of the ALRC's recommendations for reform to corporations and financial services legislation. As discussed in **Chapter 4**, however, many of the principles would be applicable to all Commonwealth legislation.

1.27 **Chapters 5–7** of this Report explain the ALRC's recommended reforms to financial services legislation and how they may be implemented. **Chapter 5** focuses on the primary legislation that regulates financial products and financial services — namely, Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. The recommendations outlined in **Chapter 5** of this Report set out how existing legislation could be restructured and reframed to establish the Act-level architecture of the reformed legislative framework.

1.28 **Chapter 6** of this Report focuses on how financial services legislation could make better and more principled use of the legislative hierarchy than at present. **Chapter 6** sets out the ALRC's recommended legislative model for financial services legislation, which focuses on finding an appropriate 'home' for different parts of the law within the legislative hierarchy. Together, the restructured and reframed primary legislation discussed in **Chapter 5** and the legislative model recommended in **Chapter 6** would comprise the reformed legislative framework.

1.29 **Chapter 7** of this Report explains how the reformed legislative framework may be implemented. The chapter sets out a detailed roadmap for implementation and discusses recommendations relating to implementation taskforces and post-enactment review.

1.30 **Chapter 8** of this Report considers reforms that would complement the recommendations discussed in **Chapters 5** and **6**, but which could also be implemented as standalone improvements to the existing legislation. **Chapter 8** also discusses options for reform that present alternatives to at least some of the recommendations discussed in **Chapters 5** and **6**. These alternatives are not recommended by the ALRC because they are sub-optimal when compared to the ALRC's recommendations, or they would fall outside the Terms of Reference for this Inquiry.

1.31 **Chapter 9** of this Report discusses policy developments in corporations and financial services legislation. In particular, it discusses the increasing pace and scale of policy development since 2010, issues arising in the existing legislation when implementing recent policy initiatives, and how the ALRC's recommendations could facilitate future policy developments.

1.32 Finally, **Chapter 10** of this Report explains the ALRC's novel, data-driven approach to analysing legislation. It discusses how the methods that have underpinned the ALRC's analysis could be taken forward beyond this Inquiry to help manage complexity in corporations and financial services legislation into the future.

1.33 The ALRC sincerely thanks the hundreds of organisations and individuals who have contributed to this three-year Inquiry, including the participants and other contributors recognised in the acknowledgement at the front of this Report. The ALRC has benefited enormously from their experience, expertise, and enthusiasm for reform.

2. The Imperative for Reform

Contents

Introduction

2.1 The findings of this Inquiry demonstrate that the legislative framework for corporations and financial services regulation is no longer fit for purpose. This chapter explores problems in the existing legislative framework and the costs they produce to highlight why reform is necessary to achieve an adaptive, efficient, and navigable legislative framework for corporations and financial services.

2.2 The existing legislative framework is unnecessarily complex, and the tools used to build and maintain the framework — such as notional amendments, conditional exemptions, and proliferating legislative instruments — often create more problems than they aim to solve. Much legislation is unclear and incoherent, and the objective of an adaptive, efficient, and navigable legislative framework remains unrealised. These problems also combine significantly to undermine the substantive content and quality of the law. The ALRC's findings underscore those of the Financial Services Royal Commission: fundamental norms of behaviour are unclear, and the law should be simplified so that its intent can be met.[1]

2.3 Unnecessary complexity in the existing legislative framework imposes unnecessary costs and gives rise to legislative inflexibility. For regulated persons, complexity results in substantial and growing compliance costs incurred in navigating

1 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 9–11, 44.

and understanding the law. Consumers and their advocates face increasing difficulty in ascertaining and exercising consumer rights. For government, the framework provides a poor platform for policy reform and inhibits effective legislative maintenance. Complexity is impacting regulators and courts, who must navigate disparate provisions spread across the legislative framework when attempting to discern the purpose of the legislation. The Delegated Legislation Scrutiny Committee is increasingly raising concerns about legislative instruments,[2] as the legislative toolkit provided to Ministers and ASIC becomes outdated. For the community at large, the complexity of the existing framework results in reduced compliance, diminished consumer protection, reduced competition and productivity, and more expensive products and services.

2.4 This chapter proceeds in four parts. The first part outlines how unnecessary complexity inevitably creates unnecessary costs. The second part examines problems in the existing legislative framework that create complexity, summarising the ALRC's problem analysis in Interim Reports A, B, and C. The third part identifies some of the costs these problems create for stakeholders and the community at large, including in terms of achieving just outcomes. The final part outlines what the imperative for reform means for corporations and financial services legislation.

Why complexity matters

2.5 Through the extensive evidence presented in three Interim Reports and summarised in this chapter, the ALRC has demonstrated that corporations and financial services legislation is unnecessarily complex and that this problem is pervasive. Nonetheless, the implications of this complexity may still seem an abstract and merely intellectual concern.

2.6 Therefore, if meaningful reform of the legislative framework is to be achieved, the practical implications must be recognised: unnecessary complexity creates unnecessary costs, and the greater the complexity, the greater those costs. This part briefly explores how complexity generates costs.

2.7 The complexity identified by the ALRC makes substantial parts of corporations and financial services legislation needlessly difficult to find, navigate, and understand. Such legislation directly affects businesses, consumers, and the community at large.

- For **businesses**, complexity makes it harder to operate and innovate, as they more frequently require legal advice and adopt compliance processes that are made more costly by unnecessary legislative complexity. Complexity in corporations and financial services legislation impacts a large proportion of the business community, emphasising the potential to achieve economic

2 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.72].

efficiencies and enhanced productivity by reducing that complexity.[3] This is particularly important at a time when slow productivity growth is impacting living standards.[4]

- For **consumers and investors**, complexity makes it harder to identify and enforce the protections and rights afforded by the legislation. This may increase the cost for consumers to understand and enforce their rights, as they expend more time and resources to navigate their legal entitlements or pay for legal advice. Unnecessarily complex legislation may even mean that consumers and investors do not exercise their rights at all, despite the existence of internal and external dispute resolution processes on a low-cost or cost-free basis.
- Legislation that is harder to understand and comply with is less likely to be effective and achieve the desired policy outcomes, costing the **community at large**. As the Financial Services Royal Commission demonstrated, failure to achieve compliance costs the community, as well as consumers and investors. These costs are evidenced by the significant non-pecuniary harms suffered by those whose rights are undermined or lost by reason of this complexity and the failure to meet community expectations.[5] The ultimate outcome of non-compliance, made more likely by unnecessary legislative complexity, is a loss of trust in financial institutions and the financial system.[6] The failure to achieve policy objectives also means that the benefits of those policies are not realised, such as better products or services and better outcomes for consumers and investors.

2.8 The unnecessary complexity identified by the ALRC is also likely to have broader economic costs. It creates barriers to entry for new firms or international competitors, who must have both the resources and the willingness to confront the complexity of the existing legislative framework. In creating such barriers, and by increasing the cost of bringing new financial products and services to market, unnecessary complexity is likely to reduce the range of financial products and services available to Australian consumers and investors.

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3 For example, and as discussed further below, the total regulatory compliance costs incurred by Macquarie Group Limited in the year ending 31 March 2023 were approximately $1 billion. Reducing the compliance costs of that one institution by just 1% would save $10 million a year: see Macquarie Group Limited, 'Presentation to Investors and Analysts: Result Announcement for the Full Year Ended 31 March 2023' (Presentation, 5 May 2023) 36.

4 Commonwealth of Australia, *Intergenerational Report 2023: Australia's Future to 2063* (Report, August 2023) 79–80.

5 The Financial Services Royal Commission and its numerous case studies illustrated the importance of community standards and expectations: see Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 2, February 2019).

6 Financial Stability Board, *Supplementary Guidance to the FSB Principles and Standards on Sound Compensation Practices: The Use of Compensation Tools to Address Misconduct Risk* (March 2018) 3; Australian Financial Complaints Authority, *Submission 79*. The loss of trust was also recognised in the name given to the Government's response to the Financial Services Royal Commission: Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Implementation Roadmap* (2019).

2.9 The effectiveness and efficiency of the legislative framework for corporations and financial services affects all Australians, as do the costs of unnecessary complexity. The total wealth of Australian households in financial assets totalled $6.9 trillion in June 2023, or almost half of all domestic household wealth.[7] The *Corporations Act* regulates the conduct of over 3.2 million companies in Australia,[8] tens of thousands of financial services firms and financial advisers, and financial markets worth trillions of dollars.[9] Even minor inefficiencies resulting from legislative complexity can have a profound impact on markets as large and important as the financial services market, on the operation of companies, and the value of household wealth, including superannuation.

Problems with the existing legislative framework

2.10 This part outlines the principal problems with the existing legislative framework and discusses how they impact users of the legislation. This part focuses on the *Corporations Act*, particularly Chapter 7 of that Act, and Part 2 Div 2 of the *ASIC Act*. Existing problems are highlighted in **Figure 2.1** below, and can be summarised as follows:

- the **extensive use of notional amendments** in delegated legislation to modify the effect of other legislation, thereby creating substantial uncertainty as users cannot assume that the text of provisions reflects the law as it is applied;
- an **incoherent legislative hierarchy**, partially caused by the use of notional amendments, with the result that users cannot predict where provisions will be located across primary and delegated legislation;
- a **legislative maze** in which hundreds of powers to make delegated legislation result in hundreds of regulations and other legislative instruments, creating a dense and highly interconnected legislative framework in which primary legislation must be read alongside dozens of provisions in delegated legislation;
- **poorly designed primary and delegated legislation** that fails to prioritise key messages, including fundamental norms, and does little to help users find legislation relevant to their circumstances, thereby forcing users to read through numerous provisions to identify their potential relevance or to rely on regulatory guidance by default; and

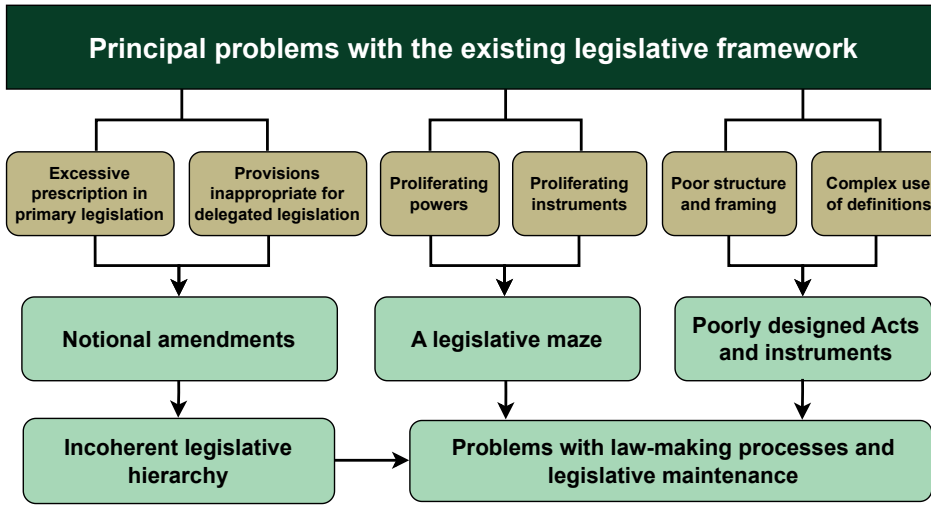
7 Australian Bureau of Statistics, 'Australian National Accounts: Financial and Wealth' (June 2023) <www.abs.gov.au/statistics/economy/national-accounts/australian-national-accounts-finance-and-wealth/jun-2023>.

8 Australian Securities and Investments Commission, 'Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics> (as at September 2023).

9 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.35]–[3.40].

- **problems with law-making processes and legislative maintenance** that are both a cause and a symptom of the complexity of the existing legislative framework, resulting in legislation in which redundant provisions, errors, and design flaws go unaddressed.

Figure 2.1: Summary of problems



Notional amendments

2.11 Notional amendments are a major source of complexity and incoherence affecting corporations and financial services legislation. Notional amendments, also known as modifications, are provisions that change the legal effect of another provision without changing the text of that provision. Notional amendments can be made by either the Minister (via regulations) or ASIC. Stakeholders have almost universally observed that notional amendments make the law harder to navigate and understand.[10] The problems created by notional amendments are illustrated by **Examples 2.1** and **2.2** below.[11]

10 See, eg, Stockbrokers and Financial Advisers Association, *Submission 19*; CPA Australia, *Submission 42*; Financial Planning Association of Australia, *Submission 59*; King Irving, *Submission 60*.

11 For a visual illustration of the complexity created by notional amendments, see Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022) 9–15 (Appendix C).

Example 2.1: The invisibility of notional amendments

Notional amendments insert, omit, or substitute provisions without making any textual amendments. The amendments are unknowable on the face of the notionally amended legislation. For example, s 1012G of the *Corporations Act* was replaced by a notional amendment in 2005. The text of the provision in the Act has not had any legal effect since then, and the 'real' s 1012G is in reg 7.9.15H of the *Corporations Regulations*.

Similarly, s 708(8)(c) of the *Corporations Act* has been notionally amended by reg 6D.5.02 of the *Corporations Regulations* such that the reference to '6 months' in the Act no longer applies, and the actual period is '2 years'. The Act's clear textual reference to '6 months' has been rendered redundant and potentially misleading. Users of the legislation must be aware of the relevant notional amendments to understand the true effect of the law.

Example 2.2: An opaque puzzle

ASIC Class Order 14/1262 notionally amends s 1012D of the *Corporations Act*, which is also notionally amended by reg 7.9.07FA of the *Corporations Regulations*. To understand the law, users must therefore read the original s 1012D of the Act, alongside the subsection notionally inserted by the *Corporations Regulations*, and the additional six subsections notionally inserted by *ASIC Class Order 14/1262*.

2.12 Notional amendments are frequently used to alter the substance of legislation, such as by imposing new obligations, omitting provisions, or substituting existing regulatory requirements.[12] The effect of notional amendments is that 'there is not one current version of the law; there are several'.[13] In this way, notional amendments also challenge 'the rule of law principles that the law should be knowable and accessible; that it should be certain; and that it should be general in its application'.[14]

Notional amendments are uniquely problematic in financial services

2.13 The ALRC's analysis has found that the *Corporations Act* is unique in the extent to which it uses notional amendments. In conducting the first ever stocktake of notional amendments affecting the *Corporations Act*, the ALRC identified over 1,200 distinct notional amendments in force, affecting over 600 provisions of the

12 See, eg, Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1, 19; Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 304.

13 Van Geelen (n 12) 307 (emphasis omitted). See also Bottomley (n 12).

14 Van Geelen (n 12) 306–7.

Act and the *Corporations Regulations*.[15] The ALRC reviewed over 300 legislative instruments to identify that notional amendments were spread across more than 95 of those instruments.

2.14 Over half of the 1,200 notional amendments identified by the ALRC potentially affected all persons subject to the notionally amended provision, while over 20% affected a broad group of persons subject to the amended provision. Notional amendments are therefore not an issue affecting only a small group of people. Piecing together this 1,200-piece puzzle and the hundreds of affected provisions is challenging and costly for businesses and legal professionals. Moreover, notional amendments have only increased in number. The ALRC has identified over 200 new notional amendments created since this Inquiry commenced in September 2020.

2.15 Notional amendment powers create significant legislative uncertainty. The *Corporations Act* includes very broad notional amendment powers by which entire parts of Chapter 7 can be modified by regulations or ASIC legislative instruments, covering hundreds of sections. This means that users can never be sure that the text of provisions reflects the law as it actually applies. A section could have been notionally amended by one of more than 1,400 regulations in the *Corporations Regulations* or by a provision of one of hundreds of ASIC legislative instruments. Although many of the provisions of the *Corporations Act* have not been notionally amended, users must be aware that many *could* have been modified and go searching to double check whether this is the case. As a result, users of the *Corporations Act* often worry that they may be missing a piece of the legislative puzzle set out before them.[16]

2.16 Moreover, users may find that crucial provisions have been created by notional amendments, including entire regulatory regimes. For example, dozens of notional sections have been added to the *Corporations Act* to regulate managed discretionary account services,[17] investor directed portfolio services,[18] and time-sharing schemes.[19] Disclosure regimes that are invisible on the face of the *Corporations Act* have been established through notional amendments, including in respect of short-form and shorter PDSs.[20] These alternative or tailored regulatory regimes are difficult to find

15 Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022).

16 See, eg, Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [5]; Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.9].

17 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.159]–[7.162]; *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968* (Cth).

18 *ASIC Class Order — Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme* (CO 13/762) (Cth); *ASIC Class Order — Investor Directed Portfolio Services* (CO 13/763) (Cth). In advance of their sunsetting on 1 October 2023, ASIC has remade these instruments in substantially the same form: *ASIC Corporations (Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme) Instrument 2023/668* (Cth); *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669* (Cth).

19 *ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272* (Cth).

20 *Corporations Regulations 2001* (Cth) schs 10BA, 10C–10F.

and even more difficult to understand, given the need to 'read in' and 'fit' the notional amendments to the text of the provisions that they notionally amend.

A legislative Hydra[21]

2.17 Notional amendments can also act as a source of power to make delegated legislation. This is a feature of legislative design that undermines meaningful limits on executive law-making. The broad powers to create notional amendments in the *Corporations Act* have been used to create other powers for the executive government to produce delegated legislation. For example, since 2005, reg 7.9.16O(1) of the *Corporations Regulations* has modified s 1017D of the *Corporations Act* to allow the regulations to 'specify requirements as to the presentation, structure and format of a periodic statement'. This power, created by notional amendment, has in turn been used to create multiple obligations.[22]

2.18 For users of the legislation, modifications can therefore create extensive uncertainty. For example, reg 7.7.09AB of the *Corporations Regulations* notionally amends the *Corporations Act* to create a power for ASIC to make a legislative instrument. Users must first be aware of this notional amendment and then seek to find any ASIC legislative instruments made under this power. Eventually, they will realise that no instrument made under the power is currently in force.[23]

A problem, but also a symptom

2.19 Notional amendments are, in part, symptoms of excessively prescriptive legislation and the corresponding need for legislative adjustment. Notional amendments raise fundamental questions as to whether the notionally amended provisions of the Act would be better located in delegated legislation and whether primary legislation should be less prescriptive. The existence of notional amendments suggests problems in the design of the legislative hierarchy and its inability to tailor regulatory regimes without unnecessary complexity.[24]

Incoherent legislative hierarchy

2.20 Corporations and financial services legislation, and particularly Chapter 7 of the *Corporations Act*, does not adopt a coherent legislative hierarchy. This means that provisions are inconsistently and unpredictably located in primary legislation, delegated legislation, or administrative instruments. In short, anything could be anywhere, meaning users need to look everywhere. Added to this, users of the legislation must also consider a large volume of regulatory guidance issued by ASIC. Some stakeholders have observed to the ALRC that there are provisions of the

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21 In Greek and Roman mythology, a Hydra is a serpentine water monster with many heads.

22 *Corporations Regulations 2001* (Cth) reg 7.9.16O(2), sch 10 pt 3.

23 Though the power has been exercised in the past, the relevant instruments are no longer in force: *ASIC Class Order — Dollar Disclosure: Amounts Denominated in a Foreign Currency* (CO 04/1435) (Cth); *ASIC Class Order — Intra-Fund Superannuation Advice* (CO 09/210) (Cth).

24 For an example, see the discussion of the legislation regulating corporate collective investment vehicles (commonly known as CCIVs) in **Chapter 9** of this Report.

existing legislation that would be better expressed as guidance, and that conversely some guidance is perceived as binding law.

2.21 The incoherent legislative hierarchy mainly results from two factors: excessively prescriptive provisions in primary legislation and provisions inappropriate for delegated legislation. As the above discussion of notional amendments demonstrates, the incoherent legislative hierarchy is not only a problem in itself, but also the source of other complex approaches to law-making that make legislation harder to navigate and understand.

Excessively prescriptive primary legislation

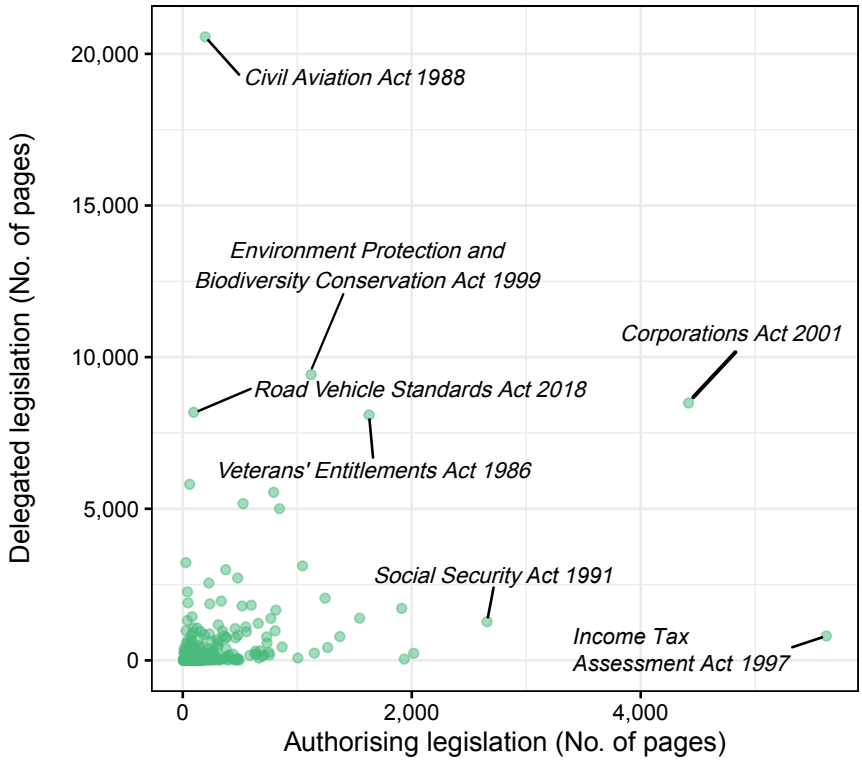
2.22 Problems with the legislative hierarchy largely result from placing excessively prescriptive provisions in primary legislation. Within the existing legislative framework, this means that adjustments to the legislation must occur through parliamentary amendments, notional amendments, or conditional exemptions. The time available for parliamentary amendments is limited and would be unproductively spent tweaking the law for particular classes of persons or circumstances. Therefore, complex notional amendments and conditional exemptions, proliferating by their hundreds, are the more common tool used to address problems in over-prescriptive primary legislation. The ALRC's recommendations are aimed at reducing the prescriptiveness of the *Corporations Act* and adopting a principled approach to the use of delegated legislation.

2.23 The ALRC has illustrated the growing volume and prescriptiveness of primary legislation over the past two decades.[25] Since 2001, the *Corporations Act* has almost doubled in length to more than 4,000 pages and over 800,000 words. Chapter 7 of the Act has similarly almost doubled to 265,000 words since the *Financial Services Reform Act 2001* (Cth) commenced in 2002, making the chapter alone equivalent to the 10th longest Act of Parliament. The prescriptiveness and broader incoherence of the existing legislative hierarchy are illustrated by **Figure 2.2**. The *Corporations Act* occupies the 'worst of both worlds', in that both primary and delegated legislation are exceptionally long. As the ALRC has previously noted, the *Corporations Act* is not realising the potential benefits of delegated legislation, particularly when compared to other regulatory regimes that make more effective use of both primary and delegated legislation.[26]

25 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.55]–[3.73], [3.87]–[3.89].

26 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.14].

Figure 2.2: Length of enabling legislation relative to delegated legislation



2.24 The existing provisions of the *Corporations Act* have steadily grown longer as more detail has been added.[27] Every part of Chapter 7 of the *Corporations Act* that existed on commencement (11 March 2002) has grown longer. Part 7.6 has grown by 150%, while the conduct and disclosure provisions in Part 7.8 and Part 7.9 have increased in length by 45% and 59%, respectively. Provisions are regularly added and amended (usually to include more detail) but are rarely removed from the *Corporations Act*.[28] In particular, financial products and services disclosure is an area in which primary legislation has become excessively prescriptive.[29] The ALRC's Prototype Legislation B demonstrated that many provisions presently in the Act could better be located in delegated legislation.[30] The Act provisions in Prototype Legislation B are approximately one third the length of their equivalent provisions in the *Corporations Act*.[31]

27 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.87]–[3.89].
28 Ibid [3.87].
29 Ibid [9.99]–[9.101].
30 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.48]–[2.49].
31 Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B — Additional Resources, September 2022) [3].

2.25 The legislative tools given to the Minister and ASIC have added to the incoherent legislative hierarchy. These tools, which have frequently taken the form of powers to make notional amendments and conditional exemptions, serve a range of purposes. Most notably, they may be used to tailor excessively prescriptive provisions of the primary legislation to accommodate particular products, persons, and circumstances. As Treasury observed in its submission to the Financial Services Royal Commission, primary legislation 'that is complex and highly prescriptive requires regular updating to ensure it remains fit-for-purpose'.[32] The frequent use of these relatively blunt tools to update the primary legislation reflects a departure from the principle that more detailed material can be contained in delegated legislation as a way of 'leaving the Act uncluttered to deal with the core policy'.[33]

2.26 Overall, the incoherent legislative hierarchy makes it difficult for users of the legislation to predict where provisions will be located and, consequently, to find relevant provisions. Over-prescriptiveness creates a need for extensive exemptions and exclusions from provisions of the primary legislation, or the creation of tailored regulatory regimes through notional amendments or conditional exemptions.[34] The lack of a coherent legislative hierarchy means that Chapter 7 of the *Corporations Act* lacks a framework that can adapt to and support changes in regulatory philosophies without generating significant complexity.[35]

Provisions inappropriate for delegated legislation

2.27 The incoherence of the legislative hierarchy is also evident in the placement of provisions in delegated legislation that would be more appropriately located in primary legislation. Provisions that should be in primary legislation include legislative and administrative powers, and significant elements of regulatory schemes.[36]

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32 Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Undated) [44].

33 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [77].

34 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.129]–[3.135].

35 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [5]. See also Nicholas Simoes da Silva and William Isdale, 'Risk and Reform in Australian Financial Services Law' (2022) 96 *Australian Law Journal* 408.

36 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.10]–[3.19], [3.58]–[3.73].

Example 2.3: Major new obligations in notional amendments

In 2017, ASIC used its notional amendment powers to ban 'flex commissions' in relation to credit contracts.[37] ASIC had found such commissions caused significant consumer harm.[38] The legislative instrument contains new obligations, breach of which attract civil penalties of 2,000 penalty units. An obligation with a penalty of this amount should generally be in primary legislation.[39] The use of notional amendments (rather than textual amendments to the primary legislation) to implement such reforms exemplifies the lack of a principled legislative hierarchy for the *Corporations Act*.

2.28 As noted above, the ALRC has identified several instances in which powers to make delegated legislation are themselves located in delegated legislation.[40] In total, there are at least 14 such powers in the *Corporations Regulations*.[41] Powers to make delegated legislation should generally only appear in primary legislation. Further, and as discussed in Interim Report B, corporations and financial services legislation is also the only area in which penalties of imprisonment are prescribed by delegated legislation.[42]

2.29 These examples illustrate the incoherence of the *Corporations Act* legislative hierarchy. To resolve this, the ALRC does not suggest that material should simply be moved from primary legislation to delegated legislation, or vice versa.[43] Instead, as discussed in **Chapter 7** of this Report, the process of reform should involve identifying the proper location for provisions within the reformed legislative framework.

37 *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* (Cth).

38 Australian Securities and Investments Commission, *Attachment 2 to CP 279: Regulation Impact Statement: Flex Commission Arrangements in the Car Finance Market* (2017).

39 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.20].

40 See, eg, ibid [2.15].

41 *Corporations Regulations 2001* (Cth) regs 7.6.01AB, 7.6.08C, 7.7.09AA(2), 7.7.09AB(b), 7.7.09BA(2), 7.7.09BB(b), 7.8.09(2), 7.8.09A, 7.8.09A, 7.9.16O, sch 10A items 5A.2, 5B.2, 5C.2, 5D.2.

42 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.80]. The *Corporations Regulations*, the *National Consumer Credit Protection Regulations 2010* (Cth), and two ASIC legislative instruments collectively provide for nine terms of imprisonment between six months and two years.

43 The ALRC has discussed in detail matters that would not be appropriate for scoping orders and rules: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.23], [2.53]–[2.56].

A legislative maze

2.30 Users of corporations and financial services legislation are often confronted by a legislative maze with winding paths and dead-ends to reach even simple destinations.[44] This creates unnecessary complexity and difficulty in finding and understanding the law. The legislative maze is created by two main problems in the existing legislative framework: proliferating powers and proliferating instruments.

Proliferating powers

2.31 The *Corporations Act* contains an exceptional number of delegated legislative powers.[45] The Act contains more than 950 powers to make delegated legislation, including:

- more than 880 regulation-making powers in the Act, with additional powers notionally inserted through the *Corporations Regulations*; and
- approximately 68 powers in the Act for ASIC to make delegated legislation, often in the form of broad 'exemption and modification' (notional amendment) powers.

2.32 Many of these powers exist for specific purposes, such as to vary a particular monetary threshold, specify the content of a particular definition, or specifically include a person, product, or circumstance. Other powers, most notably powers to make exemptions and notional amendments for entire chapters or parts of the *Corporations Act*, have far greater scope. The *Corporations Act* also contains several rule-making powers. These powers often have broad thematic scope but are much narrower in what they legally permit than notional amendment powers.

2.33 Legislative amendments continue to add delegated legislative powers. For example, amendments relating to employee share schemes made by the *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022* (Cth) introduced 24 powers for regulations or ASIC legislative instruments to prescribe matters for the purposes of Part 7.12 Div 1A of the *Corporations Act*. **Chapter 9** of this Report further discusses the employee share scheme provisions and how the ALRC's recommendations could better facilitate similar reforms in the future.

2.34 The proliferating powers create a complex web of connections between primary and delegated legislation, in which provisions of the Act make little sense without extensive regard to provisions in delegated legislation.[46] Moreover, despite

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44 Justice Rares, for example, wrote of the 'labyrinth' and 'legislative porridge' he needlessly had to wade through: *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 [947]–[948]. See also *Sandys Swim Pty Ltd v Morgan* [2022] FCA 1574 [20].

45 Analysis of other Commonwealth Acts, using data from the ALRC DataHub, suggests that no other Act has as many references to regulations as the *Corporations Act*: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.78].

46 Ibid [3.112]–[3.116]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.40]–[6.48].

hundreds of powers going unexercised,[47] users of the legislation must spend time and resources to determine whether delegated powers have been exercised and, if so, how and where. The web of interconnections that users then face can be large. The recommended legislative model, discussed in **Chapter 6** of this Report, borrows from the less complex and interconnected approaches to delegated legislative power in other regulatory regimes.[48]

Proliferating instruments

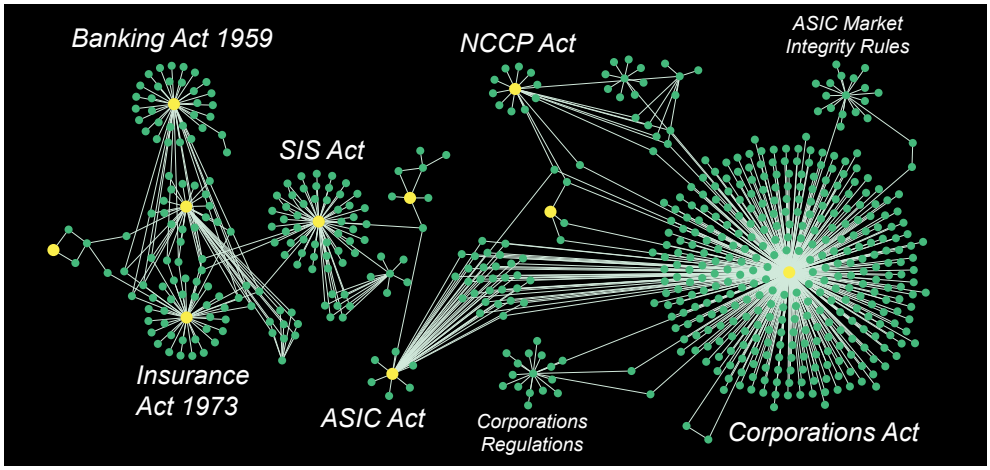
2.35 The *Corporations Act* is also notable in terms of the use of delegated legislative powers to create legislative instruments. As the ALRC noted in Interim Report A, a large number of legislative instruments can make a legislative scheme less navigable and more complex.[49]

2.36 In addition to hundreds of poorly structured regulations in the *Corporations Regulations*,[50] users must identify and navigate hundreds of Ministerial and ASIC legislative instruments applicable to corporations and financial services legislation. These range in length from one page to hundreds of pages. It is generally difficult to identify instruments that may be relevant to a particular person, circumstance, product, or service. **Figure 2.3** below highlights the scale of the challenge facing users of corporations and financial services legislation as they confront the proliferation of legislative instruments in this area. The present legislative framework can be likened to a universe, with the *Corporations Act* subject to a vast galaxy of legislative instruments with distinct solar systems for regulations and rules. **Figure 2.3** shows all the legislative instruments authorised by various corporations and financial services Acts. Each green dot is a legislative instrument, and each yellow dot is an Act. Some instruments are authorised by multiple Acts or other instruments and are therefore connected to multiple dots.

2.37 As discussed in **Chapter 6** of this Report, the ALRC's recommended legislative model seeks to produce a legislative hierarchy in which users would navigate a much smaller number of thematically structured legislative instruments, which may be known as 'rulebooks', alongside the single Scoping Order.

47 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.44].
48 Ibid [6.47]–[6.48].
49 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 128–9.
50 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.16], [6.59], [8.53].

Figure 2.3: Proliferating legislative instruments create a complex web



Poorly designed primary and delegated legislation

2.38 Throughout this Inquiry, the ALRC has demonstrated problems in the structure and framing of corporations and financial services legislation. In particular, the ALRC has shown how Chapter 7 of the *Corporations Act* fails to prioritise key messages and does not help users find provisions that apply to their circumstances. The ALRC also identified significant issues in relation to how definitions are designed and used in the *Corporations Act.*

Failing to prioritise key messages

2.39 Many provisions in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* are structured and framed such that their purpose and context are hard to discern, and fundamental norms of behaviour are not clearly communicated. Building on the observation of the Financial Services Royal Commission that fundamental norms are not sufficiently clear,[51] the ALRC has provided numerous examples of provisions that are structured in a way that makes it difficult to identify and understand the core requirements of the legislation.[52] Fundamental norms and principles are often obscured as a result.

51 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 1) 8–11, 17, 44, 496.

52 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.19], [8.46]–[8.49].

2.40 Moreover, the structure of obligations can mask the fact that that they form part of a single and otherwise coherent regulatory scheme.[53] Financial advice is a notable example in this respect. Advice provisions are spread incoherently across four different parts of Chapter 7 of the *Corporations Act*.[54] The structure of these provisions means that the law fails to communicate that advice providers are subject to a highly developed and tailored regulatory regime.[55] This makes it difficult to identify the fundamental obligations and norms that apply to their conduct.[56] The failure to prioritise key messages also obscures the context that such messages should provide for more detailed obligations. This, in turn, makes the legislation harder to interpret and apply.[57]

Failing to help users find the law

2.41 Frequently, related provisions in Chapter 7 of the *Corporations Act* are not grouped together or prioritised in a way that helps users of the legislation understand whether the law applies to a particular case or not. The lack of grouping and prioritisation often means that users — including regulated persons, regulators, and courts — must read their way through the text of provisions to determine whether they may be relevant, with little or no help from the structure and framing of provisions.[58]

2.42 For example, the prohibition on hawking financial products applies to any person who offers financial products to retail clients.[59] Yet, the prohibition appears among provisions that only apply to AFS Licensees. The significant range of users potentially covered by these generally applicable provisions must therefore search all the parts and divisions of Chapter 7 of the *Corporations Act* to be sure that they do not contain relevant provisions. Similarly, as noted above, financial advice provisions are spread across Chapter 7. Identifying these advice-related provisions without prior knowledge requires extensive review of Chapter 7.[60] The recommendations in **Chapter 5** of this Report to restructure and reframe financial services-related provisions of Chapter 7 of the Act are aimed at making provisions easier to find based on their application and significance.

53 Ibid [8.48]–[8.49].
54 Ibid [4.12].
55 Ibid [4.14].
56 Ibid [4.15].
57 Ibid [4.16]–[4.18].
58 As discussed in **Chapter 5** of this Report, the ALRC's recommended restructuring and reframing seeks to address these problems, helping users easily find the law that applies to their circumstances.
59 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [8.46], [8.51].
60 Ibid [8.52].

Complex definitions

2.43 Appropriate and effective use of definitions is an important element in the design of user-friendly legislation.[61] However, substantial complexity is produced by the use and design of definitions in the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. Broadly, these problems relate to the following:

- **Terms are sometimes defined unnecessarily or inappropriately.** In Interim Report A, the ALRC identified terms that were unnecessarily defined in corporations and financial services legislation,[62] including because they are infrequently or never used.[63] The *Corporations Act* also uses poorly designed terms and definitions, such as unintuitive abbreviations,[64] or definitions that impose obligations or vary the application of the law rather than clarify meaning.[65] Overall, the extent to which corporations and financial services legislation pursues precision through definitions is arguably extreme, and a significant driver of complexity.[66]
- **Many terms in corporations and financial services Acts are defined inconsistently.**[67] This creates unnecessary complexity as users must identify the applicable definitions and then understand the circumstances in which they apply.[68] For example, key terms such as 'financial product' are defined differently in related Acts, and even in different provisions of the same Act. This makes it difficult for users to keep in mind which particular definition of a term applies in a particular provision. This complexity is compounded by relational definitions that only take on their legislatively defined meaning in relation to particular subject matter, circumstances, or concepts,[69] and of which the *Corporations Act* makes frequent use.[70]
- **Definitions are not always well designed.** For example, the ALRC has identified various ways in which definitions in corporations and financial services legislation could be made more readable and navigable for users. These include limiting the use of interconnected definitions,[71] using intuitive labels for defined terms,[72] and making clear whether definitions are exhaustive or inclusive.[73]

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61 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.19]–[4.25].
62 Ibid [4.68]–[4.69].
63 Ibid [4.71]–[4.72], [4.129]–[4.142].
64 Ibid [4.82]–[4.83].
65 Ibid [4.100]–[4.101].
66 Ibid [4.94], [4.112]–[4.118].
67 Ibid [5.10]–[5.13], [5.18]–[5.20], [5.24]–[5.31]. The ALRC noted a high degree of consistency in defined terms between primary and delegated legislation (compared to between Acts), though some improvements were still possible: see ibid [5.100]–[5.106].
68 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [5.13]–[5.16].
69 Ibid [5.49]–[5.56].
70 Ibid [5.60]–[5.81].
71 Ibid [6.5]–[6.12].
72 Ibid [6.13]–[6.40].
73 Ibid [6.41]–[6.56].

2.44 As noted in **Chapter 1** of this Report, Parliament has passed legislation that implements several of the ALRC's recommendations relating to definitions.[74] These include creating a single glossary for the *Corporations Act* and repealing unnecessary definitions.

Problems with law-making processes and legislative maintenance

2.45 Problems with law-making processes and legislative maintenance are both a cause and a symptom of complexity in the existing legislative framework. Short timeframes for new legislative initiatives and insufficient legislative maintenance may contribute to the complexity of the existing legislative framework. However, legislative initiatives and legislative maintenance are both made more difficult by the complexity of the existing framework, emphasising that the framework provides a poor platform for policy development.[75]

Process problems and insufficient maintenance

2.46 Following feedback from stakeholders, the ALRC has previously examined how short timeframes for policy and legislative development may impact the quality of legislation and result in the creation of complex notional amendments and conditional exemptions.[76] The ALRC's findings suggested that processes for legislative maintenance may be inadequate. For example, in Interim Reports A and B, the ALRC identified more than 100 redundant provisions and definitions in corporations and financial services legislation.[77] The ALRC noted how maintenance processes could be enhanced to identify and manage redundant legislation.[78]

2.47 The ALRC also noted that a risk when administering legislation as large and rapidly evolving as the *Corporations Act* and *Corporations Regulations* is to focus on new reforms (the 'flow' of legislation) at the expense of updating existing provisions (the 'stock' of legislation). The ALRC identified several ways in which existing legislation had been neglected, meaning that incorrect, unclear, or outdated drafting went unaddressed.[79] While Treasury operates a law improvement program aimed at maintaining the quality of its portfolio legislation, the problems identified by

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74 *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth) sch 2; *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Cth) schs 1–3.

75 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.13]; Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [4]–[5]. See also **Chapter 9** of this Report.

76 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.52].

77 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.129]–[4.131]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.4]–[7.8].

78 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.9]–[7.11].

79 Ibid [7.15]–[7.17].

the ALRC suggest that the time and resources dedicated to legislative development and maintenance may be inadequate.

Complexity creates law-making issues

2.48 Law-making processes are likely undermined by the complexity of the existing legislative framework for corporations and financial services. For example, the ALRC has identified a range of regulations and ASIC instruments that seek to fix errors or unintended consequences in the law.[80] As the ALRC explored in Interim Report B, these errors may indicate that an Act has become too complex to administer, particularly given that problems arise even when sufficient time is available to develop new legislation.[81]

2.49 These problems can also affect the role that non-government stakeholders can play in law-making processes. For example, the complexity of the existing framework often means that consultation periods prove insufficient. Stakeholders must take more time and expend more resources to understand how proposed reforms would operate within the existing legislative framework. This can make it difficult to understand the various interconnections between exposure draft legislation and the existing legislation contained in the Act or one of the hundreds of regulations and ASIC legislative instruments.

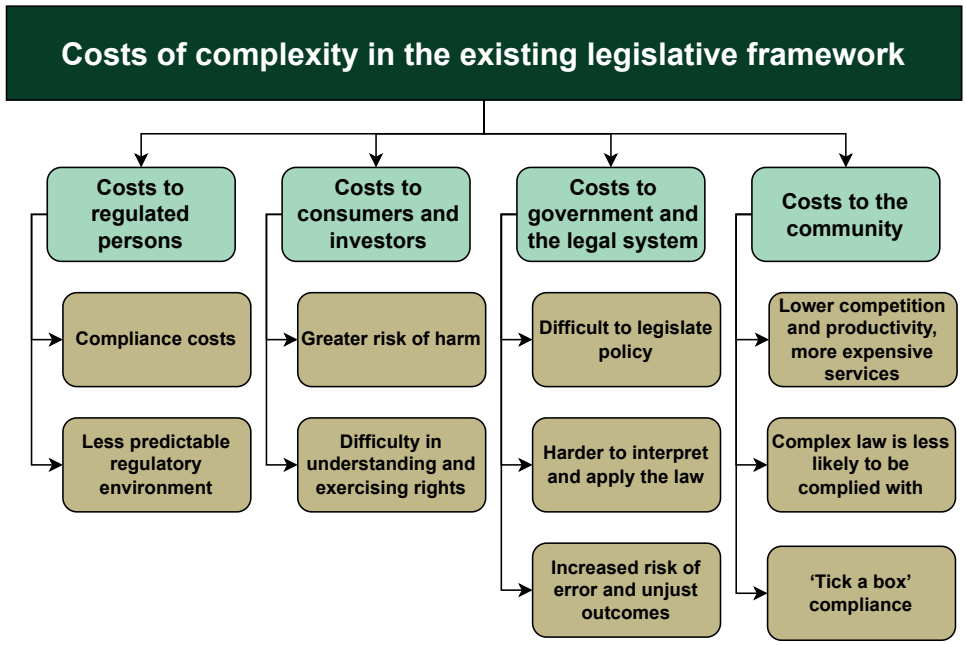
2.50 Moreover, the complexity of the existing legislative framework likely contributes to the accumulation of drafting and design issues that compromise the quality of corporations and financial services legislation, such as redundancy, errors, and design flaws. In other words, no reasonable amount of resources could guarantee high quality legislation given the fundamental problems with the design of the legislative framework, particularly those that result from notional amendments and an incoherent legislative hierarchy.

Costs of the existing legislative framework

2.51 The complexity of the existing legislative framework, and its failure to clearly communicate fundamental norms of behaviour and relevant outcomes, creates substantial costs. Building on the first and second parts of this chapter, this part details the costs affecting regulated persons, consumers, government (including regulators), courts and the legal system, and the community at large. **Figure 2.4** gives a non-exhaustive summary of the costs created by unnecessary complexity in the existing legislative framework.

80 Ibid [6.53]–[6.55], [6.57].
81 Ibid [6.56].

Figure 2.4: Summary of costs



Costs to regulated persons

2.52 The complexity of the existing legislative framework creates substantial unnecessary costs for businesses and other regulated persons, such as financial advisers. These costs are unnecessary because the legislative framework could be designed to enable policy objectives to be translated more effectively into legislation. The costs to regulated persons principally result from the higher compliance expenses and the less predictable regulatory environment generated by legislative complexity. In addition to these costs, regulated persons indirectly bear the costs of unnecessary complexity incurred by ASIC, given the industry funding model on which ASIC operates.[82]

Compliance costs

2.53 The most immediate costs faced by regulated persons appear in the form of higher compliance expenses. Compliance costs increase because regulated persons must navigate a complex legislative framework to identify and understand their obligations. It is well established both theoretically and empirically that complex

82 In 2021–22, ASIC levied $313 million on the corporations and financial services industry: *ASIC (Supervisory Cost Recovery Levy—Regulatory Costs) Instrument 2022/889* (Cth) s 6.

legislation produces higher compliance burdens,[83] in addition to 'opportunity costs involved in the time and energy devoted to compliance'.[84] Evidence suggests compliance costs may be particularly burdensome for small businesses, which lack economies of scale that help others manage compliance costs.[85] Numerous stakeholders have commented upon the costs of navigating the existing legislative framework for corporations and financial services.[86] For example, the joint submission of five financial advice and planning associations noted that the complexity of the law means that regulated persons

> are at risk of failing to comply with their obligations. As a result, participants are investing heavily in their compliance functions, with many spending between $100,000 and $500,000 each year on internal compliance staff alone.[87]

2.54 Similarly, commenting on the complexity of existing provisions, O'Bryan J recently observed:

> Persons conducting business within the financial services industry should be able to determine whether the law applies to them without having to undertake a difficult exercise of statutory interpretation.[88]

2.55 Several stakeholders have noted how reducing legislative complexity would help reduce compliance costs. For example, King Irving emphasised the benefits that simplification efforts can produce for AFS Licensees, stating that less complex legislation

> will enable licensees to determine their compliance obligations more easily and independently. As a result, they will be less reliant on external legal assistance, reducing their overall compliance costs. This cost reduction will be particularly significant for smaller firms, which are currently facing the most considerable financial strain.[89]

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83 Justin Douglas and Amy Land Pejoska, 'Regulation and Small Business' (Economic Roundup, Department of the Treasury (Cth), 28 August 2017) 9–11 <https://treasury.gov.au/publication/p2017-t213722a>; Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 478–9; Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design — Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 281.

84 Ramsay (n 83) 478–9.

85 Douglas and Pejoska (n 83); Ian Bickerdyke and Ralph Lattimore, *Reducing the Regulatory Burden: Does Firm Size Matter?* (Industry Commission Staff Research Paper, December 1997) 72.

86 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.15].

87 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 89* (citation omitted).

88 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2023] FCAFC 135 [242].

89 King Irving, *Submission 80*.

2.56 The findings of this Inquiry, and the commentary identified above, demonstrate that simpler legislation would help reduce compliance costs. This would be the case notwithstanding that there may be costs incurred in the short- to medium-term when transitioning to a simpler framework. The immense scale of the financial services industry in Australia means that even small reductions in legislative complexity may unlock substantial savings. For example, Macquarie Group Limited, the fifth largest authorised deposit-taking institution in Australia,[90] reported that its 'total regulatory compliance spend' for the full year ending 31 March 2023 was approximately $1 billion.[91] This compliance spend has more than doubled since 2017–18. In the case of Macquarie Group Limited and other similarly regulated entities, these costs would ultimately be borne by customers and shareholders.

2.57 As discussed in the first part of this chapter, even minor inefficiencies resulting from legislative complexity can have a profound impact on markets as large and important as the financial services market, on the operation of companies, and the value of household wealth.

Less predictable regulatory environment

2.58 Additional costs are created by a less predictable regulatory environment, in which the legislation depends heavily on ASIC or other administrators exercising broad discretions conferred by hundreds of provisions. As discussed in Interim Report A, the *Corporations Act* makes extensive and growing use of discretions to operate.[92] In particular, ASIC is central to the effective functioning of corporations and financial services legislation, exercising its administrative powers under various provisions of legislation on 6,940 occasions between 1 July 2016 and 28 February 2021.[93]

2.59 While discretions can be helpful to ensure flexibility and even reduce legislative complexity,[94] the extent to which the *Corporations Act* depends on discretions to function can create substantial uncertainty for regulated persons. Proliferating discretionary powers mean that numerous provisions of primary legislation make little sense without having regard to the potential exercises of discretion, such as to produce delegated legislation. Regulated persons will not know how such discretions are to be exercised and therefore may have very little idea about how the legislation will operate in practice. For example, the ALRC previously discussed the 'Your Future, Your Super' reforms as an example in which the primary legislation could

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90 This has been determined by reference to total resident assets reported in data published by the Australian Prudential Regulation Authority, as at March 2023: see Australian Prudential Regulation Authority, 'Monthly Authorised Deposit-Taking Institution Statistics' <www.apra.gov.au/monthly-authorised-deposit-taking-institution-statistics>.

91 Macquarie Group Limited (n 3) 36. As noted there, this data includes only 'direct costs of compliance' and does not include 'indirect costs'.

92 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.115], [3.160].

93 Ibid [3.159].

94 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.11].

barely operate without the Minister and APRA exercising their discretions.[95] Reducing the number of discretions, particularly powers to create notional amendments that are virtually unlimited in their scope, would help reduce regulatory uncertainty and therefore minimise the complexity of the regulatory environment.

Costs to consumers and investors

2.60 The unnecessary complexity of the existing legislative framework creates a range of costs for consumers and investors. These principally come in the form of a greater risk of harm and unnecessary difficulty in understanding and exercising legal rights.

Greater risk of harm

2.61 Legislation often exists to protect consumers and investors, and to ensure markets function effectively for the wider benefit of society. Unnecessarily complex legislation that impacts compliance and the effectiveness of the law increases the risk of harm to consumers and investors. As the Financial Services Royal Commission highlighted, the harms for consumers and investors can be substantial when legislation fails to achieve meaningful compliance and outcomes consistent with its objectives. Compensation programs established by major financial institutions have provided billions of dollars in payments to consumers over the last five years.[96] As King Irving noted in its submission to Interim Report C:

> When licensees have a better understanding of their obligations, they are more likely to comply with the rules and regulations, ensuring better protection for consumers and fostering trust in the financial services industry.[97]

Difficulty in understanding and exercising rights

2.62 Legislative complexity makes it more difficult for consumers and investors to understand and enforce their rights. This is particularly problematic in the area of financial services because it makes it harder for consumers to access what are otherwise low-cost or cost-free dispute resolution services. These include internal services operated by financial services providers and the external dispute resolution service of AFCA. As AFCA stated in its submission to Interim Report C:

> Understanding their rights empowers consumers and small business to make informed financial decisions and ensures they are aware of the protections and remedies available to them in case of any disputes or misconduct by financial services providers. This awareness is especially important considering the complex and often technical nature of financial products and services.[98]

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95 Ibid [6.51] (Example 6.5).
96 Australian Securities and Investments Commission, 'ASIC update: Compensation for financial advice related misconduct as at 30 June 2022' (Media Release 22-231MR, 24 August 2022).
97 King Irving, *Submission 80*.
98 Australian Financial Complaints Authority, *Submission 79*.

2.63 At present, consumer protection provisions are located across dozens of provisions of multiple Acts. Legislative complexity and increased costs (such as for the provision of legal advice) risk undermining the utility and accuracy of dispute resolution mechanisms — for example, by potentially deterring consumers from making claims because they cannot identify and understand their rights, increasing the risk of legal error, or increasing the distress, delay, and inconvenience consumers experience in enforcing their rights.[99]

Costs to government and the legal system

2.64 The government, including regulators, and the legal system in general incur substantial costs from the complexity of the legislative framework for corporations and financial services. These costs are incurred as a result of the difficulty in legislating new policy initiatives as well as interpreting and applying the legislation.

Difficulty legislating policy

2.65 The existing complexity of corporations and financial services legislation provides a poor platform on which to undertake future policy reforms. As Treasury has previously noted, an effective 'legislative architecture provides a strong basis for future policy and legislative development'.[100] Notional amendments and hundreds of disparate legislative instruments make it difficult and costly to identify necessary and consequential amendments from any policy initiative. Mistakes and unintended consequences become more likely.

2.66 Moreover, problems in the existing legislative framework appear to be creating an increasing divergence between the expectations of the Delegated Legislation Scrutiny Committee and the law-making practices of government departments and agencies.[101] The Committee has raised a number of concerns in relation to regulations and ASIC legislative instruments. These include issues relating to whether the content of an instrument may be more appropriate for Parliamentary enactment, particularly where notional amendments and significant exemptions are used. The Committee

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99 In this respect, it is relevant to observe that AFCA may award compensation or a non-financial remedy to a complainant for non-financial loss caused by a financial firm's conduct: see Australian Financial Complaints Authority, *The AFCA Approach to Non-Financial Loss Claims* (October 2022) 3–4 <www.afca.org.au/media/335/download>.

100 Department of the Treasury (Cth) (n 32) [42]. Members of Parliament have also made similar points, with Senator Dean Smith noting that 'the complicated nature of the existing legislation seriously reduces its potential as a vehicle for future policy reform': Senator Dean Smith, 'Address to the Conexus Institute Retirement Forum' (Speech, 8 August 2023) <www.deansmithwa.com.au/speeches/address-to-the-conexus-institute-retirement-forum/>.

101 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.71]–[6.77].

has also repeatedly criticised the exemption of the *Corporations Regulations* from the generally applicable requirement to sunset after 10 years.[102]

2.67 Overall, the complexity of the legislative framework and the increasing concern of the Delegated Legislation Scrutiny Committee may reduce the capacity and willingness of governments to undertake new policy initiatives, or the quality and effectiveness of policy programs, utilising their existing law-making toolkits. **Chapter 6** of this Report discusses how improved law-making tools may help to address these problems and **Chapter 9** discusses how the reformed legislative framework may better facilitate policy development in future.

Legislation that is harder to interpret and apply

2.68 Regulators and the judiciary bear the cost of interpreting and applying unnecessarily complex legislation. Judges have variously described provisions of corporations and financial services legislation as 'porridge',[103] 'tortuous',[104] 'exceptionally complex',[105] 'labyrinthine',[106] and as needing to be 'deciphered',[107] not merely interpreted.

2.69 Piecing together the primary legislation and hundreds of legislative instruments carries substantial costs when it must be done countless times by regulators and courts. As discussed in Interim Report C, statutory interpretation also becomes more difficult for regulators and courts as the complexity of legislation increases, thereby imposing greater costs in time and effort.[108] Legislation that is harder to interpret and apply also increases the risks of substantial error and unjust outcomes for regulated persons or consumers. These in turn produce further costs, including the time, effort, and pecuniary costs of appeals.

2.70 Unnecessary complexity also contributes to complex litigation. For example, several judges have lamented the complex nature of cases brought by ASIC in reliance on overlapping and duplicative legislative provisions.[109] In one case, Lee J

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102 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 3 of 2022, 10 March 2022) [1.7], [1.23]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 6 of 2023, 2 June 2023) [1.29], [1.32]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 8 of 2023, 2 August 2023) [2.10], [2.14].

103 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 [948].

104 *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 [12].

105 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2023] FCAFC 135 [265].

106 *Sandys Swim Pty Ltd v Morgan* [2022] FCA 1574 [20].

107 *Australian Securities and Investments Commission v TAL Life Limited (No 2)* (2021) 389 ALR 128 [169].

108 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.7], [9.25]–[9.26].

109 See, eg, *Australian Securities and Investments Commission v National Australia Bank Limited* [2022] FCA 1324 [379]; *Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 [1], [1105], [2103], [2536], [2615], [2617].

noted that ASIC's pursuit of 'repetitive declarations of contravention was a source of frustration and represented a considerable waste of time'.[110] The legal system and all litigants ultimately bear the costs of more complex and lengthy litigation created by unnecessarily complex legislation.[111]

Costs to the community

2.71 This section discusses costs to the community that result from the complexity of the existing legislative framework.

Lower competition and productivity, and more expensive services

2.72 Unnecessary complexity in the existing legislative framework creates barriers to entry that may reduce competition in financial services and financial markets.[112] Evidence suggests that reduced barriers to entry can increase productivity growth,[113] and that legal simplification programs can improve economy-wide productivity.[114] More generally, regulatory complexity has been linked to lower productivity growth.[115] The substantial compliance costs incurred by regulated persons may also result in more expensive financial products and services, the cost of which may be further affected by lower competition.

Complex legislation is less likely to achieve its objectives

2.73 The ability of people to comply with the law is substantially affected by its complexity.[116] Given that law is intended to achieve socially or economically beneficial outcomes, a failure to achieve compliance can mean a failure to achieve those beneficial outcomes. The legislation therefore becomes a 'damp squib',[117] leaving unaddressed the problems it was aimed at solving or the other objectives it was aimed at achieving.

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110 *Australian Securities and Investments Commission v GetSwift Ltd (Penalty Hearing)* [2023] FCA 100 [17]. See also Elise Bant and Jannie Marie Paterson, who note that '[e]ven the best-intentioned plaintiff or prosecutor can end up pleading every possible permutation of the law to try and cover all bases': Elise Bant and Jeannie Marie Paterson, 'Understanding Hayne. Why Less Is More', *The Conversation* (11 February 2019) <https://theconversation.com/understanding-hayne-why-less-is-more-110509>.

111 See, eg, *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 [5].

112 Productivity Commission, Australian Government, *Competition in the Australian Financial System* (Inquiry Report No 89, June 2018) 6; Organisation for Economic Cooperation and Development, *Assessment Toolkit: Volume 2. Guidance* (2019) 23; Queensland Productivity Commission, *Improving Regulation* (Research Paper, March 2021) 1.

113 Frontier Economics, *The Impact of Regulation on Growth: A Report Prepared for the Department of Business, Innovation and Skills* (May 2012) 23–4.

114 Luís F Costa and Miguel St. Aubyn, 'The Macroeconomic Effects of Legal-Simplification Programmes' (UECE Working Paper 12, 2012).

115 Juan de Lucio and Juan S Mora-Sanguinetti, 'Drafting "Better Regulation": The Economic Cost of Regulatory Complexity' (2022) 44 *Journal of Policy Modeling* 163.

116 New Zealand Productivity Commission, *Regulatory Institutions and Practices* (30 June 2014) 21.

117 David Goddard, *Making Laws That Work: How Laws Fail and How We Can Do Better* (Hart Publishing, 2022) 17–20.

'Tick a box' compliance

2.74 Even where the terms of the law are complied with, the present legislative framework often fails to communicate the purpose and intent of the law.[118] Unnecessary complexity can mean the policy intended to be achieved is 'lost sight of as we scramble through the complex maze of interlocking (and overlapping) provisions'.[119] As Associate Professor Godwin and Micheil Paton argue, 'the complexity of financial services law makes it very difficult to see unifying and informing principles and purposes'.[120] This impacts regulators, courts, and lawyers as they seek to apply the law consistently with the intent of the legislation, but more broadly harms the community as legislation is not complied with as intended by Parliament.

What should reform look like?

2.75 The above analysis highlights the imperative for reform, whether by implementing the ALRC's recommendations or otherwise. This part discusses, at a general level, the standards that any reformed legislative framework should meet. In other words, where should the imperative for reform take corporations and financial legislation? Or, to adapt the expression used by the Hon Justice David Goddard, what would the world look like if the findings of this Inquiry were applied when reforming corporations and financial services legislation?[121]

2.76 **Table 2.1** summarises problems in the existing legislative framework and how those problems could be overcome in an improved legislative framework.

Table 2.1: Comparing the existing and an improved legislative framework

Existing legislative framework	Improved legislative framework
Relies on **complex notional amendments** to provide flexibility and adaptability.	**Uses delegated legislation much more simply** and in a way that can be textually amended to provide for tailored regulatory regimes, exclusions, and exemptions from generally applicable requirements in primary legislation. Avoids duplication and minimises overlap between primary and delegated legislation.

118 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Volume 1, 2018) 162.
119 Goddard (n 117) 136.
120 Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276, 281 (citation omitted).
121 See Goddard (n 117) 1.

Existing legislative framework	Improved legislative framework
Relies on **proliferating, broad and unconstrained delegated legislative powers** that necessitate complex interactions between primary and delegated legislation.	**Delegates legislative power more simply and subject to appropriate safeguards**, and minimises the number of powers so that interactions (and potential inconsistencies) between primary and delegated legislation are also minimised.
Relies on **poorly structured and framed primary legislation**, in which provisions are frequently difficult to navigate and understand, and in which **fundamental norms are obscured by prescriptive detail**.	Uses **primary legislation that is structured and framed in a way so as to make it as easy to navigate and understand as possible**, including by assisting users to more quickly and easily identify relevant laws that apply to their circumstances.
Relies on an excessively large or **disparate body of delegated legislation** in the form of **regulations and hundreds of other legislative instruments**.	Produces a body of **delegated legislation in a limited number of instruments that is transparent and more easily navigable** according to the functions it performs.
Uses definitions in a range of complex ways, including to create obligations and alter regulatory boundaries.	**Uses definitions more simply** and in a way that minimises the challenges presented to navigability and comprehensibility.

3. A Reformed Legislative Framework

Contents

Introduction

3.1 This chapter sets out a high-level overview of the key reforms recommended by the ALRC in this Report. The main purpose of this chapter is to explain the reformed legislative framework for financial services regulation that would be produced by implementing the recommendations discussed in **Chapters 5** and **6** of this Report in accordance with the principles discussed in **Chapter 4**. This chapter therefore draws together and introduces the next three chapters, which provide further detail about the design of the reformed legislative framework. **Chapter 7** of this Report explains how the reformed legislative framework may be implemented.

3.2 This chapter proceeds in three parts. The first part outlines the aims of reform. The second part describes the reformed legislative framework and how users would interact with it. The final part discusses some considerations for the ongoing maintenance of the legislative framework.

3.3 In summary, the reformed legislative framework would consist of three elements: the Financial Services Law, a Scoping Order, and rulebooks. The Financial Services Law would be primary legislation containing the key regulatory provisions.[1] The Scoping Order would be a single, consolidated legislative instrument that adjusts the regulatory scope or boundaries. Thematic rulebooks would contain detail that gives effect to different aspects of the regulatory regime in different circumstances. Each element of the framework would be designed to make it as easy as possible to navigate and understand.

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1 As outlined in **Chapter 1** of this Report, the ALRC uses the term 'provision' to describe any structural element of legislation, such as a section, division, part, or chapter. For further discussion of legislative terminology, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.7].

Aims of reform

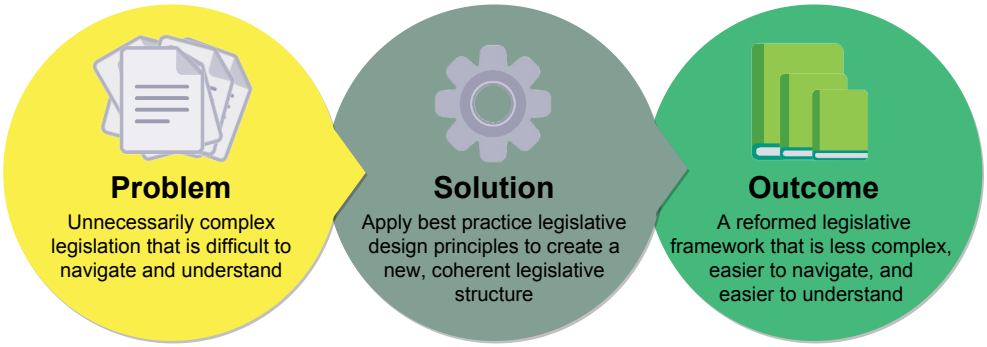
3.4 The reforms recommended by the ALRC are intended to simplify and rationalise the law relating to corporations and financial services.[2] Throughout this Inquiry, the legislation relating to financial services has been identified as a particular source of complexity. Many of the ALRC's recommendations focus on the reformed legislative framework, though they may be more generally applicable across other areas of the law.

3.5 The reformed legislative framework would be easier to navigate and understand than the existing legislative framework.[3] The reformed legislative framework would also better reflect and communicate the policy objectives underlying the regulation of financial products and services, including by:

- being sufficiently flexible and adaptive to changing or unforeseen circumstances and the continuing emergence of new business models, technologies, and practices;
- promoting meaningful compliance with the law; and
- reducing legislative complexity and lowering the costs of understanding and complying with the law, thereby helping to create a more efficient legislative framework.

3.6 **Figure 3.1** illustrates the overall aims of reform to the existing body of financial services legislation.

Figure 3.1: Overview of the reform process



2 See the **Terms of Reference**.

3 The existing legislative framework for the regulation of financial products and financial services includes most provisions of Parts 7.1, 7.6–7.10B, and 7.12 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*, as well as related delegated legislation (principally in the form of the *Corporations Regulations* and ASIC legislative instruments). Other legislation, such as the *NCCP Act* and *SIS Act*, also regulate specific financial products and services. However, the ALRC's recommendations focus on the legislation that applies to financial products and services in general.

3.7 The reformed legislative framework is intended to communicate rights and obligations more clearly and make the legislation as 'user-friendly' as possible, including by highlighting the fundamental norms of behaviour underpinning financial services regulation. As a result:

- the legislative framework would be easier for all users to navigate and understand;
- consumers would be able to better identify and understand their rights and protections;
- financial services providers would be able to better understand and comply with their obligations;
- Parliament and government would be able to maintain the legislative framework in a manner that minimises unnecessary complexity, and would find it easier to undertake future policy initiatives; and
- bodies with delegated legislative power would be able to exercise those powers in a more coherent and principled manner, with appropriate levels of guidance and oversight from Parliament.

The reformed legislative framework

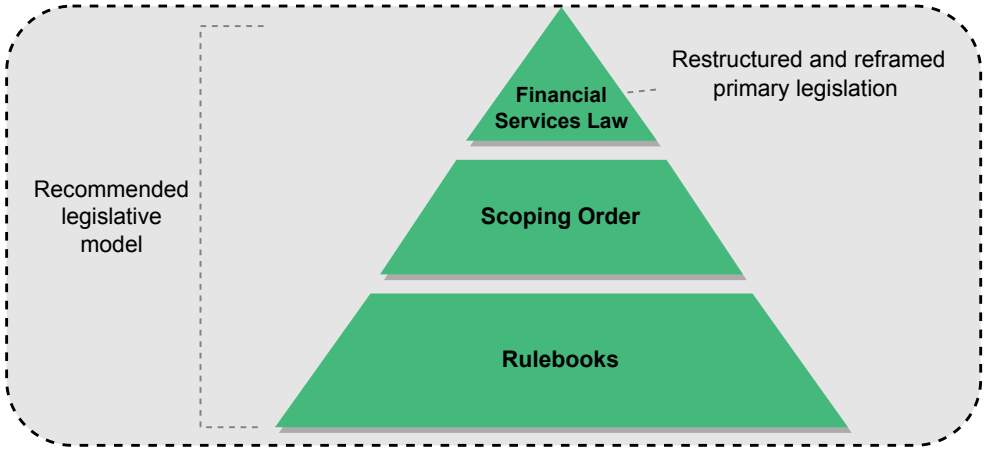
3.8 This part provides an outline of the reformed legislative framework. Further detail is contained in **Chapters 4–6** of this Report.

3.9 At a high level, the reformed legislative framework would consolidate provisions presently spread across more than a dozen parts of the *Corporations Act* and *ASIC Act*, hundreds of pages in the *Corporations Regulations*, and hundreds of legislative instruments. These provisions would be consolidated into three 'homes':

- restructured and reframed primary legislation in the form of the **Financial Services Law**, which would contain the law's key provisions, such as core obligations, offence provisions, rights, remedies, and definitions;
- a single legislative instrument, called the **Scoping Order**, which would contain matters that would adjust the scope of the regulatory regime, including exemptions and exclusions; and
- thematic, consolidated **rulebooks**, which would contain prescriptive detail that would tailor the regulatory regime for particular products, services, persons, or circumstances.

3.10 **Figure 3.2** below illustrates the reformed legislative framework, showing how it comprises the Financial Services Law (discussed in **Chapter 5** of this Report) and the recommended legislative model (discussed in **Chapter 6** of this Report).

Figure 3.2: The reformed legislative framework



Knowing where to go to find the law

3.11 The reformed legislative framework would provide an appropriate home for different types of provisions.[4] The aim is to help users of the legislation navigate it more easily by reducing the number of places they need to look. Users should also find it relatively easy to know where to go to find different types of provisions. In this way, the reformed legislative framework would help users ensure (and reassure themselves) that they have not missed something important when complying with or advising on the law.

A clear path through the law

3.12 The reformed legislative framework would provide users with a clear path through the law. Users would first visit the Financial Services Law to understand their key legal rights and obligations. For example, the Financial Services Law would contain important obligations, such as the requirement to hold an AFS Licence, and core prohibitions, such as the prohibitions on unconscionable and misleading or deceptive conduct.

3.13 Users would then visit the Scoping Order to confirm the scope of the Financial Services Law, including whether there are any carve-outs from core obligations, and to confirm whether the law applies to their circumstances. The Scoping Order would therefore provide a clear home for exemptions and exclusions presently spread across hundreds of legislative texts.

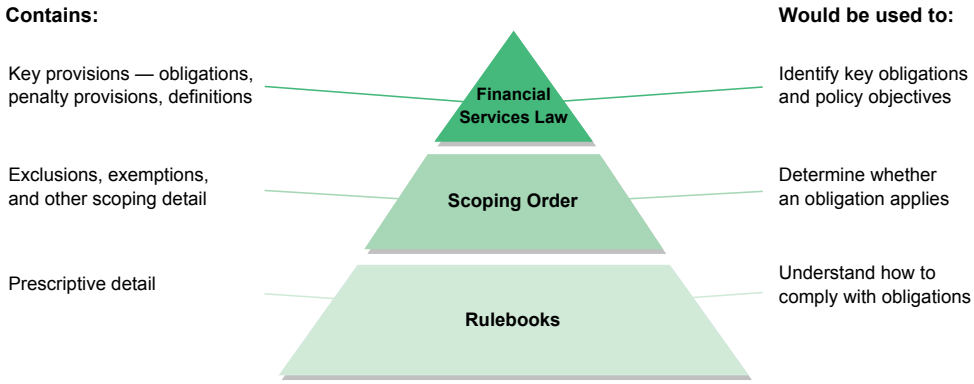
3.14 If the Scoping Order confirms that the Financial Services Law is applicable to them, users would then visit a rulebook to understand how to comply with the law's requirements and to find other supplementary detail. For example, rulebooks would

4 See **Chapter 6** of this Report for further details.

contain detail about the contents of disclosure documents or steps a person would be required to take to comply with an obligation set out in the Financial Services Law.

3.15 **Figure 3.3** illustrates how the contents of each component of the reformed legislative framework would guide users according to their reason for consulting the legislation.

Figure 3.3: Navigating the reformed legislative framework



Primary legislation: the Financial Services Law

3.16 Under the reformed legislative framework, financial services provisions in Chapter 7 of the *Corporations Act* and the provisions in Part 2 Div 2 of the *ASIC Act* would be consolidated and relocated to form the Financial Services Law. The Financial Services Law would be contained in Sch 1 to the *Corporations Act* (the FSL Schedule). Similar to the approach used for the *Australian Consumer Law*,[5] the FSL Schedule would consolidate provisions relating to financial services and group them in a single location. Like the *Australian Consumer Law*, this would help to give the Financial Services Law a clear legislative identity.

3.17 The Financial Services Law would contain the key provisions of the financial services regulatory regime. This reflects the principle that only Parliament should deal with matters of significant policy.[6] The Financial Services Law would set the regulatory perimeter and the policy objectives of regulation.

Clearer structure and framing

3.18 The provisions of the Financial Services Law would be organised according to their theme and the circumstances in which they apply. This means that provisions dealing with similar subject matter would be grouped together, and significant provisions would be located before less significant provisions.

5 The *Australian Consumer Law* is contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth).

6 See **Chapter 4** of this Report.

3.19 By applying the principles discussed in **Chapter 4** of this Report, the Financial Services Law would be designed as follows:

- It would comprise chapters and parts that **coherently group** relevant provisions together to help users find the law that applies to their circumstances. These would include legislative chapters relating to consumer protection, financial advice, and financial products and services disclosure.[7]
- Its provisions would be ordered so that the legislation has an **intuitive flow** for users. Provisions of most general application would generally appear first, followed by provisions of narrower scope.
- Its provisions would be structured to **prioritise** important information for users, such as core obligations, core prohibitions, offences, and civil penalties. This would help to communicate the law's intent and fundamental norms of behaviour more clearly. For example, a disclosure chapter would commence with a clear and succinct statement of when disclosure must be provided, the standards that apply to disclosure, and the primary offences for failing to give disclosure.
- It would be drafted **succinctly**. Prescriptive detail more appropriate for delegated legislation would be removed from the Financial Services Law, allowing it to focus on effectively communicating key regulatory messages. Wherever possible, duplicative provisions would be consolidated or removed.[8]
- It would use **defined terms** in a way that helps users understand the legislation, without impeding navigability. Defined terms would be given only one meaning and definitions would be made as easy to locate as possible.
- It would identify **offence, civil penalty, and infringement notice provisions**. These provisions would clearly communicate the relevant penalties and any applicable fault elements.[9]
- It would help users develop and maintain **mental models** so users can more efficiently navigate and understand the legislation.

3.20 Implementing the ALRC's recommendations would produce primary legislation, in the form of the Financial Services Law, that is easier to navigate and understand than existing legislation, and sets a principled foundation for the rest of the reformed legislative framework.[10]

The Scoping Order

3.21 The Scoping Order would be a single legislative instrument that adjusts the regulatory boundaries set by primary legislation.[11] The Scoping Order would contain exclusions, exemptions, and other matters that adjust the scope of the regulatory

7 See **Recommendations 33**, **36**, and **38–40**. See also **Recommendation 24**.
8 See **Recommendations 24**, **25**, **28**, **31**, **33–36**, **38–40**, and **56**.
9 See Recommendations 20–23 and **Recommendation 57**.
10 See **Chapter 5** of this Report. See also Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.25]–[7.29].
11 See **Recommendation 44**.

regime. The Scoping Order could also contain specific inclusions within the regulatory regime, although these should appear in primary legislation to the greatest extent possible. The Financial Services Law would expressly provide for the circumstances in which scoping orders (that is, provisions of *the* Scoping Order) could be made.[12]

3.22 The Scoping Order would replace hundreds of existing regulations and ASIC legislative instruments. Consolidating these matters into a single location would reduce complexity and make the legislative framework easier for users to navigate.

3.23 The Scoping Order would be designed to be as navigable and comprehensible as possible.[13] Exemptions and exclusions relating to similar topics would be grouped thematically, and the overall structure of the Scoping Order would follow the same structure as the Financial Services Law. This would mean that users who locate particular obligations in the Act would find the relevant exemptions, exclusions, and specific inclusions in the corresponding part of the Scoping Order. Exemptions and exclusions would also be restructured so as to be grouped according to the circumstances in which they apply.[14] Users would be guided through the legislative framework and, as a result, feel more confident that they had not missed anything along the way.

3.24 The power to make scoping orders would be vested in either the Minister or ASIC, or both the Minister and ASIC, in accordance with existing policy settings under Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.[15] The power to make scoping orders would neither expand nor contract the existing delegated law-making powers of the Minister and ASIC.[16]

3.25 When a scoping order is made in relation to a provision of the Financial Serivces Law, the Minister and ASIC would have the power to insert editorial notes into the Financial Services Law that would alert users to the existence of scoping orders and where they may be found.[17]

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12 In a formal sense, scoping orders would be made by legislative instruments that amend the single, consolidated Scoping Order. The amending instruments would be consolidated into the Scoping Order in the same way that changes made by an amending Act are incorporated into a principal Act by way of an updated compilation on the Federal Register of Legislation.

13 See **Recommendation 25**.

14 In Interim Report A, the ALRC demonstrated how a range of exemptions from the obligation to hold an AFS Licence could be consolidated in one location, rather than spread across the legislative hierarchy, as well as restructured and presented more clearly in a table format. For an illustration, see Part 6 of the prototype Corporations (Exclusions and Exemptions from Chapter 7) Implementation Order 2021 in Prototype Legislation A, published online: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

15 See **Recommendation 48**.

16 For further discussion, see **Chapter 6** of this Report.

17 For examples, see the notes to ss 765A(1) and 766J(1) of the Prototype Act in Prototype Legislation B: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

3.26 Under the reformed legislative framework, ASIC would retain its power to grant individual relief.[18] This power would be exercised by way of a publicly available notifiable instrument,[19] and would be accompanied by an explanatory statement setting out how the instrument is consistent with the objects set out in primary legislation.[20] The ALRC anticipates that this power would only need to be exercised in limited circumstances to address atypical circumstances or unintended consequences of the regulatory regime, and would not need to be exercised to the same extent as under the current legislation for the reason that rules could be more easily tailored to deal with specific circumstances.[21]

Rulebooks

3.27 Rulebooks would be thematically consolidated legislative instruments that contain provisions (known as rules) setting out the prescriptive detail of the regulatory regime.[22] Primary legislation would specify the types of matters that could be dealt with by rules, thereby placing limits on the power to make rules.[23] Rules would provide flexibility in the regulatory regime and allow it to be tailored to suit different products, services, industry sectors, and circumstances. Rulebooks would be designed to make those rules as easy to locate, navigate, and understand as possible.[24]

Example 3.1: Thematic rulebooks

Rules would be organised into rulebooks relating to specific themes, and would have titles that make the subject matter of the rulebook clear.

For example, there may be the following rulebooks:

- *Financial Services (Disclosure) Rules 2023*;
- *Financial Services (Financial Advice) Rules 2023*; and
- *Financial Services (Financial Services Licensing) Rules 2023*.

18 See **Recommendation 45**.
19 Currently, ASIC exercises the power to grant individual relief by way of Gazettal.
20 See **Recommendation 50**.
21 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.39]–[2.41].
22 As discussed further below, this prescriptive detail would be limited to material that is appropriate for delegated legislation. Some prescriptive detail, such as in relation to significant offences, would appear in the primary legislation because it would be inappropriate for it to appear in rules.
23 See, eg, s 1126 of the Prototype Act in Prototype Legislation B: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.
24 See **Recommendation 25**.

3.28 In the reformed legislative framework, rules would provide a home for much of the prescriptive detail that is currently spread across the legislative hierarchy. They would also replace the myriad notional amendments and conditional exemptions that have created significant complexity to date. To the extent possible, rules within rulebooks should be self-contained and capable of being understood without extensive recourse to other pieces of legislation.

3.29 For example, the *Financial Services (Disclosure) Rules 2023* noted in **Example 3.1** above may contain rules in relation to the content and form of disclosure documents, who must prepare certain disclosure documents, and detail on the information that must be given to ASIC.

3.30 Currently, this kind of prescriptive detail is scattered across hundreds of regulations and ASIC instruments. A disclosure rulebook would restructure and reframe the existing detailed provisions and put them in one logical place where they could be easily found by users seeking to understand their disclosure obligations. The Prototype Rules in Prototype Legislation B provided examples of matters that could appropriately be contained in rules.[25]

3.31 Certain matters would only appear in primary legislation and would not be permitted to appear in rules. These matters would include:

- serious criminal offences, including offences subject to imprisonment, and significant civil penalties;
- administrative penalties; and
- powers enabling regulators to take discretionary administrative action.[26]

3.32 As with scoping orders, the power to make rules would:

- be vested in either the Minister or ASIC, or both the Minister and ASIC, in accordance with existing policy settings under Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*;[27]
- neither expand nor contract the existing delegated law-making powers of the Minister and ASIC;[28] and
- be accompanied by a power to insert editorial notes into the Financial Services Law that would alert users to the existence of rules and where they may be found.[29]

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25 For further discussion of Prototype Legislation B, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.7]–[2.14], [2.48]–[2.50]; Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B — Additional Resources, September 2022). See also **Chapter 6** of this Report.

26 See **Recommendation 47**.

27 See **Recommendation 48**.

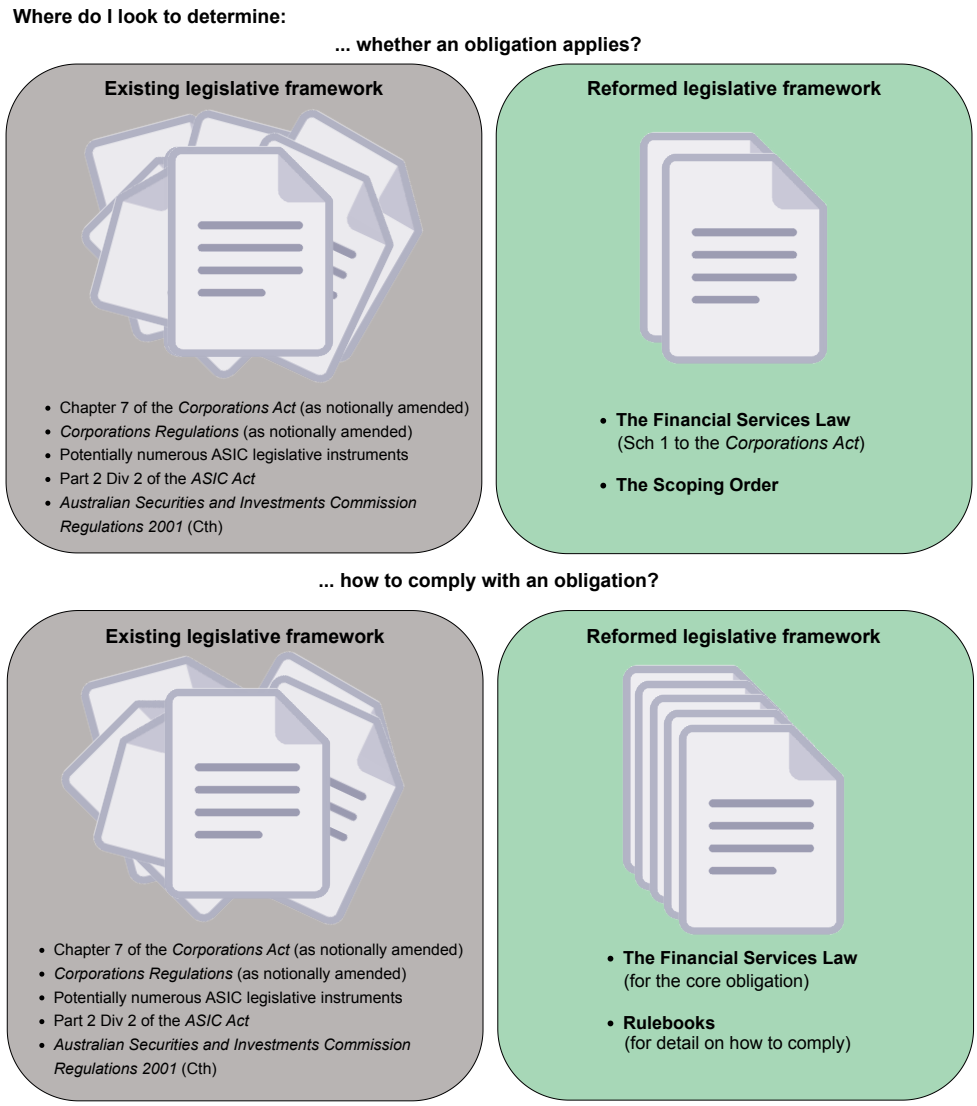
28 For further discussion, see **Chapter 6** of this Report.

29 See, for example, s 1098(7) of the prototype legislation in **Appendix E**.

Using the reformed legislative framework

3.33 By providing an appropriate home for different provisions and a clear path through the law, the reformed legislative framework would be easier to use than the existing legislative framework. **Figure 3.4** illustrates how a user would interact with the reformed legislative framework compared to existing legislation.

Figure 3.4: Using the reformed legislative framework



3.34 Rather than having to confront an opaque and confusing array of primary legislation, regulations, and other legislative instruments (each serving any number of purposes), users would only need to consult three types of legislation: the Financial Services Law, the Scoping Order, and rulebooks. The contents and purpose of each source of law would be easier to predict than the existing legislation. The reformed legislative framework would therefore make the law easier to find, navigate, and understand.

3.35 **Example 3.2** expands on how users would interact with the reformed legislative framework in the context of the AFSL regime.

Example 3.2: Using the AFSL regime

Users seeking to understand whether they need an AFS Licence and if so, how to get one, would take the following steps:

- First, users would consult the Financial Services Law to determine whether they are obliged to hold a licence.
- After confirming that they are obliged to hold a licence, a note in the Financial Services Law would refer users to the corresponding part of the Scoping Order to determine whether an exemption or exclusion means they do not need to hold a licence. Exemptions and exclusions would be structured so that users could quickly identify the scoping orders that might apply to their circumstances.
- If no exemption or exclusion applied, users would consult the relevant part of the Financial Services Law that sets out how to apply for a licence.
- Finally, if any detail relating to the application process were contained in the *Financial Services (Financial Services Licensing) Rules 2023*, then a note in the Financial Services Law would refer users to that rulebook.

In this way, users of the legislation would be guided through the relevant legislation and know where to find the information they need.

Safeguards and maintenance of the framework

3.36 Reflecting the importance of scoping orders and rules to the reformed legislative framework, the making of scoping orders and rules by the Minister and ASIC would be subject to the following safeguards:

- Before making scoping orders or rules, the Minister or ASIC would be required to **consult** publicly and with an independent Rules Advisory Committee, comprising a range of representatives with relevant expertise.[30]
- When scoping orders and rules are made, they would be accompanied by a publicly accessible **explanatory statement** that sets out how a scoping order is consistent with, or how a rule gives effect to, the relevant objects set out in the Financial Services Law.[31]
- Scoping orders and rules would be **disallowable** by either house of Parliament. This means that Parliament would have the power to scrutinise and disallow any scoping order or rule in accordance with the procedures that apply to delegated legislation generally.[32]
- Scoping orders and rules would **sunset**, meaning they would be reviewed and (if thought necessary) remade after a certain period of time. In keeping with the requirements of delegated legislation more generally, the ALRC suggests that this period should be 10 years.[33]

3.37 Compared to the safeguards that currently apply to delegated legislation made under the *Corporations Act*, the recommended safeguards aim to:

- provide greater transparency to the law-making process;
- make it easier for Parliament and stakeholders to scrutinise delegated legislation, including by making it easier to understand how newly made delegated legislation fits within the existing body of legislation; and
- ensure that the legislative framework is maintained into the future, by keeping delegated legislation up to date and ensuring it remains in force only for so long as it is needed.[34]

3.38 Other measures that would help to maintain the reformed legislative framework in future include:

- A legislative design Community of Practice to be established and led by OPC.[35] This Community of Practice would seek to support best practice legislative design and drafting across government. It would be an opportunity to share ideas, experiences, and skills.

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30 See **Recommendation 49**.
31 See **Recommendations 50** and **51**.
32 See **Recommendation 52**.
33 See *Legislation Act 2003* (Cth) s 50; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.57]–[4.58].
34 Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 25.
35 See **Recommendation 29**.

- A consolidated guide to legislative design for corporations and financial services legislation.[36] The consolidated guide would help to implement and maintain the reformed legislative framework. Both the Community of Practice and consolidated guide would help to ensure that the best practice design principles recommended by the ALRC are given effect in the long-term.
- A requirement for the reformed legislative framework to be periodically reviewed by an independent reviewer.[37] This would likely take the form of periodic reviews of different regulatory themes, such as licensing or disclosure, to ensure that the aims of reform are being met.

3.39 Together, these safeguards and other measures are intended to ensure the long-term success of the reforms recommended by the ALRC and prevent a return to the unnecessary complexity characterised by the existing legislative framework.

36 See **Recommendation 30**.
37 See **Recommendation 55**.

4. Legislative Design

Contents

Introduction

4.1 In considering how the legislative framework for corporations and financial services may be improved, the ALRC has engaged with important questions relating to legislative design. Although corporations and financial services legislation is unique in many ways, it has provided a lens though which to examine the underlying principles and practices of legislative design that broadly apply to all legislation. This chapter discusses those principles and practices.

4.2 Drawing on the Terms of Reference for each Interim Report, this chapter focuses on three particular aspects of legislative design: the structure and framing of legislation, the design of the legislative hierarchy, and the use of definitions. This chapter brings together the principles and guidance developed in each Interim Report. In doing so, it also discusses legislative design in general and identifies an overarching objective of legislative design. In line with the Terms of Reference, most recommendations in this chapter are framed by reference to corporations and financial services legislation. Nonetheless, the principles are broadly applicable, and could inform the design of other Commonwealth legislation.

4.3 This chapter proceeds in five parts. The first part discusses the importance of good legislative design. The second part discusses the structure and framing of legislation, including why structure and framing are important. The third part

discusses appropriate delegation of legislative power. The fourth part discusses the principled use and design of legislative definitions. The final part discusses further reforms that relate to legislative design in general.

4.4 The principles discussed in this chapter underpin the recommendations in subsequent chapters of this Report, particularly the recommendations in **Chapters 5** and **6** relating to the reformed legislative framework for financial services regulation. These principles have been developed from a review of:

- existing guidance published by various legislative drafting offices, including in Australia, Canada, the European Union, New Zealand, and the UK;
- guidance published by the Australian Government and Parliament relating to legislative design;
- judicial and academic commentary;
- the ALRC's qualitative and quantitative analysis of corporations and financial services legislation undertaken in preparing Interim Reports A, B, and C; and
- views expressed to the ALRC by stakeholders in submissions and consultations.

4.5 Much of the discussion in this chapter may appear obvious to many people. Many of the principles discussed in this chapter are followed in modern legislative design and drafting.[1] However, as Interim Reports A, B, and C have shown, many of the principles are not effectively applied in corporations and financial services legislation. Furthermore, knowledge is not always translated into practice, given the constraints imposed by existing legislation, resourcing, time, and the political process. Therefore, it is worth clearly articulating why good legislative design matters and how it may be achieved.

The importance of good legislative design

4.6 According to Dr Mousmouti, legislative design is

> the process of making strategic choices about legislation as an instrument that intervenes in social and legal reality, the required elements and their role. It is the process of designing the 'formula' according to which the law will intervene. The process of design involves thinking, reflecting, analysing and coming up with a strategy on how the law will change the status quo. Design allows the elements of the final product (the law) to make sense and to have, at least conceptually, the potential to produce results.[2]

4.7 Given the parameters of this Inquiry, the ALRC has focused on legislative design as it relates to the presentation, construction, and organisation of legislation. The ALRC has not analysed the design of underlying, substantive policy.

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1 For an illustration of how legislative design principles have real-world utility, see Explanatory Memorandum, Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023 [1.34]–[1.69].

2 Maria Mousmouti, *Designing Effective Legislation* (Edward Elgar Publishing, 2019) xiii.

4.8 Mousmouti's description helpfully captures a reality that underpins legislative design — in order to produce results, the law must make sense. In other words, and as explained in Interim Report C, there is no trade-off or dichotomy between legislation that can be understood and legislation that is effective.[3]

4.9 Legislation that is well designed is also likely to be less complex. Good legislative design is therefore important for reducing the costs that are produced by unnecessarily complex legislation. As outlined in **Chapter 2** of this Report, those costs include:

- costs to regulated persons, such as compliance costs and costs created by uncertainty;
- costs to the community, including greater risk of consumer harm, and lower competition and productivity produced by inefficient regulation; and
- costs to government and the legal system, including by making legislation harder to interpret, enforce, and maintain.

The overarching objective of legislative design

4.10 The ALRC suggests that the overarching objective of legislative design is to create legislation that is designed and drafted in a way that can be navigated and understood as easily as possible, consistent with the underlying policy intent of the legislation. Achieving this objective is essential to achieving the purpose of legislation, which is to effectively convert policy into legally enforceable provisions.

4.11 While it may seem obvious, articulating this objective is important because it:

- guides application of the principles discussed further below, which may sometimes compete and need to be balanced to best achieve the overarching objective; and
- brings the importance of legislative design into sharper focus when confronted by challenges to good legislative design.

Challenges to good legislative design

4.12 As the ALRC observed in Interim Report A, legislation is designed and drafted in an imperfect world and under several practical constraints.[4] The legislative design objective and principles for achieving it represent ideals, and achieving those ideals may be more difficult in practice than in theory.[5] In this sense, the principles discussed in this chapter operate as a form of guidance, and considerable scope

3 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.15]–[9.28].

4 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.8]–[4.15].

5 See, eg, Ian Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 163.

remains for professional judgement in determining how to apply the principles in a particular context.

4.13 While each Interim Report focused on a different aspect of legislative design, the following common themes emerged as challenges to good legislative design.

Demanding timeframes and constraints

4.14 Legislation is typically designed and drafted under demanding timeframes and with constrained resources. Former Commonwealth First Parliamentary Counsel, the Hon Hilary Penfold PSM KC, has observed that legislative drafting is

> almost always carried out in too much of a hurry. This is partly because of the workloads of individual drafters, and partly because of the political demands to produce legislation quickly after the initial policy decisions have been made.[6]

4.15 Interim Report B highlighted how short timeframes can negatively influence design choices.[7] In particular, it highlighted how a short timeframe for preparing draft legislation can have long-lasting impacts, creating a 'path dependency' by which early design choices limit the options available later in the legislative development process and after enactment.[8]

4.16 The process of converting policy into legislation is itself a complex one. Legislative design may not be a priority for, or may not be familiar to, policy-makers who are responsible for preparing legislative drafting instructions. In these cases, the burden of explaining the benefits and downsides of different design choices may fall on drafters, but be subject to their instructors' final decisions. This is complicated by the fact that there is no clear line between matters of policy and matters of a 'technical' nature relating to design and drafting.[9] All of this means that the relationship between drafters and instructors is important and has implications for the quality of legislation.[10]

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6 The Hon Hilary Penfold, 'The Genesis of Laws' (Paper, Courts in a Representative Democracy Conference, 11–13 November 1994) 35.

7 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.54].

8 Ibid [6.52].

9 See John Keyes and Dale Dewhurst, 'Shifting Boundaries between Policy and Technical Matters in Legislative Drafting' [2016] (1) *The Loophole* 23.

10 See Paul Salembier, 'The Do's and Don'ts of Dealing with Instructing Officials' [2014] (2) *The Loophole* 50.

Political process

4.17 The legislative process is intertwined with the political process. Often the passage of a Bill through Parliament will involve negotiations and amendments. What started out as a well-designed piece of legislation may, unavoidably, be amended considerably before it is passed into law.

4.18 Political imperatives may shape the legislative design process in other ways and incentivise design choices that run counter to the principles discussed below. For example, demands from stakeholders for an ever-growing amount of prescription are a source of complexity in corporations and financial services legislation.[11] Similarly, complex underlying policy may drive complex legislative design.[12]

4.19 Political factors may also influence decisions about the use of the legislative hierarchy. For example, a desire to increase the visibility of a policy measure, or to generate publicity through parliamentary debate, may incentivise provisions being placed in primary legislation when they may more appropriately be located in delegated legislation.[13] On the other hand, a desire to reduce publicity or to avoid parliamentary debate may incentivise leaving matters for delegated legislation.[14]

Inadequate post-enactment review and maintenance

4.20 As the 'flow' of new legislation increases, there is less opportunity and incentive to revisit the existing 'stock' of legislation.[15] Drafters have observed that some Australian legislation is decades old.[16] Despite amendments over time, the design of such legislation may at least partly reflect outdated design approaches common at the time of enactment. This reality challenges legislative design because those responsible for amending the legislation face a choice: maintain consistency by adopting outdated design approaches, or accept a degree of inconsistency to adopt modern drafting standards.

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11 See, eg, Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 495.

12 Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design — Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 281.

13 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.63].

14 Ibid [3.64], [3.71]–[3.73].

15 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.6]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.8]–[6.25], [7.12]–[7.14]. 'Flow' refers to the making of new Acts and legislative instruments within a given time period, while 'stock' refers to the existing body of in-force principal legislation at a particular moment in time: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 167.

16 Janet Erasmus, 'Keepers of the Statute Book: Lessons from the Space-Time Continuum' [2010] (1) *The Loophole* 7, 17.

Diffuse guidance

4.21 Australian guidance materials relating to legislative design are spread across numerous sources.[17] Although most resources are published and maintained by OPC,[18] other relevant materials are also published by government departments[19] and Parliament.[20] Much of this guidance may be familiar to legislative drafters, but less visible to others involved in legislative design. Its diffusion makes it less readily accessible. Furthermore, while most guidance is relevant to legislative *design*, it is largely framed as guidance relevant to legislative *drafting*. As a result, existing guidance does not emphasise the importance of good design.

4.22 This may be contrasted with New Zealand, whose Legislation Design and Advisory Committee ('LDAC') maintains the New Zealand *Legislation Guidelines*.[21] These guidelines cover a wide range of topics relating to legislative design and drafting, and are described by the LDAC as 'a guide to making good legislation'.[22]

The importance of structure and framing

4.23 Interim Report C focused on the structure and framing of legislation. Structure and framing refer to how legislation is designed — specifically, how information is presented and organised to communicate the substance of the law. Structure refers to the order in which material and concepts are introduced to readers and other aspects of legislation, such as the use of white space and indentation.[23] Framing is a broader concept, which refers to the task of constructing (or conceiving the design of) legislation to ensure it is most effective in communicating with its intended audiences.[24]

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17 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.80].

18 See, eg, Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013); Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016); Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019). OPC also publishes a number of Drafting Directions, which are 'an authoritative series of pronouncements on a range of drafting issues': Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [3].

19 See, eg, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011); Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014); Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017).

20 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (1st ed, 2020).

21 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021).

22 Legislation Design and Advisory Committee (NZ), 'Guidelines' <www.ldac.org.nz/guidelines/>. See generally Australian Law Reform Commission, 'Comparative Frameworks for Promoting Good Legislative Design' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

23 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.25]–[1.30].

24 See ibid [1.31]–[1.32].

4.24 Clear structure and framing are important means of ensuring that users can navigate and understand legislation. As Dr Onoge observes, the design and structure of legislation 'set the tone and communicate the intent as much as the words do'.[25] Good structure and framing further the objective of legislative design because they 'help users locate relevant provisions' and improve the 'overall accessibility' of legislation.[26] This, in turn, makes it easier for users to understand the law's intent and policy objectives.

Principles for structuring and framing legislation

Recommendation 24 Corporations and financial services legislation should be structured and framed so as to enhance navigability and comprehensibility, and to communicate the fundamental norms of behaviour underpinning the legislation, by applying the following working principles:

a. Provisions should have thematic and conceptual coherence (**coherence**).

b. Related provisions should be proximate to one another (**grouping**).

c. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (**intuitive flow**).

d. The most significant provisions should precede less significant provisions or more technical detail (**prioritisation**).

e. Legislation should be as succinct as practicable (**succinctness**).

f. Provisions should be designed in a way that avoids duplication and minimises overlap (**consolidation**).

g. Legislation should be structured and framed to help users develop and maintain mental models that enhance navigability and comprehensibility (**mental models**).

4.25 **Recommendation 24** largely formalises Proposal C14 from Interim Report C. In summary:

- When structuring and framing corporations and financial services legislation, the aims should be to enhance its navigability and comprehensibility, and ensure it communicates the fundamental norms of behaviour underpinning the legislation.
- The working principles of coherence, grouping, intuitive flow, prioritisation, succinctness, consolidation, and mental models are means of achieving those aims. They are described as 'working principles' because they are not 'principles' in the strict sense of that term, but more akin to 'rules of thumb' that

25 Elohor Onoge, 'Structure of Legislation: A Paradigm for Accessibility and Effectiveness' (2015) 17(3) *European Journal of Law Reform* 440, 446.

26 Ibid.

are to be applied flexibly in the pursuit of navigability, comprehensibility, and ensuring that fundamental norms of behaviour are clearly communicated.[27]

4.26 These working principles draw on a number of sources, including existing guidance related to legislative drafting and the ALRC's analysis of the current structure and framing of Chapter 7 of the *Corporations Act*. They are not an exhaustive list of principles relevant to structure and framing, and the recommendations are framed by reference to corporations and financial services legislation because that was the focus of the ALRC's analysis. However, the principles would be applicable to Commonwealth legislation generally.

4.27 Mental models, in particular, provide the foundation for how humans understand and navigate the world, including interactions with legislation.[28] The structure and framing of legislation contribute to users' mental models by giving information or 'clues' about how to use the legislation or where to find certain provisions. The information conveyed by structure and framing form part of what Don Norman calls the 'system image', which in turn helps users develop a mental model.[29] Users may then rely on their mental model to more effectively and efficiently navigate the legislation to find the information they need. In short, good mental models give users a 'structure to the apparent randomness' of the law.[30]

4.28 Each interaction with a piece of legislation has the potential to reinforce or contradict users' existing mental models for how legislation works. Accordingly, structure and framing should assist users to develop clear and effective mental models that help them interact with legislation.

4.29 Submissions in response to Interim Report C endorsed the principles set out in Proposal C14 and acknowledged their potential to make legislation easier to navigate and understand.[31]

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27 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.33]–[9.35]. In their submission in response to Interim Report C, Allens helpfully observed that the working principles covered 'principles', in the strict sese of that term, 'legislative methods', and 'objectives': see Allens, *Submission 90*. They urged applying this taxonomy to more clearly delineate between each concept. While there is value in this analytical approach, it risks introducing a level of complexity that makes it more difficult to apply the working principles in everyday practice. This is why the ALRC has expressed **Recommendation 24** in its present form.

28 Don Norman, *The Design of Everyday Things* (Basic Books, 2013) 247. See also King Irving, *Submission 80*.

29 Norman (n 28) 31.

30 Ibid 247.

31 See, eg, M Nehme, *Submission 81*; Association of Superannuation Funds of Australia, *Submission 84*; Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*; Allens, *Submission 90*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*. See also King Irving, *Submission 80*.

4.30 Interim Report C focused on the working principles in their application to the 'horizontal' structure and framing of legislation — that is, the structure and framing of legislation at one level, rather than between levels, of the legislative hierarchy.[32] However, the working principles of coherence, grouping, and prioritisation are also relevant to the design of the legislative hierarchy (the 'vertical' structure of legislation).[33] Overlap between the working principles for structuring and framing legislation and principles relating to the delegation of legislative power is discussed below.[34]

The principled delegation of legislative power

Recommendation 25 In designing legislation, the following principles should guide decisions about when and how legislative power should be delegated:

a. Democratic accountability, via Parliament and its processes, is crucial to the law's legitimacy (**democratic accountability and legitimacy**).

b. Legislation should be durable and allow for flexibility where necessary (**durability and flexibility**).

c. Provisions that delegate legislative power should be clear and enable users to understand when and how the power may be exercised (**clarity and predictability**).

d. Delegated legislation should not undermine the law's coherence and navigability (**coherence and navigability**).

Recommendation 26 The Attorney-General's Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power consistent with Recommendation 25.

4.31 Interim Report B identified three key issues relating to the delegation of legislative power and the design of the legislative hierarchy:

- First, there exists a wide range of legislative practice such that it would be impossible to prescribe a 'one size fits all' approach to delegating legislative power.[35]
- Secondly, existing guidance relating to the delegation of legislative power does not take account of this diverse practice. In some respects, existing guidance is inconsistent with modern legislative practice, particularly because

32 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.24]–[1.25].
33 Ibid [1.24].
34 See below [4.43]–[4.46].
35 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.10]–[3.14], [3.20]–[3.35].

guidance focuses on the use of examples rather than principles. Guidance could therefore be improved by drawing out the key principles that should underpin delegations of legislative power, and ensuring guidance better reflects best legislative practices.[36]

- Thirdly, guidance relating to the delegation of legislative power is currently spread across numerous sources, which are maintained by different stakeholders in the legislative process.[37]

4.32 **Recommendations 25** and **26** address these issues by:

- clearly articulating principles (applicable to a wide range of circumstances) that should guide the delegation of legislative power; and
- rationalising existing guidance and creating a central resource relating to the delegation of legislative power.

4.33 **Appendix D** to this Report contains draft guidance that could be adopted by AGD to implement **Recommendation 26** and which reflects the principles outlined in **Recommendation 25**.[38]

4.34 Implementing **Recommendations 25** and **26** would help ensure that those who design legislation follow a principled and consistent approach when considering whether, and how, to delegate legislative power. In turn, this would help design legislation that makes appropriate and effective use of the legislative hierarchy.

4.35 Although the focus of this Inquiry has been corporations and financial services legislation, **Recommendations 25** and **26** are expressed more broadly. In summary, and as outlined in Interim Report B,[39] the reasons for this are:

- The issues of coherence in regulatory design and legislative complexity arising from the delegation of legislative power are not isolated to corporations and financial services legislation.
- There would be little utility in developing guidance (particularly principles-based guidance) relevant to one area of law without having regard to more generally applicable principles.
- Consultees who work outside of corporations and financial services regulation have indicated there would be benefit in consolidated guidance of general application.
- Experiences in comparable parliamentary jurisdictions, such as the UK and New Zealand, suggest that principled guidance is important.

36 Ibid [3.38]–[3.40].
37 Ibid [3.10]–[3.19].
38 As to the roles of AGD, OPC, and the Department of the Prime Minister and Cabinet, see ibid [3.37].
39 Ibid [3.42].

4.36 **Recommendation 26** formalises Proposal B12 from Interim Report B. Submissions in response to Interim Report B broadly supported the desirability of consolidated guidance concerning the delegation of legislative power.[40] Submissions also generally supported the illustrative guidance contained in Appendix E to Interim Report B. This has been amended in light of stakeholder feedback and appears in **Appendix D** to this Report.[41] As outlined in Interim Report B, the draft guidance prepared by the ALRC:

- principally reframes existing guidance so as to draw out the key principles that underpin it; and
- revises or expands existing guidance to recognise that the key principles are capable of being applied differently in a range of circumstances.[42]

Overarching principles

4.37 The four overarching principles set out in **Recommendation 25** should guide decisions about 'what goes where' in the legislative hierarchy and how delegated legislative powers should be designed, consistent with maintaining an appropriate delegation of legislative authority. To some extent, the principles compete with each other and reflect the unavoidable tension between the benefits and risks of delegating legislative power.[43] This section briefly discusses the overarching principles.

Democratic accountability and legitimacy

4.38 Legitimacy relates to whether 'an institution or organisation is perceived as having a "right to govern" both by those its seeks to govern and those on whose behalf it purports to govern'.[44] Parliamentary legitimacy is drawn from its democratically-elected membership, the transparent conduct of its business in public, and its accountability generally. By contrast to primary legislation, delegated legislation may be made 'behind closed doors' and those who make it are not directly accountable to the public in the same way as members of Parliament.[45] Delegated legislation may therefore lack the same level of democratic legitimacy as primary legislation made by Parliament.

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40 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [57].

41 In addition to feedback provided through submissions, the ALRC gratefully acknowledges extensive feedback provided through consultation with Jacinta Dharmananda.

42 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.38]–[3.40].

43 See generally ibid [3.6]–[3.9], [3.48]–[3.49], [4.8]–[4.11].

44 Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] (Spring) *Public Law* 63, 76.

45 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.50].

4.39 Democratic accountability and legitimacy direct close attention to:

- the scope of any delegated legislative power;[46] and
- the safeguards that provide transparency, accountability, and parliamentary oversight of delegated legislative power.[47]

Durability and flexibility

4.40 Durability refers to the ability of legislation to remain fit for purpose and maintain its relevance over time. Flexibility refers to how well legislation can adapt to changing or unforeseen circumstances.[48] Delegated legislation is an important means of providing both durability and flexibility, but it should not completely replace law reform or periodic review of legislation.[49] The adoption of 'coherent legislative principles', discussed in Interim Report C, offers one way of creating durable and flexible legislation.[50]

Clarity and predictability

4.41 Where primary legislation delegates legislative power, the parameters of that power should be clear so users can understand when and how the power may be exercised, and the scope of matters that may be prescribed. The delegated law-maker should be clearly identified, as well as any preconditions to validly exercising the delegated legislative power. Wide or open-ended delegations, especially concerning important policy matters, risk undermining predictability.[51]

Coherence and navigability

4.42 As with the horizontal structure of legislation, the vertical structure of legislation should be coherent. Multiple sources of law spread across the legislative hierarchy can lead to complexity, fragmentation, and overlap. Coherence and navigability are mutually reinforcing.[52]

Overlap with principles for structuring and framing legislation

4.43 As noted above, the working principles for structuring and framing legislation overlap in some respects with the principles relating to delegated legislative power.

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46 Ibid [3.52], [4.47]–[4.51].
47 Ibid [3.51], [4.33]–[4.69].
48 Ibid [3.53].
49 See, eg, Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 309; Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023).
50 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.44]–[9.48].
51 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.55].
52 Ibid [3.56].

4.44 Democratic accountability underpins the widely held view that matters of significant policy should be contained in primary legislation, and not delegated legislation.[53] This complements the working principle of prioritisation, discussed above, because matters of significant policy should (by their nature) be prioritised for users of legislation by appearing in primary legislation.

4.45 Clarity and predictability in the delegation of legislative power complements coherence and grouping. This is because a clear and predictable delegation of legislative power should produce coherent delegated legislation that effectively groups related provisions within each layer of the legislative hierarchy. However, the extent to which related provisions can be grouped between primary and delegated legislation may be limited by other considerations relating to the legislative hierarchy, such as the requirement that matters of significant policy appear only in primary legislation.

4.46 Like structure and framing, effective use of the legislative hierarchy should help users to develop mental models of legislation. The ALRC's recommended legislative model, discussed in **Chapter 6** of this Report, illustrates this by showing how:

- removing prescriptive detail from primary legislation, and locating it in delegated legislation, can help to prioritise the core obligations in primary legislation; and
- coherently and predictably grouping provisions across the legislative hierarchy according to their theme and function can help users find the law and develop a mental model of the overall legislative framework.

The principled design of definitions

Recommendation 27 When defining words or phrases in corporations and financial services legislation, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.

Recommendation 28 The following working principles should be applied when designing and drafting definitions in corporations and financial services legislation:

When to define

a. Unless necessary, words and phrases bearing an ordinary meaning should not be defined.

b. Words and phrases should be defined if the definition significantly reduces the need to repeat text.

c. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

53 Ibid [3.58]–[3.70].

Consistency of definitions

d. Each word and phrase should be used with the same meaning throughout an Act, and in delegated legislation made under that Act.

e. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

f. Relational definitions should be used sparingly.

g. Where possible, definitions contained in the *Acts Interpretation Act 1901* (Cth) should be relied upon and identified.

Design of definitions

h. Interconnected definitions should be used sparingly.

i. Where practicable, defined terms should correspond intuitively with the substance of the definition.

j. It should be clear to users of legislation whether a word or phrase is defined, and where the definition can be found.

4.47 Interim Report A focused on the use and design of legislative definitions. Legislative definitions may be used for a number of purposes, but primarily 'to provide aid in construing the statute'.[54] As a legislative drafter has noted, the effective use of definitions can help users arrive at the intended meaning of legislation after a 'short and pleasant' journey, rather than a 'long and agonising' one.[55] However, the use of definitions can make legislation less navigable, because often users must look somewhere other than the provision they are reading to understand the meaning of a defined term.[56]

4.48 Interim Report A demonstrated that corporations and financial services legislation, particularly the *Corporations Act*, uses legislative definitions in several different ways and for several different purposes, sometimes inconsistently and in ways that impede navigability and comprehensibility.[57] The use and design of definitions in the *Corporations Act* is a source of significant complexity and in several respects makes it an outlier in the Commonwealth statute book. For example, over 30% of words in the *Corporations Act* are potentially defined, which ranks second

54 *Kelly v The Queen* (2004) 218 CLR 216 [103]. See also *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628, 635.

55 Louise Finucane, 'Definitions — A Powerful Tool for Keeping an Effective Statute Book' [2017] (1) *The Loophole* 15, 15–16.

56 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.64].

57 See, eg, ibid [3.92]–[3.103], [4.31]–[4.54].

behind only one other Act in which 32% of words are potentially defined and well above the average of 9% across all Acts.[58]

4.49 **Recommendation 28** sets out working principles that should be applied to the use and design of definitions in corporations and financial services legislation to facilitate its navigability and comprehensibility. These principles draw on a number of sources, including existing guidance related to legislative drafting and the ALRC's analysis of the current use of definitions in corporations and financial services legislation. They are not an exhaustive list of principles relevant to legislative definitions, and the recommendations are framed by reference to corporations and financial services legislation because that was the focus of the ALRC's analysis. However, the principles would be applicable to Commonwealth legislation in general.

4.50 **Recommendations 27** and **28** largely formalise Question A2 from Interim Report A. Submissions in response to Question A2 generally supported the principles outlined there and recognised the potential for them to reduce complexity. A new working principle relating to reliance on definitions contained in the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') has been included in response to stakeholder feedback.[59] This working principle is consistent with the aim of 'making Commonwealth legislation shorter, less complex and more consistent in operation', as expressed in the *Acts Interpretation Act*.[60]

Overarching consideration

4.51 When defining words or phrases in corporations and financial services legislation, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation (**Recommendation 27**). This overarching consideration should guide decisions as to whether a particular term should be defined in legislation, the choice of label for a defined term, and when deciding how any definition should be designed, structured, or drafted. The overarching consideration should therefore guide the application of the working principles outlined in **Recommendation 28.**

4.52 The overarching consideration reflects Professor Eagleson's view that definitions should be utilised primarily for the convenience of users of legislation, rather than for the convenience of drafters.[61] This is not to suggest that defined terms

58 Ibid [3.94]. The Act with the greatest number of potentially defined words is the *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018* (Cth). See the discussion of Recommendation 4 in Interim Report A, concerning the repeal of the definitions for the commonly used terms 'for' and 'of' in the *Corporations Act*: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [5.82]–[5.99].

59 J Dharmananda, *Submission 38*. See also Financial Services Council, *Submission 39*.

60 *Acts Interpretation Act 1901* (Cth) s 1A. See also J Dharmananda, *Submission 38*.

61 Robert D Eagleson, 'Legislative Lexicography' in EG Stanley and TF Hoad (eds), *Words: For Robert Burchfield's Sixty-Fifth Birthday* (DS Brewer, 1988) 81, 82; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.20].

are not important to a drafter's work.[62] However, like the overarching objective of legislative design discussed above, emphasising the primacy of users of legislation helps to avoid any misperception that there is a dichotomy between precision or accuracy and effectiveness.[63]

Working principles

4.53 The working principles outlined in **Recommendation 28** appear in three categories, which reflect the structure of Chapters 4–6 of Interim Report A: when to define a term, consistency of definitions, and designing definitions.

4.54 Applying these working principles would help to ensure that:

- defined terms are used for appropriate purposes, and not in ways that would create complexity or when the ordinary meaning of a term should be used;[64]
- definitions are used consistently within a piece of legislation, between related pieces of legislation (including delegated legislation), and to the extent possible, across the statute book;[65] and
- definitions are designed so as to promote readability, navigability, and in turn, comprehensibility.[66]

Consistency generally

4.55 Ideally, consistency should be promoted not only in the use of definitions, but wherever similar concepts, structures, and forms are used within and across pieces of legislation. For example, implementing Recommendations 20–23 discussed in Interim Report C would make offence and civil penalty provisions identifiable through consistent structures and language.[67]

4.56 Adopting consistent phrasing for definitions and common types of provisions, such as offences and civil penalties, also has the potential to make legislation more easily searchable and readable by a computer. This may help to make updating compliance systems more efficient. Specialised legislative drafting technology may also help to promote the use of common structures and phrases.[68]

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62 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.21].

63 See, eg, Jack Stark, 'Tools for Statutory Drafters' [2012] (2) *The Loophole* 51, 55–6; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.26]–[4.28].

64 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.55]–[4.119].

65 Ibid [5.5]–[5.81], [5.100]–[5.149].

66 Ibid [6.5]–[6.106].

67 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [10.7]–[10.39], [10.46]–[10.54].

68 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.14]–[3.18], [6.92]–[6.106], [10.146]; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021). See also **Chapter 8** of this Report.

Further reforms

4.57 This part discusses further reforms aimed at emphasising the importance of good legislative design in Commonwealth legislation. Although the ALRC has not been tasked with reviewing the entire Commonwealth statute book, data analysis indicates that legislative complexity is a feature of the statute book more generally. The interaction of over 1,200 Acts with over 24,000 legislative instruments, comprising hundreds of thousands of pages, invariably produces systemic complexity. Good legislative design is a recognised strategy for managing this complexity over time.[69]

Community of practice

Recommendation 29 In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles.

4.58 **Recommendation 29** formalises Proposal B14 from Interim Report B. As outlined there, Proposal B14 arose out of a consultation conducted by the ALRC with a range of agencies responsible for delegated legislation.[70] Several participants noted that while many large government departments have their own legislative design resources, there are few opportunities to share ideas, experiences, and skills across departments. Participants generally agreed that a forum such as a Community of Practice would help to foster high-quality law design and drafting through training, workshops, resource-dissemination, and information-sharing. Submissions in response to Interim Report B also generally supported Proposal B14.[71]

4.59 **Recommendation 29** is not framed by reference to corporations and financial services legislation. This is because, as consultees observed, the benefit of a Community of Practice stems largely from its cross-departmental membership. There would be less utility in a Community of Practice solely focused on corporations and financial services legislation. Noting that OPC conducts a 6-monthly Drafters' Forum, which aims to support 'in-house' drafters of legislative instruments,[72] **Recommendation 29** is directed at the broader cohort of stakeholders involved in legislative design.[73]

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69 See, eg, Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014); See also **Chapter 10** of this Report.

70 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.46].

71 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [60]–[62].

72 Office of Parliamentary Counsel (Cth), *Annual Report 2019–2020* (2020) 5.

73 See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.47].

4.60 Implementing **Recommendation 29** would also complement the creation of a consolidated guide to legislative design for all Commonwealth legislation, discussed further below.[74]

A consolidated guide to legislative design

Recommendation 30 The Department of Treasury (Cth), in consultation with the Office of Parliamentary Counsel (Cth), should review existing guidance relating to the design and drafting of legislation, with a view to producing and maintaining a consolidated guide to legislative design for corporations and financial services legislation.

4.61 A guide to legislative design for corporations and financial services legislation would serve four main purposes:

- First, it would aid implementation of the ALRC's recommended reforms, as discussed in **Chapter 7** of this Report. The guide could be produced and iteratively maintained as part of the process for implementing the reforms arising out of this Inquiry.
- Secondly, it would present a means of 'operationalising' the principles and guidance recommended in this chapter, as well as capturing other important observations made by the ALRC throughout this Inquiry.
- Thirdly, it could capture guidance relating to aspects of legislative design that have not been considered in detail during this Inquiry.[75]
- Fourthly, it would provide a valuable resource to aid in the ongoing maintenance of corporations and financial services legislation, to help manage legislative complexity in that legislation, and would act as a repository of institutional knowledge within OPC and Treasury.[76]

4.62 Implementing **Recommendation 30** may overlap in some respects with **Recommendation 26** (guidance relating to the delegation of legislative power). However, any overlap could be managed and each may nonetheless be implemented independently. Implementing **Recommendation 30** would also provide an opportunity to implement Recommendation 10 (relating to the identification of defined terms).[77]

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74 See below [4.63]–[4.64].

75 This may include, for example, guidance relating to the design of administrative powers.

76 Cf Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006). This Drafting Direction reflects principles and drafting approaches that arose out of the Taxation Laws Improvement Project (1994), now reflected in the *Income Tax Assessment Act 1997* (Cth).

77 For discussion of Recommendation 10, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.71]–[6.88].

A guide for all Commonwealth legislation

4.63 Although it may be outside the scope of this Inquiry to recommend its creation, there would be significant benefit in a consolidated guide to legislative design applicable to all Commonwealth legislation. Principally, a consolidated guide would address the existing diffusion of guidance, noted above.[78] It would also help to emphasise legislative *design* as an important, complementary discipline to regulatory design and legislative drafting.[79] Relatedly, reviewing existing guidance with a view to creating a consolidated guide to legislative design may help to clarify the audiences for guidance materials. For example, OPC presently publishes a range of guidance that is potentially relevant to those within government who design policy or legislation, as well as legislative drafters within and outside OPC. The process of review may allow for particular audiences to be clarified and relevant guidance to be tailored accordingly.

4.64 As the department with responsibility for upholding the rule of law and the integrity of the law-making process, AGD should lead the development of any consolidated guide to the design of Commonwealth legislation, in consultation with OPC and the Department of the Prime Minister and Cabinet. This process would commence with a review of existing guidance relating to legislative design and drafting in order to identify opportunities for consolidation and any gaps in existing guidance. The end product should be a consolidated guide in similar form to the New Zealand *Legislation Guidelines,* noted above.[80] In this respect, there would be value in consulting with (at least) the LDAC before commencing the project.

An expert advisory body

4.65 Interim Report B discussed the potential for an expert advisory body to help improve the design of Commonwealth legislation.[81] With reference to the LDAC, the Delegated Legislation Scrutiny Committee has recognised the potential for an expert advisory body to 'assist in resolving issues associated with inappropriate delegations of legislative power' and has recommended that the Australian Government consider establishing such a body.[82]

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78 See above [4.21]–[4.22].

79 See generally Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.73]–[2.108].

80 See above [4.22].

81 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.70]–[4.80].

82 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) 91, rec 8. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.75]–[4.77]. The Australian Government has indicated that it does not support the Committee's recommendation: see Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation* (2019) 3.

4.66 In light of the importance of legislative design for the navigability, comprehensibility, and ultimately effectiveness of legislation, there may be considerable value in establishing an expert advisory body relating to legislative design. Such a body could be modelled on the LDAC.[83] However, and as noted in Interim Report B, feedback from consultees indicated that an expert advisory body may be ineffective without a more comprehensive review of the legislative development process in Australia.[84] Consultees particularly emphasised that the short timeframes for developing Commonwealth legislative proposals would limit the ability of an expert advisory body to assist.

4.67 The findings of this Inquiry suggest that a wider review of the parliamentary legislative development process would have merit. Clearly, such a review would be a significant undertaking and would require input from all stakeholders in the legislative development process — including parliamentarians and their advisers, policy-makers, legislative designers and instructors, and legislative drafters. In light of stakeholder feedback during this Inquiry, a particular focus of any review should be the short timeframes for developing legislation, their impact upon the complexity of legislation, and the means of managing legislative complexity (discussed further in **Chapter 10** of this Report). The outcome of any review should be to identify improvements to the legislative development process that could facilitate better quality and less complex legislation.

83 See generally Australian Law Reform Commission, 'Comparative Frameworks for Promoting Good Legislative Design' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

84 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.78].

5. Restructuring and Reframing Financial Services Legislation

Contents

Introduction

5.1 In this chapter, the ALRC recommends restructuring and reframing the financial services-related provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. In Interim Report C, the ALRC demonstrated how the current structure and framing of financial services legislation makes the legislation unnecessarily difficult to navigate and understand. This unnecessary complexity creates costs for businesses and other stakeholders. Implementing the recommendations in this chapter would reduce those costs by making the legislation easier to navigate and understand than is presently the case. The recommendations would also ensure that fundamental norms of behaviour are more effectively communicated to regulated persons, underpinning a legislative framework that should enable more meaningful compliance with the substance and intent of the law.

5.2 This chapter focuses on the structure and framing of the primary legislation that regulates financial products and financial services. This chapter complements the discussion of 'vertical' structure and use of the legislative hierarchy in **Chapter 6** of this Report. Together, the recommendations in this chapter and **Chapter 6** comprise

the reformed legislative framework for financial services regulation recommended by the ALRC.[1]

5.3 This chapter proceeds in seven parts. The first part briefly summarises the problem that this chapter seeks to address and the ALRC's recommended solution. The second part explains the ALRC's recommendations for simplifying the definitions of 'financial product' and 'financial service'. The third, fourth, fifth, and sixth parts focus on how existing legislation could be restructured and reframed to produce legislative chapters relating to four regulatory themes: consumer protection, disclosure for financial products and financial services, financial advice, and the general regulatory obligations of financial services providers. The final part explains how these legislative chapters should be structured to create a distinctive Financial Services Law in Sch 1 to the *Corporations Act*.

The problem and solution in overview

5.4 Clear structure and framing are crucial for ensuring that users of legislation can navigate and understand it, and thereby comply with its obligations or enforce compliance with those obligations.[2] The existing structure and framing of financial services legislation make the legislation difficult to navigate and understand.[3] This difficulty impedes the law's effectiveness and creates burdens of compliance that are higher than necessary.[4]

5.5 Many of the existing problems in the structure and framing of Chapter 7 of the *Corporations Act* appear more broadly in corporations and financial services legislation.[5] The ALRC's problem analysis demonstrates three key problems in the structure and framing of Chapter 7 of the *Corporations Act*:

- Chapter 7 **lacks coherence and does not have an intuitive flow**.[6] By regulating financial products, services, and markets together, Chapter 7 appears to be thematically consistent. However, thematic consistency at such a high level means that the Chapter simply tries to do too much. This makes it difficult to achieve an intuitive flow and to prioritise provisions based on their scope of application or general importance.
- Chapter 7 **fails to prioritise key messages**.[7] The structure and framing of Chapter 7 do not help to communicate important messages and make it more difficult to comply with the law. As the Financial Services Royal Commission observed, financial services legislation fails to communicate the fundamental

1 For an overview of the reformed legislative framework, see **Chapter 3** of this Report.
2 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.35]–[1.47].
3 Ibid ch 8.
4 Ibid.
5 Ibid [8.6]–[8.9].
6 Ibid [8.40]–[8.46].
7 Ibid [8.46]–[8.49].

norms of behaviour that it promotes.[8] This makes it less likely that the law will be effective and fulfil its objectives.

- The structure and framing of Chapter 7 make it **difficult for users to find relevant law**.[9] The lack of coherent grouping and the failure to prioritise important provisions mean that users must read through the text of numerous provisions to determine whether they are relevant, with little help from their structure and framing.

5.6 These problems are compounded by three other design features of the existing legislative framework:

- Legislation that applies to the financial services industry as a whole is split between Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. Additional (and sometimes overlapping) requirements are also contained in more specific legislation, such as the *NCCP Act*, *SIS Act*, and *Insurance Contracts Act 1984* (Cth) ('*Insurance Contracts Act*').
- Different, but overlapping, concepts and definitions are used across different Acts.[10] This is most notable in respect of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*, which use different definitions of each of 'financial product' and 'financial service' to set and adjust regulatory boundaries.
- There is extensive and complex use of delegated legislation made under the *Corporations Act*, discussed further in **Chapter 6** of this Report.[11]

The solution

5.7 In summary, the ALRC recommends that the primary legislation regulating financial products and financial services be restructured and reframed so that it is easier to navigate and understand. Implementing the recommendations explained in this chapter would see the creation of:

- a single definition of each of the terms 'financial product' and 'financial service' for all corporations and financial services legislation; and
- a coherent body of primary legislation, known as the Financial Services Law, contained in Sch 1 to the *Corporations Act* (the FSL Schedule).

5.8 The Financial Services Law would not replace every piece of primary legislation that currently regulates financial services, such as the *NCCP Act*, *SIS Act*, and *Insurance Contracts Act*. However, compared with the existing legislative framework, the Financial Services Law would provide a clear home for the primary legislation that applies generally to financial products and financial services.

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8 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494–6.

9 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [8.50]–[8.53].

10 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.31]–[4.54].

11 See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.26]–[6.48].

5.9 By applying the working principles for structuring and framing legislation discussed in **Chapter 4** of this Report, the Financial Services Law would be structured and framed in a way that:

- **coherently groups related provisions** according to their scope of application and regulatory theme;
- **does not rely on different definitions** of 'financial product' and 'financial service' to adjust regulatory boundaries;
- **prioritises significant provisions** over less significant provisions or technical detail appropriate for inclusion in primary legislation;
- **consolidates provisions** to avoid duplication and minimise overlap;
- **creates an intuitive flow** for users of the legislation; and
- helps users develop and maintain **effective mental models** that enhance the legislation's navigability and comprehensibility.

5.10 The recommendations discussed in this chapter would be most effective if implemented as a package. However, the recommendations are also designed such that partial implementation would nonetheless produce simpler and more navigable legislation. If **Recommendation 42** to create the FSL Schedule were not adopted, the recommendations to create separate legislative chapters (or parts within a chapter) relating to consumer protection, disclosure, financial advice, and general regulatory obligations could be implemented independently. Similarly, the FSL Schedule could be created with a different structure from that described by **Recommendations 33–40**.

5.11 The recommendations in this chapter are also designed to be implemented alongside the recommended legislative model explained in **Chapter 6** of this Report. Together, the recommendations in this chapter and **Chapter 6** comprise the reformed legislative framework for financial services regulation (summarised in **Chapter 3** of this Report).

5.12 As **Chapter 6** of this Report explains in more detail, implementing the recommended legislative model would produce:

- primary legislation that embodies the core policy of the regulatory regime;
- a single, consolidated legislative instrument — known as the Scoping Order — containing the vast majority of exclusions and exemptions from the Act-level provisions and other detail necessary for adjusting the scope of the regulatory regime; and
- thematically consolidated rules, which for convenience may be labelled 'rulebooks', containing prescriptive detail.

5.13 This chapter focuses upon the structure and framing of the Act-level provisions, but also touches upon the role of the Scoping Order and rules. **Chapter 6** of this Report further discusses how the recommendations in this chapter and **Chapter 6** interact. **Chapter 7** of this Report contains further detail about how these recommendations may be implemented.

Definitions of 'financial product' and 'financial service'

Recommendation 31 Corporations and financial services legislation should be amended to enact a single, simplified definition of each of the following terms:

a. 'financial product'; and

b. 'financial service'.

These terms should be defined in the *Corporations Act 2001* (Cth) and cross-referenced in other legislation.

Recommendation 32 To implement Recommendation 31:

a. specific inclusions within the definitions of 'financial product' and 'financial service' should, so far as possible, be located in primary legislation; and

b. application provisions, exclusions, and exemptions (where relevant) should be used to limit the application of provisions to specific products, services, persons, and circumstances.

5.14 The definitions of 'financial product' and 'financial service' are foundational because they establish the regulatory boundaries of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.[12] In other words, something is regulated by financial services legislation only if it meets the definition of a 'financial product' or a 'financial service'.

5.15 Significant complexity is created by the use of different definitions for each of 'financial product' and 'financial service' to adjust the scope of regulation in different areas.[13] For example, Part 2 Div 2 of the *ASIC Act* adopts different, broader definitions of 'financial product' and 'financial service' than Chapter 7 of the *Corporations Act*.[14] However, some parts of Chapter 7 of the *Corporations Act* nonetheless adopt, and further tailor, the broader *ASIC Act* definitions.[15]

5.16 In summary, the ALRC recommends that:

- a simplified definition of each of 'financial product' and 'financial service' should appear in the *Corporations Act*;

12 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.14]–[7.15].
13 Ibid [4.107]–[4.119].
14 Ibid [7.75]–[7.84].
15 See, eg, *Corporations Act 2001* (Cth) pt 7.8A.

- the definition of 'financial product' should cover the broader range of products presently subject to Part 2 Div 2 of the *ASIC Act* (compared to the narrower definition in Chapter 7 of the *Corporations Act*);
- the definition of 'financial service' should cover the full extent of services currently subject to Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*;[16]
- other legislation, such as the *ASIC Act*, should adopt the same definitions by reference to the *Corporations Act*;
- application provisions should be used to adjust the scope of regulation in different areas, not different definitions; and
- all exclusions from the definitions of 'financial product' and 'financial service' should be grouped and, where possible, consolidated in the Scoping Order (discussed further in **Chapter 6** of this Report).

5.17 Implementing these recommendations would simplify the legislative framework by:

- creating a single definition of each of 'financial product' and 'financial service';
- enabling users to look in one place (the *Corporations Act*) to determine what each of those terms means; and
- enabling users to look in one place (the Scoping Order) to identify all exclusions from those terms and any inclusions that may be in force and not appear in primary legislation.

5.18 The following sections outline how **Recommendations 31** and **32** may be given legislative effect. Prototype legislation contained in **Appendix E** to this Report illustrates the reformed definitions of 'financial product' and 'financial service'. Footnotes in the following sections include cross-references to specific illustrative provisions in the prototype legislation.

Financial product

5.19 To implement **Recommendation 31**, the definition of 'financial product' in the *Corporations Act* would be amended so that its scope corresponds to the definition currently found in s 12BAA of the *ASIC Act*.[17] This would mean incorporating within the *Corporations Act* the definition of 'credit facility' currently contained in reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) ('*ASIC Regulations*').[18] Doing so would ensure that consumer protections continue to apply to the range of products currently covered by Part 2 Div 2 of the *ASIC Act*. As outlined below, specific inclusions would appear in primary legislation and may, where not consolidated into primary legislation, also appear in the Scoping Order.

16 See below [5.25]–[5.27].
17 See ss 763A–764A of the prototype legislation in **Appendix E**.
18 See s 763E of the prototype legislation in **Appendix E**.

5.20 Implementing **Recommendations 31** and **32** would remove the need for different definitions of 'financial product' to adjust the scope of regulation. Instead, application provisions, exemptions, and exclusions would be used to limit the application of provisions to specific persons, products, services, and circumstances. Exclusions from the definitions of 'financial product' and 'financial service' should be avoided where possible (and application provisions used in their place, so far as possible). To further improve navigability, all exclusions from the definitions of 'financial product' and 'financial service' should be grouped and, where possible, consolidated in delegated legislation (the Scoping Order) in accordance with the recommended legislative model.[19]

5.21 As outlined in Interim Report A, the incidental product exclusion in s 763E of the *Corporations Act* is an unnecessary source of complexity.[20] To reduce that complexity but maintain existing policy settings, s 763E of the Act should be repealed and replaced with one or more specific exclusions in the Scoping Order, which only apply to exclude incidental products from certain provisions of the Act. In other words, the same outcomes as presently achieved by the incidental product exclusion could be achieved more simply by way of specific exclusions in the Scoping Order.

5.22 To further simplify the definition of 'financial product', the definitions of financial product-related terms in s 761A of the *Corporations Act* should be amended so that they contain the text of the definitions they currently cross-reference in s 764A.[21] The cross-referenced provisions in s 764A could then be replaced by the defined terms. **Example 5.1** illustrates how financial product-related terms in s 761A of the Act are currently defined by reference to specific paragraphs in s 764A, and how these definitions could be simplified.

19 See s 765A of the prototype legislation in **Appendix E**.

20 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.144]–[7.148].

21 The relevant definitions are those for 'deposit product', 'foreign passport fund product', 'general insurance product', 'insurance product', 'investment life insurance product', 'life risk insurance product', 'managed investment product', 'risk insurance product', and 'RSA product'.

Example 5.1: Simplifying financial product-related terms

Section 764A of the *Corporations Act* contains a number of specific inclusions within the term 'financial product' for the purposes of Chapter 7 of the Act. For example, s 764A(1)(i) specifies that the following is a financial product:

> any deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA (RSAs are covered by paragraph (h)) …

The term 'deposit product' is defined in s 761A of the Act by reference to s 764A(1)(i), as follows:

> ***deposit product*** means a financial product described in paragraph 764A(1)(i).

This current design approach reflects the need to limit financial product-related terms (such as 'deposit product') to products that are 'financial products'. In other words, to be a 'deposit product' something must meet the definition in s 764A(1)(i) *and* not be excluded from being a financial product by, for example, one of the specific exclusions in s 765A of the Act. This outcome could be achieved more directly, while also reducing cross-references and making the definitions in s 761A more self-contained.

5.23 A better design approach would be to amend each of the financial product-related terms in s 761A of the *Corporations Act* to contain the text of the paragraph they currently refer to in s 764A. Section 764A(1)(i), for example, which is cross-referenced by the existing definition of 'deposit product' in s 761A, could then be amended to simply say 'a deposit product'.

5.24 This approach is made possible because most of the definitions incorporate any relevant carve-outs, such as the definition of 'deposit product' in s 764A(1)(i) which excludes retirement savings accounts (RSAs). Consistent with **Recommendation 32**, exclusions and exemptions in the Scoping Order could further limit the application of these terms where relevant.

Financial service

5.25 To implement **Recommendation 31**, a single definition of 'financial service' would be created by reconciling the design and drafting of the present definitions found in Part 7.1 Div 4 of the *Corporations Act* and s 12BAB of the *ASIC Act*.[22]

5.26 This single definition should not (and need not) be a 'Frankenstein's monster' created by simply fusing the existing definitions. For example, the *ASIC Act* definition has some features that should not appear in a consolidated definition. Most confusingly, under s 12BAB(1AA) of the *ASIC Act*, a financial product is a 'financial service' for the purposes of Part 2 Div 2 of the Act.[23] If necessary, this outcome could be achieved for consumer protection provisions by changing references to 'financial services' to 'financial services and financial products'. The consolidated definition should nonetheless seek to preserve an appropriately broad scope that covers the services in both Part 7.1 Div 4 of the *Corporations Act* and s 12BAB of the *ASIC Act*.

5.27 For example, the definition should cover operating a financial market or clearing and settlement facility,[24] which are not presently specifically covered by Part 7.1 Div 4 of the *Corporations Act*. Similarly, s 12BAB of the *ASIC Act* does not expressly include either providing a crowdfunding service or providing a claims handling and settling service.[25] As discussed below, provision-specific exclusions could be used to reflect the existing application of obligations. Specific inclusions, exclusions, and related detail in delegated legislation would also need to be reconciled to ensure a sufficiently broad definition of 'financial service'.[26]

5.28 The effect of the above reforms would be that 'financial service' has only one meaning across corporations and financial services legislation. There would be no provision-specific variations to the definition. Application provisions, exclusions, and exemptions could be used to clearly and transparently narrow the scope of a particular provision, such as by excluding certain types of financial services or circumstances. The definition of 'financial service' itself, however, would not change.

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22 See s 766A of the prototype legislation in **Appendix E**.

23 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.78].

24 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB(1)(f).

25 *Corporations Act 2001* (Cth) ss 766A(1)(ea)–(eb). However, the expansive inclusion in s 12BAB(1)(g) of the *ASIC Act* may cover these services.

26 See, eg, *Corporations Regulations 2001* (Cth) pt 7.1 div 3; *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 2C, 2D.

Application provisions, exclusions, and exemptions

5.29 **Recommendation 32** complements **Recommendation 31** to ensure that the defined terms 'financial product' and 'financial service' remain consistent and navigable. At present, the definitions of these terms are adjusted to limit the application (scope) of obligations and other provisions, using exclusions in the Act and delegated legislation. In conjunction with different inclusions, these exclusions produce different definitions in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.

5.30 Implementing **Recommendation 32** would mean replacing tailored definitions for specific provisions with exclusions and exemptions from specific provisions (such as a part of the *Corporations Act*), or application provisions that otherwise limit the products, services, and persons to which provisions apply.[27] The potential benefits of **Recommendation 32** were first noted in Interim Report A.[28] **Examples 5.2** and **5.3** illustrate the differences between, on the one hand, tailoring definitions and, on the other hand, using exemptions and exclusions or application provisions.

Example 5.2: Tailored definitions

As discussed above, the definitions of 'financial product' and 'financial service' are tailored for the purposes of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*, with the *Corporations Act* definitions generally being tailored so they are of narrower scope. However, the *Corporations Act* further tailors the definitions of these terms for the purposes of specific provisions. For example, Part 7.8A of the *Corporations Act* uses a tailored definition of 'financial product' that includes both financial products as defined in Part 7.1 Div 3 of the *Corporations Act* and in Part 2 Div 2 of the *ASIC Act*.[29] The effect of the tailored definition in Part 7.8A is to broaden the application of design and distribution obligations, though this is not immediately apparent. Tailoring definitions is an unnecessarily complex way of narrowing or broadening obligations. Doing so makes it difficult for users to comprehend the scope of particular provisions and prevents users from developing effective mental models.

27 As outlined in **Chapter 1** of this Report, exclusions operate as carve-outs for particular products, services, categories of products and services, or circumstances, to change the scope of application of particular provisions. Exemptions perform a similar function, but operate as carve-outs from an obligation. Obligations attach to persons, so a person or class of persons may be exempted from an obligation. Application provisions may also be used to determine the scope of application for particular provisions by specifying the products, services, persons, or circumstances to which the provision applies. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [5.16], [5.115], [6.23], [7.131].

28 Ibid [7.165]–[7.167].

29 *Corporations Act 2001* (Cth) ss 994A, 994AA.

Example 5.3: Application provisions, exclusions, and exemptions

Application provisions offer an alternative way to narrow or broaden the scope of provisions, including obligations. For example, s 1010A of the *Corporations Act* provides that Part 7.9 does not apply to securities. This is an example of an application provision. Exclusions from provisions of legislation can achieve the same result. For example, s 994B(3) of the *Corporations Act* and reg 7.8A.20 of the *Corporations Regulations* contain exclusions that limit the financial products to which design and distribution obligations apply. Importantly, these application provisions and exclusions do not change definitions — they transparently limit the application of specific obligations to certain products and services.

Exemptions from obligations can be used to perform the same function as exclusions, with the main difference being that exemptions attach to persons rather than products, services, or circumstances.

5.31 As discussed further in **Chapter 6** of this Report, the recommended legislative model seeks to ensure that exclusions and exemptions created under **Recommendation 32** would be easy to locate and navigate.[30] Implementing **Recommendation 32** would see exclusions and exemptions grouped and, where possible, consolidated in the single Scoping Order created as part of the recommended legislative model. This would help users to quickly and easily establish whether any provisions in primary legislation do not apply to specific products, services, or persons.

Comparison with earlier proposals

5.32 This section briefly outlines how **Recommendations 31** and **32** correspond to Proposals A3–A6 in Interim Report A relating to the definitions of 'financial product' and 'financial service'.

5.33 Stakeholders generally supported Proposals A3–A6 in Interim Report A, but expressed some reservations concerning elements of Proposals A4–A6. **Recommendations 31** and **32** reflect Proposal A3 from Interim Report A by recommending that there be a single definition of each of 'financial product' and 'financial service'. However, the recommendations differ in some respects from Proposals A4–A6.

Proposal A4(a)–(c): Specific inclusions

5.34 Submissions expressed low levels of support for removing specific inclusions from the definition of 'financial product' (Proposal A4(a)). Removing specific inclusions

30 See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.168]–[7.169].

would simplify the process of determining whether something is a financial product.[31] However, it may come at the cost of disruption and legal uncertainty. For example, several stakeholders suggested that the specific inclusions are a source of clarity and certainty, particularly for products that may fall at the margins of the functional definition of 'financial product'.[32]

5.35 On balance, and in light of the ALRC's other recommendations for simplifying the legislative framework, the ALRC does not consider that the additional simplification produced by removing specific inclusions would outweigh the potential costs. Therefore, the ALRC does not recommend removing specific inclusions from the definition of 'financial product'.

5.36 Proposal A4(b)–(c) suggested removing the ability for delegated legislation to deem conduct to be a 'financial service'. As explained in Interim Report A, these powers add complexity to the framework because people must consult the *Corporations Regulations* to identify any specific inclusions, in addition to inclusions in the *Corporations Act* and the many exclusions spread across the legislative hierarchy.[33] Repealing powers to specifically deem conduct to be a 'financial service', thereby ensuring all specific inclusions would appear in the Act, would simplify the legislative framework. However, such a change may implicate policy issues, as it would eliminate the power to expand the regulatory boundaries by delegated legislation.

5.37 The ALRC's recommended legislative model provides a means of accommodating specific inclusions in delegated legislation (to the extent necessary) in a more transparent and navigable way than is presently the case. This would be achieved by specific inclusions appearing in the Scoping Order. The prototype legislation in **Appendix E** to this Report illustrates how the current powers to specifically include financial products[34] and financial services[35] by regulations could be replaced with equivalent powers to make scoping orders.[36]

5.38 So far as possible, however, specific inclusions within the definition of 'financial product' and 'financial service' should appear in primary legislation. This would reflect the potential significance of specific inclusions as they may expand the boundary of the regulatory regime, as well as their importance to stakeholders as a source of clarity. Where it is nonetheless necessary for specific inclusions to be created by

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31 See ibid [7.115]–[7.123], [10.113]–[10.114].

32 P Hanrahan, *Submission 36*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

33 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.127].

34 *Corporations Act 2001* (Cth) s 764A(1)(m); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7)(m).

35 *Corporations Act 2001* (Cth) s 766A(1)(f); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB(1)(h).

36 See s 764A(1)(m) (financial product) and s 766A(1)(m) (financial service) of the prototype legislation in **Appendix E**.

delegated legislation, it would be helpful for government to periodically relocate them from delegated legislation to primary legislation. This would make them more visible and better communicate the true scope of regulation.

Proposal A5: The functional definition of 'financial product'

5.39 Proposal A5 suggested removing the definitions of 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments'.[37] The proposal was intended to simplify the definition of 'financial product' by reducing the number of detailed defined concepts that users must understand in applying the definition of 'financial product'.[38] Stakeholders were generally supportive of Proposal A5,[39] with only some concern as to potential legal uncertainty.[40] However, the ALRC has concluded that the benefits of removing the definitions covered by Proposal A5 are relatively minor and do not, in the light of other recommendations, outweigh potential disruption and transition costs. The ALRC therefore recommends no other changes to the definitions of 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments'.

Proposal A6: The definition of 'credit'

5.40 Proposal A6 suggested that credit-related financial products could be accommodated within a single definition of 'financial product' by adopting a functional definition of 'credit' that would be consistent with the *NCCP Act*. Stakeholders were broadly supportive of the aim of aligning definitions of 'credit' across financial services legislation, while some expressed reservations about the precise definition and how existing regulatory boundaries may be maintained.[41]

5.41 Taking account of stakeholder feedback, the ALRC recommends that credit-related products be incorporated within the single definition of 'financial product' by adopting the existing definition of 'credit facilities' contained in reg 2B of the *ASIC Regulations*. Adopting this approach would most easily facilitate the integration of consumer protection provisions currently spread across Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*, as discussed below, and would maintain existing policy settings. It would not preclude further rationalisation of differences between the *Corporations Act*, *ASIC Act*, and *NCCP Act* definitions of 'credit' if desirable in the future.

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37 *Corporations Act 2001* (Cth) ss 763B–763D; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA(4)–(6). See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.180]–[7.193].

38 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.170].

39 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [77]–[84].

40 Ibid [85]–[87].

41 Ibid [88]–[104].

Consumer protection

Recommendation 33 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:

a. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth);
b. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth);
c. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth);
d. Part 7.8A of the *Corporations Act 2001* (Cth); and
e. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).

5.42 Presently, provisions relating to consumer protection in financial services legislation are scattered across Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.[42] As the ALRC observed in Interim Report C, generally applicable consumer protections are foundational to the regulation of financial services and need to be understood by both financial services providers and consumers. In its submission in response to Interim Report C, AFCA observed that 'when both consumers and financial services providers are aware of their rights and obligations, it fosters trust in the financial system'.[43] It is therefore essential that consumer protection provisions be structured and framed to make them as easy to navigate and understand as possible.

5.43 Implementing **Recommendation 33** would produce a new legislative chapter devoted to consumer protection in the provision of financial services. This structure and framing would make the law easier to navigate by grouping generally applicable consumer protections in one place. It would also help to make more explicit the fundamental norms of behaviour that many consumer protection provisions aim to promote.

5.44 **Recommendation 33** formalises Proposal C1 in Interim Report C. Submissions in response to Proposal C1 generally supported the creation of a legislative chapter relating to consumer protection.[44] Stakeholders' concerns in relation to Proposal C1 largely centred on the challenges in identifying which provisions of the existing

42 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [2.13]–[2.14].
43 Australian Financial Complaints Authority, *Submission 79*.
44 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [7]–[9].

legislation should be contained in a consumer protection chapter, as distinct from other thematic chapters proposed by the ALRC.[45]

5.45 As noted in Interim Report C, the distinction between consumer protection provisions of general application and other provisions may not always be clear.[46] Stakeholder feedback also reflects the fact that views may differ over how to optimally apply the principles for structuring and framing identified by the ALRC. For example, **Recommendation 33** emphasises coherently grouping provisions that have the same scope of application — namely, those that apply to financial products and services covered by the broader *ASIC Act* definitions of those terms. While different approaches may emphasise different working principles, any approach to constructing a consumer protection chapter should aim to enhance navigability and comprehensibility, as discussed in **Chapter 4** of this Report.

Unconscionable and misleading or deceptive conduct

Recommendation 34 Section 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed, and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.

Recommendation 35 Proscriptions concerning false or misleading representations and misleading or deceptive conduct in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be replaced by a single, consolidated proscription.

5.46 The current proliferation of provisions relating to unconscionable conduct and misleading or deceptive conduct is problematic. Reasons for this include:

- the communicative power of the law is reduced on account of overlap, duplication, and over-particularisation;
- the existence of numerous provisions invites or requires parties to consider and potentially plead (or defend against) more than one provision covering the same conduct, increasing the burdens of litigation and enforcement; and
- it makes the legislation more difficult to apply, increasing costs and lessening the likelihood of meaningful compliance.[47]

45 M Nehme, *Submission 81*; Financial Services Council, *Submission 87*; MinterEllison, *Submission 92*.
46 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [2.20]–[2.22].
47 Ibid [2.26]–[2.27].

5.47 **Recommendations 34** and **35** would address these problems by consolidating existing provisions into a smaller number of provisions that cover the same scope of conduct.

5.48 **Recommendations 34** and **35** formalise Proposals C2 and C3 from Interim Report C. Submissions generally supported Proposals C2 and C3.[48] Concerns in relation to the proposals centred on ensuring that reformed provisions did not reduce the scope of consumer protections, and potential inconsistency with equivalent provisions in the *Australian Consumer Law*.[49]

5.49 In his submission in response to Proposal C2, Professor Horrigan outlined a number of 'precautionary steps' that could be adopted in implementing the reforms to unconscionable conduct provisions to ensure that there is 'no substantive change in the law that results from the reform in fact or that needs determination to that effect by any court in wasteful post-reform test cases'.[50] Horrigan's suggestions included the addition of 'a 'principle of interpretation for statutory unconscionability', similar to the existing s 12CB(4) of the *ASIC Act*, and the use of extrinsic materials (such as explanatory memoranda) to make clear that amending legislation does not intend to substantively change the law.[51] These suggestions should be considered as part of implementing **Recommendation 34**. Extrinsic materials for legislation that implements **Recommendation 35** may similarly clarify that consolidating provisions relating to misleading or deceptive conduct is not intended to alter the substantive law.

5.50 As noted in Background Paper FSL9, simultaneous or later reforms could be undertaken to remove overlap and consolidate equivalent provisions in the *Australian Consumer Law*.[52] However, it should be emphasised that any differences between the comparable regimes would be differences of form only, and the substantive protections should nonetheless be mirrored as between goods and services generally (under the *Australian Consumer Law*), and financial services.

48 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [10]–[13].

49 See, eg, B Horrigan, *Submission 78*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*. See also N Howell and C Brown, *Submission 47*.

50 B Horrigan, *Submission 78*.

51 Ibid.

52 See, eg, Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) [83]–[85].

Disclosure

Recommendation 36 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating:

a. Part 7.7 Divs 1, 2, 3A, 6, and 7;

b. section 949B; and

c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

5.51 The provisions relating to disclosure for financial products and services are among the most complex and least coherent in the *Corporations Act*.[53] Their existing structure and framing do little to help users of the legislation find the law that applies to relevant products, services, or circumstances. These difficulties are compounded by the extensive use of notional amendments, conditional exemptions, and excessively prescriptive primary legislation.[54] Parts 7.7 and 7.9 alone account for half of all notional amendments to the *Corporations Act,* as well as 27% of the words in Chapter 7 of the Act.[55]

5.52 **Recommendation 36** formalises Proposal C4 from Interim Report C. Submissions in response to Proposal C4 were generally supportive.[56] Stakeholders' reservations centred on the scope of a disclosure chapter, including whether the provisions regulating financial services disclosure should appear in their own chapter,[57] and the relationship between a newly created disclosure chapter and the provisions relating to capital fundraising in Chapter 6D of the *Corporations Act*.[58]

5.53 Stakeholders have observed to the ALRC that disclosure in relation to fundraising has certain purposes, such as informing the market, that are not necessarily shared by disclosure provisions relating to financial products.[59] Restructuring and reframing the disclosure provisions in Chapter 7 of the *Corporations Act* presents an opportunity to distinguish the disclosure regimes more clearly in two respects.[60] First, consolidating all provisions relating to financial products and services gives those

53 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.13]–[3.19].
54 Ibid [3.13]–[3.15].
55 Ibid [3.14].
56 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [15]–[16].
57 MinterEllison, *Submission 92*.
58 Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*.
59 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.27].
60 Cf Financial Services Council, *Submission 87*.

provisions a clearer identity, making them more identifiable and navigable as distinct from the provisions in Chapter 6D of the *Corporations Act*. Secondly, blurring and overlap between the two regimes may be addressed as part of the reform process, although this may involve questions of policy.[61] Overall, restructuring and reframing disclosure provisions relating to financial products and services would make the legislation easier to identify, navigate, and understand.[62]

5.54 As the ALRC noted in Interim Report C, meaningful reform to disclosure legislation necessitates addressing the complexity presently created by the incoherent use of the legislative hierarchy.[63] The recommended legislative model discussed in **Chapter 6** of this Report expressly addresses those issues.

Better framing of disclosure regulation

Recommendation 37 Disclosure regimes in Chapter 7 of the *Corporations Act 2001* (Cth) that require disclosure documents to 'be worded and presented in a clear, concise and effective manner' should be amended to require that disclosure documents also be worded and presented 'in a way that promotes understanding of the information'.

5.55 **Recommendation 37** is directed at better framing disclosure obligations in Chapter 7 of the *Corporations Act*. Implementing **Recommendation 37** would recognise the widely held view that there is a need for disclosure legislation to focus on promoting consumer understanding, as the desirable outcome of disclosure documents that are 'clear, concise and effective'.[64] This would help to focus attention on that ultimate outcome and therefore better frame the existing tailored and

61 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.27].

62 In Interim Report A, the ALRC proposed amending ss 1011B and 1013A(3) of the *Corporations Act 2001* to replace the term 'responsible person' with 'preparer' (Proposal A7). In light of the more significant improvements that would result from implementing **Recommendation 36** and stakeholder feedback in response to Proposal A7, the ALRC has not formalised Proposal A7 as a recommendation. For discussion of stakeholder feedback relating to Proposal A7, see Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [107]–[114].

63 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.6]–[3.12].

64 See, eg, Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (Regulatory Guide 168, July 2022) [RG 168.39], [RG 168.76]–[RG 168.92]; Australian Securities and Investments Commission, *Licensing: Financial Product Advisers—Conduct and Disclosure* (Regulatory Guide 175, June 2021) [RG 175.112]–[RG 175.213]. See also Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.102]–[3.103], [3.107]–[3.111]; Australian Financial Complaints Authority, *The AFCA Approach to Adequacy of Statements of Advice* (May 2022) <www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>.

prescriptive obligations to give disclosure. In this way, it would also help to promote meaningful, as opposed to 'tick a box', compliance.

5.56 **Recommendation 37** formalises Proposal C5 from Interim Report C. The majority of submissions that addressed Proposal C5 did not support it. Some submissions expressed concern about the policy implications that may be caused by the proposed wording change.[65] Other submissions were not confident that the proposed change would actually be an improvement, or if there were an improvement, thought it would likely be minimal.[66] Some submissions were also concerned that the word 'understanding' was too subjective and would create uncertainty until a test was developed to assess whether disclosure documents 'promote understanding of the information'.[67]

5.57 Given the existing complexity of disclosure provisions, there is merit in stakeholder concerns about introducing additional uncertainty. If, however, **Recommendation 37** is implemented alongside the ALRC's other recommendations for reform to financial services legislation and it is understood as a helpful clarification of the requirement for disclosure to be 'effective', the recommendation should not introduce additional uncertainty. Rather, implementing **Recommendation 37** would complement other reforms by improving the framing of reformed disclosure provisions and further promote meaningful compliance with the core expectations of disclosure regulation.

Financial advice

Recommendation 38 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating:

a. sections 912EA and 912EB;
b. Part 7.6 Divs 8A, 8B, and 8C;
c. Part 7.6 Div 9 Subdivs B and C;
d. Part 7.7 Div 3;
e. section 949A;
f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and
g. sections 1012A and 1020AI.

65 See, eg, Insurance Council of Australia, *Submission 86*; Financial Services Council, *Submission 87*.
66 See, eg, M Nehme, *Submission 81*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*.
67 See, eg, Association of Superannuation Funds of Australia, *Submission 84*; Financial Services Council, *Submission 87*.

5.58 The current structure and framing of provisions relating to financial advice in Chapter 7 of the *Corporations Act* makes the law difficult to find and difficult to understand.[68] This is principally a result of their dispersal among more general provisions relating to financial services and a failure to update the legislation's structure to reflect changes in the substance of provisions relating to financial advice.

5.59 Numerous stakeholders have commented on the impacts of complexity in the existing legislative framework for financial advice. For example, an individual stakeholder observed that the present 'regulatory environment is overly complex and obtuse' and that uncertainty 'precludes new entrants and … limit[s] consumers choice and access to good advice, while keeping costs high'.[69] Other stakeholders noted that difficulties in locating, understanding, and applying relevant provisions lead to increased compliance costs.[70]

5.60 Implementing **Recommendation 38** would group financial advice provisions together to make it easier for users to locate, navigate, and understand the law that applies to financial advice. Improving the structure of financial advice provisions would also simplify the task of statutory construction by making it easier to interpret provisions within their broader context.[71]

5.61 **Recommendation 38** formalises Proposal C6 from Interim Report C. Submissions in response to Proposal C6 were generally supportive.[72] Submissions that expressed qualified support focused on the range of provisions selected to form part of a financial advice chapter, such as breach reporting obligations relating to financial advice.[73] However, as the Financial Services Council observed, navigational difficulties caused by these choices may be overcome through the use of cross-references, signposts, and other aids to interpretation that alert users to potentially relevant provisions that are located elsewhere.[74]

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68 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.7]–[4.18].

69 A Wolfenden, *Submission 77*.

70 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 89*.

71 See, eg, Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.13]–[4.18].

72 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [20]–[21].

73 See, eg, Financial Services Council, *Submission 87*; MinterEllison, *Submission 92*.

74 Financial Services Council, *Submission 87*. See generally Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.88]–[9.95].

General regulatory obligations

Recommendation 39 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:

a. Part 7.6 Divs 2, 3, and 10;

b. section 963K;

c. Part 7.7A Div 5 Subdiv A, and Div 6;

d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and

e. sections 991B, 991E, 991F, 992A, and 992AA.

Recommendation 40 The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 4, 5, 6, and 8.

5.62 In addition to consumer protections, the general regulatory obligations of financial services providers are among the most wide-ranging and important for the operation of their business.[75] At present, general regulatory obligations are scattered throughout Chapter 7 of the *Corporations Act* and are not effectively prioritised for users of the legislation. This creates unnecessary complexity which, in turn, makes the legislation harder to navigate and understand, more difficult to interpret, and can lead to legal uncertainty.[76]

5.63 Implementing **Recommendations 39** and **40** would produce two legislative chapters that more coherently group and prioritise general regulatory obligations than the existing legislation. The recommendation to create two chapters provides a means of:

- prioritising more important obligations separately from related detail, thereby making it easier to identify the overarching context and purpose of those provisions; and
- accommodating prescriptive detail that appropriately belongs in primary legislation, without obscuring other more important provisions.[77]

75 For further discussion, including what is meant by the expression 'general regulatory obligations', see Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [5.5]–[5.9], [5.15]–[5.22].
76 Ibid [5.7].
77 Ibid [5.22].

5.64 **Recommendations 39** and **40** formalise Proposals C7 and C8 from Interim Report C. Submissions that commented upon Proposals C7 and C8 supported the proposals.[78] Similar to other proposals, some stakeholders questioned the exact scope of each chapter and how the different scope of each chapter may be communicated to users.[79] The legislation's framing and aids to interpretation may help users of the legislation in this respect.[80] Headings may usefully communicate the general theme of each chapter and provisions within that chapter. For example, a part-level heading such as 'Obligations of financial services licensees' would clearly indicate that the part contains obligations that apply only to licensees.[81] Decentralised tables of contents and simplified outlines may also help users develop mental models of the chapters, and notes may be used to indicate how provisions in the two chapters relate to each other.[82]

5.65 The ALRC's suggested allocation of provisions between the two chapters and their potential design is outlined in further detail in Interim Report C.[83] Interim Report C also illustrated how s 912A of the *Corporations Act* could be restructured and reframed as part of implementing **Recommendation 39**. Section 912A could be restructured and reframed to highlight the obligations of AFS Licensees more clearly, including the central obligation to provide financial services 'efficiently, honestly and fairly'.[84]

78 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [23].

79 Financial Services Council, *Submission 87*; MinterEllison, *Submission 92*.

80 See generally Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.88]–[9.95].

81 See, eg, ibid 257–265 (Appendix D).

82 For example, notes in one chapter may indicate where detail relevant to obligations in that chapter appears in a later chapter focused on administrative detail, and vice versa.

83 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [5.15]–[5.46].

84 See ibid [5.36]–[5.39]. In Interim Report A, the ALRC made two proposals to simplify the existing s 912A of the *Corporations Act* (Proposals A20 and A21). In light of **Recommendation 39** and stakeholder feedback in response to Proposals A20 and A21, the ALRC has not formalised those proposals as recommendations. For a summary of feedback in response to Proposals A20 and A21, see Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [227]–[246].

The Financial Services Law

Recommendation 41 The *Corporations Act 2001* (Cth) should be amended to create a dedicated group of provisions known as the Financial Services Law. Consistent with Recommendations 31–40, the Financial Services Law should comprise restructured and reframed provisions relating to the regulation of financial products and financial services, including:

a. objects clauses identifying the fundamental norms of behaviour underpinning the legislation;

b. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the *Corporations Act 2001* (Cth);

c. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the *Corporations Act 2001* (Cth);

d. Part 7.10 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;

e. Parts 7.10A and 7.10B of the *Corporations Act 2001* (Cth);

f. Part 7.12 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;

g. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth); and

h. a list of terms defined for the purposes of the Financial Services Law.

Recommendation 42 The Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001* (Cth).

5.66 Currently, the primary legislation that regulates the financial services industry in general is split between Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. The *Corporations Act* is a very large Act that covers diverse subject matters, with Chapter 7 alone covering both financial services regulation and the regulation of financial markets.[85] It is anomalous that important consumer protections relating to financial services appear in the *ASIC Act*, which is otherwise focused on the establishment of ASIC, its functions, and its powers.[86] This structure makes the legislation difficult to navigate and does not help to communicate the legislation's core messages.

5.67 Implementing **Recommendations 41** and **42** would bring together the legislation that applies to the financial services industry as a whole and give it a clear legislative identity as the Financial Services Law, contained in Sch 1 to the

85 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.55]–[3.60]; Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [8.40]–[8.44].

86 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [2.19], [6.50].

Corporations Act. As outlined in Interim Report C, restructuring and reframing financial services legislation in a schedule to the *Corporations Act* provides the most benefits when compared to other options that would be possible within the existing constitutional constraints.[87]

5.68 To further improve its framing, the Financial Services Law should incorporate appropriate objects clauses identifying the fundamental norms of behaviour that underpin the legislation. Objects clauses help to frame legislation by providing context for users, aiding navigation, and promoting the purposive interpretation of legislation.[88] Existing objects clauses in Chapter 7 of the *Corporations Act*, such as s 760A, are insufficiently helpful on account of their vagueness and lack of particularity.[89] By identifying fundamental norms of behaviour, objects clauses in the Financial Services Law would help to promote meaningful compliance and assist courts when interpreting ambiguous provisions, thereby giving better effect to fundamental policy objectives in this area of the law.[90] **Recommendation 41** is not otherwise prescriptive about the objects clauses that should form part of the Financial Services Law because their specific design would depend on the ultimate structure that is adopted.

5.69 **Recommendations 41** and **42** largely formalise Proposals C9 and C10 from Interim Report C.[91] Submissions in response to Interim Report C supported the grouping and consolidation of financial services-related provisions, but expressed mixed views on the utility of a schedule to the *Corporations Act*. Allens, for example, noted that creating a 'prominent home for the Financial Services Law' would give it a clearer identity, increase awareness of it, and improve its communicative force.[92] This is because the ability of regulated entities

> to identify norms within the Financial Services Law, and to modify their social conduct accordingly, is inherently linked to their awareness and understanding of the content of those laws.[93]

87 Ibid [6.17]–[6.24].
88 Ibid [9.97]–[9.99].
89 Ibid [9.100].
90 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [13.19]–[13.25].
91 Proposal C9 in Interim Report C did not incorporate reference to objects clauses as included in **Recommendation 41**. In formulating **Recommendation 41**, the ALRC has been informed by feedback in response to Questions A18 and A19 in Interim Report A, which sought stakeholder views in relation to incorporating norms as an objects clause for Chapter 7 of the *Corporations Act*. See ibid [13.19]–[13.42]; Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [217]–[225]. **Recommendation 41** also includes Part 7.10B of the *Corporations Act*, which came into force on 4 July 2023: see *Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023* (Cth) s 2, sch 1.
92 Allens, *Submission 90*.
93 Ibid.

5.70 King Irving noted how using a schedule could improve accessibility and navigability:

> By encapsulating all parts of the relevant financial services legislation within a separate schedule, the proposed reform simplifies the process of locating and accessing information. This particularly benefits less sophisticated readers, enabling them to easily find relevant provisions without the need to cross-reference various pieces of legislation. The improved accessibility and navigability empowers consumers to understand their rights and protections more readily, fostering transparency and consumer confidence in the financial services industry.[94]

5.71 By contrast, Associate Professor Nehme submitted that placing financial services legislation in a schedule may 'provide a perception to the industry and market participants that such laws are secondary as they are hidden at the back of the *Corporations Act*'.[95] Allens, on the other hand, observed that concerns about '"relegating" the Financial Services Law to a schedule of the *Corporations Act*' would carry more weight if the Act were better structured, but because it is not there is no obviously better location for the Financial Services Law within the Act.[96] Further, as noted in Interim Report C, experience with the *Australian Consumer Law* suggests that its location in a schedule has improved, rather than detracted from, public awareness of the legislation.[97]

5.72 Nehme and MinterEllison supported the creation of a standalone financial services Act,[98] as others have also suggested during this Inquiry.[99] Stakeholders have generally recognised, however, that this would not be possible within the existing constitutional constraints.[100] It is likely beyond this Inquiry's Terms of Reference for the ALRC to recommend that the Commonwealth and states revisit the terms of the corporations and financial services referral. However, as the ALRC has noted previously, this Inquiry and the reforms arising out of it offer an opportunity to consider how revisiting existing constitutional arrangements might open up significant opportunities for simplification.[101] **Chapter 8** of this Report discusses the range of reforms that this could facilitate.

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94 King Irving, *Submission 80*.
95 M Nehme, *Submission 81*.
96 Allens, *Submission 90*.
97 Department of the Treasury (Cth) and EY Sweeney, *Australian Consumer Survey 2016* (Report, 2016) 21.
98 M Nehme, *Submission 81*; MinterEllison, *Submission 92*.
99 See, eg, Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [6.18].
100 See generally ibid; Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [108]–[116], [168].
101 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.88].

5.73 Some submissions also queried the scope of existing legislation that should form part of the Financial Services Law, and its relationship to other pieces of financial services legislation.[102] The Australian Financial Markets Association, for example, expressed concern about how the Financial Services Law would interact with provisions relating to financial markets, particularly market integrity.[103] In part, this concern arises because of the existing, problematic design of Chapter 7 of the *Corporations Act* in seeking to regulate financial products, services, and markets together.[104] Rather than undermining those provisions of Chapter 7 of the *Corporations Act* that are directed at market integrity, the reform process offers an opportunity to make them more prominent than they currently are, interspersed among myriad other provisions directed at regulating financial services.[105] More generally, the ALRC also agrees with the Australian Retail Credit Association's observation that the Financial Services Law should be designed in a way that would permit the integration of other financial services legislation if desirable in future.[106]

5.74 Interim Report C contained an illustrative outline of the FSL Schedule to illustrate how Proposals C9 and C10 (now **Recommendations 41** and **42**) may be implemented.[107] Stakeholder feedback generally recognised that the illustrative outline would improve the structure and framing of the existing legislation, while offering constructive feedback on various aspects of its design.[108] These perspectives illustrate the value of consultation as part of the implementation process discussed in **Chapter 7** of this Report.

102 See, eg, Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*.

103 Australian Financial Markets Association, *Submission 85*.

104 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [8.40]–[8.43].

105 For discussion of provisions relating to financial markets, see ibid [6.13]–[6.14], [6.62]–[6.66].

106 Australian Retail Credit Association, *Submission 83*.

107 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) 257–265 (Appendix D). Appendix D to Interim Report C is also available as a standalone download from the ALRC website: Australian Law Reform Commission, 'Illustrative FSL Schedule (Appendix D to Interim Report C)' <www.alrc.gov.au/wp-content/uploads/2023/05/Illustrative-FSL-Schedule.pdf>.

108 See, eg, King Irving, *Submission 80*; M Nehme, *Submission 81*; MinterEllison, *Submission 92*. MinterEllison, for example, provided insightful comments in relation to the location of definitions and the interpretation of the FSL Schedule more generally.

6. A Legislative Model for Financial Services

Contents

Introduction

6.1 In this chapter, the ALRC recommends that the legislative hierarchy of financial services legislation be reformed to implement a principled and coherent legislative model. In Interim Reports A and B, the ALRC identified the incoherent use of the legislative hierarchy as a key source of complexity in corporations and financial services legislation.[1] This complexity creates unnecessary costs for businesses and other stakeholders in navigating and understanding financial services legislation. Implementing the recommendations in this chapter would reduce those costs. It would do so by minimising legislative complexity, enhancing regulatory flexibility, and addressing unforeseen or unintended consequences of regulatory arrangements in a more coherent and navigable way than is possible at present.

1 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.158]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 6. See also **Chapter 2** of this Report.

6.2 This chapter focuses on the design of the legislative hierarchy for financial services legislation, which may also be described as the legislation's 'vertical' structure.[2] This chapter complements the discussion of the structure and framing of the primary legislation that regulates financial services in **Chapter 5** of this Report. Together, the recommendations in **Chapter 5** and this chapter comprise the reformed legislative framework for financial services regulation recommended by the ALRC.[3]

6.3 This chapter proceeds in eight parts. The first part briefly summarises the problem that this chapter seeks to address and the ALRC's recommended solution. The second, third, and fourth parts discuss the role of primary and delegated legislation under the recommended legislative model. The fifth part discusses the allocation of delegated legislative powers under the legislative model, and the sixth part outlines safeguards that should be placed upon those powers. The seventh part discusses steps to implementing the legislative model. The final part briefly discusses the role of regulatory guidance alongside the legislative model.

The problem and solution in overview

6.4 A principled and coherent legislative hierarchy is essential to an adaptive and efficient legislative framework that maintains regulatory flexibility, addresses atypical or unforeseen circumstances, and responds to unintended consequences of regulatory arrangements.[4] At present, **the legislative hierarchy of Chapter 7 of the *Corporations Act* is neither principled nor coherent**.[5] This is mainly a result of:

- overly prescriptive primary legislation;[6]
- the myriad powers that enable delegated legislation to be made;[7]
- poorly designed delegated legislation;[8] and

2 For an explanation of these terms, see **Chapter 1** of this Report. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.133]–[2.153]; Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [1.24].

3 For an overview of the reformed legislative framework, see **Chapter 3** of this Report.

4 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.60]–[1.64], [2.25], [6.7].

5 For further discussion, see **Chapter 2** of this Report.

6 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.87]–[3.89]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.7], [6.24]–[6.25].

7 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.40]–[6.46].

8 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.116]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.30]–[6.48].

- the extensive use of notional amendments and conditional exemptions in delegated legislation.[9]

6.5 As observed in **Chapter 2** of this Report, the *Corporations Act* contains an exceptional number of delegated legislative powers.[10] The financial services-related provisions of Chapter 7 of the *Corporations Act*[11] contain (or may be affected by) approximately 420 powers to make delegated legislation spread across approximately 410 provisions.[12] These powers are discussed in further detail below.[13] Proliferating powers create complexity and costs because users must spend time determining whether these powers have been exercised and navigate the relevant delegated legislation accordingly.

6.6 At a general level, delegated legislative powers in the *Corporations Act* have four main functions:

- 'Carving in' or extending the law: Delegated legislation may specifically include something within a provision of the Act or may extend its application.[14]
- Carving out: Delegated legislation may limit the application of a provision or definition so as to exclude or exempt a product, service, person, or circumstance. Chapter 7 of the *Corporations Act* contains both broad and specific examples of this type of power.[15]

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9 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.136]–[3.140], ch 10; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.33]–[6.39]; Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022); Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022).

10 ALRC analysis of other Commonwealth Acts, using data from the ALRC DataHub, suggests that no other Act has as many references to the regulations as the *Corporations Act*. See Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.

11 As discussed in **Chapter 5** of this Report, the financial services-related provisions of Chapter 7 of the *Corporations Act* include most provisions in Parts 7.1, 7.6–7.10B, and 7.12. The ALRC recommends that these provisions form part of the Financial Services Law (**Recommendation 41**). These provisions are distinguished from others such as Parts 7.2–7.5B of the *Corporations Act* that relate more closely to the regulation of financial markets.

12 An additional 26 powers appear in Part 2 Div 2 of the *ASIC Act*. A spreadsheet containing the underlying data (current as at 31 March 2022) and an outline of the ALRC's methodology is available on the ALRC website: Australian Law Reform Commission, 'Delegated Legislative Powers Mapping — Financial Services' <www.alrc.gov.au/wp-content/uploads/2023/10/Delegated-Legislative-Powers-Mapping.xlsx>. This data does not include the 9 additional powers to make regulations or legislative instruments that appear in Part 7.10B of the *Corporations Act*, which came into force on 4 July 2023: see *Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023* (Cth).

13 See below [6.47]–[6.48].

14 For example, s 961F(e) of the *Corporations Act* enables regulations to extend the definition of a 'basic banking product'.

15 Examples of broad powers include ss 926A, 926B, 951B and 951C of the *Corporations Act*. Examples of more specific powers include s 962G(2) of the *Corporations Act*, which allows regulations to provide that s 962G(1) does not apply in a particular situation, and ss 765A(1)(y)–(z) which permits exclusions from the definition of 'financial product'.

- Notionally amending (also known as modifying): Delegated legislation may modify the operation of another piece of legislation by notionally amending the text of that legislation, without the change appearing on the face of the notionally amended legislation.[16]
- Prescribing detail: Delegated legislation may prescribe certain matters for the purposes of specific provisions of the Act.[17]

6.7 These categories are useful for understanding how delegated law-making tools in the existing legislative framework create complexity. For example, delegated legislation that may carve out from an exemption contained in primary legislation can effectively function as a 'carve-in'.[18] This is because it re-extends an obligation in the Act to something that was otherwise exempt. Notional amendments were originally seen as tools for enhancing flexibility and 'fleshing out detail', but they have surpassed this role by often creating parallel, and sometimes inconsistent, regulatory regimes that are not apparent on the face of the Act.[19] The recommended legislative model discussed in this chapter seeks to address these problems by providing a better delegated law-making toolkit.

16 For further explanation of the term 'notional amendment', see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 135. Chapter 7 of the *Corporations Act* includes several general powers to create notional amendments (for example, s 994L(2) allows ASIC to modify the provisions of Part 7.8A), and more specific powers (for example, s 1017F(9) permits the regulations to modify specific subsections of s 1017F, while s 921H permits the Minister to modify Part 7.6 in relation to certain time periods determined by the Minister).

17 For example, s 940C(7) of the *Corporations Act* allows regulations to specify certain requirements in relation to financial services disclosure documents. Similarly, s 985M(5) allows ASIC to determine certain matters in relation to margin calls, such as the time by which, and manner in which, a provider must notify a client or agent of a margin call under s 985M. It should be noted that there may not always be a clear line between prescribing detail to supplement a provision of the Act and detail that has the effect of extending the law. For example, reg 2DA of the *Australian Securities and Investments Commission Regulations 2001* (Cth) made under s 12BC(3)(a)(ii) of the *ASIC Act* has the effect of expanding consumer protections to a larger range of transactions than would otherwise be covered. It does this by increasing the maximum price of financial services which a person will be assumed to acquire as a consumer from $40,000 (as set in s 12BC(3)(a)(i) of the *ASIC Act*) to $100,000. This may be compared with s 12DMC(3) of the *ASIC Act*, which enables ASIC (by legislative instrument) to determine a cap on the value of commissions in relation to certain insurance products. Breach of the cap contravenes s 12DMC(1). While changing the cap affects the range of conduct captured by s 12DMC(1), it is more akin to prescribing detail that relates to how the obligation in s 12DMC(1) must be complied with.

18 For example, reg 7.6.01AAA of the *Corporations Regulations*, made under s 911A(5A) of the *Corporations Act*, has the effect of disapplying the exemption from the obligation to hold an AFS Licence contained in s 911A(2)(b) of the Act in respect of margin lending facilities. By way of further example, regulations made under s 766B(9) of the *Corporations Act*, such as reg 7.1.08 of the *Corporations Regulations*, may exclude certain documents from the definition of 'exempt document' for the purposes of s 766B.

19 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.28]–[6.36].

6.8 In many respects, the delegated legislative powers of the Minister (often exercised by way of regulations) and ASIC co-exist.[20] In other cases, however, one of the functions outlined above can be performed only by the Minister or by ASIC (but not by both) in respect of certain provisions.

6.9 As a result, users of Chapter 7 of the *Corporations Act* must confront a legislative framework in which:

- they are given little guidance as to what they can expect to find at each 'layer' of the legislative hierarchy, or how to find it;
- the text they read in the *Corporations Act* and *Corporations Regulations* may not actually represent the law because it has been notionally amended; and
- overlooking a relevant provision in one of numerous regulations or ASIC legislative instruments may significantly affect their understanding of, and therefore compliance with, the law.

6.10 Even experienced legal practitioners have observed to the ALRC that they are often concerned about 'missing something' when advising on the law in Chapter 7 of the *Corporations Act*.[21]

The solution

Recommendation 43 As detailed in Recommendations 44–52, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended, in a staged process, to implement a legislative model. The legislative model should comprise:

a. primary legislation containing provisions appropriately enacted only by Parliament, including key obligations and prohibitions;

b. a Scoping Order (a single, consolidated legislative instrument) dealing with inclusions, exclusions, class exemptions, and other detail necessary for adjusting the scope of the primary legislation, as appropriate for delegated legislation; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the primary legislation in different regulatory contexts as appropriate.

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20 Regulations are made by the Governor-General in Council. The Minister responsible for administering the *Corporations Act* (with the exception of ss 1315(1)(c) and 1316) and *ASIC Act* is the Minister of State responsible for administering the Department of the Treasury (Cth): see *Acts Interpretation Act 1901* (Cth) s 19(2); *Administrative Arrangements Order - 14/10/2022* (Cth) s 2.

21 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [5]; Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.9].

6.11 In summary, the ALRC recommends that the *Corporations Act* be amended to implement **a coherent and principled legislative model for the regulation of financial services**. This model would remain adaptive and navigable in the face of changing policy priorities and regulatory approaches. The recommended legislative model would comprise:

- primary legislation that contains key obligations, prohibitions, powers, serious offences, significant civil penalties, and other provisions appropriately enacted only by Parliament — so as to embody the core policy of the regulatory regime for financial products and financial services;
- the Scoping Order — a single, consolidated legislative instrument — that contains the vast majority of exclusions and exemptions from provisions in the primary legislation and other detail necessary for adjusting the scope of the regulatory regime;[22] and
- thematically consolidated rules, which for convenience may be labelled 'rulebooks', that contain prescriptive detail.

6.12 The recommended legislative model aims to provide **an appropriate 'home' for each part of the law**. Compared to the existing legislative framework, implementing the legislative model would produce a more coherent and navigable body of primary and delegated legislation by:

- significantly **reducing the number of places that users of the legislation need to look in order to find relevant law** and to be more confident that they have not overlooked potentially relevant legislation;
- organising relevant material between primary legislation, the Scoping Order, and rulebooks according to a provision's function and theme, thereby **making it easier to know where to find different types of provisions**;
- **simplifying the present array of delegated legislative powers**; and
- **making it easier to navigate between primary legislation and delegated legislation**.

6.13 The powers to make scoping orders (provisions of the consolidated Scoping Order) and rules would serve similar functions to existing powers, such as prescribing detail and extending the application of provisions. However, scoping orders and rules would replace notional amendments and complex conditional exemptions. In short, the legislative model aims to create a better set of law-making tools to ensure that the legislative framework can be adaptive and respond to changing circumstances over time without creating unnecessary complexity.

22 Other exclusions or exemptions that are structural in nature and give effect to key policies would be contained in primary legislation: see below [6.27]. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.23].

6.14 There would not be a role for regulations as a mode of law-making in the recommended legislative model.[23] Rather, scoping orders and rules made by both the Minister and ASIC would be consolidated into the same legislative instruments, namely, the Scoping Order or a thematic rulebook. This design feature, discussed further below,[24] helps to reduce the number of places users must look to find the law and avoid the need for notional amendments.[25]

6.15 The recommended legislative model would also ensure a more appropriate delegation of legislative authority than the existing legislative framework. This is because the powers to make scoping orders and rules would be narrower than existing, unconstrained notional amendment powers provided by the *Corporations Act*.[26] Additionally, the powers would be subject to appropriate safeguards and parliamentary oversight.[27]

Stakeholder feedback on the legislative model

6.16 The recommended legislative model largely replicates the model foreshadowed in Interim Report A and described in Proposals B1–B11 in Interim Report B.[28] **Recommendations 41–53** are narrower than Proposals B1–B11 in that they focus on the financial services-related provisions of Chapter 7 of the *Corporations Act* (consistent with **Recommendations 31–42** discussed in **Chapter 5** of this Report). However, the recommended legislative model is likely to be more broadly applicable to other parts of the *Corporations Act*.[29] Submissions and other stakeholder feedback in relation to the legislative model were supportive in this respect and recognised that the model would produce more coherent and navigable legislation.[30]

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23 Regulation-making powers and the *Corporations Regulations* would continue to apply to provisions of the *Corporations Act* that are not brought within the recommended legislative model.

24 See below [6.58]. See also **Chapter 7** of this Report for further discussion of how this could be given legislative effect.

25 See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.78]–[2.84].

26 A court may invalidate delegated legislation that goes beyond the scope of the power or is inconsistent with the enabling legislation: *Gentel v Rapps* [1902] 1 KB 160, 166; Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 6th ed, 2022) 284–5, 405–6, 412–21. As the ALRC has previously noted, the *Corporations Act* does not place any express limits upon current exemption and notional amendment powers: see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.24]; *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].

27 See below [6.66]–[6.77].

28 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 10; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

29 For further discussion, see **Chapter 8** of this Report.

30 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [129]–[130], [138], [146]–[149]; Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [10]–[13], [21], [28], [33], [51]–[52].

6.17 Most concerns raised by stakeholders centred on the scope of the powers to make scoping orders and rules,[31] and their vesting concurrently in the Minister and ASIC.[32] In some respects, stakeholder views reflect the reality that the question of how to allocate delegated law-making responsibility between government and an independent regulator is a difficult and perennial issue.[33]

6.18 The ALRC recommends ways to appropriately scope and place safeguards on delegated legislative powers in the recommended legislative model. Furthermore, in light of stakeholder concerns, the ALRC has sought to demonstrate how the legislative model may, for policy reasons, specify boundaries between the delegated legislative powers of the Minister and ASIC. These issues are discussed further below.[34]

Relationship to Recommendations 31–42

6.19 The recommended legislative model would best be implemented alongside the restructuring and reframing of primary legislation discussed in **Chapter 5** of this Report (**Recommendations 31–42**). As discussed further in **Chapter 7** of this Report, reasons for this include the following:

- For the legislative model to be effective, at least some reform to primary legislation would be necessary. This would include removing prescriptive detail from primary legislation that would be more appropriate for delegated legislation and moving provisions into primary legislation that are inappropriately located in delegated legislation at present.
- The process of restructuring and reframing primary legislation would help to inform the appropriate breadth of the powers to make scoping orders and rules under the legislative model.
- The restructured and reframed provisions in primary legislation would provide a clearer and more coherent Act-level structure that could be reflected in the Scoping Order and thematic rulebooks created as part of the legislative model. This would improve navigability and help users create a mental model of the legislative framework as a whole.[35]

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31 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [131], [140]; Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [22], [30], [44]–[48].

32 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [37]–[47].

33 See Julia Black, *Constitutionalising Regulatory Governance Systems* (LSE Law, Society and Economy Working Papers No 02/2021, London School of Economics and Political Science, 2021) 2; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.68], [4.22]–[4.32].

34 See below [6.40]–[6.63].

35 See also Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.25]–[7.29].

Primary legislation

6.20 As noted above, one aim of the recommended legislative model is to find an appropriate home in the legislative hierarchy for different parts of the law. In particular, the legislative model offers a way to remove unnecessarily prescriptive detail from Chapter 7 of the *Corporations Act* and locate it more appropriately in delegated legislation.[36] Equally, the legislative model would enable provisions that are currently located inappropriately in delegated legislation to appear in the Act.[37]

6.21 Alongside the restructuring and reframing of primary legislation recommended in **Chapter 5** of this Report, implementing the recommended legislative model would help to produce more navigable and comprehensible primary legislation. Consolidating provisions and creating more principles-focused primary legislation would complement the legislative model, in which most prescription would appear in scoping orders or rules.[38] In limited cases, prescriptive detail may remain in primary legislation because it is appropriately enacted only by Parliament. In these cases, applying the working principles for structuring and framing legislation discussed in **Chapter 4** of this Report would help to ensure that such detail does not obscure the law's fundamental norms.[39]

6.22 Applying the principles relating to the appropriate delegation of legislative power discussed in **Chapter 4** of this Report, primary legislation should contain the following critical provisions:

- core obligations and prohibitions, as well as the consequences of non-compliance, including:
  - prohibitions on unconscionable and misleading or deceptive conduct (currently contained in both the *Corporations Act* and *ASIC Act*);
  - the obligation to hold an AFS Licence;[40]
  - the best interests obligation;[41] and
  - design and distribution obligations;[42]

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36 Relocating matters currently dealt with by primary legislation to delegated legislation should not affect their interpretation because the same general principles of interpretation apply to both primary and delegated legislation: see *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 398; *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 [28]. For completeness, the ALRC notes that in some circumstances, including where delegated legislation deals with technical matters drafted by a person other than a parliamentary drafter, more specific principles may apply to the interpretation of delegated legislation: see Pearce and Argument (n 26) 593–304. The ALRC does not suggest that different principles should apply to delegated legislation made as part of the recommended legislative model and does not otherwise envisage significant changes to how scoping orders and rules are interpreted compared to existing delegated legislation.

37 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.15].

38 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.36]–[9.48].

39 See ibid [6.56]–[6.57].

40 *Corporations Act 2001* (Cth) s 911A.

41 Ibid s 961B.

42 Ibid pt 7.8A divs 2, 3.

- provisions that create rights and remedies for private persons (as distinct from regulators such as ASIC) based on contraventions of the Act;[43]
- offence provisions, civil penalty provisions, and coercive powers;[44]
- other regulatory powers, such as ASIC's powers in relation to:
  - the AFSL regime;[45]
  - product intervention orders;[46] and
  - granting individual relief from provisions of primary legislation;
- delegated legislative powers, discussed further below, including powers that presently appear in delegated legislation;[47] and
- key defined terms, such as the definitions of 'financial product' and 'financial service'.

Adjusting regulatory boundaries

6.23 This part discusses the role of the Scoping Order and individual relief in adjusting regulatory boundaries as part of the recommended legislative model.

The Scoping Order

Recommendation 44 In a manner consistent with existing policy settings, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to create a power to:

a. include classes of products and services or classes of persons within the scope of relevant provisions of the Act;

b. exclude classes of products and services or exempt classes of persons from relevant provisions of the Act; and

c. set out detail that adjusts the scope of relevant provisions of the Act;

in the Scoping Order.

6.24 As its title suggests, the Scoping Order is intended to provide a home for legislative detail that adjusts the scope of provisions in the *Corporations Act*. It would be a single, consolidated legislative instrument that would contain exclusions

43 See, eg, ibid ss 1022B, 1023Q, 1041I; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GF.

44 These provisions are discussed in more detail in **Chapter 8** of this Report. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 5.

45 See, eg, *Corporations Act 2001* (Cth) ss 913B, 915A, 915B.

46 Ibid s 1023D.

47 See, eg, *Corporations Regulations 2001* (Cth) regs 7.9.19A, 7.9.19B.

and class exemptions from the financial services regulatory regime, as well as any carve-ins (where appropriate) and other detail that is used to adjust the scope of the regime or particular provisions. **Appendix F** to this Report contains a table outlining the types of existing provisions that may appear in the Scoping Order.

6.25 The purpose of the Scoping Order is not to supplant primary legislation, which would establish the regulatory boundaries and core policy of the regulatory regime. Rather, the power to make scoping orders — which would become provisions of the single, consolidated Scoping Order — would allow for delegated legislation to adjust the scope of provisions of the Act in a more navigable and coherent way than at present.

6.26 Stakeholder feedback and submissions in response to Interim Report B have supported the Scoping Order as part of the recommended legislative model.[48] Stakeholders have generally acknowledged that the Scoping Order would make the legislative framework easier to navigate and understand. For example, Associate Professor Nehme observed that consolidating exclusions and exemptions in the Scoping Order would 'facilitate access to the public' and 'provide a level of transparency that is currently lacking as it is challenging for stakeholders, including consumers, to fully grasp the system'.[49]

6.27 Combined with rules, the Scoping Order would replace the existing regulations and diffuse ASIC legislative instruments relating to financial products and financial services. For users of the legislation, this would mean:

- first, consulting the primary legislation to identify whether their circumstances come within the regulatory regime and each of its core obligations, before identifying any exclusions or exemptions that appear in primary legislation because they are 'structural' in nature and give effect to key policies within the regulatory regime;[50]
- secondly, consulting the Scoping Order to locate all other inclusions, exclusions, exemptions, and scoping detail relating to their circumstances;[51] and
- thirdly, if their circumstances do not fall outside the operation of the Act, consulting the relevant rules (where necessary) for further detail relating to the obligations contained in the primary legislation.

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48 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [21].

49 M Nehme, *Submission 64*.

50 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.22]–[2.25].

51 For an example of how the Scoping Order helps to consolidate and simplify exclusions and exemptions that are currently spread across the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments, see the Implementation Order (now re-named Scoping Order) in Prototype Legislation A: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.115]–[10.122].

6.28 As discussed in **Chapter 5** of this Report, specific inclusions (such as inclusions within the definitions of 'financial product' and 'financial service') should, so far as possible, appear in primary legislation. To the extent specific inclusions in delegated legislation would be necessary, however, the Scoping Order would provide a single home where they could be co-located with related exclusions and exemptions.

6.29 In implementing the recommended legislative model, judgement would need to be exercised where there is uncertainty about whether particular legislative detail would be more appropriate for scoping orders or rules. This may arise where, for example, it is unclear whether a provision prescribes detail that fleshes out an obligation contained in primary legislation or if such detail may operate to extend the operation of the Act. Interim Report B outlined some relevant considerations to guide those judgements,[52] which would form part of the implementation process discussed in **Chapter 7** of this Report.

6.30 Inclusions, exclusions, and exemptions illustrate the inherent tension between the principle that matters of significant policy should be contained in primary legislation and the principles of durability, flexibility, coherence, and navigability.[53] Compared to the existing legislative framework, consolidating inclusions, exclusions, and exemptions in a single legislative instrument would improve navigability, comprehensibility, and transparency. Additionally, as discussed further below, the powers to make scoping orders and rules should be subject to appropriate limits and safeguards, including public consultation and parliamentary oversight.[54] The recommended legislative model therefore seeks to implement an appropriate balance between important principles relating to the delegation of legislative authority while also producing a navigable legislative framework.

Individual relief

Recommendation 45 Consistent with existing policy settings, the provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to include a single power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as 'individual relief').

52 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.37].

53 See ibid [2.25], [3.48]–[3.66]. This tension is also reflected in the concerns of stakeholders who expressed qualified support for the Scoping Order as part of the legislative model. See, eg, Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [22].

54 See below [6.66]–[6.77].

6.31 **Recommendation 45** maintains the existing policy that ASIC may grant individual relief from many provisions of Chapter 7 of the *Corporations Act*. Stakeholders have observed to the ALRC that ASIC's ability to grant individual relief is important, particularly for addressing atypical circumstances or unintended consequences of the regulatory regime as it applies to particular persons.[55] The ALRC envisages a reduced need for individual relief if the recommended legislative model were implemented, as prescriptive detail in rules can be readily tailored to minimise problems in its application.[56]

6.32 The requirement to publish individual relief in the form of a notifiable instrument, instead of Gazettal, would be consistent with modern practice and improve the visibility of individual exemptions from provisions of primary legislation.[57] As the ALRC has previously observed, while there may be implications for resourcing and the timeliness of publishing notifiable instruments compared to publishing notices in the Gazette, these problems are able to be addressed.[58]

Rules and rulebooks

Recommendation 46 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to create a power to make 'rules' that may prescribe matters expressly authorised by provisions of the Act.

Recommendation 47 Rules made under the power described by Recommendation 46 should not deal with matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

6.33 The purpose of rules in the recommended legislative model is to accommodate much of the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors, and circumstances that Chapter 7 of

55 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [23].

56 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.39].

57 See, eg, ibid rec 17, [8.5]; Australian Law Reform Commission, *Recommendation 17 — Unnecessary Complexity Note* (Interim Report B — Additional Resources, 2022) [39]–[57], 21–3 (Appendix).

58 Australian Law Reform Commission, *Recommendation 17 — Unnecessary Complexity Note* (Interim Report B — Additional Resources, 2022) [55]–[57].

the *Corporations Act* presently regulates.[59] Currently, this type of prescriptive detail is spread across the legislative hierarchy, including in the Act, and in the form of conditional exemptions and notional amendments in delegated legislation. Rules that are able to be amended by both the Minister and ASIC could replace many existing, and future, conditional exemptions and notional amendments.

6.34 Unlike conditional exemptions and notional amendments, rules would permit the creation of self-contained legislative instruments that could be understood without frequent reference to the Act or another legislative instrument. Presenting rules in thematically consolidated instruments, which may be known as rulebooks, would create a much more navigable legislative framework than at present.

6.35 The Prototype Rules in Prototype Legislation B illustrated several types of matters that, in the context of financial product disclosure, could appropriately be contained in rules.[60] Examples of existing provisions that were converted to rules in Prototype Legislation B are listed in **Table 6.1** below. In general, the types of matters in the Prototype Rules included the content and form of different disclosure documents, who must prepare a disclosure document, and information that must be given to ASIC.

Table 6.1: Examples of provisions converted to rules

Current provision	Equivalent provisions of the Rules in Prototype Legislation B
Corporations Act s 1013A (as notionally amended by reg 7.9.07J of the *Corporations Regulations*)	s 61-10 (Who must prepare PDS)
Corporations Regulations reg 7.9.15DA	s 61-36 (PDS may refer to publicly available information not set out in full)
ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 (Cth) s 7(a)	ss 61-15(1)–(2), 61-45(3), 65-3(1) (Provisions replacing current notional amendments to the *Corporations Act*)

59 In Interim Report B, the ALRC sought stakeholder feedback on whether rulebooks should contain 'evidential provisions' that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation (Question B16). In light of stakeholder feedback, and the relatively novel nature of evidential provisions, the ALRC has not formalised Question B16 as a recommendation. For discussion of Question B16, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.53]–[5.61]. For a summary of feedback in response to Question B16, see Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [68]–[71].

60 For further discussion of Prototype Legislation B, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.7]–[2.14], [2.48]–[2.50]; Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B — Additional Resources, September 2022).

6.36 Stakeholder feedback and submissions have generally supported the use of rules in the recommended legislative model.[61] Several stakeholders have noted the potential for thematic rulebooks to make the law easier to access, navigate, and understand.[62] Most concerns among stakeholders have centred on the scope of any rule-making power and accountability for its exercise.[63]

6.37 While there may be challenges in drafting appropriate legislative provisions, the recommended legislative model does not anticipate or necessitate an expansion of existing delegated legislative powers. **Recommendation 46** does not, for example, contemplate the creation of a general rule-making power akin to that of the FCA (UK).[64] Rather, the powers to make scoping orders and rules are intended to be more circumscribed, and subject to additional safeguards, when compared with the existing unfettered exemption and notional amendment powers.[65]

6.38 As discussed further below, prototype legislation in **Appendix E** to this Report illustrates how empowering provisions and 'heads of power' (provisions that activate a power) can be used to appropriately scope the power to make rules.[66] Section 1098A of the prototype legislation in **Appendix E** also illustrates how express limits may be placed on the extent of the power to make rules (as contemplated by **Recommendation 47**).

6.39 **Chapter 7** of this Report further discusses how the power to make rules may be developed, and appropriately scoped, as part of the implementation process.

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61 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [146]–[149]; Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [28].

62 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [28].

63 Ibid [30].

64 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.91].

65 Ibid [10.92]–[10.97]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2. See **Chapter 7** of this Report for further discussion of how this may be given legislative effect.

66 See below [6.50]–[6.53]. See also s 1126 of the Prototype Act in Prototype Legislation B which illustrated how a head of power to make rules in relation to disclosure documents may be drafted: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

The law-making roles of the Minister and ASIC

Recommendation 48 In a manner consistent with existing policy settings, the powers described by Recommendations 44 and 46 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission.

A protocol should be used to coordinate the exercise of any concurrent power vested in the Minister and the Australian Securities and Investments Commission in respect of the same provisions or subject matters.

6.40 In Chapter 7 of the *Corporations Act*, the delegated legislative powers of the Minister and ASIC overlap and may be exercised concurrently in many respects. To reflect this general position, in Interim Report B the ALRC:

- proposed that the power to make scoping orders and the power to make rules be vested concurrently in the Minister and ASIC (Proposal B8); and
- noted that if Parliament were minded to grant exclusive law-making power to either the Minister or ASIC in a particular area, this could be achieved by inserting additional delegated legislative powers exercisable by only one of the Minister or ASIC, thereby re-introducing a level of complexity that the legislative model seeks to avoid.[67]

6.41 **Recommendation 48** is a refined form of Proposal B8 that takes account of stakeholder feedback in response to Proposal B8 and further analysis of delegated legislative powers in respect of the financial services-related provisions of Chapter 7 of the *Corporations Act*.

6.42 In summary, the ALRC recommends that the powers to make scoping orders and rules be conferred on the Minister and ASIC in a way that reflects the allocation of existing delegated legislative powers. This means that in areas where existing policy and the principles discussed in **Chapter 4** of this Report indicate that a power should be exercisable by only one of the Minister or ASIC in respect of certain subject matter, the relevant power should continue to be limited in that way. In other words, implementing **Recommendation 48** would neither expand nor contract the delegated legislative powers of the Minister and ASIC in respect of areas where they do, or do not, presently have power. The mechanisms for giving this legislative effect are discussed in detail below.[68]

6.43 Importantly, while this introduces some complexity to the allocation and exercise of delegated legislative powers, it nonetheless makes it possible for the

67 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.67].

68 See below [6.50]–[6.53].

Minister and ASIC to amend the same consolidated legislative instruments (in the form of the Scoping Order and rulebooks), thereby reducing the complexity currently created by proliferating legislative instruments and notional amendments.

Stakeholder feedback

6.44 Stakeholders expressed a range of views in response to Proposal B8. Submissions generally did not support vesting concurrent power to make scoping orders and rules in the Minister and ASIC.[69] For example, some submissions suggested that:

- the powers to make scoping orders and rules should be conferred on the Minister alone;[70]
- the power to make rules should be conferred on ASIC alone;[71] or
- the powers should be conferred on an alternative delegated law-making body.[72]

6.45 As noted above, these diverse views reflect the fact that the appropriate allocation of law-making responsibility between government and an independent regulator is a perennial issue.[73] While many stakeholders' suggestions present valid alternatives, most would require an important change in existing policy settings under Chapter 7 of the *Corporations Act*. **Recommendation 48** seeks to accommodate existing policy settings, as well as the principles discussed in **Chapter 4** of this Report.

6.46 As discussed further below, the recommended legislative model may be adapted to accommodate different allocations of legislative power or different law-makers.[74] Under any allocation of powers, the recommended legislative model would facilitate a more coherent and navigable legislative framework than is possible at present.

Existing delegated legislative powers

6.47 As noted above, the financial services-related provisions of Chapter 7 of the *Corporations Act* may be affected by approximately 420 powers to make regulations, ASIC legislative instruments, or Ministerial legislative instruments spread across approximately 410 provisions.[75] **Table 6.2** below summarises these powers and their allocation.

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69 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [37]–[38].
70 Ibid [41].
71 Ibid [40].
72 Ibid [44].
73 See above [6.17].
74 See below [6.50]–[6.58], [6.64]–[6.65].
75 An additional 26 powers appear in Part 2 Div 2 of the *ASIC Act*. A spreadsheet containing the underlying data (current as at 31 March 2022) and an outline of the ALRC's methodology is available on the ALRC website: Australian Law Reform Commission, 'Delegated Legislative Powers Mapping — Financial Services' <www.alrc.gov.au/wp-content/uploads/2023/10/Delegated-Legislative-Powers-Mapping.xlsx>.

Table 6.2: Existing delegated legislative powers

Delegated law-maker	Potential effect	Number
Governor-General in Council (Regulations)	Carve in or extension	67
	Carve out	94[76]
	Modify (notionally amend)	18
	Prescribe detail	208[77]
	Total	387
ASIC	Carve in or extension	4
	Carve out	13
	Modify (notionally amend)	5
	Prescribe detail	11
	Total	33
Minister	Carve in or extension	1
	Carve out	1
	Modify (notionally amend)	1
	Prescribe detail	2
	Total	5[78]

6.48 **Appendix G** to this Report contains a breakdown of powers currently exercisable by the Minister (by way of regulations) or by ASIC according to the part of Chapter 7 of the *Corporations Act* to which they relate.[79] In summary, the analysis in **Appendix G** shows:

- Generally, only the Minister (by way of regulations) may exercise specific powers that carve in to, or expand, the regulatory regime. These include, for example, powers to specifically include matters within the definitions of 'financial product' and 'financial service'.[80] ASIC's specific powers in this respect

76 This includes s 1368 of the *Corporations Act*, which applies to Chapter 7 of Act but appears in Part 9.12.

77 This includes s 1364(w) of the *Corporat*ions Act, which though located in Part 9.12 may apply to regulations made for the purposes of Chapter 7 of the Act.

78 These powers all appear in Part 7.6 of the *Corporations Act*. They relate to professional standards for financial advisers (Part 7.6 Div 8A) and restrictions on terms relating to financial advice (s 923C).

79 The analysis in **Appendix G** is limited to Parts 7.1, 7.6–7.10A, and 7.12 of the *Corporations Act*. It also includes two relevant provisions that appear in Part 9.12 of the Act.

80 *Corporations Act 2001* (Cth) ss 764A(1)(m), 766A(1)(f).

are more limited, and extend to including something within the definition of 'margin lending facility'.[81] However, many of the notional amendment powers conferred on ASIC may be exercised in respect of the definitions contained in Part 7.1 of the *Corporations Act*, with the result that they may, in particular cases, operate to carve in or expand the law's operation.[82]

- In substantial areas of regulation, both the Minister (by way of regulations) and ASIC may exercise concurrent exemption and modification powers. These include Part 7.6 (relating to the AFSL regime, with the exception that ASIC's power does not extend to Divs 4 and 8), Part 7.7 (financial services disclosure), Part 7.8 (other provisions relating to conduct), and Part 7.9 (financial product disclosure). These parts also contain numerous, more specific regulation-making powers. However, given the expansive notional amendment powers conferred on ASIC, concurrent power is effectively vested in both the Minister and ASIC.
- In respect of the design and distribution obligations contained in Part 7.8A, both regulations and ASIC legislative instruments may exclude products or exempt persons from those obligations.[83] However, only the Minister (by way of regulations) may expressly expand the operation of the central obligation to produce a target market determination,[84] and only ASIC may notionally amend provisions of Part 7.8A.[85]
- Only the Minister (by way of regulations) may adjust the regulatory boundaries or prescribe detail in relation to the product intervention order regime in Part 7.9A. However, ASIC is empowered by Part 7.9A to issue product intervention orders, which have the status of a legislative instrument if made in relation to a class of financial products.
- Only the Minister (by way of regulations) may adjust the regulatory boundaries and supplement the generally applicable requirements in respect of the best interests obligation and conflicted remuneration provisions relating to financial advice in Part 7.7A. ASIC has relatively limited powers relating to the prescription of detail in relation to Part 7.7A.

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81 Ibid ss 761EA(8)–(9).

82 See, eg, *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (Cth) s 8; *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682* (Cth) s 5; *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* (Cth) s 5.

83 See ss 994B(3)(f) and 1368 of the *Corporations Act* in respect of regulations, and s 994L in respect of ASIC legislative instruments.

84 *Corporations Act 2001* (Cth) s 994B(1)(c).

85 Ibid s 994L. Given the unqualified expression of the power in s 994L of the *Corporations Act*, it is arguable that it would be open to ASIC to notionally amend s 994B of the Act to expand its application, but doing so may have substantial policy implications by imposing a range of new obligations on persons otherwise not covered by design and distribution obligations. For further discussion of the potential breadth of existing notional amendment powers, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.24]; *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].

- Only the Minister (by way of regulations) may exempt a class of persons or products from, or notionally amend, Part 7.10 relating to market misconduct and other prohibited conduct (including consumer protections in relation to financial services).

6.49 The following section explains how **Recommendation 48** may accommodate variation in the powers allocated to the Minister and ASIC where necessary, and still facilitate significant simplification.

Accommodating different allocations

6.50 Prototype legislation in **Appendix E** to this Report illustrates how the ALRC's recommended legislative model may accommodate different allocations of law-making power between the Minister and ASIC.

6.51 The prototype legislation establishes an architecture whereby:

- an empowering provision creates the powers to make scoping orders (prototype s 1097) and rules (prototype s 1098);
- the empowering provision confers those powers on both the Minister and ASIC; and
- other provisions, referred to as heads of power, activate each power as necessary and specify whether scoping orders or rules may be made by the Minister, ASIC, or both.

6.52 In other words, neither the Minister nor ASIC could exercise their powers in relation to a matter unless a head of power specifically authorised them to do so. **Table 6.3** gives an overview of how different heads of power may be allocated under the recommended legislative model.

Table 6.3: Overview of heads of power

Power	**Heads of power**	
	Minister	***ASIC***
Scoping order	Both may make scoping orders	
	Minister-only subject matters	X
	X	ASIC-only subject matters
Rules	Both may make rules	
	Minister-only subject matters	X
	X	ASIC-only subject matters

6.53 **Table 6.4** lists example heads of power that are contained in the prototype legislation in **Appendix E** and shows how they correspond to existing provisions in the *Corporations Act*.

Table 6.4: Overview of prototype legislation

Subject	Effect	Delegated law-maker	Head of power (prototype provision)	Existing *Corporations Act* provisions
***Scoping order power* (Prototype s 1097)**				
Definition of 'financial product'	Carve in or extend	Minister only	s 764A(1)(m)	s 764A(1)(m)
	Exclude products	Minister and ASIC	s 765A(1)	ss 765A(1)(q), (y), (z), (2)–(3)
Definition of 'financial service'	Carve in or extend	Minister only	s 766A(1)(m)	s 766A(1)(f)
	Set scope of 'traditional trustee company service'	Minister only	s 766A(4)	s 766A(1B)
	Delimit scope of definition	Minister only	s 766J(2)	s 766A(2)
***Rule-making power* (Prototype s 1098)**				
Consumer protection rules (particularly relating to design and distribution obligations, current Part 7.8A)	Rule-making power (specified matters)	Minister only	s 994L(1)	s 994B(1)(c)
	Rule-making power (specified matters)	ASIC only	s 994L(2)	s 994L(2)
	Rule-making power (specified matters)	Minister and ASIC	s 994L(3)	ss 994F(7), 994L(2)

Subject	Effect	Delegated law-maker	Head of power (prototype provision)	Existing *Corporations Act* provisions
Financial advice rules	Rule-making power (specified matters)	Minister only	s 970(1)	ss 961B(5)(a), 963N

Implications

6.54 Adopting Proposal B8 as outlined in Interim Report B would:

- produce the simplest legislative framework, with the boundaries and exercise of powers to be managed solely by a protocol (between the Minister and ASIC) and oversight mechanisms (including disallowance by Parliament);
- reflect the policy in large parts of Chapter 7 of the *Corporations Act* where both the Minister and ASIC presently have concurrent exemption and notional amendment powers; and
- greatly reduce the number of heads of power needed in primary legislation.

6.55 However, adopting Proposal B8 so as to confer concurrent powers on both the Minister and ASIC in respect of all areas of regulation may involve some changes in existing policy settings. It would, for example, confer on ASIC the ability to expand the scope of the legislative regime and also confer powers in respect of some specific subject matters currently reserved for the Minister alone (as noted above).

6.56 By contrast, **Recommendation 48** maintains existing policy settings by accommodating different allocations of specific powers as between the Minister and ASIC, where necessary. This introduces some complexity to the recommended legislative model, resulting from:

- an increased number of heads of power that are necessary for differentiating between the Minister-only and ASIC-only subject matter, which could otherwise be consolidated into fewer provisions;
- relatively complex machinery provisions that enable the Minister and ASIC to make amendments to the same legislative instruments, but prevent them from amending scoping orders or rules that may only be made by one of them (for example, ASIC amending a scoping order that is only within a ministerial head of power, and vice versa, so as to change its effect);[86] and

86 See ss 1097(8)–(10) and 1098(8)–(10) of the prototype legislation in **Appendix E**.

- the potential that one of the Minister or ASIC may inadvertently legislate beyond the scope of power or inconsistently with the primary legislation, and therefore invalidly.[87]

6.57 The risk of legislating beyond power arises in respect of any delegation of legislative power. In the case of the C*orporations Act* at present, that risk is minimised by the delegation of very wide law-making powers.[88] However, the risk nonetheless exists (and is managed) in respect of many narrow law-making powers that presently exist in the *Corporations Act*. It is also managed in the context of other legislation that confers overlapping powers on a Minister (via regulations) and a regulator.[89]

6.58 Notwithstanding this complexity for administrators of the legislation, implementing **Recommendation 48** would still produce a simpler legislative framework than at present. This is because the powers would be exercised by way of amendments to consolidated legislative instruments. Put differently, all scoping detail would appear in the single Scoping Order and rules relating to the same theme would appear in consolidated thematic legislative instruments (rulebooks). In this sense, the different law-making arrangements would generally be irrelevant to most users of the legislation, who would simply see consolidated legislative instruments that bring together amendments made by both the Minister and ASIC in the same instrument.[90]

6.59 Implementing **Recommendation 48** would present an opportunity to clarify and simplify the existing allocation of delegated legislative powers. This may be done by examining the existing allocations and considering whether they reflect a deliberate policy or simply an ad hoc legislative design choice. For example, it may be justifiable from both the perspective of policy and principle that only the Minister (who is directly accountable to Parliament) may expand the scope of the regulatory regime by specifically including matters within the definition of a 'financial product'.[91] In many other cases, however, it may be appropriate to vest powers in both the Minister and ASIC. Vesting concurrent heads of power in the Minister and ASIC may often be consistent with existing policy (given the breadth of ASIC's current exemption and notional amendment powers), would produce a simpler legislative framework, and would reduce the risk that one of the Minister or ASIC may legislate beyond the scope of their power.

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87 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.43]. See also Pearce and Argument (n 26) 284–5, 412–28.

88 See, eg, *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.24].

89 See, for example, the *Navigation Act 2012* (Cth), which confers overlapping powers on the Minister (exercisable via regulations) and the Australian Maritime Safety Authority. This example is discussed in Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.69], [2.81]–[2.83].

90 Amendments to the Scoping Order and rulebooks may be consolidated in the same way that changes made by an amending Act are incorporated into the principal Act by way of an updated compilation on the Federal Register of Legislation.

91 As is presently possible via regulations: see *Corporations Act 2001* (Cth) ss 764A(1)(m), (3).

6.60 As is the case at present, concurrent heads of power should be managed through cooperation between the Minister (with the assistance of Treasury) and ASIC. Some submissions in response to Interim Report B expressed concern about how the exercise of concurrent powers could be effectively managed between the Minister and ASIC.[92] These concerns may be at least partly addressed through a protocol between the Minister and ASIC. Although the ALRC does not suggest that the protocol be enforceable, there would be benefit in formalising (via the protocol) how concurrent powers are to be managed.[93] As noted in Interim Report B, the details of a protocol or other arrangement between the Minister and ASIC should be publicly available to promote transparency and accountability.[94]

Technical matters versus policy

6.61 During this Inquiry, the ALRC has recognised that there is no clear line between technical matters and matters that may relate to substantive policy.[95] This means that when making delegated legislation, ASIC may sometimes be perceived as dealing with matters of policy that may more appropriately be dealt with by Parliament or government.[96]

6.62 While this possibility or perception cannot be eliminated, the recommended legislative model addresses the issue in two main ways:

- First, as discussed above, the powers to make scoping orders and rules would be more narrowly crafted than many existing powers and, crucially, would not permit notional amendments. By their nature, the powers would make it less likely that ASIC may or may be perceived to be dealing with policy.
- Secondly, the protocol may specify, for example, that in matters where the Minister and ASIC have concurrent powers, responsibility for exercising those powers in respect of matters relating to policy, as well as responsibility for policy development more generally, resides with the Minister (to the extent permitted by primary legislation), rather than ASIC.

6.63 In this latter respect, the protocol would fulfil a similar role to the Australian Government's 'Statement of Expectations' regarding ASIC. For example, the 'Statement of Expectations' released in August 2021 provided that:

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92 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [40].

93 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.69]–[2.73].

94 Ibid [2.72].

95 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.28]–[10.31]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.58].

96 See, eg, Financial Services Council, *Submission 66*; Financial Services Council, Submission No 7 to Senate Standing Committees on Economics, Parliament of Australia*, Australian Securities and Investments Commission Investigation and Enforcement* (28 February 2023) 13. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.28]–[10.31]; Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1.

> In achieving its objectives, carrying out its functions and exercising its powers, the Government also 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 rule-making powers, and guidance …[97]

Alternative approaches

6.64 Several different approaches to delegated law-making could be adopted under the ALRC's recommended legislative model. These may include, for example:

- conferring the power to make scoping orders solely on the Minister and the power to make rules solely on ASIC;[98]
- conferring the powers to make scoping orders and rules on the Minister alone, but expressly permitting the Minister to delegate power to ASIC;[99]
- conferring one or both of the powers to make scoping orders and rules on ASIC, subject to a power of consent or veto, or a directions power, conferred on the Minister;[100] or
- conferring the powers on a new law-making body, as suggested by some stakeholders in response to Interim Report B.[101]

6.65 Each of these alternatives may have potential benefits and disadvantages. Critically for the purposes of this Inquiry, each would involve significant policy change. However, if such policy change were desirable, the powers to make scoping orders and rules could be adapted so as to produce an equivalent body of simplified primary and delegated legislation in line with the recommended legislative model.

Safeguards

6.66 As discussed in **Chapter 4** of this Report, safeguards are crucial for ensuring an appropriate delegation of legislative authority.[102] This part discusses key safeguards that should apply to the powers to make scoping orders and rules.

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97 Australian Government, *Statement of Expectations: Australian Securities and Investments Commission* (2021) [3.3].

98 To some extent, this would be a similar approach to that adopted under the *Financial Services and Markets Act 2000* (UK), whereby the regulatory boundary is set and adjusted by a statutory instrument prepared by the UK Treasury and rules (of a wider scope than contemplated by the ALRC's recommendations) are made by the Financial Conduct Authority (UK). For discussion, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.12]–[7.43], [7.69], [7.72], [10.91].

99 For discussion in the context of rule-making, see ibid [10.89]–[10.90].

100 See, eg, Australian Law Reform Commission, *Interim Report A Summary: Financial Services Legislation* (Report No 137, 2021) [10.94]. For discussion of the implications that such powers may have for the perceived independence of ASIC, see International Monetary Fund, *Financial System Stability Assessment (Australia)* (IMF Country Report No 19/54, February 2019) 28.

101 See Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [44]–[45].

102 The draft guidance in **Appendix D** further discusses safeguards relating to the delegation of legislative power. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.33]–[4.69].

Prescribed consultation

Recommendation 49 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. require the Minister and the Australian Securities and Investments Commission to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.

6.67 Recognising the important role of scoping orders and rules in the recommended legislative model, **Recommendation 49** creates an enhanced consultation mechanism compared to the generally applicable requirements under the *Legislation Act*.[103] It also responds to concerns expressed by some stakeholders that although consultation is usually conducted as a matter of course, current processes do not always result in meaningful consultation with affected stakeholders.

6.68 The role of the Rules Advisory Committee would be to provide input on proposed scoping orders and rules as part of the consultation process.[104] The Committee's task would be to ensure that scoping orders and rules respond appropriately to practical market concerns, meet the legislative design principles that underpin the reformed legislative framework, and to act as a source of expertise when consulted about proposed scoping orders and rules. The Committee would not have a role in policy development or proposing the subject matter of scoping orders and rules.

6.69 As at present, the ALRC does not suggest that inadequate consultation should affect the validity of delegated legislation made under the recommended legislative model. Rather, the requirement to consult should act as a normative constraint on delegated legislative power as well as providing transparency and enhancing scrutiny. Further, the ALRC recognises that it may be appropriate to dispense with prescribed consultation in case of emergencies or in other circumstances of urgency, provided an explanation is given.[105]

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103 Note, however, that several existing provisions of the *Corporations Act* also adopt an enhanced consultation mechanism in respect of rules made by ASIC, including a requirement to consult the public: see, eg, *Corporations Act 2001* (Cth) ss 903G(3), 908CL(3), 981L(3).

104 The Committee's advisory role would be limited to the delegated legislative powers within the recommended legislative model. The Committee's role would not extend to existing delegated legislative powers, such as the power to create market integrity rules in s 798G of the *Corporations Act*.

105 See, for example, s 1098C of the prototype legislation in **Appendix E**.

6.70 **Recommendation 49** formalises Proposal B9 from Interim Report B. Consistent with feedback from stakeholders throughout the Inquiry, submissions in response to Interim Report B unanimously viewed consultation as an important part of the law-making process.[106] Comments concerning Proposal B9 largely focused on the appropriate composition of the Rules Advisory Committee.[107] These comments suggest that further consultation with stakeholders would be beneficial when implementing **Recommendation 49** and when determining the Committee's structure and composition. As a minimum, the ALRC suggests that:

- in recognition of the complexity of the financial services industry, the Committee should possess sufficient technical expertise to effectively aid the Minister and ASIC in their delegated law-making roles;
- the Committee should be composed and appointed in a way that ensures appointment based on merit; and
- relatedly, the Committee should be composed and appointed in a way that facilitates its independence from Government and prevents undue dominance of the Committee by sectoral interests.[108]

Explanatory statements

Recommendation 50 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to require that:

a. every legislative instrument made under the power described by Recommendation 44; and

b. every notifiable instrument made under the power described by Recommendation 45;

must be accompanied by a publicly available statement explaining how the instrument is consistent with relevant objects within Chapter 7 of the Act.

Recommendation 51 The provisions of Chapter 7 of the *Corporations Act 2001* (Cth) relating to the regulation of financial products and financial services should be amended to require that the explanatory statement accompanying every legislative instrument made under the power described by Recommendation 46 must address explicitly how the instrument gives effect to relevant objects within Chapter 7 of the Act.

106 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [140], [159]; Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [52].

107 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [52]–[53].

108 See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.87]–[2.91].

6.71 **Recommendations 50** and **51** have two main purposes. First, they would provide normative guidance to the Minister and ASIC by requiring them to consider the objects set out in primary legislation when making delegated legislation. Secondly, they would promote further transparency in the law-making process by making it easier to see how delegated legislation relates to the objects of the legislation.[109] The ALRC does not recommend that an inadequate explanation should affect the validity of a legislative or notifiable instrument.

6.72 **Recommendations 50** and **51** formalise Proposals B4 and B6 from Interim Report B, respectively. Only **Recommendation 51** differs slightly from Proposal B6 by recommending that the explanatory statement for rules identify how they 'give effect to' relevant objects, rather than 'further' relevant objects (as suggested by Proposal B6). This change avoids any misperception that rules in delegated legislation may 'go further than' what is permitted by primary legislation.

6.73 Submissions in response to Interim Report B generally supported Proposals B4 and B6, recognising their potential for improving transparency.[110] As discussed in **Chapter 5** of this Report, implementing the ALRC's reforms provides an opportunity to clarify the objects presently articulated in Chapter 7 of the *Corporations Act*.

Parliamentary oversight and sunsetting

Recommendation 52 Legislative instruments made under the powers described by Recommendations 44 and 46 should be disallowable by Parliament and subject to sunsetting.

6.74 Disallowance and sunsetting are the primary means by which Parliament scrutinises and controls the exercise of delegated legislative power.[111] While the main goal of sunsetting is to ensure that legislative instruments 'are kept up to date and only remain in force for so long as they are needed',[112] it is recognised that sunsetting also facilitates parliamentary oversight.[113] Both disallowance and sunsetting further the principle of democratic legitimacy and accountability, as discussed in **Chapter 4** of this Report.[114]

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109 Ibid [2.26], [2.46]–[2.47].

110 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [25]–[26], [31].

111 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.52]; Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023) [128]–[155].

112 Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 25.

113 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 34; Legislation Act Review Committee, Attorney-General's Department (Cth) (n 112) 45.

114 See **Recommendation 25**.

6.75 Consistent with the generally applicable requirements of the *Legislation Act*, scoping orders and rules made under the recommended legislative model should be disallowable by Parliament and subject to sunsetting. Recognising the resource implications of sunsetting,[115] **Recommendation 52** is not otherwise prescriptive and contemplates that there may be a range of approaches to managing sunsetting in the context of the recommended legislative model.[116] For example, the ALRC has previously noted that each thematic rulebook may adopt a single sunsetting date, and that provisions of the Scoping Order may also be grouped thematically and given a single sunsetting date.[117] This would provide clarity for stakeholders and delegated law-makers, as well as helping to manage the resource burden associated with reviewing and remaking legislative instruments. Consistent with the generally applicable position under the *Legislation Act*, the ALRC suggests that an appropriate sunsetting period would be 10 years.[118]

6.76 Implementing **Recommendation 52** would maintain the existing position in respect of legislative instruments made by ASIC, but would alter current practice insofar as scoping orders and rules replace regulations currently contained in the *Corporations Regulations*. This is because the *Corporations Regulations* are currently exempt from sunsetting.[119] The Delegated Legislation Scrutiny Committee has identified this exemption as a source of concern and questioned its appropriateness.[120]

6.77 **Recommendation 52** is consistent with the Delegated Legislation Scrutiny Committee's emphasis on the importance of sunsetting in the context of the *Corporations Regulations*. It is also consistent with a recent undertaking given by the Assistant Treasurer in response to Committee concerns to amend particular regulations so that they cease operation after 10 years.[121]

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115 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 112) 45–9.

116 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.31], [2.52].

117 Ibid.

118 *Legislation Act 2003* (Cth) s 50.

119 See generally Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.85], [6.20].

120 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 3 of 2022, 10 March 2022) [1.7], [1.23]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 6 of 2023, 2 June 2023) [1.29], [1.32]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 8 of 2023, 2 August 2023) [2.10], [2.14].

121 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 8 of 2023, 2 August 2023) [2.9], [2.13]. The relevant amending regulations are the *Corporations Amendment (Litigation Funding) Regulations 2022* (Cth), *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* (Cth), and *Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023* (Cth).

Steps to implementation

Recommendation 53 As part of the staged implementation of the recommended legislative model, the following provisions should be repealed:

a. powers to omit, modify, or vary relevant provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument;

b. powers to include products, services, or persons within the scope of relevant provisions of Chapter 7 of the Act by regulation or other instrument; and

c. powers to exclude products or services, and exempt persons, from the operation of Chapter 7 of the Act by regulation or other instrument.

6.78 Delegated legislative powers in the existing legislative framework are a significant source of complexity. **Recommendation 53** is aimed at ensuring that those powers are repealed as and when the recommended legislative model is implemented. The subject matter of pre-existing exclusions, exemptions, and notional amendments made in reliance on the current powers would be considered for inclusion in the reformed legislative framework, and their effect preserved, before **Recommendation 53** would be implemented.[122]

6.79 **Recommendation 53** formalises Proposals B10 and B11 from Interim Report B. Throughout this Inquiry, stakeholders have almost universally agreed with the ALRC that the current exemption and notional amendment powers create considerable complexity, make the law difficult to navigate, and raise principled rule of law concerns.[123]

6.80 There may be a very limited role for notional amendment powers in the reformed legislative framework in the case of emergencies. The now-repealed s 1362A of the *Corporations Act*, introduced in response to the COVID-19 pandemic, illustrates such a provision.[124] This section empowered the Minister to notionally amend or exempt a person from any provision of the *Corporations Act*. Importantly, the power was also subject to limitations, including that:

- it could only be exercised where the Minister was satisfied of certain matters, such as that the exercise would 'mitigate the economic impact of the coronavirus known as COVID19';[125] and
- any instruments made under the power were time-limited to six months.[126]

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122 Implementation is discussed further in **Chapter 7** of this Report.

123 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.96]; Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [129]–[137].

124 The power was introduced by *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

125 *Corporations Act 2001* (Cth) s 1362A(2)(b)(ii).

126 Ibid ss 1362A(4), (5).

6.81 Notional amendments would otherwise be unnecessary under the recommended legislative model, and should not form part of the law-making toolkit afforded to the Minister and ASIC in the ordinary course of events.

Aids to interpretation and navigability

6.82 When implementing **Recommendations 43–52**, consideration should be given to how the legislation and guidance materials may help users develop an effective mental model of the legislative framework.

6.83 Section 1096 of the prototype legislation in **Appendix E** to this Report contains an illustrative objects clause for the machinery provisions explained earlier in this chapter. It shows how an objects clause may:

- succinctly explain the recommended legislative model, its components, and the objective of creating 'a coherent, principle-based legislative hierarchy';
- explain the function of scoping orders and rules in plain language, as well as introduce the concept of 'heads of power' for users unfamiliar with the term; and
- ultimately, help users to form a mental model of the legislation and navigate it more easily.

Regulatory guidance

6.84 Stakeholders have identified regulatory guidance issued by ASIC as a source of complexity and concern during this Inquiry.[127] As outlined in Interim Report B, the purpose of the recommended legislative model is not to displace regulatory guidance.[128] Appropriate regulatory guidance would still play a role alongside the legislative model. However, the ALRC envisages that the volume of regulatory guidance could be significantly reduced. For example, simpler and more navigable legislation would reduce the need for guidance (or parts of guidance) aimed at

127 See, eg, Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [18].

128 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.94].

explaining disclosure obligations.[129] Regulatory guidance necessitated by notional amendments would also be unnecessary under the legislative model.[130]

6.85 Implementing the legislative model would therefore provide an important opportunity to simplify and significantly reduce the volume of existing regulatory guidance, reducing its contribution to complexity in the regulatory regime and reducing the burden of producing and maintaining guidance currently borne by ASIC.[131] This process may also involve ASIC and industry stakeholders exploring how regulatory guidance should best evolve alongside the reformed legislative framework into the future.

129 See, eg, Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (Regulatory Guide 168, July 2022); Australian Securities and Investments Commission, *Disclosure for On-Sale of Securities and Other Financial Products* (Regulatory Guide 173, March 2016); Australian Securities and Investments Commission, *Hedge Funds: Improving Disclosure* (Regulatory Guide 240, October 2022); Australian Securities and Investments Commission, *Offering Securities Under a Disclosure Document* (Regulatory Guide 254, August 2020).

130 See, for example, ASIC Regulatory Guide 160, which is 79 pages long and explains the regulation of time-sharing schemes, mostly based on notional amendments made by a 68-page long legislative instrument: Australian Securities and Investments Commission, *Time-Sharing Schemes* (Regulatory Guide 160, December 2020); *ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272* (Cth). For a further example, see the consolidated version of Part 7.9 Div 15 of the *Corporations Act* showing notional amendments made by legislative instrument: Australian Securities and Investments Commission, *Short Selling* (Regulatory Guide 196, October 2018).

131 For discussion of how regulatory guidance contributes to complexity in the regulation of financial services, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.93].

7. Implementation

Contents

Introduction

7.1 This chapter outlines how the reformed legislative framework for financial services regulation could be implemented and maintained into the future. As outlined in **Chapter 3** of this Report, and developed in further detail in **Chapters 5** and **6**, the reformed legislative framework includes:

- the recommended legislative model, comprising decluttered primary legislation, a Scoping Order, and 'rulebooks';
- restructured and reframed financial services-related provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* in the form of the Financial Services Law, complemented by recommendations relating to definitions and penalty provisions; and
- the FSL Schedule (Sch 1 to the *Corporations Act*), which provides a single home for the Financial Services Law.

7.2 The approach to implementation outlined in this chapter seeks to provide a realistic pathway for reform, identifying targeted and staged reforms that successive Parliaments or governments may take forward.

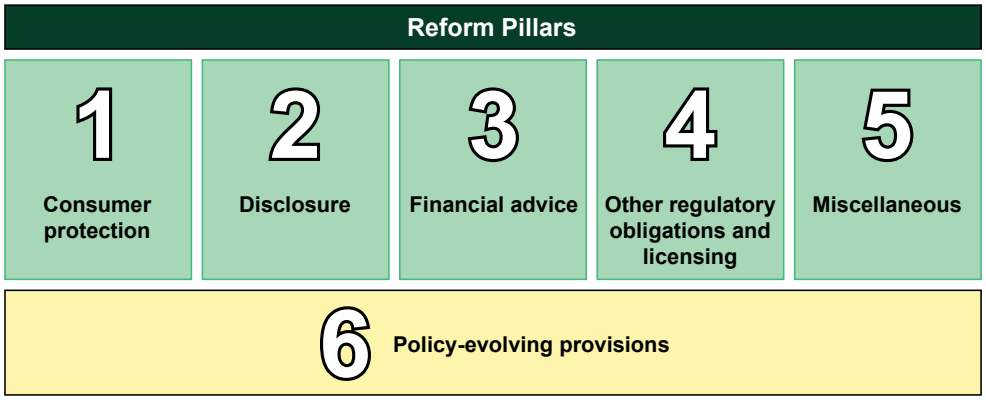
7.3 This chapter proceeds in six parts. The first part provides an overview of the ALRC's suggested roadmap to implement the reformed legislative framework. The second part discusses recommendations that lay the groundwork for the reform roadmap, and which could therefore be implemented before embarking on full implementation. The third part provides a detailed outline of how to implement the reformed legislative framework, including a methodology, a typology of provisions to be reformed, and a general approach to each stage of reform. The fourth part explains the ALRC's recommendation for reform taskforces to oversee the implementation of reforms. The fifth part discusses how the commencement of reforms could be managed. The final part discusses the recommended approach to post-implementation review of the reformed legislative framework.

Overview of the reform roadmap

7.4 The ALRC has created a reform roadmap that comprises the six pillars visualised in **Figure 7.1** below. The reform roadmap is based around the staged application of the ALRC's recommendations to each pillar, with the potential for further staging within each pillar. This part provides an overview of the reform roadmap and a brief summary of each pillar. The pillars are outlined in further detail below.[1]

7.5 Each pillar is designed to ensure that it could be implemented within a single term of Parliament.[2] The pillars are also designed so they may be implemented sequentially or simultaneously.

Figure 7.1: Reform roadmap



1 See below [7.55]–[7.74].

2 Several submissions have suggested that different governments' priorities may affect implementation of ALRC recommendations: see, eg, Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*. The reform roadmap seeks to minimise this risk by formulating separate reform pillars that could be implemented according to government priorities.

The order of the reform roadmap

7.6 The roadmap is structured to realise the benefits of the reforms as early as possible. Collectively, the first four pillars cover the most significant, complex, and policy sensitive financial services provisions in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.

7.7 The consumer protection pillar appears first as it would help lay the foundation for future reforms,[3] including by better communicating fundamental norms and thereby framing the more specific obligations in later pillars. Pillar One also offers an opportunity to implement recommendations related to the definitions of 'financial product' and 'financial service', which would be helpful for later reforms.

7.8 Financial product and services disclosure appear as Pillar Two because the relevant provisions are among the most complex in the existing legislative framework.[4] Reform to disclosure provisions could bring significant benefits for regulated persons, consumers, and investors.

7.9 Pillar Three of the reform roadmap relates to financial advice. Financial advice provisions are significant because they regulate one of the key means through which consumers access financial products and services. Multiple governments have reiterated the importance of effectively regulated and affordable financial advice.[5] A simplified legislative framework would be an important step to reducing the costs of advice, supporting advisers to understand their obligations, and promoting higher quality advice.

7.10 The first three pillars of the roadmap therefore target areas in which substantial benefits could be realised. Pillar Four is focused on reforming general regulatory obligations and provisions comprising the AFSL regime. Implementing Pillar Four would see the simplification of various important provisions, principally through restructuring and reframing primary legislation. This would complete the process of establishing a more navigable and comprehensible legislative framework.

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3 Consumer protection provisions include Part 2 Div 2 of the *ASIC Act* and related provisions in the *Corporations Act* that presently rely on the broader definition of 'financial product' in the *ASIC Act*, such as the provisions relating to design and distribution obligations and product intervention powers. Provisions relating to disclosure for financial products and services are treated separately from consumer protection and as a discrete thematic area of regulation (see Pillar Two). For further discussion of the provisions that would form part of a legislative chapter centred on consumer protection, see Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [2.5]–[2.7], [2.20]–[2.22].

4 Ibid [3.13]–[3.20].

5 See, eg, The Hon Stephen Jones MP, 'Delivering better financial outcomes: roadmap for financial advice reform' (Media Release, 13 June 2023) <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/delivering-better-financial-outcomes-roadmap-financial>; The Hon Josh Frydenberg MP and Senator the Hon Jane Hume, 'Strengthening and streamlining oversight of the financial advice sector' (Media Release, 9 December 2020) <www.ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/strengthening-and-streamlining-oversight-financial>.

7.11 Pillar Five is focused on reforming other provisions of the *Corporations Act* that are covered by **Recommendation 41** and which are not dealt with by other pillars, including Pillar Six. The exact scope of Pillar Five would depend on how government scoped other pillars and would require further consideration and consultation. Each pillar has core provisions, identified by the recommendations discussed in **Chapter 5** of this Report.[6] Other provisions that are not specifically listed in the recommendations discussed in **Chapter 5** could be dealt with under various pillars, including Pillar Five.

7.12 Implementing Pillar Six would involve identifying policy-evolving provisions of Chapter 7 of the *Corporations Act* to which the recommended legislative model and legislative design principles could be applied alongside policy reforms.[7] This would be an ongoing element of the reform roadmap, which seeks to use opportunities for technical reform as policy reforms emerge. Pillar Six would be implemented on an ongoing basis as and when policy reforms are adopted. Its implementation would therefore proceed in parallel with other pillars of the roadmap. Many submissions have noted the importance of ensuring this Inquiry's recommendations are compatible with other reform measures.[8]

Alternative approaches to the roadmap

7.13 While the reform roadmap in **Figure 7.1** suggests one approach to implementation, there is ultimately no single 'correct' order in which to implement the ALRC's recommendations. The roadmap therefore offers just one approach to undertaking reforms. Governments could choose to differently conceptualise and scope reform pillars, or to undertake them in an alternative order. Where possible, government should seek to align the roadmap with its own priorities, to ensure sustained momentum and resourcing for implementation.

7.14 Under any approach, it would be desirable to begin implementing the ALRC's recommendations as part of any new legislative measures and what the ALRC refers to as 'policy-evolving provisions', discussed below.[9] New legislation should avoid the perpetuation of complex law-making approaches, such as notional amendments, conditional exemptions, and highly particularised regulation-making powers. Instead, new measures should be designed according to the principles recommended in **Chapter 4** of this Report.

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6 **Recommendations 33**, **36**, and **38–40**. The overall scope of the recommended Financial Services Law is described by **Recommendation 41**.

7 The ALRC has previously discussed the benefits of considering both policy and simplification issues together: Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.54] (Example 7.1).

8 See, eg, Australian Retail Credit Association, *Submission 83*; Association of Superannuation Funds Australia, *Submission 84*; Insurance Council of Australia, *Submission 86*; Chartered Accountants Australia and New Zealand, *Submission 89*; Australian Banking Association, *Submission 91*.

9 See below [7.69]–[7.74].

Laying the groundwork

7.15 This part discusses amendments to the *Corporations Act* that should be undertaken before beginning work on the reform pillars shown in **Figure 7.1**. If the reformed legislative framework were to be implemented, these initial steps would include:

- enacting the skeletal FSL Schedule in Sch 1 to the *Corporations Act*;
- establishing the legislative architecture for scoping order and rule-making powers; and
- updating guidance relating to legislative design to operationalise the working principles recommended in this Report and aid the implementation process.

Enacting the FSL Schedule

7.16 Implementing **Recommendation 41** would see the creation of a coherent body of primary legislation referred to as the Financial Services Law. The ALRC recommends that the Financial Services Law be enacted in Sch 1 to the *Corporations Act* (the FSL Schedule).[10]

7.17 A skeletal FSL Schedule could be enacted to lay the groundwork for the progressive implementation of the Financial Services Law. This skeletal FSL Schedule would include placeholder chapters, which could contain simplified outlines that explain where provisions are presently located in the pre-reform legislative framework.[11] These outlines would provide a navigability tool for users of the legislation.[12] The placeholder chapters would be replaced as and when reform pillars are implemented.

7.18 The creation of a skeletal FSL Schedule would not be necessary if **Recommendation 42** were not adopted. Instead, reforms pillars could be added as new chapters to the existing structure of the *Corporations Act*. The ALRC demonstrated this alternative approach in Prototype Legislation B.[13] In Prototype Legislation B, financial products and financial services disclosure reforms were implemented in a new Chapter 7A of the *Corporations Act*. The other fundamental features of the ALRC's reforms were otherwise unchanged, including the recommended legislative model.

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10 See **Recommendation 42**.

11 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.37]–[7.38].

12 See, eg, ibid 267–70 (Appendix E).

13 Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

Scoping order and rule-making powers

7.19 Under the recommended legislative model, powers to make scoping orders and rules would replace hundreds of existing powers to make delegated legislation. The intention of these reforms is to reduce the number of particularised legislative powers and facilitate the consolidation of hundreds of regulations and ASIC legislative instruments. The existing powers could continue to operate alongside the consolidated powers until they become redundant through implementation of the relevant reform pillar.[14]

7.20 The legislative architecture to enable and govern the use of scoping orders and rules could be enacted before commencing the first pillar of reforms. This architecture would then be 'switched on' while implementing the reform roadmap. As discussed in **Chapter 6** of this Report, prototype legislation in **Appendix E** illustrates how this general architecture could be designed. In summary:

- Primary legislation would provide for powers to make scoping orders and rules as legislative instruments. These powers could be exercised by the Minister, ASIC, or both.[15] Primary legislation would govern how these instruments may interact with each other.[16] For example, the legislation would provide for the circumstances in which ASIC instruments may amend Ministerial instruments (and vice versa), thereby laying the foundation for the consolidated Scoping Order and rulebooks. This architecture helps avoid the proliferation of legislative instruments, as at present.
- The legislative architecture would establish a framework for 'turning on' the powers through 'heads of power' in primary legislation. These are provisions that would permit matters to be prescribed by scoping orders or rules.[17] In other words, neither the Minister nor ASIC would be able to make scoping orders or rules unless specifically enabled to do so by a head of power in primary legislation. This would create clear limits on the powers. Primary legislation would also set out specific matters that cannot appear in rules, such as provisions that allow individuals to be arrested or detained.[18]
- Primary legislation would also set out procedural requirements to ensure proper consultation and accountability. These would include specific obligations to consult the public and a Rules Advisory Committee,[19] and requirements to explain how scoping orders and rules relate to the objects set out in primary legislation.[20]

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14 See **Recommendation 53**.
15 See ss 1097(1)–(4) and 1098(1)–(4) of the prototype legislation in **Appendix E**.
16 See ss 1097(8)–(10) and 1098(8)–(10) of the prototype legislation in **Appendix E**.
17 See ss 1097 and 1098 of the prototype legislation in **Appendix E**.
18 See s 1098A of the prototype legislation in **Appendix E**.
19 See ss 1098B and 1098C of the prototype legislation in **Appendix E**.
20 See ss 1097(5) and 1098(5) of the prototype legislation in **Appendix E**.

7.21 The prototype legislation in **Appendix E** provides several example heads of power.[21] These show how heads of power would interact with the higher-level powers to specify whether the Minister, ASIC, or both may make scoping orders or rules in a particular case, and to specify the matters scoping orders or rules may deal with. As the ALRC's various iterations of prototype legislation have demonstrated, enacting the architecture is a necessary step before creating rules and scoping orders. The recommended legislative model of scoping orders and rules is built upon this architecture.

7.22 As part of establishing the architecture for scoping orders and rules, **Recommendation 49** could also be implemented to create a Rules Advisory Committee. Primary legislation would then require consultation with this Committee, as well as the general public, when rules are made.[22]

Legislative design principles and guidance

7.23 **Chapter 4** of this Report contains seven recommendations aimed at improving the quality and consistency of corporations and financial services legislation. Several of the recommendations in **Chapter 4**, such as to apply certain working principles when designing corporations and financial services legislation,[23] could be affirmed and operationalised as part of the consolidated guide to designing corporations and financial services legislation contemplated by **Recommendation 30**. This guide could then inform the design and implementation of each reform pillar.

7.24 Creating consolidated guidance relating to the delegation of legislative power in accordance with **Recommendation 26** would assist in the design and drafting of delegated legislative powers during implementation. The establishment of a Community of Practice for those involved in the legislative design process (**Recommendation 29**) could help ensure lessons from other government departments and agencies inform the roadmap, and that experiences in reforming corporations and financial services legislation are shared across government.

Implementing the reformed legislative framework

7.25 This part examines how to implement the principal elements of the ALRC's reformed legislative framework for financial services regulation. The part focuses on providing a general methodology for implementing the reformed legislative framework, before considering issues relevant to each pillar of the reform roadmap.

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21 The prototype legislation in **Appendix E** is limited to illustrative primary legislation provisions. Illustrative scoping orders and rules can be found in Prototype Legislation B: see Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

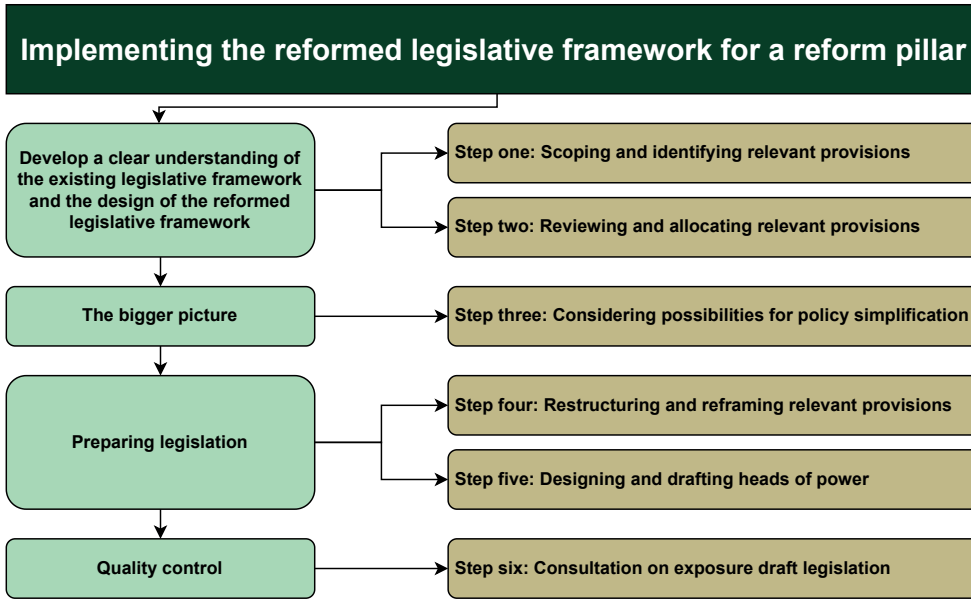
22 See s 1098B of the prototype legislation in **Appendix E**.

23 **Recommendations 24–25** and **27–28**.

General methodology

7.26 A general methodology could be used to implement the reformed legislative framework, particularly in reframing and restructuring provisions and implementing the recommended legislative model. At a high level, each reform pillar could be approached in a similar manner, working through a series of steps illustrated in **Figure 7.2**. Each step looks at 'relevant provisions', which are those provisions covered by the reform pillar to which the methodology is being applied.

Figure 7.2: Steps to implementation



Step one: Scoping and identifying relevant provisions

7.27 Each reform pillar's scope would need to be comprehensively identified. The ALRC has suggested the general scope for each reform pillar and for the Financial Services Law.[24] The reform taskforces, discussed below, could help delineate and consult on the scope of each pillar, with government then making the final decision as to the provisions and subject matter covered by the pillar.

7.28 Relevant regulations and ASIC legislative instruments would then be identified. The structure of the *Corporations Regulations*, which broadly aligns with the *Corporations Act*, should help in this regard. Relevant ASIC legislative instruments can be identified based on the empowering provision they are made under, or the provisions they exempt from or notionally amend.

24 **Recommendations 33**, **36**, and **38–41**.

7.29 Identifying relevant materials will at times be laborious, particularly for more complex provisions like financial product disclosure. This underlines the necessity of reform. For example, it should not be as difficult as it presently is to identify all financial product disclosure-related delegated legislation. Nonetheless, this task is realistic, and the ALRC's small team has been able to undertake it multiple times during this Inquiry.[25]

Step two: Reviewing and allocating relevant provisions

7.30 Once identified, the provisions covered by the pillar should be reviewed and classified by whether they belong in primary or delegated legislation, and within delegated legislation whether allocated to the Scoping Order or rules. As discussed above, implementing **Recommendation 26** to create consolidated guidance on the delegation of legislative power could help with allocating material between primary and delegated legislation.

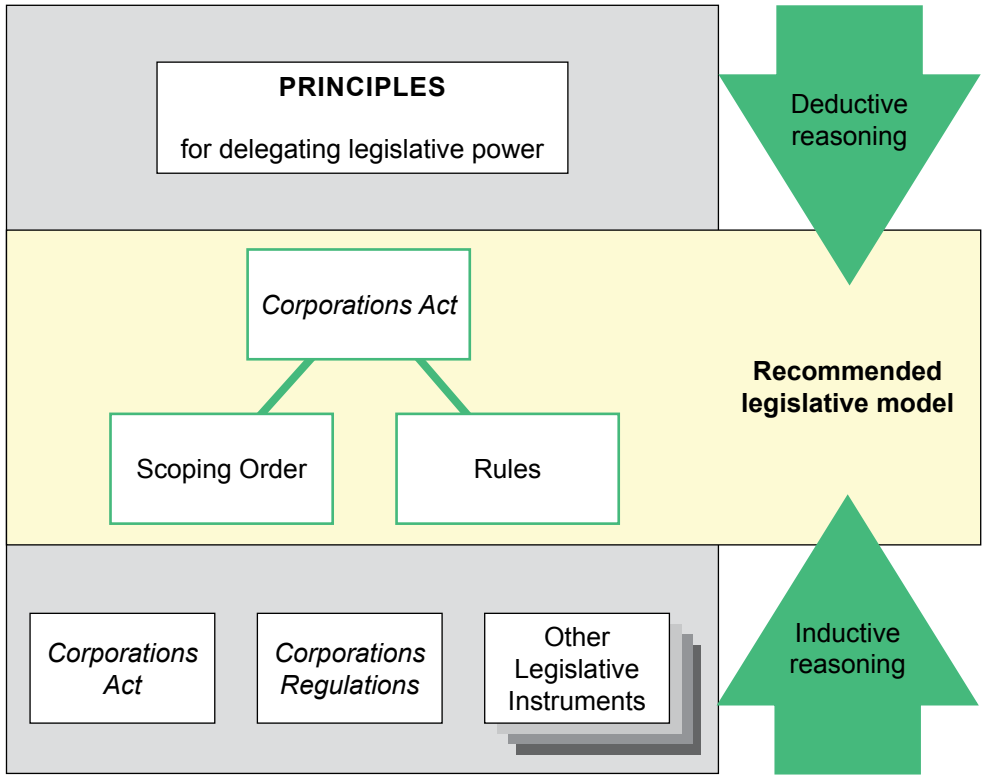
7.31 While developing Prototype Legislation B, the ALRC created a methodology for implementing the recommended legislative model. **Figure 7.3** illustrates the methodology, showing how deductive (or 'top-down') and inductive (or 'bottom-up') analyses are used together. In the context of financial product disclosure for Prototype Legislation B, this involved examining the existing law in Chapter 6D and Part 7.9 of the *Corporations Act* to consider the proper location of provisions, drawing on both principles for the appropriate delegation of legislative power and the existing allocation of material in the existing legislative framework.

7.32 Inevitably, judgements must be made in deciding the proper location for material. This is true of most (if not all) legislative design and drafting.[26] The methodology outlined here would help to make better-informed and principled judgements about the legislative hierarchy, resulting in a more coherent legislative framework.

25 Some of the resources published by the ALRC, though no longer current, may assist in the identification process: see, eg, Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022); Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) — 30 June 2021' <www.alrc.gov.au/wp-content/uploads/2021/09/ASIC-made-legislative-instruments-Qualitative-30-June-2021.xlsx>.

26 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.16], [6.107].

Figure 7.3: Methodology for applying the recommended legislative model



The Scoping Order, exclusions, and exemptions

7.33 The ALRC's model for accommodating exclusions and exemptions from Chapter 7 of the *Corporations Act* could be implemented as follows:

- First, by examining the range of exclusions and class exemptions applicable to the reform pillar, and considering the extent to which they could be consolidated and rationalised. This process need not involve reopening questions of policy.
- Secondly, by identifying 'structural' exclusions or significant class exemptions — those giving effect to key policies, or affecting a substantial proportion of the regulated population and consumers — for inclusion in primary legislation.[27]
- Thirdly, by identifying the remaining exclusions and class exemptions to be included in the Scoping Order. The drafting of these provisions could take place in step four, discussed below.

27 See, for example, s 911A(2) of the Prototype Act in Prototype Legislation B: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

7.34 Under the recommended legislative model many exemptions would be rendered unnecessary. For example, a range of exemptions could be avoided by reducing the prescriptiveness of primary legislation, with rules drafted to overcome the need for such exemptions.[28]

Step Three: Considering possibilities for policy simplification

7.35 The ALRC has noted some instances where targeted policy simplification could complement technical reforms to reduce legislative complexity.[29] Depending on government priorities, policy simplification that would result in additional benefits could be identified, such as removal of overlapping or duplicative obligations. The ALRC has shown how duplicative offences for financial products and services disclosure could be consolidated with some changes to policy settings.[30] Such targeted policy simplification need not take the form of deregulation, watering down obligations, or weakening consumer protections. Consultation, informed by clear communication from government about the potential scope of policy reform, would be helpful.

7.36 Pillar Six of the reform roadmap anticipates that government is likely to undertake additional policy reforms while implementing the reform roadmap.

Step Four: Restructuring and reframing provisions

7.37 Provisions covered by the reform pillar should then be restructured and reframed with a focus on making the legislation easier to navigate and understand. This process would result in draft provisions of primary legislation, draft scoping orders, and draft rules.

7.38 Restructuring and reframing provisions would be assisted by the ALRC's recommended working principles and consolidated guidance.[31] The ALRC's analysis of the problems in the structure and framing of existing provisions, discussed in Chapters 2–6 and Chapter 8 of Interim Report C, could help in developing reformed provisions. The ALRC has also published illustrative outlines of reformed legislative chapters that could appear in the FSL Schedule,[32] including a detailed outline of a financial advice chapter.[33]

7.39 More generally, prototype legislation published by the ALRC has demonstrated how the legislative design principles discussed in **Chapter 4** of this Report may be applied. Prototype Legislation A, for example, illustrated how exemptions from the

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28 See, eg, *Corporations Regulations 2001* (Cth) regs 7.9.15A–7.9.15C, 7.9.15D, 7.9.15F.

29 Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B — Additional Resources, September 2022) [3], [15].

30 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.77]–[3.79].

31 **Recommendations 24–25**, **27–28**, and **30**. See generally **Chapter 4**.

32 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) 257–66 (Appendix D).

33 Ibid 251–6 (Appendix C).

obligation to hold an AFS Licence may be consolidated, grouped, and presented in a more user-friendly table format.[34]

Step Five: Designing and drafting heads of power

7.40 Specific heads of power to form part of the architecture for scoping orders and rules should be drafted based on the above analysis and earlier steps. As discussed in detail below, the design and scope of these heads of power would be informed by steps one and two above. The result would be powers to make scoping orders and rules that are clearly constrained and carefully enumerated — not 'general' powers to make scoping orders or rules.

Step Six: Consultation on exposure draft legislation

7.41 After completing the standard exposure draft and consultation process, provisions should be enacted through amendments to the FSL Schedule. The ALRC has repeatedly emphasised the benefits of, and need for, sufficient time for consultation and revising exposure draft legislation.[35] As noted above, consultation may also occur during earlier steps.

A holistic approach to reform

7.42 It is important to regard implementation of the reformed legislative framework holistically. For example, it would be undesirable for the power to make scoping orders to be implemented separately from the power to make rules. Decluttered and restructured primary legislation is also important for making scoping orders and rules work. The pillars of the reform roadmap seek to enable this holistic approach — under each pillar, the reformed legislative framework can be applied comprehensively to the respective area of financial services legislation. **Figure 7.4** highlights this approach, in which the existing legislative framework would apply to each pillar until it is 'switched off' and the new framework is 'switched on' in respect of that pillar. This can be contrasted to an approach in which powers to make scoping orders and rules were introduced, but primary legislation is either not reformed or reformed separately. This would represent a more piecemeal implementation of the reformed legislative framework and potentially lead to confusion. This is explained further below.

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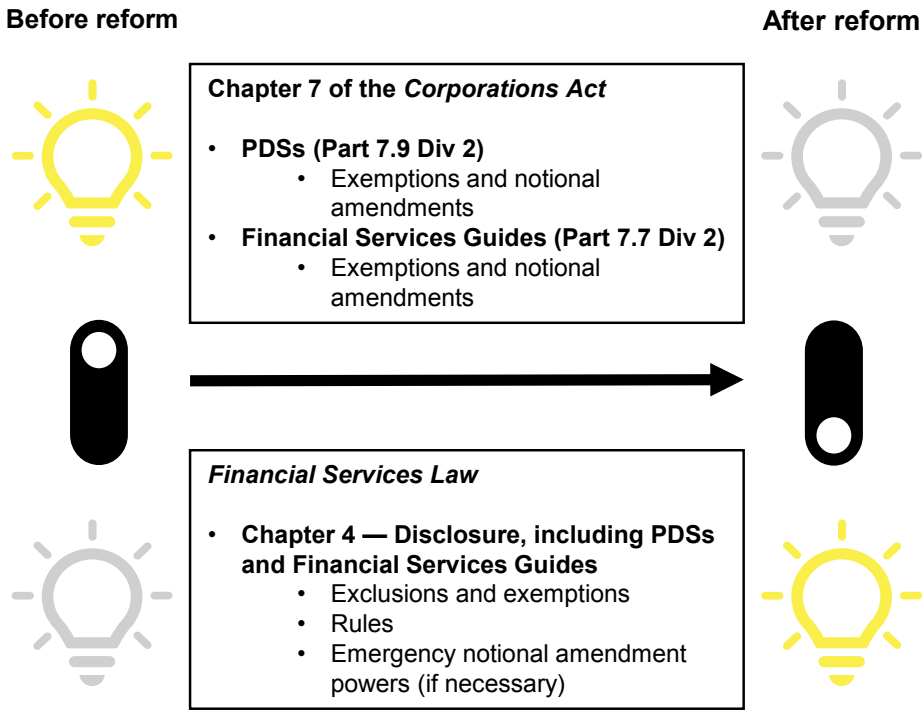
34 See Part 6 of the Implementation Order (now re-named the Scoping Order) in Prototype Legislation A: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.115]–[10.122].

35 Australian Law Reform Commission, Interim Report B*: Financial Services Legislation* (Report No 139, 2022) [4.63]–[4.66], [6.50]–[6.54].

Figure 7.4: Transitioning between disclosure regimes under Pillar Three



7.43 This holistic approach is necessary for two main reasons. First, the elements of the reformed legislative framework are complementary. Implemented separately or in a piecemeal way, the elements could reduce legislative flexibility and coherence, and even increase legislative complexity. Secondly, a holistic approach would ensure a comprehensive understanding of the existing legislative framework and the role that primary legislation, scoping orders, and rules should play in the reformed framework. This understanding is essential to designing appropriate legislative powers. It is worth considering these two reasons in more detail.

A package of reforms

7.44 It may appear attractive to implement elements of the reformed legislative framework without implementing the whole package of reforms. For example, the primary legislation that regulates financial services could be restructured and reframed without implementing the recommended legislative model. Alternatively, powers to make scoping orders and rules could be created without undertaking work to reduce the prescriptiveness of primary legislation, or without restructuring and reframing that legislation.

7.45 However, the ALRC's analysis suggests that these approaches would be less effective and risk compounding complexity. In particular, any approach to reform that did not address excessive prescription in primary legislation would be unlikely to remove the need for notional amendments and conditional exemptions. Rules could not be used to fix issues in primary legislation because they would not be able to override it, unlike notional amendments and conditional exemptions. This would mean that, in practice, the circumstances in which the Minister or ASIC would exercise a rule-making power may be very limited, with a likely preference for continued use of notional amendments and conditional exemptions instead.

7.46 Similarly, the recommended legislative model is intended to make complex conditional exemptions unnecessary, by moving detail from primary legislation into rules that can then be tailored to specific circumstances. Without addressing the problem of excessive prescription in primary legislation, conditional exemptions would persist and reduce the utility of the Scoping Order.

7.47 Ultimately, rule-making and scoping order powers would only operate effectively in the broader context of the reformed legislative framework. The rule-making powers, in particular, would be a new 'tool' for the Minister and ASIC, but would be a tool unfit for addressing the fundamental problem of overly prescriptive primary legislation that needs tailoring for specific persons, products, services, and circumstances. Effective use of rules and scoping orders depends on first answering the question of 'what goes where', thereby allocating provisions to their appropriate place in the legislative hierarchy and removing the need to override the primary legislation.

A comprehensive understanding to inform legislative powers

7.48 The ALRC's recommendations are aimed at replacing the present model of broad and proliferating delegated powers with relatively few specific, clearly bounded powers to make delegated legislation.

7.49 Most relevantly, the ALRC does not propose the creation of a 'general' rule-making power.[36] Instead, heads of power that enable rules to be made should be crafted as narrowly as possible with reference to specific themes (such as disclosure, financial advice, and licensing). This is consistent with the need to ensure that powers to make delegated legislation are appropriately scoped, easily understood, and subject to adequate accountability processes. Creating powers in this way requires a comprehensive analysis of the kinds of matters that are appropriately covered by rules for each area of law. As described in step two above, this requires reviewing primary legislation, regulations, and ASIC legislative instruments in detail.[37] This process of review and analysis provides the foundation for implementing the new legislative hierarchy. The process represents much of the work in implementing the ALRC's recommended legislative model.

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36 Cf *Financial Services and Markets Act 2000* (UK) s 137A.

37 See above [7.30]–[7.34].

7.50 The ALRC has demonstrated the benefits of a holistic understanding of the existing framework for the development of legislative powers in its prototype legislation. For example, ss 1126–1129 of the Prototype Act in Prototype Legislation B were the result of reviewing and analysing the current disclosure framework for the purposes of Interim Report B. These sections illustrated heads of power in respect of disclosure that would activate the rule-making power contained in s 1098 of the Prototype Act. This experience shows how heads of power may be clearly enumerated based on an understanding of where the legislative framework may need prescription or tailoring for particular persons or circumstances.

7.51 Like rules, heads of power that permit scoping orders to be made would be more narrowly crafted than existing powers. The heads of power would be drafted with reference to particular matters, such as specific sections from which a person may be exempted or definitions that can be affected by a scoping order. The heads of power may only be drafted once primary legislation has been made less prescriptive and restructured and reframed, which would reduce the need for broad exemption powers.

7.52 Overall, reviewing provisions covered by each reform pillar is necessary to answer the fundamental question of 'what goes where' in relation to each area of law. Creating heads of power before completing this review would likely result in the need for overly broad powers. Put differently, these would be a 'best guess' as to what would be appropriate and desirable for scoping orders or rules. In that case, scoping orders and rules might be perceived as simply a replacement for notional amendment powers, rather than as pieces of a broader reform project to implement a coherent and principled legislative hierarchy.

A typology of provisions

7.53 In developing the reform roadmap, the ALRC has found it useful to categorise corporations and financial services provisions into three types: significant, complex, and minimal amendment provisions. Each type of provision, outlined below, requires a different approach to reform:

- **Significant provisions** are of most general application and legislative significance. These provisions generally make less use of delegated legislation and would largely require restructuring and reframing in primary legislation. Pillar One of the reform roadmap, which covers consumer protections, includes most provisions that fall into this category. Additional significant provisions include definitions that set the regulatory perimeter, such as for 'financial product' and 'financial service'. These could be folded into Pillar One or dealt with as part of another pillar. Financial advice provisions under Pillar Two, which largely require restructuring, reframing, and some targeted reform to the legislative hierarchy, can also be conceptualised as significant provisions.
- **Complex provisions** are the most complex and would therefore benefit most from reform and applying the recommended legislative model. These provisions make extensive use of delegated legislation and prescriptive detail

in primary legislation. Pillar Two of the reform roadmap, relating to disclosure for financial products and services, covers the most complex provisions of Chapter 7 of the *Corporations Act*. Other complex provisions, such as client money requirements, appear in Pillar Four. Miscellaneous complex provisions could be dealt with in Pillar Five.

- **Minimal amendment provisions** would require minimal reform to fit within the reformed legislative framework. Many provisions, largely falling under Pillars Four and Five of the reform roadmap, require only minimal amendments. These include requirements in relation to financial services licensing, breach reporting, external dispute resolution, and client property. Design and distribution obligations and product intervention powers, which fall under Pillar One, would also require relatively little restructuring and reframing to bring them into the reformed legislative framework.

7.54 Some provisions may fall into multiple categories. For example, design and distribution obligations are both significant and minimal amendment provisions. Licensing provisions could also be understood as both significant and minimal amendment provisions. In such instances, an approach informed by both categories will be most effective.

The reform pillars

7.55 This section discusses each of the reform pillars introduced earlier in this chapter.

Pillar One: Consumer protection

7.56 Pillar One is focused on reforming consumer protection provisions, which are significant provisions. The core scope of this pillar is suggested in **Recommendation 33**, discussed in **Chapter 5** of this Report. This pillar could also implement **Recommendation 31** so as to enact a single, simplified definition of each of 'financial product' and 'financial service', and the related **Recommendation 32** as applied to consumer protection provisions.

7.57 Reforming many consumer protection provisions would be relatively straightforward, given that very few provisions rely on delegated legislation. Restructuring and reframing these provisions, discussed in Chapter 2 of Interim Report C, would be focused on consolidating overlapping provisions and providing a structure that better groups and prioritises the fundamental norms and standards of commercial behaviour.

Pillar Two: Disclosure

7.58 Pillar Two is focused on reforming financial product and financial services disclosure provisions of Chapter 7 of the *Corporations Act*. The core scope of this pillar is suggested in **Recommendation 36**, discussed in **Chapter 5** of this Report.

7.59 Financial product and financial services disclosure provisions are complex provisions. Reform of Parts 7.7 and 7.9 of the *Corporations Act* would be the core elements of Pillar Two. These parts account for more than 100 ASIC legislative instruments, half of all notional amendments to the *Corporations Act*, over 27% of the words in Chapter 7 of the Act, and 35% of the words in Chapter 7 of the *Corporations Regulations*.[38]

7.60 Reform to disclosure provisions could bring significant benefits to this area of law, the complexity of which seriously affects regulated persons, consumers, and government. Chapter 3 of Interim Report C discussed how disclosure-related primary legislation may be restructured and reframed. The Explanatory Note accompanying Prototype Legislation B discussed how the recommended legislative model may be applied to disclosure provisions.[39] As suggested in the Explanatory Note, these reforms could be broken intro tranches, based on establishing the Act-level architecture and legislating rules for different types of disclosure documents (such as PDSs and Financial Services Guides).

Pillar Three: Financial advice

7.61 Pillar Three focuses on reforming financial advice provisions. The core scope of this pillar is suggested in **Recommendation 38**, which is discussed in **Chapter 5** of this Report.

7.62 Financial advice provisions are significant provisions that, at least at present, may also be regarded as policy-evolving provisions under Pillar Six of the reform roadmap.[40] Financial advice provisions use relatively little delegated legislation, so much of the reform would occur through restructuring and reframing existing provisions of the *Corporations Act* into a single legislative chapter.[41] The recommended legislative model would be applied to existing delegated legislation, largely though moving exemptions and technical scoping provisions to the Scoping Order. If approached as policy-evolving provisions, the financial advice provisions would be subject to both policy and technical reform. This approach is discussed below in relation to Pillar Six.

Pillar Four: Other regulatory obligations and licensing

7.63 Pillar Four is focused on reforming general regulatory obligations and provisions comprising the AFSL regime. The core scope of this pillar is suggested in **Recommendations 39** and **40**, which are discussed in **Chapter 5** of this Report.

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38 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.14].

39 Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B — Additional Resources, September 2022) [40]–[44].

40 For further discussion of policy developments relating to financial advice, see **Chapter 9** of this Report.

41 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) ch 4.

7.64 Many provisions in Pillar Four are significant provisions or minimal amendment provisions. Reform to regulatory and licensing provisions would occur by restructuring and reframing the primary legislation, discussed in Chapter 5 of Interim Report C, and applying the recommended legislative model. This would mean exemptions and exclusions would be located in the Scoping Order and any prescriptive detail appropriate for delegated legislation would appear in rules, rather than scattered across regulations and ASIC legislative instruments as at present.

7.65 Some provisions covered by Pillar Four are complex provisions due to their extensive use of both primary and delegated legislation. These include client money requirements in Part 7.8 Div 2 of the *Corporations Act* and *Corporations Regulations*. Some of these requirements are already implemented through rules (the Client Money Reporting Rules).[42] However, many requirements are implemented through a mix of interconnected provisions of primary legislation,[43] regulations,[44] and ASIC legislative instruments that include notional amendments.[45]

Pillar Five: Miscellaneous

7.66 Pillar Five is focused on reforming other provisions of the *Corporations Act* that are covered by **Recommendation 41** and are not dealt with by other pillars. The core scope of this pillar is therefore not explicitly articulated in any one recommendation.

7.67 The scope of Pillar Five would depend on how other pillars were scoped and would require further consideration and consultation. For example, the advertising and cooling-off provisions in Part 7.9 Divs 4 and 5 of the *Corporations Act* could be dealt with under Pillars Three, Four, or Five, depending on their exact scope. Each pillar has core provisions, noted above, but other provisions might be dealt with under multiple pillars, including Pillar Five.

7.68 The typology of complex provisions and minimal amendment provisions discussed above would assist in prioritising reforms and managing workflow within Pillar Five.

Pillar Six: Policy-evolving provisions

7.69 Similar to Pillar Five, the scope of Pillar Six is not explicitly outlined in any one recommendation. Instead, Pillar Six would involve applying the recommended legislative model and legislative design principles to new policy initiatives. This would be an ongoing element of the reform roadmap, which would seek to use opportunities for technical reform as policy reforms emerge. Pillar Six would be implemented on an ongoing basis as and when policy reforms are adopted. It would therefore proceed in parallel with other pillars.

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42 *ASIC Client Money Reporting Rules 2017* (Cth).
43 *Corporations Act 2001* (Cth) ss 981A–981P.
44 *Corporations Regulations 2001* (Cth) pt 7.8 div 2.
45 See, eg, *ASIC Corporations (NZD Denominated Client Money) Instrument 2018/152* (Cth); *ASIC Corporations (Client Money - Cash Common Funds) Instrument 2016/671* (Cth).

7.70 The ALRC's legislative design principles should be capable of helpfully informing any legislation resulting from a new policy initiative. In contrast, applying the recommended legislative model to new policy initiatives would need to be done in a more targeted and considered manner, otherwise there may be a risk of creating new complexity in the legislative framework.

7.71 For example, government may choose to undertake limited policy reform to some financial advice provisions, which are not otherwise linked by any thematic relationship beyond financial advice. As part of these reforms, it may not be desirable to simply insert a rule-making power that relates only to the reformed provisions, or move only exemptions relating to those provisions into scoping orders. Such an approach would create a financial advice framework in which different provisions have varying legislative models, with no easy way to understand when and where those models apply.

7.72 It would instead be desirable, and more efficient, to consider expanding the reforms to include technical legislative reforms that cover all or at least a thematically distinct group of financial advice provisions, even if policy reform related only to a limited subset of those provisions

7.73 The importance of thematic reforms is underlined by the experiences of previous reforms that introduced new legislative models. For example, the creation of Part 7.2A (Supervision of financial markets) of the *Corporations Act* in 2010 suggests that it is possible to create reformed legislative models that only apply to certain provisions. Part 7.2A empowers ASIC to make rules (the Market Integrity Rules) in relation to certain matters. The newer legislative model in Part 7.2A has sat comfortably alongside older legislative models that also applied to financial markets, including in Part 7.2. This approach works because the new model in Part 7.2A relates to a thematically distinct area, so users may clearly delineate the circumstances in which they need to consult rules as distinct form regulations and other ASIC legislative instruments.

7.74 The above discussion suggests it would be most effective to apply the recommended legislative model to new policy initiatives in circumstances where thematically distinct legislation is likely to be produced. Those themes may differ from the higher-level themes identified by the ALRC for each pillar in the reform roadmap. For example, if government were undertaking policy reforms to financial advice disclosure documents, it may be possible to apply the legislative model to the legislation governing those new disclosure documents. The guiding concern when deciding whether to introduce the ALRC's recommended legislative model alongside new policy initiatives should be whether doing so would make the legislative framework easier to understand and navigate.

Implementation taskforces

Recommendation 54 The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

7.75 The ALRC recommends that implementation of the reforms in the roadmap be overseen by specifically resourced and dedicated taskforces. These taskforces would help ensure appropriate leadership and oversight of the reforms arising from this Inquiry. **Recommendation 54** recognises there may be one or more differently composed taskforces overseeing the reform process. This is because different reform pillars may require differing expertise and input, as well as potential changes of focus brought about by changes in government.

7.76 **Recommendation 54** formalises Proposal C12 from Interim Report C. Submissions in response to Interim Report C supported Proposal C12, with several stakeholders strongly endorsing this approach to staged implementation as a way to manage the burdens of reform.[46]

7.77 Specifically resourced taskforces would not be the only way to implement the ALRC's recommended reforms. For example, and as discussed above, each pillar of the reform roadmap is designed to be capable of implementation in the ordinary course of a government's legislative agenda. However, specifically resourced and dedicated taskforces would help to mitigate some of the challenges that typically face legislative reform. As discussed in Interim Report C, these include the need for committed resourcing and sustained engagement during the reform process, and the need to appropriately manage transition costs.[47] The broad membership of implementation taskforces, which would include non-government and industry stakeholders, would help in both of these respects. In particular, taskforces with industry insight could consult more broadly with industry on how best to manage transition costs, while simultaneously maintaining momentum in the reform process.

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46 See, eg, M Nehme, *Submission 81*; Association of Superannuation Funds of Australia, *Submission 84*; Australian Financial Markets Association, *Submission 85*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 89*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*.

47 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [7.74]–[7.82].

Purpose and function

7.78 The Australian Government would set a taskforce's terms of reference, which should include clear deliverables. The principal responsibility of the taskforces would be to oversee the implementation of reforms, including how to do so most efficiently. The taskforces should collaborate across Treasury and the Australian Government more generally. Deliverables would therefore include creating implementation timelines in partnership with industry and in line with government priorities, and advising Treasury on how various provisions should be addressed.

7.79 As a starting point, the remit of each taskforce would be narrower than earlier reform taskforces, such as the Corporations Law Simplification Task Force,[48] in two main respects. First, their remit would be limited to those aspects of the *Corporations Act* and *ASIC Act*, and related delegated legislation, that comprise each pillar of the reform roadmap. Secondly, their task would be limited to planning and implementing the package of reforms recommended by the ALRC and chosen for implementation by the Australian Government.

7.80 Nonetheless, governments may choose to provide terms of reference including more substantive policy or technical reforms that go beyond the ALRC's recommendations. This reflects the adaptability of the reform roadmap. It is not intended to limit the reforms pursued by governments, but to provide a platform for simplification that can be shaped by government priorities. Several stakeholders have noted the potential for policy implementation to occur alongside implementation of the ALRC's recommendations.[49]

7.81 The taskforces should document their processes, so that these may be of assistance later when analysing the intent underpinning reform choices. Retrospective analysis of these processes may assist users of the legislation to understand certain reform or design choices in the future.[50] The processes and analyses of earlier taskforces may also be used to inform the work of later taskforces formed for the purposes of implementing subsequent reform pillars.

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48 See Parliamentary Joint Committee on Corporations and Financial Services, Report on the Draft Second Corporate Law Simplification Bill 1996 (November 1996) [1.1]–[1.4]. The Corporations Law Simplification Task Force was replaced on 4 March 1997 by the Corporate Law Economic Reform Programme: The Hon IDF Callinan AC KC, 'The Corporate Law Economic Reform Programme: An Overview' (Speech, Corporations Law Update Conference, 26 October 1998).

49 See, eg, Insurance Council of Australia, *Submission 86*; Australian Banking Association, *Submission 91*.

50 Australian Retail Credit Association, *Submission 83*. See, for example, OPC Drafting Direction 1.8 which explains the design features of the *Income Tax Assessment Act 1997* (Cth) and other legislation arising out of the Tax Law Improvement Project: Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006).

7.82 The work of the taskforces would vary somewhat, depending on their terms of reference. However, the taskforces are intended to help guide and inform the reform process at a high level — their role would not be to manage the day-to-day preparation or implementation of the reforms and they would not determine the policy implemented by the reforms. Examples of the types of activities taskforces could undertake include:

- advising on the scope of reform pillars, including the provisions that could be covered by each pillar, and helping to break the pillars down into further stages where necessary;
- providing feedback on potential approaches to restructuring and reframing provisions, and where provisions are proposed to be located in the legislative hierarchy;
- identifying areas of the legislation that are likely to require greater flexibility, such as in the form of tailoring for particular classes of persons, products, or services, and which may therefore require delegated legislative powers in the form of scoping orders or rules;
- advising on possibilities for targeted policy simplification, which could occur alongside more technical legislative simplification;
- providing targeted reviews of draft legislation, such as where particular issues arise and for which it would be beneficial for Treasury and OPC to obtain early stakeholder feedback, before releasing exposure draft legislation; and
- advising on potential commencement dates for specific tranches of reforms, thereby informing appropriate transition periods and transitional arrangements.

7.83 The taskforces should also provide a forum for structured consultation and engagement with a range of stakeholders.

Taskforce membership

7.84 The taskforces should be led by Treasury, but draw on expertise from across government, most obviously including OPC and ASIC. However, membership should be broader than government officials. A diverse membership is a common feature of many Australian Government taskforces. Diverse memberships enable a range of stakeholders to meaningfully contribute, and for reforms to benefit from non-government and private sector expertise. Many stakeholders identified committee representation from certain sectors or interest groups as key to successful reform.[51]

51 See, eg, Insurance Council of Australia, *Submission 86*; Financial Services Council, *Submission 87*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Australian Banking Association, *Submission 91*.

7.85 For example, the Australian Government's 'Strengthening Medicare Taskforce' has just four government members out of a total 17 members. The Taskforce includes members from the Australian Medical Association, the Consumers Health Forum of Australia, the National Aboriginal Community Controlled Health Organisation, and academia, as well as individual general practitioners.[52] Similarly, the Australian Government's 'Strategic Fleet Taskforce' includes 'representatives from the shipping industry, major charterers, unions, Australian business representatives and the Department of Defence'.[53]

7.86 Given the significance of legislative design to this reform process, there would be potential for the inclusion of multidisciplinary expertise on relevant committees. There may be areas of untapped potential, such as in the fields of linguistics and computational analysis, that could open new avenues for simplifying and rationalising legislation on a broader scale.[54]

7.87 The membership of taskforces formed under **Recommendation 54** may also vary based on the reform pillar being implemented. For example, the taskforce implementing Pillar Two (financial advice) might only include members relevant to that area of legislation, and not (for example) financial services firms that do not provide advice or distribute financial products through financial advisers. The taskforce implementing Pillar One (consumer protection) would likely have broader membership than the taskforce for Pillar Two (financial advice).[55]

7.88 It is important to note that although taskforces should be drawn from diverse stakeholders, implementing legislation should be drafted by OPC based on instructions prepared by Treasury, and ultimately reflect government policy.

Commencement

7.89 As part of developing and implementing the reform roadmap, the reform taskforces established under **Recommendation 54** would also be responsible for considering how the commencement of reformed provisions (in both primary and delegated legislation) should be managed. At a high level, this would mean considering whether the reformed provisions should commence upon completion of the entire reform project, sometimes known as the 'big bang' approach,[56] or in a staged manner.

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52 Department of Health and Aged Care (Cth), 'Strengthening Medicare Taskforce' (28 April 2023) <www.health.gov.au/committees-and-groups/strengthening-medicare-taskforce>.

53 The Hon Catherine King MP, 'Strategic Fleet Taskforce launched' (Media Release, 20 October 2022) <https://minister.infrastructure.gov.au/c-king/media-release/strategic-fleet-taskforce-launched>.

54 Australasian Society for Computers and Law, *Submission 51*; A Schmulow and S Dreyfus, *Submission 56*. See also the discussions of technological improvements to the publishing of legislation in **Chapters 8** and **10** of this Report.

55 For example, credit providers and advisers such as mortgage brokers may not provide financial advice but will be regulated by the consumer protections in the FSL Schedule.

56 See, eg, Patricia Langenakker, 'The Tax Law Improvement Project' (Presentation, Tax Teachers Conference, 20 January 1995) 3.

7.90 Earlier simplification projects illustrate both the 'big bang' and staged approaches to commencement. Reforms that resulted in the *Social Security Act 1991* (Cth) and the *Private Health Insurance Act 2007* (Cth) adopted the 'big bang' approach, with the rewritten legislation being passed in one Act and commencing upon a single date.[57] In both cases, a primary goal of reform was to clarify and simplify the respective legislative frameworks without major changes to existing policy.[58]

7.91 The Tax Law Improvement Project ('TLIP') and progressive enactment of the *Income Tax Assessment Act 1997* ('*ITA Act 1997*') illustrate the staged approach. Under this approach, several Bills were enacted and commenced in a staged manner. The 'first instalment of the rewritten law established the structure and framework' for the *ITA Act 1997*, which was amended by other reform packages in subsequent stages.[59] This approach was adopted because the 'income tax law [was] considered too large to rewrite and enact in a single stage'.[60]

7.92 The ALRC suggests that a staged approach to commencement of the legislation enacted under the reform roadmap may be more desirable than the 'big bang' alternative. This would mean that each Bill comprising the reform package, and relevant delegated legislation, would commence after completion of that stage. Compared with a single, delayed commencement date, a staged approach would also be beneficial because parts of the law would not need to remain static and could be further amended before commencement of all reforms. In particular, this would facilitate implementing other reforms recommended by the ALRC, as has already occurred during this Inquiry.[61]

7.93 Although the reform roadmap relates to substantially shorter legislation than the income tax legislation considered by TLIP, the need to address both primary legislation and delegated legislation means the reform task is suited to being enacted and commenced in stages. In this way, both the primary legislation and relevant delegated legislation (in the form of scoping orders and rules under the recommended legislative model) could commence at or around the same time.[62]

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57 *Social Security Act 1991* (Cth) s 2; *Private Health Insurance Act 2007* (Cth) s 1-5.

58 Explanatory Memorandum, Social Security Bill 1990 (Cth), 'Outline and Financial Impact Statement'; Explanatory Memorandum, Private Health Insurance Bill 2006 (Cth) 2–3, 14–15.

59 Explanatory Memorandum, Tax Law Improvement Bill (No. 1) 1998 (Cth) 1.

60 Explanatory Memorandum, Income Tax Assessment Bill 1996 (Cth) 16.

61 See **Chapter 1** of this Report, which outlines recommendations implemented by the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Cth) and *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth).

62 The ALRC envisages that the preparation of the first ('principal') versions of scoping orders and rules would be led by the reform taskforces as part of the overall implementation process, with input from ASIC and other stakeholders. In formal terms, the principal legislative instruments would be enacted by one of the Minister or ASIC. After this time, the power to amend those instruments could be exercised by either the Minister or ASIC. At each stage of implementation, this process could be repeated. For example, the Scoping Order could be developed by the reform taskforces, with input from the Minister and ASIC, and made by the Minister to commence alongside (or shortly after) the first stage of the FSL Schedule (that is, the primary legislation). Similarly, the first principal rulebook could commence alongside the first tranche of primary legislation that requires rules.

7.94 In consultations and submissions, stakeholders have emphasised the importance of sufficient time to prepare for changes to the law by updating compliance systems.[63] The concerns of regulated entities should be addressed through consultation as reforms are implemented and by allowing sufficient time between the passage of legislation and staged commencement dates.

Maintenance of the reformed legislative framework

Recommendation 55 As part of implementing Recommendation 41 (the Financial Services Law), the *Corporations Act 2001* (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.

7.95 During this Inquiry, some stakeholders have commented on the lack of maintenance of corporations and financial services legislation, such that provisions and structures that may have once made sense have fallen into disrepair. The ALRC recommends that the reformed legislative framework should be subject to periodic post-enactment review, by an independent body, to assess whether the intended outcomes of reform are being met.

7.96 The ALRC's Background Paper FSL8 discusses the benefits of post-enactment review of legislation, with a particular focus on post-legislative scrutiny by Parliament.[64] These benefits include providing an opportunity to address any unintended consequences caused by new provisions and to assess the efficacy of various legislative design choices. The ALRC therefore recommends that a requirement for post-enactment review should be built into the Financial Services Law.

7.97 As discussed in Background Paper FSL8, statutory review clauses typically require that the operation of legislation, in whole or in part, be reviewed within a specified time or on a periodic basis.[65] Review clauses vary as to whether the review must be undertaken by a parliamentary committee or another body, typically appointed by the relevant minister.[66] Recent legislative practice suggests a trend towards the use of statutory review clauses in new primary legislation.[67]

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63 See, eg, Law Council of Australia, *Submission 49*.

64 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023).

65 Ibid [53]. See also Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [5.26].

66 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023) [56]–[57].

67 Ibid [55]. See also Department of the Prime Minister and Cabinet (Cth) (n 65) [5.26].

7.98 **Recommendation 55** formalises Proposal C13 from Interim Report C. Submissions in response to Proposal C13 were generally positive, with concerns largely reflecting a desire for more detail.[68] Several submissions also identified independence from the government of the day as a key attribute of the review body.[69]

7.99 If the Financial Services Law were to be implemented in stages, the first review should occur within five to seven years of commencement. This would provide an opportunity to assess the reforms after they have been in operation for some time, but flexibility in the exact timing in light of staged implementation.[70] The ALRC suggests that subsequent periodic reviews should be required to help ensure the legislative framework is properly maintained.

7.100 A review could assess whether, and the extent to which, the reformed legislation produces an adaptive, efficient, and navigable legislative framework for the regulation of financial services (as contemplated by the Terms of Reference for this Inquiry). That assessment could be undertaken by reference to the overarching principles identified by the ALRC in Interim Report A.[71] Through consultation and submissions, a review could also consider the extent to which the anticipated benefits for stakeholders have been achieved.

7.101 The ALRC suggests that the statutory review should be undertaken by an independent review panel with expertise in legislative design, financial services, and public administration. Notwithstanding the importance of post-legislative scrutiny by Parliament, the ALRC suggests that an independent panel which includes expertise in legislative design would possess the appropriate skills to review the technical (as distinct from policy) reforms recommended by the ALRC. To ensure parliamentary oversight, the Minister should be required to table a copy of the panel's report in Parliament within a prescribed time after receipt. Furthermore, any review of the Financial Services Law could supplement and be used to inform the ongoing work of the Parliamentary Joint Committee on Corporations and Financial Services in its oversight of corporations and financial services legislation.[72]

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68 See, eg, M Nehme, *Submission 81*; Association of Superannuation Funds Australia, *Submission 84*; Insurance Council of Australia, *Submission 86*; Financial Services Council, *Submission 87*; Consumer Action Law Centre, *Submission 88*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*.

69 Consumer Action Law Centre, *Submission 88*; MinterEllison, *Submission 92*.

70 This could be given legislative effect by, for example, including a date by which a review must take place in provisions enacted as part of the first stage.

71 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

72 See *Australian Securities and Investments Commission Act 2001* (Cth) s 243.

8. Complementary Reforms and Alternatives

Contents

Introduction

8.1 Throughout this Inquiry, stakeholders have generally agreed that corporations and financial services legislation is unnecessarily complex, and that reform is needed to ensure that the legislative framework meets the objectives set out in the Terms of Reference.[1] At a high level, views have differed between stakeholders about the scope of reform that should be undertaken to achieve those objectives. Some stakeholders have told the ALRC that its proposed reforms are too far-reaching, too resource-intensive to implement, or carry high implementation risks and transition costs.[2] Other stakeholders have told the ALRC that its proposed reforms do not go far enough.

8.2 In part, the purpose of this chapter is to respond to feedback from stakeholders by discussing options for reform that would complement, or would differ from, the recommendations discussed in **Chapters 5** and **6** of this Report that describe the reformed legislative framework for financial services regulation.

8.3 This chapter proceeds in two parts. The first part discusses reforms that would complement the ALRC's recommendations, but that may also form standalone

1 These include that the legislative framework: is adaptive, efficient, and navigable; promotes meaningful compliance with the substance of the law; and is able to accommodate the continuing emergence of new business models, technologies, and practices.

2 **Chapter 7** of this Report responds to at least some of these concerns by setting out a detailed roadmap for implementing the reformed legislative framework for financial services regulation.

improvements. These include two recommendations to improve the design of offence and penalty provisions. The second part discusses alternative reforms that may take the place of at least some of the recommendations discussed in **Chapter 5** of this Report.

Complementary reforms

8.4 This part discusses reforms that would complement recommendations made by the ALRC during this Inquiry. These include reforms that could be implemented in advance of the recommendations contained in **Chapters 5** and **6** of this Report, other reforms to the *Corporations Act* that would complement the ALRC's recommendations, and broader technological reform that would have implications beyond corporations and financial services legislation.

Improving the design of offence and penalty provisions

Recommendation 56 Offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

8.5 The high level of prescription in the *Corporations Act* is matched by a large number of specific offence and civil penalty provisions.[3] As at 1 January 2022, there were 168 civil penalty provisions and 978 offence provisions in the *Corporations Act*.[4] Many of these provisions are highly particularised, and available data suggests that a majority are rarely enforced.[5]

8.6 **Recommendation 56** is intended to address the current multiplicity of offence and penalty provisions. Analysis suggests that having a large number of detailed, sometimes overlapping, offence and penalty provisions does not lead to better compliance or more effective enforcement.[6] As the Financial Services Royal Commission observed:

> So many wires are strung between the fence posts that they inevitably overlap, intersect and leave gaps. And, instead of entities meeting the *intent* of the law, they meet the terms in which it is expressed.[7]

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3 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.31].

4 Ibid.

5 Ibid. Some stakeholders suggested to the ALRC that a broader review of offence provisions in corporations and financial services legislation should be undertaken with a view to examining their necessity and the proportionality of penalties. However, such a review would involve questions of policy that are beyond the scope of this Inquiry.

6 Ibid [5.33].

7 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 496 (emphasis in original).

8.7 Implementing **Recommendation 56** would produce a set of consolidated offence and penalty provisions that would embody, and therefore communicate, the core intent of the law more effectively than existing provisions. It may also minimise the uncertainty produced by overlapping offence provisions, and thereby reduce compliance costs.

8.8 **Recommendation 56** formalises Proposal B15 from Interim Report B. Submissions in response to Proposal B15 broadly supported the consolidation of offence and penalty provisions.[8] Some stakeholders expressed concern about how applicable penalties would be determined when consolidating provisions and others urged caution in undertaking consolidation to ensure that it does not produce 'gaps' in the law.[9] Both of these issues could be addressed as part of the implementation process. As discussed in **Chapter 7** of this Report in relation to implementation more generally, consultation would be an important aspect of this process.

Recommendation 57 Infringement notice provisions in corporations and financial services legislation should include the following at the foot of each provision:

a. the words 'infringement notice';
b. any applicable monetary sum, expressed as one or more amounts in penalty units; and
c. a note referring readers to any additional rules for calculating the applicable infringement notice amount.

8.9 Implementing **Recommendation 57** would ensure that all infringement notice provisions in corporations and financial services legislation are clearly identifiable on the face of the provision that is subject to an infringement notice. These provisions should be clearly identifiable given their importance as an enforcement mechanism.[10]

8.10 At present, corporations and financial services legislation does not clearly and consistently identify infringement notice provisions, and the *Corporations Act* is particularly problematic in this respect.[11] The legislation also makes it unnecessarily difficult to identify the amount payable under an infringement notice for breach of

8 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; M Nehme, *Submission 64*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

9 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [64]–[65].

10 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [10.41].

11 Ibid [10.42]–[10.43].

any particular provision.[12] Implementing **Recommendation 57** would address these issues, enhancing the ease with which these important elements of the regulatory regime can be identified and understood.

8.11 **Recommendation 57** formalises Proposal C15 from Interim Report C.[13] Submissions in response generally supported Proposal C15.[14] **Recommendation 57** is a natural complement to the similar recommendations made in Interim Report C relating to offence provisions (Recommendation 20) and civil penalty provisions (Recommendation 22).[15]

Improving navigability of the legislative hierarchy

8.12 In Interim Reports A and B, the ALRC identified the incoherent and inconsistent use of the legislative hierarchy as a particular source of complexity in the *Corporations Act*. Several of the ALRC's targeted recommendations aim to address difficulties faced by users in navigating the legislative hierarchy, including by:

- replacing generally applicable notional amendments with textual amendments to the notionally amended legislation (Recommendation 18);[16] and
- developing freely available electronic materials designed to help navigate the legislation (Recommendation 19).[17]

8.13 These recommendations could be implemented prior to or alongside the ALRC's recommendations in **Chapters 5** and **6** of this Report. In particular, Recommendation 18 could reduce the substantial complexity created by more than 1,200 notional amendments affecting the *Corporations Act* and *Corporations Regulations* at present. The ALRC has identified over 500 notional amendments that could be considered for consolidation into the text of the provisions they notionally amend, or otherwise consolidated into the *Corporations Act*. Consolidation would clarify the meaning and effect of the legislation and remove a significant burden on users who, currently, must identify and comprehend notional amendments across hundreds of regulations and other legislative instruments. In accordance with the recommendations in **Chapters 5** and **6** of this Report, some of

12 Ibid [10.44].
13 Ibid [10.40]–[10.45].
14 Australian Law Reform Commission, 'Reflecting on Reforms III — Submissions to Interim Report C' (Background Paper FSL12, September 2023) [43].
15 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [10.7]–[10.39].
16 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) rec 18.
17 Ibid rec 19.

the consolidated provisions might appropriately be replaced with simplified provisions or delegated legislation in the form of rules.[18]

8.14 More generally, navigability (and in turn, comprehensibility) could be improved by:

- removing excessive prescription from the *Corporations Act* where it may be appropriately located in delegated legislation; and
- consolidating existing delegated legislation.

8.15 **Example 8.1** provides an illustration in the context of the AFSL regime.

Example 8.1: Consolidating exemptions from the obligation to hold an AFS Licence

The obligation to hold an AFS Licence in s 911A(1) of the *Corporations Act* is subject to numerous exemptions contained in s 911A(2) of the Act, the *Corporations Regulations*, and ASIC legislative instruments. As noted in Interim Report A, s 911A(2) alone has grown from three pages long, comprising 926 words upon enactment, to be four pages long and 1,969 words as at 30 June 2021.[19] Section 911A is also notionally amended by three regulations that notionally insert 26 subsections.[20]

Prototype Legislation A showed how exemptions from the obligation to hold an AFS Licence, currently spread across the Act, the *Corporations Regulations*, and ASIC legislative instruments, could be consolidated in a single legislative instrument.[21] It also showed how doing so significantly decluttered s 911A and enabled the exemptions to be restructured and presented more clearly in a table format.[22]

18 For further discussion of how Recommendation 18 may be implemented, see Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022). For example, the ALRC has identified approximately 100 notional amendments that could be consolidated into the provisions they notionally amend without considerable change. Others may require closer review or amendment before being consolidated into the legislation they notionally amend.

19 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [8.36].

20 Ibid [8.37].

21 See the Implementation Order (now re-named Scoping Order) in Prototype Legislation A: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.115]–[10.122].

22 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.118].

While Prototype Legislation A sought to illustrate what is now the recommended legislative model, a similar approach could be applied within the current legislative framework by consolidating the existing range of exemptions in the *Corporations Regulations*.[23] The consolidated exemptions could later be transferred (with minimal amendment) to the Scoping Order as part of implementing **Recommendation 44** discussed in **Chapter 6** of this Report.[24] A similar approach could be applied to other exemptions currently spread across the legislative hierarchy, such as exemptions from provisions of Part 7.7 and 7.9 of the *Corporations Act*.[25]

8.16 Treasury's current program of incorporating matters contained in ASIC legislative instruments into the *Corporations Act* and *Corporations Regulations* illustrates a similar approach. For example, the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* (Cth) had the effect of relocating several licensing exemptions from ASIC legislative instruments to the *Corporations Regulations*, with the aim of improving the legislation's navigability.[26] Treasury's current program differs from **Example 8.1** because it is being undertaken on a case-by-case basis and does not contemplate (for example) consolidating *all* relevant exclusions or exemptions in a single location.[27]

8.17 As noted in **Example 8.1**, reforms that remove excessive prescription from the *Corporations Act* and consolidate existing delegated legislation may be implemented in advance of, and consistently with, other recommendations. If the ALRC's recommendations were not adopted or fully implemented, such reforms would represent an improvement to the existing legislative framework. However,

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23 Noting that this would have implications for exemptions in ASIC instruments currently subject to sunsetting, which would be moved to the *Corporations Regulations* and therefore exempt from sunsetting: see, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 6 of 2023, 2 June 2023) [1.27].

24 For discussion of implementation more generally, see **Chapter 7** of this Report.

25 See, eg, *Corporations Regulations 2001* (Cth) pt 7.7 div 6, pt 7.9 divs 2C, 14; *ASIC Corporations (Credit Union Member Shares) Instrument 2017/616* (Cth) s 6; *ASIC Corporations (Offers over the Internet) Instrument 2017/181* (Cth) s 5; *ASIC Corporations (Disclosure in Dollars) Instrument 2016/767* (Cth) pt 2; *ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211* (Cth) pt 2.

26 See Explanatory Statement, Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 (Cth).

27 The Delegated Legislation Scrutiny Committee has expressed concern about the practice of moving matters currently contained in ASIC legislative instruments, and therefore subject to sunsetting, to the *Corporations Regulations* which are exempt from the sunsetting regime contained in the *Legislation Act*. In the case of the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* (Cth), these concerns were resolved by an undertaking from the Assistant Treasurer to amend the relevant regulations so they cease operation after 10 years: see Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 8 of 2023, 2 August 2023) [2.2]–[2.13].

they would not address the underlying sources of complexity. This is because the existing powers to create exemptions and notional amendments would remain.

Restructuring and reframing financial markets provisions

8.18 In Interim Report C, the ALRC observed that there is potential for the financial markets-related aspects of Chapter 7 of the *Corporations Act* to be restructured and reframed according to the working principles discussed in **Chapter 4** of this Report.[28] The ALRC has not recommended that the financial markets-related aspects form part of the Financial Services Law contemplated by **Recommendation 41**. This is because it would help to promote grouping and coherence if the respective provisions were kept separate.[29]

8.19 During the Inquiry, stakeholders have generally observed that the provisions relating to financial markets operate well. Furthermore, though the ALRC's analysis has revealed extensive complexity within Chapter 7 of the *Corporations Act*, the financial markets-related aspects are not at the heart of that complexity. For example, several parts relating to financial markets are less prescriptive and create a more coherent legislative hierarchy through the use of rules.[30] Similarly, very few notional amendments and ASIC legislative instruments affect the financial markets-related provisions of Chapter 7.[31]

8.20 Reforms to the structure and framing of the financial markets-related aspects of Chapter 7 of the *Corporations Act* could nonetheless ensure that Chapter 7 is more fully reformed to enhance navigability and comprehensibility. To that end, reforms to the following provisions may form an additional pillar in the reform roadmap discussed in **Chapter 7** of this Report:

- Parts 7.2–7.5A of the *Corporations Act*; and
- the provisions of Part 7.10 of the Act that relate more closely to financial markets than financial services.

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28 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [6.62]–[6.66].

29 Ibid [6.62].

30 See, for example, Part 7.2A of the *Corporations Act* relating to the Market Integrity Rules and Part 7.5A relating to the Derivative Trade Repository Rules. For a further example, see the ASX Listing Rules, which may be enforced against listed entities pursuant to ss 793C and 1101B of the *Corporations Act*.

31 This was determined based on the ALRC's databases of notional amendments and ASIC legislative instruments, and by identifying notional amendments and legislative instruments authorised by a provision in the financial markets-related parts of Chapter 7 of the *Corporations Act*: Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022); 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/wp-content/uploads/2021/09/ASIC-made-legislative-instruments-Qualitative-30-June-2021.xlsx>. Though the databases are no longer current, the overall picture is unlikely to have changed.

8.21 While the implementation of **Recommendations 31–42** would necessarily consider and address implications for the financial markets-related provisions that would remain in Chapter 7 of the Act, incorporating them within the reform project would more directly address concerns that those implications might be overlooked.[32]

Other opportunities for restructuring and reframing

8.22 Reform to other provisions of the *Corporations Act* would complement reforms to Chapter 7 and help reduce the Act's overall complexity. For example, in its inquiry into corporate insolvency in Australia, the Parliamentary Joint Committee on Corporations and Financial Services identified that a

> common theme in much of the evidence received was that the corporate insolvency legislative framework has become overly complex, adding cost and hindering access to insolvency processes.[33]

8.23 The Parliamentary Joint Committee concluded that 'Australia's corporate insolvency system is overly complex, difficult to access, and creates unnecessary cost and confusion for both debtors and creditors'.[34] The Committee ultimately recommended a 'comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency'.[35] Submissions to the Parliamentary Joint Committee recognised that the approaches to reducing complexity highlighted by the ALRC during this Inquiry could be applied as part of any review of the legislation that regulates corporate insolvency,[36] including Chapter 5 of the *Corporations Act*.

8.24 As noted in **Chapters 7** and **9** of this Report, policy developments may also offer an opportunity for restructuring and reframing provisions that are not subject to recommendations in this Report. For example, as discussed in **Chapter 9**, the Australian Government is presently reviewing Chapter 5C of the *Corporations Act* as part of a review into managed investment schemes. Treasury's consultation paper invited submissions on whether that legislative framework needed modernising,[37] underscoring the ongoing potential for reform to the legislative framework alongside government policy initiatives.

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32 See, eg, Australian Financial Markets Association, *Submission 85*.

33 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency in Australia* (Final Report, July 2023) [3.33].

34 Ibid [3.97].

35 Ibid rec 1.

36 See ibid [3.35], [4.6]; Law Council of Australia, Submission No 30 to Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (1 December 2022); Australian Restructuring Insolvency and Turnaround Association, Submission No 36 to Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (30 November 2022).

37 Department of Treasury (Cth), *Review of the Regulatory Framework for Managed Investment Schemes* (Consultation Paper, August 2023) [8.1].

Other opportunities for applying the legislative model

8.25 The ALRC's recommended legislative model could be applied to other chapters and parts of the *Corporations Act* to make them easier to navigate and understand. This section considers the example of securities disclosure in Chapter 6D of the *Corporations Act* in detail.

Securities disclosure

8.26 Chapter 6D of the *Corporations Act* is a key area in which the recommended legislative model could bring substantial benefits. Chapter 6D is subject to more than 80 notional amendments by 15 ASIC legislative instruments and several regulations.[38] These notional amendments can significantly alter the legal effect of provisions in Chapter 6D without being visible on the face of the Act.[39] Dozens of exclusions, exemptions, and other scoping provisions spread across the *Corporations Regulations* and ASIC legislative instruments also apply to Chapter 6D.[40] Furthermore, several highly prescriptive provisions that regulate the content of multiple disclosure documents are inconsistently located in primary and delegated legislation.[41]

8.27 Applying the recommended legislative model could help simplify this diffuse legislation. This would not require consolidating Chapter 6D with Part 7.9,[42] as suggested in Interim Report B.[43] Instead, securities disclosure could remain separate, and its potentially distinct policy objectives and obligations could be made clearer. In summary:

- Primary legislation could specify the circumstances in which securities disclosure is required,[44] and the core principles regulating the content and

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38 See Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022). The database was prepared based on legislation in force on 30 June 2022, but the ALRC has confirmed all Chapter 6D instruments remained in force as at 1 September 2023.

39 See, for example, the effect that notional amendments have on s 708A of the *Corporations Act*: Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022) 9–15 (Appendix C).

40 See, eg, *ASIC Corporations (Foreign Rights Issues) Instrument 2015/356* (Cth); *ASIC Corporations (Renounceable Rights Issue Notifications) Instrument 2016/993* (Cth); *ASIC Corporations (IPO Communications) Instrument 2020/722* (Cth); *Corporations Regulations 2001* (Cth) regs 6D.2.01, 6D.2.02, 6D.2.03, 6D.3A.01, 6D.5.01.

41 See, eg, *Corporations Act 2001* (Cth) ss 711–15; *Corporations Regulations 2001* (Cth) regs 6D.2.04–6D.2.06, 6D.3A.02–6D.3A.07.

42 See **Chapter 5** of this Report, which explains why the ALRC does not recommend consolidation of these disclosure regimes.

43 Nonetheless, Prototype Legislation B could help in applying the ALRC's recommendations to Chapter 6D of the *Corporations Act*. The Prototype Legislation demonstrated the kinds of matters that would be covered in primary legislation, scoping orders, and rules. The Reverse Concordance Table also mapped out the legislative material relevant to Chapter 6D: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

44 *Corporations Act 2001* (Cth) ss 706–7.

form of that disclosure.[45] Key offences and remedies, such as for defective disclosure or failure to give disclosure documents, would also appear in the Act, and could be given greater prominence by the removal of prescriptive detail.[46]

- Exclusions, exemptions, and other scoping provisions that are presently difficult to locate could be consolidated in a Scoping Order.
- A thematic rulebook, potentially known as the 'Fundraising Rules', could bring together prescriptive detail on the content, form, and procedural requirements for preparing and providing disclosure documents.[47] A rulebook may incorporate existing provisions that create the tailored disclosure documents currently in primary legislation, including short-form prospectuses, profile statements, and offer information statements.

8.28 Applying the ALRC's recommended legislative model would consolidate legislation presently spread across dozens of regulations and ASIC legislative instruments into just three places: Chapter 6D of the *Corporations Act*, a Scoping Order, and a rulebook.[48]

Other provisions

8.29 A range of other provisions in corporations and financial services legislation have an incoherent legislative hierarchy, with excessively prescriptive primary legislation and poorly designed delegated legislation. This makes them suitable candidates for reform in accordance with the recommended legislative model. In particular, provisions regulating financial reports and audit in Chapter 2M of the *Corporations Act* could be restructured to move material into a Scoping Order and to create what may be known as the 'Financial Reporting and Audit Rules'. This would help reduce the prescriptiveness of the primary legislation and better highlight the core norms and obligations in Chapter 2M of the Act. Implementing the ALRC's recommended legislative model would also complement the existing use of accounting and auditing standards in Chapter 2M of the Act,[49] producing a more coherent and navigable body of delegated legislation in which each instrument has a clear purpose: adjusting the scope of provisions of the Act (in the case of the Scoping Order) and prescribing detail for compliance with the Act (in the case of rules, auditing standards, and accounting standards).

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45 Ibid s 710.

46 Ibid ss 726–33, 737.

47 See, eg, ibid ss 711–15, 718–19A, 725; *Corporations Regulations 2001* (Cth) regs 6D.2.04–6D.2.06, 6D.3A.02–6D.3A.07.

48 The reformed provisions could also be located in the Financial Services Law in Sch 1 to the *Corporations Act*, with exclusions and exemptions located in the single consolidated Scoping Order created for the purposes of the Financial Services Law (as distinct from a Scoping Order created for the purposes of Chapter 6D of the *Corporations Act*).

49 *Corporations Act 2001* (Cth) pt 2M.5.

Making greater use of technology

8.30 Several stakeholders have asked the ALRC whether technology may offer a solution to complexity in corporations and financial services legislation. For example, some stakeholders queried whether it would be possible to develop a freely available annotated version of the *Corporations Act* that identifies or links to relevant delegated legislation.[50] Several stakeholders cited the FCA Handbook, prepared by the FCA (UK), as an example of the effective use of technology.

8.31 Greater use of technology may help to improve the navigability of corporations and financial services legislation. However, technology alone cannot substantially reduce or manage unnecessary complexity in the existing legislative framework. Technological solutions should be complementary to the reforms discussed in **Chapters 5** and **6** of this Report.

8.32 For example, technology cannot completely overcome the legislative complexity created by notional amendments. Technology may make it easier to cross-reference between a provision and the notional amendment that affects the provision, thereby improving navigability. However, it may be difficult to use technology to improve the comprehensibility of notionally amended provisions. This is illustrated by s 708A of the *Corporations Act* which is modified by six distinct legislative instruments.[51] Technology may assist in navigating between s 708A and the notional amendments that affect it, but the provision itself remains complex. The annotated provision contains much prescriptive detail, making it lengthy (around seven pages) and difficult to understand the primary obligations. More generally, many notional amendments apply to only a class of persons, and so cannot be technologically 'folded into' the text of the provision they notionally amend, as the ALRC was able to do in the case of s 708A of the *Corporations Act*.[52]

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50 As noted previously, even commercial publishers find it difficult to identify all relevant notional amendments in their annotated legislation resources: see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.35].

51 See Appendix C of the ALRC's Notional Amendments Note, which annotates s 708A of the *Corporations Act* to show the modifications given effect by six legislative instruments: Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022). See also ASIC Regulatory Guide 196 which shows how over half of reg 7.9.99 of the *Corporations Regulations* is modified by notional amendments: Australian Securities and Investments Commission, *Short Selling* (Regulatory Guide 196, October 2018) Appendix.

52 Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022) 9–15 (Appendix C).

8.33 Technological improvements are also limited by the ways in which Commonwealth legislation is currently drafted and published. Commonwealth legislation is something of an outlier because it is not drafted and published using extensible markup language (commonly referred to as 'XML').[53] XML allows documents to be 'marked up' so that they can be read by a computer in a meaningful way.

8.34 Using XML for drafting and publishing legislation can make it easier to support more effective compliance. For example, frequent amendments to financial services legislation can make it difficult and costly for industry stakeholders to update their own compliance systems. If legislation were published in a machine-readable format, stakeholders may be able to update their compliance systems more efficiently.[54] XML can also improve navigability as cross-references can be more easily marked up and hyperlinked. XML can also allow defined terms to be searched within an Act or across legislation.[55]

8.35 In Interim Report A, the ALRC recommended that OPC investigate publishing Commonwealth legislation in XML (Recommendation 11).[56] XML is not intended to solve the issue of legislative complexity. However, it can enable a range of more sophisticated approaches to drafting and publishing legislation, which can play a role in managing and reducing complexity.[57]

8.36 The combination of XML and other technological tools can also enhance technological support for legislative drafters. For example, the UK has created and implemented the 'Lawmaker' tool for legislative drafters.[58] Lawmaker is intended to be a single, shared system for drafting primary and delegated legislation using XML.[59] The tool facilitates more consistent approaches to legislative drafting across

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53 Microsoft Word proprietary formats, HTML, and PDF are currently used to publish Commonwealth Acts and regulations. For discussion on the limits of HTML, see Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [152]–[153]. The jurisdictions that currently use XML to draft and publish legislation include overseas jurisdictions such as the US, UK, and New Zealand, and State jurisdictions such as Queensland, South Australia, New South Wales, Tasmania, and Western Australia: Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [149]; Michael Rubacki, 'Free Access Online Legislation in a Federation: Achievements of Australian Governments and Issues Remaining' (Research Paper No 28/2013, Faculty of Law, University of New South Wales, 10 May 2013) 7.

54 For further discussion of the benefits of XML, see Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [155]–[164].

55 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.94].

56 See also Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) rec 6.3.

57 See also Recommendation 12 relating to further research to improve the user-experience of the Federal Register of Legislation. For discussion of Recommendation 12, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.107]–[6.111].

58 Matt Lynch, 'Lawmaker: The New Legislative Drafting Service of the UK and Scotland' [2022] (2) *The Loophole* 24, 31.

59 Ibid 26–7.

government, and similar tools could form the basis for marking up cross-references, defined terms, offences, penalties, and various other legislative features. The tool also simplifies the publication process, with amendments able to be automatically merged into the provisions they amend. Complementary reforms like these could help build a more efficient legislative development process and form the basis for other navigability tools.

8.37 More ambitious technological solutions are also being developed overseas. For example, the UK Government is seeking to launch an Open Regulation Platform ('ORP') as an online 'single-point-of-entry … to original primary and secondary legislation, rules made by regulators through Codes of Practice and other guidance documents'.[60] All materials on the ORP are intended to be machine readable. The ORP is also intended to underpin the development of new regulatory technology solutions (commonly referred to as 'RegTech'). While useful, particularly for regulated entities, the program may have fewer benefits for the public at large, given the typical expense involved in developing and employing RegTech products. Technological developments like Lawmaker and the ORP nonetheless complement other measures that are aimed at reducing complexity in legislation.

8.38 While the use of technology alone cannot resolve issues of unnecessary complexity within the existing legislative framework, it can help to improve navigability and innovation brought about by RegTech. Technology should therefore be used in conjunction with other reforms that aim to reduce unnecessary complexity.

Reinstating the Corporations and Markets Advisory Committee

8.39 Several stakeholders have suggested that the Corporations and Markets Advisory Committee ('CAMAC'), or a similar body, should be reinstated as part of the reforms recommended by the ALRC. For example, some stakeholders suggested that CAMAC (or a similar body) may perform functions similar to:

- the Rules Advisory Committee in providing input on proposed scoping orders and rules under the recommended legislative model (**Recommendation 49**);[61]
- implementation taskforces in overseeing the implementation of reforms arising out of this Inquiry (**Recommendation 54**);[62] or
- the body tasked with periodically reviewing the Financial Services Law (**Recommendation 55**).[63]

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60 Department for Business and Trade (UK), 'About the Open Regulation Platform', *Open Regulation Platform* <https://app.dev.open-regulation.beis.gov.uk/about>.

61 See, eg, Australian Financial Markets Association, *Submission 6*; Law Council of Australia, *Submission 49*; Allens, *Submission 54*; M Nehme, *Submission 64*; P Hanrahan, *Submission 72*; Law Council of Australia, *Submission 75*.

62 See, eg, IG Australia, *Submission 33*; M Nehme, *Submission 64*; M Nehme, *Submission 81*; Australian Financial Markets Association, *Submission 85*.

63 See, eg, P Spender and S Bottomley, *Submission 41*; M Nehme, *Submission 81*.

8.40 During the Inquiry, some stakeholders suggested that CAMAC should be reinstated to fulfil the broader range of functions that it performed prior to its abolition in 2018.[64] CAMAC's role was 'to provide advice and recommendations to the Minister about matters relating to corporations and financial services, administration and practice'.[65] CAMAC focused on potential reforms relating to 'substantive questions of law',[66] as distinct from technical issues relating to how the law is expressed or designed (the focus of this Inquiry).

8.41 Professor Ramsay AO has observed that the 'abolition of CAMAC was controversial'.[67] In the view of Professor Baxt AO, CAMAC's abolition left 'a gaping hole … in the corporate law reform process'.[68] Numerous others, including industry participants and representative bodies, have expressed support for CAMAC as having made an effective and positive contribution to the reform of corporations and financial services legislation.[69]

8.42 According to the Australian Institute for Company Directors ('AICD'), CAMAC's strengths included its 'non-partisan approach to policy proposals' and its 'broad consultation on issues at hand'.[70] In the AICD's view:

> Given the increasing complexity of corporate law and corporate governance in Australia … there is a need for expert and independent capacity to support the Government's policy-making in this area.[71]

8.43 Further, in the AICD's view, the 'reinstatement of a CAMAC-equivalent body could play a useful complementary role to that of Treasury' and its 'independence would also align with heightened stakeholder expectations around evidence-based policy informed by expert advice'.[72]

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64 See, eg, Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [9]; P Hanrahan, *Submission 36*; P Hanrahan, *Submission 72*. See also Alex Morris, Diana Nicholson and Will Heath, 'Bring back CAMAC for independent advice on company law', *The Australian Financial Review* (online, 27 June 2022) <www.afr.com/companies/financial-services/bring-back-camac-for-independent-advice-on-company-law-20220627-p5awzl>.

65 Department of the Treasury (Cth), 'Corporations and Markets Advisory Committee (CAMAC)' <https://treasury.gov.au/policy-topics/business-and-industry/CAMAC>. For further discussion of CAMAC's role and its history, see Ian Ramsay, 'A History of the Corporations and Markets Advisory Committee and its Predecessors' in Pamela Hanrahan and Ashley Black (eds), *Corporate and Competition Law: Essays in Honour of Professor Robert Baxt* (LexisNexis Butterworths) 56.

66 The Hon Dr RP Austin, 'Corporate Law Reform: Some Reflections on the Reform Experience of the Last 30 Years' (2021) 36 *Australian Journal of Corporate Law* 197, 208.

67 Ramsay (n 65) 56.

68 Robert Baxt AO, 'Editorial' (2015) 33(1) *Company and Securities Law Journal* 3, 3.

69 See, for example, the numerous sources quoted and cited in Ramsay (n 65) 63–7.

70 Letter from Australian Institute of Company Directors to the Australian Law Reform Commission, 1 November 2023 <www.aicd.com.au/content/dam/aicd/pdf/news-media/policy/2023/aicd-letter-to-alrc-reinstatement-of-camac.pdf>.

71 Ibid.

72 Ibid.

8.44 **Chapter 9** of this Report discusses how the ALRC's recommendations to reduce legislative complexity could facilitate future policy developments. The ALRC is of the view that the establishment of a body, such as CAMAC, that focused on supporting the Australian Government in policy development would complement the ALRC's reforms. However, given CAMAC's role as a policy-oriented body, and the focus of this Inquiry on reforms within existing policy settings, the ALRC has not consulted on or recommended the reinstatement of CAMAC.

Alternative reforms

8.45 This part discusses alternatives to some of the reforms recommended by the ALRC. These include:

- an alternative approach to defining 'financial product'; and
- more fundamental restructuring of corporations and financial services legislation than what is recommended by the ALRC.

8.46 This part does not discuss alternatives to the recommended legislative model discussed in **Chapter 6** of this Report. As discussed above, the ALRC has identified targeted reforms that may help to improve navigability in the legislative hierarchy. However, the ALRC has not identified an alternative to the recommended legislative model that would address the causes of complexity in the legislative hierarchy and satisfy the objectives in the Terms of Reference for this Inquiry. Further, and as discussed in **Chapter 6**, most alternative suggestions from stakeholders centred upon a shift in the existing policy settings relating to the allocation of delegated law-making powers to the Minister and ASIC.

The specific list approach to defining 'financial product'

8.47 In Interim Report A, the ALRC identified an alternative approach to defining 'financial product' and establishing the perimeter of the regulatory regime in Chapter 7 of the *Corporations Act*. This may be called the specific list approach, summed up in the expression: 'If it's in, it's in; if it's not in, it's out'.[73]

8.48 Presently, the *Corporations Act* and *ASIC Act* adopt a functional definition of 'financial product', supplemented by specific inclusions and exclusions.[74] Australia is relatively unique in its use of a functional definition, with other jurisdictions such as the UK and New Zealand utilising a specific list approach.[75] The functional approach provides an intentionally broad definition so as to encompass a wide range of products and capture new products as they are developed so long as their function falls within the defined concepts of making a financial investment, managing financial risk,

73 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.172]–[7.179].
74 See generally ibid [7.19]–[7.22].
75 Ibid [7.65]–[7.66].

or making non-cash payments.[76] The regulatory perimeter is then adjusted using exclusions and exemptions.[77]

8.49 In comparison, the specific list approach uses inclusions to determine when something is to be regulated. It is intended to be an exhaustive list to provide greater certainty than a functional definition when identifying the boundaries of regulation.[78] The specific list approach is illustrated by the UK's *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)* ('RAO (UK)'). The RAO (UK) sets out the types of activities and investments that are regulated under the *Financial Services and Markets Act 2000* (UK). The RAO (UK) shows some of the benefits of a specific list approach, including certainty as to what activities and investments are included within the regulatory perimeter.

8.50 In practice, however, a specific list approach will likely necessitate broad, open-ended terms to describe financial products.[79] As a result, the specific list approach cannot eliminate all uncertainty or the need for exclusions and carve-outs.[80] For example, in the RAO (UK) the relatively open-ended category of 'dealing in investment as an agent' may permit interpretational ambiguity,[81] and is nonetheless subject to exclusions.[82]

8.51 In the Australian context, shifting from a functional definition to a solely specific list approach would require an important policy change. This is because a specific list is unlikely to capture new and emerging products as effectively as the functional definition does at present. This has been identified as a concern by some stakeholders.[83] It would also require addressing whether the specific list should be maintained in primary legislation, delegated legislation (as in the UK), or a combination of both.[84]

8.52 The ALRC has not recommended a specific list approach to defining 'financial product' because it would likely require a policy shift that would be outside the Terms of Reference. Furthermore, and in light of that existing policy, it is not clear that a specific list approach would be significantly more beneficial in the Australian context.

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76 *Corporations Act 2001* (Cth) ss 763A–763D; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA(1), (4)–(6); *International Litigation Partners Pte Ltd v Chameleon Mining NL (recs and mgrs apptd)* (2012) 246 CLR 455 [5]; *Australian Securities and Investments Commission v Davidof* [2017] FCA 658 [4].

77 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.176].

78 Ibid [7.172]–[1.173].

79 See, eg, ibid [7.174].

80 Ibid [7.174]–[7.175].

81 *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) SI 2001/544 art 21.

82 Ibid art 22. See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.174] for greater discussion on the illusion of certainty within specific list approaches.

83 See, eg, Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

84 See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.178].

More fundamental restructuring

8.53 In **Chapter 5** of this Report, the ALRC recommends that the financial services-related aspects of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* be consolidated to form the Financial Services Law in Sch 1 to the *Corporations Act*. However, some stakeholders suggested to the ALRC that corporations and financial services legislation should be restructured more fundamentally. This section discusses some of those alternatives.

8.54 The ALRC has not recommended more fundamental restructuring of corporations and financial services legislation for two main reasons. First, doing so may go beyond the Terms of Reference for this Inquiry, including because it may involve questions of policy. Secondly, many of the options discussed below would necessitate revisiting the constitutional bases of the *Corporations Act* and other legislation. This would include the separate referrals of matters under s 51(xxxvii) of the *Australian Constitution* that underpin the *Corporations Act* and the *NCCP Act*, and potentially the various state legislation that supports the *Australian Consumer Law's* application beyond corporations.[85]

A standalone financial services Act

8.55 As discussed in **Chapter 5** of this Report, some stakeholders suggested there should be a standalone Act relating to financial services.[86] Given the express reference to 'financial products and services' in the referral underpinning the *Corporations Act* and the clear limitations imposed by the referral, creating a standalone financial services Act would require the states and Commonwealth to revisit the existing referral.[87] Some stakeholders supported this, with Associate Professor Nehme, for example, suggesting that it is 'time to face any constitutional issues … and remedy them instead of trying to avoid such issues'.[88] Alternatively, but potentially at greater risk of constitutional challenge, the Commonwealth could seek to rely on a different head of power in the *Australian Constitution* to enact standalone financial services legislation.[89]

8.56 Many of the ALRC's recommendations may nonetheless guide the design and implementation of a standalone financial services Act if it were contemplated in the future.

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85 These are discussed in detail in Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

86 See, eg, Financial Planning Association of Australia, *Submission 10*; Australian Banking Association, *Submission 61*; Insurance Australia Group Limited, *Submission 73*; M Nehme, *Submission 81*; MinterEllison, *Submission 92*.

87 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [108]–[116], [168].

88 M Nehme, *Submission 81*.

89 See, eg, Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [175]–[181]; The Hon Robert French AC, 'Executive and Legislative Power in the Implementation of Intergovernmental Agreements' (2018) 41 *Melbourne University Law Review* 1383.

Consolidating regulatory regimes

8.57 During the Inquiry, some stakeholders also expressed interest in consolidating similar and overlapping regulatory regimes currently spread across different pieces of corporations and financial services legislation. Generally speaking, this may involve consolidating parts of the *Corporations Act, NCCP Act, ASIC Act*, and *SIS Act*.

8.58 The similar regulatory regimes for financial products and services in Chapter 7 of the *Corporations Act* and for consumer credit in the *NCCP Act* present one opportunity for consolidation.[90] A consolidated regime was considered at the time of enacting the *NCCP Act*.[91] Despite overlap and similarities, however, sufficient differences have developed between the two regulatory regimes such that it may not be possible to consolidate the regimes to reduce legislative complexity unless policy differences were also addressed. For example, there are best interest obligations that apply to both financial advisers and mortgage brokers, but the substantive contents of these obligations differ in certain respects.[92] Furthermore, constitutional issues also arise in this context as the *Corporations Act* and *NCCP Act* are currently supported by separate and different referrals of matters under s 51(xxxvii) of the *Australian Constitution*.[93]

8.59 A narrower area for potential consolidation includes the licensing regimes relating to financial services, consumer credit, and registrable superannuation entities. Currently, these three separate licensing regimes are respectively contained in the *Corporations Act*, the *NCCP Act*, and the *SIS Act*.[94] After analysing the three licensing regimes in detail, Davies, Walpole, and Pearson suggested that there are sufficient similarities between the AFSL regime and credit licensing regime to warrant considering their consolidation.[95] These include similarities in the application criteria, duties, and obligations of licensees.[96] Some stakeholders, however, queried whether consolidating the AFSL regime and the credit licensing regime would be any less complex than maintaining separate regimes.[97] In respect of registrable superannuation entities, Davies, Walpole, and Pearson observed that

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90 See, eg, N Howell, *Submission to Background Paper FSL9*; Nicola J Howell, 'Addressing the Contrasting Definitions of Financial Product and Financial Service in Australian Financial Services and Consumer Legislation' (2022) 39(2) *Company and Securities Law Journal* 86.

91 Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [9.94]–[9.114]. See also Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [101]–[102].

92 Samuel Walpole, M Scott Donald and Rosemary Langford, 'Regulating for Loyalty in the Financial Services Industry' (2021) 38 *Company and Securities Law Journal* 355, 366–70.

93 Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [170].

94 For an overview of each licensing regime, see Walpole, Donald and Langford (n 92) 341–52.

95 Cindy Davies, Samuel Walpole and Gail Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks Toward the Twin Peaks' (2021) 38(5) *Company and Securities Law Journal* 332, 333. See also N Howell, *Submission to Background Paper FSL9*.

96 Davies, Walpole and Pearson (n 95) 333.

97 See, eg, Australian Retail Credit Association, *Submission 83*.

several characteristics unique to superannuation and its regulation support retaining a separate licensing regime.[98] Similar to other options for more fundamental restructuring, the ALRC has not made any recommendations relating to the consolidation of licensing regimes principally due to the constitutional constraints noted above.

98 Davies, Walpole and Pearson (n 95) 333.

9. Facilitating Policy Developments

Contents

Introduction

9.1 This chapter highlights the importance of an adaptive, efficient, and navigable legislative framework for accommodating the increasing pace and scale of policy developments affecting corporations and financial services legislation. An adaptive legislative framework helps to promote and support Australia's economic productivity in the face of financial products, services, and markets that are rapidly transforming due to the continual evolution of technology and business practices. This chapter demonstrates that the existing legislative framework is poorly designed for achieving such adaptivity, and policy initiatives are currently hindered by unnecessary legislative complexity. Moreover, issues in the existing legislative framework often mean that implementation of policy initiatives can compound the unnecessary complexity in that framework.

9.2 This chapter proceeds in three parts by examining:

- the increasing pace and scale of policy developments since 2010;
- the issues caused by the existing legislative framework when implementing recent policy initiatives; and
- how the ALRC's recommendations could facilitate future policy developments.

Defining policy

9.3 Before discussing the increasing pace and scale of policy developments, this section briefly explains relevant policy-related definitions.

9.4 This chapter uses the following policy-related terms:

- 'Policy development' refers to a new or changed 'course of action by government designed to attain specific results'.[1] The term 'policy development' is used in this chapter to refer to the general evolution of policy. This recognises that the 'policy positions of today may not be the policy positions of tomorrow' and that policy does not develop in a vacuum.[2]
- 'Policy initiative' refers to specific policy developments. A policy initiative may amend legislation to add new provisions or to extend, narrow, or otherwise alter the scope and operation of existing provisions.
- 'Policy objective' refers to a specific result or goal to be achieved by a policy initiative.[3] It is well understood that legislation should clearly convey policy objectives.[4] As a result, this chapter focuses on legislation as the means through which policy objectives can be achieved.

9.5 Policy also has a particular meaning in the context of legislative design. In designing legislation to implement policy initiatives, some elements of the design process will raise questions of policy, while other elements will be more technical. Matters of policy include questions about the subject matter that legislation should regulate, such as whether and why something or someone should be regulated through legislation.[5] These policy issues are generally understood as appropriate for determination by Parliament or government, rather than regulators (for example). Significant policy matters should generally be contained in primary legislation, enacted by Parliament, rather than delegated legislation.[6]

9.6 In comparison, technical aspects of legislative design include questions about how the law is presented, constructed, and organised; where prescriptive detail is placed within the legislative hierarchy; and models or styles of regulation.[7] The technical aspects of legislative design align with the Terms of Reference for this Inquiry which focus on the design of corporations and financial services legislation 'within existing policy settings'.

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1 Catherine Althaus et al, *The Australian Policy Handbook: A Practical Guide to the Policymaking Process* (Routledge, 7th ed, 2022) 7.

2 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [9].

3 Althaus et al (n 1).

4 See, eg, John Keyes and Dale Dewhurst, 'Shifting Boundaries between Policy and Technical Matters in Legislative Drafting' [2016] (1) *The Loophole* 23, 25.

5 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.50]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.37]–[1.42]; Keyes and Dewhurst (n 4) 24–6.

6 See **Chapter 4** of this Report. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.11], [3.17]–[3.18], [3.58]–[3.66].

7 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.72]; Keyes and Dewhurst (n 4) 26–7.

Accelerating policy developments

9.7 This part demonstrates that the pace and scale of policy developments are accelerating due to several factors. These include systemic issues in the financial system, shifts in regulatory philosophies, and the rapid evolution of financial markets, technology, and business practices. The increasing volume of policy developments affecting corporations and financial services legislation emphasises the need for an adaptive, efficient, and navigable legislative framework.

Empirical data and analysis

9.8 The ALRC undertook an analysis of amendments to the *Corporations Act, NCCP Act,* and Part 2 Div 2 of the *ASIC Act* ('the reviewed Acts') to identify the number of policy initiatives affecting these Acts between 2010 and 2022.[8] The policy initiatives were identified by examining each piece of amending legislation and accompanying explanatory memoranda to determine whether the legislation would add new provisions or would extend, narrow, or otherwise alter the scope of existing provisions of the reviewed Acts. In many instances, one piece of amending legislation contained multiple policy initiatives.[9]

9.9 **Figure 9.1** shows that there is a general trend of increasing policy initiatives affecting the reviewed Acts.[10] The scale of policy reform has also been substantial. In total, 228 policy initiatives affected the reviewed Acts between 2010 and 2022.[11] These policy initiatives were contained within 71 pieces of legislation that amended provisions of the reviewed Acts. Of the surveyed years, 2012, 2017, and 2020 saw the highest levels of policy reform. These years are considered in more detail below to examine the potential drivers of policy reform. An understanding of these drivers provides context for the argument that the increasing pace and scale of policy developments is likely to continue in the future.[12]

8 The underlying data and methodology are available on the ALRC website: Australian Law Reform Commission, 'Corporations and Financial Services Policy Initiatives 2010–22' <www.alrc.gov.au/wp-content/uploads/2023/10/Policy-Initiatives-2010–22-1.xlsx>. Consequential and technical amendments, which rectified errors or updated the legislation as a result of changes in another area of law (such as taxation), were not included within the data set as they were not considered policy initiatives within the definition adopted by this chapter.

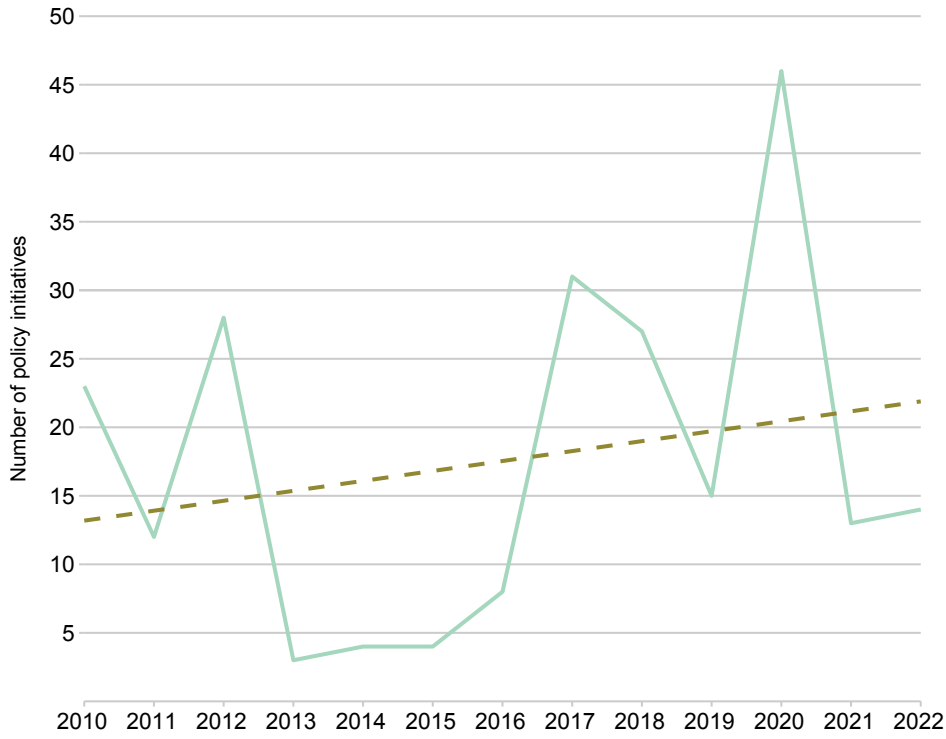
9 For example, the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020* (Cth) contained seven policy initiatives affecting credit and financial services legislation. The policy initiatives included strengthening the AFSL regime and Australian credit licensing requirements, introducing offences for false and misleading documents, and expanding the banning order powers of ASIC.

10 Fitting a simple linear regression model to the data shows a general trend of increasing policy developments.

11 Legislation enacted in 2023 was excluded as only partial data was available.

12 See below [9.40]–[9.43].

Figure 9.1: Policy initiatives per year

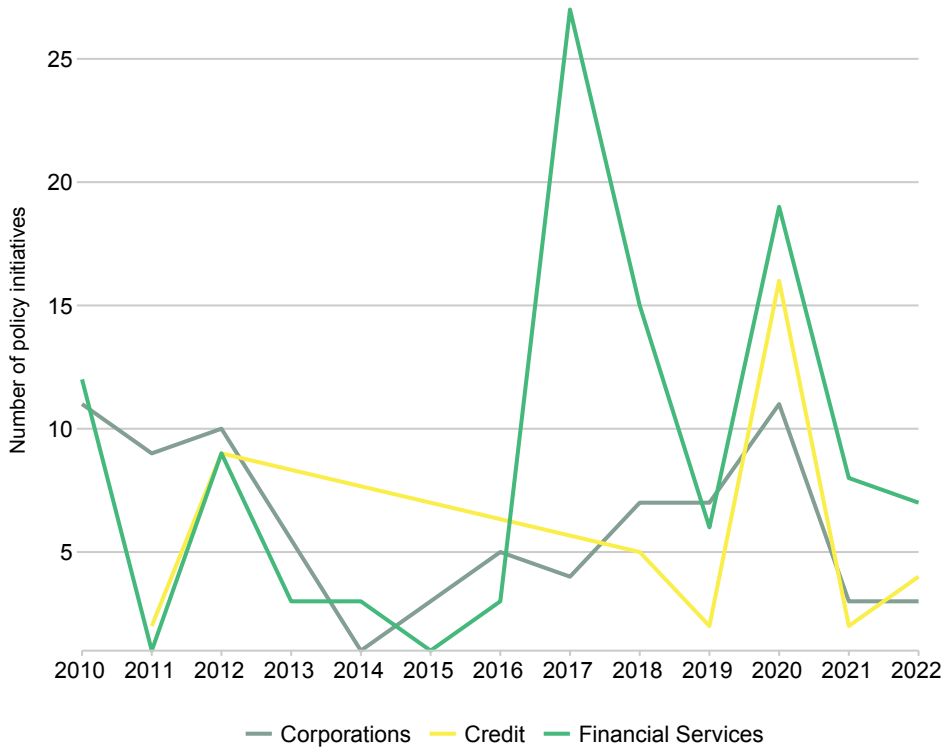


9.10 To gain an understanding of the kind of policy initiatives that have been enacted, the ALRC classified policy initiatives into three types:

- financial services — policy initiatives that led to amended provisions in Chapter 7 of the *Corporations Act*, Chapter 6D of the *Corporations Act* (relating to securities disclosure), and Part 2 Div 2 of the *ASIC Act*;
- corporations — policy initiatives that led to amended provisions of the *Corporations Act* that are not within Chapter 7 or Chapter 6D of the *Corporations Act*; and
- credit — policy initiatives that led to amended provisions of the *NCCP Act* and the *National Credit Code* (Sch 1 to the *NCCP Act*).

9.11 **Figure 9.2** shows the number of each type of policy initiative enacted yearly between 2010 and 2022. In total, 50% of policy initiatives (114) related to financial services, 32% (74) related to corporations, and 18% (40) related to credit.

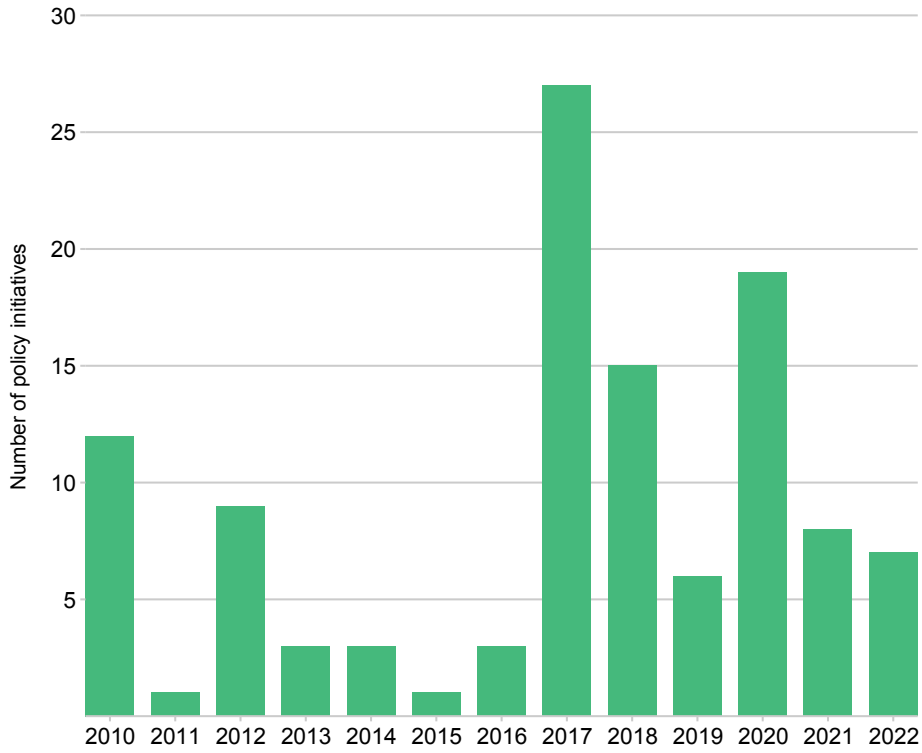
Figure 9.2: Types of policy initiatives per year



9.12 **Figure 9.3** below illustrates the increasing pace of financial services reform. Seventy-two percent of all policy initiatives relating to financial services have been undertaken since 2017, highlighting the extent to which this area has undergone significant and accelerating policy reform in recent years.[13]

13 Of the 114 financial services-related policy initiatives implemented since 2010, 82 were implemented between 2017 and 2022.

Figure 9.3: Financial services policy initiatives per year



9.13 The volume of policy initiatives legislated since 2010 underscores the need for a legislative framework that can adapt to change, clearly express underlying policy objectives, and is navigable by users of the legislation.

Factors contributing to acceleration

9.14 Several factors contribute to the increasing pace and scale of policy developments affecting the financial services sector. This section focuses on three important factors that have influenced, and continue to influence, policy developments. These are:

- shifts in regulatory philosophies;
- responses to perceived systemic issues; and
- the rapid evolution of technology and business practices that affect financial products, services, and markets.[14]

14 See generally Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022).

9.15 The drivers of policy change discussed below highlight the extent to which regulation changes over time. The legislative framework should be sufficiently flexible to adjust to such changes. It should be able to do so without introducing unnecessary complexity that makes it both harder and more costly to comply with the law. The existing legislative framework, as discussed below, fails to ensure such flexibility and often generates substantial complexity when new policy initiatives are enacted.

Shifts in regulatory philosophies

9.16 As previously identified by the ALRC, shifts in regulatory philosophies over the past 20 years have been an important driver of reform in financial services legislation.[15] For example, the 2012 Future of Financial Advice reforms reflected a shift in regulatory philosophy away from disclosure of conflicts of interest by financial advisers. Instead, the reforms sought to reduce or eliminate such conflicts and impose more substantive duties on advisers aimed at improving the quality of advice. For example, the reforms introduced an obligation on advisers to act in their clients' best interests and to provide appropriate advice.[16] The reforms also banned most forms of conflicted remuneration,[17] with further restrictions on remuneration for life insurance introduced in 2017.[18] The Financial Services Royal Commission also produced a range of policy initiatives regulating remuneration,[19] again marking a shift away from simply disclosing remuneration arrangements.

9.17 Similarly, the introduction in 2019 of design and distribution obligations and product intervention powers represented a substantial shift in regulatory philosophy away from undue reliance on disclosure.[20] For example, design and distribution obligations reflect a regulatory philosophy in which issuers of financial products — and not simply consumers — bear responsibility for ensuring that products are suitable for their end-users. Product intervention orders have also allowed the first complete ban on the sale of a class of financial products in Australian financial services legislation.[21] This is a significant departure from the policy that consumers

15 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022). See also Nicholas Simoes da Silva and William Isdale, 'Risk and Reform in Australian Financial Services Law' (2022) 96 *Australian Law Journal* 408.

16 *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

17 Ibid.

18 *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* (Cth); *ASIC Corporations (Life Insurance Commissions) Instrument 2017/510* (Cth).

19 For example, the reforms added caps on commission for add-on risk products for the sale or lease of motor vehicles, and introduced restrictions on conflicted remuneration for mortgage brokers: *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth); *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth).

20 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth); Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [61]–[70].

21 *ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240* (Cth).

'should have the freedom to take financial risks and bear the consequences of these risks'.[22]

9.18 A final example comes from legislative reforms in 2017 aimed at improving the quality of financial advice through professional standards for financial advisers.[23] The 12 policy initiatives pursued as part of these reforms marked a shift in the regulatory philosophy towards financial advice. They did this by drawing a starker distinction between providers of personal and general financial advice, and seeking to move to a more 'professionalised' model of personal advice. The reforms required advisers to meet education and training requirements, and to comply with a new Code of Ethics, among other requirements.

Systemic issues

9.19 Systemic issues, often revealed by crises affecting the financial sector, have been an important driver of policy development. For example, the Future of Financial Advice reforms were enacted, in part, to address issues that had become evident following crises like the collapse of Storm Financial and Opes Prime.[24] The need to address systemic issues has become an increasingly important driver of new policy initiatives, particularly for financial services legislation. For example, the Financial Services Royal Commission led to approximately 34 policy initiatives being enacted between 2020 and 2021.[25] These reforms were made in response to serious misconduct within the sector.[26]

9.20 There is significant overlap between systemic issues and shifts in regulatory philosophies, where both factors may drive policy change. For example, the push to better regulate participants in derivatives markets in 2012 was an immediate result of the Global Financial Crisis,[27] but was also more indirectly the result of changing regulatory philosophies towards derivatives markets.[28] Reforms in response to the Global Financial Crisis led to a more interventionist regulatory approach for financial stability and consumer protection purposes.

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22 David Murray et al, *Financial System Inquiry* (Final Report, November 2014) 28.

23 *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth).

24 Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) 3; Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [84]–[89]. Some of the systemic issues that became apparent after this crisis include those surrounding the effectiveness of disclosure and ability for consumers to rationally assess risk.

25 *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth); *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth). For other policy initiatives enacted in 2020, see, eg, Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth); *Treasury Laws Amendment (2018 Measures No. 2) Act 2020* (Cth); *Coronavirus Economic Response Package Omnibus Act 2020* (Cth); *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth); *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth).

26 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 1–4.

27 *Corporations Legislation Amendment (Derivative Transactions) Act 2012* (Cth); Council of Financial Regulators, *OTC Derivatives Market Reform Considerations* (Report, March 2012) 1.

28 Council of Financial Regulators (n 27) 1.

9.21 More recent policy initiatives, such as in relation to crypto assets and buy now pay later ('BNPL'), appear to be partly driven by a recognition of the systemic harms these products can create for consumers.[29] Such policy initiatives also illustrate how drivers of reform compound one another. As an example, systemic issues often result from new technologies and business practices, such as crypto assets, that themselves drive reform.

Evolving technology and business practices

9.22 Evolving technology can lead to new or more efficient business practices, which in turn can influence the financial services industry and policy change. For example, the 2014 Financial System Inquiry (commonly known as the 'Murray Inquiry') examined the rapid evolution of financial markets since the 1996 Financial System Inquiry (commonly known as the 'Wallis Inquiry'). This evolution was influenced by the development of technologies that had a profound effect on financial services and new business methods. Some of these technologies included cloud computing, internet and mobile phone banking, online payments systems like PayPal, and business methods like crowd-sourced funding.[30] In 2017, there were 11 policy initiatives introduced to regulate crowd-sourced funding. At the time, crowd-sourced funding was emerging as a way for innovative businesses to obtain finance through crowdfunding platforms.[31] Policy initiatives were developed after several reviews, including the Murray Inquiry, had recommended amendments to facilitate crowd-sourced funding within financial services legislation.[32]

9.23 Further, more recent developments in technology and business practices are continuing to change the financial system and markets. Examples of new technology include BNPL, automation of financial advice (commonly referred to as 'robo-advice'), crypto assets, and decentralised autonomous organisations.[33] New business structures include corporate collective investment vehicles.[34] The recent and future

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29 In relation to BNPL arrangements, see Australian Securities and Investments Commission, *Review of Buy Now Pay Later Arrangements* (Report 600, November 2018) [73]–[79]; Australian Securities and Investments Commission, *Buy Now Pay Later: An Industry Update* (Report 672, November 2020) 23. In relation to crypto assets, see Department of Treasury (Cth), *Token Mapping* (Consultation Paper, February 2023) 5.

30 Murray et al (n 22) xix.

31 *Corporations Amendment (Crowd-Sourced Funding) Act 2017* (Cth); Explanatory Memorandum, Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017 (Cth) [1.4].

32 Explanatory Memorandum, Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017 (Cth) [1.4]; Explanatory Memorandum, Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (Cth) [1.2].

33 For further discussion of BNPL arrangements and robo-advice, see below [9.57]–[9.61]. For discussion of the current regulatory challenges in relation to crypto assets and decentralised autonomous organisations, see Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022). See also Department of Treasury (Cth), *Regulating Digital Asset Platforms* (Proposal Paper, October 2023).

34 *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth); *Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022* (Cth).

policy initiatives that have been prompted by these technological developments are discussed below.[35]

9.24 Changes in the structure, size, and importance of financial markets have also been significant. The superannuation system has become increasingly critical to the financial security of Australian households.[36] Superannuation assets were equivalent to 116% of gross domestic product ('GDP') in 2022–23 and are projected to rise to around 218% of GDP by 2062–63.[37] Financial markets have rapidly grown in size, and the nature of their participants has continued to evolve.[38] In Interim Report A, for example, the ALRC noted the growing role of retail clients in securities trading and in the development of markets for binary options and contracts for difference.[39]

9.25 Importantly, evolving technologies, businesses, and markets are not new issues, and will continue to evolve in unanticipated ways.[40] This underscores the need for the legislative framework to support and appropriately regulate innovation, thereby helping to ensure greater economic productivity.[41] An adaptive and efficient legislative framework recognises the reality that policy positions always change.[42] New technologies, changing business practices, and evolving financial markets are only accelerating the pace and scale of this policy change.

Policy reform within the existing legislative framework

9.26 The accelerating pace and scale of policy initiatives affecting financial services legislation highlights the importance of a legislative framework that is adaptive and navigable so as to support economic productivity and reduce compliance costs. This part examines how design issues in the existing legislative framework make policy reform more difficult and contribute to unnecessary legislative complexity. Three examples provide a good survey of the difficulties facing policy-makers, legislative drafters, and users of the legislation when policy reforms are implemented in the existing legislative framework:

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35 For discussion, see below [9.28]–[9.31] in relation to CCIVs, [9.57] in relation to robo-advice, and [9.59]–[9.61] in relation to BNPL arrangements.

36 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.44].

37 Commonwealth of Australia, *Intergenerational Report 2023: Australia's Future to 2063* (Report, August 2023) 167.

38 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.36]–[3.37].

39 Ibid [3.38]–[3.39].

40 This is reflected in the **Terms of Reference** which provide that reform of the regulatory framework should have regard to 'the continuing emergence of new business models, technology and practices'.

41 Murray et al (n 22) 97.

42 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [9].

- the disclosure-related provisions of the corporate collective investment vehicle ('CCIV') reforms;[43]
- the design and distribution obligations regime ('DDO regime') that was enacted in Part 7.8A of the *Corporations Act*;[44] and
- the employee share scheme ('ESS') reforms enacted in Part 7.12 Div 1A of the *Corporations Act*.[45]

9.27 This part also discusses how applying some of the ALRC's recommendations to each example could simplify the legislation and better facilitate the implementation of similar policy initiatives.

Corporate collective investment vehicles

9.28 The CCIV reforms illustrate how the existing legislative framework struggles to integrate and manage the regulation of new and emerging products and services, particularly those requiring tailored regulation. As CCIVs 'operate with a corporate structure', the regime was created through the introduction of Chapter 8B of the *Corporations Act*.[46] CCIVs are also collective investments, similar to managed investment schemes, and so the financial product disclosure requirements in Part 7.9 of the *Corporations Act* are applicable. However, many of the provisions in the CCIV regime exempt CCIVs from the operation of Part 7.9 or otherwise tailor it.

9.29 The CCIV regime exemplifies how primary legislation and notional amendments can contribute to legislative complexity. As previously identified by the ALRC, the use of notional amendments can make legislation inaccessible by changing the substance of a provision with no indication on the face of the legislation.[47] This detracts from the readability and navigability of legislation.[48] For example, dozens of notional amendments in the *Corporations Regulations* omit or modify the application of disclosure requirements in the *Corporations Act* in relation to CCIVs.[49] By way of further example, the primary legislation implementing the CCIV regime also uses numerous phrases, such as 'treats' and 'applies as if',

43 *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth); *Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022* (Cth).

44 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth); Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.56].

45 *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022* (Cth).

46 Explanatory Memorandum, Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (Cth) [1.19].

47 See **Chapter 2** of this Report. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.139]; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [100]–[104].

48 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [100].

49 *Corporations Regulations 2001* (Cth) schs 10A pt 5D, 10BA pt 3, 10F.

which modify the operation of provisions within Chapter 7 of the *Corporations Act* in relation to CCIVs.[50]

9.30 Therefore, to identify disclosure requirements that apply to CCIVs, users must locate and consult two parts of the *Corporations Act* and three schedules to the *Corporations Regulations*.[51] To understand the legislation, users must read those differently located provisions alongside each other. Additionally, as ASIC may make notional amendments by legislative instrument under s 951B of the *Corporations Act*, providers must also have regard to any legislative instruments in force.[52] The CCIV reforms are an example of how the lack of a clear legislative hierarchy and thematic structure can obscure policy objectives. This makes it harder to locate key obligations and understand the norms of behaviour they give effect to, contributing to increased costs of compliance.

9.31 If implemented, the reformed legislative framework recommended by the ALRC may facilitate the simpler and clearer enactment of policy objectives that require tailored disclosure requirements, such as the CCIV reforms. Under the reformed legislative framework, the core financial product disclosure provisions would be restructured into a single chapter within the Financial Services Law.[53] Exclusions and exemptions from disclosure requirements relating to CCIVs could be consolidated within the Scoping Order.[54] Finally, requirements regarding the form and contents of disclosure for financial products and services relating to CCIVs could be grouped thematically within a rulebook.[55] Overall, the ALRC's recommendations would help to produce a legislative framework that is easier to navigate and more adaptive for the introduction of policy initiatives like the CCIV reforms.

Design and distribution obligations

9.32 The DDO regime is an example of how legislative complexity can obscure policy objectives and key obligations. The DDO regime came into force in

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50 Upon examination of Chapter 8B of the *Corporations Act*, there are at least 12 uses of the phrase 'applies as if' and 57 uses of 'treat' (including 'treated' and 'treating'). This does not include consideration of the use of such phrases within notional amendments or legislative instruments, so these figures may under-represent the use of such phrases within the CCIV regime to modify Chapter 7 of the *Corporations Act*.

51 *Corporations Act 2001* (Cth) pts 7.9, 8B.7 div 4; *Corporations Regulations 2001* (Cth) schs 10A pt 5D, 10AB pt 3, 10F.

52 Before it was repealed on 1 September 2023, only one legislative instrument applied to CCIVs directly: *ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449* (Cth). However, as at 1 March 2023, 12 legislative instruments and three class orders were updated in order to accommodate the CCIV regime. For a list of relevant legislative instruments, see Australian Securities and Investments Commission, 'Corporate Collective Investment Vehicles' <www.asic.gov.au/regulatory-resources/managed-funds/corporate-collective-investment-vehicles/>.

53 See **Recommendation 36**.

54 See **Recommendation 44**.

55 See **Recommendation 46**. For a visual representation of how the recommended legislative model could be applied in the context of disclosure, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.9], [2.12].

October 2021 within Part 7.8A of the *Corporations Act*. The aim of the DDO regime is to create obligations to produce a target market determination ('TMD') for a financial product, and develop product distribution processes that ensure sales of the product are directed at an appropriate target market of consumers.[56] The DDO regime is intended to complement disclosure requirements by imposing an obligation to identify and distribute financial products to members of a target market in the same circumstances that disclosure would be required under Chapter 6D and Part 7.9 of the *Corporations Act*.[57]

9.33 The provisions comprising the DDO regime are unnecessarily complex, principally owing to the bespoke definition of 'financial product', a lack of logical structure, and a high level of prescriptive detail. The definition of 'financial product' for the purposes of Part 7.8A is inconsistent with the rest of Chapter 7 of the *Corporations Act* as it encompasses the definitions of that term in both s 761A of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.[58] The definition within the *ASIC Act* is broader and expressly includes credit facilities (as well as BNPL arrangements).[59] The result is that Part 7.8A has a broad application so that the DDO regime applies to credit products. However, Part 7.8A is placed within the middle of Chapter 7 of the *Corporations Act*. This positioning makes it harder for providers who do not necessarily hold an AFS licence (like credit providers) to locate the DDO regime. Part 7.8A is also highly prescriptive. For example, the main obligation within s 994B of the *Corporations Act* is to create a TMD, but this obligation gets lost in the detail of an extensive list of what a TMD needs to contain. By not clearly communicating core obligations, these structural complexities inhibit meaningful compliance and make it harder to identify the policy objectives of the regime.

9.34 If implemented, the reformed legislative framework would help to reduce and prevent the accrual of unnecessary legislative complexity when enacting policy initiatives like the DDO regime. For example, the inconsistent definition of 'financial product' for the purposes of the DDO regime could be resolved by **Recommendation 31**, which recommends having the same definition for 'financial product' across both the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. The DDO regime could then be tailored as necessary through provisions of the Scoping Order containing exclusions and exemptions. This would reduce the number of places that users would have to look to determine whether the law applies, instead of having to search through the *Corporations Regulations* and multiple ASIC legislative instruments. Similarly, prescriptive detail could be moved into a thematic rulebook,

56 Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) [1.41]–[1.43].
57 Ibid [1.14].
58 *Corporations Act 2001* (Cth) s 994AA(1).
59 See *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B. For discussion of how inconsistent definitions cause unnecessary complexity, see **Chapter 2** of this Report.

leaving primary legislation to better prioritise core obligations.[60] Finally, navigability may be enhanced by relocating Part 7.8A to the Financial Services Law.[61] Overall, such reform would facilitate clearer communication of policy objectives, increase adaptivity of the legislative framework, and help to reduce compliance costs.

Employee share schemes

9.35 The ESS reforms provide another example of how the existing legislative framework makes it difficult to integrate new policy initiatives. An ESS is an arrangement that can reward and incentivise employees of a business by granting employees shares, or other financial products or services, in exchange for their labour.[62] The ESS regime was introduced within Part 7.12 Div 1A of the *Corporations Act* to provide regulatory relief from provisions of Chapter 7 of the Act.[63]

9.36 Like the CCIV regime, the ESS regime contains many provisions that create exemptions from the operation of Chapter 7 of the *Corporations Act*. However, its placement within Chapter 7 creates some structural complexity. The ESS regime is located within Part 7.12 of the Act, which is headed 'Miscellaneous'. This makes the ESS regime harder to find as the heading is arguably too general to be intuitive, although this is partly compensated for by the heading of Division 1A ('Employee share schemes'). By making the regime harder to locate, its existence and potential policy benefits may be obscured.

9.37 The use of notional amendments to modify the regime has also added complexity and exacerbated the costs of compliance. As ASIC has the power to make exemptions and modifications via legislative instrument,[64] the text of the primary legislation cannot be relied upon without reference to possible notional amendments that may be in force. For example, ASIC enacted a legislative instrument a few months after the ESS regime was introduced to resolve unintended technical consequences of the primary legislation.[65] The instrument modified several provisions within Part 7.12 Div 1A of the *Corporations Act*.

9.38 If implemented, the reformed legislative framework would help to reduce the legislative complexity produced by policy initiatives that provide regulatory relief, such as the ESS reforms. This could be achieved by placing exclusions and exemptions within the Scoping Order, and prescriptive detail in rules. Doing so would mean that changes to exemptions could occur within the Scoping Order.

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60 For example, much prescriptive detail contained within ss 944B(5)–(7) of the *Corporations Act*, which provides an extensive list of content requirements for a TMD, could potentially be located in rules so as to leave the core obligation to prepare a TMD less cluttered.

61 See **Recommendations 41** and **42**.

62 Explanatory Memorandum, Treasury Laws Amendment (Cost of Living Support and Other Measures) Bill 2022 (Cth) [4.3].

63 Ibid [4.9], [10.19].

64 *Corporations Act 2001* (Cth) s 1100ZK.

65 *ASIC Corporations (Employee Share Schemes) Instrument 2022/1021* (Cth); Australian Securities and Investments Commission, 'ASIC provides legislative relief to facilitate employee share schemes' (Media Release 22-370MR, 20 December 2022).

This would make it easier to identify where such amendments would be placed, provide flexibility when changes need to occur, and render notional amendments unnecessary. Further, the remainder of Part 7.12 Div 1A of the *Corporations Act* could be relocated within the recommended Financial Services Law so as to have a more intuitive and identifiable home.

A legislative framework designed for policy change

9.39 Due to the increasing pace and scope of policy developments,[66] it is important to have an adaptive legislative framework that accommodates future policy initiatives. The first section below considers recent developments that provide examples of possible policy initiatives in the future. These examples demonstrate that the increasing pace and scale of policy developments appears likely to continue. It also examines international policy developments as an increasingly important factor likely to influence future policy change. The final section shows how implementing the ALRC's recommendations could help to produce an adaptive legislative framework for accommodating policy change, such as in relation to financial advice and BNPL reforms.

The pace and scale of future policy developments

9.40 **Figure 9.1** above shows an upward trend in policy developments since 2010. Treasury is currently conducting a number of reviews and consultations that may result in the implementation of policy initiatives within corporations, financial services, and credit legislation. A brief outline of the range of work that Treasury is undertaking demonstrates that the upward trend shown in **Figure 9.1** is likely to continue.

9.41 Some of the developments which may result in future policy initiatives include:

- the regulation of crypto assets;[67]
- a review of managed investment schemes,[68] including consideration of the distinction between wholesale and retail clients (which may have implications beyond managed investment schemes);[69]

66 See above [9.8]–[9.13].

67 Department of Treasury (Cth), *Regulating Digital Asset Platforms* (n 33); Department of Treasury (Cth), *Token Mapping* (n 29); Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022).

68 Department of Treasury (Cth), *Review of the Regulatory Framework for Managed Investment Schemes* (Consultation Paper, August 2023).

69 Ibid 14. In Interim Report A, the ALRC sought stakeholder feedback on potential amendments to simplify ss 761G and 761GA of the *Corporations Act* in respect of the definition of 'retail client' and the 'sophisticated investor' exception (Questions A16 and A17). In light of stakeholder feedback, as well as the ongoing consultations relating to the regulation of managed investment schemes and financial advice, the ALRC has not formalised Questions A16 and A17 as recommendations. For discussion of feedback in response to Questions A16 and A17, see Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [189]–[214].

- consideration of climate-related disclosure requirements;[70]
- development of a sustainable finance strategy;[71]
- expansion of the Consumer Data Right regime;[72]
- consideration of the policy implications of screen scraping;[73]
- reforms to Australia's payment systems;[74]
- a review of policy responses to de-banking;[75]
- consultation on draft legislation to provide licensing exemptions for foreign financial services providers;[76]
- reform of the financial advice regime;[77] and
- the regulation of BNPL arrangements.[78]

9.42 Potential reforms to the regulation of financial advice and BNPL arrangements are discussed in more detail below.[79]

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70 Department of Treasury (Cth), *Climate-Related Financial Disclosure* (Consultation Paper, December 2022); Department of Treasury (Cth), *Climate-Related Financial Disclosure* (Consultation Paper, June 2023).

71 While the development of a sustainable finance strategy has not yet been formalised, there is indication that Treasury could release a consultation paper later this year: The Hon Dr Jim Chalmers MP, Address to the Australian Sustainable Finance Institute (Speech, Sydney, 12 December 2022) <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/speeches/address-australian-sustainable-finance-institute-sydney>.

72 There have been multiple consultations relating to the Consumer Data Right regime: see, eg, Department of Treasury (Cth), 'Consumer Data Right Rules – Expansion to the Telecommunications Sector and Other Operational Enhancements' <www.treasury.gov.au/consultation/c2022-315575>; Department of Treasury (Cth), 'Consumer Data Right Rules and Data Standards Design Paper for Non-Bank Lending Sector' <www.treasury.gov.au/consultation/c2022-341682>; Department of Treasury (Cth), 'Consumer Data Right Rules – Expansion to the Non-Bank Lending Sector' <www.treasury.gov.au/consultation/c2023-434434-expansion>.

73 Department of the Treasury (Cth), *Screen Scraping: Policy and Regulatory Implications* (Discussion Paper, August 2023).

74 Department of the Treasury (Cth), *Payments System Review: From System to Ecosystem* (Report, June 2021); Department of Treasury (Cth), 'Reforms to the Payment Systems (Regulation) Act 1998 – Exposure Draft Legislation' <www.treasury.gov.au/consultations/c2023-452114>.

75 Council of Financial Regulators, *Potential Policy Responses to De-Banking in Australia* (Report, August 2022); Commonwealth of Australia, *Government Response: Potential Policy Responses to De-Banking in Australia* (June 2023).

76 Department of Treasury (Cth), 'Licensing Exemptions for Foreign Financial Services Providers' <www.treasury.gov.au/consultation/c2023-430917>.

77 Michelle Levy, *Quality of Advice Review* (Final Report, 2023). See also commentary on the emergence of robo-advice and the potential issues in the existing legislative framework when applied to robo-advice: Zofia Bednarz and Kayleen Manwaring, 'Insurance, Artificial Intelligence and Big Data: Can Provisions of Ch 7 of the *Corporations Act* Help Address Regulatory Challenges Brought About by New Technologies?' (2021) 36 *Australian Journal of Corporate Law* 216; Jeannie Marie Paterson, 'Making Robo-Advisers Careful? Duties of Care in Providing Automated Financial Advice to Consumers' (2021) 15(3–4) *Law and Financial Markets Review* 278.

78 Department of Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (Options Paper, November 2022); The Hon Stephen Jones MP, 'Address to the Responsible Lending and Borrowing Summit' (Speech, Responsible Lending and Borrowing Summit, Sydney, 22 May 2023) <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit>.

79 See below [9.55]–[9.61].

9.43 The drivers of policy change (discussed above) continue to contribute to the accelerating pace and scale of policy developments.[80] For example, interest in regulation of BNPL and crypto assets has arisen in response to systemic concerns about consumer harm. The existing legislative framework is also struggling to accommodate these new business practices and evolving technology, raising regulatory challenges. For example, questions arise as to the extent to which the current AFSL regime is adequate for crypto asset regulation,[81] and whether there is sufficient certainty for determining when a particular crypto asset constitutes a financial product or service within the meaning of the *Corporations Act*.[82]

International developments affecting policy change

9.44 International developments increasingly contribute to the pace and scale of policy developments in Australia.[83] Due to the globalised nature of financial markets, future Australian policy initiatives are likely to be informed by international developments.

9.45 Many of the evolving challenges that were raised above have international dimensions due to the influence of the internet and increasing digitisation of financial services, products, and business methods. For example, robo-advice, BNPL, and crypto assets are all services or products that operate digitally and across multiple jurisdictions. The CCIV regime also illustrates a recent policy initiative that has been implemented for consistency with international business practices and to facilitate foreign investment.[84]

9.46 It is important, then, for the financial services legislative framework to be adaptive to accommodate potential policy change that may be driven by international developments.

Principles-based and outcomes-based regulation

9.47 Consistent with the findings of this Inquiry, Treasury has previously identified a high level of prescription in financial services legislation as a significant cause of unnecessary complexity, and suggested a more principles-based approach to legislation.[85] International developments in the UK, South Africa, and New Zealand

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80 See above [9.14]–[9.25].

81 Treasury is currently seeking feedback on its proposal to regulate crypto exchanges by including them within the AFSL regime: Department of Treasury (Cth), *Regulating Digital Asset Platforms* (n 33).

82 For further discussion on the regulatory challenges of crypto assets, see Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022) [105]–[127].

83 This is in addition to systemic issues, shifts in policy philosophies, and evolving technology and business practices: see above [9.14]–[9.25].

84 Explanatory Memorandum, Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (Cth) [1.14], [1.17], [1.22].

85 See, eg, Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Undated). See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.109].

signal a broader trend towards more principles- and outcomes-based regulation for financial services. Notable examples in the UK include the 'Treating Customers Fairly' ('TCF') regime[86] and the recently introduced 'Consumer Duty'.[87] These international developments have the potential to influence the direction of future policy reform in Australia.

9.48 The UK Consumer Duty is articulated in Principle 12 of the FCA Handbook and states that 'a firm must act to deliver good outcomes for retail customers'.[88] To aid compliance, this high level standard is supplemented by rules and guidance 'that explain how firms should act to deliver good outcomes'.[89] The Consumer Duty commenced operation in relation to new and existing products or services on 31 July 2023 and will come into force for closed products and services on 31 July 2024.[90] The Consumer Duty was introduced partly in response to feedback that the TCF regime was not sufficiently focused on outcomes for consumers of financial products and recipients of financial services.[91] There are some limits on the Consumer Duty's scope of application. However, where the Consumer Duty does not apply, Principle 6 (which comprises the TCF regime) will apply.[92]

9.49 In some respects, the UK Consumer Duty represents an evolution of the TCF regime. The TCF regime was implemented by the Financial Services Authority (UK) in 2006.[93] The TCF regime is a principles- and outcomes-based regulatory regime that encompasses the overarching principle of 'treating customers fairly'.[94] When it was introduced, the TCF regime attempted to depart from the rigidity and complexity

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86 While the ALRC has treated reforms of this nature as a policy development, and therefore outside existing policy settings, Howell and others argue that the current policy settings of financial services legislation may be compatible with implementing a TCF regime: see Nicola Howell et al, 'The Case for a "Treating Customers Fairly" Regime in Australia: Evidence from Other Jurisdictions and a Customer Survey' (2023) 30 *Competition and Consumer Law Journal* (forthcoming), 19–21.

87 Financial Conduct Authority (UK), *FCA Handbook*, Principle 12, PRIN 2A <www.handbook.fca.org.uk/>.

88 Ibid Principle 12.

89 Financial Conduct Authority (UK), *Final Non-Handbook Guidance for Firms on the Consumer Duty* (Finalised Guidance No FG22/5, July 2022) [1.3]. For the applicable rules, see Financial Conduct Authority (UK), *FCA Handbook* (n 87) PRIN 2A.

90 Financial Conduct Authority (UK), *A New Consumer Duty: Feedback to CP21/36 and Final Rules* (Policy Statement No PS22/9, July 2022) [1.57]. A closed product is defined in the glossary of the FCA Handbook as 'a product: (1) where there are existing contracts with retail customers entered into before 31 July 2023; and (2) which is not marketed or distributed to retail customers (including by way of renewal) on or after 31 July 2023'.

91 Andy Schmulow et al, *Treating Customers Fairly. A Concept. A Framework. An Alternative?* (Submission, 27 July 2023) 10 <www.alrc.gov.au/wp-content/uploads/2023/09/Consumer-Experiences-in-Financial-Services-Results.pdf>. During the Inquiry, the ALRC and consumer advocacy group CHOICE commissioned survey research of consumer understandings and experiences with financial services and the legislative framework for their regulation. This submission contains the findings of that research, conducted by the submission's authors, and related analysis. Both the ALRC and CHOICE contributed funding and assisted in formulating the questions asked of participants in the survey.

92 Financial Conduct Authority (UK), *FCA Handbook* (n 87) PRIN 2A.1.18.

93 Financial Services Authority (UK), *Treating Customers Fairly — Towards Fair Outcomes for Consumers* (Report, July 2006). The Financial Services Authority (UK) is now the FCA (UK).

94 Ibid 3–5.

of the previously prescriptive financial services legislation in the UK.[95] The stated goal was to adopt a flexible approach to regulation, where firms are responsible for determining 'how they will ensure that they treat customers fairly, in the context in which they operate'.[96] Like the UK Consumer Duty, these high level standards are supplemented by 'detailed rules and guidance'.[97] While there is 'significant overlap' between the UK Consumer Duty and the TCF regime, the FCA (UK) considers the Consumer Duty to impose 'a higher and more exacting standard of conduct'.[98]

9.50 Since its implementation in the UK, the TCF regime has influenced regulatory approaches in other jurisdictions.[99] In 2011, South Africa implemented a similar TCF regime for financial services regulation.[100] The New Zealand Government has also committed to implementing a new sub-part 6A into the *Financial Markets Conduct Act 2013* (NZ) which will include a 'fair conduct principle', akin to the TCF regime.[101]

9.51 The potential adoption of a more principles- or outcomes-based approach to regulation, such as the TCF regime, highlights how implementing the reformed legislative framework for financial services regulation recommended by the ALRC could facilitate such policy developments in Australia.[102] The reformed legislative framework would do this by more effectively separating high-level principles and obligations from prescriptive detail compared to the existing legislative framework.[103] In the case of the TCF regime, the principle of treating customers fairly, and core outcomes, would be prioritised within the Financial Services Law in primary legislation.[104] The reformed legislative framework could aid navigability and retain flexibility by capturing any necessary prescriptive detail in a thematic rulebook.[105] Adjustments to the regime could be made through this instrument rather than adding complexity to the framework through tools like notional amendments.[106]

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95 Andromachi Georgosouli, 'The FSA's "Treating Customers Fairly" (TCF) Initiative: What Is So Good About It and Why It May Not Work' (2011) 38(3) *Journal of Law and Society* 405, 408–11.

96 Howell et al (n 86) 5.

97 Financial Services Authority (UK) (n 93) 5; Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 217, 229.

98 Financial Conduct Authority (UK), *A New Consumer Duty: Feedback to CP21/36 and Final Rules* (n 90) [4.15].

99 For an in-depth comparison between the UK, South African and New Zealand TCF regimes, see Schmulow et al (n 91).

100 Financial Services Board (South Africa), *Treating Customers Fairly: The Roadmap* (Paper, 31 March 2011).

101 Schmulow et al (n 91) 15. The new sub-part 6A of the *Financial Markets Conduct Act 2013* (NZ) will come into force in 2025.

102 See also Howell et al (n 86).

103 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

104 Ibid [2.15].

105 Ibid [2.43].

106 For further discussion of how the ALRC's recommendations may facilitate implementing a policy development like the TCF regime, see Howell et al (n 86) 19–21.

Designing an adaptive legislative framework

9.52 The likelihood that policy developments will continue apace and at a large scale emphasises the importance of a legislative framework able to accommodate future policy initiatives.[107] Such a legislative framework should make it as easy as possible to identify policy objectives, be adaptive to change, and be as navigable possible. These features facilitate the ability to review when and how legislation may be amended, extended, or modified to implement a potential policy initiative.

9.53 Implementing the ALRC's recommendations would help to produce a legislative framework that is more adaptive, efficient, and navigable than the existing framework. In particular, the reformed legislative framework would better accommodate future policy initiatives by:

- restructuring and reframing financial services legislation to provide a more coherent structure that can adapt to change in the future;[108]
- reforming the legislative hierarchy to increase navigability and comprehensibility;[109] and
- making definitions easier to find and understand.[110]

9.54 Two areas of potential policy development help to illustrate this point.

Financial advice reforms

9.55 Financial advice is an area of potential policy development in the future. For example, several policy initiatives may emerge from the recent Quality of Advice Review and the Australian Government's further consultation in response.[111]

9.56 At present, provisions relating to financial advice are scattered throughout Chapter 7 of the *Corporations Act* without having a logical and coherent home.[112] Implementing **Recommendations 38** and **41** so as to restructure and reframe those

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107 See, eg, Insurance Council of Australia, *Submission 52*.

108 See **Recommendations 24**, **31–42**.

109 See **Recommendations 25**, **43–47**.

110 See **Recommendations 27–28**.

111 Levy (n 77); The Hon Stephen Jones MP, 'Delivering better financial outcomes: roadmap for financial advice reform' (Media Release, 13 June 2023) <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/delivering-better-financial-outcomes-roadmap-financial>. In Interim Report A, the ALRC made three proposals relating to the definition of 'financial product advice' (Proposals A13–A15) and sought stakeholder feedback concerning amendments to the 'best interests' duty in s 961B of the *Corporations Act* (Question A24). In light of recommendations made by the Quality of Advice Review, the ongoing consultation relating to financial advice provisions, and the improvements that would be effected by implementing **Recommendation 38**, the ALRC has not formalised Proposals A13–A15 and Question A24 as recommendations. For discussion of Proposals A13–A15 and Question A24, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [11.43]–[11.82], [13.138]–[13.155]. For a summary of stakeholder feedback in response, see Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [173]–[188], [259]–[268].

112 See, eg, Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [4.7]–[4.21].

provisions alongside the ALRC's recommended legislative model would provide a better foundation for undertaking policy reform. For example, the restructured and reframed provisions would make it easier to identify the key objectives and norms of behaviour relating to financial advice. This would make the legislation more amenable to implementing recommendations concerning the provision of good advice, for example, as contemplated by the Quality of Advice Review.[113] Problems in the current legislative framework would continue to make identifying key objectives and norms difficult, even if the objective of providing good advice were adopted.

9.57 Restructuring and reframing financial advice provisions may also make them more adaptive to changes in technology and business practices. For example, robo-advice has the potential to increase access to financial advice due to its convenience and lower costs.[114] Advances in data analysis, particularly 'big data' and machine learning, have the potential to increase the sophistication of robo-advice,[115] with implications for the quality of financial advice that is given to consumers. However, unnecessary complexity in the existing legislative framework may present a barrier to innovation in respect of robo-advice and prevent new firms from entering the market.[116] A legislative framework that is more adaptive and makes it easier to implement clear policy objectives may better facilitate innovation so that consumers could benefit from more accessible financial advice. An adaptive framework would also enable any future policy developments in relation to robo-advice if bespoke regulation were necessary.

9.58 As discussed in **Chapter 7** of this Report, the ALRC's reform roadmap envisages that the reformed legislative framework could be implemented alongside policy reforms to financial advice within Pillar Six of the reform roadmap (policy-evolving provisions).

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113 Levy (n 77) rec 4. The Quality of Advice Review made a number of recommendations, including, for example: removal of the general advice warning requirement (Recommendation 2), amending the statutory best interests duty (Recommendation 5), and introducing a requirement that consent must be given to be treated as a wholesale client (Recommendation 11).

114 Australian Securities and Investments Commission, *Providing Digital Financial Product Advice to Retail Clients* (Regulatory Guide 255, August 2016) [RG 255.3]; Wolf-Georg Ringe and Christopher Ruof, 'Robo Advice — Legal and Regulatory Challenges' in Iris HY Chiu and Gudula Deipenbrock (eds), *Routledge Handbook of Financial Technology and Law* (Routledge, 2021) 193, 193; Aurelio Gurrea-Martinez and Wai Yee Wan, 'The Promises and Perils of Robo-Advisers: Challenges and Regulatory Responses' (Research Paper No 2021/11, SMU Centre for AI and Data Governance, 2021) 3.

115 Bednarz and Manwaring (n 77) 219–21; Ringe and Ruof (n 114) 204–5. While 'big data' may be difficult to define, it is often used as a 'catch-all label for a wide selection of data': Rob Kitchen and Gavin McArdle, 'What Makes Big Data, Big Data? Exploring the Ontological Characteristics of 26 Datasets' (2016) 3(1) *Big Data and Society* 1, 2. Many define 'big data' as encompassing the characteristics of high volume, high velocity, and high variety: Bednarz and Manwaring (n 77) 219.

116 Professor Ringe and Christopher Ruof, for example, discuss how unnecessary legislative complexity is a barrier to the innovation of robo-advice: Ringe and Ruof (n 114) 209–10. See also **Chapter 2** of this Report.

BNPL reforms

9.59 A reformed legislative hierarchy and implementation of clear definitional principles should also provide a useful framework for policy change relating to innovation at the margins of existing regulation. BNPL arrangements provide an example.

9.60 BNPL arrangements 'allow consumers to buy and receive goods and services immediately from a merchant, and repay a [BNPL] provider over time'.[117] It is difficult to regulate BNPL arrangements under the current legislative framework as they can fall outside of legislation such as the *NCCP Act*.[118] The Australian Government has committed to an initiative that would extend the *NCCP Act* so that it captures BNPL arrangements.[119]

9.61 As details of this future policy initiative develop, the ALRC's recommendations may be applied to credit legislation to make it more adaptive and therefore amenable to policy change. For example, BNPL arrangements are a diverse and evolving area, so it may prove challenging to insert a definition of BNPL arrangements to bring them within the scope of the *NCCP Act*. A definition that is too narrow and detailed may be unsuitable, causing evolving BNPL service providers to fall outside of the *NCCP Act*. A wide definition would allow flexibility, but if exclusions and exemptions were to be introduced without a coherent legislative hierarchy, then unnecessary complexity may accrue over time. This is where the ALRC's recommended legislative model could provide the requisite flexibility while minimising unnecessary legislative complexity.

117 Australian Securities and Investments Commission, *Buy Now Pay Later: An Industry Update* (n 29) 3.

118 BNPL arrangements generally fall outside the scope of s 5 of the *National Credit Code* or within the exclusion in s 6(5) of the *National Credit Code*.

119 Jones (n 78).

10. Data and Legislative Complexity

Contents

Introduction

10.1 This chapter explains the ALRC's novel, data-driven approach to analysing legislation. This has not been a merely intellectual exercise. Data analysis has been critical in helping the ALRC to navigate and understand the existing legislative framework. It has also helped the ALRC to consider the consequences of recommended reforms.

10.2 To ensure that the benefits of legislative data analysis can be realised more broadly, the ALRC recommends that the Australian Government publish legislative data through a legislative data framework (referred to throughout this chapter as the 'data framework'). This chapter explains how the data framework, and the methods that underpin it, could bring a range of benefits to those affected by corporations and financial services legislation, including regulated persons, government, and regulators. The data framework would be capable of expansion to all Commonwealth legislation.

10.3 This chapter also describes the legislative complexity framework that the ALRC has used in this Inquiry to identify and measure legislative complexity (referred to throughout this chapter as the 'complexity framework'). The complexity framework complements the data framework, and this chapter explains how the complexity framework could be applied when developing future legislative reforms and to help identify potential legislative complexity.

10.4 This chapter proceeds in four parts. The first part contextualises the ALRC's approach to data and legislative complexity, and explains how data analysis has benefited this Inquiry. The second part explains how the recommended data framework would extend the benefits of data analysis to others, including users of legislation. The third part explains the ALRC's complexity framework. The final part argues that the ALRC's analysis of complexity in this Inquiry underscores the need for a greater focus on managing legislative complexity. Managing complexity requires both proactively confronting unnecessary complexity and helping users cope with necessary legislative complexity.

Context

10.5 There is increasing recognition among scholars, firms, and government of the role that data and metrics can play in enhancing the visibility, navigability, and comprehensibility of regulatory and legislative frameworks.[1] The NSW Government, for example, recently launched a data-driven website to support users of NSW legislation.[2] The website helps people navigate features of legislation, such as legislative definitions and cross-references, and to identify Ministers responsible for Acts and instruments.

10.6 Importantly for this Inquiry, data can help identify and respond to legislative complexity. As Dr Ruhl and Professor Katz argue, 'monitoring legal system complexity' through data-driven methods can 'provide real-time assessments of how complex a legal system is and whether relative complexity is increasing or decreasing'.[3] They note that 'extreme shifts in these metrics could raise red flags'.[4]

10.7 In addition to enhancing visibility and comprehensibility, data and metrics can also support systems of accountability. The Financial System and Regulator Metrics Framework, developed for use by the Financial Regulator Accountability Authority ('FRAA'), provides one example.[5] Legislative data and metrics could assist with tracking the development and complexity of corporations and financial services legislation, and provide a basis for stakeholders and the public at large to consider the performance of government when legislating in this area.

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1 The ALRC has previously reviewed this literature in relation to measuring legislative complexity: Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021). See, eg, Patrick A McLaughlin et al, 'Is Dodd-Frank the Biggest Law Ever?' (2021) 7(1) *Journal of Financial Regulation* 149; Bernhard Waltl and Florian Matthes, 'Towards Measures of Complexity: Applying Structural and Linguistic Metrics to German Laws' in Rinke Hoekstra (ed), *Legal Knowledge and Information Systems* (IOS Press, 2014) 153. 'Metrics' are defined as quantitative measures for the purposes of the ALRC's work, though such measures may result from qualitative analyses (such as to classify the subject matter of notional amendments).

2 NSW Data Analytics Centre, *NSW Government Legislation Twin* <https://legislationtwin.dac.nsw.gov.au>.

3 JB Ruhl and Daniel M Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191, 231–2.

4 Ibid 232.

5 Financial Regulator Assessment Authority, *Draft Financial System and Regulator Metrics Framework* (Consultation Paper, June 2023).

Limited data to support navigability and understanding

10.8 At the commencement of this Inquiry, the ALRC identified very limited empirical data on Australia's corporations and financial services legislation. The most common available metric was the length of the *Corporations Act*, in words or pages. There was little to no data relating to definitions, delegated legislation, legislative powers, offences and penalties, cross-references, or the design of provisions (such as parts and sections).

10.9 This absence of data reflects a broader lack of visibility of legislation in Australia. For example, there was no complete and easily accessible catalogue of in-force legislative instruments made under the *Corporations Act*,[6] let alone under other corporations and financial services Acts. Neither were there any comprehensive lists of powers to make delegated legislation, offence provisions, or defined terms. There was also no visibility as to which delegated legislative powers had been used, were not currently in use, or had never been used. Data that could support a basic understanding of the existing legislative framework, track its development over time, and identify sources of complexity, was lacking.

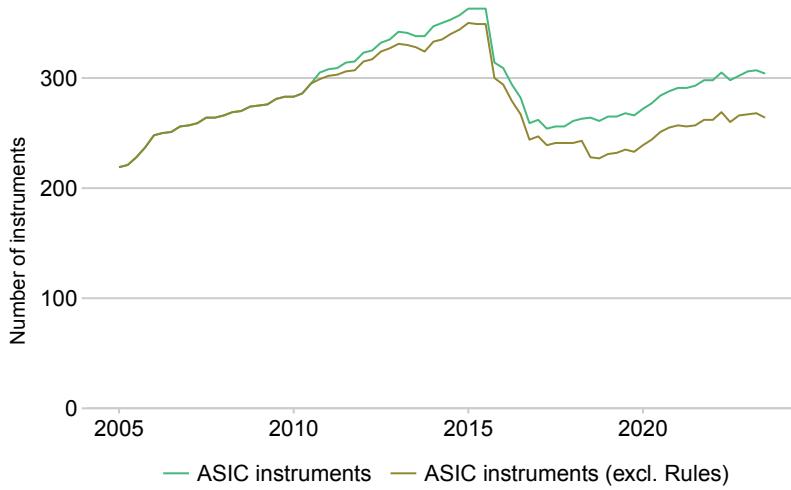
10.10 In 2020–21, the ALRC reviewed previous work relating to legislative data, including international literature on the topic.[7] Simultaneously, the ALRC obtained data on all Commonwealth Acts and legislative instruments, as well as UK and New Zealand legislation relating to corporations and financial services. In total, the ALRC collected the text of over 140,000 legislative texts covering more than 9.8 million pages. The ALRC then undertook computational analyses, supported by targeted manual analysis, to derive a range of data from these texts. This data allowed the ALRC to track the development of legislation over time and understand the current design of corporations and financial services legislation.

10.11 The ALRC also obtained extensive metadata on each legislative text, such as the responsible government department, start and end dates, and the type of legislation (Act, regulation, or other legislative instrument). **Figure 10.1** below exemplifies the novel insights generated through the use of data. The Figure illustrates how the ALRC was able to use data to identify and navigate over 1,500 principal (as opposed to amending) ASIC legislative instruments in force over time, including by examining those that were in force at any particular time. Understanding the proliferation of legislative instruments has been an important element of this Inquiry.

6 The list of instruments made under the *Corporations Act* on the Federal Register of Legislation includes non-legislative instruments and instruments that are no longer in force. A user must click through hundreds of links to identify all in-force legislative instruments.

7 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).

Figure 10.1: ASIC legislative instruments in force over time[8]



10.12 Legislative data and computational methods allowed the ALRC to map and navigate the vast body of corporations and financial services legislation more easily. Using data, the ALRC was also able to compare the *Corporations Act* to other Commonwealth Acts and conclude that the *Corporations Act* is notable in its proliferation of legislative instruments.[9]

The benefits of data for this Inquiry

10.13 Legislative data and its computational analysis have made this Inquiry more efficient to conduct and provided the ALRC with novel insights into corporations and financial services legislation.[10]

10.14 For example, Interim Report A related to the use and design of definitions in legislation. The ALRC was able to computationally analyse its database of legislative texts to identify all defined terms in Commonwealth legislation and examine their use.

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8 This Figure shows the number of instruments in force on the first day of each quarter (for example, 1 January 2021, 1 April 2021 etc). A large number of legislative instruments were registered on the Federal Register of Legislation in 2005. The drop in legislative instruments during 2015 came principally because of instruments sunsetting ten years after their registration in 2005. ASIC consolidated some sunsetting legislative instruments, so the total page length of ASIC legislative instruments remained largely the same and grew in subsequent years.

9 As at 1 July 2023, the *Corporations Act* had directly or indirectly authorised the creation of 416 in-force legislative instruments (including instruments made by ASIC and other persons), ranking it fourth among more than 1,200 principal (as opposed to amending) Commonwealth Acts for the number of authorised legislative instruments.

10 In Interim Report A, the ALRC sought stakeholder input relating to the types of data that would benefit this Inquiry (Question A1). For a summary of the responses to Question A1, see Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [11]–[18].

This made it possible to see where and how defined terms were used. The ALRC therefore did not need to manually piece together the dozens of definitional provisions in the *Corporations Act* to identify its 1,349 definitions of 1,077 unique terms.[11] Data also enabled the ALRC to review over 100 compilations of the *Corporations Act* to track how defined terms were used over time.[12]

10.15 The use of data and computational analysis helped the ALRC to identify unused defined terms that could be repealed. The data also allowed the ALRC to compare the use of defined terms in the *Corporations Act* to other Commonwealth Acts.[13] The ALRC was able to conclude that relative to its size, the *Corporations Act* does not have an unusual number of defined terms,[14] but that their use relative to the number of words in the Act is remarkable.[15] The ALRC created a database of how many times each defined term was used in the *Corporations Act.* This was provided to Treasury to help implement the ALRC's recommendations relating to definitions.[16]

10.16 Similarly, the ALRC has computationally analysed the text of ASIC legislative instruments to identify those that contain notional amendments, a process that would otherwise have been resource-intensive. The ALRC was able to analyse these instruments to create a database of over 1,200 notional amendments, which helped to identify over 500 notional amendments that could be consolidated into the text of the legislation they notionally amend.[17] The ALRC's data also indicates that the *Corporations Act* is exceptional in its use of notional amendments, a finding that has been critical in shaping the ALRC's recommendations to replace notional amendments as a law-making tool.

10.17 The ALRC used its data-driven methods to identify redundant provisions in legislation. The ALRC did this by writing a program that found all references to dates and repealed Acts or provisions.[18] These were used as indicators for redundancy, which were then confirmed through manual analysis. The ALRC discovered over 100 redundant provisions in corporations and financial services legislation.[19]

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11 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.92]. Some terms have multiple definitions.
12 Ibid [3.95].
13 Ibid [3.93]–[3.94].
14 Ibid [3.93].
15 Ibid [3.94].
16 Legislation implementing ALRC recommendations has subsequently repealed a range of unused definitions and created a single glossary of defined terms: see *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Cth). See also **Chapter 1** of this Report.
17 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.24]–[8.25].
18 Ibid [7.9].
19 Ibid [7.4]–[7.9].

10.18 The ALRC also used computational approaches to help identify offences in primary and delegated legislation (across thousands of legislative instruments),[20] then manually reviewed those provisions for duplication and over-particularisation. Such data would be helpful for compliance, and in helping government consider existing civil penalties and offences when undertaking policy initiatives.

10.19 Overall, using a 'law as data' approach in this Inquiry has brought multiple benefits. It has most obviously helped to highlight why reform is necessary by identifying features of the *Corporations Act* and its existing legislative framework that are exceptional relative to other Commonwealth legislation. It has also empirically confirmed stakeholders' anecdotal experiences of the *Corporations Act*. More practically, legislative data has allowed the ALRC to navigate and understand the existing legislative framework in ways that could benefit a range of other stakeholders, including regulated persons and government.

A legislative data framework

Recommendation 58 The Australian Government should establish a publicly available data framework for monitoring the development of corporations and financial services legislation. At a minimum, this framework should track:

a. principal primary and delegated legislation in force and enacted annually, including with respect to the number of Acts and legislative instruments and their length in pages and words;

b. offence, civil penalty, and infringement notice provisions in force and enacted annually;

c. notional amendments in force and enacted annually, and the provisions and legislation affected by these notional amendments;

d. powers to make regulations and other legislative instruments in force and enacted annually, and the number of times the powers have been exercised; and

e. regulatory guidance in force and published annually by the Australian Securities and Investments Commission.

10.20 **Recommendation 58** is directed at ensuring that the types of legislative data generated by the ALRC are made available into the future. The data framework has three principal purposes:

- to provide resources that help stakeholders navigate and understand corporations and financial services legislation;
- to help government administer and reform the legislation, including to more proactively address legislative complexity; and

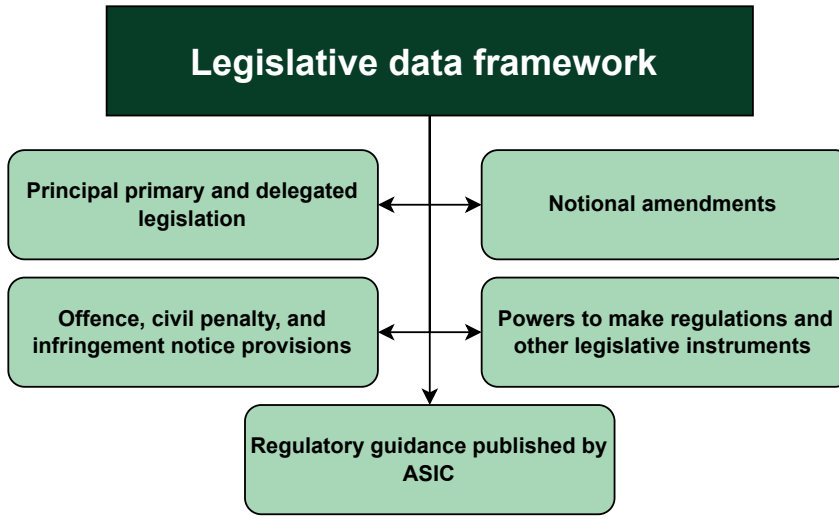
20 Ibid [6.59], [6.62]–[6.69].

- to allow the legislation to be monitored over time and for stakeholders to hold government accountable for the legislation's development over time.

10.21 The specific data suggested in **Recommendation 58** would provide a foundation for the data framework and, as discussed below, would help users of the legislation navigate and understand several key features of it. The data framework could also facilitate the development of regulatory technology (commonly referred to as 'RegTech') and other technological solutions to aid compliance. The ALRC has already demonstrated that the data covered by **Recommendation 58** is capable of collection, having used the same data during this Inquiry and published much of it on the ALRC DataHub.[21] The vast majority of the ALRC's data collection and publication was performed by the equivalent of less than one full-time staff member and with modest computing resources. This demonstrates that **Recommendation 58** could be implemented without significant expenditure or resourcing.

10.22 **Figure 10.2** below summarises the scope of the data framework.

Figure 10.2: Scope of the legislative data framework



Helping users of legislation

10.23 Non-legislative materials, such as the recommended navigability resources discussed in Interim Report B, can support users in navigating corporations and financial services legislation.[22] Legislative data can also help users navigate and

21 The DataHub includes data on all principal primary and delegated legislation in force and enacted annually, including the number of Acts and legislative instruments and their length in pages and words: Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.

22 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) rec 19, [9.4]–[9.17].

understand the legislation. In particular, legislative data could reduce some of the compliance costs discussed in **Chapter 2** of this Report. For example, it could help non-lawyers, such as directors, shareholders, and investors, to better understand their legal position without professional assistance. Similarly, it could reduce the time and resources that professional advisers spend on assembling the disparate legislation affecting their clients, thereby reducing the costs of advice. Fundamentally, by making the law easier to find and understand, legislative data furthers the rule of law requirement that laws should be clear and 'knowable'.

10.24 The ability to quickly identify all legislative instruments made under corporations and financial services legislation is foundational to a navigable legislative framework and the rule of law. This is because overlooking any one instrument may significantly affect how users understand the law. At present, users face a laborious process of analysing potentially hundreds of webpages on the Federal Register of Legislation, or visiting the numerous websites of financial services law-makers such as ASIC, APRA, the Australian Accounting Standards Board, and the Auditing and Assurance Standards Board (a process that would still not produce an exhaustive list).

10.25 Similarly, offences and civil penalties are critical features of corporations and financial services legislation, yet often remain difficult to find. Several stakeholders in consultations have observed that while the *Corporations Act* has a list of offences in Sch 3, it is not exhaustive. Other relevant legislation has no equivalent to Sch 3. Exhaustively identifying offences and civil penalties in legislation like the *Corporations Regulations*, *ASIC Act*, and *NCCP Act* is therefore arduous. As discussed in Interim Report B, legislative data on offences and penalties can be enhanced to include annotations as to who the provisions affect and the associated penalties.[23] The ALRC has repeatedly demonstrated the feasibility of this work, publishing extensive data on offences and civil penalties in this Inquiry and in its Review of Corporate Criminal Responsibility.[24]

10.26 For so long as notional amendments remain part of the existing legislative framework, making them more visible is important to enhancing navigability and comprehensibility. The ALRC's 2022 database of notional amendments included over 1,200 distinct amendments to hundreds of provisions of the *Corporations Act* and *Corporations Regulations*.[25] If such a table was published and maintained by government or ASIC, then users of the legislation would not have to piece together these notional amendments themselves. The same kind of table would also support users of the legislation in identifying where legislative powers have been exercised, eliminating the need to review the hundreds of legislative instruments made under the *Corporations Act*. Stakeholders' positive responses to the ALRC's database of

23 Ibid [9.14].
24 Australian Law Reform Commission, *Corporate Criminal Responsibility: Data Appendices* (2020).
25 Australian Law Reform Commission, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022).

ASIC legislative instruments demonstrates the benefit of identifying whether and how legislative powers are exercised.[26]

10.27 Importantly, the legislative data covered by **Recommendation 58** could be used to build other tools that enhance the navigability of corporations and financial services legislation. For example, the NSW Legislation Twin website presents legislative data in an interactive and 'intuitive interface'.[27] This illustrates how government or private providers may use legislative data to create interactive websites or software that allows people to understand the relationship between different pieces of legislation. For example, a website may allow users to search for whether certain powers have been exercised and produce a graph visualising instruments authorised by the power. The legislative data covered by **Recommendation 58** is foundational for creating or enhancing technological solutions that help users of legislation navigate and understand the legislative framework.[28]

10.28 The need for legislative data to enhance navigability and comprehension is particularly acute in corporations and financial services legislation. This legislation is spread across hundreds of separate Acts and legislative instruments, which are often difficult to exhaustively identify, and all of which are interconnected. Certain law design choices, such as using notional amendments and extensive regulations, presently make corporations and financial services legislation particularly difficult to navigate without further resources. Accordingly, it would be appropriate for government to play a leading role in enhancing the navigability of corporations and financial services legislation.

Supporting government and regulators

10.29 Government and regulators, as administrators and regular users of legislation, would also benefit from legislative data. This would particularly be the case for government as it seeks to make policy and legislate with respect to corporations and financial services.[29] The use and analysis of legislative data should make legislating easier, while also producing higher quality legislation.

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26 Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/wp-content/uploads/2021/09/ASIC-made-legislative-instruments-Qualitative-30-June-2021.xlsx>. This included data on all in-force ASIC legislative instruments and the provision under which the instrument is made, as well as various other information on each legislative instrument.

27 'NSW Government Legislation Twin', *Data.NSW* <https://data.nsw.gov.au/blog/nsw-government-legislation-twin>.

28 More detail on these technological solutions, and other forms of additional resources that would be facilitated by **Recommendation 58**, is available in Interim Report B: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [9.14]–[9.17].

29 See also **Chapter 9** of this Report, which discusses the accelerating pace and scope of policy developments in corporations and financial services legislation.

10.30 For example, the ALRC has shown how failing to identify notional amendments when amending primary legislation has produced errors.[30] Managing the stock of notional amendments is a challenge for Treasury and ASIC, and can result in errors or inconsistencies among Acts and instruments. This reduces the overall quality of legislation and increases complexity. Data relating to notional amendments would help in this respect, as would increasing the visibility of all corporations and financial services legislative instruments. Data relating to legislative powers generally would help government understand whether and how they are exercised. Legislative data would also support government in considering the need for consequential amendments when enacting legislation, and to identify whether existing legislative powers, offences, and other penalties are sufficient or necessary.

10.31 The data framework in **Recommendation 58** could more generally help government embed technology-assisted approaches to law reform. Throughout this Inquiry, the ALRC has published or shared various data to help with implementing Inquiry recommendations. This has included identifying unused legislative powers and defined terms, quantifying the use of every defined term in the *Corporations Act*, and finding relevant legislative instruments and provisions of the *Corporations Regulations* that use the terms 'retail client' and 'wholesale client'. The ALRC has easily produced this data using technology-assisted methods. As discussed above, these would otherwise be laborious processes. Implementing **Recommendation 58** could substantially enhance Treasury's ability to use technology-assisted approaches to law reform, making its work more efficient while producing data that aids higher quality law-making. For example, the ALRC DataHub contains a database of all cross-references between Commonwealth Acts, which would help in understanding potential policy implications and consequential amendments when undertaking legislative reform.[31]

10.32 As discussed further below, legislative data could also support Treasury in its regulatory stewardship role.[32] Legislative data could help Treasury more proactively address complexity, such as by preventing the build-up of what Professor Cooper describes as 'legislative detritus'.[33] For example, the data framework and the methods that underpin it could be used to periodically identify and address the following causes of unnecessary complexity:

- unused defined terms, which includes definitions that no longer apply, or are unnecessary;

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30 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.36] (Example 6.3).

31 Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.

32 The Australian Government has stated its commitment to regulatory stewardship, both with respect to corporations and financial services legislation and more generally: see, eg, Revised Explanatory Memorandum, Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 1; Department of Finance (Cth), 'Regulatory Stewardship', *Regulatory Reform* <www.regulatoryreform.gov.au/priorities/regulatory-stewardship>.

33 Graeme S Cooper, 'Fixing the Defective Jigsaw' (2021) 45(1) *Melbourne University Law Review* 362, 365.

- spent and redundant legislation and provisions,[34] including redundant declarative provisions, cross-references to repealed provisions, and redundant transitional provisions;[35]
- terms that are defined multiple times, which could be consolidated to achieve consistency;[36]
- outdated notes and references;[37] and
- notional amendments of general application that could be replaced with amendments to the text of the legislation.[38]

10.33 The ALRC has obtained all of the above data in this Inquiry and has used it to inform recommendations aimed at reducing legislative complexity.

Promoting accountability

10.34 A further purpose of the data framework is to enhance visibility of the evolution and complexity of corporations and financial services legislation. This would support greater law-making accountability, including by making it easier to track and assess legislative developments over time. It would also help to sustain the imperative for reform where issues such as proliferating notional amendments or legislative instruments remain unaddressed.

10.35 The data framework would complement the FRAA's proposed Financial System and Regulator Metrics Framework, which excludes metrics that go to the 'adequacy of the law' or the potential need for law reform.[39] The data framework could provide the basis for accountability dashboards that track changes in the volume of legislation, regulatory guidance, notional amendments, unused legislative powers, offences, and other penalties. Taken together, the outputs of both the Financial System and Regulatory Metrics Framework and the data framework could provide a more holistic assessment of the regulatory landscape.

10.36 To further enhance accountability, the data framework could be usefully complemented by a framework for understanding legislative complexity, such as that developed by the ALRC in this Inquiry and described below.[40] This can help direct attention to the areas of legislation that are potentially most complex and in need of reform. These areas can then be made visible and tracked by the data framework.

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34 See Recommendations 13–15.
35 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.4]–[7.8].
36 See **Recommendations 27** and **28**.
37 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.16]–[7.17].
38 Ibid rec 18, [8.24]–[8.28].
39 Financial Regulator Assessment Authority (n 5) 7.
40 See below [10.42]–[10.67].

Expanding the data framework

10.37 This Inquiry has also demonstrated how additional, more sophisticated data could enrich the data framework over time to help users better navigate and understand the legislative framework, and to monitor complexity within it. Data could be added to the data framework over time, such as monitoring defined terms and the proportion of all words in an Act that are potentially subject to a definition. The ALRC has obtained this data during this Inquiry.

10.38 As the data framework develops, it could also be used to obtain more granular data like that obtained for Interim Report A. That data focused on gaining greater visibility and understanding of specific legislative provisions, such as parts and sections, to identify particularly complex provisions. For example, the ALRC created datasets in which each row was a chapter, part, or section of the *Corporations Act*.[41] This allowed the ALRC to identify provisions that were potentially complex because, for example, they have a high number of defined terms or were structurally intricate. This granular approach would assist law-making because government could identify the sections across Commonwealth legislation that use certain defined terms and cross-references for which consequential amendments may be necessary.

10.39 Much of the data described in this chapter could be more easily obtained over time if government enhanced its use of technology in publishing legislation, such as by adopting extensible markup language (commonly referred to as 'XML'). Publication of legislation in XML would allow definitions, offences, civil penalties, legislative powers, cross-references, and notional amendments to be 'marked-up' in text, which could then be computationally recognised.[42] The ALRC's experience in analysing UK, United States, and New Zealand legislation, which is all published in XML, suggests that it is substantially easier to treat like data. The ALRC has recommended that the Australian Government consider publishing Commonwealth legislation in XML.[43]

10.40 Finally, the data framework could be extended in the future to all Commonwealth legislation. This would support broader navigability and understanding of the Commonwealth statute book, particularly by giving users visibility of all offences, civil penalties, and legislative powers across Acts and legislative instruments. Comprehensive legislative data could also assist the Senate Standing Committee for the Scrutiny of Bills and the Delegated Legislation Scrutiny Committee in monitoring developments in areas subject to frequent amendment (such as migration and tax law).

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41 Australian Law Reform Commission, 'Legislative Data' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

42 For further discussion of XML in legislative drafting, see **Chapter 8** of this Report.

43 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.92]–[6.106]. See also Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) rec 6.3.

10.41 Were the data framework to be extended, it may be desirable for each government department to obtain and analyse data on the legislation for which it is responsible. This would put each department in the best position to use that data in their law-making processes and in administering relevant legislation. However, data should be made available to the public through a single source. The Department of Finance (Cth) is responsible for 'whole of government data and digital policy coordination'[44] and could therefore work with departments to provide a single repository for legislative data. A complementary approach, which may realise some efficiencies, could be for a single agency or body to collect the data and coordinate its use with departments across government.

A legislative complexity framework

10.42 A core task of this Inquiry has been to simplify and rationalise the law relating to corporations and financial services.[45] The ALRC was also tasked with considering how legislative complexity can be appropriately managed over time. Simplifying and rationalising the law, and attempting to manage legislative complexity, has necessitated a deeper understanding of the legislative features that can make legislation more or less complex. The concept of 'complexity' is therefore of central importance to this Inquiry, and specifically the concept of 'legislative complexity'.

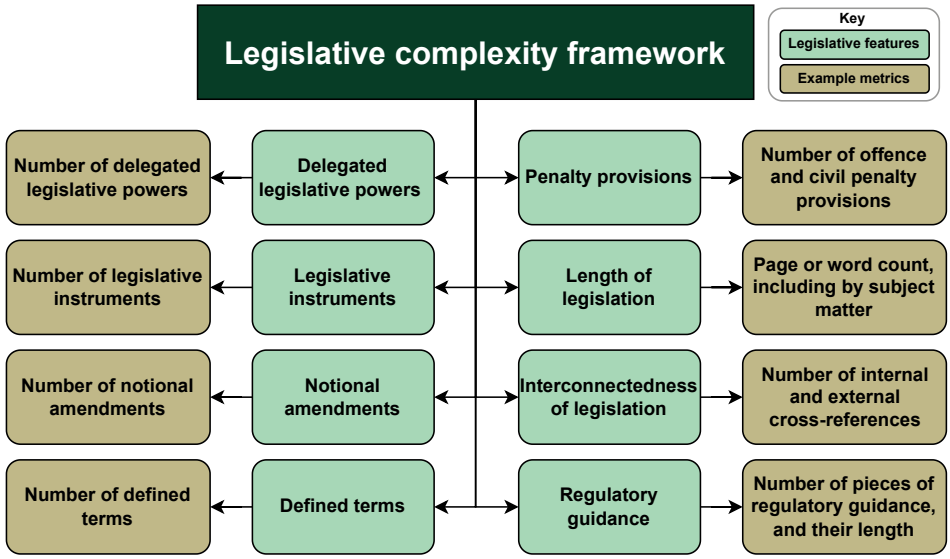
10.43 This Inquiry was established following the Financial Services Royal Commission's finding that corporations and financial services legislation is unnecessarily complex. The Financial Services Royal Commission concluded that 'industry, community groups and regulators agreed the current law is too complex'.[46] In dozens of submissions to this Inquiry, stakeholders have suggested that the existing level of complexity is excessive and unnecessary, and that the legislative framework is in need of simplification.[47] As one submission put it, 'the complexity is obvious to everyone'.[48]

44 *Administrative Arrangements Order - 14/10/2022* (Cth) sch pt 7.
45 See the **Terms of Reference**.
46 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494.
47 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [5], [14]–[41].
48 G Elkington, *Submission 20*.

10.44 Yet, as discussed above, the ALRC found only limited research and empirical data on legislative complexity in Australia,[49] including in relation to identifying and measuring complexity. The ALRC has therefore developed an analytical framework in relation to legislative complexity.

10.45 In particular, the data-driven analysis discussed above has informed the ALRC's approach to identifying and measuring legislative complexity across the three Interim Reports published for this Inquiry. In developing its analysis, the ALRC has come to create a distinct and novel framework for identifying and measuring legislative complexity. **Figure 10.3** below provides a summary of the ALRC's complexity framework, including the principal legislative features on which it is focused. The Figure shows examples of the kind of metrics that can be used to measure each legislative feature. The examples are relatively simple, and the ALRC has often used more detailed and nuanced metrics, such as the number of notional amendments by scope of application and subject matter, as well as the number of legislative instruments by authorising Act provision and scope of application. The framework in **Figure 10.3** is explained in subsequent sections of this chapter.

Figure 10.3: The ALRC's legislative complexity framework



49 Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35(2) *Australian Journal of Corporate Law* 142. Professor Bottomley subsequently published a further article on the topic: Stephen Bottomley, 'The Complexity of Corporate Law' (2022) 44(3) *Sydney Law Review* 415. See also Andrew Godwin and Rosemary Teele Langford, 'Corporations, Financial Services and Charities: Regulatory Complexity and Coherence' [2023] *Australian Journal of Corporate Law* (forthcoming) which draws on Bottomley's articles and examines the relationship between complexity and coherence. There is a substantial and growing international literature on legal complexity: see the citations in Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).

10.46 The complexity framework has allowed the ALRC to demonstrate that corporations and financial services legislation is among the most complex on the Commonwealth statute book. Much of the complexity affecting corporations and financial services legislation is unnecessary. As a result, there is substantial scope for simplifying the legislation, within existing policy settings, so that it is easier to navigate and understand.

Conceptual underpinnings of the complexity framework

10.47 Two concepts are important to the ALRC's complexity framework:

- **Legislative features** refer to characteristics of legislation that can make it more or less complex. Examples include defined terms, exemptions, and a legislative text's language and length. Some legislative features are present in all pieces of legislation (for example, length), whereas others are only present in some (for example, cross-references). All legislative features have some potential benefit, and the question is whether the benefit outweighs the disadvantage caused by the complexity of the feature, or whether there is another feature that can achieve the same benefit in a less complex way.
- **Metrics** refer to quantitative measures of a legislative feature. For example, metrics relevant to definitions in a legislative text may include the number of defined terms and the number of times they are used in the text. Metrics relevant to delegated legislative powers and legislative instruments would include the number of individual legislative instruments, which could be broken down further by maker and scope of these instruments (that is, the classes of person they affect).

What is legislative complexity?

10.48 A further critical concept is that of 'legislative complexity'. In summary, the ALRC suggests that legislative complexity should be characterised as the ease (or lack thereof) with which users can navigate and understand a legislative text, such as an Act or piece of delegated legislation. The complexity of a legislative text is determined by its legislative features.

10.49 The complexity of one legislative text is often dependent on the complexity of other legislation. For example, the *Corporations Act* makes extensive reference to matters being prescribed in 'regulations'. The ease with which the *Corporations Regulations* can be navigated and understood will affect the complexity of the *Corporations Act*. Individual legislative texts can therefore form part of a broader 'legislative framework' composed of all the Acts, regulations, and other legislative instruments that must be understood to comprehend a legislative text. The ALRC's focus in this Inquiry has been on the existing legislative framework for corporations and financial services, composed principally of the *Corporations Act*, *ASIC Act*, and their associated delegated legislation.

10.50 The above conception of legislative complexity accords with OPC and AGD guidance relating to legislative complexity, though neither offers an explicit definition of the term. OPC's guidance focuses on reducing the complexity of legislative texts, such as through better structure and avoiding complicated drafting.[50] OPC also recognises how the complexity of one text can be affected by the design of other texts. For example, OPC suggests that 'putting detail in the wrong place' can be a cause of complexity, and that some material can be better located in delegated legislation.[51] Similarly, the AGD guidance discusses legislative complexity in the context of particular legislative texts and emphasises 'the clarity and accessibility of laws'.[52]

10.51 Complexity can also take on other, broader meanings in the context of the legal system. For example, Emeritus Professor Bottomley has discussed the complexity of the 'corporate law system', in which he includes financial services laws.[53] His analysis moves beyond the complexity of particular legislative texts and emphasises the benefits of a 'non-legal perspective' towards complexity.[54] This includes looking at complexity as not 'solely the product of technical or procedural issues'.[55] Similarly, the ALRC has previously explored how 'complexity' has a technical meaning in complexity theory,[56] which has (in some cases) been carried across into legal analysis.[57] For example, Bottomley's work on corporate law draws from scholars of complexity theory.[58] In the tradition of complexity theory, he looks at 'system' complexity.[59] His resulting definition of complexity is therefore substantially different to that offered by the ALRC above.[60]

10.52 The ALRC has not used 'complexity theory' in relation to documents, such as legislative texts. The ALRC's complexity framework is instead directed at identifying and analysing important legislative features that may affect legislative complexity.

Necessary and unnecessary legislative complexity

10.53 Before discussing the ALRC's approach to understanding and measuring legislative complexity, it is important to acknowledge that legislative complexity is not inherently harmful or undesirable. As Emeritus Professor Schuck argues, 'simpler is

50 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [36]–[40], [63]–[71].
51 Ibid [72]–[77].
52 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014) 1.
53 Bottomley, 'The Complexity of Corporate Law' (n 49) 418.
54 Ibid.
55 Ibid.
56 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [55]–[63].
57 Roger Jacobs, 'Legislation in a Complex and Complicated World' [2017] (3) *The Loophole* 19.
58 Bottomley, 'The Complexity of Corporate Law' (n 49) 419–20.
59 Ibid 420–2.
60 Ibid 422–5.

not always better'.[61] Complex rules can 'be tailored to acts more precisely, thereby allowing better control of behaviour'.[62] Moreover, many potentially complex features of legislation, such as prescriptive rules, indeterminate language, and defined terms, can be used to produce simpler or more flexible legislation in which meaning is clearer and legal obligations are more certain.

10.54 Given this context, almost all legislation will likely be 'complex' to some degree.[63] The challenge for law-makers is to mitigate unnecessary (or avoidable) complexity, as distinct from necessary (or unavoidable) complexity. Necessary complexity is that which is required to achieve the desired outcomes of the legislation. Unnecessary complexity is that which is not essential to achieve those outcomes.[64] In other words, legislative design should reduce unnecessary complexity and therefore make legislation as easy to navigate and understand as possible.[65] Thus,

> the question of complexity is really a question of necessity. Given a society and a set of normative preferences, how much complexity in the means is necessary to achieve law's desired ends?[66]

10.55 The ALRC uses the term 'simplification' to refer to the process of reducing complexity to its necessary core, which includes improving legislation 'in the linguistic and structural sense' and making it 'simpler in the content or conceptual sense'.[67]

The foundation of the complexity framework

10.56 Any analysis of legislative complexity requires a theory of what makes legislation more or less complex. A theory of legislative complexity needs a clear articulation of 'what attributes and variables' affect legislative complexity.[68]

10.57 The theoretical foundation of the ALRC's complexity framework is comprised of a series of assumptions about the legislative features that make legislation complex. These assumptions are open to revision, but the ALRC has provided evidence for each during this Inquiry. The ALRC assumes the following legislative features affect legislative complexity:

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61 Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42(1) *Duke Law Journal* 1, 8.

62 Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11(1) *Journal of Law, Economics, and Organization* 150, 150.

63 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [21].

64 See also ibid [23]–[25].

65 As discussed in **Chapter 4** of this Report, the ALRC has identified this as the overarching objective of legislative design.

66 Daniel M Katz and Michael J Bommarito II, 'Measuring the Complexity of the Law: The United States Code' (2014) 22(4) *Artificial Intelligence Law* 337, 339.

67 Binh Tran-Nam and Chris Evans, 'Towards the Development of a Tax System Complexity Index' (2014) 35(3) *Fiscal Studies* 341, 346–7. See also Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [26].

68 Ruhl and Katz (n 3) 194.

- **Proliferating delegated legislative powers and a large number of legislative instruments** can increase complexity by creating a legislative maze.[69] Users of the legislation must check whether each power has been exercised, and this latter task is made increasingly difficult as the number of legislative instruments grows.
- **Notional amendments (also known as modifications)** are not apparent on the face of legislation, yet they have the same legal effect as textually amending the legislation. They are inherently complex and one of the greatest sources of incoherence affecting Australian legislation, undermining the transparency and accessibility of legislation. [70] Internationally, notional amendments are highly unusual.[71]
- **Detailed and overlapping offences and civil penalty provisions** can increase legislative complexity and make compliance less likely.[72] The increasing number of penalty provisions demands particular focus on effective legislative design, so that fundamental norms and obligations are not lost in a thicket of prescriptive offence, civil penalty, or infringement notice provisions.
- **The creation and use of defined terms** can add to legislative complexity, or reduce it when designed effectively and used appropriately.[73] For example, OPC notes that a 'large number of concepts within a single scheme can be difficult for a reader to bear in mind and can therefore lead to complexity'.[74] Similarly, defining terms that have an ordinary meaning may produce confusion.
- **Long legislation**, and particularly long provisions such as sections, parts, and chapters, can make legislation harder to follow.[75] Excessively long legislation can also be a sign of structural incoherence or over-prescription.[76]
- **The interconnectedness of legislation** refers to the extent to which the operation of one provision depends on information contained in another. These interconnections can be internal (cross-references to provisions in

69 See **Chapter 2** of this Report. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.116]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.40]–[6.48].

70 See **Chapter 4** of this Report. See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.24]–[8.28]; Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296.

71 Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1, 2.

72 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.64]–[5.75]; Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 46) 496.

73 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [121]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.19]–[4.28].

74 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [41].

75 Ibid [8]–[11], [27]–[31].

76 Ibid [8]–[11].

the same legislation) or external (cross-references to provisions in other legislation). More interconnected legislation can create a complex web in which provisions make little sense without extensive regard to information contained in cross-referenced provisions.

- **A significant volume of regulatory guidance** is arguably both a source and a symptom of complexity in the law. It leads to complexity because it adds another layer of material that regulated entities have to consider and weigh up against other sources of rules.[77] On the other hand, effective regulatory guidance can help users of legislation deal with necessary complexity, including in relation to complex or highly technical subject matters.[78]

10.58 The ALRC has also previously noted additional legislative features that could be assumed to affect legislative complexity, such as conditional statements, structural elements, obligations, and language.[79]

Measuring legislative complexity

10.59 Approaches to identifying and understanding legislative complexity have traditionally focused on qualitative analysis,[80] perhaps reflecting the methods generally used in doctrinal approaches to legal analysis.[81] Such qualitative analyses can be conducted through case studies of potentially complex areas of the law, close reading of legislative provisions, analyses of case law, and stakeholder feedback. For example, scholars may look at how specific provisions can create complexity.[82]

10.60 The ALRC has extensively used qualitative analysis during this Inquiry to analyse legislative complexity. However, the ALRC has also made novel use of data and metrics in analysing the complexity of corporations and financial services legislation. The ALRC has produced and visualised data on the number and use of defined terms in corporations and financial services legislation, the volume of delegated legislation produced by regulators, the number of notional amendments affecting the *Corporations Act*, and numerous other metrics identified in the ALRC's Background Paper FSL2.[83] The ALRC has demonstrated how these metrics can help in measuring the complexity of corporations and financial services legislation, both at a point in time and historically.

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77 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.159]–[3.161].

78 See, eg, Australian Securities and Investments Commission, *Guidance on ASIC Market Integrity Rules for Participants of Futures Markets* (Regulatory Guide 266, August 2022).

79 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.29]–[3.32].

80 Waltl and Matthes (n 1) 155.

81 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 116.

82 See, for example, the discussion of §§ 117(m) and 305 of the US Code in Sidney I Roberts et al, 'A Report on Complexity and the Income Tax' (1972) 27(3) *Tax Law Review* 325, 338–40.

83 See Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).

10.61 In helping guide the use of legislative data to identify and track legislative complexity, the complexity framework would complement the data framework described by **Recommendation 58**. The complexity framework could help stakeholders interpret the legislative data, such as understanding the significant complexity that notional amendments and proliferating legislative powers and legislative instruments can produce. It would also support accountability, allowing stakeholders to identify and interrogate in more detail potentially complex developments (such as new notional amendments, offences, or defined terms). The complexity framework can therefore help measure the implications of any proposed amendments in terms of reducing (or increasing) legislative complexity.

10.62 The use of the data framework in combination with the complexity framework also allows comparisons between legislation, which help illuminate where complexity may be unnecessary.[84] For example, the ALRC has used the complexity framework to compare corporations and financial services delegated legislation to other Commonwealth delegated legislation,[85] and to compare different types of regulator-made legislation.[86] This analysis suggested that the *Corporations Act* represents the 'worst of both worlds' — long primary legislation accompanied by extensive delegated legislation.[87] However, contrary to some stakeholder views about excessive use of delegated legislation, the ALRC concluded that the *Corporations Act* uses an unremarkable volume of delegated legislation.[88] Complexity is principally produced by the ways in which delegated legislation is used and designed, rather than its volume alone.

10.63 Overall, adopting the complexity framework would help interpret legislative data so as to identify, and therefore address, complexity in corporations and financial services legislation into the future.

A note on using metrics

10.64 In Interim Report A, the ALRC suggested that a framework could be developed that measures the total complexity of an Act by taking into account different metrics of complexity and weighting those inputs accordingly.[89] This would create a single numerical value for the complexity of an Act, which could be compared to the score for another Act. Such a 'complexity index' had previously been proposed in relation to specific areas of legislation.[90] The ALRC has determined that it would

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84 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.51]–[3.54].

85 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.15].

86 Ibid [6.17].

87 Ibid [6.12].

88 Ibid [6.16].

89 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.31].

90 Gareth Jones et al, *Developing a Tax Complexity Index for the UK* (Office of Tax Simplification, 2014) <www.gov.uk/government/publications/developing-a-tax-complexity-index-for-the-uk>; Tran-Nam and Evans (n 67).

be neither appropriate nor desirable to proceed with developing a single score for measuring the complexity of Commonwealth Acts. A single score risks becoming a performance target, and such a score could have undesirable effects on legislating. As Donald T Campbell notes,

> the more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.[91]

10.65 Moreover, a single complexity score for an Act would collapse any distinction between necessary and unnecessary legislative complexity by removing any nuance from the individual metrics. For example, defined terms can be necessary forms of legislative complexity that clarify meaning, but such context would be lost when merging the number of defined terms into a single, weighted complexity score.

10.66 It would instead be preferable to use each individual metric in a more nuanced and contextual way, considering, for example, how a particular Act may need to use delegated legislation or defined terms given its subject matter and potential policy demands (such as for legislative flexibility).

10.67 The fact that different Acts will have distinct legislative design needs also means that metrics should generally not be regarded as targets. There is no 'correct' amount of particular legislative features for a particular Act or set of provisions. The only exception to this rule is notional amendments, which should be eliminated as far as possible. There are simpler approaches to law-making that can be used to achieve the same goals.

Managing legislative complexity

10.68 The ALRC's conclusions in relation to the growing complexity of corporations and financial services legislation, and legislation more broadly, suggest that there should be a greater focus by government on managing legislative complexity. This part discusses the ways in which unnecessary legislative complexity can be reduced, while noting the importance of helping users better cope with necessary complexity in the legislative framework for corporations and financial services.

Confronting legislative complexity

10.69 A risk when administering legislation as large and rapidly evolving as the *Corporations Act* and *Corporations Regulations* is to focus on new amendments (the 'flow' of legislation) at the expense of updating existing provisions (the 'stock' of legislation). While the ALRC's recommended legislative model would substantially reduce the complexity of the existing legislative framework, maintenance of any reformed framework would be critical to managing legislative complexity into the future. This section explains ways in which complexity can be better managed in

91 Quoted in Jerry Z Muller, *The Tyranny of Metrics* (Princeton University Press, 2018) 19.

the stock of legislation, and how greater emphasis on effective law-making processes can reduce the risk of creating unnecessary complexity.

10.70 The ALRC's findings in this Inquiry suggest that legislative maintenance and law-making processes have proven inadequate in managing legislative complexity. For example, the ALRC has identified multiple instances of 'legislative detritus'.[92] In Interim Report B, the ALRC identified over 100 spent provisions and cross-references to repealed provisions in corporations and financial services legislation.[93] Such provisions not only contribute to the excessive length of the legislation but give rise to a risk that legislation will be less accurate and have associated maintenance costs.[94] In Interim Report A, the ALRC identified defined terms that are not used in legislation.[95] Similarly, the ALRC identified dozens of longstanding notional amendments in delegated legislation, many in effect for more than 15 years, that could be consolidated into the provisions they notionally amend.[96]

10.71 These examples highlight the need to proactively reduce complexity and ensure that law-making processes minimise the risk of creating unnecessary complexity in the future. This could be achieved through using the data framework and complexity framework, ensuring regulators and government departments continue to have appropriate organisational capacity, incorporating longer legislative development periods, and placing greater emphasis on a 'stewardship mindset'.

Embracing a 'stewardship mindset'

10.72 Alongside specific measures for preventing future unnecessary complexity, the ALRC suggests greater emphasis on a 'stewardship mindset' when designing and maintaining legislative frameworks. Legislative stewardship is key to ensuring the longevity of a robust legislative framework that prevents the accretion of complexity over time. As set out in Interim Report B, legislative stewardship involves

> a long-term commitment to the quality, accessibility, and navigability of legislation by bodies who create and administer Acts and legislative instruments.[97]

10.73 While regulatory stewardship is emphasised by both Treasury and the Australian Government more generally,[98] the ALRC's Inquiry suggests that existing stewardship efforts may be insufficient in their resourcing and therefore intensity.

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92 Cooper (n 33) 365.

93 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.5].

94 Ibid.

95 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [11.100].

96 Australian Law Reform Commission, *Recommendation 18 — Notional amendments note* (Interim Report B — Additional Resources, September 2022) 3–6 (Appendix A).

97 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [9.6].

98 See Department of the Treasury (Cth), 'Improving Corporations and Financial Services Law' <www.treasury.gov.au/consultation/c2022-310544>.

In particular, stewardship could be enhanced to better emphasise the proactive management of unnecessary complexity in the stock of existing legislation.

10.74 Treasury already operates various legislative maintenance and law improvement programs that seek to improve the quality of Treasury-administered legislation. In addition to being better resourced, these could be more directly aimed at addressing unnecessary complexity beyond redundant provisions or legislative errors. For example, the ALRC has identified a range of complex provisions that could be addressed through legislative maintenance, such as provisions relating to the prescribing of forms and other documents, infringement notices and civil penalties, and conditional exemptions.[99]

10.75 It would also be helpful, consistent with a stewardship mindset, to more frequently consider ways to address complexity when undertaking policy-oriented reform. For example, the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth) demonstrates how unnecessary legislative complexity can be addressed alongside policy-oriented efforts to simplify regulatory obligations. Schedule 1 to the Act aims to increase the technology neutrality of Treasury-administered legislation. In achieving this policy objective, the amendments will simultaneously simplify the Act. They do this by introducing principled obligations to replace excessive prescription, such as by creating principles-based publication requirements that replace obligations to publish in a newspaper.[100] They also increase consistency among provisions, such as by providing that all 'documents under the *Corporations Act* can be signed or executed electronically'.[101]

10.76 Other recommendations made in this Report seek to facilitate a stewardship mindset that proactively identifies and reduces unnecessary complexity. These recommendations include requirements for sunsetting legislative instruments and periodic reviews of the legislative framework.[102]

10.77 One further way to embed a stewardship mindset across the Australian Government would be to incorporate it within legislation. For example, New Zealand legislation provides that one of the principles of the New Zealand Public Service is to promote 'stewardship' of the legislation administered by government agencies.[103] Similarly, the legislated objective of the New Zealand Parliamentary Counsel Office is to 'promote high-quality legislation that is easy to find, use, and understand and, to that end, to exercise stewardship of New Zealand's legislation as a whole'.[104] Equivalent Australian legislation does not expressly suggest a stewardship role for

99 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.4]–[8.6].

100 See, eg, *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth) sch 1 pt 1 item 56, pt 4.

101 Revised Explanatory Memorandum, Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 [1.8].

102 See **Recommendations 52** and **55**.

103 *Public Service Act 2020* (NZ) s 12(e).

104 *Legislation Act 2019* (NZ) s 129.

the Australian Public Service or OPC.[105] The Australian Government has committed to incorporating the concept of 'stewardship' in the *Public Service Act 1999* (Cth), alongside developing 'a framework to implement a stewardship approach to managing Australian Government regulatory systems'.[106]

Law-making processes

10.78 The ALRC has previously discussed in detail potential issues in law-making processes. In particular, compressed timeframes for legislative design and drafting may be a cause of unnecessary complexity.[107] Insufficient time for drafting, review, and consultation can create avoidable drafting errors in legislation. It can also produce inflexible legislation, which may limit the options available later in the legislative development process.[108] Wherever possible, the legislative design process should incorporate longer consultation periods and provide sufficient time to draft, review, and incorporate the results of consultation processes.

10.79 The complexity and prescription of the *Corporations Act* means even measures developed over a longer period may be subject to problems.[109] The ALRC's recommendations aim to reduce the complexity of corporations and financial services legislation, and should therefore reduce the likelihood of legislative problems if sufficient time is left available. However, it could be that greater organisational capacity is required to legislate in the context of the *Corporations Act*. Good organisational capacity means having resources such as technical expertise and information, and the ability to deploy them appropriately.[110]

10.80 In particular, the ALRC's recommendations for scoping orders and rules would require a different approach to legislating compared to existing delegated legislative powers (such as exemption and notional amendment powers). As part of implementing the ALRC's recommendations, the Australian Government should ensure the Minister (assisted by Treasury) and ASIC have sufficient technical expertise and support to adapt their existing approaches. The data and complexity frameworks described above could help both Treasury and ASIC ensure that they have appropriate information to understand and legislate effectively within the legislative framework for corporations and financial services.

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105 See, eg, *Public Service Act 1999* (Cth) s 10; *Parliamentary Counsel Act 1970* (Cth) s 3.

106 See Public Service Amendment Bill 2023 (Cth) sch 1 item 2; Department of Finance (Cth) (n 32); Senator the Hon Katy Gallagher, Albanese Government's APS Reform Agenda (Speech, Institute of Public Administration Australia, Canberra, 13 October 2022) <https://ministers.pmc.gov.au/gallagher/2022/albanese-governments-aps-reform-agenda>.

107 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.52].

108 Ibid [6.52].

109 Ibid [6.56].

110 Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] (Spring) *Public Law* 63, 73–8.

10.81 Lastly, to the extent that compressed timeframes are unavoidable in some cases, technology-assisted law reform approaches like those described above could help government meet timeframes while still producing high quality legislation that minimises errors and addresses transitional issues.

Coping with legislative complexity

10.82 This section argues for a greater emphasis by government on helping users cope with any necessary complexity in the legislative framework for corporations and financial services. This is necessary because corporations and financial services are themselves inherently complex landscapes. As Bottomley notes, 'complexity in the corporate law system will not be eliminated'.[111] The financial services industry is constantly evolving and becoming increasingly complex.[112] Regulating this dynamic industry can involve difficult policy decisions that produce some degree of complexity in legislation. As discussed above in relation to necessary and unnecessary complexity, even if all the recommendations in this Report were to be accepted and implemented, there would remain a level of unavoidable complexity in the legislative framework.

10.83 Rather than attempting to remove all complexity from the legislative framework, the focus should be on improving the navigability of legislation and making it more 'user-friendly'.[113] This can be done in a variety of ways, including through effective legislative design and better use of technology.

Effective legislative design

10.84 Legislative design can help users of legislation cope with complexity. Applying the various working principles recommended by the ALRC would help in this respect, such as by helping users find relevant information and develop mental models that make it easier to find relevant legislation.[114] However, the *Corporations Act* could particularly help users cope with complexity through the use of aids to interpretation. The ALRC has written extensively about the potential uses of aids to interpretation.[115]

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111 Bottomley, 'The Complexity of Corporate Law' (n 49) 438.

112 See generally Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design — Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280.

113 See generally William Isdale and Nicholas Simoes da Silva, 'User-Friendly Legislation: Why We Need It, and How to Achieve It', *ALRC News* (19 January 2023) <www.alrc.gov.au/news/user-friendly-legislation/>; William Isdale and Christopher Ash, 'The Design of Everyday Law', *ALRC News* (25 November 2022) <www.alrc.gov.au/news/design-of-everyday-law/>.

114 See **Chapter 4** of this Report.

115 Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.88]–[9.103]; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [67]–[110]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44], [9.15]–[9.17].

10.85 A range of these aids can help manage necessary complexity. For example, well drafted objects clauses can help users comprehend the purpose of detailed legislation,[116] examples can assist to clarify the operation of a particular provision, and simplified outlines can help users to understand the structure of legislation and improve its navigability.

10.86 Perhaps most significantly for helping users cope with complexity, notes in primary legislation may be used to indicate when a provision has been affected by delegated legislation.[117] The ALRC's findings suggest that the need to understand the relationship between different pieces of legislation in the legislative hierarchy produces substantial complexity. Such complexity would not be entirely eliminated as users navigate the reformed legislative framework comprising primary legislation, a Scoping Order, and rulebooks. The prototype legislation in **Appendix E** to this Report illustrates how the Minister and ASIC may be given a power to insert editorial notes into the text of the *Corporations Act* to indicate that a provision has been affected by delegated legislation.[118] These notes could, for example, give at least the name of the relevant delegated legislation, thereby helping users to navigate the legislative hierarchy and the relationship between texts within it.

10.87 Defined terms could also be marked-up within the text of legislation,[119] acknowledging the fact that the *Corporations Act* has more than 1,000 defined terms that are very frequently used. Marking-up would provide a visual cue that alerts users to the existence of a defined term. As the ALRC has previously discussed, this marking-up could be expanded to include hyperlinks and hover boxes containing definitions.[120] Hyperlinking could also be used to help users navigate cross-references in legislation.

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116 See Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.96]–[9.100]. See also the example objects clause in s 1096 of the prototype legislation in **Appendix E**.

117 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [9.15]–[9.16].

118 See ss 1097(7) and 1098(7) of the prototype legislation in **Appendix E**. This power would not allow the Minister or ASIC to substantively change obligations or the text of provisions. Editorial notes would otherwise appear in the text of *Corporations Act* compilations on the Federal Register of Legislation in the same way as ordinary amendments, compiled as part of ongoing publication processes.

119 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.71]–[6.88]; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [126]–[132].

120 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.71]–[6.88]; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [126]–[132]. Hover boxes are a functionality whereby a box containing text appears when a cursor is placed (or 'hovers') above the linked term.

Better use of technology

10.88 As discussed in **Chapter 8** of this Report, effective use of technological solutions offers an important way in which users can be supported in coping with complexity in a reformed legislative framework.

10.89 The FCA Handbook exemplifies how technology can facilitate 'user-friendly' legislation.[121] The FCA Handbook is a modular, online resource which integrates legislative materials (such as regulator-made legal instruments, regulatory guidance, and evidential provisions) in one location. It also uses hyperlinks and marked-up defined terms. The FCA Handbook can be seen as an exemplar for using technology to improve navigability.

10.90 The ALRC has also identified ways in which other regulators enhance navigability through technological solutions. To repeat a small number of the examples noted in Interim Report B:

- The Australian Maritime Safety Authority ('AMSA') maintains an online index of all Marine Orders and exemptions created by AMSA. This index contains summaries of the instruments, including their effect and scope.
- The Australian Taxation Office ('ATO') maintains a searchable and categorised database of all instruments and documents generated by the ATO. This includes ATO law aids, public rulings, legislative instruments, practical compliance guidelines, and ATO interpretive decisions.
- The Civil Aviation Safety Authority maintains a database of the legislative and non-legislative instruments that it creates. The database is searchable by type of instrument, purpose, and the legislation. Each instrument is summarised in its effect and application.[122]

10.91 The current technical capabilities of the Federal Register of Legislation would limit attempts to use technology to enhance the publication of legislation on that website. However, the ALRC has recommended that ASIC publish additional freely available electronic materials designed to help users navigate the legislation it administers.[123] These efforts could use the data framework discussed above, which would help identify all relevant legislation that needed to be indexed, or could assist in finding all defined terms for marking-up. For example, ASIC could use the data produced by the data framework to create searchable databases of laws that ASIC administers. Such databases would enable the law to be better monitored by regulated persons and would enable users to navigate the legislative framework more easily.

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121 Financial Conduct Authority (UK), *FCA Handbook* <www.handbook.fca.org.uk/>.

122 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [9.10].

123 See Recommendation 19 and discussion of its implementation: ibid [9.4]–[9.10].

Appendix A
List of Consultations and Events (2020–23)

Consultees

Note that individuals are listed with the affiliation and title held at the time of consultation.

	Name	Consultee location
1	Law Council of Australia	Canberra
2	Law Division, Department of the Treasury (Cth)	Canberra
3	Emeritus Professor Peta Spender, Australian National University	Canberra
4	Emeritus Professor Stephen Bottomley, Australian National University	Canberra
5	Stephen Mason, King and Wood Mallesons	Canberra
6	Markets Group, Department of the Treasury (Cth)	Canberra
7	Office of Parliamentary Counsel (Cth)	Canberra
8	Emeritus Professor Kevin Davis AM, University of Melbourne	Melbourne
9	David Murray AO	Melbourne
10	Hon Kenneth Hayne AC KC	Melbourne
11	Financial Services Council	Various
12	Cate Heyworth-Smith KC, Barrister	Brisbane
13	Michael Hodge KC, Barrister	Brisbane
14	Melanie Hindman KC, Barrister	Brisbane
15	Matthew Brady KC, Barrister	Brisbane
16	Simon Cleary, Barrister	Brisbane
17	Steven Forrest, Barrister	Brisbane
18	Scott Seefeld, Barrister	Brisbane

	Name	Consultee location
19	Kate Slack, Barrister	Brisbane
20	Justin McDonnell, King and Wood Mallesons	Brisbane
21	John Kettle, McCullough Robertson	Brisbane
22	Jacqueline Wootton, Herbert Smith Freehills	Brisbane
23	Tim Wiedman, McCullough Robertson	Brisbane
24	Craig Wappett, Johnson Winter and Slattery	Brisbane
25	Peter Anderson, Corrs Chambers Westgarth	Brisbane
26	Brett Cook, Clayton Utz	Brisbane
27	Meredith Bennett, Ashurst	Brisbane
28	Michael Anastas, HWL Ebsworth	Brisbane
29	Ian Lockhart, MinterEllison	Brisbane
30	Laurence White, Barrister	Melbourne
31	Financial Counselling Australia	Various
32	Professor Ian Harper AO, University of Melbourne	Melbourne
33	Professor Carsten Murawski, University of Melbourne	Melbourne
34	Professor Elise Bant, University of Western Australia	Perth
35	Jacinta Dharmananda, University of Western Australia	Perth
36	Kanaga Dharmananda SC, Barrister	Perth
37	Joseph Longo, Herbert Smith Freehills	Perth
38	Andrew Shearwood, Dentons	Perth
39	Nicholas Creed, Allens	Perth
40	Barbara Gordon, University of Western Australia	Perth
41	Dr Radha Ivory, University of Queensland	Brisbane
42	Professor Nicole Gillespie, University of Queensland	Brisbane
43	Australian Securities and Investments Commission	Various
44	Professor Bryan Horrigan, Monash University	Melbourne
45	Dr Ann Wardrop, La Trobe University	Melbourne
46	Dr Michael Duffy, Monash University	Melbourne

	Name	Consultee location
47	David Court, Holley Nethercote	Melbourne
48	Daniel Knight, K and L Gates	Melbourne
49	Harry New, Hall and Wilcox	Melbourne
50	Professor Louis de Koker, La Trobe University	Melbourne
51	Ruth Overington, Herbert Smith Freehills	Melbourne
52	Penny Nikoloudis, Allens	Melbourne
53	Dr Steve Kourabas, Monash University	Melbourne
54	David Kreltszheim, Cornwalls	Melbourne
55	Yechiel Belfer, Baker McKenzie	Melbourne
56	Dr David Wishart, La Trobe University	Melbourne
57	Professor Paul Latimer, Swinburne University of Technology	Melbourne
58	Professor Jeannie Paterson, University of Melbourne	Melbourne
59	Helen Bird, Swinburne University of Technology	Melbourne
60	Associate Professor Rosemary Teele Langford, University of Melbourne	Melbourne
61	Dr George Gilligan, University of Melbourne	Melbourne
62	Emeritus Professor Ian Ramsay AO, University of Melbourne	Melbourne
63	Professor Jean du Plessis, Deakin University	Melbourne
64	Professor Jennifer Hill, Monash University	Melbourne
65	Dr Zehra Gulay Kavame Eroglu, Deakin University	Melbourne
66	Consumer Action Law Centre	Melbourne
67	Australian Financial Complaints Authority	Melbourne
68	Dr Beth Nosworthy, University of Adelaide	Adelaide
69	Professor Jennifer McKay AM, University of South Australia	Adelaide
70	Professor Roman Tomasic, University of South Australia	Adelaide
71	Associate Professor Sulette Lombard, University of South Australia	Adelaide
72	Associate Professor Vivienne Brand, Flinders University	Adelaide

	Name	Consultee location
73	Adam Cooper, Flinders Port Holdings	Adelaide
74	Jennifer Tobin, Epic Energy	Adelaide
75	Julia Dreosti, Lipman Karas	Adelaide
76	Kerry Morrow, Laity Morrow	Adelaide
77	Philip Laity, Laity Morrow	Adelaide
78	Marcus Clayton, Adbri Ltd	Adelaide
79	Richard Beissel, Cowell Clarke Commercial Lawyers	Adelaide
80	Kristy Zander, Lipman Karas	Adelaide
81	Kit Legal	Adelaide
82	Association of Financial Advisers	Various
83	Insurance Council of Australia	Sydney
84	Hon Justice Ashley Black, Supreme Court of New South Wales	Sydney
85	Ian Govey AM	Sydney
86	Australian Finance Industry Association	Brisbane
87	Hon Justice Steven Rares, Federal Court of Australia	Sydney
88	Legal and Compliance Expert Group, Financial Services Council	Sydney
89	Hon Dr Robert Austin AM, Barrister	Sydney
90	Dr Andy Schmulow, University of Wollongong	Sydney
91	Steven Rice, Herbert Smith Freehills	Sydney
92	Malcolm Stephens, Allens	Sydney
93	Dominic Tran, Ashurst	Sydney
94	Dr Ian Enright, Australian College of Insurance Studies	Sydney
95	Professor Jason Harris, University of Sydney	Sydney
96	Michelle Levy, Allens	Sydney
97	Professor Pamela Hanrahan, University of New South Wales	Sydney
98	Richard Batten, MinterEllison	Sydney

	Name	Consultee location
99	Associate Professor Scott Donald, University of New South Wales	Sydney
100	Vince Battaglia, Hall and Wilcox	Sydney
101	Australian Prudential Regulation Authority	Various
102	Hon Justice Kathleen Farrell, Federal Court of Australia	Sydney
103	Shannon Finch, Jones Day	Sydney
104	Customer Owned Banking Association	Sydney
105	Commonwealth Bank of Australia	Sydney
106	Australian Banking Association	Sydney
107	Hon Justice Julie Ward, Supreme Court of New South Wales	Sydney
108	ANZ	Various
109	Australian Institute of Company Directors	Sydney
110	Financial Rights Legal Centre	Various
111	CPA Australia	Various
112	Hon John Hewson AM	Sydney
113	Association of Superannuation Funds of Australia	Melbourne
114	National Insurance Brokers Association	Sydney
115	Avant Mutual	Sydney
116	Australian Restructuring Insolvency and Turnaround Association	Sydney
117	Professor Gail Pearson, University of Sydney	Sydney
118	Chief Justice Tom Bathurst AC, Supreme Court of New South Wales	Sydney
119	Nicola Howell, Queensland University of Technology	Brisbane
120	Chartered Accountants Australia and New Zealand	Sydney
121	Institute of Public Accountants	Various
122	Financial Planning Association of Australia	Sydney
123	SMSF Association	Various

	Name	Consultee location
124	Stockbrokers and Investment Advisers Association (formerly Stockbrokers and Financial Advisers Association)	Sydney
125	Financial Services Institute of Australasia (FINSIA)	Various
126	Advisers Association	Sydney
127	Office of the Australian Small Business and Family Enterprise Ombudsman	Canberra
128	Australian Chamber of Commerce and Industry	Canberra
129	Advice Board Committee, Financial Services Council	Various
130	Parliamentary Counsel Office (New Zealand)	Auckland
131	Macquarie Group Ltd	Sydney
132	Professor Miranda Stewart, University of Melbourne	Melbourne
133	Superannuation Industry Stewardship Group, Australian Taxation Office	Melbourne
134	Industry Fund Services	Various
135	Office of the Queensland Parliamentary Counsel	Brisbane
136	Australasian Legal Information Institute (AustLII)	Sydney
137	Mortgage and Finance Association of Australia	Sydney
138	Pip Bell, PMC Legal	Sydney
139	Anne Murphy Cruise, Macquarie Group	Melbourne
140	Rebecca Maslen-Stannage, Herbert Smith Freehills	Sydney
141	Glenda Hanson, King and Wood Mallesons	Sydney
142	Andrew Ham, Hunt and Hunt Lawyers	Melbourne
143	John Keeves, Johnson Winter and Slattery	Adelaide
144	Legislation Act Review Committee, Department of the Attorney-General (Cth)	Canberra
145	Department of the Treasury (Cth)	Canberra
146	MetLife Australia	Sydney
147	Quality of Advice Review	Various
148	Department of Social Services (Cth)	Canberra

	Name	Consultee location
149	Secretariat, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation	Canberra
150	Department of Health and Aged Care (Cth)	Canberra
151	Professor Julia Black CBE, London School of Economics and Political Science	London
152	Hon Justice Robert Bromwich, Federal Court of Australia	Brisbane
153	Australian Taxation Office	Canberra
154	Department of Agriculture (Cth)	Canberra
155	Civil Aviation Safety Authority (Cth)	Canberra
156	Australian Maritime Safety Authority	Canberra
157	Department of Home Affairs (Cth)	Canberra
158	Dr Jason Allen, Stirling and Rose	Sydney
159	Pia Andrews, Amazon Web Services	Broome
160	Hannah Glass, King and Wood Mallesons	Melbourne
161	Michael Mathieson, Allens Linklaters	Sydney
162	Australian Retail Credit Association	Melbourne
163	Andrew Bradley, Herbert Smith Freehills	Sydney
164	Fiona Smedley, Herbert Smith Freehills	Sydney
165	Michael Vrisakis, Herbert Smith Freehills	Sydney
166	Maged Girgis, Herbert Smith Freehills	Sydney
167	Tamanna Islam, Herbert Smith Freehills	Sydney
168	Kate Mulligan, King Irving	Sydney
169	Kristijan Vicoroski, King Irving	Sydney
170	Alycia Mills, King Irving	Sydney
171	Simun Soljo, Allens	Sydney
172	Consumers' Federation of Australia	Sydney
173	COTA (formerly Council on the Ageing)	Sydney
174	CHOICE	Sydney

	Name	Consultee location
175	Indigenous Consumer Assistance Network	Sydney
176	Legal Aid NSW	Sydney
177	Super Consumers Australia	Sydney
178	Justin Williams SC, Barrister	Sydney
179	Gabrielle Bashir SC, Barrister	Sydney
180	Administrative Law Section, Attorney-General's Department (Cth)	Canberra
181	Bruce Dyer, Conisante Consulting	Melbourne
182	Dr Elizabeth Boros SC, Barrister	Melbourne
183	Gerard Brody, Consumer Action Law Centre	Melbourne
184	Andrew Eastwood, Herbert Smith Freehills	Sydney
185	Luke Hastings, Herbert Smith Freehills	Sydney
186	Property Council of Australia	Various
187	Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia	Canberra
188	Equity Capital Markets Legal Committee, Australian Financial Markets Association	Sydney
189	Commonwealth Director of Public Prosecutions	Various
190	Criminal Law Division, Attorney-General's Department (Cth)	Canberra
191	Westpac	Sydney
192	Matthew Kimber, UK Law Commission	London
193	Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia	Various
194	Professor Hans Tjio, National University of Singapore	Singapore
195	Associate Professor Alvin See, Singapore Management University	Singapore
196	Professor James Lee, King's College London	Singapore
197	Paul Yuen, Monetary Authority of Singapore	Singapore
198	Fiona Gray, Linklaters	Singapore

	Name	Consultee location
199	Jonathan Horan, Linklaters	Singapore
200	Evan Lam, Linklaters	Singapore
201	Eugene Ooi, Linklaters	Singapore
202	Law Reform Committee, Singapore Academy of Law	Singapore
203	Assistant Professor Nydia Remolina Leon, Singapore Management University	Singapore
204	Associate Professor Zhang Wei, Singapore Management University	Singapore
205	Hagen Rooke, Reed Smith	Singapore

Events

Date	Host Organisation	Event Name
Australian Law Reform Commission events		
17 May 2021	Australian Law Reform Commission	The Regulatory Ecosystem for Financial Services in Australia
24 May 2021	Australian Law Reform Commission	Comparative Perspectives on Financial Services Regulation
20 July 2021	Australian Law Reform Commission	The Devilish Detail of Financial Services Laws
27 January 2022	Australian Law Reform Commission	(Re)Viewing Twin Peaks in Australia and Abroad
10 February 2022	Australian Law Reform Commission	Reducing Complexity: Why? Where? How?
24 May 2022	Australian Law Reform Commission	What Goes Where? A Comparative Discussion of the Legislative Puzzle
17 June 2022	Australian Law Reform Commission	What We've Heard and Where to Next
16 November 2022	Australian Law Reform Commission	Legislation Renovation: What Interim Report B means for you
15 February 2023	Corporate Law and Financial Regulation Research Program, Melbourne Law School, University of Melbourne Australian Law Reform Commission	Crypto Assets and Decentralised Autonomous Organisations
10 July 2023	Australian Law Reform Commission	From Ideas to Action: What Interim Report C means for you
Other events		
19 November 2020	Queensland University of Technology	2020 QUT WA Lee Equity Lecture: 'Credit and Unconscionability: The Rise and Fall of Statutes' (Attended)

Date	Host Organisation	Event Name
1 December 2020	University of New South Wales	Regulation and Culture/Conduct Norms: UNSW Centre for Law Markets and Regulation Research Symposium, Session 6 (Attended)
3 December 2020	Queensland University of Technology	Australian Consumer Law Roundtable Insolvency Academics Network Meeting Session 3: Debt and financial services (Presented)
8–9 February 2021	Corporate Law Teachers Association	Thirty Years of Corporate Law: Still Fit for Purpose? (Attended)
15–16 May 2021	Law Council of Australia	Business Law Section, Corporations Workshop 2021 (Presented)
7–8 June 2021	Conexus Financial	Licensee Summit 2021 (Presented)
21 July 2021	Monash University, Commercial Bar Association of Victoria, and Victorian Bar	Reflections on the 20th Anniversary of the Corporations Act (Attended)
26–28 August 2021	Banking and Financial Services Law Association	37th Annual Conference (Attended)
11 October 2021	Singapore Management University and University of Melbourne	Decentralisation and the Future of Corporations (Attended)
13 October 2021	Independent Compliance Committee Member Forum	Rewriting the Financial Services Laws: An ALRC Update (Presented)

Date	Host Organisation	Event Name
18 November 2021	University of Queensland	2021 QUT WA Lee Equity Lecture: 'Oh Equity, Equity, wherefore art thou, Equity? Thou art thyself, through not Fairness. What's Fairness?' (Presented)
25 November 2021	Ross Parsons Centre, University of Sydney	Common Mistakes in Using National Uniform Legislation (Attended)
2022–23	Law Council of Australia	Business Law Section, Corporations Committee and Financial Services Committee meetings (Presented and attended)
16–18 February 2022	Australian National University	Public Law and Inequality Legislation (Attended)
22 March 2022	Centre for Ethics and Law, University College London	Regulating Digital and Crypto finance: A Conversation Across Borders (Presented)
30 March 2022	Melbourne Law School, University of Melbourne	Corporate Law and Governance in the 21st Century: A Symposium in Honour of Professor Ian Ramsay (Presented)
25 May 2022	Stockbrokers and Investment Advisers Association	Stockbrokers and Investment Advisers Association Conference (Presented)
23 June 2022	Clyde and Co	Review of the Legislative Framework for Corporations and Financial Services Regulation (Presented)
4–5 June 2022	Law Council of Australia	2022 Corporations Law Workshop (Presented)
6 June 2022	Conexus Financial	Licensee Summit 2022 (Presented)
3–5 July 2022	Society of Corporate Law Academics	Re: The Corporation: Re-Thinking, Re-Forming, Re-Imagining (Presented)

Date	Host Organisation	Event Name
21 July 2022	Insignia Financial	Consultum National Conference 2022 (Presented)
25 August 2022	Insignia Financial	RI Connect Conference 2022 (Presented)
9 September 2022	Melbourne Law School, University of Melbourne	Guest Lecture: Financial Advice Litigation (Presented)
25 November 2022	Securities Commission of Malaysia	Financial Regulatory Reforms: The Experience in Australia (Presented)
29 November 2022	The State Bank of Vietnam Vietnam Asset Management Company	Reforms to Develop the NPL Trading Market in Vietnam (Presented)
6 December 2022	Western Sydney University	Technology, Innovation and Law course (Presented)
6 February 2023	Society of Corporate Law Academics	2022 Conference of the Society of Corporation Law Academics (Presented)
7 February 2023	Melbourne Business School, University of Melbourne	25th Melbourne Money and Finance Conference 2023 — Superannuation: Performance, Impact and Reform (Presented)
15 March 2023	Melbourne Law School, University of Melbourne	Guest Lecture: The Regulation of Crypto Assets and Decentralised Autonomous Organisations (Presented)
6 April 2023	Monash University	Challenging Government: Law Reform and Public Advocacy course (Presented)
6 April 2023	Australian Securities and Investments Commission	Presentation to ASIC Chief Legal Office (Presented)

Date	Host Organisation	Event Name
27 April 2023	Asian Business Law Institute Singapore Management University	The Regulation of Crypto Assets and Blockchain-based Business Models in Australia (Presented)
8 June 2023	Property Council of Australia, Corporate Governance and Regulation Committee	Committee Meeting (Presented)
21 July 2023	Cornwalls	Technology Neutrality and Crypto Regulation in Australia (Presented)
5–6 August 2023	Law Council of Australia Corporations Committee	LCA Corporations Workshop (Presented)
12 October 2023	Melbourne Law School, Melbourne Centre for Commercial Law, Corporate Law, and Financial Regulation Research Program	Lessons for Insolvency Law from the Pandemic: Practice and Reform (Presented)

Appendix B
Primary Sources

Australian legislation

Commonwealth Acts

Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018 (Cth).

Acts Interpretation Act 1901 (Cth).

Administrative Decisions (Judicial Review) Act 1977 (Cth).

Australian Constitution.

Australian Securities and Investments Commission Act 2001 (Cth).

Banking Act 1959 (Cth).

Civil Aviation Act 1988 (Cth).

Competition and Consumer Act 2010 (Cth) sch 2 ('*Australian Consumer Law*').

Coronavirus Economic Response Package Omnibus Act 2020 (Cth).

Corporate Collective Investment Vehicle Framework and Other Measures Act 2022 (Cth).

Corporations Act 2001 (Cth).

Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

Corporations Amendment (Crowd-Sourced Funding) Act 2017 (Cth).

Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth).

Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017 (Cth).

Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 (Cth).

Corporations Legislation Amendment (Derivative Transactions) Act 2012 (Cth).

Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth).

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020 (Cth).

Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020 (Cth).

Financial Services Reform Act 2001 (Cth).

Great Barrier Reef Marine Park Act 1975 (Cth).

Income Tax Assessment Act 1997 (Cth).

Insurance Contracts Act 1984 (Cth).

Judiciary Act 1903 (Cth).

Legislation Act 2003 (Cth).

National Consumer Credit Protection Act 2009 (Cth).

National Measurement Act 1960 (Cth).

Navigation Act 2012 (Cth).

Parliamentary Counsel Act 1970 (Cth).

Private Health Insurance Act 2007 (Cth).

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth).

Public Service Act 1999 (Cth).

Road Vehicle Standards Act 2018 (Cth).

Social Security Act 1991 (Cth).

Superannuation Industry (Supervision) Act 1993 (Cth).

Treasury Laws Amendment (2018 Measures No. 2) Act 2020 (Cth).

Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023 (Cth).

Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022 (Cth).

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth).

Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023 (Cth).

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023 (Cth).

Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 (Cth).

Veterans' Entitlements Act 1986 (Cth).

Commonwealth legislative instruments

Administrative Arrangements Order - 14/10/2022 (Cth).

ASIC (Supervisory Cost Recovery Levy—Regulatory Costs) Instrument 2022/889 (Cth).

ASIC Class Order — Dollar Disclosure: Amounts Denominated in a Foreign Currency (CO 04/1435) (Cth).

ASIC Class Order — Intra-Fund Superannuation Advice (CO 09/210) (Cth).

ASIC Class Order — Investor Directed Portfolio Services (CO 13/763) (Cth).

ASIC Class Order — Relief for 31 Day Notice Term Deposit Accounts (CO 14/1262) (Cth).

ASIC Class Order — Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme (CO 13/762) (Cth).

ASIC Client Money Reporting Rules 2017 (Cth).

ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682 (Cth).

ASIC Corporations (Client Money - Cash Common Funds) Instrument 2016/671 (Cth).

ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 (Cth).

ASIC Corporations (Credit Union Member Shares) Instrument 2017/616 (Cth).

ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 (Cth).

ASIC Corporations (Employee Share Schemes) Instrument 2022/1021 (Cth).

ASIC Corporations (Foreign Rights Issues) Instrument 2015/356 (Cth).

ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449 (Cth).

ASIC Corporations (Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme) Instrument 2023/668 (Cth).

ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669 (Cth).

ASIC Corporations (IPO Communications) Instrument 2020/722 (Cth).

ASIC Corporations (Life Insurance Commissions) Instrument 2017/510 (Cth).

ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 (Cth).

ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211 (Cth).

ASIC Corporations (NZD Denominated Client Money) Instrument 2018/152 (Cth).

ASIC Corporations (Offers over the Internet) Instrument 2017/181 (Cth).

ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240 (Cth).

ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 (Cth).

ASIC Corporations (Renounceable Rights Issue Notifications) Instrument 2016/993 (Cth).

ASIC Corporations (Short Selling) Instrument 2018/745 (Cth).

ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272 (Cth).

ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 (Cth).

ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 (Cth).

Australian Securities and Investments Commission Regulations 2001 (Cth).

Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019 (Cth).

Corporations (Passport) Rules 2018 (Cth).

Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023 (Cth).

Corporations Amendment (Litigation Funding) Regulations 2022 (Cth).

Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022 (Cth).

Corporations Regulations 2001 (Cth).

Legal Services Directions 2017 (Cth).

National Consumer Credit Protection Regulations 2010 (Cth).

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 (Cth).

Australian case law

ADCO Constructions Pty Ltd v Goudappel (2014) 254 CLR 1.

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175.

Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450.

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2023] FCAFC 135.

Australian Securities and Investments Commission v Davidof [2017] FCA 658.

Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321.

Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing) [2021] FCA 1384.

Australian Securities and Investments Commission v GetSwift Ltd (Penalty Hearing) [2023] FCA 100.

Australian Securities and Investments Commission v National Australia Bank Limited [2022] FCA 1324.

Australian Securities and Investments Commission v TAL Life Limited (No 2) (2021) 389 ALR 128.

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147.

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389.

Commonwealth v Grunseit (1943) 67 CLR 58.

Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628.

Imperial Chemical Industries plc v Echo Tasmania Pty Ltd [2007] FCA 1731.

International Litigation Partners Pte Ltd v Chameleon Mining NL (2011) 248 FLR 149.

International Litigation Partners Pte Ltd v Chameleon Mining NL (recs and mgrs apptd) (2012) 246 CLR 455.

Kelly v The Queen (2004) 218 CLR 216.

RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185.

Sandys Swim Pty Ltd v Morgan [2022] FCA 1574.

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (2012) 301 ALR 1.

Foreign legislation

Financial Markets Conduct Act 2013 (NZ).

Financial Services and Markets Act 2000 (UK).

Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (UK) SI 2001/544.

Legislation Act 2019 (NZ).

Public Service Act 2020 (NZ).

Foreign case law

Gentel v Rapps [1902] 1 KB 160.

Appendix C
Concordance Table

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Interim Report A			
Question	**A1**	Additional data that should be obtained by the ALRC	Not formalised as a recommendation (see **Chapter 10**)
Question	**A2**	Principled design of definitions	**Recommendations 27 and 28**
Proposal	**A3**	Single definition for each of 'financial product' and 'financial service'	**Recommendations 31 and 32**
Proposal	**A4**	Amendments to the definitions of 'financial product' and 'financial service'	Addressed within **Recommendations 31 and 32** (see **Chapter 5**)
Proposal	**A5**	Repeal definitions of 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments'	Not formalised as a recommendation (see **Chapter 5**)
Proposal	**A6**	Incorporate 'credit' within the single definition of 'financial product'	Addressed within **Recommendations 31 and 32** (see **Chapter 5**)
Proposal	**A7**	Replace the term 'responsible person' with 'preparer' (in respect of PDSs)	Not formalised as a recommendation (see **Chapter 5**)
Proposal	**A8**	Outcomes-based standard of disclosure	Superseded by Proposal C5 in Interim Report C

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Proposal	**A9**	Remove existing exemption and modification (notional amendment) powers from Chapter 7 of the *Corporations Act*	Superseded by Proposals B1–B11 in Interim Report B
Proposal	**A10**	A sole power to create exclusions and grant exemptions	
Question	**A11**	Power to make rules and vesting power in ASIC	
Proposal	**A12**	Interim mechanism to improve visibility and accessibility of notional amendments	**Recommendations 18 and 19 in Interim Report B**
Proposal	**A13**	Amendments to simplify the definition of 'financial product advice' in s 766B of the *Corporations Act*	Not formalised as recommendations (see **Chapter 9**)
Proposal	**A14**	Removing 'financial product advice' from the definition of 'financial service' in s 766A(1) of the *Corporations Act*	
Proposal	**A15**	Replace the term 'general advice' in s 766B of the *Corporations Act* with a more intuitive term	
Question	**A16**	Amendments to the definition of 'retail client' in s 761G of the *Corporations Act*	Not formalised as recommendations (see **Chapter 9**)
Question	**A17**	Amendments to the sophisticated investor exception in s 761GA of the *Corporations Act*	

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Question	**A18**	Norms as objects clause in Chapter 7 of the *Corporations Act*	Addressed within **Recommendation 41** (see **Chapter 5**)
Question	**A19**	Norms for inclusion in an objects clause	
Proposal	**A20**	Amend s 912A(1)(a) of the *Corporations Act* and the expression 'efficiently, honestly and fairly'	Not formalised as recommendations (see **Chapter 5**)
Proposal	**A21**	Remove prescription from s 912A(1) of the *Corporations Act*	
Proposal	**A22**	Repeal s 991A of the *Corporations Act* and s 12CA of the *ASIC Act* (relating to unconscionable conduct)	Superseded by Proposal C2 in Interim Report C
Proposal	**A23**	Consolidate proscriptions concerning false or misleading representations and misleading or deceptive conduct	Superseded by Proposal C3 in Interim Report C
Question	**A24**	Amendments to s 961B(2) of the *Corporations Act* and repeal of ss 961C and 961D	Not formalised as a recommendation (see **Chapter 9**)
Interim Report B			
Proposal	**B1**	Proposed legislative model	**Recommendation 43**
Proposal	**B2**	Scoping Order (power to make 'scoping orders')	**Recommendation 44**
Proposal	**B3**	Individual exemptions power (by notifiable instrument)	**Recommendation 45**
Proposal	**B4**	Explanatory statement for scoping orders and individual exemptions	**Recommendation 50**
Proposal	**B5**	Rule-making power	**Recommendation 46**
Proposal	**B6**	Explanatory statement for rules	**Recommendation 51**

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Proposal	**B7**	Express limits on rule-making power	**Recommendation 47**
Proposal	**B8**	Concurrent powers for making scoping orders and rules vested in the Minister and ASIC	**Recommendation 48**
Proposal	**B9**	Establishment of Rules Advisory Committee and prescribed consultation	**Recommendation 49**
Proposal	**B10**	Repeal existing modification (notional amendment) powers	**Recommendation 53**
Proposal	**B11**	Repeal existing exclusion or exemption powers	
Proposal	**B12**	Consolidated guidance concerning the delegation of legislative power	**Recommendations 25 and 26**
Question	**B13**	Feedback on the draft guidance relating to the delegation of legislative power	
Proposal	**B14**	Community of Practice relating to legislative design	**Recommendation 29**
Proposal	**B15**	Consolidate offence and civil penalty provisions	**Recommendation 56**
Question	**B16**	Evidential provisions	Not formalised as a recommendation (see **Chapter 6**)
Proposal	**B17**	Amend offence and civil penalty provisions to more clearly identify consequences of breach	**Recommendations 20–22 in Interim Report C**
Proposal	**B18**	Amend offence provisions to specify any applicable fault element	**Recommendation 23 in Interim Report C**
Interim Report C			
Proposal	**C1**	Consumer protection chapter	**Recommendation 33**

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Proposal	**C2**	Consolidate unconscionable conduct provisions	**Recommendation 34**
Proposal	**C3**	Consolidate false or misleading representation and misleading or deceptive conduct proscriptions	**Recommendation 35**
Proposal	**C4**	Disclosure chapter	**Recommendation 36**
Proposal	**C5**	Incorporate outcomes-based disclosure standard to reframe existing 'clear, concise and effective' standard	**Recommendation 37**
Proposal	**C6**	Financial advice chapter	**Recommendation 38**
Proposal	**C7**	General regulatory obligations chapter (provisions of general application)	**Recommendation 39**
Proposal	**C8**	General regulatory obligations chapter (administrative and procedural provisions)	**Recommendation 40**
Proposal	**C9**	Create a Financial Services Law	**Recommendation 41**
Proposal	**C10**	Place the Financial Services Law in Sch 1 to the *Corporations Act* ('FSL Schedule')	**Recommendation 42**
Question	**C11**	Feedback on the illustrative FSL Schedule	
Proposal	**C12**	Implementation taskforces	**Recommendation 54**
Proposal	**C13**	Post-enactment review of the Financial Services Law	**Recommendation 55**
Proposal	**C14**	Principles for structuring and framing legislation	**Recommendation 24**

Proposal or Question		Description	Subsequent proposal, recommendation, or discussion
Proposal	**C15**	Amend infringement notice provisions to more clearly identify consequences of breach	**Recommendation 57**

Appendix D
Draft Guidance

This Appendix contains the draft guidance discussed in **Chapter 4** of the Final Report. The draft guidance expands upon the principles discussed in **Recommendation 25** and exemplifies principles-based guidance that may be adopted in implementing **Recommendation 26**.[1]

Guidance for Delegating Legislative Power

Contents

1 In some places, the draft guidance adopts the same expression as existing guidance without quotation marks. Footnotes are used throughout the draft guidance to identify those sources of existing guidance, to indicate another relevant source, or to provide further information. Cross-references to the existing guidance may enable stakeholders to more easily identify how the draft guidance corresponds to existing guidance. The ALRC does not envisage that retaining all the cross-references to existing guidance would be necessary if the draft guidance were adopted in implementing **Recommendation 26**.

Introduction

D.1 Subject to the *Australian Constitution*, Parliament is able to delegate its power to make laws. Parliament typically delegates legislative power to the various persons and entities that comprise the Executive — such as ministers, departments, and statutory agencies. Parliament does this through an Act — an 'enabling' or 'empowering' Act — and the process for using that delegated power is commonly referred to as executive law-making. Regardless of any specific label that may be used in particular cases, the product of executive law-making is generally referred to as 'delegated legislation'.

D.2 When designing legislation that delegates legislative power, fundamental questions are:

- **What** can (or should) be delegated?
- **Who** is to exercise the delegated power?
- **Which safeguards** will apply to the delegated power?

D.3 The principles and guidance below help to answer those questions.

When and how to use these guidelines

D.4 The purpose of these guidelines is to help all of those involved in designing, drafting, and scrutinising enabling legislation. These guidelines are therefore directed towards a wide readership, including policy-makers, legislative drafters (and their instructors), civil society, regulators, and Parliamentarians.

D.5 These guidelines will be of most benefit if they are considered at the outset of the policy and legislative development process, or as soon as it becomes apparent that delegated legislation may form part of a legislative initiative. If difficult or contentious issues arise ,or are likely to arise, then policy-makers and others involved in legislative design are encouraged to engage with the Attorney-General's Department as early as possible in the legislative development process. These guidelines may also be useful when considering amendments to pre-existing legislation.

D.6 To the extent possible, the principles and questions in these guidelines should be addressed in the explanatory memoranda for Bills that delegate legislative power (as well as the explanatory statements for delegated legislation made using that power). Adhering to this practice will assist Parliament, and in particular the Senate Standing Committees for the Scrutiny of Bills ('Bills Scrutiny Committee') and the Scrutiny of Delegated Legislation ('Delegated Legislation Scrutiny Committee'), to perform their oversight roles.[2]

2 The Delegated Legislation Scrutiny Committee was formerly known as the Senate Standing Committee on Regulations and Ordinances.

D.7 These guidelines do not directly address how a power to make delegated legislation should be exercised, nor how delegated legislation should be drafted and made. The *Instruments Handbook* provides detailed guidance on these issues.[3]

Legislative power

D.8 This guidance focuses on the delegation of *legislative* power, as distinct from executive or judicial power.[4] Whether a power is legislative in nature is itself a legislative design question that focuses upon the intended nature, scope, and effect of the power. Policy-makers should carefully consider which type of power best suits, or is most appropriate for, the particular policy and legislative context.

D.9 The distinction between legislative powers and other powers (most particularly executive power) has implications for the availability of judicial review and the framework established by the *Legislation Act 2003* (Cth) ('*Legislation Act*').[5] Both the common law (case law) and s 8(4) of the *Legislation Act* establish functional tests for determining whether a power or an instrument made using a power is legislative in character.[6]

D.10 In addition to the functional test, s 8 of the *Legislation Act* sets out circumstances in which an instrument is deemed to be (or not to be) a legislative instrument, including when specified by an empowering provision. When a delegated power is intended to be legislative in nature, it is best practice to specify that the power is to be exercised by way of legislative instrument. This will clearly bring it within the *Legislation Act* definition. The *Instruments Handbook* contains more detailed discussion of the difference between legislative instruments and other types of instrument (such as notifiable instruments) for the purposes of the *Legislation Act*.

D.11 Empowering provisions and their drafting are therefore of great significance, as they determine both the nature of the delegated power and its scope.[7]

D.12 **Figure 1** illustrates the typical way that Parliament delegates, and oversees the exercise of, its legislative power.

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3 Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document release 3.7, September 2022).

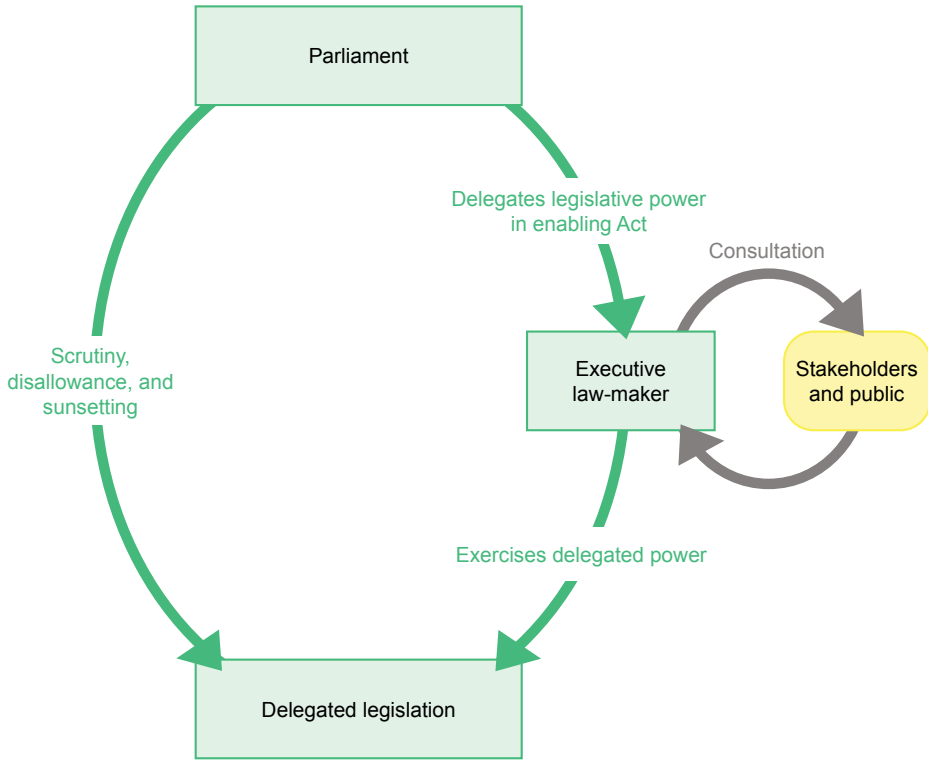
4 For guidance regarding administrative law issues in draft legislation or proposals, see Attorney-General's Department (Cth), *Australian Administrative Law Policy Guide* (2011).

5 Including judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or *Judiciary Act 1903* (Cth).

6 See, eg, *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; *Commonwealth v Grunseit* (1943) 67 CLR 58.

7 See below [D.25].

Figure 1: Delegating and overseeing legislative power



Overarching principles

D.13 The following principles should guide decisions about when it is appropriate for Parliament to delegate its legislative power.[8] To some extent, these principles may compete and need to be balanced in each case.

- **Democratic accountability and legitimacy**: democratic accountability, via Parliament and its processes, is crucial to the law's legitimacy.

  Parliament's role is to determine matters of important policy and political significance through an open, democratic process. That democratic process is crucial to the law's legitimacy. Delegating too much legislative power, or delegating overly broad and unconstrained powers, can undermine the law's legitimacy and the separation of powers between the legislature and the executive. However, parliamentary time is scarce and in a complex world not every law or necessary detail can be made by Parliament.
- **Durability and flexibility**: laws should be durable and allow for flexibility where necessary.

8 See, eg, Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021) 67.

Durability refers to the ability of legislation to remain fit for purpose and maintain its relevance over time. Delegation helps to create durable and flexible laws. In particular, delegation can provide a means for regulatory flexibility and adaptability in response to changing or unforeseen circumstances. It may also be used to close loopholes or reduce opportunities for avoidance. Delegated legislation should not, however, be viewed as a substitute for periodic review and reform of primary legislation.

- **Clarity and predictability**: provisions that delegate legislative power should be clear and enable users to understand when and how the power may be exercised.

  Clarity begins with the empowering provision in the Act. Provisions that do not clearly delegate law-making powers can undermine the law's clarity, both in terms of how the law is expressed and in terms of understanding what the Act requires or permits. The identity of any delegated law-maker should be clear. Unconstrained or open-ended delegations that effectively enable delegates to determine matters of significant policy risk undermining the law's predictability and the federal separation of powers. Unconstrained delegations also increase the risk that a power may be exercised arbitrarily.

- **Coherence and navigability**: delegated legislation should not undermine the law's coherence and navigability.

  Coherence is important within legislation, but also between primary legislation and delegated legislation. Multiple sources of law can lead to complexity, fragmentation, and overlap, making the law difficult to navigate and understand. Equally, too much prescription in primary legislation can make it difficult to navigate and obscure important messages. Coherence and navigability are mutually reinforcing and help to produce legislation that is easier to read and understand.

Primary legislation or delegated legislation

Is the matter appropriate for delegated legislation?

Legislation should not contain a power to make delegated legislation in respect of matters that are more appropriate for an Act of Parliament.[9]

D.14 Parliament is the Commonwealth's democratically accountable law-maker. As a general rule, therefore, matters of significant policy and principle should be contained in an Act. Generally, delegated legislation should deal with minor or

9 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.10]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (j); Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [77].

technical matters that relate to implementing the objectives and intent of the Act, and the Act's operation. However, there are difficult decisions as to where some matters sit on the continuum between significant policy and minor or technical matters.[10]

D.15 Some matters, such as those that substantially affect human rights, clearly should be contained in an Act. However, the decision will not always be clear-cut. Some matters may be appropriate for either primary or delegated legislation. Delegated legislation may (unavoidably) involve some matters of policy, but close attention must be paid to the nature of those matters to ensure appropriate safeguards apply to retain oversight and accountability.

Policy and its significance

D.16 'Policy' can be an elusive term, and its meaning differs depending on context. In the context of legislation, policy refers to decisions about the matters that should be the subject of legislation and how those matters should be dealt with. In other words, policy encapsulates a particular problem and its legislative solution. Policy may also refer to the underlying goal of legislation, or its purpose and object. In this sense policy may be expressed at varying levels of generality or specificity.

D.17 Likewise, 'significance' is difficult to define objectively, and is necessarily a matter of degree. When choosing between primary legislation and delegated legislation, there may be several relevant aspects of significance:

- **Democratic or public interest significance**: the policy has the potential to give rise to widespread public interest or controversy.[11] This includes issues of major political disagreement or disagreement between key stakeholders. Moral issues or issues involving important human and civil rights fall into this category.
- **Substantive significance**: the policy answers the key problems addressed by the legislation.[12] The policy is central to the legislative scheme or solution and is likely to have universal or near-universal application.
- **Significance to legislative design**: a well-designed legislative scheme should itself identify matters of policy (understood broadly) that are more suitable for delegated legislation than primary legislation, for reasons such as adaptability and flexibility.

D.18 The more significant a matter is from the perspective of democratic accountability and the rule of law, including because of its substantive significance, the more likely it will be appropriate for inclusion in primary legislation.

D.19 Recognising significance as relevant to legislative design helps to ensure that the principles of durability and flexibility, and coherence and navigability, are also considered when allocating matters between primary and delegated legislation.

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10 Legislation Design and Advisory Committee (NZ) (n 8) 68.
11 See, eg, ibid 69.
12 See, eg, ibid.

In some cases, democratic significance (or public interest significance) may be at odds with the demands of appropriate legislative design. For example, certain prescriptive detail that is not substantively significant, and may be more suitable for delegated legislation, may nevertheless become the subject of strong political disagreement. As a result, legislators may consider it desirable to enact such detail in primary legislation. This may be for the purposes of being seen to take action or to make it more difficult for a future government to change. In other cases, it may be appealing (but contrary to principle and good legislative design) for legislators to leave significant policy questions (more appropriate for parliamentary enactment) for future delegated legislation, so as to avoid debate or to speed up the passage of legislation.

D.20 In cases such as these, coherence of the legislative scheme (in particular) should be considered and weighed against other aspects of significance. Ultimately, it is a matter for Parliament to determine whether political priorities (and the principle of democratic legitimacy) outweigh the potential incoherence introduced to a legislative scheme (relevant to the principles of clarity and predictability, and coherence and navigability).

D.21 As a general rule, the following matters — which exemplify applications of the principle that Parliament should deal with significant policy matters — should be addressed in primary legislation:

- matters that have a significant impact on fundamental human or civil rights and personal liberties;
- the creation of serious criminal offences and imposition of significant penalties;
- the creation of coercive powers, such as search and seizure or confiscation of property;
- provisions imposing burdensome obligations on individuals or organisations to undertake certain activities or prohibiting certain activities;
- variations to the common law, particularly if a common law right is to be taken away, or replaced, by legislation;
- the authorisation of a tax or levy, borrowing money, or an appropriation of money;
- provisions imposing fees and charges;
- procedural matters that go to the essence or integrity of a legislative scheme or set the scheme's fundamental policy, for example, rights of review; and
- retrospective changes to the law.[13]

13 See, eg, Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 16–17; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 9) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principles (h), (j); Legislation Design and Advisory Committee (NZ) (n 8) 69.

D.22 The following reasons do not justify leaving policy matters to be addressed in delegated legislation:

- to fill substantive gaps in an Act caused by a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters in Parliament;
- solely to accelerate a Bill's passage through Parliament; or
- simply to follow a past practice of using delegated legislation on that subject where no clear reason otherwise exists for doing so.[14]

D.23 The following are examples of matters that are generally appropriate for delegated legislation:

- the mechanics of implementing an Act, such as prescribing the amount of fees, the form and content of documents, or other administrative procedures not going to the essence of the legislative scheme;
- large lists and schedules of prescriptive details;
- technically complex matters;
- subject matters requiring flexibility or updating in light of rapid or unpredictable developments in an area;
- responses to emergencies or other matters requiring agile or rapid responses; and
- matters requiring additional input from experts or key stakeholders.[15]

D.24 These examples are not exhaustive or prescriptive. They are intended to aid decision-makers in applying the more general principle that matters of significant policy are appropriately determined by Parliament. They should be considered in light of all of the principles discussed in this guidance. In addition, there may be circumstances in which two or more considerations are relevant (for example, technically complex matters and matters that require input from experts or key stakeholders).

14 Legislation Design and Advisory Committee (NZ) (n 8) 69–70.

15 Department of the Prime Minister and Cabinet (Cth) (n 9) [5.65]–[5.66]; Legislation Design and Advisory Committee (NZ) (n 8) 69.

Scope of power and purpose

For what purpose may the power to make delegated legislation be exercised?

The empowering Act should define the content, purpose, and scope of a delegated law-making power as clearly as possible.[16]

D.25 Empowering provisions are critical because they establish the nature and scope of the power delegated by Parliament. Clearly defining the range of subject matters and purposes for which delegated legislation can be made is important because it helps to ensure that the resulting delegated legislation is within the limits intended by Parliament. A clearly scoped empowering provision also helps to maintain the appropriate distribution of matters between primary and delegated legislation.

D.26 An alternative way to approach this question is to ask, from the perspective of citizens who may be subjected to the power, whether the empowering provision would enable them to understand the factors that will guide the exercise of the delegated power and to predict how the power may be exercised.

D.27 When considering the scope of a delegated law-making power, it may assist to consult those responsible for implementing or administering the Act and who will be responsible for making delegated legislation.[17] Doing so would help identify the extent of the powers that are necessary and the circumstances in which they may be exercised.[18] So far as possible, those responsible for implementing or administering the Act should have a clear idea of the scope and content of potential delegated legislation when an empowering provision is being developed.[19]

D.28 A power to create delegated legislation should be wide enough to enable the Act and the objectives of the empowering provision to be effectively implemented.[20] Some flexibility or discretion in an empowering provision may be justified as it can be difficult to predict how an Act's requirements will be given full effect or the full range of circumstances that may require delegated legislation. However, flexibility should be balanced against the need to place clear limits on the scope of power so that it is not unfettered.[21]

16 See, eg, Legislation Design and Advisory Committee (NZ) (n 8) 73.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.

D.29 Clarity of scope and purpose may be aided by:

- clearly describing the matters in relation to which power may (or may not) be exercised;
- describing matters that should be taken into consideration when exercising the power; and
- setting out the purposes for which the power is intended to be used.

How is the power intended to affect primary legislation?

Delegated legislation should only be permitted to override or modify the operation of an Act (including by way of notional amendments) in exceptional circumstances, where:

- there is a strong need or benefit in doing so;
- the empowering provision is as circumscribed as possible; and
- there are sufficient safeguards in place to reflect the significance of the power.

D.30 Delegated powers that affect the operation of an Act can be placed along a spectrum. Towards one end of the spectrum are powers to effect a change in such a narrowly circumscribed way that the policy is fully or largely set by Parliament, and the subject matter would in any case be appropriate for delegated legislation. Examples include adding to a list of matters using a test or criteria set out in an Act, or expanding on concepts that do not set the scope of the Act (meaning that they are not central to the policy or principle of the Act). These types of provisions can be used to supplement an Act. That is to say, if the power is appropriately circumscribed, subject to appropriate safeguards, and the matter is generally appropriate for delegated legislation, then its exercise should supplement the Act consistently with the Act's objectives and Parliament's intention. These types of powers do not pose a significant risk of undermining the separation of powers and the law's legitimacy.

D.31 At the other end of the spectrum are unconstrained powers that allow delegated legislation to modify an Act in ways that may affect its underlying policy. Examples include several of the modification powers contained in the *Corporations Act 2001* (Cth).[22] These powers are typically exercised through notional amendments (or 'modifications') which, although they do not appear on the face of the Act, take effect *as though* the Act were amended as described by the delegated legislation.[23] These powers are sometimes referred to as 'Henry VIII clauses'. Strictly speaking,

22 For example, s 926B(1)(c): 'The regulations may … provide that this Part [7.6] applies as if specified provisions were omitted, modified or varied as specified in the regulations'. Provisions such as this confer a 'wide discretionary power': see *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].

23 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 135.

however, a 'Henry VIII clause' is one that permits an Act to be textually amended by delegated legislation, not just notionally amended.[24] Regardless of the label given to a power, notional amendments and textual amendments have the same legal effect.

D.32 Notional amendment (or modification) powers pose a greater risk to the separation of powers and democratic legitimacy than many other powers. Delegated legislation should not be permitted to notionally amend the text of offence provisions, especially where offences carry significant penalties or terms of imprisonment. Offence provisions are discussed in detail further below.

D.33 Exclusions or exemptions are another specific example of delegated legislation that may adjust the scope or change the operation of an Act in potentially significant ways. These are discussed in further detail below.

D.34 Any modification power to amend the text of primary legislation, notionally or otherwise, should only be enacted in exceptional circumstances. In these cases, such powers require strong justification, careful design, and appropriate safeguards. When a modification power is contemplated, the following questions should be asked:

- Why delegate this power, and in this way? What is the need or benefit that justifies delegating a power to override or notionally amend the Act? Possible justifications may include:
    - to provide for genuine emergencies that require a much swifter response than can be provided by Parliament; or
    - to facilitate a complicated transition between statutory regimes, or between a new and old regime.[25]
- If a modification power is necessary, what is the extent of delegation that is being permitted? What is the significance of the matters being delegated? Would the subject matter generally be appropriate for delegated legislation?[26]
    - As discussed above, there is a continuum between significant policy and technical detail. The closer a subject of delegation is to affecting significant policy, the greater the risks to the separation of powers and democratic legitimacy. In these cases, the need or justification for the power should be stronger and clearly explained. If a modification power is needed, then the empowering provision should be drafted in the most limited terms possible to address the need, and its exercise should be consistent with the provisions of the empowering Act.[27]

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24 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 46.

25 See, eg, Legislation Design and Advisory Committee (NZ) (n 8) 79–80. Safeguards, including those that apply to all delegated legislation under the *Legislation Act*, are discussed in more detail further below.

26 Ibid 80.

27 For example, s 370-5 of the *Taxation Administration Act 1953* (Cth) illustrates a more circumscribed modification (notional amendment) power.

- If the power is justified, are additional safeguards needed to ensure that the power is appropriately exercised and subject to appropriate scrutiny?[28] In the case of modification powers that potentially affect policy, additional safeguards should also be considered. These may include:
    - specific consultation requirements with stakeholders likely to be affected;
    - preconditions on the exercise of the power, such as satisfaction that a particular state of affairs exists or exercise of the power would not cause detriment;
    - providing that the power is exercised by the Governor-General in Council (so at the highest level of delegation, involving both OPC and the Federal Executive Council) by way of regulations;[29]
    - providing a shorter timeframe for sunsetting than the default position (10 years) provided by the *Legislation Act*;[30]
    - establishing or allocating responsibility to a review panel to consider and report to Parliament or the responsible Minister on the exercise of the power;
    - for emergency powers, making any exercise of the power conditional upon a prior declaration of emergency which is itself subject to disallowance; or
    - making delegated legislation created using the power subject to parliamentary approval (rather than only disallowance).
- If notional amendments are used, can they be made easier to find?
    - Notional amendments inevitably make the law more difficult to find and navigate. If they are to be used, consideration should be given to how their existence may be brought to the attention of the people most affected by them.
    - Technology may also assist in this regard. For example, a non-authoritative but annotated version of the Act containing hyperlinks may aid navigation.

Exclusions and exemptions

Should legislation delegate a power to exclude or exempt?

There must be good reasons to delegate a power of exclusion or exemption.[31]

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28 Legislation Design and Advisory Committee (NZ) (n 8) 80. See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 9) Principle (iv).

29 See further discussion regarding the use of regulations below at [D.42]–[D.43].

30 See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (l).

31 Legislation Design and Advisory Committee (NZ) (n 8) 84.

D.35 The scope (or perimeter) of a statutory regime is an important policy decision that should be made by Parliament and generally contained in an Act. Factors that may favour delegating a power of exclusion or exemption include:

- the Act relates to a complex, developing, or rapidly changing field which means that its boundaries may be difficult to foresee;
- the Act relates to fields in which an urgent decision on an exclusion or exemption may be required;
- the Act relates to fields that require frequent adaptation to changing factual or policy circumstances;
- technical issues or minor unforeseen developments may arise in the law, and are sufficiently technical or minor in nature that they do not immediately justify amending an Act; or
- where compliance with a regulatory scheme may be impractical, inefficient, or unduly expensive, but the scheme's policy objective can be achieved by other means (which may include imposing conditions on an exemption).[32]

D.36 In cases such as these, delegated legislation that is subject to appropriate safeguards may be a suitable way to manage regulatory boundaries.

D.37 These factors may also be relevant where a power is delegated to exclude or exempt by way of non-legislative instrument (such as an individual exemption).

D.38 A delegated power to exclude or exempt should rarely be unconstrained. The following limitations, in particular, should be considered when designing and drafting an exclusion or exemption power:

- **Consistency with the purposes of the Act**: the power must be exercised consistently with, or at least taking into account, the objects of the Act.
- **Criteria or principles for the exercise of power**: where a wide or discretionary power is granted, the Act may set out criteria or guiding principles to limit the discretion.
- **Review process**: there should ideally be a process to review exclusions and exemptions at regular intervals to identify a need to amend the Act. A person that exercises delegated power may also be required to provide an annual report to Parliament detailing the number of times and circumstances in which the power was exercised to ensure appropriate accountability.[33]

32 Ibid 84–5.

33 Ibid 85. See also Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j).

Appropriate delegates

Who will hold or exercise the power to make delegated legislation?

The person or body granted a power to make delegated legislation must be appropriate, having regard to the subject matter and the importance of the relevant issues.[34]

D.39 The power to make delegated legislation should be granted to the most appropriate person or body (the 'delegate'). In identifying an appropriate delegate, the following factors should be taken into account:

- the extent of policy or value judgements required;
- the degree of democratic accountability required, or alternatively, the extent to which the decision-maker should be insulated from political influence; and
- the technical expertise required of the person making the delegated legislation.[35]

D.40 Technical expertise has two relevant aspects: subject matter expertise and law-making expertise. The chosen delegate should possess subject matter expertise to make delegated legislation in the particular subject area, especially in complex or technical fields. The delegate should also have sufficient capacity and capability to carry out the law-making function. This would include drafting expertise. Where the delegate may lack drafting expertise, or in cases of particularly complex delegated legislation, the delegate should consult the Office of Parliamentary Counsel ('OPC') and obtain its support as appropriate.[36]

D.41 The identity of the delegate should be clear and unambiguous. If a power is capable of being 'sub-delegated' then the intent to permit sub-delegation should be clearly set out in the Act.[37] Providing that a power may only be sub-delegated by legislative instrument, so as to subject it to disallowance by Parliament, would reinforce oversight and accountability.

D.42 Some limited subject matters may be more appropriately enacted as regulations made by the Governor-General in Council than other legislative instruments because of the involvement of the Federal Executive Council and OPC

34 See, eg, Legislation Design and Advisory Committee (NZ) (n 8) 74.

35 Ibid.

36 Section 16 of the *Legislation Act 2003* (Cth) provides that to 'encourage high standards in the drafting of legislative and notifiable instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments and notifiable instruments'.

37 *Acts Interpretation Act 1901* (Cth) s 34AB(1)(b); Legislation Design and Advisory Committee (NZ) (n 8) 77–8; Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [26]–[27].

in the drafting of regulations.[38] Examples include the following matters, which in any event are matters that should be addressed in primary legislation and appear in delegated legislation in only limited circumstances:

- offence provisions, powers of arrest or detention, entry provisions, search and seizure provisions, and civil penalties (discussed in further detail below);
- impositions of taxes; and
- setting the amount of an appropriation authorised by an Act.[39]

D.43 The involvement of the Federal Executive Council and OPC should not, however, be given undue weight or serve as the default position in deciding who should exercise delegated power if the Minister (as the effective rule-maker for regulations) would not be the most appropriate delegate. To the extent that additional accountability or scrutiny is warranted, other safeguards (as discussed further below) may be considered. If drafting capability or quality causes concern, this may indicate a need for the delegate to consult with OPC about improving its drafting capability or to engage the drafting services of OPC.

Appropriate safeguards

Is the making of delegated legislation subject to appropriate safeguards?

All delegated legislation should be subject to an appropriate level of scrutiny, a sound process, and periodic review.[40]

D.44 Safeguards are important because of the potentially significant effects that delegated legislation can have. The more significant those effects, and the closer the subject of delegated power is to the significant policy end of the spectrum, the more important the safeguards become. This is illustrated by **Figure 2** below. However, safeguards also aim to strike an appropriate balance between the expediency of executive law-making (compared to parliamentary law-making) and the important principles at stake.

D.45 Safeguards provide an important check on the exercise of delegated legislative power so as to promote:

- a good law-making process (through, for example, consideration of certain matters or consultation before exercising a power);
- transparency (through processes open to the public and the publication of explanatory materials);

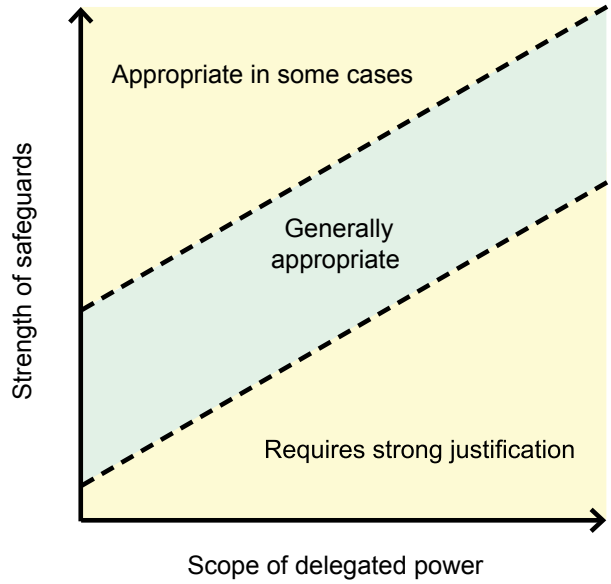
38 The drafting of regulations is 'tied work' within the meaning of the *Legal Services Directions 2017* (Cth), and must only be performed by OPC.

39 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [3]. See also Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 26.

40 Legislation Design and Advisory Committee (NZ) (n 8) 74.

- participation (through consultation, oversight, or approval); and
- accountability (through parliamentary oversight and other review procedures).[41]

Figure 2: Appropriate safeguards



Legislation Act safeguards

D.46 The *Legislation Act* establishes a set of safeguards that are generally applicable to all delegated legislation. These safeguards provide for minimum standards in relation to:

- consultation before delegated legislation is made;[42]
- publication requirements;[43]
- parliamentary scrutiny, including that delegated legislation be tabled in Parliament and disallowable by either House of Parliament;[44] and
- sunsetting, which provides for automatic repeal after a set period of time.[45]

D.47 Exemptions or deviations from the minimum standards of the *Legislation Act* should be adequately justified in explanatory materials. This includes exemptions from disallowance by Parliament and sunsetting. Disallowance is the most important mechanism allowing Parliament to control the exercise of delegated legislative power.

41 Ibid 74–5.
42 *Legislation Act 2003* (Cth) s 17.
43 Ibid ch 2 pt 1.
44 Ibid ch 3 pt 2.
45 Ibid ch 3 pt 4.

D.48 The Delegated Legislation Scrutiny Committee has expressed the view that exemptions from disallowance:

- should only be created in exceptional circumstances;
- should only be made if there is an alternative parliamentary role equivalent to disallowance, providing an alternative form of democratic accountability;[46] and
- should not be made where instruments would adversely affect rights, liberties, duties, or obligations.[47]

D.49 Alternative mechanisms for preserving Parliament's control while balancing other considerations may include, for example, providing that instruments commence only after the disallowance period has expired or providing for a shorter disallowance period where good reasons exist for doing so.

D.50 Sunsetting is a safeguard that helps ensure delegated legislation is kept up to date and fit-for-purpose. Sunsetting also provides Parliament with an opportunity to reconsider the continued appropriateness of a legislative instrument if it is to be remade.[48] Delegated legislation, particularly instruments that modify primary legislation, should not be allowed to continue in force for such a long period as to operate as a de facto amendment to primary legislation.[49]

D.51 Unless a different review mechanism applies — such as periodic review mandated by the enabling Act — exemptions from sunsetting make it more likely that outdated or irrelevant laws will be allowed to remain in force. Exemptions from sunsetting also reduce Parliament's ability to remain informed about the operation of delegated legislation and to perform its oversight function. Instruments should not be exempt from sunsetting without strong justification. The *Guide to Managing the Sunsetting of Legislative Instruments* provides further guidance, including policy criteria, for exemptions from sunsetting.[50]

D.52 The Delegated Legislation Scrutiny Committee has expressed the following views in relation to exemptions from disallowance and sunsetting:

- Subject to the circumstances of the particular case, instruments that do any of the following should not be exempt from disallowance or sunsetting:
    - override or modify primary legislation;
    - trigger, or are a precondition to, the imposition of custodial sentences or significant pecuniary penalties;
    - restrict personal rights and liberties; and

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46 For further discussion of alternative accountability mechanisms, see Chapters 4 and 5 of Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021).

47 Ibid [7.91].

48 Ibid [7.74].

49 Ibid [7.114].

50 Attorney-General's Department (Cth), *Guide to Managing the Sunsetting of Legislative Instruments* (2020).

- facilitate expenditure of public money, including 'Advance to the Finance Minister' determinations.[51]

- The following reasons are highly unlikely to be acceptable, in any circumstances, for exempting delegated legislation from disallowance and sunsetting:
  - the rule-making process needs to be separated from the political process; and
  - the instrument is intended to remain within executive control.[52]
- The following reasons are unlikely to be acceptable for exempting delegated legislation from disallowance and sunsetting unless exceptional circumstances exist:
  - the instrument is based on technical or scientific evidence;
  - the instrument relates to internal departmental administration;
  - the instrument is central to machinery of government arrangements or electoral matters;
  - commercial certainty will be affected;
  - the exemption is in response to a parliamentary committee recommendation;
  - the instrument is part of an intergovernmental scheme, or required under an international treaty or convention;
  - the instrument is critical to ensuring urgent and decisive actions; and
  - the exemption will provide certainty in meeting specific security needs.[53]

Other safeguards

D.53 Safeguards other than the default rules provided by the *Legislation Act* may also be considered in each case. Some examples are discussed below. The more significant a delegated legislative power, and the more likely its exercise involves considerations of policy or value judgements, the more likely the delegated legislation being made under the power will warrant additional safeguards. Different safeguards may also be considered based on the identity of the delegate, the delegate's role in the executive arm of government (for example, the extent of any independence from the elected government), and the delegate's relationship to Parliament (for example, the extent of parliamentary oversight).

D.54 When considering additional or tailored safeguards, their potential benefits should be considered against any potential to create complexity or to disproportionately inhibit the exercise of the delegated power, thereby potentially frustrating Parliament's intention.

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51 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 46) [7.93].
52 Ibid [7.94].
53 Ibid [7.95].

Specific consultation requirements

D.55 Section 17 of the *Legislation Act* requires a rule-maker to be satisfied that any reasonably practicable and appropriate consultation has taken place before making a legislative instrument. Non-compliance does not, however, affect the validity or enforceability of a legislative instrument.[54]

D.56 An empowering provision may modify the standard consultation requirements by, for example, providing that:

- rule-makers must have regard to particular matters when determining whether consultation has been appropriate (in addition to the non-mandatory matters suggested by s 17(2) of the *Legislation Act*);
- rule-makers must consult particular individuals, entities, or groups; or
- non-compliance with a mandatory consultation requirement will enable a court to invalidate the relevant legislative instrument or declare it invalid against certain persons.

D.57 Creating a judicially enforceable requirement to consult would be a significant departure from the default position provided by the *Legislation Act*, but may be warranted in cases where consultation is particularly important.

D.58 The following circumstances would tend to support a delegated legislative power being subject to enhanced consultation requirements:

- the exercise of the power involves important policy considerations or value judgements;
- specific groups may be significantly affected by the exercise of the power (particularly in circumstances where those groups are not otherwise likely to participate in an ordinary consultation process);
- the delegated power relates to a significant regulatory scheme; or
- the exercise of the power involves scientific or technical considerations that are the subject of controversy in a specialist field.[55]

Affirmative resolution or delayed commencement

D.59 Typically, a legislative instrument commences the day it is registered on the Federal Register of Legislation or at a time specified by the instrument itself.[56] As an alternative, commencement may be delayed until:

- both Houses of Parliament expressly approve the legislative instrument (referred to as the 'affirmative resolution procedure');[57] or
- the time for parliamentary disallowance under the *Legislation Act* has expired.

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54 *Legislation Act 2003* (Cth) s 19.
55 See, eg, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) [3.40]–[3.41].
56 *Legislation Act 2003* (Cth) s 12.
57 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 24) 82.

D.60 Both processes increase the opportunity for scrutiny by Parliament before commencement and promote a degree of certainty as the laws commence only after an opportunity for disallowance. However, the processes also introduce practical constraints, particularly during parliamentary recesses. In the case of the affirmative resolution procedure, for example, there may be no clear timeline or process to facilitate commencement, potentially delaying commencement indefinitely.[58] Delaying commencement also reduces the ability to respond to an issue quickly and potentially provides an opportunity for avoidance.

D.61 Where delegated legislation is made by a department or statutory agency, it may be possible to require consent, or to permit veto, by the responsible minister (provided such a measure would align with the parliamentary disallowance procedure and timeframes). This may be appropriate, for example, in situations where a regulator with technical expertise is responsible for significant elements of a regulatory scheme.[59] In cases where an agency or regulator functions independently of government (in respect of both law-making and non-law-making functions), veto may be a more appropriate mechanism than prior approval, in order to promote independence.

Publicity and publication

D.62 An empowering provision may require that delegated legislation be published in a particular way in addition to the general requirement that it be lodged and registered on the Federal Register of Legislation.[60] Although publication on the Federal Register of Legislation has supplanted many older forms of notification, such as Gazettal, consideration may be given to additional publication or notice requirements if particular delegated legislation may not otherwise come to the attention of an affected group. This may include, for example, prominent notice on a website or inclusion in an email update to stakeholders.

Adjusted sunsetting

D.63 While the standard sunsetting regime in the *Legislation Act* applies a period of 10 years, a lesser period of time may be appropriate in some cases. These may include, for example, where the delegated legislation is permitted to make modifications to primary legislation. A shorter sunsetting timeframe in these cases gives Parliament an opportunity to review and scrutinise changes to primary legislation.[61]

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58 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 55) [8.45].

59 See, eg, *Corporations Act 2001* (Cth) s 798G (Market Integrity Rules).

60 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [109].

61 For example, the Delegated Legislation Scrutiny Committee has suggested that in these cases, a three year timeframe would be appropriate as it would allow sufficient time for the modifications or exemptions to be in force so as to consider whether they are required for a longer period: Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 46) [7.115]. See also Legislation Act Review Committee, Attorney-General's Department (Cth) (n 24) 49–50.

Reporting to Parliament

D.64 An empowering provision may require the delegate of legislative power to periodically report to Parliament on the use of that power. Such reporting may assist Parliament to gain a 'macro level' understanding that it would otherwise lack through the usual scrutiny process, which is focused on particular legislative instruments as they are made. As noted above, this may also be considered in the case of a power to grant exemptions from primary legislation.

Specific issues

Fundamental rights and liberties

Could exercise of the power significantly impact personal rights and liberties?

Matters that have a significant impact on civil rights and liberties should generally be addressed in primary legislation, regardless of whether the impact is positive or negative.[62]

D.65 Matters that have a significant impact on civil rights and liberties are examples of significant policy matters that should be addressed in primary legislation. The Parliamentary Joint Committee on Human Rights has prepared a *Guide to Human Rights* which outlines 25 of the key human rights against which the Committee considers questions of human rights compatibility. This resource provides a useful starting point for assessing whether a legislative measure impacts on civil rights and liberties.

D.66 The Delegated Legislation Scrutiny Committee has also identified provisions that impact personal rights and liberties and which therefore appropriately belong in primary legislation or require special justification if they are to be contained in delegated legislation.[63] These include provisions relating to law enforcement (discussed under the next heading) and provisions that:

- apply retrospectively or have a retrospective effect;
- confer immunity from liability;
- exclude or limit procedural fairness; or
- provide for the collection, use, and disclosure of personal information.

62 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j).

63 Ibid Principle (h).

Offences, penalties, and coercive powers

Does the delegation allow for the creation of criminal offences?

Criminal offences subject to serious criminal sanctions, including imprisonment, should be contained in primary legislation.[64]

D.67 Laws creating offences should ordinarily be contained in primary legislation.[65] This is because:

- a criminal conviction carries a range of consequences beyond the immediate penalty;[66]
- there are public policy and political dimensions to decisions as to what contraventions are regarded as 'criminal';[67] and
- those who read legislation have a legitimate expectation that 'fundamental aspects of a legislative scheme (such as serious criminal penalties) will be in the principal Act'.[68]

D.68 Any term of imprisonment is considered to be a serious criminal sanction and should not be included as a penalty in delegated legislation.[69] Serious criminal sanctions are also generally considered to include fines of more than 50 penalty units for an individual or 250 penalty units for a corporation.[70] However, in certain regulatory contexts, higher penalties have been set for corporations in delegated legislation, and this may be appropriate depending on the nature of the regulated community.[71]

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64 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 9) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j); Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10].

65 Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 44. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) [17.3], [17.39]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [3.43].

66 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 13.

67 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) [3.43].

68 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 44.

69 Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 44.

70 Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10]. 'Penalty units' are defined in s 4AA of the *Crimes Act 1914* (Cth).

71 See, eg, *Corporations Regulations 2001* (Cth) reg 5D.2.01(2A) (50 penalty units for an individual and 500 penalty units for a corporation).

Does the delegation allow for the imposition of civil penalties?

Obligations that attract significant civil penalties for their breach, and provisions setting significant civil penalties, should be contained in primary legislation.[72]

D.69 Civil penalties are non-criminal monetary penalties imposed by a court in civil proceedings that apply the civil standard of proof ('the balance of probabilities'). They are one of a range of enforcement tools available to those designing legislation and have become common in Australian regulatory laws. Such penalties exist to deter contraventions and promote compliance with regulatory standards.[73]

D.70 Although civil penalties are not criminal sanctions, they can have serious reputational and financial impacts on a person or entity. There are also some differences between the protections in the criminal law, and the procedural and evidential rules applicable in civil penalty proceedings. Given this, it is not generally appropriate to delegate the power to create significant civil penalties.[74] The monetary threshold for a 'significant' pecuniary penalty under a civil penalty provision is the same as for a criminal offence: 50 penalty units for an individual and 250 penalty units for a corporation (see above). However, as with criminal fines, the level of civil penalty is set higher in some regulatory contexts for corporations.[75]

Is the enabling power subject to appropriate safeguards?

Any power to create criminal offences or civil penalty provisions in delegated legislation should be clearly defined and subject to appropriate safeguards.

D.71 If it is intended that an offence or civil penalty provisions are to be included in delegated legislation, the empowering Act must include express power for a legislative instrument to create them, and should also specify the maximum penalty.[76]

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72 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j).

73 See, eg, *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450.

74 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j). See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) [6.50].

75 See, eg, *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019* (Cth) regs 10(2) and (4) (300 penalty units).

76 See also Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 14.

D.72 Because of their impact on fundamental rights and liberties, the following types of criminal law provisions are of heightened concern to the Delegated Legislation Scrutiny Committee and require particular safeguards:

- abrogation of the privilege against self-incrimination;
- strict or absolute liability offences; and
- reversals of the legal or evidential burden of proof.[77]

Does the Act delegate the content of an offence or civil penalty provision?

The content of an offence or civil penalty provision should not be provided in another instrument unless there is a demonstrated need to do so and appropriate safeguards apply.

D.73 The content of an offence or civil penalty provision set out in an Act or regulation should be clear from the provision itself, although it may rely on the Act or regulations, or another instrument, to define terms or give context.[78] For example, the following would normally be considered undesirable:

> A person commits an offence if the person fails to comply with obligations set out in the regulations.

D.74 Clarity of content on the face of the provision is important:

- so the scope and effect of the provision is clear to Parliament and those subject to the provision;
- to enable Parliament to scrutinise the entire content of an offence or civil penalty provision; and
- in the case of offences, to avoid imposing a general offence with a single maximum penalty to a wide range of potential conduct of undifferentiated seriousness.[79]

D.75 It will generally be easier to justify delegating the content of civil penalty provisions than offences. This is because of the different consequences attached to offences and the existence of case law and specific statutory provisions addressing the threshold for imposing, and calculation of, civil pecuniary penalties.

D.76 Circumstances in which it may be appropriate to delegate offence or civil penalty content to another instrument include where:

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77 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (h).

78 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 26. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [8].

79 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 27.

- the relevant content involves a level of detail inappropriate for an Act;[80]
- prescription by legislative instrument is necessary because of the changing nature of the subject matter;[81]
- the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act;[82]
- elements of the offence or civil penalty provision are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or other international agreements, or for consistency with international practice;[83]
- the offence or civil penalty provision relates to breach of conditions of a licence, authorisation, permit, or exemption (because the holder applies for it and agrees to its terms);[84] or
- a civil penalty provision relates to contravention of a specific set of highly visible and easily identifiable regulatory rules or a code of conduct.[85]

D.77 Offence and civil penalty content should not be enacted by delegated legislation if it would be more appropriate for that content to receive the full consideration and scrutiny of Parliament (for example, if the content to be delegated is likely to be significant or contentious).

D.78 It is generally easier to justify the delegation of offence and civil penalty content to regulations than other kinds of legislative instrument.[86] However, where an Act delegates content directly to a different type of instrument (such as 'rules'

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80 For example, s 20AB of the *Civil Aviation Act 1988* (Cth) allows for regulations to specify the process for determining the types of people who are authorised to carry out a variety of duties in relation to different categories of aircraft.

81 For example, s 18HE of the *National Measurement Act 1960* (Cth) allows for the prescription of scales of measurement on measuring instruments appropriate for particular classes of goods for sale.

82 For example, Part VI Div 4 of the *National Measurement Act 1960* (Cth) allows for the prescription of the procedures by which the average quantity of a statistically significant sample of goods is calculated.

83 See, eg, *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth); *Corporations (Passport) Rules 2018* (Cth).

84 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 29. However, where legislation permits the relevant authority to vary the terms of the licence, authorisation, or permit, the legislation should generally provide for the holder to be notified of the change. Consideration should also be given to allowing a minimum period for compliance with the new conditions, especially where a person may be criminally liable for non-compliance.

85 Examples in the context of the *Corporations Act* include s 798H, by which contraventions of obligations in the Market Integrity Rules attract a civil penalty (not applicable to overseas market operators under s 798H(2)), s 908CF, by which contraventions of the Financial Benchmark Rules attract civil penalties, and s 921E, by which contraventions of the Financial Planners and Advisers Code of Ethics (made by legislative instrument) attracts a 'restricted' civil penalty. Note that the final bullet point in this list is a new addition, whereas the other bullet points are covered in Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 27–30.

86 Ibid 26. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [28]–[34].

or 'orders')[87] it may be appropriate to delegate offence and civil penalty content to such an instrument, subject to parliamentary scrutiny and any other appropriate safeguards.[88]

D.79 The Scrutiny of Bills Committee has noted that, at a minimum, delegated legislation containing the content of offences should be subject to parliamentary review and disallowance.[89] The Committee has previously expressed concern about provisions that allow for obligations to be changed without Parliament's knowledge, or without any opportunity for Parliament to scrutinise the variation.[90] There should also be strong justification where delegated legislation is exempt from scrutiny.[91]

D.80 The above principles also apply to the delegation of offence or civil penalty content from regulations to another legislative instrument. Offence and civil penalty content should generally only be sub-delegated where it is likely to be lengthy, technical in nature, or changed regularly.

D.81 When the content of an offence or civil penalty provision is delegated to a legislative instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence or civil penalty provision can readily ascertain their obligations.

D.82 Appropriate safeguards include:

- clearly defining and circumscribing what may be contained in delegated legislation;
- mechanisms for ensuring delegated legislation is readily publicised and obtainable, in addition to publication on the Federal Register of Legislation (such as on the relevant Department's website);
- mechanisms for distinguishing parts of an instrument to which the offence or civil penalty provision applies. For example, if an offence applies to contravention of a regulation made for the purposes of the offence, the relevant regulation should refer to the offence provision;
- where an offence or civil penalty provision affects an identifiable class of people, it may be appropriate for relevant stakeholders to be consulted when changes are made to the delegated content. For example, the Civil Aviation Safety Authority has informal and formal processes for consulting

87 See, eg, *Navigation Act 2012* (Cth) ss 14, 342. The effect of these provisions is to include Marine Orders, a form of delegated legislation made by the Australian Maritime Safety Authority, within the definition of 'regulations' and to provide that Marine Orders may be made with respect to the same matters as regulations (subject to exceptions).

88 This may include, for example, ensuring that instruments relating to offences and civil penalties are drafted by OPC.

89 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 28.

90 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2010* (June 2010) 217–21.

91 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2007* (February 2007) 7.

stakeholders in the aviation industry whenever legislative changes are made affecting business or restricting competition; and

- explanatory material for the Act and the delegated legislation clearly explaining why it is necessary to delegate offence or civil penalty provision content and any safeguards that have been included in the legislation.[92]

Does the delegation allow for the creation of an infringement notice scheme?

When primary legislation allows for the creation of an infringement notice scheme in delegated legislation, regulations are preferable to other legislative instruments.

D.83 Infringement notices are an administrative device to dispose of criminal and non-criminal contraventions without going to court. An infringement notice sets out particulars of an alleged offence or contravention, and gives the person to whom the notice is issued the option of either paying the penalty set out in the notice or electing to have the matter dealt with by a court.

D.84 Infringement notices are generally used for low-level offences where a high volume of uncontested contraventions is likely.[93] The amount payable under an infringement notice scheme at any level of the legislative hierarchy should not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate.[94]

D.85 Regulations are generally considered an appropriate form of instrument for detailed matters such as how an infringement notice scheme operates or the content of notices.[95] If an infringement notice scheme is intended to be included in regulations, the primary legislation should include an express regulation-making power providing for this.[96] It should also be noted that the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) sets out a general scheme for infringement notices that may be relied on to reduce the length of an Act.[97]

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92 See generally Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 28–30.

93 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) 59.

94 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 60.

95 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [6.100].

96 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 57.

97 For further guidance and information, see Attorney-General's Department (Cth), 'Regulatory Powers' <www.ag.gov.au/legal-system/administrative-law/regulatory-powers>.

Does the delegation allow for the imposition of administrative penalties or other administrative action?

Provisions establishing schemes for the imposition of administrative penalties, or other administrative action related to regulatory offences or contraventions, should be contained in primary legislation.

D.86 Regulatory schemes may also include a range of administrative penalties (automatic, non-discretionary monetary administrative penalties that can be imposed without going to court) or other consequences such as enforceable undertakings, licensing restrictions, or banning orders that may be imposed or negotiated following the alleged commission of regulatory offences or contraventions.

D.87 The Delegated Legislation Scrutiny Committee considers that provisions establishing significant elements of a regulatory scheme should be contained in primary legislation. Such elements may include:

- licensing regimes;
- principles underpinning the scope and exercise of significant discretionary powers;
- the availability of independent review of administrative decisions made under the scheme;
- safeguards to protect against undue trespass on personal rights and liberties in the administration of the scheme; and
- significant penalties for regulatory breaches.[98]

Does the delegation allow for the creation of coercive powers?

Coercive powers should generally be contained in primary legislation.

D.88 Including coercive powers (such as powers of arrest, detention, entry, search, and seizure) in primary legislation ensures that the scope and effect of these powers is clear to Parliament, those using the powers, and those potentially subject to the powers. Consideration should be given to adopting the standard suite of provisions for monitoring and investigation powers contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).[99]

D.89 However, providing for such powers in delegated legislation may be appropriate in certain circumstances, including where the principal legislation makes express

98 See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 9) Principle (j).

99 For further guidance and information, see Attorney-General's Department (Cth), *Regulatory Powers* (n 97).

provision for the creation of the power under delegated legislation,[100] or where the objectives of the principal legislation may be frustrated unless the powers are created under regulation (for example, because of rapidly changing circumstances).[101]

Incorporation by reference

Does the empowering provision contemplate 'incorporation by reference'?

Incorporation by reference should only be used if there are clear benefits to doing so.

D.90 Section 14 of the *Legislation Act* provides general authority for delegated legislation to apply, adopt, or incorporate material contained in an Act, an instrument, rules of court, or another written document. OPC Drafting Direction 3.8 discusses the requirements for particular circumstances and issues to consider when drafting delegated legislation.[102] In summary, a legislative instrument can apply, adopt, or incorporate:

- the provisions of a Commonwealth Act, disallowable legislative instrument (as defined in the *Legislation Act*), or rules of court as in force at a particular time, or as in force from time to time;
- material contained in something other than a Commonwealth Act, or disallowable legislative instrument (as defined in the *Legislation Act*) as in force or existing *at or before* the time the legislative instrument commences; and
- if expressly permitted by the enabling Act, material contained in something other than a Commonwealth Act or disallowable legislative instrument (as defined in the *Legislation Act*) as in force or existing *from time to time*.[103]

D.91 The prospect of incorporating material by reference should be kept in mind when designing an empowering provision. This is particularly the case if potentially incorporated material is not in legislation as existing from time to time. There are four main issues to consider in this regard:[104]

- **Quality**: Incorporated material may not be sufficiently certain or understandable to be appropriate for legislation. This is particularly important if the material forms the basis for offences.
- **Accessibility**: Legislation should be easy to find, use, and understand. Incorporated material should generally be accessible to the same extent as legislation.

100 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) s 66(2)(c).
101 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 13) 73.
102 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [164]–[180].
103 See *Acts Interpretation Act 1901* (Cth) ss 10, 10A.
104 Legislation Design and Advisory Committee (NZ) (n 8) 81.

- **Legitimacy**: If incorporated material can be changed, then those changes may automatically flow through to the legislation, and Parliament or the delegated law-maker may have no control over that process. Sub-delegation of this kind must be carefully considered.
- **Good process**: It is problematic if incorporation by reference would bypass or subvert important law-making procedures.

D.92 These potential problems must be weighed against the benefits of incorporation by reference, which include:

- making primary legislation shorter and simpler by removing significant detail that otherwise clutters core requirements;
- allowing certain aspects of rules to be developed by people with specialist knowledge and expertise; and
- facilitating convergence and consistency of standards, including by keeping laws up to date with national and international standards.

D.93 Incorporation by reference may be appropriate in cases where, for example:

- the incorporated document is long or complex, covers only technical matters, and few people are likely to be affected;
- the document has been agreed with one or more foreign governments, cannot easily be recast into legislation, and deals with only technical details of a policy already approved by Parliament;
- it is appropriate for the document to be formulated by a specialist government agency or private sector organisation, rather than by Parliament or Ministers; or
- the document has been developed by an organisation for use in respect of a product manufactured by it or its members.

Naming delegated legislation

D.94 When formulating the terms of an empowering provision, consideration should be given to how the delegated power is described in operative terms. This is important because the nature of the power will generally be reflected in the name of instruments made under that power, which in turn affects their findability and useability. For example, if the exercise of power is intended to 'certify' something, then the instrument giving effect to it will typically be a 'Certification'. OPC Drafting Directions give further guidance regarding the appropriate language to use in an empowering provision.[105]

105 See especially Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) 8; Office of Parliamentary Counsel (Cth), Drafting Direction 1.1A, 'Names of instruments and provision units of instruments' (Document release 3.2, July 2022).

Other resources

D.95 This guidance aims to consolidate and synthesise pre-existing resources relating to the legislative process so far as they touch on questions concerning the design of provisions that delegate legislative power. Those resources include:

- The *Legislation Handbook* maintained by the Department of the Prime Minister and Cabinet, as it relates to the distinction between primary and delegated legislation.[106] The *Legislation Handbook* contains detailed information regarding the procedures for making Commonwealth Acts.
- OPC guidance materials, in particular Drafting Direction 3.8 regarding delegated legislation. OPC is an important source of knowledge and expertise in this respect, and should be consulted early and regularly regarding the delegation of legislative power.
- The Attorney-General Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, in relation to delegated legislation creating, providing the content of, or modifying offences.

D.96 This guidance also draws on comparable guidance published by the New Zealand Legislation Design and Advisory Committee.[107]

D.97 As committees responsible for scrutinising all bills and delegated legislation, the Bills Scrutiny Committee and Delegated Legislation Scrutiny Committee are an important source of guidance. The guidance in this document draws on the scrutiny guidelines of both committees and recent reports of the Delegated Legislation Scrutiny Committee.[108] The committees also create an important resource by applying many of the principles discussed above on a case-by-case basis. So far as possible, policy-makers and law-makers should remain up to date with both committees' views by:

- subscribing to the Scrutiny News, an email newsletter service highlighting key aspects of the work of both the Bills Scrutiny Committee and Delegated Legislation Scrutiny Committee;
- consulting the Bills Scrutiny Committee's *Scrutiny Digest*, which is published during parliamentary sitting weeks and contains the Committee's comments on recently introduced Bills; and
- consulting the Delegated Legislation Scrutiny Committee's *Delegated Legislation Monitor*, which is published during parliamentary sitting weeks and provides a periodic overview of the Committee's scrutiny work.

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106 See especially Department of the Prime Minister and Cabinet (Cth) (n 9) [1.10]–[1.12], [5.65]–[5.76].

107 Legislation Design and Advisory Committee (NZ) (n 8).

108 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 55); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 46).

Appendix E
Prototype Legislation

This appendix contains prototype legislation that seeks to illustrate the following recommendations:

- **Recommendations 31** and **32** relating to the definitions of 'financial product' and 'financial service'; and
- **Recommendations 43–52** relating to the recommended legislative model.

For further discussion of these recommendations, see **Chapters 3**, **5**, and **6** of this Report.

This prototype legislation is indicative only and is not intended to be a complete representation of the law. Footnotes are used in some places to identify equivalent provisions in existing legislation or to indicate how existing provisions could otherwise be accommodated. In some places, provision numbering has been adopted to reflect existing, equivalent provisions. Generally, however, provision numbering is indicative only. Square brackets are used to indicate placeholders that have not been drafted for the purposes of this prototype legislation.

Corporations Act 2001

Chapter 1—Introductory

Part 1.2—Interpretation

Division 1—General

9 Dictionary

In this Act:

acquire a financial product: if a financial product is issued to a person, the person ***acquires*** the product from the issuer.

arrangement means a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

(a) whether formal or informal, or partly formal and partly informal; and

(b) whether written or oral, or partly written and partly oral; and

(c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

Australian financial services licence means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

corporate collective investment vehicle *or* ***CCIV*** means a company that is registered as a corporate collective investment vehicle under this Act.

credit facility has the meaning given by section 763E.

dealing in a financial product has the meaning given by section 766C.

deposit product means a deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA.

facility includes:

(a) intangible property; or

(b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or

(c) a combination of 2 or more things each of which is covered by paragraph (a) or (b).

Note: For cases where 2 or more arrangements may be taken to constitute a single arrangement, see section 764B.

financial product has the meaning given by sections 763A, 763E and 764A.

Note: Scoping orders in force under section 765A may exclude the application of provisions of Chapter 7 to some financial products.

financial service has the meaning given by section 766A.

Note: Scoping orders in force under section 766J may exclude the application of provisions of Chapter 7 to some financial services.

financial services business means a business of providing financial services.

financial services licensee means a person who holds an Australian financial services licence.

financial services rules means rules made under section 1098.

foreign passport fund product means:

(a) an interest in a notified foreign passport fund; or

(b) a legal or equitable right or interest in an interest covered by paragraph (a); or

(c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b).

funeral benefit means a benefit that consists of the provision of funeral, burial or cremation services, with or without the supply of goods connected with such services, but does not include a funeral expenses facility.[1]

funeral expenses facility means an arrangement for the provision of benefits consisting of the payment of money, on the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral, burial or cremation of the person.

general insurance product has the meaning given by section 71.

government security means a debenture or bond, or stock, issued or proposed to be issued by a government.

1 This definition replaces section 765B of the *Corporations Act* and subsection 12BAA(10) of the *ASIC Act* (as in force on 1 July 2023). Note that section 765B of the *Corporations Act* was repealed and the definition of 'funeral benefit' in section 761A of the Act was amended by the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth), with effect from 15 September 2023.

investment life insurance product has the meaning given by section 71.

issue a financial product: a financial product specified in an item of the table is ***issued*** to a person when the event specified in that item occurs.

When financial product is issued		
Item	**Financial product**	**Event**
1	a financial product not covered by a later item	the financial product is first issued, granted or otherwise made available, if that first issue, grant or making available is to the person
2	a superannuation product	the person becomes a member of the fund concerned
3	an RSA	the account concerned is opened in the person's name
4	a derivative	the person enters into the legal relationship that constitutes the derivative
5	a margin lending facility	the person enters into the legal relationship that constitutes the margin lending facility, if the person does so as the client under the facility
6	a financial product of a kind specified in a scoping order made by the Minister for the purposes of this item	the event specified for that kind of financial product in the scoping order

However, none of the following results in a financial product being ***issued*** to a person:

(a) the person making a further contribution to a superannuation fund of which the person is already a member;

(b) an employer of the person making a further contribution, for the person's benefit, to a superannuation fund of which the person is already a member;

(c) the person making a further deposit into an RSA maintained in the person's name;

(d) the person making a further payment under an investment life insurance product;

(e) the person making a further deposit into a deposit product.

issuer of a financial product: the ***issuer*** of a financial product specified in an item of the table is the person specified in that item.

Issuer of a financial product

Item	Financial product	Issuer
1	a financial product not covered by a later item	the person responsible for the obligations owed, under the terms of the facility that constitutes the product, to: (a) if the product has not yet been issued to a person—the person to whom the product will be issued, or a person nominated by that person; or (b) if the product has been issued to a person and paragraph (c) does not apply—that person, or a person nominated by that person; or (c) if the product has been issued to a person from whom it has been transferred to another person, and is now held by the other person or a third person to whom it has later been transferred—the person by whom it is held, or a person nominated by that person
2	an interest in a notified foreign passport fund	the operator of the fund
3	a financial product that: (a) is a derivative; and (b) is *not* entered into, or acquired, on a financial market	each person who is a party to the financial product

Issuer of a financial product		
Item	**Financial product**	**Issuer**
4	a financial product that: (a) is a derivative; and (b) is entered into, or acquired, on a financial market	(c) if the derivative is so entered into or acquired through an arrangement made by a financial services licensee acting on behalf of another person—the licensee; or (d) if the product is so entered into or acquired through an arrangement made by an authorised representative, of a financial services licensee, acting on behalf of another person (who is not the licensee)—the licensee; or (e) otherwise—the market operator
5	a financial product of a kind specified in a scoping order made by the Minister for the purposes of this item	the person specified for that kind of financial product in the scoping order

managed investment scheme product means:

(a) an interest in a managed investment scheme; or

(b) a legal or equitable right or interest in an interest covered by paragraph (a); or

(c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b).

Note: A notified foreign passport fund is a managed investment scheme for the purposes of this Act: see section 1213E.

provide a financial product: if a financial product is issued to a person, the issuer ***provides*** the product to the person.

registered scheme product means:

(a) an interest in a registered scheme; or

(b) a legal or equitable right or interest in an interest covered by paragraph (a); or

(c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b).

risk life insurance product has the meaning given by section 71.

RSA has the same meaning as in the *Retirement Savings Accounts Act 1997*.

Note: RSA is short for retirement savings account.

scoping order means an order made under section 1097 or a provision of such an order.

superannuation product means a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*.

unregistered scheme product means:

(a) an interest in a managed investment scheme that is neither a registered scheme nor a managed investment scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) is satisfied; or

(b) a legal or equitable right or interest in an interest covered by paragraph (a) of this definition; or

(c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b) of this definition.

Note: Paragraphs 601ED(1)(a), (b) and (c) each set out a different threshold condition for when a managed investment scheme must be registered under section 601EB.

71 Meaning of *general insurance product*, *investment life insurance product* and *risk life insurance product*

(1) Subject to this section:

general insurance product means a contract of insurance that is neither a life policy, nor a sinking fund policy, within the meaning of the *Life Insurance Act 1995*.

investment life insurance product means a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is *not* a contract of insurance.

risk life insurance product means a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is a contract of insurance.

(2) None of the definitions in subsection (1) covers a contract or policy:

(a) to the extent that it provides for a benefit to be provided, by an association of employees that is registered as an organisation,

or recognised, under the *Fair Work (Registered Organisations) Act 2009*, for a member of the association or a dependant of a member; or

(b) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995* (which excludes such things from the scope of life insurance business for the purposes of that Act); or

(c) to the extent that it provides for the provision of a funeral benefit; or

(d) that is issued by an employer to an employee of the employer.

(3) If a single contract of insurance provides 2 or more kinds of cover, this section applies separately in relation to that contract, in relation to each kind of cover, as if the contract only provided that kind of cover.

Note: Because of this subsection (including as affected by subsection (4)), a single contract of insurance may constitute 2 or more separate general insurance products.

(4) If a contract of insurance provides a kind of cover in relation to 2 or more kinds of asset, subsection (3) applies to the contract, in relation to each kind of asset, as if the cover provided by the contract in relation to that kind of asset constituted a separate kind of cover.

(5) For the purposes of this section:

(a) a contract that would ordinarily be regarded as a contract of insurance is taken to be a contract of insurance, even if some of its provisions are not by way of insurance; and

(b) a contract that includes provisions of insurance is taken to be a contract of insurance in so far as those provisions are concerned, even if the contract as a whole would not ordinarily be regarded as a contract of insurance.

Chapter 7—Financial products and financial services

Part 7.1—Preliminary

Division 3—Scope of this Chapter: financial products

Subdivision A—Functional definition of *financial product*

763A Meaning of *financial product*

(1) In this Act, ***financial product*** means a facility by means of which, or by the acquisition of which:

(a) a person does one or more of the following:

(i) makes a financial investment (see section 763B);

(ii) manages financial risk (see section 763C);

(iii) makes non-cash payments (see section 763D); or

(b) people commonly do one or more of the things mentioned in paragraph (a), even if a particular person acquires the facility for some other purpose.

Note: The meaning of ***financial product*** is extended by sections 763E and 764A.

(2) A financial product does not cease to be a financial product because of this section merely because:

(a) it is acquired by a person other than the one to whom it was originally issued; and

(b) that person, in acquiring it, is not making a financial investment or managing financial risk.

763B Meaning of *makes a financial investment*

For the purposes of this Act, a person (the ***investor***) ***makes a financial investment*** if:

(a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:

(i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor; and

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note 1: Examples of making a financial investment are:

(a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or

(b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note 2: Examples of actions that do *not* constitute making a financial investment are:

(a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or

(b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

763C Meaning of *manages financial risk*

For the purposes of this Act, a person ***manages financial risk*** if they:

(a) manage the financial consequences to them of particular circumstances happening; or

(b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

Note 1: Examples of managing financial risk are:

(a) taking out insurance; or

(b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 2: An example of an action that does *not* constitute managing financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

763D Meaning of *makes non-cash payments*

For the purposes of this Act, a person ***makes non-cash payments*** if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian currency in the form of notes and/or coins.

Note: Examples of making non-cash payments are:

(a) making payments by means of a facility for direct debit of a deposit account; or

(b) making payments by means of a facility for the use of cheques; or

(c) making payments by means of a smart card or other purchased payment facility within the meaning of the *Payment Systems (Regulation) Act 1998*; or

(d) making payments by means of traveller's cheques.

Subdivision B—Specific inclusions within the meaning of *financial product*

763E Credit facilities

(1) In this Act, ***financial product*** includes a credit facility.

(2) In this Act, ***credit facility*** means:

(a) the provision of credit:

(i) for any period; and

(ii) with or without prior agreement; and

(iii) whether or not both credit and debit facilities are available; or

(b) a facility:

(i) known as a bill facility; and

(ii) under which a person provides credit by accepting, drawing, discounting or indorsing a bill of exchange or promissory note; or

(c) the provision of credit by a pawnbroker in the ordinary course of lawfully conducting a pawnbroker's business; or

(d) the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate; or

(e) the provision of credit by an employer, or a related body corporate of an employer, to an employee or former employee (or to the employee or former employee with another person); or

(f) the provision of a charge (other than one arising by operation of any law or by custom) that secures obligations under a credit contract; or

(g) a guarantee related to a charge mentioned in paragraph (f); or

(h) a guarantee of obligations under a credit contract; or

(i) a facility for making non-cash payments if payments made using the facility will all be debited to a credit facility of a kind referred to in any of paragraphs (a) to (h); or

(j) a hire purchase agreement; or

(k) an arrangement for the hire, lease or rental of goods, unless:

(i) full payment is made under it at or before the time when the goods are provided; and

(ii) an amount at least equal to the value of the goods is paid under it as a deposit in relation to the return of the goods; or

(l) an arrangement for the hire, lease or rental of services, unless full payment is made under it at or before the time when the services are provided; or

(m) an article known as a credit card or charge card; or

(n) an article, other than a credit card or charge card, intended to be used to obtain cash, goods or services; or

(o) an article, other than a credit card or charge card, commonly issued to customers or prospective customers by persons who carry on business for the purpose of obtaining goods or services from those persons by way of a loan; or

(p) a letter of credit.

(3) The provision of consumer credit insurance that includes a contract of general insurance for the purposes of the *Insurance Contracts Act 1984* is *not* a credit facility.

Note: See subsection 11(6) of that Act.

(4) For the purposes of subsection (2), ***credit*** is provided if:

(a) payment of a debt owed by one person to another person is deferred; or

(b) one person incurs a deferred debt to another person; or

(c) any form of financial accommodation is provided; or

(d) credit is provided for the purchase of goods or services; or

(e) a liability exists in respect of redeemable preference shares; or

(f) a financial benefit arises from or as a result of a loan; or

(g) assistance is provided to obtain a financial benefit arising from or as a result of a loan; or

(h) a promissory note is issued, indorsed or otherwise dealt in; or

(j) a bill of exchange or other negotiable instrument is drawn, accepted, indorsed or otherwise dealt in; or

(k) a lease over real or personal property is granted or taken.

764A Other specific inclusions

(1) In this Act, ***financial product*** includes the following:

(a) a security;

(b) a managed investment scheme product;[2]

(c) a derivative;

(da) a general insurance product;

(db) a risk life insurance product;

(e) an investment life insurance product;[3]

(fa) a superannuation product;

(fb) a beneficial interest in a superannuation fund (as defined by section 10 of the *Superannuation Industry (Supervision) Act 1993*) that is not a superannuation entity (as defined by that section);[4]

(g) an RSA;[5]

(h) a deposit product;[6]

(i) a government security;[7]

(j) a foreign exchange contract;[8]

(k) a margin lending facility;

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2 Paragraph 764A(1)(b), together with the definition of ***managed investment scheme product*** in section 9 of this prototype legislation, replicates the inclusions presently found in paragraphs 764A(1)(b), (ba), and (bb) of the *Corporations Act* and paragraph 12BAA(7)(b) of the *ASIC Act*.

3 Paragraphs 764A(1)(da), (db), and (e), together with the definitions in section 71 of this prototype legislation, replicate the inclusions presently found in paragraphs 764A(1)(d), (e), and (f) of the *Corporations Act* and paragraphs 12BAA(7)(d) and (e) of the *ASIC Act*.

4 Paragraphs 764A(1)(fa) and (fb), together with the definition of ***superannuation product*** in section 9 of this prototype legislation, replicate the inclusions presently found in paragraph 764A(1)(g) of the *Corporations Act* and paragraph 12BAA(7)(f) of the *ASIC Act*.

5 Paragraph 764A(1)(g), together with the definition of ***RSA*** in section 9 of this Prototype, replicates the inclusions presently found in paragraph 764A(1)(h) of the *Corporations Act* and paragraph 12BAA(7)(g) of the *ASIC Act*.

6 Paragraph 764A(1)(h), together with the definition of ***deposit product*** in section 9 of this prototype legislation, replicates the inclusions presently found in paragraph 764A(1)(i) of the *Corporations Act* and paragraph 12BAA(7)(h) of the *ASIC Act*.

7 Paragraph 764A(1)(i), together with the definition of ***government security*** in section 9 of this prototype legislation, replicates the inclusions presently found in paragraph 764A(1)(j) of the *Corporations Act* and paragraph 12BAA(7)(i) of the *ASIC Act*.

8 Paragraph 764A(1)(j) replicates the inclusions presently found in paragraph 764A(1)(k) of the *Corporations Act* and paragraph 12BAA(7)(j) of the *ASIC Act*. The effect of the exclusions in paragraph 764A(1)(k) of the *Corporations Act* could be replicated in scoping orders made under section 765A of this prototype legislation.

(la) an Australian carbon credit unit;

(lb) an eligible international emissions unit;

(m) anything that a scoping order made by the Minister prescribes as a financial product for the purposes of this Act.

(2) Nothing in subsection (1) limits the generality of anything else in that subsection or of anything in sections 763B to 763E, inclusive.

Subdivision C—Scope of provisions applying to financial products

764B Aggregating arrangements that constitute a single scheme

For the purposes of this Division, 2 or more arrangements may be treated as together constituting a single arrangement if it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme.

Note: For example, this section can affect how the definition of ***facility*** in section 9 is applied in determining what does or does not constitute a financial product.

764C How this Act applies to composite products[9]

If a facility (the ***composite product***) has 2 or more components that, considered separately, include:

(a) at least one financial product; and

(b) at least one component that is not a financial product;

then this Act, in applying to a component that is a financial product, applies to the composite product only to the extent that it consists of such a component.

Note: So, for example, Part 7.9 does not require disclosures to be made in relation to a component that is not a financial product.

765A Narrowing the scope of provisions applying to financial products

(1) Scoping orders made by the Minister or by ASIC may, to the extent they specify, exclude the application of provisions of this Chapter to:

(a) financial products; or

(b) in so far as the provisions refer to persons making non-cash payments—persons making non-cash payments.

Note: Subdivision 3-A of the *Corporations (Exclusions and Exemptions from Chapter 7) Scoping Order 2023* excludes the application of this Chapter as mentioned in this subsection.

9 This section replicates section 762B of the *Corporations Act*.

(2) A scoping order in force under subsection (1) has effect accordingly, except so far as this Chapter expressly provides to the contrary.

(3) In so far as the operation of a provision of this Chapter is affected by, or affects, the operation of another provision of this Act, a scoping order in force under subsection (1) in relation to the first-mentioned provision has the same effect on that other provision, except so far as this Act expressly provides to the contrary.

(4) In so far as an instrument is made under or for the purposes of a provision of this Act, this section affects the application of the instrument to the same extent, and in the same way, as it affects the application of the provision itself, except so far as the instrument expressly provides to the contrary.

(5) A scoping order in force under subsection (1) of this section:

(a) has effect despite a scoping order in force under paragraph 764A(1)(m); and

(b) for the purposes of subsection 1097(8), is taken not to change the effect of a scoping order in force under paragraph 764A(1)(m).

Division 4—Scope of this Chapter: financial services

766A Definition of *financial service*

(1) For the purposes of this Act, a person provides a ***financial service*** if the person:

(a) provides financial product advice (see section 766B); or

(b) deals in a financial product (see section 766C); or

(c) makes a market for a financial product (see section 766D); or

(d) operates a registered scheme; or

(e) operates the business, and conducts the affairs, of a CCIV; or

(f) provides a custodial or depository service (see section 766E); or

(g) provides a crowdfunding service (see section 766F); or

(h) provides a claims handling and settlement service (see section 766G); or

(j) provides a superannuation trustee service (see section 766H); or

(k) is a trustee company and provides a traditional trustee company service; or

Note: Trustee companies may also provide other kinds of service mentioned in this subsection. See also subsection (4).

(m) engages in conduct of a kind that a scoping order made by the Minister prescribes as a financial service for the purposes of this Act.

(2) However, to avoid doubt, conduct done in the course of work of a kind ordinarily done by clerks or cashiers is not providing a financial service.

(3) The same conduct may constitute providing 2 or more different financial services.

Note: For example, conduct may constitute providing a superannuation trustee service and also dealing in a financial product that is a superannuation product.

(4) Scoping orders made by the Minister may, in relation to a traditional trustee company service of a particular class, specify the person or persons to whom a service of that class is taken for the purposes of this Act to be provided. This subsection does not limit (and is not limited by) subsection 766J(2).

766J Narrowing the scope of provisions applying to financial services

(1) Scoping orders made by the Minister may, to the extent they specify, exclude the application of provisions of this Chapter to:

(a) financial services; or

(b) in so far as the provisions refer to a particular kind of financial service—financial services of that kind.

Note 1: The following are examples of specific kinds of financial services to which provisions refer:

(a) persons providing financial product advice;

(b) persons dealing in financial products;

(c) persons making a market for financial products;

(d) persons providing custodial or depository services;

(e) persons providing superannuation trustee services.

Note 2: Subdivision 3-B of the *Corporations (Exclusions and Exemptions from Chapter 7) Scoping Order 2023* excludes the application of this Chapter as mentioned in this subsection.

(2) Scoping orders made by the Minister may set out, for the purposes of specified provisions of this Chapter:

(a) circumstances in which persons facilitating provision of a financial service (for example, by publishing information) are taken also to provide that service; or

(b) circumstances in which persons are taken to provide a financial service instead of the persons who would otherwise be taken to provide it.

(3) A scoping order in force under subsection (1) or (2) has effect accordingly, except so far as this Chapter expressly provides to the contrary.

(4) In so far as the operation of a provision of this Chapter is affected by, or affects, the operation of another provision of this Act, a scoping order in force under subsection (1) or (2) in relation to the first-mentioned provision has the same effect on that other provision, except so far as this Act expressly provides to the contrary.

(5) In so far as an instrument is made under or for the purposes of a provision of this Act, this section affects the application of the instrument to the same extent, and in the same way, as it affects the application of the provision itself, except so far as the instrument expressly provides to the contrary.

(6) A scoping order in force under subsection (1) or (2) of this section:

(a) has effect despite a scoping order in force under paragraph 766A(1)(m); and

(b) for the purposes of subsection 1097(8), is taken not to change the effect of a scoping order in force under paragraph 766A(1)(m).

Part 7.7A—Best interests obligations and remuneration

Division 8—Scoping orders and financial services rules

969 Scoping orders made by the Minister[10]

Scoping orders made by the Minister may prescribe circumstances in which persons who provide personal advice to other persons as a retail client do not have a duty to act in the best interests of those other persons in relation to the advice.

970 Financial services rules made by the Minister

(1) Financial services rules made by the Minister may prescribe the following matters:

(a) steps that persons (***providers***) who provide personal advice to other persons as a retail client must, in order to satisfy their duty to act in the best interests of those other persons in relation to the advice, prove that they have taken;[11]

(b) a scheme under which specified persons must, in specified circumstances relating to conflicted remuneration, pay to specified persons amounts based on that conflicted remuneration, or provide to specified persons monetary benefits based on that conflicted remuneration.[12]

(2) A person must comply with financial services rules in force under this section, in so far as they apply to the person.

10 This head of power replicates the regulation-making power in paragraph 961B(5)(c) of the *Corporations Act*.

11 This head of power replicates the regulation-making power in paragraph 961B(5)(a) of the *Corporations Act*.

12 This head of power replicates the regulation-making power in section 963N of the *Corporations Act*.

Part 7.8A—Design and distribution requirements relating to financial products for retail clients

994L Financial services rules

Financial services rules made by the Minister

(1) Financial services rules made by the Minister may prescribe the persons by whom, the financial products for which, and the circumstances in which, target market determinations must be made.[13]

Financial services rules made by ASIC

(2) Financial services rules made by ASIC may prescribe the following matters:[14]

(a) the form and content of target market determinations;

(b) the periods within which, and the manner and form in which, target market determinations must be reviewed;

(c) what steps must be taken, and by whom, to ensure that retail product distribution conduct is consistent with target market determinations.

Financial services rules made by the Minister or by ASIC

(3) Financial services rules made by the Minister or by ASIC may prescribe requirements to make and retain records relating to persons' compliance with this Part and with financial services rules in force under this section.[15]

Compliance with financial services rules

(4) A person must comply with financial services rules in force under this section, in so far as they apply to the person.

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13 This head of power replicates the regulation-making power in paragraph 994B(1)(c) of the *Corporations Act*.

14 This head of power is based in part on the modifications (notional amendment) power in paragraph 994L(2)(c) of the *Corporations Act*. The ALRC has suggested that rule-making powers should be narrower in scope than existing modification powers.

15 This head of power replicates the regulation-making power in subsection 994F(7), and the modifications (notional amendment) power in paragraph 994L(2)(c), of the *Corporations Act*.

Part 7.11A—Scoping orders, financial services rules and specific exemptions

Division 1—Preliminary

1096 Object of this Part

(1) The object of this Part is to set out machinery provisions governing 3 different types of subordinate instrument, with each type performing a different role in supporting the provisions of this Act so as to create a coherent, principle-based legislative hierarchy.

(2) Division 2 provides for legislative instruments called scoping orders, whose principal function is to narrow, but in some cases to extend, the scope of application of provisions of this Act outside this Part, as provided by provisions (***heads of power***) of Chapter 1 or this Chapter.

(3) Division 3 provides for legislative instruments called financial services rules, whose function is to set out matters of operational detail as provided by provisions (***heads of power***) of this Chapter.

(4) Division 4 provides for consultation with the Rules Advisory Committee and the public about proposed scoping orders and financial services rules.

(5) Division 5 enables ASIC to grant specific exemptions from requirements of this Chapter or of financial services rules. These exemptions are not legislative in character, and are granted by notifiable instrument.

(6) It is intended that, for ease of reference by users:

(a) the scoping orders in force from time to time will be consolidated into a single instrument; and

(b) financial services rules on the same topic, or on related topics, will be consolidated into a single instrument.

Note: Consolidation is facilitated by subsections 1097(8) to (10) and 1098(8) to (10) .

Division 2—Scoping orders

1097 Power to make scoping orders

(1) This section applies if a provision (the ***head of power***) of Chapter 1 (Introductory) or of this Chapter requires or permits matters to be prescribed by scoping orders.

(2) If the head of power only provides for the scoping orders to be made by the Minister, then the Minister may, by legislative instrument, make orders prescribing those matters.

Note: For example, paragraph 764A(1)(m) provides for scoping orders made by the Minister to prescribe something as a financial product for the purposes of this Act.

(3) If the head of power only provides for the scoping orders to be made by ASIC, then ASIC may, by legislative instrument, make orders prescribing those matters.

(4) If the head of power provides for the scoping orders to be made by the Minister or by ASIC, then:

(a) the Minister or ASIC may, by legislative instrument, make orders prescribing those matters; and

(b) in relation to orders made by the Minister for the purposes of the head of power, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that paragraph (a) of this subsection confers on ASIC in the same way as those subsections apply to that power in relation to scoping orders made by ASIC; and

(c) in relation to orders made by ASIC for the purposes of the head of power, those subsections apply to the power that paragraph (a) of this subsection confers on the Minister in the same way as those subsections apply to that power in relation to scoping orders made by the Minister.

Note 1: For example, subsection 765A(1) provides for scoping orders made by the Minister or by ASIC to exclude application of this Chapter to financial products.

Note 2: Subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* deal with the power to amend or repeal instruments of a legislative or administrative character.

Explanatory statement to explain consistency with objects of Chapter

(5) An explanatory statement (as defined by section 15J of the *Legislation Act 2003*) for a legislative instrument made under this section must include an explanation of how the effect of the instrument is consistent with the objects of this Chapter.

(6) An explanation included under subsection (5) is not binding on any court or tribunal.

Editorial matters

(7) Scoping orders made by the Minister or by ASIC may amend:

(a) provisions of this Act; or

(b) an instrument made under or for the purposes of such provisions;

by inserting, amending or repealing notes that:

(c) refer to scoping orders and describe their effect; and

(d) do not otherwise change the effect of this Act or of the instrument, as the case may be.

(8) A legislative instrument made by the Minister under subsection (2) or (4) may insert provisions into, or add provisions to, an existing legislative instrument containing provisions made by ASIC under subsection (3) or (4), but not so as to change the effect of provisions made under subsection (3).

(9) A legislative instrument made by ASIC under subsection (3) or (4) may insert provisions into, or add provisions to, an existing legislative instrument containing provisions made by the Minister under subsection (2) or (4), but not so as to change the effect of provisions made under subsection (2).

(10) Nothing in subsection (8) or (9) limits anything in subsection (4).

Division 3—Financial services rules

1098 Power to make financial services rules

(1) This section applies if a provision (the ***head of power***) of this Chapter requires or permits matters to be prescribed by financial services rules.

(2) If the head of power only provides for the financial services rules to be made by the Minister, then the Minister may, by legislative instrument, make rules prescribing those matters.

Note: For example, subsection 994L(1) provides for financial services rules made by the Minister to prescribe the persons by whom, the financial products for which, and the circumstances in which, target market determinations must be made.

(3) If the head of power only provides for the financial services rules to be made by ASIC, then ASIC may, by legislative instrument, make rules prescribing those matters.

Note: For example, subsection 994L(2) provides for financial services rules made by ASIC to prescribe various matters relating to implementing and reviewing target market determinations.

(4) If the head of power provides for the financial services rules to be made by the Minister or by ASIC, then:

(a) the Minister or ASIC may, by legislative instrument, make rules prescribing those matters; and

(b) in relation to rules made by the Minister for the purposes of the head of power, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that paragraph (a) of this subsection confers on ASIC in the same way as those subsections apply to that power in relation to rules made by ASIC; and

(c) in relation to rules made by ASIC for the purposes of the head of power, those subsections apply to the power that paragraph (a) of this subsection confers on the Minister in the same way as those subsections apply to that power in relation to rules made by the Minister.

Note 1: For example, subsection 994L(3) provides for financial services rules made by the Minister or by ASIC to prescribe record keeping requirements relating to compliance with Part 7.8A (Design and distribution requirements relating to financial products for retail clients).

Note 2: Subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* deal with the power to amend or repeal instruments of a legislative or administrative character.

Explanatory statement to explain how rules give effect to objects of Chapter

(5) An explanatory statement (as defined by section 15J of the *Legislation Act 2003*) for a legislative instrument made under this section must include an explanation of how the instrument gives effect to the objects of this Chapter.

(6) An explanation included under subsection (5) is not binding on any court or tribunal.

Editorial matters

(7) Financial services rules made by the Minister or by ASIC may amend:

(a) provisions of this Act; or

(b) an instrument made under or for the purposes of such provisions;

by inserting, amending or repealing notes that:

(c) refer to financial services rules and describe their effect; and

(d) do not otherwise change the effect of this Act or of the instrument, as the case may be.

(8) A legislative instrument made by the Minister under subsection (2) or (4) may insert provisions into, or add provisions to, an existing legislative instrument containing provisions made by ASIC under subsection (3) or (4), but not so as to change the effect of provisions made under subsection (3).

(9) A legislative instrument made by ASIC under subsection (3) or (4) may insert provisions into, or add provisions to, an existing legislative instrument containing provisions made by the Minister under subsection (2) or (4), but not so as to change the effect of provisions made under subsection (2).

(10) Nothing in subsection (8) or (9) limits anything in subsection (4).

1098A Extent of power

(1) Financial services rules may:

(a) create offences (including offences of strict liability) and civil penalties; and

(b) prescribe penalties, not exceeding 50 penalty units for an individual or 500 penalty units for a body corporate;

for contraventions of the rules.

(2) However, to avoid doubt, financial services rules may not do the following:

(a) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(b) impose a tax;

(c) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(d) directly amend the text of this Act (except as provided by subsection 1098(7)).

Division 4—Consultation on scoping orders and financial services rules

1098B Consultation required

(1) Before making an instrument under section 1097 or 1098, the Minister or ASIC (the ***rule-maker***) must consult the Rules Advisory Committee and the public about the proposed instrument, unless section 1098C applies.

(2) Without limiting how the requirement in subsection (1) to consult the public may be complied with, the rule-maker may comply with that requirement by doing the following on a publicly available website:

(a) making available the text of the proposed instrument or a description of its content;

(b) inviting the public to comment on the proposed instrument within a specified period that gives the public a reasonable opportunity to comment.

(3) Section 17 of the *Legislation Act 2003* (Rule-makers should consult before making legislative instruments) does not apply to an instrument made under section 1097 or 1098 of this Act.

1098C Dispensing with consultation in an emergency

(1) The Minister or ASIC (the ***rule-maker***) may make an instrument under section 1097 or 1098 without consulting as required by section 1098B if the rule-maker is of the opinion that it is necessary to do so in the public interest:

(a) to protect against a substantial risk of consumer detriment that cannot otherwise be addressed in a timely manner; or

(b) to respond in a timely manner to unforeseen events so as to support the functioning of financial markets and the provision of financial products and financial services.

(2) If the rule-maker makes the instrument without consulting the Rules Advisory Committee:

(a) the rule-maker must as soon as practicable, and in any event within 24 hours, give [each member of] the Committee a notice in writing setting out the content of the instrument and the reasons for making it without consulting the Committee; and

(b) the instrument, and each amendment it makes to another instrument, cease to have effect at the end of 12 months starting on the day the first-mentioned instrument commences.

(3) Paragraph (2)(b) does not prevent a provision or an amendment from ceasing to have effect before the end of the 12 months referred to in that paragraph.

1098D Procedural requirements do not affect validity

Failure to comply with subsection 1097(5), 1098(5) or 1098B(1) or paragraph 1098C(2)(a) does not affect the validity, operation or enforcement of the instrument or of any law of the Commonwealth.

1098E Establishment of Rules Advisory Committee

[Further policy decisions to be made about composition, tenure and other procedural matters.]

Division 5—Specific exemptions

1099 Specific exemptions by ASIC

(1) ASIC may, by notifiable instrument, exempt a specified person:

(a) either generally or as otherwise specified in the instrument; and

(b) either unconditionally or subject to specified conditions;

from a specified provision of:

(c) this Chapter; or

(d) financial services rules.

(2) A person to whom a condition specified in an exemption under subsection (1) applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for such an order.

(3) The power conferred by subsection (1) does not include the power to exempt a class or kind of person, or to exempt a person from a class or kind of provision.

Note: Other provisions of this Act confer powers to make legislative instruments (called scoping orders) that provide for exclusions or exemptions: see, for example, paragraph 911B(1)(b) and subsection 911B(6). Those powers include the power to specify matters by class: see subsection 13(3) of the *Legislation Act 2003* and subsection 33(3A) of the *Acts Interpretation Act 1901*.

(4) A notifiable instrument under subsection (1) must include an explanation of how the exemption is consistent with the objects of this Chapter.

(5) An explanation included under subsection (4) is not binding on any court or tribunal.

(6) Failure to comply with subsection (4) does not affect the validity or operation of the exemption or the enforcement of a condition to which it is subject.

Appendix F
Types of Scoping Order Provisions

This table gives an overview of the types of provisions that may appear in the Scoping Order (as part of the ALRC's recommended legislative model) and examples of equivalent existing provisions. For further discussion, see **Chapter 6** of this Report.

Scoping Order provision type	Equivalent existing provisions
Specific exclusions from the definitions of 'financial product' and 'financial service'[1]	The definitions of 'financial product' and 'financial service' set the boundaries of financial services regulation in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.[2] Both Acts rely on delegated legislation to adjust those regulatory boundaries as a result of the regulatory regime's deliberate over-inclusiveness.[3]
Specific inclusions within the definitions of 'financial product' and 'financial service' (to the extent these are not consolidated in primary legislation)	
Class exemptions from obligations contained in primary legislation	These would include, for example, the numerous exemptions from the obligation to hold an AFS Licence in s 911A of the *Corporations Act*, which are currently spread across the Act, *Corporations Regulations*, and ASIC legislative instruments.[4]

1 For further discussion, see **Chapter 5** of this Report.
2 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.89]–[7.90], [7.149]–[7.152]. See also **Chapter 5** of this Report.
3 Ibid [7.12]–[7.13]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.5].
4 See Australian Law Reform Commission, Interim Report A: Financial Services Legislation (Report No 137, 2021) [10.115]–[10.122].

Scoping Order provision type	Equivalent existing provisions
Carve-ins or other detail extending the operation of the Act, where appropriate for delegated legislation	These would include, for example, regulations currently made under the following provisions of the *Corporations Act*: • section 994B(1)(c), where regulations have the effect of extending the obligation to make a target market determination;[5] • section 911A(5A), where regulations create carve-ins by disapplying exemptions from the obligation to hold an AFS Licence;[6] and • section 761G(5)(b), where regulations have the effect of bringing particular kinds of insurance product within the definition of retail client.[7]
Other detail adjusting the scope of provisions in primary legislation	These would include, for example, regulations: • prescribing monetary thresholds, such as under s 761G(7)(a) of the *Corporations Act* in respect of the definition of retail client[8] and s 946AA(1)(a)(i) of the Act in relation to the threshold for a small investment under that section;[9] and • delimiting the scope of a defined term or other provision, such as regulations made under s 766A(2)(a) of the *Corporations Act* that may set out circumstances in which persons facilitating the provision of a financial service are taken also to provide that service.

5 See, eg, *Corporations Regulations 2001* (Cth) regs 7.8A.05–7.8A.10.
6 See, eg, ibid reg 7.6.01AAA.
7 See, eg, ibid reg 7.1.17A.
8 See, eg, ibid reg 7.1.18.
9 See, eg, ibid reg 7.7.09A.

Appendix G
Overview of Delegated Legislative Powers

The following table gives an overview of the number of existing delegated legislative powers in the financial services-related parts of Chapter 7 of the *Corporations Act* according to whether they may be exercised by way of regulations or ASIC legislative instruments.[1] It also includes delegated legislative powers in Part 9.12 of the *Corporations Act* that may be exercised in relation to Chapter 7 of the Act. Comments in the table provide a high-level summary of the powers, focusing on exemption and notional amendment powers where they exist (being the broadest types of powers).

A spreadsheet containing the underlying data (as at 31 March 2022) and methodology is available on the ALRC website.[2] For further discussion, see **Chapter 6** of this Report.

1 As discussed in **Chapter 5** of this Report, the financial services-related provisions of Chapter 7 of the *Corporations Act* include most provisions in Parts 7.1, 7.6–7.10B, and 7.12. The ALRC recommends that these provisions form part of the Financial Services Law (**Recommendation 41**). These provisions are distinguished from others such as Parts 7.2–7.5B of the *Corporations Act* that relate more closely to the regulation of financial markets.

2 Australian Law Reform Commission, 'Delegated Legislative Powers Mapping — Financial Services' <www.alrc.gov.au/wp-content/uploads/2023/10/Delegated-Legislative-Powers-Mapping.xlsx>. This spreadsheet also lists 26 delegated legislative powers within Part 2 Div 2 of the *ASIC Act*. The data does not include include 9 additional powers to make regulations or legislative instruments that appear in Part 7.10B of the *Corporations Act*, which came into force on 4 July 2023: see *Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023* (Cth).

<table>
<tr><th colspan="3">Corporations Act provision and number of delegated legislative powers</th><th>Comments</th></tr>
<tr><td colspan="3">Part 7.1 (Preliminary)</td><td rowspan="3">Delegated legislative powers in respect of Part 7.1 largely relate to defined terms and other concepts. These, in turn, relate to obligations contained elsewhere in Chapter 7 of the Corporations Act.
Among the most significant powers are those relating to the definitions of ‘financial product’ and ‘financial service’, which largely set the regulatory boundaries for Chapter 7.
Both regulations and ASIC legislative instruments may exclude things from the definition of ‘financial product’. To the extent of any inconsistency, regulations prevail over any instrument made by ASIC (s 765A(4)).
Only regulations may exclude from the definition of ‘financial service’.
Generally, only regulations may ‘carve in’ to the definitions of ‘financial product’ and ‘financial service’
However, ASIC may effectively ‘carve in’ to the definition of ‘margin lending facility’ (s 761EA(8)).
The definitions in Part 7.1 may also be affected by exemption and notional amendment powers located elsewhere in Chapter 7 and exercisable either by regulations or ASIC legislative instruments.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>65</td><td>3</td><td>68</td></tr>
<tr><td colspan="3">Part 7.6 (AFS Licensing)</td><td rowspan="3">Regulations may exempt a class of persons, exclude products, and notionally amend Part 7.6 (s 926B).
ASIC may exempt a class of persons, exclude products, and notionally amend Part 7.6, with the exception of Divs 4 and 8 (s 926A).
Part 7.6 also contains five provisions conferring powers on the Minister relating to professional standards for financial advisers (Part 7.6 Div 8A) and restrictions on terms relating to financial advice (s 923C).</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>57</td><td>7</td><td>64</td></tr>
</table>

<table>
<tr><th colspan="3">Corporations Act provision and number of delegated legislative powers</th><th>Comments</th></tr>
<tr><td colspan="3">Part 7.7 (Financial services disclosure)</td><td rowspan="3">Both regulations (s 951C) and ASIC legislative instruments (s 951B) may exempt a class of persons or services from, and notionally amend, Part 7.7.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>49</td><td>5</td><td>54</td></tr>
<tr><td colspan="3">Part 7.7A (Best interests and remuneration)</td><td rowspan="3">ASIC has relatively limited powers (relating only to the prescription of detail) in respect of Part 7.7A.
Only regulations may adjust the regulatory boundaries or alter the generally applicable requirements in respect of the best interests obligation relating to financial advice and prohibitions on conflicted remuneration in Part 7.7A.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>19</td><td>3</td><td>22</td></tr>
<tr><td colspan="3">Part 7.8 (Other provisions relating to conduct)</td><td rowspan="3">Both regulations (s 992C) and ASIC legislative instruments (s 992B) may exempt a class of persons, exclude products, and notionally amend Part 7.8.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>59</td><td>5</td><td>64</td></tr>
<tr><td colspan="3">Part 7.8A (Design and distribution obligations)</td><td rowspan="3">Both regulations (ss 994B(3)(f) and 1368) and ASIC legislative instruments (s 994L) may exempt a class of persons and exclude products from Part 7.8A.
Only ASIC may notionally amend Part 7.8A (s 994L).
Only regulations may ‘carve in’ so as to expand the application of the central obligation to prepare a target market determination in Part 7.8A (s 994B(1)(c)).</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>3</td><td>3</td><td>6</td></tr>
<tr><td colspan="3">Part 7.9 (Financial product disclosure and other provisions)</td><td rowspan="3">Both regulations (s 1020G) and ASIC legislative instruments (s 1020F) may exempt a class of persons, exclude products, and notionally amend Part 7.9.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>115</td><td>3</td><td>118</td></tr>
</table>

<table>
<tr><th colspan="3">Corporations Act provision and number of delegated legislative powers</th><th>Comments</th></tr>
<tr><td colspan="3">Part 7.9A (Product intervention orders)</td><td rowspan="3">Only regulations may alter the regulatory boundaries and prescribe detail in relation to the product intervention order regime in Part 7.9A.
ASIC is, however, empowered by Part 7.9A to issue product intervention orders (s 1023D). Product intervention orders in relation to a class of financial products must be legislative instruments (s 1023D(3)).</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>6</td><td>1</td><td>7</td></tr>
<tr><td colspan="3">Part 7.10 (Market misconduct and other prohibited conduct)</td><td rowspan="3">Only regulations may exempt a class of persons, exclude products, and notionally amend Part 7.10.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>4</td><td>0</td><td>4</td></tr>
<tr><td colspan="3">Part 7.10A (External dispute resolution)</td><td rowspan="3">ASIC may issue regulatory requirements to AFCA in respect of its approved external dispute resolution scheme (s 1052A).</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>0</td><td>1</td><td>1</td></tr>
<tr><td colspan="3">Part 7.12 (Miscellaneous)</td><td rowspan="3">The legislative powers in Part 7.12 include the ability for both regulations (s 1101AE) and ASIC (s 1101A) to approve codes of conduct.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>8</td><td>2</td><td>10</td></tr>
<tr><td colspan="3">Part 9.12 (Regulations)</td><td rowspan="3">Section 1364(w) provides that regulations may prescribe penalties not exceeding 50 penalty units for an individual or 500 penalty units for a body corporate for contraventions of a provision of the Corporations Regulations.
Regulations made under s 1368 in Part 9.12 may conditionally exempt from any provision of Chapter 6D or Chapter 7 of the Corporations Act.</td></tr>
<tr><td>Regulations</td><td>ASIC</td><td>Total</td></tr>
<tr><td>2</td><td>0</td><td>2</td></tr>
</table>