
Legislative Design – Clarifying the Legislative Porridge

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Legislative design directly affects the clarity, coherence and navigability of legislation. It is therefore of critical importance to regulated persons and entities as they seek to comply with legislative requirements, and to regulators and courts as they seek to interpret and apply them. Calls over many years for legislation governing corporate and financial services law in Australia to be simplified were reinforced by the Financial Services Royal Commission Final Report of 2019. The report recommended that, as far as possible, exceptions and qualifications to generally applicable norms of conduct be eliminated and that legislation identify expressly the fundamental norms of behaviour in respect of rules. These calls recently culminated in the commencement of a review into the legislative framework for corporations and financial services regulation by the Australian Law Reform Commission. This article examines the context behind these calls and engages with the ongoing debate about legislative design and simplification of law. In addition to outlining the issues, the article provides the context for the articles that follow in this Special Issue.

Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?¹

I. INTRODUCTION

As the 20th anniversary of the enactment of the *Corporations Act 2001* (Cth) (*Corporations Act*) approaches in 2021, calls for corporate and financial services law to be simplified have increased in intensity, reaching an apotheosis in the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) Final Report of 2019. These calls recently culminated in the commencement of a review into the legislative framework for corporations and financial services regulation by the Australian Law Reform Commission (ALRC). This article provides the background and context to the ALRC review and outlines some of the relevant issues and challenges.

The structure of this article is as follows: Part II – *Legislative Design* – examines four legislative design choices: the extent of detail that the law should contain (detail and complexity in policy and law); how the law should be allocated between primary legislation and delegated legislation (legislative hierarchy); what alternative forms of regulation should be considered (regulatory models); and what method or style of legislation should be adopted (rules-based or principles-based). Part III – *Legislative Drafting in Australia* – considers legislative drafting in Australia in respect of three areas: the evolution of corporate and financial services legislation; legislative drafting techniques; and legislative review provisions. Part IV – *Legislative Porridge* – examines the challenges in interpreting and applying the *Corporations Act*, particularly in the area of financial services law, and concludes by outlining potential reform pathways for simplifying corporate and financial services law or, as it were, clarifying the legislative porridge.

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¹ *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* (2012) 7 BFRA 1, [948] (Rares J); [2012] FCA 1028.



II. LEGISLATIVE DESIGN

A. Detail and Complexity in Policy and Law

In most (if not all) cases, legislation reflects policy choices about the fundamental norms of conduct that are expected of those members of society that are the subject of regulation. At its basic level, legislation is the end result of the process by which policy is converted into law. Once policy is converted into law, however, legislation then operates as the baseline for permitted conduct and becomes a significant catalyst for future policy choices. In turn, these future policy choices generate amendments to the law.

The mutually reinforcing and generative nature of law and policy creates its own dynamic and often makes it difficult to separate law and policy. The more detailed and complex policy becomes, the more detailed and complex law tends to become and *vice versa*. Underpinning both law and policy is the need for clarity in articulating the desired outcomes and facilitating compliance by the regulated community. A relevant legislative design choice, therefore, is the extent of detail that the content of the law should contain in order to implement policy effectively. The extent of detail in law will be influenced by the extent of detail in policy.

The relationship between detail and clarity in legislation is a complex one. Logic would suggest that greater detail leads to greater clarity and greater certainty, particularly in terms of enabling the line to be drawn between conduct that is permitted and conduct that is prohibited. As the analysis in this article will reveal, however, greater detail in legislation often leads to greater complexity, requiring the legislation to recognise extensive exceptions and qualifications in order to make it workable or fit for purpose.²

One point appears relatively uncontroversial: the greater the complexity of legislation and the rules that it embodies, the less clear it is likely to become and the greater the challenges for achieving compliance. The focus then turns to the relationship between detail and complexity.

This article discusses these issues primarily in relation to financial services law as regulated under the *Corporations Act*. The challenges, however, are relevant in many other areas of regulation. In 2004, the Australian Government released Treasury's final report on the Review of Aspects of Income Tax Self Assessment (Tax Report).³ Recognising that much of the tax law remained long and complex, the Tax Report identified difficulties in simplifying income tax self-assessment and quoted from Sir Robert Garran:

When war expenditure compelled the Commonwealth to resort to direct taxation, our first Income Tax Assessment Act was a thing of beauty and simplicity that would not have shamed Wordsworth or T. S. Eliot. But a graduated income tax tempts the crafty taxpayer to all sorts of devices to reduce his assessment; and just as in the Navy there was never-ending competition between guns and targets – armour being strengthened to stop missiles and missiles being weighted and hardened and speeded to pierce armour – so the battle of wits between taxpayer and taxation office led to all sorts of barbed-wire entanglements to keep the wily taxpayers from slipping through, till the Act became the literary monstrosity it is today.⁴

The Tax Report went on to outline the process by which tax legislation had become increasingly detailed, resulting in law that was long and complex and creating difficulties in identifying the underlying policy intent. The Tax Report also noted the extent to which detail was conflated with certainty.⁵ One solution, the Tax Report suggested, was the use of high level principles in preference to black letter law:

A new design approach being developed by Treasury aims to write tax law in a series of operative rules that are principled statements about what the law is intended to do, rather than details about the mechanisms

² See further in Part IV(A).

³ For details see The Treasury, *Report on Aspects of Income Tax Self Assessment* (16 December 2004) <<https://treasury.gov.au/publication/p2004-aspects-income-tax-self-assessment/chapter-7-policy-law-design-and-administration-issues>> (Tax Report).

⁴ Sir Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958), as quoted in the Tax Report, n 3.

⁵ As the Tax Report noted, n 3: “[d]uring the 1980s and 1990s the tax legislation set out in increasing detail how the law applied in a variety of fact situations. This was seen as desirable because taxpayers naturally want a high level of certainty as to whether and how the law will apply in their particular circumstances. While the ‘detailed’ approach to law does provide certainty where a taxpayer’s circumstances are specifically addressed by a rule, laws designed in this way can never anticipate all the relevant circumstances for every taxpayer.”

that get it there. This new approach will accommodate detailed or specific rules when required, but not as a matter of course. While not usually providing details about the cases it covers, it will provide a framework for working out how the law is to apply to each of them. Additionally, the approach will impose a discipline on the development of policy that could, in itself, result in less complex policy choices.

Treasury proposes to use this principled approach for new tax measures, except where those measures simply amend existing black-letter detail structures in the law and using the new approach would require extensive rewriting of the existing law.⁶

The relationship between complexity and uncertainty (and the associated compliance challenges) have been recognised by the Attorney-General's Department,⁷ which has identified the following five general principles that policymakers, instructing agencies and drafters should apply when developing Commonwealth legislation:⁸

1. Consider all implementation options – don't legislate if you don't have to.
2. When developing policy, reducing complexity should be a core consideration.
3. Laws should be no more complex than is necessary to give effect to policy.
4. Legislation should enable those affected to understand how the law applies to them.
5. The clarity of a proposed law should be continually assessed, from policy development through to consideration by Parliament (for Acts) and consideration by the rule-maker (for legislative instruments).

The first principle cautions against legislating for the sake of legislating and recognises that legislation is not the only – and in some circumstances may not be the most appropriate – form of regulation.⁹ The second principle identifies the importance of designing policy with a view to reducing complexity. The third principle speaks to the importance of reducing complexity in law as it seeks to give effect to policy. The fourth principle underscores the importance of clarity in helping those affected by the law to understand and comply with it. A related issue – as this article will discuss – is the importance of navigability in terms of the ease with which the applicable law can be found. The fifth principle highlights the need for the clarity of law to be regularly reviewed.¹⁰

As suggested above, greater detail in law generally leads to greater complexity. This often leads to the requirement for legislation to recognise extensive exceptions and qualifications in order to make the law workable in a practical sense or fit for purpose. In its publication entitled “Causes of Complex Legislation and Strategies to Address These”, the Attorney-General's Department identifies various causes of complexity.¹¹ In addition to the increasing complexity of policy and its impact on complex legislation, other causes of complexity include “a tendency to respond to policy issues with legislative changes even when legislation is not necessary to address them”, which reflects the reasoning behind the first principle outlined above. Further, the above publication identifies the following causes:

- (1) an aversion to principles-based legislation, leading to a tendency to have rules that accommodate very small variations in circumstances
- (2) an aversion to judicial discretion, so that the courts are not left to evolve detailed rules in a common-law fashion, and
- (3) an aversion to official discretion, so that officials are not left to evolve administrative practice.

To a large extent, the aversion to principles-based legislation is driven by the other two areas of aversion – namely, aversion to judicial discretion and aversion to official discretion – and is motivated by the belief that a prescriptive, rules-based approach to legislation makes the legislation easier to understand, easier to comply with and easier to enforce. The causal relationship in this regard, however, is subject to query.

⁶ *Tax Report*, n 3.

⁷ Attorney-General's Department website, “Reducing the Complexity of Legislation” <<https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>>.

⁸ Attorney-General's Department website, n 7.

⁹ For a discussion of alternative forms of regulation see Part II(C).

¹⁰ For a discussion about regular review of legislation see Part III(C).

¹¹ Attorney-General's Department, “Causes of Complex Legislation and Strategies to Address These” <<https://www.ag.gov.au/legal-system/publications/causes-complex-legislation-and-strategies-address-these>>.

The web page also raises the issue of coherence or useability and states that this can be compromised when amending legislation makes patchwork amendments “without a review of existing provisions, or the legislation as a whole”.¹² The inherent risk of incoherence resulting from patchwork amendments is exacerbated by legislation that is the product of continuing evolution over a long period of time. Such is the case with the *Corporations Act*, which will celebrate the 20th anniversary of its enactment in 2021 and has doubled in length since its enactment in 2001.

To the causes of complexity as suggested by the Attorney-General’s Department, one could add the desire for legislation to be comprehensive or to operate as a codification of the law. As Justice Rares has written extra-judicially, “attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something”.¹³ In the context of financial services law, one could also add the increase in the complexity of retail financial products, the emergence of new financial services providers and new platforms for providing financial services, and the use of technology for regulatory compliance purposes.¹⁴

B. Legislative Hierarchy

A second legislative design choice is whether, and if so how, the content of the law should be allocated between primary legislation and delegated legislation that appears in the form of regulations or regulatory instruments. Experience to date indicates that the question of legislative hierarchy – what goes where? – is not always amenable to an easy answer.¹⁵

The justification for delegated legislation is often based on the need for regulation to be adaptable and responsive to changing circumstances. Bottomley has explained this justification as follows:

The financial and commercial context in which corporations operate is complex and fast-changing, and it is simply not possible for laws promulgated at one point in time by Parliament (or the courts) to capture all the subtleties of current practice or the changes that inevitably occur later on. Consequently, corporate regulators are given discretionary power to decide how and when they will enforce the rules, along with the capacity to grant exemptions from the operation of the law. For example, the *Corporations Act 2001* (Cth) ... gives the Australian Securities and Investments Commission (ASIC) the power to exempt persons or companies from a number of requirements in the Act. All this is necessary so that the law can be applied appropriately in particular cases.¹⁶

Delegated legislation, however, gives rise to various concerns. These concerns include the lack of public accountability when rule-making (quasi-legislative) power is vested in regulators, particularly when regulators have the power to modify the primary legislation in addition to modifying their own rules.¹⁷ The navigability of the law also becomes a concern.

¹² Attorney-General’s Department, n 11: “In some cases more than one area of the same Department may be working on several items of legislation that amend the same principal legislation, without coordination or consideration of what the end result will be for the useability of that legislation.”

¹³ Justice Steven Rares, “Competition, Fairness and the Courts” (FCA) [2014] *FedJSchol* 10.

¹⁴ The emergence of new financial services providers and new platforms for providing financial services has been driven by financial technology or Fintech. In the regulatory compliance space, semantic technology has been used to facilitate compliance in areas such as corporate reporting and disclosure requirements. The adoption of this technology has been supported by the advent of machine-readable legislation.

¹⁵ For a discussion of this question see Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9 (1987) xvi: “There are also no clear criteria for determining what material should be included in Acts and what should be left to regulations. The development of clear criteria would contribute to better organisation of material and improved clarity. In consultation with the Cabinet Office, the Regulation Review Unit and other interested bodies, Chief Parliamentary Counsel should develop guidelines to assist Ministers, Departments and parliamentary counsel in the allocation of legislative material between an Act and the regulations made under it. In developing the guidelines, Chief Parliamentary Counsel should take account of the practical and constitutional concerns referred to in this report. The guidelines should be presented for consideration by Government.”

¹⁶ Stephen Bottomley, “The Notional Legislator: The Australian Securities and Investments Commission’s Role as a Law-maker” (2011) 39(1) *Federal Law Review* 1, 1; see also 19: “The system of modification by Class Order is geared towards facilitating the operation of the financial markets by fine-tuning the rules so that they keep pace with new developments. Thus, rather than ‘responsive regulation’ this could more accurately be described as ‘responsive rule-making’.”

¹⁷ Bottomley, n 16, 2. See also 9, where Bottomley points out that notional provisions have force of law and that their effect is the same as primary legislation. For a detailed discussion of related issues see the article by Tess Van Geelen in this Special Issue.

In its submission to the Financial Services Royal Commission, Treasury submitted that “[a]n improved financial services law would see the primary law being used – where possible – to set the enduring framework and principles, with rules and regulations that are more easily amended and updated being used to provide more detail where necessary”.¹⁸

C. Regulatory Models – Alternative Forms of Regulation

A third legislative design choice is whether legislation is the appropriate model of regulation and, if not, what other form of regulation should be chosen in its place. As cautioned by the Attorney-General’s Department, “don’t legislate if you don’t have to”. Three alternative forms of regulation (ie forms other than legislation or explicit government regulation) are outlined in the Australian Government, *Best Practice Regulation Handbook* (Handbook)¹⁹ as set out below:

Alternative Form	Description
Self-regulation	<i>Self-regulation is generally characterised by industry formulating rules, standards and codes of conduct, with industry solely responsible for enforcement ... In some cases, governments may also be involved in a limited way, for example, by providing advisory information.</i> ²⁰
Quasi-regulation	<i>Quasi-regulation includes a wide range of rules or arrangements where government influences business to comply, but which do not form part of explicit government regulation. Broadly, whenever government takes action that puts pressure on businesses to act in a particular way, the government action may be quasi-regulatory.</i> ²¹
Co-regulation	<i>Co-regulation usually refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.²² This is known as “underpinning” of codes or standards. Sometimes legislation sets out mandatory government standards, but provides that an industry code can override those standards. Legislation may also provide for government-imposed arrangements in the event that industry does not develop arrangements of its own.</i> ²³

The Handbook proceeds to identify the advantages, disadvantages and costs of the three alternative forms of regulation as outlined above.²⁴ By contrast, the Handbook notes, explicit government regulation in the form of legislation:

is often considered to offer more certainty, including industry-wide coverage, and greater effectiveness compared with other forms of regulation because of the availability of legal sanctions. It is often preferred by regulators, particularly in dealing with high-impact, high-risk public issues. In some circumstances, compliance costs might be lower for legislation because of greater certainty. However, explicit government regulation can have several potential drawbacks.²⁵

¹⁸ Australian Government Treasury, *Submission to the Financial Services Royal Commission Interim Report, 2 (Treasury Interim Report Submission)*.

¹⁹ Australian Government, *Best Practice Regulation Handbook* (2007) 95: “In the past, much regulation tended to involve a prescriptive approach. However, governments around the world, including in Australia, are moving away from these approaches to more innovative methods of dealing with identified problems. These alternative methods can be less costly, more flexible, and therefore more effective than prescriptive regulation.” (*Handbook*). For a discussion about these alternative forms of regulation see ALRC, *Classification – Content Regulation and Convergent Media*, Report No 118 (2012) Ch 13.

²⁰ *Handbook*, n 19, 96.

²¹ *Handbook*, n 19, 98: “Some examples of quasi-regulation include government-endorsed industry codes of practice or standards, government-issued guidance notes, industry–government agreements and national accreditation schemes.”

²² An example is *Corporations Act 2001* (Cth) s 1101A, under which the Australian Securities and Investments Commission has the power to approve codes of conduct.

²³ *Handbook*, n 19, 100.

²⁴ *Handbook*, n 19, 102–103.

²⁵ *Handbook*, n 19, 104.

Three potential drawbacks of legislation identified in the Handbook are relevant for the purposes of this analysis. First, legislation “may, over time, generate more and more regulation”, including where “more regulation is created to adapt the original regulation to a new situation or to close the gaps where compliance is not being achieved”.²⁶ This drawback speaks to the inherent challenges of a prescriptive approach to legislation that attempts to deal comprehensively with an area of regulation, and the resulting complexity, as discussed in Part II(A). It also reflects the truism that complex legislation is likely to beget more complex legislation.

Second, “[t]here are potentially significant time lags inherent in making and amending legislation”.²⁷ This drawback speaks to the perceived benefits of delegated legislation such as regulatory instruments, which enable regulators to respond to changing circumstances in a responsive and timely manner.

Third, “[l]egislation may not be well suited for influencing the quality of complex services, such as those provided by many of the professions”.²⁸ This is particularly so in the case of the regulation of financial services under the *Corporations Act*, where regulators and courts have struggled to interpret and apply concepts such as “personal advice” and “general advice”.²⁹

D. Rules-based vs Principles-based Regulation

A fourth legislative design choice concerns the method or style of legislation that should be adopted. Two choices are primarily available in this respect: rules-based regulation and principles-based regulation.³⁰ Other methods have been identified, some of which are variants of principles-based regulation, including outcomes-focused regulation.³¹

In its Report No 108, *For Your Information: Australian Privacy Law and Practice*, the ALRC described principles-based regulation as follows:

Principles-based regulation can be distinguished from rules-based regulation in that it does not necessarily prescribe detailed steps that must be complied with, but rather sets an overall objective that must be achieved. In this way, principles-based regulation seeks to provide an overarching framework that guides and assists regulated entities to develop an appreciation of the core goals of the regulatory scheme. A key advantage of principles-based regulation is its facilitation of regulatory flexibility through the statement of general principles that can be applied to new and changing situations. It has been said that such a regulatory framework is exhortatory in that it emphasises a “do the right thing” approach and promotes compliance with the spirit of the law.³²

The reference in the above description to the “overall objective” embraces both norms of conduct and also outcomes, thus overlapping with the concept of outcomes-focused legislation.³³ The reference to the “do the right thing” approach resonates with the recommendations of the Financial Services Royal

²⁶ *Handbook*, n 19, 104.

²⁷ *Handbook*, n 19, 104.

²⁸ *Handbook*, n 19, 104.

²⁹ See, eg, the decision of the Full Court of the Federal Court in *Australian Securities and Investment Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187.

³⁰ For articles discussing the difference between rules-based regulation and principles-based regulation see Julia Black, Martyn Hopper and Christa Band, “Making a Success of Principles-based Regulation” (2007) 1(3) *Law and Financial Markets Review* 191; Julia Black, “Forms and Paradoxes of Principles-based Regulation” (2008) 3(4) *Capital Markets Law Journal* 425.

³¹ Another variant of principles-based regulation is compliance-oriented regulation, which incorporates factors relating to enforcement into its design. For a discussion of compliance-oriented regulation see Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [4.19], [4.20] (*ALRC Report No 108*).

³² *ALRC Report No 108*, n 31, [4.7], citing S Arjoon, “Striking a Balance between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach” (2006) 68 *Journal of Business Ethics* 53, 58.

³³ Bottomley, n 16, 18, has described principles-based regulation as “regulation which relies on broadly-drafted principles to specify desired **outcomes**, leaving matters of process to the market actors” (emphasis added). See also *ALRC Report No 108*, n 31, [4.5]: “Principles-based legislation relies on principles to articulate the **outcomes** to be achieved by the regulated entities” (emphasis added).

Commission and its six principles.³⁴ The extract from the above ALRC report also notes the extent to which principles-based regulation can facilitate regulatory flexibility for the reason that, even though circumstances might change, the general principles are likely to remain constant.

From a compliance perspective, an overly prescriptive, rules-based approach can also cause problems. This is because such an approach may impose constraints on regulators and reduce their flexibility to engage in risk-based regulation – an approach to regulatory supervision under which the regulatory response to compliance issues is tailored by reference to “the severity and behavioural drivers of noncompliance”.³⁵ Highly prescriptive process-oriented regulatory approaches can also increase incentives to engage in “creative compliance”, while time-consuming, complex rules may lead to resistance from regulated entities.³⁶

In its submission to the Financial Services Royal Commission, Treasury submitted that “[a] principles-based approach [would promote] simplicity and efficiency by stating the outcomes sought or obligations imposed, but [leaving] the regulated population free to find the most efficient way of achieving that outcome”.³⁷ According to this submission:

principles are adaptive. They do not require frequent changes to the overarching statute. When a principle is correctly distilled there is little need for ongoing legislative amendments, particularly when contrasted with more prescriptive granular approaches.³⁸

A principles-based approach would mirror the approach in other jurisdictions such as the United Kingdom, where a principles-based, outcome-focused framework has been adopted in the financial services legislation and is supported by regulatory guidance.³⁹ The Financial Conduct Authority (FCA) defines principles as “high level statements of the core obligations of firms, [which] act as an overarching framework to govern the actions of firms”. It states that a “breach of one or more of the Principles for Businesses will make a firm liable to disciplinary action” and, “[w]here appropriate, a firm can be disciplined on the basis of a breach of the Principles alone”.⁴⁰

The FCA defines outcomes as “[setting] the baseline of our expectations of how firms should treat consumers and ... [providing] the basis of what consumers can expect to see when firms are treating them fairly”.⁴¹ An example is as follows:

³⁴ See further in Part IV(B).

³⁵ New South Wales Department of Finance, Services and Innovation, *Guidance for Regulators to Implement Outcomes and Risk-based Regulation* (2016) 9 <http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance_for_regulators_to_implement_outcomes_and_risk-based_regulation-October_2016.pdf>. For a discussion about risk-based regulation see Julia Black and Robert Baldwin, “Really Responsive Risk-based Regulation” (2010) 32(2) *Law & Policy* 181; Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (OUP, 2nd ed, 2012) Ch 13.

³⁶ For an analysis of the cosmetic compliance risks of process-oriented rather than outcomes-focused regulatory approaches see Ingrid Landau, “Human Rights Due Diligence and the Risk of Cosmetic Compliance” (2019) 20 *Melbourne Journal of International Law* 221, 234ff. On the significance of regulation complexity for compliance see the discussion of compliance factors in Christine Parker and Vibeke Lehmann Nielsen, “Compliance: 14 Questions” in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) Ch 13, 221.

³⁷ *Treasury Interim Report Submission*, n 18, 6.

³⁸ *Treasury Interim Report Submission*, n 18, 7.

³⁹ See *Financial Services and Markets Act 2000* (UK). See also the Financial Conduct Authority approach to consumers: “Our regulation is outcomes-focused and is based on a combination of the Principles, other high-level rules and, where necessary, detailed rules and guidance”: Financial Conduct Authority, *FCA Mission: Approach to Consumers* (2018) 12–13 <<https://www.fca.org.uk/publication/corporate/approach-to-consumers.pdf>>.

⁴⁰ Financial Conduct Authority, n 39, 13.

⁴¹ Financial Conduct Authority, n 39, 13. See also New South Wales Department of Finance, Services and Innovation, n 35, 8 [2.1]: “Regulatory outcomes that are clearly defined and achievable are critical to effective outcomes and risk-based regulation. It requires regulators to consider: their legislative mandate; their core purpose to regulated entities, regulation beneficiaries, and the broader strategic context; and the options available to implement regulatory initiatives”. See also the UK Solicitors Regulation Authority Code of Conduct: “Outcomes-focused regulation concentrates on providing positive outcomes which when achieved will benefit and protect clients and the public.”

Principle

Customers: relationships of trust – a firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.⁴²

Outcome

Where consumers receive advice, the advice is suitable and takes account of their circumstances.⁴³

Guidance for firms

We expect firms to pay attention to indicators of potential vulnerability when they arise and to have policies in place to deal with consumers who may be at greater risk of harm.⁴⁴

A principles-based approach is not, however, recognised to be superior to a rules-based approach in all respects. A prescriptive rules-based approach has been said to “provide greater clarity in the regulation, as it is easier for a regulated entity to determine what rules it must comply with and the minimum standards of compliance expected”.⁴⁵ Principles, on the other hand, are “criticised for not providing certainty; for creating an unpredictable regulatory regime in which regulators can act retrospectively; for allowing firms to ‘backslide’, and get away with the minimum level of conduct possible; and thus for providing inadequate protection to consumers or others”.⁴⁶

That said, principles-based regulation can resolve uncertainty when it is combined with others forms of regulation, such as official guidance, and when dialogue between the regulator and regulated entities is facilitated.⁴⁷ Further, principles-based regulation can minimise the need for enforcement by “encouraging organisations to understand the values behind the law and change their behaviour accordingly”.⁴⁸ This speaks to the expressive function of the law; namely, the function of law in terms of identifying norms and influencing social action through a legal expression, or statement, about appropriate behaviour.⁴⁹

III. LEGISLATIVE DRAFTING IN AUSTRALIA**A. The Evolution of Corporate and Financial Services Legislation**

The concept of simplifying corporate and financial services law is not new. In the area of corporate law, the need to reform and simplify the law received a significant boost in 1993, when the Commonwealth Attorney-General established a Corporations Law Simplification Program. This followed substantial growth in the size and prescriptiveness of corporate legislation over several decades.⁵⁰ The aim of the program was to rewrite the then Corporations Law to make it easier to understand and to remove

⁴² Financial Conduct Authority, *Financial Conduct Authority Handbook of Rules and Guidance*, Principle 9 <<https://www.handbook.fca.org.uk/handbook>> (*FCA Handbook*).

⁴³ *FCA Handbook*, n 42, Outcome 4.

⁴⁴ *FCA Handbook*, n 42, 25.

⁴⁵ *ALRC Report No 108*, n 31, [4.11], citing O Krackhardt, “New Rules for Corporate Governance in the United States and Germany – A Model for New Zealand” (2005) 36 *Victoria University of Wellington Law Review* 319, 331.

⁴⁶ *ALRC Report No 108*, n 31, [4.13], citing J Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (London School of Economics and Political Science, 2007) 2.

⁴⁷ *ALRC Report No 108*, n 31, [4.14].

⁴⁸ *ALRC Report No 108*, n 31, [4.17], citing K Curtis, “Reducing Overlap, Duplication and Inconsistency” (Paper presented at Australian Regulatory Reform Evolution 2006, Canberra, 24 October 2006) 17.

⁴⁹ The expressive function of the criminal law was noted by the ALRC in its *Corporate Criminal Responsibility Report*, Report No 136 (2020). For a more complete description of the expressive function of the law and its capacities to make “‘statements’ as opposed to controlling behavior directly” see Cass Sunstein, “On the Expressive Function of Law” (1996) 144 *University of Pennsylvania Law Review* 2021, 2024, and for a more recent summary see Thomas McGinn, “The Expressive Function of the Law and the Lex Imperfecta” (2015) 11 *Roman Legal Tradition* 1.

⁵⁰ This growth might be attributed to various factors, including the traditional preference for strict literalism in the construction of legislation, under which “it was ... thought that the only way to squash loopholes was to bury them with words” (Dr RP Austin, “Corporate Law Reform: Some Reflections on the Reform Experience of the Last 30 Years” (Keynote Address to the Corporate Law Teachers Association Conference, Sydney Law School, 7–9 February 2021)). Another related factor is the Australian predilection for statutes. See Paul Finn, “Statutes and the Common Law” (1992) 22(1) *University of Western Australia Law Review* 7.

unnecessary business regulation.⁵¹ This resulted in the *First Corporate Law Simplification Act 1995* (Cth) and, subsequently, the launch of the Corporate Law Economic Reform Program (CLERP) in March 1997. Aimed at reforming key areas of corporate and business regulation, CLERP led to the enactment of the *Company Law Review Act 1998* (Cth). Changes brought about by this Act included simplified drafting and changes to the substantive law.⁵²

Following various constitutional challenges in respect of the validity of the legislative framework for corporations law and the referral of powers by the States to the Commonwealth,⁵³ the current *Corporations Act* was enacted. A further series of CLERP reforms took place between 2001 and 2007.⁵⁴

To date, relatively little reform has occurred for the purpose of simplifying financial services law. This area of regulation has continued to grow in length and complexity and calls for reform have increased, particularly following the recommendations of the Financial Services Royal Commission in 2019. It is therefore timely to consider how financial services law might be simplified and how the priorities in this regard should be ordered.

B. Legislative Drafting Techniques

As noted by Jordan, the initial efforts during the period of reform that commenced in 1993 were “focused on form not substance: simplification and the use of plain English drafting”.⁵⁵ This was a key motivation behind the *First Corporate Law Simplification Act*, which saw the insertion of a small business guide in Pt 1.5. According to the Bills Digest, the purpose of the Act was “to simplify the rules which regulate corporations and to express the law in plain English”. The Explanatory Memorandum provided further details of this motivation:

The Government announced in 1993 that it would undertake a program to simplify the Law. The aim is to simplify policy and clarify wording so that users can understand and act on their rights and obligations under the Law. In October 1993 the Attorney General appointed a 4-person Task Force to have day-to-day carriage of the simplification program. It comprises an experienced commercial lawyer from the private sector, an expert in plain language, a senior legislative drafter and a senior policy adviser from the Attorney-General’s Department.⁵⁶

...

A vital factor in making the law accessible is the approach to drafting and layout. The text in the Bill has been written in line with the principles of plain English. The material has been arranged in the way that readers look for information. Long, convoluted sentences and unfamiliar structures have been avoided.⁵⁷

Plain English – or plain language – drafting has now become a key focus of legislative drafting in Australia, both in the context of corporation and financial services law and otherwise. To support plain English legislative drafting, the Office of Parliamentary Counsel (OPC) has produced a Plain English Manual, which was released in 1993 to deal with “only one aspect of drafting: making drafts easier

⁵¹ See Parliament of Australia website, “Simplifying Corporate Law” <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/1996-99/2nd_simp/report/c01>.

⁵² For an outline of the developments see Centre for Corporate Law, Melbourne Law School website, “Key Documents in the History of Australian Corporate Law” <<https://law.unimelb.edu.au/centres/ccl/resources/history/key-documents-in-the-history-of-australian-corporate-law#:~:text=Corporations%20Legislation%20Amendment%20Act%201991,voidable%20transactions%20in%20windings%20up>>; see also Cally Jordan, “Unlovely and Unloved: Corporate Law Reform’s Progeny” (2009) 33(2) *Melbourne University Law Review* 626.

⁵³ For an outline of the constitutional issues see Jordan, n 52, 628, fn 9.

⁵⁴ See Jordan, n 52, 627, fn 5.

⁵⁵ Jordan, n 52, 629.

⁵⁶ Explanatory Memorandum, *First Corporate Law Simplification Bill 1995* (Cth) [3.3] <http://classic.austlii.edu.au/au/legis/cth/bill_em/fclsb1995374/memo_0.html>.

⁵⁷ Explanatory Memorandum, *First Corporate Law Simplification Bill 1995* (Cth) [3.18].

to understand”.⁵⁸ In addition to outlining the principles and techniques of plain English drafting, the Manual includes the following information on “general principles drafting” or “fuzzy law”.⁵⁹

Background

15. This is the style used when you deliberately state the law in general principles and leave the details to be filled in by the courts, by delegated legislation or in some other way. It has one big advantage: it’s very easy to read, and the general purpose of the law is easy to understand. But it has a big disadvantage: the precise meaning is uncertain.
16. Drafters trained in common law countries have traditionally avoided this style on principle, assuming that the users of the legislation don’t like it (or wouldn’t like it if they knew about it). However, if you use this style properly, it can be an important technique to simplify the law.

The OPC has also produced a Drafting Manual.⁶⁰ Although it deals with many of the granular details of legislative drafting such as numbering and naming conventions, it also contains statements of principles in relation to definitions:

- 65 Definitions are an important tool in legislative drafting. They are used for a number of purposes. Primarily, they are used to make legislation more readable by labelling concepts that are used throughout the legislation and reducing the need to repeat text.
- 66 However, the overuse or misuse of definitions can reduce the readability of legislation. Therefore, it is important to ensure that definitions are used carefully.
- 67 One approach that OPC has started to adopt is “one expression, one meaning”. Under this approach, an expression is not defined to have different meanings in different parts of an Act or instrument.⁶¹

Over the years, the plain English approach has been complemented by the adoption of various innovations, such as the use of dictionaries,⁶² the use of examples and the insertion of guides into legislation.⁶³ It would appear, therefore, that the need to simplify financial services law is not attributable to a failure to apply the principles of plain English but, instead, to other factors. This is not to say, however, that further drafting innovations might not be harnessed as part of the ALRC’s review. It may be, for instance, that a new drafting manual is timely, perhaps dealing with the drafting of principles. Mechanical interventions ought also to be considered, such as the creation of separate statutes where legislation has become cumbersome and complex.⁶⁴

C. Legislative Review Provisions

The inherent risk of incoherence resulting from patchwork amendments over a long period of time could be mitigated by more rigorous review of legislation. The Attorney-General’s Department states that “legislation should be regularly reviewed for readability, usability, ease of administration and policy desirability”. Such a review “should be done both as a stand-alone process and when existing legislation is being amended”. Further, “[t]he overall clarity of the legislation should be reconsidered and the underlying policy could also be reassessed”.⁶⁵ Although the document does not expressly distinguish between primary and delegated legislation, there does not appear to be any reason why reviews should not be conducted in respect of both areas of legislation. The attractiveness of this “hygiene” approach to legislation is clear, allowing for an independent, mandated process of periodic review.

⁵⁸ Office of Parliamentary Counsel, *Plain English Manual* (1993) 5.

⁵⁹ The term “fuzzy law” is often used to describe the use of broad legal principles that allow scope for judicial discretion in the interpretation and application of the principles. For an early statement of fuzzy law and a semi-humorous analysis of the issues see John Green, “Fuzzy Law: A Better Way to Stop Snouts in the Trough” (1991) *Polemic* 82.

⁶⁰ Office of Parliamentary Counsel, *Drafting Manual* (edition 3.2, July 2019).

⁶¹ Office of Parliamentary Counsel, n 60, 11.

⁶² See, eg, *Corporations Act 2001* (Cth) s 9.

⁶³ See, eg, the *Personal Property Securities Act 2009* (Cth) with its guides to the Act, Chapters and Parts.

⁶⁴ See, eg, Jordan, n 52, 637–638, who suggests that “[u]npacking the *Corporations Act* into separate statutes would promote a more obvious, and conceptually sound, characterisation of principles and issues”.

⁶⁵ Attorney-General’s Department website, n 7.

An example of an agreed ongoing review process in respect of Commonwealth legislation is the Intergovernmental Agreement for the *Australian Consumer Law*, which provides that the arrangements in the Memoranda of Understanding in respect of the enforcement and administration of the *Australian Consumer Law* should include ongoing reporting and review of its enforcement and administration.⁶⁶

Some Commonwealth legislation now mandates a one-off statutory review to be undertaken in respect of the legislation within a certain period of time after its commencement date. An example is Pt 9.6 of the *Personal Property Securities Act 2009* (Cth) (*PPS Act*):

343 Review of operation of Act

(1) The Minister must cause a review of the operation of this Act to be undertaken and completed within 3 years after the registration commencement time.

...

(2) The persons who undertake the review under subsection (1) must give the Minister a written report of the review.

(3) The Minister must cause a copy of the report of the review under subsection (1) to be tabled in each House of the Parliament within 15 sitting days of the day on which the report is given to the Minister.

Pursuant to s 343, a statutory review of the *PPS Act* was undertaken in 2014.⁶⁷ Submissions were sought from interested parties on the operation of the legislation and the matters set out in the terms of reference. Included in these matters were “opportunities for further efficiencies in the PPS Act regime”; “the scope and definitions of personal property covered by the PPS Act” and “the interaction of the PPS Act with other legislation including the *Corporations Act 2001*”.⁶⁸

Relevantly, for the purposes of this analysis, the final report in respect of the statutory review of the *PPS Act* made the following comments about the drafting of the *PPS Act*:

Much can be done to improve the Act. The Act is significantly longer than the corresponding legislation in other jurisdictions, and while some of that additional length is attributable to constitutional or other machinery provisions, much of it flows from the very prescriptive nature of some of the drafting, and from the inclusion of additional provisions that may be of only marginal benefit. ...⁶⁹

The Act has been successful in sweeping away the uncertainties and complexities that plagued the fragmented sets of rules that it replaced. Many submissions argued, however, that the Act has replaced those old uncertainties and complexities with new uncertainties and complexities, because of the unfamiliar terminology, and the complex and difficult drafting, that I referred to earlier in this report.⁷⁰

These comments, which were made following the review of submissions by industry, resonate with issues previously discussed in this article, including the challenges associated with prescriptive drafting, the marginal benefits of attempts to achieve comprehensiveness over clarity, and the uncertainties and complexities that result from complex and difficult drafting.

IV. LEGISLATIVE PORRIDGE

A. The Challenges

Since its enactment in 2001, the challenges in interpreting and applying the *Corporations Act* have been the subject of regular debate among commentators (academic and otherwise).⁷¹ In relation to financial

⁶⁶ Intergovernmental Agreement for the Australian Consumer Law between the Commonwealth and the States and Territories, [22.4]. For a copy of the current Memorandum of Understanding see <https://consumerlaw.gov.au/sites/consumer/files/inline-files/ACL_MOU_enforcement2020.pdf>.

⁶⁷ For details see Australian Government, Attorney-General’s Department, *Statutory Review of the Personal Property Securities Act 2009* <<https://www.ag.gov.au/legal-system/consultations/statutory-review-personal-property-securities-act-2009>>.

⁶⁸ Australian Government, Attorney-General’s Department, n 67, “Call for Submissions”, Attachment A, 9.

⁶⁹ Bruce Whittaker, *Review of the Personal Property Securities Act 2009 – Final Report* (2015) [1.3].

⁷⁰ Whittaker, n 69, [3.3.2].

⁷¹ Jordan excoriated the general state of the *Corporations Act* in Jordan, n 52, 626: “Despite massive efforts at law reform in the last 15 years, and continuous tweaking, the *Corporations Act* remains, as Sir Anthony Mason found it, ‘indigestible and incomprehensible’” (627, citing Sir Anthony Mason, “Corporate Law: The Challenge of Complexity” (1992) 2 *Australian Journal*

services under Ch 7, these challenges were considered by the Financial Services Royal Commission and resulted in recommendations in its Final Report. The analysis below does not undertake a comprehensive examination of the debate but, instead, provides an overview of the challenges by reference to three themes, all of which are interrelated: complexity, comprehensibility, and navigability.

1. Complexity

Many commentators have attributed complexity to length and detail and also to the use of complex definitions and overlapping provisions within one piece of legislation and across two or more related pieces of legislation.

The impact of length and detail on complexity has been noted by Justice Rares, writing extra-judicially.⁷² In blunt terms, Justice Rares questioned the need for the *Corporations Act* to be its current size:

Let me be quite clear. The business community of this country cannot be expected to deal with legislation of this unnecessary detail. The cost of trying to understand the discordant patchwork of wish list amendments that have been welded onto a simple body of an original Act must be truly mind boggling. Do we really need a telephone book size statute to regulate corporations?⁷³

The use of complex definitions and overlapping provisions was the subject of judicial comment by Rares J in *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)*.⁷⁴ In relation to the overlap between the provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act* that prohibit misleading or deceptive conduct, his Honour remarked:

Of course, each Act has a myriad of complex definitions of what is a financial product or a financial service or are financial services. ... Since the end result of this legislative morass seems to be the same, it is difficult to discern why the public, their lawyers (if they can afford them) and the courts must waste their time turning up and construing which of these statutes applies to the particular circumstance. Here, should it make any difference whether Grange was alleged to have engaged in conduct in relation to “financial services” (s 12DA(1)⁷⁵) or “a financial product or a financial service” (s 1041H(1)⁷⁶)? Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?⁷⁷

The Attorney-General’s Department has noted that a number of provisions were regularly repeated across the statute book and that this added to the volume of an Act.⁷⁸ It appears to be generally settled that the use of complex definitions and overlapping provisions within one piece of legislation and across two or more related pieces of legislation adds to the level of complexity in legislation.

of Corporate Law 1, 1); “Complex, ungainly, badly drafted, internally inconsistent and conceptually troubled; it is a mishmash of old law, ad hoc amendments, provisions pulled willy-nilly from different legal systems, statements which are not law at all, ideological posturing, and drafting styles that swing wildly from the colloquial to the technical” (627); “However, neither comprehensiveness nor coherency was the motivating factor in the drafting of the *Corporations Act*; rather, the amalgamation of the disparate rules served to prop up the Commonwealth’s constitutional claim to regulatory authority. Sadly, coherency was the victim of this approach. The *Corporations Act* is clutter and complexity, rife with inconsistencies and anachronisms” (635–636).

⁷² Rares, n 13, [16]: “overall length can make understanding the law very difficult for lawyers and other users of legislation” (citing Parliamentary Counsel, *Reducing Complexity in Legislation*, [7]–[9]).

⁷³ Rares, n 13, [61].

⁷⁴ *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* (2012) 7 BFRA 1; [2012] FCA 1028.

⁷⁵ *Australian Securities and Investments Commission Act 2001* (Cth).

⁷⁶ *Corporations Act 2001* (Cth).

⁷⁷ *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* (2012) 7 BFRA 1, [948]; [2012] FCA 1028. Hanrahan has described this as “imperfect” overlap. Pamela Hanrahan, “Legal Framework for the Provisions of Financial Advice and Sale of Financial Products to Australian Households” (Royal Commission, Background Paper 7, April 2018) 45. See also 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>>: “Research conducted at Melbourne Law School finds the same prohibition in slightly different forms, with different requirements, different defences, and different remedies and penalties in more than 30 pieces of state and federal legislation.”

⁷⁸ Attorney-General’s Department website, n 7.

2. Comprehensibility

Complexity can lead to incomprehensibility and incoherence.⁷⁹ Chief Justice Allsop has attributed incomprehensibility and incoherence to the modern cast of mind:

But one must say something of a modern cast of mind. It is the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence. Often, if not always, this is in the name of certainty and completeness; but it is false certainty. Attempts to define whole concepts concerning human experiential relationships are generally doomed. Such attempts change the concept itself and only bring artificial certainty, by that change. ... Deconstruction and particularism plague our statutes, especially Commonwealth drafting. Corporations legislation, competition legislation and taxation legislation are living examples.⁸⁰

The reference to the false certainty that is associated with deconstruction and particularism harks back to the discussion in Part II(A) about the relationship between detail and clarity and the extent to which detail is conflated with certainty.⁸¹

3. Navigability

In addition to leading to incomprehensibility, complexity can create challenges for navigability; namely the ease with which the law can be found and understood. The law governing financial services has been described as labyrinthine and providing “an endless supply of ‘stall and evade’ opportunities for wrongdoers who can clog up the courts with technical and strategic debates over how to interpret the vast body of legislation”.⁸²

Navigability has implications from both a rule of law perspective⁸³ and a general compliance perspective. Its relevance has been recognised in the Terms of Reference for the ALRC Review, the preamble of which noted “the importance, within the context of existing policy settings, of having an adaptive, efficient and navigable legislative framework for corporations and financial services”.⁸⁴ Relevantly, whereas plain English drafting may have previously been considered sufficient to achieve navigability, the experience of the *Corporations Act* over the past two decades has revealed that something more is required. The following section outlines some of the reform pathways that might be considered to achieve greater navigability of the *Corporations Act* and to achieve simplification generally.

B. Reform Pathways

In its Final Report, the Financial Services Royal Commission made two recommendations that are relevant to the analysis in this article:

⁷⁹ See Rares, n 13, [43]: “complexity can result in incomprehensibility. Plain English drafting is not the answer indeed, it can contribute to the problem. One thing is clear, and that is that the ordinary person cannot readily understand most statutes, however they are expressed. Which man or woman in the street could read the thousands of pages of the *Corporations Act* or the *Competition and Consumer Act* in the thirsty search for knowledge of his or her rights and liabilities?”

⁸⁰ Chief Justice JLB Allsop AO, “The Judicialisation of Values” (Speech delivered at the Law Council of Australia Joint Competition Law Dinner, Sydney, 30 August 2018) [17].

⁸¹ The problem of particularism was noted by the ALRC in its report on corporate criminal responsibility, which concluded that the unnecessary complexity and over-particularisation of offence provisions may enable misconduct to go unchecked. ALRC, n 49, [1.27].

⁸² Bant and Paterson, n 77, 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”. See also Rares, n 13, [48]: “That legislation requires those whom it affects to address each and every possible situation that it prescribes in order to navigate through the regulatory shoals and reefs in multiple narrow channels. There is no big picture or norm of conduct prescribed; instead, there is a plethora of minutiae that require compliance on pain of acting unlawfully or even criminally. That is generally not a good thing in attempting to regulate human behaviour.” Similarly, as noted in Part II(D), the time and cost of complying with complex rules may act as a disincentive to compliance: Parker and Nielsen, n 36, 221.

⁸³ See the article by Tess Van Geelen in this Special Issue.

⁸⁴ Australian Law Reform Commission, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (11 September 2020) “Terms of Reference” <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>>.

Recommendation 7.3 – Exceptions and qualifications: As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.

Recommendation 7.4 – Fundamental norms: As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.

In relation to Recommendation 7.4, the Final Report stated that “[b]y drawing explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect, the regulated community and the public more generally will better understand what the rules are directed to achieving”.⁸⁵

The Final Report described these recommendations as examples of the steps that need to be taken in the context of the “overall task” of simplification of the law. According to the Final Report, such a task:

will require examination of how the existing laws fit together and identification of the various policies given effect by the law’s various provisions. Only once this detailed work is done can decisions be made about how those policies can be given better and simpler legislative effect.⁸⁶

The above recommendations are effectively a call for greater clarity about outcomes and also a move towards a more principles-based approach to regulation. Such a move was supported by Treasury in its submission to the Royal Commission. According to the submission, “[principles-based regulation] requires a commitment from policy-makers to the regulatory architecture”.⁸⁷ Such a commitment means that governments need to resist the temptation to make the legislative and regulatory framework more prescriptive in response to pressure from stakeholders.⁸⁸

The Final Report provided insights into the fundamental norms by identifying six principles:

- (1) obey the law;
- (2) do not mislead or deceive;
- (3) act fairly;
- (4) provide services that are fit for purpose;
- (5) deliver services with reasonable care and skill; and
- (6) when acting for another, act in their best interests.

It is relevant to note that all of these principles focus more on conduct on the part of financial services providers than on outcomes from a consumer perspective. An exception in this regard is the fourth principle, which requires service providers to provide services that are fit for purpose.

In its response to the Final Report, the Government tasked the Department of Treasury “to begin the longer term task of considering how to simplify the law, consistent with recommendations 7.3 and 7.4 of the Royal Commission”.⁸⁹ This was followed in turn by the referral by the Attorney-General to the ALRC in September 2020 to review corporations and financial services regulation.⁹⁰

The specific reform pathway for corporate and financial services law is yet to be forged. There are, however, many ideas from which reform proposals can be identified and considered. In terms of dealing

⁸⁵ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2019) Vol 1, 44 (*Final Report*).

⁸⁶ *Final Report*, n 85, 496.

⁸⁷ *Treasury Interim Report Submission*, n 18, 7.

⁸⁸ *Treasury Interim Report Submission*, n 18, 2: “Over time, as particular issues have emerged, the policy response has taken into consideration the requests by financial firms for greater clarity and certainty of their obligations – leading to additional layers of prescription in the legal framework.” It is worth noting that requests from industry stakeholders may carry additional weight in the immediate future in light of economic pressures engendered by the COVID-19 pandemic, since governments may seek to avoid imposing additional burdens on business. It remains to be seen whether a substantial shift in the Federal Government’s appetite for implementing the recommendations of the Financial Services Royal Commission results.

⁸⁹ Australian Government, *Restoring Trust in Australia’s Financial System: Financial Services Royal Commission Implementation Roadmap* (2019) 5.

⁹⁰ See ALRC, n 84.

with complexity, one option is to de-clutter the primary legislation by reducing legislation to its core principles and general rules, placing details such as exclusions and area-specific rules in regulations and supporting the formal regulatory framework as appropriate with “soft law” guidelines and “problem-based practice notes that model the application of key provisions against standard problem scenarios”.⁹¹ This would achieve at least three outcomes. First, it would minimise the overlap that permeates the existing regulatory framework. Second, it would complement calls for a strengthened focus on consumer outcomes and a move away from the current prescriptive, rules-based regulatory framework “towards a framework that recognises financial wellbeing as the core objective of the financial services system in relation to personal finances and as the guiding principle in the design and implementation of government policy, regulation and technology”.⁹² Third, it would require the abandonment of the ideal that legislation can or should provide for every possibility⁹³ and help to achieve the recommendation of the Royal Commission that legislation identify expressly the fundamental norms of behaviour when particular and detailed rules are made about a particular subject matter.⁹⁴ In essence, this would amount to the implementation of a principles-based legislative approach.

Another way to reduce complexity is to minimise the use of delegated legislation, such as regulatory instruments for amendments that affect a large or open-ended class of people, and, instead, to embody such amendments within the primary legislation.⁹⁵ A related initiative is to ensure that where delegated legislation makes amendments that do affect a large or open-ended class of people, such delegated legislation is confirmed through the ordinary process of parliamentary legislative reform at the earliest opportunity.⁹⁶

A range of structural drafting innovations are also worth considering. While of potentially general application, there may be additional incentives to attempt these in the vexed domain of corporate law and financial services. One option to achieve greater coherence is to promote a mirror approach to like definitions and like provisions,⁹⁷ in an evolution of the drafting reforms implemented by the Plain English reforms of the 1990s. This could be supported by developing new Acts of general application that could “reduce the volume, and increase the consistency, of the statute book”.⁹⁸ The production of a Principles Drafting Manual would be helpful here too. Mandated rigorous legislative reviews, of the kind described in Part III(C), represent a further potentially useful technique. From a structural perspective, suggestions have been made to separate the *Corporations Act* into discrete pieces of legislation in respect of corporations and financial services.⁹⁹ By way of example, this could result in having three separate statutes: for corporate law (as traditionally conceived to include incorporation, shareholder rights and fundraising), securities regulation and financial services.¹⁰⁰

In terms of achieving greater navigability, one possibility is to publish “consolidated versions of the legislation showing both ‘actual’ and ‘notional’ sections” at regular intervals “to give all users and

⁹¹ Elise Bant and Jeannie Paterson, “Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia” in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU, 2017) 302. These practice notes would “seek to encapsulate key legal principles in a straightforward and accessible format and then illustrate their operation by reference to a series of simple but realistic examples” (307). This approach may of course raise analogous concerns to those expressed in relation to delegated legislation in Part II(B), including any expansion of the role of quasi-legislators.

⁹² Christoph Breidbach et al, *FinFuture: The Future of Personal Finance in Australia* (The University of Melbourne, 2019) 33.

⁹³ See Rares, n 13, [67]: “You just cannot provide for every possibility in legislation any more than in life.”

⁹⁴ *Final Report*, n 85, Recommendation 7.4.

⁹⁵ Bottomley, n 16, 29.

⁹⁶ Bottomley, n 16, 29.

⁹⁷ See Jeannie Paterson and Elise Bant, “After Hayne: Reflections on the Banking Royal Commission – Simplification and Enforcement”, *MLS News*, 21 June 2019 <<https://law.unimelb.edu.au/alumni/mls-news/issue-21-june-2019/after-hayne-reflections-on-the-banking-royal-commission>>.

⁹⁸ Attorney-General’s Department website, n 7.

⁹⁹ A suggestion made by Jordan, n 52, 637–638.

¹⁰⁰ We are indebted to Dr RP Austin for a recent suggestion to this effect.

readers of the Act a clear idea of the full scope of its regulatory operations”.¹⁰¹ There is also scope to harness technology to achieve greater navigability of legislation in electronic form, even if the hard copies of the legislation still have the appearance of a telephone book.

V. CONCLUSION

This article provides an overview of a range of factors that are relevant to effective legislative design and drafting and to reducing complexity, while enhancing comprehensibility and navigability. It suggests that in relation to design there are good arguments for preferencing less detail, reducing reliance on delegated legislation, employing alternative regulatory models and adopting a principles-based approach (subject to certain caveats). From a legislative drafting point of view this article notes that while the CLERP and Plain English reforms of the 1990s and later years have been fruitful, more needs to be done to identify practical strategies for improved drafting. In the corporate and financial services context the effects of complexity, incomprehensibility and poor navigability are evident. This article points to a range of strategies that could be employed in an effort to address these problems, including both conceptual and structural suggestions. The pathway towards simplifying the corporations and financial services law in Australia is likely to be somewhat lengthy. Of particular interest will be the recommendations of the ALRC after its three-year review. The remaining articles in this Special Issue provide further insight into the considerations the Commission may need to take into account as it wades through the legislation in its quest for simplification.

Ultimately, of course, the proof of attempts to clarify the legislative porridge will be in the eating.

¹⁰¹ Bottomley, n 16, 30. According to Bottomley, this task should not be left to commercial publishers: “those who make the rules should have an obligation (and should be provided with the necessary resources) to ensure that comprehensive, comprehensible and contemporary compilations are available for the rule-users.”