Australian Government

Australian Law Reform Commission

BACKGROUND PAPER FSL2

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Complexity and Legislative Design

October 2021

This summary of complexity and legislative design is the second in a series of background papers to be released by the Australian Law Reform Commission as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation ('the Inquiry').

These background papers are intended to provide a high-level overview of topics of relevance to the Inquiry. Further background papers will be released throughout the duration of the Inquiry, addressing key principles and areas of research that underpin the development of recommendations.

The ALRC is required to publish three Interim Reports during the Inquiry, and these Reports will include specific questions and proposals for public comment. A formal call for submissions will be made on the release of each Interim Report. In the meantime, feedback on the background papers is welcome at any time by email to financial.services@alrc.gov.au.

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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Introduction

1. This Background Paper explores the drivers and metrics of *legislative complexity*, and considers how legislative complexity can be managed and reduced through legislative design. In particular, this paper explores the drivers and metrics of complexity in corporations and financial services laws in Australia. The paper also explains why complexity matters to businesses, consumers, professional advisors, parliamentary drafters, and legislators. While this paper focuses on legislative complexity, the broader regulatory ecosystem for financial services is complex in various ways unrelated to legislation. Legislative complexity is just one type of complexity that consumers, businesses, and practitioners have to grapple with in the financial services regulatory ecosystem.

Context for the paper

2. The core task of this Inquiry is to 'simplify and rationalise the law'. The ALRC considers that this task necessitates reducing legislative complexity. The Inquiry Terms of Reference (under Topic B) explicitly acknowledge the need to manage legislative complexity. The Terms of Reference also acknowledge the importance of:

- an adaptive, efficient and navigable legislative framework for corporations and financial services;
- meaningful compliance with the substance and the intent of the law.

3. Legislative complexity can prevent the achievement of both objectives. Legislative complexity also makes it difficult for the law to adapt to and regulate 'the continuing emergence of new business models, technologies and practices', a development referred to in the Inquiry Terms of Reference.

4. Pursuing legislative simplification, and managing or reducing legislative complexity, requires an understanding of legislative complexity. What does it mean? Why does it matter? What drives it? What features of legislation contribute to complexity? How do we measure legislative complexity? How do we manage and reduce legislative complexity?

5. The ALRC is seeking to answer these questions across the course of this Inquiry. In particular, the ALRC is collecting quantitative data on legislative design and legislative complexity in Australia and selected other jurisdictions, currently the United Kingdom and New Zealand. This Background Paper therefore serves to explain the ALRC's conception of legislative complexity, particularly with respect to the data collection project undertaken for the purposes of the Inquiry. Data on some of the metrics set out in this paper will be contained in the first Interim Report, and on the ALRC website.

6. The ALRC considers that it may be possible to create a framework for quantitatively calculating legislative complexity using the metrics of complexity set out in this paper. This idea will be explored in greater detail in future publications.

7. This paper serves to commence and inform a dialogue with stakeholders about the drivers and metrics of legislative complexity, and how complexity should be addressed. The aim of this dialogue is to understand more rigorously how to reduce unnecessary complexity and better manage necessary complexity.

Complexity and Legislation

8. Legal complexity, including legislative complexity, has been of increasing interest to academics, judges, and legal practitioners over the past forty years. In particular, there has been a growing focus on developing clearer understandings of the drivers and metrics of legal complexity, and the features of legislation that can contribute to legislative complexity. The aim of this research has been to better understand how necessary complexity can be managed, and how unnecessary complexity can be reduced or eliminated.

Drivers of complexity → Legislative features → Metrics of complexity

Key Concepts

Drivers of complexity: Refers to the social, political, and economic trends that lead to more or less complex *legislative features.* Drivers also include the limited time and resources available to develop legislation, and the high-level decisions made during the lawmaking and law design process that can result in complex *legislative features*.

Legislative features: Refers to the features of legislation that can make legislation 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 (eg length), whereas others are only present in some (eg defined terms). 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 with less complexity.

Metrics: Refers to the potential quantitative measures of the complexity of a *legislative feature*. For example, metrics relevant to the complexity of 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 the complexity of exemptions may include the number of class and individual exemptions granted, and the location of those exemptions (eg the number contained in each of Acts, regulations, and other legislative instruments).

Legislative scheme: Refers to the overarching legislative context in which a single legislative text operates. The scheme includes related primary legislation (ie Acts), delegated legislation (ie regulations and other legislative instruments), and other administrative instruments, such as individual relief. The legislative scheme for corporations and financial services law includes multiple Acts (eg *Corporations Act 2001* (Cth) ('*Corporations Act*') and *ASIC Act 2001* (Cth) ('*ASIC Act*')), as well as hundreds of legislative instruments and thousands of administrative instruments.

Regulatory ecosystem: The legislative scheme is situated within the broader regulatory ecosystem for corporations and financial services. This ecosystem includes case law and other dispute resolution processes that apply the law, as well as Australian Securities and Investments Commission ('ASIC') guidance and codes of conduct.

9. Research into legislative complexity has also developed into a specific field of inquiry for scholars of legal complexity. Legislative features identified by scholars as potentially contributing to overall legislative complexity include cross-references, length, language, legislative hierarchy, exceptions and exemptions, definitions, and frequent legislative change.

10. To manage and reduce legislative complexity, a number of research and reform agendas have emerged, broadly embracing linguistic and structural simplification of legislation, better use of delegated legislation, and the use of technology and drafting to improve the navigability of legislation.

11. This Background Paper seeks to synthesise this literature to produce a clearer understanding of legislative complexity for the purposes of this Inquiry. The paper also seeks to develop a list of quantitative and qualitative metrics which can be used to identify and measure legislative complexity, particularly in the *Corporations Act*.

Legislation

12. Legislative complexity is about complexity in understanding legislation. It is therefore useful to briefly explain the origins of legislation as a system of regulation in a common law jurisdiction such as Australia.

13. In common law jurisdictions such as England and Australia, there is a distinction between judge-made law and legislation made by Parliament. The common law tradition rests on the historical dominance of judge-made law, which regulated most social and economic activities. The core of the common law tradition is 'case law', 'the outcome of solutions found in real cases' adjudicated by courts.[1] This judge-made law historically regulated vast swathes of social and economic life, including property relations, contract, negligence, and defamation, and created and punished crimes and regulated economic relations through a range of torts such as those relating to unfair or deceptive competition and abuse of monopolies.[2]

14. This judge-made law, from the period of the Norman Conquest of England in 1066, existed alongside legislation made by the monarch and, later, the Parliament.[3] This 'legislation was always important'[4] but it remained narrow in its application to social and economic life until the 19th century.

15. A central fact of the common law tradition, therefore, is that the common law coexists alongside legislation, and will apply unless implicitly or, sometimes, explicitly displaced.[5] As French CJ, Bell and Keane JJ noted in *Commonwealth Bank of Australia v Barker*, an example of the coexistence of the common law and legislation exists in the governance of the 'employment relationship': it 'operates within a legal framework defined by statute and by common law principles'.[6]

1 John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 207.
2 Ibid Part Two.
3 Baker (n 1) notes that the 'Normans and Angevins … produced a good deal of legislation, variously known as assizes, constitutions, charters, or even statute': 216.
4 Ibid 167.
5 The requirement for explicit displacement of common law rights is a feature of the 'principle of legality': Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) ch 5.
6 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, [1].

16. The common law approach can be contrasted with the civil law tradition in operation in some other countries. The core of the civil law tradition is a 'sharp separation of powers' in the 'system of law and government. It is the function of the legislator to make law, and the judge must be prevented from doing so'.[7] The codes that exist in civil law jurisdictions are therefore underpinned by a distinct ideology, under which the code is a complete statement of the law that displaces other possible sources of law, such as judge-made law or customs.[8] In some circumstances, the centrality of legislation was interpreted to mean that judges 'should not interpret incomplete, conflicting, or unclear legislation', but instead 'should always refer such questions to the legislature for authoritative interpretation'.[9] This would prevent courts from making law.[10] However, there has been a steady shift away from this fundamentalist position and, in modern civil law jurisdictions today, judges do interpret the law so as to substantially develop its 'meaning and application'.[11] Nonetheless, the civil law tradition rejects the notion of judge-made law inherent in the common law tradition.

17. Despite their tradition of judge-made law, common law jurisdictions have seen an exponential expansion in the role of legislation in regulating social and economic life, so that we live in what Ramsay, Crawford, and other scholars refer to as the 'age of statutes'.[12] As Crawford notes, the 'federal Parliament enacted 8401 statutes in the 50-year period between 1967 and 2017, compared to 2656 between 1901 and 1951, which represents a more than threefold increase'.[13]

18. The regulatory scope of the common law, and the rights, obligations and prohibitions it creates, have consequently narrowed. As Ramsay noted in 1992, 'it is now very clear that the way in which significant social problems are resolved is through legislation rather than the courts'.[14] Baker has suggested, in the British context, that 'Government ministers have come to gauge their success in office by the quantity of new legislation for which they can claim responsibility'.[15] Ramsay has also argued that the dominance of legislation has been particularly notable in corporate law, which 'has been dominated by statutes since its earliest days'.[16]

19. Nonetheless, as *Commonwealth Bank of Australia v Barker* indicates, the common law and legislation coexist in many parts of our economic and social life, and legislation does not 'codify' in the sense of replacing all pre-existing common law. The common law tradition of the Australian legal system still has at its core a significant role for the judiciary in interpreting, developing, and applying the law, including the law as established by legislation. This underpins approaches such as principles-based legislative drafting, which relies on judges to interpret legislation by reference to the general principles in the legislation and apply them to particular circumstances, thereby generating case law.

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7 John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed, 2019) 33.
8 Ibid 28–33; Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press, 2018) 207–208.
9 Henry Merryman and Perez-Perdomo (n 7) 36.
10 Ibid 39.
11 Ibid 43.
12 Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474; Lisa B Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159, 159 n 1.
13 Crawford (n 12) 162.
14 Ramsay (n 12) 474.
15 Baker (n 1) 224.
16 Ramsay (n 12) 474.

20. It is in the context of an enormous body of legislation affecting all citizens and interacting with the common law that legislative complexity has assumed greater prominence and significance. Legislation today imposes innumerable obligations and prohibitions, affecting all facets of economic and social life. It is therefore essential that legislation is as accessible, navigable, and as limited in its complexity as possible for those who are affected by its provisions and those who are required to comply with it. The effective management of legislative complexity matters more than ever in common law jurisdictions.

What is legislative complexity?

21. The concept of 'legislative complexity' is more nuanced than the ordinary meaning of complexity might convey.[17] This is because legislation in all its forms arguably satisfies the ordinary meaning of 'complex': 'consisting of parts or elements not simply co-ordinated, but some of them involved in various degrees of subordination; complicated, involved, intricate; not easily analysed or disentangled'.[18] However, some pieces of legislation are more complex than others. This variation is sometimes justified: for example, it may reflect variations in the complexity of subject matters with which legislation deals. But variations in legislative complexity are often unjustified: sometimes the variations may be a product of the processes by which law and policy are made.

22. If it is accepted that some degree of complexity exists in all laws, then the challenge for lawmakers is to mitigate *unnecessary* (or avoidable) complexity, as distinct from *necessary* 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. Katz and Bommarito refer to this challenge as Einstein's razor: 'make everything as simple as possible, but not simpler'.[19] In other words, an objective of legislative design should be to reduce unnecessary complexity as much as possible. 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?'[20]

23. The distinction between necessary and unnecessary complexity is implicit in many discussions of legal and legislative complexity. For example, the Parliament's Joint Committee of Public Accounts and Audit noted in 2008 that the

> Committee accepts that complex tax laws will occasionally be required. However, the breadth of complaints during the inquiry about complexity, and the comments that stakeholders have made over the last 20 years, *demonstrate that this complexity has exceeded necessary levels*.[21]

17 'Complexity' has a technical meaning in complexity theory, and this theory suggests there is a fundamental difference between 'complex' and 'complicated'. The ALRC does not use this theoretical framework in relation to documents, such as legislative texts, but this paper uses the framework when discussing systems, including the legal system as a whole. For a discussion of the difference between 'complex' and 'complicated', and an argument that within this framework legislative texts are 'complicated' or even 'simple' rather than 'complex', see Roger Jacobs, 'Legislation in a Complex and Complicated World' [2017] (3) *The Loophole* 19, 22–3.

18 *Oxford English Dictionary* (online at 27/07/2021) 'complex' (adj, def 2(a)).

19 Daniel M Katz and Michael J. Bommarito II, 'Measuring the Complexity of the Law: The United States Code' (2014) 22 *Artificial Intelligence Law* 337, 337.

20 Ibid 339.

21 Joint Committee of Public Accounts and Audit, *Tax Administration* (Report No 410, 2008) 50 (emphasis added).

24. The United Kingdom ('UK') Office of Tax Simplification likewise distinguishes necessary and unnecessary complexity,[22] drawing on Professor Ulph's suggestion that 'fundamental complexity', that which is unavoidable, is distinguishable from 'unnecessary complexity'.[23] Commissioner Hayne also suggested that 'financial services laws will always involve a measure of complexity'.[24]

25. In summary, the ALRC does not consider that legislation will ever be 'simple'. Instead, there is an irreducible core of necessary complexity in every piece of legislation, which is a product of real-world complexity, policy complexity, stakeholder demands, and a range of other drivers discussed in this paper. The degree of necessary complexity will differ for each legislative text, as drivers of complexity will vary across subject matters and over time.

26. Therefore, this paper 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'.[25] Simplification in the context of this Inquiry should be understood as wholly distinct from deregulation. During preliminary consultations in relation to this Inquiry, a number of stakeholders expressed concern that the term simplification could be used (either inadvertently or as a euphemism) to mean watering down obligations, or weakening consumer protections. At the same time, the ALRC does not understand simplification to mean stifling innovation, nor banning complex financial products. These are all aspects of policy, with which the ALRC is not primarily concerned in this Inquiry. Instead, the ultimate aim of legislative simplification in this Inquiry is to express and implement existing policy settings more clearly and coherently in the law.

27. Legislative complexity can be both relative and absolute. A particular piece of legislation might be relatively complex in terms of having sections that are longer and denser than other Acts, or using defined terms more frequently than other Acts. In addition, a piece of legislation might be complex in an absolute sense in terms of having a large number of defined terms or conditional statements overall, even though the use of defined terms or conditional statements on a section-by-section basis is unexceptional relative to other Acts. Relative complexity accounts for the size of legislation and allows for meaningful comparison between legislation of different sizes. Absolute complexity disregards the size of the legislation and looks at overall measures of complexity, such as total number of defined terms rather than defined terms as a percentage of all words. The *Corporations Act* is occasionally relatively complex, such as by using defined terms more frequently than almost any other Act, but it is arguably also absolutely complex in the sense of having high overall measures of complexity in relation to particular legislative features.

22 Gareth Jones et al, *Developing a Tax Complexity Index for the UK* (Office of Tax Simplification, 2014) 13–14 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285944/OTS_Developing_a_Tax_Complexity_Index_for_the_UK.pdf>.

23 Ibid 1; David Ulph, *Measuring Tax Complexity* (Office of Tax Simplification, 2013) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193497/ots_david_ulph_measuring_tax_complexity.pdf>.

24 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 491.

25 Binh Tran-Nam and Chris Evans, 'Towards the Development of a Tax System Complexity Index' (2014) 35(3) *Fiscal Studies* 341, 346–7.

Why legislative complexity matters

28. Significant legislative complexity is sometimes necessary for legislatures to achieve their objectives.[26] Through detailed legislation, drafters can distinguish 'instances where differential treatment is or might be appropriate'.[27] As Schuck notes, '[l]egal complexity sometimes produces fairer, more refined, more efficient, even more certain, forms of social control'.[28] However, with greater legislative complexity comes trade-offs.

29. **Legislative complexity and compliance:** Legislative complexity complicates the process of complying with the law. Indeed, Godwin, Brand, and Langford have suggested that it is 'relatively uncontroversial' that 'the greater the complexity of legislation and the rules that it embodies … the greater the challenges for achieving compliance'.[29] Roberts has suggested that complexity can mean that a 'reasonably certain conclusion [to a legal question], in some instances, cannot be determined despite diligent and expert research'.[30] Commissioner Hayne also suggested that legislative complexity 'can cause the regulated community to lose sight of what the law is intending to achieve and instead see the law as no more than a series of hurdles to be jumped or compliance boxes to be ticked'.[31]

30. **Legislative complexity and cost:** Complexity requires greater resources from persons whose conduct is affected by legislation and drafters who must predict how a change in the law will affect the legal and regulatory ecosystem as a whole.[32] Excessive complexity can also mean that a 'reasonably certain conclusion can be determined … only after an expenditure that is excessive in time and dollars'.[33] Ramsay argued in 1992 that complexity can 'lead to inefficiency with respect to the costs of obtaining advice in order to comply with the complex requirements and also the opportunity costs involved in the time and energy devoted to compliance with the requirements'.[34] The regulator also incurs costs in the need for regulatory guidance.[35] The extra costs of complying with the law for businesses and practitioners are borne by all Australians in higher costs for goods and services, including for legal advice when exercising rights and understanding obligations.

31. **Legislative complexity, uncertainty, and the rule of law:** Where complexity creates uncertainty in the meaning of legislation, this can result in the 'misapplication of rules'[36] and can mean that the law ceases to be 'capable of guiding one's conduct in order

26 Lance W Rook, 'Laying Down the Law: Canons for Drafting Complex Legislation' (1993) 72(3) *Oregon Law Review* 663, 665.
27 Katz and J. Bommarito II (n 19) 338.
28 Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 8.
29 Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design – Clarifying the Legislative Porridge' (2021) 38 *Corporate and Securities Law Journal* 280, 281.
30 Sidney I Roberts, 'Overview: The Viewpoint of the Tax Lawyer' (1978) 34(1) *Tax Law Review* 5, 6.
31 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Volume 1, 2018) 162.
32 Katz and J. Bommarito II (n 19) 338; Schuck (n 28) 18: 'A more complex law entails many significant transaction costs which must be accounted for. Such law tends to be more costly and cumbersome to administer, more difficult for lawmakers to formulate and agree upon, and more difficult to reform once established. Administrators and subjects of such law must invest more in order to learn what it means, when and how it applies, and whether the costs of complying with it are worth incurring. Other costs of administering a complex legal system include those related to bargaining about and around the system's rules and litigating over them.'
33 Roberts (n 30) 6.
34 Ramsay (n 12) 478–9.
35 Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389, 394.
36 Neville Harris, 'Complexity in the Law and Administration of Social Security' (2015) 37(2) *Journal of Social Welfare and Family*

that one can plan one's life'.[37] As Lord Neuberger notes, excessive legislative complexity may mean that the law becomes 'incapable of providing a proper framework within which the state and its citizens can operate'.[38] Chia and Ramsay suggest legislative ambiguity 'may have a chilling effect on lawful and productive activity because persons or companies may not enter into transactions if they are uncertain about their legality'.[39] In addition to potentially reducing compliance with the law, uncertainty therefore fundamentally undermines the ability of individuals or businesses, and their advocates, to understand and effectively exercise their rights under the law.

Complexity in the financial services law in Australia

32. The Australian Government has stated its commitment to 'simplify[ing] the financial services laws to eliminate exceptions and qualifications to the law, where possible'.[40] The Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Financial Services Royal Commission') noted that the Commission raised concerns that

> over-prescription and excessive detail can shift responsibility for behaviour away from regulated entities and encourage them to undertake a "box-ticking" approach to compliance, rather than ensuring they comply with the fundamental norms of behaviour that should guide their conduct.[41]

33. There is a common view that financial services and corporations legislation is unnecessarily complex. In 1997, the Wallis Inquiry saw 'merit in simplifying the Corporations Law to the greatest extent possible while maintaining its effectiveness'.[42] The ALRC has observed from consultations with stakeholders over the past year that there is 'a level of consensus … that the law in this area is "too complex" and in need of simplification'.[43] Some stakeholders have suggested that not only is the overall legislative scheme for financial services and corporations too complex, but particular provisions of the *Corporations Act* are notably complex.[44] ALRC analysis of submissions to the Financial Services Royal Commission also indicated that there was a consensus amongst stakeholders that 'the law and regulatory regime are too complex'.[45]

34. The judiciary has also described the *Corporations Act* as complex. Writing extra-curially in 1992 during his term as Chief Justice of the High Court of Australia, Sir Anthony Mason referred to the 'Byzantine complexity' of Australian corporations legislation.[46] Similarly, the Federal Court in *Ku v Song* stated in relation to provisions for share transfers, whoever 'coined the expression "as clear as mud" must have been slaving over the extraordinarily, and unnecessarily, complex provisions in the *Corporations Act* and *Corporations Regulations*'.[47] With respect to the use of definitions, the Federal Court in

Law 209, 212.

37 Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] (Autumn) *Public Law* 467, 469.

38 Lord Neuberger, 'General, Equal and Certain: Law Reform Today and Tomorrow' (2012) 33(3) *Statute Law Review* 323, 325.

39 Chia and Ramsay (n 35) 394.

40 Australian Government, *Restoring Trust in Australia's Financial System: Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019) 38.

41 Ibid.

42 Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) 286.

43 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [5].

44 Ibid [13].

45 Ibid [14].

46 Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2(1) *Australian Journal of Corporate Law* 1, 1.

47 *Ku v Song* (2007) 63 ACSR 661, [175].

ASIC v Westpac Banking Corporation stated that the *Corporations Act* contains provisions which are 'not always easy to comprehend, particularly given the complex and prolix, if not labyrinthine, statutory definitions of many of the key concepts or expressions that are employed in the provisions'.[48]

35. Alongside this has emerged an ever-growing body of academic literature opining on the complexity of corporations and financial services legislation and law in Australia.[49] Professor Stephen Bottomley has suggested that it is now 'stating the obvious that the legal terrain in which corporations operate is complex and diverse'.[50]

Drivers of legislative complexity

36. There is no single driver of complexity in legislation, and every piece of legislation has a unique context in which its complexity originated.[51] There are, however, a number of common drivers of legislative complexity, including:

- complexity arising from real-world factors relevant to the legislation;
- subject matter complexity;
- stakeholder demands and external influences;
- policy complexity; and
- legislative design decisions.

37. Each of these drivers of complexity is discussed in detail below.

Real-world complexity

38. One purpose of legislation is to regulate the persons and interactions that occur in society. In societies consisting of millions of citizens with various aspirations, a complex set of rules is often required to achieve that aim. In particular, the law is called upon to regulate developments in 'social interaction, economic exchange, and political behaviour'[52] which are often more complex than they were in the past. As Farina points out, making 'public policy in a heterogeneous society with an ambitious regulatory agenda inevitably implicating complex commitments – the reconciliation of which will necessarily involve an evolving process of contextualizing and adjustment – is not likely to be a high-efficiency undertaking'.[53] This cause of complexity may be considered inevitable and even 'driven by a genuine effort to keep pace with ongoing developments in society', as demands on the state and for regulation grow or change.[54]

48 *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 [7] (Wigney J). See also *Imperial Chemical Industries plc v Echo Tasmania Pty Ltd* [2007] FCA 1731, [104]: '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'.

49 For a summary of this literature, see Chia and Ramsay (n 35) 390–3.

50 Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35 *Australian Journal of Corporate Law* 142, 143.

51 See, for example, the discussion of the 'causes of complexity in Australia's tax laws': Joint Committee of Public Accounts and Audit (n 21) 55–61. See also Richard Krever, 'Taming Complexity in Australian Income Tax' (2003) 25(4) *Sydney Law Review* 467.

52 Katz and J. Bommarito II (n 19) 339.

53 Cynthia R Farina, 'The Consent of the Governed: Against Simple Rules for a Complex World' (1997) 72(4) *Chicago-Kent Law Review* 987, 1030.

54 Katz and J. Bommarito II (n 19) 339.

Subject matter complexity

39. The complexity of the subject matter that specific legislation addresses is also a significant cause of legislative complexity, and linked to the idea of real-world complexity. Godwin, Brand and Langford have suggested that the increasing complexity of financial services laws may be partially due to an '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'.[55]

40. Likewise, the Department of the Treasury (Cth) ('Treasury'), in its submission to the Financial Services Royal Commission, noted that to some degree the complexity in financial services law is 'necessitated by the complexity and range of the activities across the risk-reward spectrum that it seeks to regulate – a level of complexity and prescription may be inherent and necessary to support effective regulation of the sector'.[56] In explaining complexity in financial services laws, the Treasury also pointed to the 'the dynamic and diverse nature of financial services, the existence of numerous and complex products, and the often high stakes, particularly for consumers, given that housing and superannuation are the two biggest assets of Australian households'.[57]

Stakeholder and external influences

41. In addition to the complexity of the people, products, services, and issues that legislation seeks to regulate, 'imperfect interactions between the stakeholders involved and the unpredictability of external factors' can all contribute to the complexity of legislation.[58] Such external factors can include pressure to 'prepare legislation in constrained timeframes'.[59]

42. The influence of stakeholders on legislation has been described by the Office of Parliamentary Counsel (UK) as 'one of the key reasons for the increased volume of legislation'.[60] It states that interest groups and individuals increasingly expect the legislature to 'arbitrate on respective rights and duties'.[61] This need for further specification may be due to a 'change in the way society in general, and practitioners in particular, deal with rules'.[62]

43. The Treasury has suggested that legislative complexity in financial services is

> also a consequence of the piecemeal evolution of the legal framework. Overtime, 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.[63]

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55 Godwin, Brand and Teele Langford (n 29) 283.

56 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) 2.

57 Ibid 4.

58 Office of the Parliamentary Counsel (UK), *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (2013) 19.

59 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2011) 2.

60 Office of the Parliamentary Counsel (UK) (n 58) 7.

61 Ibid.

62 Rook (n 26) 664.

63 Department of the Treasury (Cth) (n 56) 2.

44. Citing Treasury's views, Commissioner Hayne concluded: 'Lobbying for prescription, detail and tailoring has been a significant contributor to the current state of the law'.[64]

45. Stakeholder input is an inevitable and desirable feature of democratic lawmaking, and this underlines the need for stakeholder support for effective legislative simplification.

Policy complexity

46. Complexity in policy can also contribute to complexity in legislation. In the Australian context, the Attorney-General's Department has pointed to unnecessary 'complexity in the underlying policy' as a cause of legislative complexity.[65] Webb and Geyer note that legislative drafters 'are supposed to be carrying out the will of their elected leaders who, unsurprisingly given the complex nature of society, often make contradictory and confusing demands on their expertise'.[66]

47. To achieve complex policy aims, detailed exemptions and carve-ins may be necessary to ensure legislation applies correctly. If these features of legislation are used in an overly prescriptive, or excessive fashion, the overall complexity of the law may be significantly impacted. The Commonwealth Office of Parliamentary Counsel dedicates a significant portion of its guide to 'Reducing complexity in legislation' to addressing policy complexity.[67]

Legislative design preferences

48. The Attorney-General's Department has also pointed to the following legislative design preferences as drivers of complexity:[68]

a. A tendency to respond to policy issues with legislative changes even when legislation is not necessary to address them;

b. An aversion to principles-based legislation;

c. An aversion to judicial discretion; and

d. An aversion to official discretion.

49. In relation to the above drivers of complexity, Godwin, Brand and Langford have suggested that, 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.[69]

50. Godwin, Brand and Langford also emphasise 'the desire for legislation to be comprehensive or to operate as a codification of the law' as a cause of legislative

64 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 24) 495.
65 Attorney-General's Department (Cth) (n 59) 2.
66 Thomas Webb and Robert Geyer, 'The Drafters' Dance: The Complexity of Drafting Legislation and the Limitations of "Plain Language" and "Good Law" Initiatives' (2020) 41(2) *Statute Law Review* 129, 136.
67 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) 14–20.
68 Attorney-General's Department (Cth) (n 59) 2.
69 Godwin, Brand and Teele Langford (n 29) 282.

complexity.[70] They cite Justice Rares' suggestion that 'attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something'.[71]

51. Likewise, former Commonwealth First Parliamentary Counsel, Peter Quiggin PSM QC, has suggested that administrative 'discretion can take the place of a substantial amount of detailed law on how to work out a particular matter'.[72] He has also argued that a legislative drafting preference towards more prescriptive legislation can be driven by 'perception[s] about how courts are interpreting the law in general'.[73] A perception, on the part of drafters and the Parliament, 'that courts will take a reasonable and purposive approach to interpretation' is arguably necessary for principles-based legislation.[74]

Legislative features and legislative complexity

52. This section explores how the ALRC and stakeholders might appropriately determine whether and in what way legislation is unnecessarily complex and in need of simplification.

Methodological evolution

53. In pushing for a more academically and conceptually rigorous understanding of legal complexity, legal scholars including Schuck have attempted to identify, in broad terms, the criteria of complexity in a legal system. In 1992, Schuck identified the following criteria of legal complexity:[75]

- Density ['Dense rules are numerous and encompassing. They occupy a large portion of the relevant policy space and seek to control a broad range of conduct, which causes them to collide and conflict with their animating policies with some frequency'];[76]
- Technicality ['Technical rules require special sophistication or expertise on the part of those who wish to understand and apply them. Technicality is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires'];[77]
- Institutional differentiation [A highly 'differentiated' system includes many different sources and structures of rules];[78] and
- Indeterminancy [Rules which are 'indeterminate' use 'open-textured, flexible, multifactored, and fluid' concepts that can have unpredictable outcomes in their application to facts].[79]

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70 Ibid 283.

71 Justice Steven Rares, *Competition, Fairness and the Courts* (Speech, Competition Law Conference, 24 May 2014) [18].

72 Peter Quiggin, 'The Spectrum of Drafting - from Black Letter to Coherent Principles' in Graeme Cooper (ed), *Executing an Income Tax* (Australian Tax Research Foundation, Conference Series No 25, 2008) 59, 62.

73 Ibid 63.

74 Ibid.

75 Schuck (n 28) 3.

76 Ibid.

77 Ibid 4.

78 Ibid.

79 Ibid. Professor Stephen Bottomley recently applied these criteria to Australian corporations law and concluded that 'Australian corporate law ticks each of' Schuck's proposed criteria for complexity in a legal system: Bottomley, 'Corporate Law, Complexity and Cartography' (n 50) 143–4.

54. The research into complexity in the legal system has developed significantly since Schuck's seminal 1992 article. Two developments have supported increasingly sophisticated understandings of legal complexity: the evolution of complexity theory and the emergence of computational law and legal informatics.

Complexity theory

55. Complexity theory first emerged in mathematics and the natural sciences. It draws on ideas present in physics, biology, chemistry, and statistics.[80] However, it also drew on work in the social sciences, principally from network theory and game theory.[81]

56. Complexity theory posits that complex systems have a range of characteristics, including being 'composed of many elements' which 'interact with each other through one or more interaction types'.[82] Elements are 'characterized by states' which 'are not static but evolve with time'.[83] An example of a state is a 'political preference of a person',[84] with the person being the element who has a particular state in regard to their preference for a particular political party.

57. Interactions can be analysed through networks: 'Interactions are represented as links in the interaction networks' and the 'interacting elements are the nodes in these networks'.[85] Networks can evolve independently, but often interact with one another to create 'multilayer networks'.[86] A number of other characteristics have proven relevant to understanding social systems, such as the law. For example, complex systems are 'non-linear',[87] meaning that the outcomes of system processes can be highly unpredictable and in some circumstances 'the concept of predictability must, for all practical purposes, be abandoned'.[88] They are also 'context-dependent' and 'path-dependent',[89] so that their evolution is determined by the networks in which they are embedded and their historical development.

58. In the 1990s, a number of legal scholars started drawing on complexity theory and its observations in explaining legal systems,[90] which are presented as dynamic networks composed of various elements such as legislators, courts, legal practitioners, litigants, and a range of other actors, institutions and sources of laws and norms.[91]

59. Some of this emerging literature has used complexity theory to better understand legal texts, in addition to legal systems. For example, Bourcier and Mazzega, writing in 2007, suggested that law is a 'complex dynamical system evolving from network

80 Stefan Thurner, Rudolf Hanel and Peter Klimek, *Introduction to the Theory of Complex Systems* (Oxford University Press, 2018) 1–19.
81 Ibid 19–20.
82 Ibid 22.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid 23.
88 Ibid 6.
89 Ibid 20.
90 JB Ruhl, 'Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State' (1996) 45(5) *Duke Law Journal* 849; Eric Kades, 'The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997) 49(2) *Rutgers Law Review* 403; R George Wright, 'The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex' (2000) 27(3) *Florida State University Law Review* 715.
91 For a discussion of this literature, see Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019).

structures'.[92] Building on network-based understandings of complexity, they considered that legal complexity could be identified in legal texts through structure-based and content-based measures. Structure-based complexity relates to the networked nature of legal texts, including in the hierarchy of the text (eg chapter, part, division and section) and cross-references between provisions of the law (referred to as 'quotations').[93] Content-based complexity focuses on understanding a law's 'aptitude to produce "legal outputs" or "legal effects"'.[94]

60. Likewise, writing in 2017, Jacobs drew on complexity theory in critiquing legislative texts, though he considered that legislation is 'complicated' or perhaps 'simple' in the typology of complexity theory.[95] By 'simple', Jacobs meant that the 'system is known. How it works is self-evident as the relationship between cause and effect is obvious. You don't need to be an expert to understand it'. In contrast:

> A complicated system is one that is not simple, although it may have simple elements within it. Its complicated nature derives from a combination of the following: large scale, many components, the need for coordination and the need for specialist knowledge. For example, building a car or launching a rocket. The system may not be simple, but it is knowable. It is susceptible to analysis so an understanding of the parts of the system will yield an understanding of the whole system.[96]

61. A complex system, because of the features described at 56–57, has an element of unpredictability in it, and a complete understanding of its operation into the future is therefore unknowable.

> These [complex] systems may include elements that are simple or complicated, but are not reducible to them. Launching a child into life is complex. It is not predictable. What works with one child may not work with the next and success with one child does not predict success with the next. In a complex system the relationship between cause and effect can only be understood in retrospect.[97]

62. As noted at 21, in this Paper a colloquial definition of 'complexity' is adopted that is more consistent with the definition of 'complicated' in complexity theory. However, complexity theory can particularly help enlighten the operation of laws once enacted, which can be deeply unpredictable. This requires research to understand how particular pieces of legislation fit within the broader regulatory ecosystem, and how regulated entities and other participants react to the law. In this sense, a legislative text may not be 'complex' in the complexity theory sense, but the ecosystem in which it operates may be deeply complex in the sense of being highly networked, unpredictable, and unknowable.

63. Finally, a key lesson from complexity theory is that there are normally 'various origins' that combine to make a law complex, so 'it is unlikely that a single influence factor can be identified'.[98] Rather, 'results from complexity theory have shown that in complex systems

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92 Danièle Bourcier and Pierre Mazzega, 'Toward Measures of Complexity in Legal Systems' in *ICAIL 2007: Proceedings of the 11th International Conference on Artificial Intelligence and Law* (2007) 211, 211.
93 Ibid 212.
94 Ibid 212–213.
95 Jacobs (n 17) 22–23.
96 Ibid 20.
97 Ibid.
98 Bernhard Waltl and Florian Matthes, Comparison of Law Texts: An Analysis Of German and Austrian Law Texts Regarding Linguistic and Structural Metrics (Conference Paper, Internationales Rechtsinformatik Symposium, Salzburg, Austria, 2015) [3.2].

it is not reasonable to assume monocausality … [it] is more appropriate to assume that a larger set of parameters contribute to the emerging behaviour of a system'.[99]

Computational law

64. Advances in computational power over the past twenty years have accelerated the development of computational analysis of complexity, including in the law.[100] This has also enabled an increased focus on understanding complexity in legal texts, rather than the system as a whole or particular areas of law, and with a particular focus on quantitative measures of complexity.

65. For example, building on earlier work such as that by Bourcier and Mazzega, Bommarito and Katz have identified legislative features that can lead to complexity as related to legislative structure, language and interdependence. The difference in their approach is that it adopts a large-scale quantitative approach to *measuring* complexity. This allowed for unprecedentedly broad analyses of structural and linguistic features of legal texts, with Bommarito and Katz able to analyse the entirety of the US Code (comprising 49 active Titles and millions of words).[101]

66. Bommarito and Katz argue that 'legal complexity can be approximated using the [quantitative research] tools from complex systems [theory] and linguistics'.[102] The focus on linguistic complexity in part reflects a recognition that this is related to 'the human capital expended by a society when an end user is required to review and assimilate a body of legal rules'.[103] Others in the field have also used computational analysis to develop quantitative measures of complexity in legal texts.[104]

Examining legislative complexity through metrics

67. Whilst the legislative features that can lead to legislative complexity can be examined qualitatively, such as through case studies of complexity, close readings of provisions of the text, and analysis through case law and stakeholder feedback on complexity, the research noted above suggests that the complexity of legislative features can also be measured quantitatively. Drawing on approaches such as those proposed by Bommarito and Katz, the complexity of a legislative feature and a piece of legislation can be approximated quantitatively.

68. The next section explores how each legislative feature that can contribute to complexity might be understood and, in particular, what metrics are effective proxies for an analysis of their complexity. A summary of the metrics that the ALRC regards as significant in relation to each legislative feature are included in Table 1.

99 Ibid.
100 In relation to complexity theory, it has been suggested that a 'science of complex systems is unthinkable without computers': Thurner, Hanel and Klimek (n 80) 25.
101 Katz and J. Bommarito II (n 19).
102 Ibid 371.
103 Ibid 340.
104 See, for example, Waltl and Matthes (n 98).

Table 1: Metrics of legislative complexity

Legislative features	Potential metrics
Length	• Page and word count of a legislative text • Word count per provision (eg chapters, parts, divisions, subdivisions, sections)
Structural elements	• Number of sections, subsections, paragraphs, subparagraphs, and sub-subparagraphs within each hierarchical container • Density of structural elements
Cross-references	• Number of internal cross-references (ie to provisions within the same legislative text) • Number of external cross-references (ie to provisions in other legislative texts, such as cross-references from an Act to regulations or another Act)
Obligations	• Number and location of obligations and prohibitions in a legislative text • Number of provisions that provide for consequences for breaching an obligation or prohibition, such as by creating offences, civil penalties, and infringements notices.
Conditional statements	• Number and use of conditional statements (eg 'if', 'where', 'but')
Indeterminate concepts	• Number and use of indeterminate terms in Act (eg 'reasonable', 'fair')
Prescription	• Length of particular provisions, including over time • Intricacy of structural elements in provision • Overall size of provisions relevant to an area of regulation, including in the Act and legislative instruments
Duplication and redundancy	• Number of duplicated or overlapping regulatory regimes (eg multiple licensing regimes serving a similar purpose and with duplicated features) • Number of duplicated or overlapping obligations and prohibitions (eg multiple misleading and deceptive conduct prohibitions) • Number of provisions that are no longer necessary, such as transitional arrangements for new legislation
Definitions	• Number of defined terms in a legislative text or particular provisions • Number of uses of defined terms within a text or particular provisions • Location of definitions within legislative texts and across legislative schemes (eg in the Act or legislative instruments) • Proportion of all words that are potentially subject to a definition • Number of definitions that have certain characteristics, such as only applying in certain contexts

Legislative features	Potential metrics
Language	• Readability measures, including the Flesch Reading Ease score • Vocabulary size (eg number of words comprising the vocabulary of the text or provision) • Entropy (which is a numerical score identifying the variability of a text's language use and potentially subject matter) • Average word and sentence length in legislative text or provision
Legislative hierarchy	• Number and size of legislative instruments made under an Act • Number of legislative instruments under Act which notionally amend the Act
Exceptions	• Number and type of class exemptions and exclusions in an Act, and their location in the Act, regulations, or other legislative instruments • Number and type of individual relief instruments
Legislative change	• Number of amendments to Acts in total and per year • Development of inconsistent alphanumeric numbering systems (eg 12BAA)

69. In addition to the above legislative features that may lead to complexity in legislation, a number of potential features of the ecosystem may serve as an indicator that legislation or provisions of legislation are too complex. These include:

a. Litigation- and dispute-related data: Metrics for this include court judgments in relation to different Acts or particular provisions, as well as use of Act-specific dispute resolution regimes such as the Australian Financial Complaints Authority in the context of financial services legislation.

b. Compliance-related data: Metrics for this include prosecutions and civil enforcement, as well as Act-specific processes for identifying breaches. This includes, for example, breach reporting to ASIC in the context of financial services legislation. This data can identify parts of an Act that may be operating inappropriately.

Structural legislative features

70. The structure of legislation can include a number of legislative features that can lead to legislative complexity. The Office of Parliamentary Counsel (Cth) has concluded: 'Poorly structured legislation can be a cause of complexity. ... Adopting a clearer and more logical structure is a useful step in reducing that complexity'.[105]

71. Analysis of structural legislative features focuses on the constituent elements of legislation and the way that related content is grouped together.[106] Legislation is structured hierarchically in what the ALRC refers to as 'structural elements', which include chapters, parts, divisions, subdivisions, sections, subsections, paragraphs, subparagraphs, and, rarely, sub-subparagraphs. Not all Acts will use all types of structural elements (for example, some Acts do not contain chapters).

105 Office of Parliamentary Counsel (Cth) (n 67) 6.
106 Katz and J. Bommarito II (n 19) 347.

72. Legislative complexity can result from a number of structurally-related legislative features, as outlined below.

The length of legislation

73. Long legislation, and particularly long provisions such as sections, parts, and chapters, can make legislation more difficult to follow,[107] and can be a sign of structural incoherence or over-prescriptiveness. In addition to Act length, the Office of the Parliamentary Counsel (Cth) notes that 'overly long sections' can mean 'that the reader struggles to maintain a clear understanding of what a particular section is trying to achieve'.[108] Prescriptiveness can exacerbate the problems of length insofar as

> clarity can be impaired by too much specificity—in law as in other communicative endeavours. Expressive acts flout norms of communicative rationality when they multiply detail needlessly: an audience has finite time to read and listen and limited capacity to remember.[109]

74. Importantly, the length of legislation cannot be considered in isolation from the length of any associated legislative instruments. The Office of the Parliamentary Counsel (UK) has remarked that a 'short Act that requires the user to go to a complicated set of Regulations is not, overall, a simplifying measure'.[110]

Structural elements

75. Understanding the structure of legislation can be useful for understanding its complexity and 'can highlight the level of intricacy present in a given [legislative] architecture'.[111]

76. In the context of Commonwealth Acts, the number of higher-level structural elements (eg chapters, parts, divisions, and subdivisions) may be used to provide an indication of the diversity (or breadth) of subject matters with which an Act deals, while the number of lower-level structural elements (eg sections, subsections, paragraphs, and subparagraphs) may be an indication of the level of detail (or depth) it includes. The number of lower-level structural elements contained within a higher-level structural element may be a metric for establishing relative complexity in terms of the intricacy of the provisions. For example, identifying particular chapters and parts of an Act that contain a large number of subsections and paragraphs may highlight areas of notable prescriptiveness and intricacy. The number of divisions and subdivisions within a particular part may also be an indication of the diversity of subject matter that part covers.

Cross-references

77. Cross-references in a legislative text reflect the extent to which the operation of one provision depends on the operation of another. Cross-references can be internal (eg cross-references to other provisions in the same Act) or external (eg cross-references to provisions in other Acts). Definitions are a form of cross-referencing, because each use of a defined term requires a reader to have regard to the definition of that term.

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107 Office of Parliamentary Counsel (Cth) (n 67) 2, 4.
108 Ibid 2.
109 Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ, 2011) 101, 118, quoted in Crawford (n 12) 166.
110 Office of the Parliamentary Counsel (UK) (n 58) 7.
111 JB Ruhl and Daniel M Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191, 215.

Cross-references may lead to greater legislative complexity. However, cross-references are often necessary and may reduce the length and repetitiveness of a legislative text. An increasing body of research has emerged to understand interdependencies, of which cross-references are a significant cause, within legislation and the legal system.

78. Some scholars have attempted to apply complex network theory or computational legal studies approaches to visualise the complexity of 'interdependence' in the legal system. For example, when considered as a network, 'legislative and executive rules can be linked with case citations and language in judicial opinions, creating a macro-network model'.[112] By considering statutes as a 'network of dependencies',[113] it is possible to identify highly referenced provisions which might either lead to 'cascading failure' if they are ineffective or which, if improved, might 'affect the operation and viability of other statutes'[114] and materials.

79. Metrics for cross-references are easily obtained by computationally counting the number of references to other provisions and Acts. More sophisticated analysis can be conducted on highly structured legislative texts that use XML, which allows for the creation of network maps such as those described above.

Obligations and Prohibitions

80. Provisions containing obligations and prohibitions, as well as the consequences that may flow from breaching them, may be unnecessarily complex if they are unduly long, structured inappropriately, duplicative, or overly intricate.

81. The Office of the Parliamentary Counsel (Cth) has noted that 'if the important concepts in a legislative measure are not stated as its central elements, but are obscured by other material such as procedural detail, overly complex provisions are likely to result'.[115] Appropriately structuring these provisions may mean placing provisions which apply to a large majority of readers before less important or operative details.[116] It is arguable that obligations and prohibitions, particularly where they attract significant penalties or are offences, are important to many readers, and should therefore be located and structured in such a way that they are easy to find and understand. The number of obligations and prohibitions in a legislative text may in itself be complex, given the challenge on a regulated person to navigate and comprehend the overall body of regulatory requirements to which they are subject.

Conditional Statements

82. Conditional statements create legislative complexity, though they are an inevitable feature of legislative design. Conditional statements are words such as 'if', 'except', 'but', 'provided', 'when', 'where', 'whenever', 'unless' and 'notwithstanding'. Each of these words indicates a fork in the road for a reader of legislation. For example, a rule may apply 'if' a requirement or list of requirements is satisfied, but might be subject to a 'but' that means the rule does not apply in certain circumstances.

112 JB Ruhl, Daniel M Katz and Michael J Bommarito II, 'Harnessing Legal Complexity' (2017) 355(6332) *Science* 1377, 1378.
113 Ibid.
114 Ibid.
115 Office of Parliamentary Counsel (Cth) (n 67) 6.
116 Ibid.

83. Conditional statements may lead to unnecessary complexity when their use becomes excessive or they are used in a particularly complex ways. Conditional statements can be measured computationally by counting the presence of certain words and their location and use, a task undertaken by scholars of legislative complexity at MIT and Harvard.[117] They can be considered at the level of an Act or provision.

Indeterminate concepts

84. Words or concepts are potentially indeterminate if their application to a particular set of facts may be subject to multiple interpretations. Consequently, their interpretation by courts may be less predictable than if a more determinate word or concept were used.

85. In a recent review of debates around 'uncertain' terms, Bigwood and Dietrich observe the fact 'that a legal concept is capable of being described as "nebulous" in its nature, "vague" in its meaning(s), or "uncertain" in its application(s) is often advanced as a weighty, if not decisive, reason for rejecting it'.[118] However, potentially indeterminate terms are an inevitable and in many ways desirable legislative feature. These concepts are used to ensure that a rule or standard applies appropriately in a variety of cases. Bigwood and Dietrich argue:

> In many instances, the law, given its complex nature and society's expectations of what it is meant to deliver, cannot avoid resort to concepts whose meanings are unfixed and whose applications leave considerable scope for expert judgement — so-called 'leeway of choice'.[119]

86. Likewise, indeterminate terms may be used in principles-based legislation to reduce other types of complexity, such as prescriptiveness, length, linguistic diversity, and density of obligations and prohibitions. Bigwood and Dietrich also note that arguments against 'uncertainty' are often highly selective,[120] and have suggested that if 'vagueness were a sufficient reason for repudiating legal concepts and criteria, large portions of current law would be eviscerated'.[121]

87. However, the use of such words can increase the difficulty of interpretation. In their study on complexity in German laws, Waltz and Matthes identified 62 indeterminate legal terms and counted their appearance throughout German law texts.[122] Schuck also considered that 'open-textured, flexible, multi-factored, and fluid' concepts potentially contribute to legislative complexity.[123] Although measuring indeterminacy requires a degree of subjective judgment in choosing 'indeterminate' words, it does provide one way of seeing which laws include more 'complexity-driving terms'.[124]

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117 William Li et al, 'Law Is Code: A Software Engineering Approach to Analyzing the United States Code' (2015) 10(2) *Journal of Business and Technology Law* 297. The approach was suggested in Kades (n 90) 425. It has since been cited by other scholars as an approach to measuring complexity: Patrick McLaughlin et al, 'Is Dodd-Frank the Biggest Law Ever?' (2021) 7(1) *Journal of Financial Regulation* 149, 154.

118 Rick Bigwood and Joachim Dietrich, 'Uncertainty in Private Law: Rhetorical Device or Substantive Legal Argument?' (2021) 45(1) *Melbourne University Law Review* (advance), 2.

119 Ibid 3.

120 Ibid 2–3.

121 Rick Bigwood, 'Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales' (2008) 27(2) *University of Queensland Law Journal* 41, 79.

122 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, 160.

123 Schuck (n 28) 4.

124 Waltl and Matthes (n 122) 159. See also Waltl and Matthes (n 98) [3.3.2]. Waltl and Matthes noted that some scholars have suggested that vague terms fall into one of three categories: evaluation, quantification and time.

88. Examining the use of indeterminate terms, in consultation with stakeholder feedback, can identify indeterminate terms that unnecessarily contribute to legislative complexity. A metric for this could be to identify indeterminate concepts that are unnecessarily complex and then computationally consider their use in the Act or particular provisions. One example of unnecessarily complex use of indeterminate terms may be a requirement that is subject to multiple standards of 'reasonableness'.

Linguistic legislative features

89. Language has long been understood as a legislative feature that can lead to complexity. For example, the Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) suggested that an obstacle to 'users of the law find[ing] out and understand[ing] their rights and obligations under the [Corporations] Law' is the 'unnecessarily complex language' of the law, which means that businesspeople require 'professional advice (eg from accountants or lawyers) before undertaking routine company activities'.[125] The focus on plain language in legislation, which was a cornerstone of the Commonwealth's 'Tax Law Improvement Project' in the 1990s,[126] is fundamentally a recognition that language, when used in certain ways, may contribute to legislative complexity.

90. Interrogating this legislative feature means measuring how the language used in legislation impacts on the ability for users to understand the law.[127] Different users of legislation have different abilities to process the language used in legislation which may relate to their social and educational backgrounds.[128] However, an impression of the complexity of language can be ascertained by measuring 'readability' and other linguistic features. These metrics are aimed at an understanding of 'linguistic complexity that seeks to model the "cost" of assimilating the language contained within each element' of the law.[129] Reducing the complexity of language as a legislative feature can also manage legislative complexity that is irreducible for various reasons, such as because it has its roots in policy or subject matter.

91. The ALRC has identified the following metrics that may be used to measure the complexity of language as a legislative feature.

92. **Readability metrics:** There are various readability measures, including the Flesch Reading Ease score, which can be used to measure readability. Critics of readability scores point out that readability scores do not capture all of the complexities which could appear in a text.[130] However, 'to compare different texts and to classify them based on a uniform method is an accepted method in other disciplines'.[131] Further, multiple different readability measures can be used to analyse whether there are differences in results. The UK Office for Tax Simplification has focused on measuring the complexity of legislation through readability scores among other methods.[132]

125 Explanatory Memorandum, Company Law Review Bill 1997 (Cth) [2.6].
126 Australian Taxation Office, *Tax Law Improvement Project: Building the New Tax Law* (Information Paper No 2, April 1995) 12.
127 Of course, different groups use legislation, and these groups have become increasingly diverse in the last 20–30 years: Office of the Parliamentary Counsel (UK) (n 58) 19.
128 See, for example, Waltl and Matthes (n 122) 156 where the authors describes this as 'understandability' and differentiate it from readability.
129 Katz and J. Bommarito II (n 19) 352.
130 See, for example, Duncan Berry, 'Legislative Drafting: Could Our Statutes Be Simpler?' (1987) 8(2) *Statute Law Review* 92, 100. The author queries whether the Flesch Reading Index really assists in measuring readability.
131 Waltl and Matthes (n 122) 156.
132 Webb and Geyer (n 66) 137–8.

93. **Linguistic diversity metrics:** This measures the total size of the vocabulary (ie unique words) used in legislation and the number of 'stems' they are based on (eg the stem of 'provided' and 'provider' is 'provid'). Relative measures of linguistic diversity may examine the number of unique words per 1000 words, for example. Linguistic diversity 'drives the inhomogeneity of texts and is an indicator for the number of distinct topics covered by a law'.[133] However, research of this kind on German laws found that the readability of a German legislative text was not influenced by the number of unique words used within a text. This could mean that linguistic diversity is not necessarily a contributor to the complexity of legal texts.[134]

94. **Linguistic entropy metrics:** Entropy is a measure of conceptual diversity in a text. Proposed by Shannon in 1948,[135] it is a numerical score that seeks to reflect the diversity of language and concepts used within a legislative text. When an individual is reading an Act with greater entropy, the person will encounter a greater range of concepts than they would encounter if reading a lower entropy text. Entropy can serve as a proxy for the cognitive difficulty which a person will experience in reading a text, given 'it is more difficult for an individual to understand a set of concepts with high variance than one comprised of homogeneous material'.[136]

Legislative hierarchy

95. Acts may be linked to delegated legislation, notably in the form of regulations and other legislative instruments, through the legislative hierarchy. The legislative hierarchy can contribute to overall legislative complexity in a number of ways. The ALRC has identified particular complexity in three legislative features: consistent use of legislative hierarchy, notional amendments, and the proliferation of legislative instruments. Each of these features is explored further below.

Consistent use of legislative hierarchy

96. An inconsistent use of the legislative hierarchy in a legislative scheme may be complex and reduce the readability and navigability of the scheme. Inconsistency occurs where a person navigating a legislative scheme is unable to clearly identify where certain types of provisions will be located. For example, in a legislative scheme with an inconsistent hierarchy a reader may have to search the Act, regulations, and regulator-made legislative instruments to identify exemptions potentially relevant to their circumstances. A consistent hierarchy would see exemptions, or particular types of exemptions, clearly located in one type of instrument or potentially one instrument.

97. Inconsistency can arise within a single legislative scheme, as in the example above, or across legislative schemes. A significant body of guidance from the Senate Standing Committee for the Scrutiny of Delegated Legislation,[137] the Office of the Parliamentary Counsel (Cth),[138] and Department of Prime Minister and Cabinet seeks to ensure principled

133 Waltl and Matthes (n 122) 160.
134 Ibid 161.
135 Claude Shannon, 'A Mathematical Theory of Communication' (1948) 27 *The Bell System Technical Journal* 379.
136 Michael J Bommarito II and Daniel M Katz, 'A Mathematical Approach to the Study of the United States Code' (2010) 389 *Physica A* 4195, 4199.
137 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines* (1st ed, 2020) 27–29.
138 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, Reissued June 2020).

and relatively consistent legislative hierarchies.[139] This guidance reflects a particular Commonwealth legislative hierarchy whereby particular provisions are to be included in the primary Act, and others in delegated legislation. For example, this guidance generally suggests that the following should go in an Act:

a. Provisions creating offences or civil penalties which impose significant criminal penalties;

b. amendments to Acts of Parliament;

c. provisions imposing high or substantial fees and charges;

d. procedural matters that go to the essence of the legislative scheme; and

e. significant questions of policy including significant new policy or fundamental changes to existing policy.

98. Where a legislative scheme complies with the general principles and guidelines on Commonwealth legislative hierarchies, readers may be able to predict where particular provisions will be located and therefore navigate the scheme with more ease. Legislative schemes that depart from these principles, particularly where they do so to a significant extent, have a legislative hierarchy that is inconsistent with accepted standards of legislative design and are therefore potentially inconsistent with other legislative schemes. This may be complex for businesses, practitioners, and lawmakers who frequently have to navigate between legislative schemes. Each of these schemes may have their own unique internal legislative hierarchy, which may be internally consistent or inconsistent.

99. However, the guidance recognises that it is sometimes necessary to depart from the principles for consistent legislative hierarchies across legislative schemes. This may ensure particular pieces of legislation remain flexible and adaptable, such as where dynamic provisions are located in delegated legislation so that they can be easily amended. In such cases, a scheme is still arguably less complex if it has an internally consistent legislative hierarchy. For example, a legislative scheme may be less complex if it has just one type of instrument containing certain classes of obligations, where it is thought necessary to place these in delegated legislation rather than the Act. A consistent internal legislative hierarchy may therefore reduce complexity even where the internal hierarchy is inconsistent with general principles of Commonwealth legislative hierarchies.

Notional amendments

100. The ALRC has identified notional amendments as potentially detracting significantly from the readability and navigability of legislation. These amendments are known as 'notional amendments' because the amendments are not apparent on the face of the legislation, yet they have the same legal effect as amending the legislation directly.[140] Notional amendments can also be known as 'modifications', as defined in the glossary on the Federal Register of Legislation.

139 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017).

140 For a discussion of 'notional amendments' in the context of the *Corporations Act*, see Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as Law-Maker' (2011) 39(1) *Federal Law Review* 1.

101. Notional amendments can mean that the text of an Act does not reflect the ultimate effect of the law, nor is the existence of notional amendments apparent to the reader of the Act. Notional amendments can fundamentally change the substance of an Act or legislative instrument, such as by imposing new obligations or amending obligations for a particular class of persons. Such amendments, whether to an Act or another piece of delegated legislation, can therefore lead to legislative complexity. As Van Geelen notes, notional amendments can also mean 'there is not one current version of the law; there are several'.[141] This creates obvious complexity as users of legislation have to determine the version of the law that applies to their circumstances, often by piecing together the effect of various legislative instruments that contain notional amendments.

102. Metrics relevant to understanding current use of notional amendments include the number of instruments making notional amendments, and the number and substance of these amendments.

103. Notional amendments to an Act are generally created through exercises of powers contained in 'Henry VIII clauses'. This type of clause enables the making of instruments that omit, insert or amend provisions of an Act (rather than supplementing the operation of an Act, such as by providing the content of a defined term or a monetary threshold). Instruments made under Henry VIII clauses in Australia do not amend the text directly. This means that the amendment does not appear in the Act compilation on the Federal Register of Legislation. An example of such a clause is s 1362A of the *Corporations Act* which was introduced in 2020.[142] This section gave the Treasurer a temporary power to make notional amendments or exemptions in relation to *any* provision of the *Corporations Act* lasting up to six months.

104. By permitting modifications to an Act without the same public lawmaking processes as Acts, instruments made under Henry VIII clauses can lead to instability and unpredictability in legislation. The instruments can also result in complexity in legislation when they are used to tailor provisions of the Act to particular persons, products, or circumstances.

Proliferating legislative instruments

105. A large number of legislative instruments may make legislation less navigable, less accessible, and more complex. Relevant metrics may include the number of legislative instruments made under an Act, and the length of such instruments.

Exceptions and exemptions

106. Exceptions in Acts and delegated legislation can make legislation more complex to understand and apply. This is because 'the number of factual situations or assessments involved in the determination of a rule's applicability' affects the rule's complexity.[143] Exemptions can also 'reduce accessibility to the law, leading to a lack of clarity about the full extent of a legislative framework'.[144] This feature can be measured by counting the number of exemptions and considering their location within the legislative hierarchy. For example, legislation may be more complex where it requires a reader to examine multiple

141 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, 307 (italics removed).

142 *Corporations Act 2001* (Cth) s 1362A.

143 Julia Black, *Rules and Regulators* (Clarendon Press, 1997) 23.

144 Debra Angus, 'Things Fall Apart: How Legislative Design Becomes Unravelled' (2017) 15(2) *New Zealand Journal of Public and International Law* 149, 150.

legislative sources to understand the scope of a provision. In the *Corporations Act*, a reader frequently must have regard to the Act, regulations, and dozens of other legislative instruments in determining the application of particular regulatory regimes.[145]

107. Furthermore, a large number of exceptions and exemptions can obscure a regulatory regime's underlying principles. Commissioner Hayne noted that exceptions and 'limitations encourage literal application' of a law, and this has the effect of making it 'more complicated' to discern the law's 'unifying and informing principles and purposes'.[146] Based on this proposition, the number of exemptions and exclusions in an Act may affect the discernibility of the Act's principles and purposes, and increase its complexity.

108. Exemptions can also be subject to conditions. These effectively create an alternative regulatory regime for those relying on the exemption, and the potential to create such regimes can mean that exemptions 'become a de facto legislative scheme if the law does not keep pace with developments'.[147] The accretion of exemptions in place of law reforms that address the source of exemptions can occur because managing a 'regulatory environment through an exemptions process is an attractive option for regulators because of the flexibility, immediacy and control it can provide'.[148]

109. This legislative feature can be measured by counting and locating the number of exemptions and exclusions in an Act and legislative instruments. This can provide a useful indication of how complex the legislative scheme is with respect to navigability, as well as how complicated it is to discern its core principles and purposes.

110. Where exemption powers are considered necessary, Angus argues they 'should be exceptional, rather than the norm. Such powers should not supplant a proper legislative amendment process, shore up an incomplete policy process or allow arbitrary exceptions to the law'.[149] They should also be subject to 'clear criteria, time limits and transparency requirements'.[150] Any conditions that can be imposed on exemptions should also be 'consistent with the requirements of the empowering legislation and no more onerous than the requirements they replace'.[151] Overall, 'stewardship and oversight is needed to prevent legislative design from becoming unravelled by the use of exemptions from legislative requirements'.[152]

111. In addition to contributing to legislative complexity, extensive use of exemptions and exclusions is a symptom of complexity and other problems in legislation, such as over-prescriptiveness. Exemptions and exclusions highlight parts of the legislation that are not operating appropriately for a sufficiently broad range of circumstances. In particular, exemptions by regulatory agencies, which are often visible only to highly engaged stakeholders,

145 Parts 7.6 (Financial Services Licensing) and 7.9 (Financial Product Disclosure) are notable examples in this regard.

146 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 24) 44. In *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, [2012] FCA 1028 [813], [948] the Court similarly noted that complicated exceptions can themselves add to the complexity of the law, especially when the court has to 'waste its time wading through [the] legislative porridge' to work out which exceptions might apply.

147 Angus (n 144) 153.

148 Ibid.

149 Ibid 151.

150 Ibid 152.

151 Ibid 152–153.

152 Ibid 159.

> can lead to a disconnect between the state of the law and its actual operation as there is no overall picture about the need for a law change. If numerous exemptions are continually being granted by regulatory agencies, there is an issue whether the law is fit for purpose.[153]

Prescription

112. For the purposes of this analysis, prescription can refer to either the imposition of detailed rules and requirements (including conduct obligations) in a certain regulatory area or the breadth of the regulatory areas that are subject to detailed rules and requirements. Prescription is often a necessary feature of legislation. For example, writing of welfare law, Harris has suggested that there will always be 'an inherent necessity for prescription of the diverse circumstances and needs to which a welfare system is expected to be responsive'.[154] The same is arguably true of many areas of the law, and in this sense there is no irreconcilable tension between 'principles' at the general level and 'prescription' at the detailed level. The two can and often must go hand in hand. But prescription, particularly where it reflects the density and technicality of rules,[155] can lead to legislative complexity. This complexity is likely to be excessive and unjustified where the prescription is disproportionate when measured against the capacity of the regulated community to understand, and comply meaningfully with, the legislation.

113. Identifying prescription and the degree of complexity it introduces requires both quantitative and qualitative analysis of legislative texts and schemes. A quantitative analysis means identifying distinct subject matter of legislation and considering its level of prescription. Distinct subject matter, such as particular regulatory regimes, may be identified in a legislative text at the level of chapters, parts, divisions, and subdivisions. Potentially prescriptive—and in some cases overly prescriptive—subject matter can be quantitatively identified by examining provisions which are particularly long, which have grown longer over time, or which have intricate structural elements (eg they are densely packed with subsections, paragraphs, subparagraphs). Identifying prescription in a legislative scheme requires a consideration of the size and intricacy of legislative instruments, including regulations, as they relate to particular subject matter. For example, ALRC research in the *Corporations Act* has focused on understanding prescription in disclosure, which has tens of thousands of words and highly intricate provisions associated with it in the Act, *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*'), and ASIC legislative instruments.

114. Having identified potentially prescriptive areas of a legislative text, a qualitative assessment is required to understand the degree of prescription and to consider whether the prescription is necessary and therefore justified. This is often a matter of judgment on which reasonable minds may differ. Prescription may be unnecessary where 'the fineness of the distinctions a rule makes' is excessive,[156] or where the density of the rules means that they are 'numerous and encompassing' in a way 'which causes them to collide and conflict with their animating policies with some frequency'.[157]

153 Ibid 153.
154 Harris (n 36) 224.
155 Schuck (n 28) 4.
156 Ibid.
157 Ibid 3.

Duplication and redundancy

115. Duplicated, redundant, and overlapping provisions and regulatory regimes are a legislative feature that can contribute to overall legislative complexity. Consolidating provisions and regimes by removing duplicated, redundant, and overlapping provisions and regulatory regimes may simplify the law. It may also mean that other legislative features that contribute to overall complexity are reduced. Eliminating overlapping regimes, for example, may mean that fewer concepts, obligations, and prohibitions are needed in legislation.

116. In writing about Australia's tax laws, Cooper identified as among its 'structural flaws' 'regime duplication and overlap (typically by legislative accretion)' and a 'failure to remove legislative detritus'.[158] Duplicated and overlapping regimes can mean that too 'many matters … do not admit simple answers', and as a legislative feature they are 'perhaps the most annoying and unnecessary design defect' in legislation.[159]

117. The ALRC has identified duplication and overlap in a range of provisions of the *Corporations Act*. Previous ALRC research has shown that '92 offences within the *Corporations Act* relate to defective disclosure or false, misleading, or deceptive conduct'.[160] The consequence of this duplication are significant. As has been observed, the 'myriad provisions regulating misleading conduct have been described as … "a labyrinth that defies navigation, let alone rational analysis"'.[161] The ALRC's research concluded that, in relation to duplication,[162]

> Effective regulation of corporate misconduct requires balancing the competing demands of achieving sufficient specificity in offence provisions with the complexity that ensues from excessive specificity therein.

118. Duplication may sometimes be necessary or justified. For example, sometimes it may be justified to create tailored licensing regimes in the same Act where the entities being licensed are significantly different, and tailoring of the regime cannot appropriately occur within a single licensing scheme. Chapter 7 of the *Corporations Act* includes separate licensing regimes, with some specific associated conduct obligations, for persons operating financial markets, derivative trade repositories, clearing and settlement facilities, significant financial benchmarks, and financial services businesses. This may be justified given the different activities engaged in, though it is also arguable that tailoring of regulatory regimes could occur through licensing conditions and rules applicable to particular licence authorisations rather than wholly separate licensing regimes.

119. An example of unnecessary duplication and overlap may be the dozens of provisions in the *Corporations Act* that require a person to 'notify ASIC' of a matter. These provisions can have a variety of consequences attached to their breach, and can apply in different ways to different persons. This model of overlapping and duplicated provisions may be contrasted with one in which a higher level obligation to notify ASIC of a range of matters

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158 Graeme S Cooper, 'Fixing the Defective Jigsaw' (Forthcoming) 45 *Melbourne University Law Review* 1, 4.
159 Ibid 5.
160 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, 2020) 79.
161 Ibid citing Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in M Douglas, J Eldridge and C Carr (eds), *Economic Torts in Context* (Hart Publishing, 2020).
162 Ibid.

is included in a single provision, for which a series of consequences may be applicable and where courts are relied on to select the most appropriate consequence for breach.

120. Measuring this legislative feature should be done both qualitatively and quantitatively. Quantitative computational analysis may identify obligations or prohibitions that appear frequently. Qualitative analysis can then examine the provisions that contain these duplicated and overlapping obligations or prohibitions to determine whether their duplication is necessary. This process may highlight redundant provisions, such as transitional and consequential provisions contained at the end of many Acts.

Definitions

121. Defined terms can contribute to legislative complexity.[163] The Office of the Parliamentary Counsel (Cth) 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. Of course, for inherently complex schemes, large numbers of concepts might be unavoidable'.[164] But, definitions can also reduce legislative complexity by achieving consistent interpretation of terms and by reducing the need for repetition of text. Thus, to gain a holistic picture on the use of defined terms in an Act, the number, use, location, and content of defined terms should be analysed.

Legislative change

122. Legislative change is an inherent and desirable feature of legislation. But change also has consequences. The statute book is 'an ever-evolving network of complex information that expands organically and is extremely difficult to map'.[165] This difficulty is exacerbated when legislation is amended regularly in a way that does not make clear how existing and new legislation fit together.[166] Frequent amendment also results in changes to the existing 'scheme structures' which makes both the 'legislative and procedural arrangements' associated with the law more complex.[167]

123. Frequent amendment arguably increases the risk that changes will be undertaken 'without a review of existing provisions, or the legislation as a whole',[168] which the Commonwealth Attorney-General's Department suggests can be a cause of complexity. Godwin, Brand and Langford note that patchwork legislative amendments result in an 'inherent risk of incoherence' that is only 'exacerbated by legislation that is the product of continuing evolution over a long period of time'.[169] A potential metric for identifying incoherent or patchwork legislative change is the emergence of widespread use of alphanumeric provisions (eg s 12BAA). These may suggest a lack of forethought in the initial policy and legislative design stage, or that there has not been sufficient review of the legislation as a whole, as the Attorney-General's Department suggests is necessary.

163 Definitions as a legislative feature can be particularly problematic in the regulation of financial services. In *Ku v Song* (2007) 63 ACSR 661 [175], the Court noted that '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'.

164 Office of Parliamentary Counsel (Cth) (n 67) 7.

165 Office of the Parliamentary Counsel (UK) (n 58) 14.

166 Ibid 13.

167 Harris (n 36) 210–11.

168 Attorney-General's Department (Cth) (n 59).

169 Godwin, Brand and Teele Langford (n 29) 283.

124. The Board of Taxation has noted that ‘refinements to complex legislation will be required even after the legislation has been enacted. New issues will inevitably surface as the legislation is applied to real-life transactions, often not contemplated during the legislative design phase despite the best efforts of all involved’.[170] In addition, the Board has described legislative change as ‘a necessary and healthy part of maintaining a complex system’.[171] Thus, a balance must be struck between keeping the law up to date and ensuring that it does not become too complex by virtue of constant amendment.

125. In addition to the emergence of alphanumeric provisions, legislative change as a legislative feature can be measured through the number of amendments per year for Acts or for particular provisions within an Act, such as a Chapter or Part.

Proxies for identifying legislative complexity

126. The ALRC considers that metrics can be identified that are not directly related to particular legislative features, but which may indicate that legislation is overly complex. They are therefore proxies for identifying legislative complexity.

127. The ALRC considers that data on litigation, disputes and compliance may be relevant in identifying areas of complexity within legislation. Particular provisions that are subject to litigation may be affected by uncertain drafting, complex definitions, or overly prescriptive content, all of which may necessitate the involvement of courts or other dispute resolution bodies. Disputes and non-compliance with legislation may also be the result of unnecessarily complex legislative regimes more broadly, which can make compliance with the law difficult.

128. However, proving causation between legislative complexity and non-compliance or high levels of legal disputes is difficult (if not impossible). Some breaches of the law will simply be the result of deliberate non-compliance or underinvestment in compliance processes. Likewise, court resolution of disputes between private parties is an ordinary feature of our legal system, and high levels of litigation can simply reflect high volumes of activity affected by provisions of an Act or legislative scheme.

129. The ALRC therefore consider dispute and compliance-related data to be relevant only in indicating potential areas of complexity, which should then be subject to more rigorous qualitative and quantitative analysis. For example, financial product and services disclosure is among the areas in which AFCA disputes are most frequently lodged. ALRC quantitative and qualitative analysis suggests this is one of the most unnecessarily complex areas of the *Corporations Act*, including in terms of prescriptiveness, use of legislative instruments, definitions, and exceptions and exemptions.

170 Tax Design Review Panel, *Better Tax Design and Implementation* (2008) 38.
171 Ibid.

Managing and reducing complexity

130. This section summarises some of the broad approaches suggested in the literature for better managing necessary complexity and reducing unnecessary complexity. One of the most useful approaches for managing necessary complexity—improving the navigability of legislation—will be considered in another Background Paper. This section discusses other ways of managing complexity, such as: simplification of drafting and better legislative design; better use of delegated legislation; and, frequent review and improvement of laws.

Simplification of drafting and better legislative design

131. Simplification of drafting and legislative design can reduce unnecessary complexity and better manage necessary complexity. Historically, legislation in most common law jurisdictions was written for lawyers.[172] Therefore, 'the principal goal of the drafter was precision, not readability or intelligibility by ordinary citizens'.[173] As Professor Ross Grantham has stated[174]

> most of the law on the statute books remains technically and formally expressed. It also continues to be drafted against the background of the common law and thus a presumption that the reader has a body of technical legal knowledge and experience with which to read, understand, and to contextualise the words of the statute.

132. It is against this background that efforts to 'simplify' the law or draft it using 'plain English language' have emerged. In 1987, the Law Reform Commission of Victoria stated that the law 'should be drafted in such a way to be intelligible, above all, to those directly affected by it. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it'.[175]

133. Simplification in this sense is to be distinguished from making legal rules 'less nuanced, shorter and easier to understand' without regard to related policy consequences.[176] Instead, simplification is aimed at making the law comprehensible by those whose conduct is governed and by those whose interests might be affected'.[177]

134. A number of the different drafting approaches are posited to lead to simplification in legislative drafting. Plain English in law has been described as a 'style of writing … that best conveys to the reader who is to do (or not to do) what and when'.[178] The Law Reform Commission of Victoria in its report *Plain English and the Law* favoured an approach whereby legal documents are written in 'plain English'.[179]

135. There are other approaches to drafting that are similarly intended to simplify the law. In particular, general principles drafting, or 'European style' drafting, 'is one of

172 Ross Grantham, 'To Whom Does Australian Corporate and Consumer Legislation Speak?' (2018) 37(1) *University of Queensland Law Journal* 57, 57.
173 Ibid 57–8. Grantham cites Office of Parliamentary Counsel (Cth) (n 67) [7].
174 Grantham (n 172) 58.
175 Law Reform Commission of Victoria, *Plain English and the Law* (Report No 9, 1987) [69].
176 Katz and J. Bommarito II (n 19) 338.
177 *Casaclang v Wealthsure Pty Ltd* (2015) 238 FCR 55, [236].
178 Anthony Watson-Brown, 'In Search of Plain English – the Holy Grail or Mythical Excalibur of Legislative Drafting' (2012) 33(1) *Statute Law Review* 7, 7. For a comprehensive history on Plain English drafting in Australia, see Ian Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18(1) *Statute Law Review* 21.
179 Law Reform Commission of Victoria (n 175).

several names for the style used when the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts, by subordinate legislation or in some other way'.[180] In Australia, this approach has been criticised on the basis that 'the commercial world often insists on detailed statements'.[181] However, the ALRC questions whether this limitation still endures today; in consultation with lawyers, industry, and consumer groups, the ALRC has been told that the *Corporations Act* is overly complex because of its prescriptiveness and that a more principles-based drafting approach would be preferred.

136. Sir William Dale, writing in 1977, identified and attacked many of the legislative features that can characterise poor legislative design. These include excessively long sections,[182] which were a feature of drafting in common law jurisdictions and which the Office of the Parliamentary Counsel (Cth) also criticises.[183] Dale criticised the poor structuring of Acts, including the failure to prioritise core concepts and principles.[184] Complexity, he suggested, also came from the use of unnecessary defined terms and the use of phrases such as 'except where the context otherwise requires' or 'subject to the provisions of this Act'.[185] These 'distract the reader, and depreciate the value of what [the reader] is told'.[186] Dale valued the concision and general absence of 'conditions, qualifications, reservations, warnings and other interceptions of the communication' in French and Swedish law.[187] He called for the adoption of 'drafting techniques … which serve the purpose of clarity'.[188] This requires 'an absence of undue length',[189] 'to be less fussy over detail, to be more general and concise; and to situate each rule where it belongs, in an orderly and logical development'.[190] It also requires reducing cross-references, which though 'saving space' increase 'the vexation'.[191] He considered principles to be core to better drafting, and he praised French laws in which 'a manifestation of principle is combined with an orderly development of detail'.

137. The need to balance simplicity and precision is a challenge for lawmakers and drafters. As Ian Turnbull QC has stated: 'In moving towards a simpler style, it is a matter of delicate judgment to decide how high the standard of precision should be, and how many words can be omitted without losing precision'.[192] This delicate judgement is deeply subjective. For example, critics of simplification projects argue that reductions in 'regulatory compliance requirements do not eliminate the complex interplay between the regulators, regulated, public, and the state, they just conceal it … simplification may have the effect of increasing uncertainty by making regulatory relationships and industrial obligations unclear to the regulated, regulators, judicial bodies, and citizens'.[193]

180 Turnbull (n 178) 26.
181 Ibid 27. See also page 28, where Turnbull points to the Attorney-General of Australia's comment at a 1992 conference in Parliament House relating to the corporations law: 'The law is already too general for some practitioners. They want the law spelt out, and not left to bureaucrats or courts to interpret'.
182 William Dale, *Legislative Drafting: A New Approach* (Butterworths, 1977) 55.
183 Office of Parliamentary Counsel (Cth) (n 67) 4.
184 Dale (n 182) 12.
185 Ibid.
186 Ibid.
187 Ibid 13.
188 Ibid 333.
189 Ibid 331.
190 Ibid 335.
191 Ibid 332.
192 Ian Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 165.
193 Webb and Geyer (n 66) 145.

138. There are other views on ways that drafting and structure could be improved. For example:

- Morrison has advocated for the increased use of ‘safe harbours’ in drafting;[194]
- Horn has argued for increased use of headings in legislation; and[195]
- Stewart has suggested that section headings be framed as questions.[196]

139. The Attorney-General’s Department has also suggested that legislation be tested with focus groups or exposure drafts be released early for public comment.[197] This process could assist drafters to determine if the structure or content of draft legislation is too complex. It has also suggested that legislation be tested ‘for continuing relevance’.[198]

140. The Office of the Parliamentary Counsel (Cth) can directly manage some aspects of complexity by exercising its editorial powers. Currently, s 15V of the *Legislation Act 2003* (Cth) gives the First Parliamentary Counsel (‘FPC’) the power to make editorial changes and other changes to Acts and instruments. Changes can only be made if the FPC considers them necessary to ‘bring the Act or instrument into line, or more closely into line, with legislative drafting practice being used by the Office of Parliamentary Counsel; to correct an error, or to ensure that a misdescribed amendment of the Act or instrument is given effect to as intended’.[199] Notably, the FPC cannot make changes that change the effect of the law, and the power is therefore very circumscribed.[200] The Office of the Parliamentary Counsel (Cth) publishes data on the exercise of the FPC’s editorial powers.[201] These powers can help address minor unintended quality issues in Commonwealth legislation. But they also underline the limited formal power of the Office of the Parliamentary Counsel (Cth) to improve legislative design and reduce legislative complexity without broader stakeholder support, notably from policymakers and parliamentarians.

141. In Australia, changes that are not appropriate for FPC editorial changes are made through Statute Update Acts, which used to be called Statute law revision Acts.[202] Some changes are also made as part of department-specific amendment Acts.[203] For example, in early 2021, Treasury consulted on miscellaneous amendments to Treasury portfolio laws.[204] The draft explanatory memorandum explains that ‘Minor and technical

194 Andrew Stumpff Morrison, ‘Case Law, Systematic Law, and a Very Modest Suggestion’ (2014) 35(2) *Statute Law Review* 159, 173: ‘With a safe harbor, the rule-writers lays down a general, relatively vague standard … To this general standard is added one or more specific, more objectively delineated categories of conduct that will be conclusively deemed not to violate the standard’.

195 Nick Horn, ‘Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy’ (2011) 32(3) *Statute Law Review* 186. However, Horn recognises that little research has been done on whether headings assist user understanding.

196 Gordon Stewart, ‘Legislative Drafting and the Marginal Note’ (1995) 16(1) *Statute Law Review* 21, 22.

197 Attorney-General’s Department (Cth) (n 59) 4.

198 Ibid 6.

199 *Legislation Act 2003* (Cth) s 15V(2). The Office of the Parliamentary Counsel’s (Cth) approach to using the power is summarised in Office of Parliamentary Counsel (Cth), Drafting Direction 4.4, ‘Minor, technical and editorial changes (including changes using FPC’s editorial powers)’ (Document release 3.0, Reissued October 2019).

200 *Legislation Act 2003* (Cth) s 15V(6). The Parliamentary Counsel Office (NZ) is similarly restricted in editorial changes it can make: *Legislation Act 2019* (NZ) s 86.

201 Federal Register of Legislation, ‘Editorial Changes Reports’ <www.legislation.gov.au/Content/EditorialChanges>.

202 Office of Parliamentary Counsel (Cth), Drafting Direction 4.4, ‘Minor, technical and editorial changes (including changes using FPC’s editorial powers)’ (Document release 3.0, Reissued October 2019) 4.

203 For example, the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* (Cth) includes 31 pages of minor amendments.

204 Department of the Treasury (Cth), ‘Miscellaneous Amendments to Treasury Portfolio Laws 2021’ <treasury.gov.au/consultation/c2021-167053>.

amendments are periodically made to Treasury legislation … to remove anomalies, correct unintended outcomes and generally improve the quality of laws'.[205]

Effective use of delegated legislation

142. Delegated legislation can also help manage the complexity of Acts.[206] Jacobs has argued that legislation that regulates complex social systems, like financial markets, requires a 'greater degree of delegation than Parliaments may be used to'.[207] To this end, Jacobs argues that the legislative hierarchy should have one or more of the following features:

- flexibility to accommodate evolution of the system;
- the capacity for regulators to choose different methods of regulation to suit the situation;
- the capacity to undertake small interventions; and
- flexibility to accommodate and learn from results of experimentation.

143. However, an increase in the use of delegated legislation can contribute to the complexity of an Act and the legislative scheme. Thus, flexibility must be balanced against maintaining coherence in legislation.

144. The complexity caused by extensive use of delegated legislation might be reduced by structuring legislative instruments thematically and avoiding notional amendments to Acts. For example, APRA conducts much of its prudential regulation through thematically consolidated legislative instruments. Likewise, accounting standards in Australia are consolidated thematically and published in legislative instruments. Each of these instruments operate as relatively self-contained statements of rules and requirements, rather than as notional amendments to an Act.

145. Parliamentary processes for oversight of delegated legislation include disallowance and sunsetting. Disallowance refers to the process by which an instrument may be repealed if a notice of motion to disallow the instrument is introduced in the House of Representatives or the Senate within a short period and it is not voted down. Sunsetting refers to the automatic repeal of delegated instruments after 10 years, unless they are remade. Both processes are set out in the *Legislation Act 2003*.

146. An increasing number of Commonwealth regulations and other legislative instruments are exempt from sunsetting.[208] These exemptions include many instruments made under the *ASIC Act*, *Corporations Act*, *Competition and Consumer Act 2010*, *Aviation Transport Security Act 2004, CrossBorder Insolvency Act 2008, Extradition Act 1988, Fair Work Act 2009, Financial Framework (Supplementary Powers) Regulations 1997, Foreign Acquisitions and Takeovers Act 1975,* and the *National Consumer Credit Protection Act 2009*. In addition, many types of legislative instruments are not subject to parliamentary disallowance.[209]

205 Exposure Draft Explanatory Materials, Treasury Laws Amendment (Measures for Consultation) Bill 2021: Miscellaneous and Technical Amendments [1.3].

206 See discussion in Stephen Bottomley, 'Where Did the Law Go? The Delegation of Australian Corporate Regulation' (2003) 15 *Australian Journal of Corporate Law* 1, 9.

207 Jacobs (n 17) 19.

208 *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) Part 5.

209 Ibid Part 4.

Reviewing the statute book

147. One approach to managing the complexity in the statute book is to conduct regular reviews of the stock of legislation. Godwin, Brand and Langford argue that legislative review is extremely important.[210] They suggest that the 'inherent risk of incoherence resulting from patchwork amendments over a long period of time could be mitigated by more rigorous review of legislation'.[211]

148. New Zealand has a Legislation Design and Advisory Committee ('LDAC') which examines the stock of existing laws and encourages agencies to proactively review their legislative instruments. The *Legislation Act 2012* (NZ) also provides that the 'Attorney-General must prepare a draft 3-yearly revision programme for each new Parliament'.[212] The purpose of this programme is to 'make New Zealand statute law more accessible, readable, and easier to understand'.[213] Some European jurisdictions also have formal processes in place to review the stock of legislation.[214]

149. The Board of Taxation recommended in its Better Tax Design and Implementation report that the Government ensure 'greater priority is given to the ongoing care and maintenance of the tax system'.[215] Similar efforts to better manage the stock of tax legislation have been attempted in the UK.[216]

150. The Commonwealth Attorney-General's Department suggests that the statute book be reviewed periodically to reduce duplication, which contributes to complexity. It has also acknowledged that many 'Bills are introduced in Parliament without any outside assessment of readability and useability. This means that it is difficult to ensure the end user will be able to understand the impact of the Bill on their rights and interests'.[217]

151. Individual departments are also encouraged to take a stewardship approach to their lawmaking. The Government recently reiterated this in a new Regulator Performance Guide. As the website for Guide suggests, the 'Australian Government has adopted a stewardship approach to regulation where Ministers, Secretaries and Agency Heads are ultimately responsible for ensuring the regulations and regulatory approaches under their authority are fit for purpose'.[218]

152. Likewise, the Commonwealth Legislation Handbook provides general guidance on lawmaking by departments. It recommends working with the Office of the Parliamentary Counsel (Cth) to identify 'how to avoid unduly complex legislation and whether there might be alternative approaches which would permit simpler legislation'.[219] It also encourages departments working on amendments or new laws to 'consider whether any aspects of

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210 Godwin, Brand and Teele Langford (n 29) 289–290.
211 Ibid 289.
212 *Legislation Act 2012* (NZ) s 30(1).
213 Ibid s 3(e).
214 See Edward Donelan, 'European Approaches to Improving Access to and Managing the Stock of Legislation' (2009) 30(3) *Statute Law Review* 147.
215 Tax Design Review Panel (n 170) 35 (Recommendation 16).
216 Webb and Geyer (n 66) 137.
217 Attorney-General's Department (Cth) (n 59) 4.
218 Department of the Prime Minister and Cabinet (Cth), 'Regulator Performance Guide and Supporting Material' <deregulation.pmc.gov.au/priorities/regulator-best-practice-and-performance/regulator-performance-guide>. See also, Department of the Prime Minister and Cabinet (Cth), *Regulator Performance Guide* (July 2021) 3.
219 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (n 139) [3.3].

the proposed approach add complexity, and whether there are any acceptable alternative approaches that would be less complex'.[220]

153. The Office of the Parliamentary Counsel's (Cth) guide to drafting services also notes that drafters will 'raise issues of complexity in the drafting process with instructors, and will be proactive in suggesting ways that complexity might be reduced'.[221] It also suggests that:

> Drafters may decide to include a "complexity flag" (which is a specially formatted note) in a draft if they think that the policy creates or adds to complexity. In some cases flags relate to the basic policy or fundamental aspects of how the policy is to be implemented. In other cases flags relate to matters of detail or particular provisions. Instructing agencies need to consider the flags and advise the drafters what they wish to do.[222]

154. Independent review bodies can also serve a legislative stewardship role. In Australia, a Corporations and Markets Advisory Committee (CAMAC) existed from 1989 to 2014 and had the ability to make recommendations about any matter connected with a proposal to make or amend corporations legislation. It had the ability to consider the stock of legislation and make law reform proposals on an ongoing basis.

155. It is possible that the Office of the Parliamentary Counsel (Cth) could adopt more of a 'stewardship' role in which it focuses more squarely on reviewing and managing the stock of legislation in priority areas, such as areas that frequently change. However, this would likely require improved resourcing and potential changes to its mandate and powers.

Legislative blueprint

156. Another way of managing legislative complexity is to have a legislative blueprint which explains the manner in which a piece of legislation should be amended in future years to maintain the law's fundamental policy aims and its design philosophy. The existence of explicit blueprints for certain areas of law remains rare. Tax law appears to be the main area in which a legislative design philosophy has been expressed. This is reflected in the Office of the Parliamentary Counsel's (Cth) Drafting Direction 1.8,[223] which is the only Direction relating to a particular area of law. The focus on principles for better tax law design has been longstanding. The Board of Taxation in 2004 recommended that a design team 'monitor the early implementation of substantive new law to ensure that the legislation is operating as intended by identifying legislative refinements that are needed and ensuring that appropriate administrative products and guidance material are in place'.[224] This type of approach could assist to manage inherent legislative complexity.

220 Ibid [5.16].
221 Office of Parliamentary Counsel (Cth), *OPC's Drafting Services—A Guide for Clients* (6th ed, 2016) [33].
222 Ibid [34].
223 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, Issued May 2006).
224 Tax Design Review Panel (n 170) Recommendation 22.