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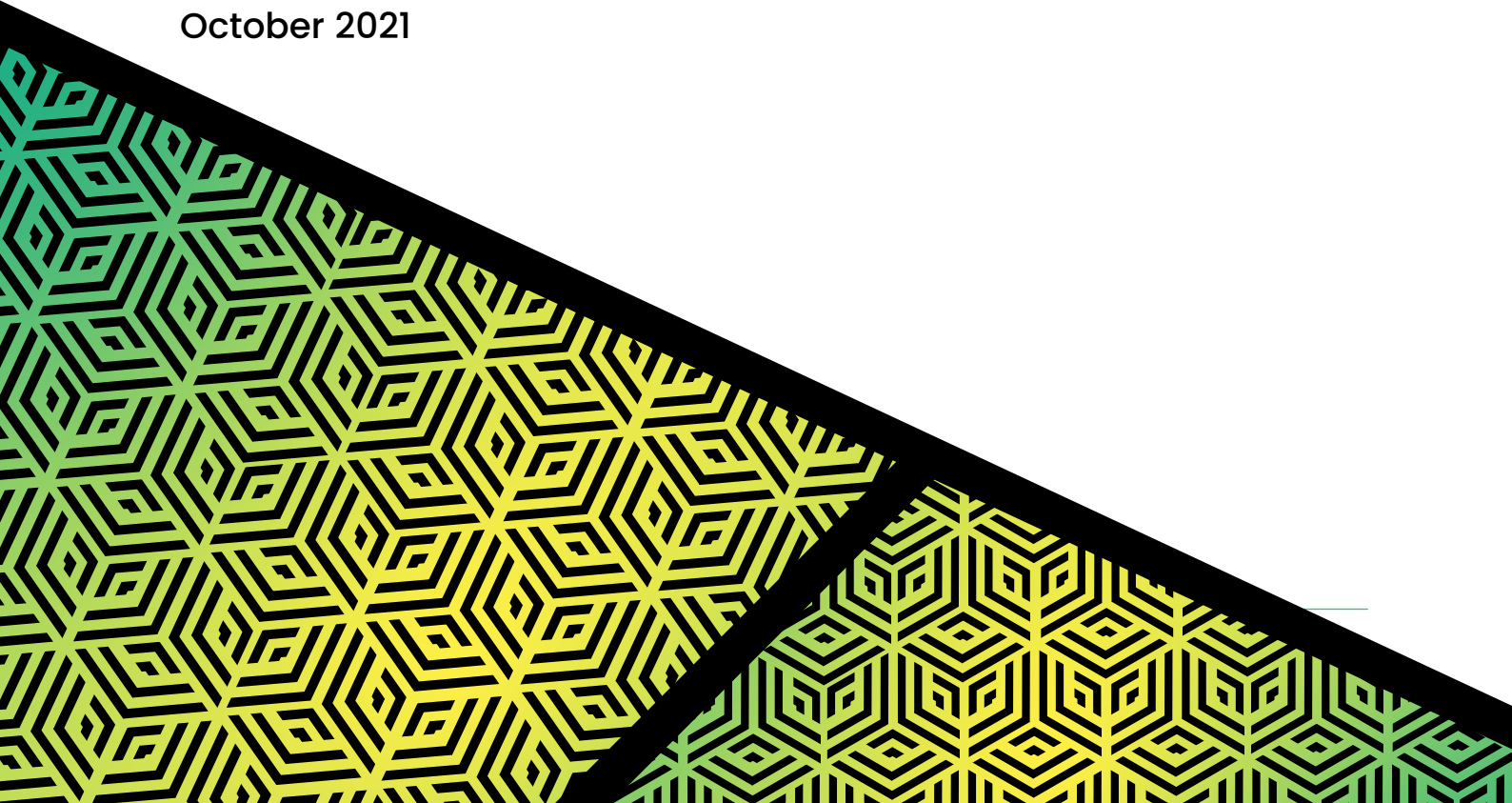
Australian Law Reform Commission

BACKGROUND PAPER FSL3

# LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND **FINANCIAL SERVICES REGULATION**

## Improving the Navigability of Legislation

October 2021



This discussion of legislation and its navigability is the third 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](mailto: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. The Terms of Reference for the ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation highlight the importance of having 'an adaptive, efficient and navigable legislative framework for corporations and financial services'. This Background Paper discusses the range of features and techniques that can be used to make legislation more navigable.
2. Legislation is easier to navigate if a reader can more easily find in legislation the information they need for their purposes. Easier to navigate legislation contributes to simplification by making the law both easier to find and easier for a reader to find their way around. Features relating to the drafting as well as the presentation of legislation can be used to make legislation easier to navigate.
3. Technology also offers solutions to make legislation more navigable, particularly in respect of its electronic publication and presentation. Better use of technology in publishing legislation, particularly the use of Extensible Markup Language ('XML'), opens up a range of possibilities for users of legislation to customise how they engage with legislation. For regulated entities, this could include significantly streamlining the development and maintenance of compliance systems.
4. There is a relatively modest body of empirical research considering whether legislative features aid readers by improving navigability. The existing work suggests that further research could usefully be undertaken to gain a greater understanding of the range of users of legislation and whether aids to navigation are effective.
5. Although the focus of this Paper is on Acts of Parliament, much of what is discussed may also have application to delegated legislation. Wherever possible, examples are used to illustrate the features discussed below, with a particular focus on examples drawn from the *Corporations Act 2001* (Cth) ('*Corporations Act*'). If an example is located in an appendix rather than the text of the discussion, then there will be a hyperlink to that appendix and a link to return to the in-text discussion.

## Navigability

6. Navigability refers to the ability of a person who uses legislation to find, and find their way around, the law. Just as a map and signposts can help a traveller reach a destination more easily, so too can more navigable legislation help a reader to find what they need in the law.<sup>1</sup> Navigability is important at three levels: across the statute book (Acts of Parliament) as a whole, between Acts and delegated legislation, and within individual pieces of legislation.
7. Navigability at the level of the statute book refers to being able to find the statutory law on one topic as easily as possible.<sup>2</sup> Locating the law on one topic is made more difficult when it is spread across several Acts.<sup>3</sup> So too when multiple topics are (sometimes

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1 Ronan Cormacain, 'Legislative Drafting and the Rule of Law' (PhD Thesis, University of London, 2017) 63.

2 New Zealand Law Commission, *Presentation of New Zealand Statute Law* (Report No 104, 2008) [1.21]. For a discussion of the insights that cartography has for the design of corporations law more generally, see Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35 *Australian Journal of Corporate Law* 142.

3 New Zealand Law Commission (n 2) [1.21].

counterintuitively) combined into one Act. The *Corporations Act*, for example, covers diverse topics such as the structure and regulation of corporations, corporate insolvency and insolvency practitioners, financial services law, and consumer protection. In complex areas of the law it may not be possible to house all of the relevant statutory provisions in one Act, so navigability across different Acts is important.

8. Aside from being contained in multiple Acts, the law may also be spread across the legislative hierarchy. This means that navigability involves both a ‘horizontal’ aspect (between Acts, as discussed above) and a ‘vertical’ aspect (between an Act and delegated legislation<sup>4</sup> made under that Act). Delegated legislation presents a particular challenge to ‘vertical’ navigability because although an Act may indicate that regulations or other legislative instruments can be made under it, the text of an Act does not indicate whether any have, in fact, been made. In the case of the *Corporations Act*, both extensive regulations and other legislative instruments have been made, often covering the same topic, such that a reader may need to consult three legislative sources to locate the law. So too is there a large amount of regulatory guidance contained in Regulatory Guides issued by ASIC. Although these are not legislative in character, they are nonetheless important and often need to be navigated by users of the *Corporations Act*.

9. Navigability within individual pieces of legislation is also important, for two main reasons. First, a single section of legislation will rarely provide a complete answer to a legal question or the entirety of the law on one topic. One simple reason for this may be because the provision uses a defined term, and that definition is contained elsewhere in the legislation. Second, and relatedly, the rules of statutory interpretation require that an Act be read as a whole. This means it is important that all other relevant provisions can be identified.

10. While navigability may be an end in itself, it is better viewed as one aspect of making the law accessible. According to the New Zealand Law Commission, ‘one aspect of the rule of law is to ensure that Acts of Parliament are accessible and available.’<sup>5</sup> The law is accessible if it is publicly available, navigable, and able to be understood.<sup>6</sup> According to Dr Ronan Cormacain, navigability is one of several principles that can be used to facilitate the drafting of legislation in accordance with the rule of law.<sup>7</sup> Complex legislation, even if publicly available, is unlikely to be accessible legislation because it will be difficult to navigate, read and understand. Complex legislation can therefore present a challenge to the rule of law.<sup>8</sup>

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4 Delegated legislation, sometimes called subordinate legislation, is a term used to describe legislation made not directly by an act of Parliament, but made under the authority contained in an Act of Parliament. This includes Regulations and a range of other instruments. Delegated legislation is ordinarily made by the executive arm of government pursuant to power granted (delegated) to it by an Act of Parliament. See Parliament of Australia, ‘Delegated Legislation’, *Parliament of Australia* <[www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/Practice7/HTML/Chapter10/Delegated\\_legislation](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter10/Delegated_legislation)>.

5 New Zealand Law Commission (n 2) iv; see also Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002).

6 New Zealand Law Commission (n 2) [16]–[18].

7 Cormacain (n 1) 12.

8 Lisa B Crawford, ‘The Rule of Law in the Age of Statutes’ (2020) 48(2) *Federal Law Review* 159; William Isdale and Christopher Ash, ‘Legislative Morass and the Rule of Law: A Warning, and Some Possible Solutions’ <<https://www.auspublaw.org/2021/05/legislative-morass-and-the-rule-of-law-a-warning-and-some-possible-solutions/>>.

## Empirical research and user experience testing

11. To date, there has not been a substantial amount of empirical research exploring how users (or readers) engage with legislation and what insights that may offer for legislative drafting.<sup>9</sup> In particular, there has been little research to determine whether particular drafting techniques or aids to navigability are effective. Two examples of surveys undertaken in Australia and the United Kingdom are outlined below, and the findings of other research are discussed in the context of specific navigability aids.

### Australian Legislation Users Survey

12. In 2010, the Office of Parliamentary Counsel (Cth) ('OPC') commissioned a study aimed at understanding whether 16 particular drafting features made Commonwealth legislation easier to read and understand ('2010 OPC Survey').<sup>10</sup> Though questions were aimed predominantly at understanding and readability, respondents were specifically asked whether four features made legislation easier to navigate:

- decentralised tables of contents;
- subsection headings;
- diagrams; and
- the new format of legislation.

13. The survey found that the majority of features rated very positively among respondents and revealed some differences in satisfaction levels regarding particular features between different user groups.<sup>11</sup> Insights from the survey in relation to specific features are highlighted when discussing those features below.

14. A limitation of the 2010 study was its selective reliance on a relatively narrow range of legislation users. All user groups were either legally qualified,<sup>12</sup> involved in court processes,<sup>13</sup> or involved in the process of developing legislation.<sup>14</sup> The vast majority of survey respondents were familiar with legislation.<sup>15</sup> The survey did not account for the views of those who administer legislation (such as regulators), infrequent or inexperienced users of legislation, and members of the general public. Although the OPC acknowledged that members of the general public are potential users of Commonwealth legislation, the general population was not included in the survey because of difficulties in selecting an appropriate sample.<sup>16</sup>

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9 This can be distinguished from other empirical research which has focused on examining the readability of legislation, using readability measures such as the Flesch Readability Index. See, for example, a study that compared the readability of the *Income Tax Assessment Act 1936* (Cth) with the *Income Tax Assessment Act 1997* (Cth): David Smith and Grant Richardson, 'The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation' (1999) 20(3) *Fiscal Studies* 321.

10 Office of Parliamentary Counsel (Cth), *Results of the 2010 Legislation Users Survey* (2010).

11 Ibid 4–5.

12 Such as judges, barristers and solicitors.

13 Namely, 'staff of Federal Court judges, Family Court Judges, Federal Magistrates and AAT members'.

14 Namely, 'Commonwealth Public Servants from instructing areas and advising areas in Departments': Office of Parliamentary Counsel (Cth) (n 10) 1.

15 Ibid 7. Of the respondents, 57% reported that they had worked with Commonwealth legislation for more than 10 years and 27% for more than 21 years.

16 Peter Quiggin PSM, 'A Survey of User Attitudes to the Use of Aids to Understanding in Legislation' [2011] (1) *The Loophole* 96, 96.

## United Kingdom study on drafting and presenting legislation

15. In 2012 and 2013 the United Kingdom Office of Parliamentary Counsel and the National Archives (UK) commissioned a study examining ‘whether some particular drafting techniques or drafting styles are better understood than others’ and, if so, ‘which techniques and styles are best understood’.<sup>17</sup> In a 2014 paper, Alison Bertlin, Deputy Parliamentary Counsel at the UK Office of Parliamentary Counsel, provided a detailed discussion of the study and its findings.

16. Bertlin noted that the National Archives had ‘amassed a considerable body of research about users’ of the UK legislation website and identified three main categories of users.<sup>18</sup> A ‘persona’ was attributed to each:

- non-lawyers who need to use legislation in their job;
- members of the public seeking to enforce their legal rights or those of a relative or friend; and
- lawyers.<sup>19</sup>

For the purposes of the study’s in-person user testing, 12 participants, each matching one of these ‘personas’, were selected.

17. The online survey component of the study presented respondents with alternative versions of an example legislative provision addressing five drafting topics: conditional statements, formulas, use of the expression ‘subject to’, ‘second sentences’, and ‘sandwich provisions’.<sup>20</sup>

18. Conditional statements and the expression ‘subject to’ would be familiar parts of language to most readers of legislation. While not all readers would regularly encounter formulas in legislation, most people would be familiar with the concept. Bertlin explained ‘second sentences’ in these terms:

Occasionally a second (unnumbered) sentence is used in a subsection. This happens typically where a subsidiary proposition is closely related to the first sentence or does not merit a subsection in its own right. A second sentence can be useful to signal, at the end of a subsection, that the subsection is subject to some other provision. This device offers a way to avoid opening the subsection with the possibly distracting, and certainly inelegant, phrase ‘Subject to subsection (x)’.<sup>21</sup>

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17 Alison Bertlin, ‘What Works Best for the Reader? A Study on Drafting and Presenting Legislation’ [2014] (2) *The Loophole* 25, 29. The study comprised an online survey that was completed by 1,901 respondents and partially completed by over 3,300 people. In-person user testing was also conducted.

18 Ibid 27.

19 Ibid.

20 Ibid 31–41.

21 Ibid 40.



19. A ‘sandwich provision’, according to Bertlin, describes a provision with opening and concluding text with paragraphs in between.<sup>22</sup> An example used in the study was as follows:

If –

(a) any goods are exported or brought to any place in the United Kingdom for the purpose of being exported, and

(b) export of the goods is, or would be, contrary to any prohibition or restriction,

the goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.<sup>23</sup>

20. For the online survey, an example provision was prepared and redrafted in different ways for each topic. According to Bertlin, ‘All the versions for each topic were intended to be examples of good drafting’, with the intention being that ‘no version should be clearly “worse” than any other’.<sup>24</sup> For each of the five topics

participants were shown one of the versions, then asked a comprehension question; they were then shown one or two alternative versions (options) and asked ‘Which option do you feel would best support you to work out the answer to the question?’<sup>25</sup>

21. Summarising the study’s conclusions, Bertlin noted that, ‘Not surprisingly, the survey did not produce conclusive evidence that any one drafting style is generally clearer or better understood than another’.<sup>26</sup> The study led the UK Office of Parliamentary Counsel to change its drafting guidance in some respects. However, the dominant and unexpected finding to come out of the in-person testing according to Bertlin was

the striking level of difficulty that users of legislation have in making sense of it. This greatly outweighed any observations about how one drafting style compared with another. Readers seem to have very little grasp of how legislation is structured and organised. Their ‘mental model’ of it is simply not very good. This was true not just for members of the public but for participants of all types, including some of the lawyers.<sup>27</sup>

22. This finding pointed to ‘a pressing need to help readers to “find their feet” when reading legislation’.<sup>28</sup> This observation suggests that the navigability of a statute and tools to help a user orient themselves are important. The potential use of guides that are aimed at orienting a reader are discussed under the heading ‘Simplified outlines and guides’ below.<sup>29</sup>

23. Bertlin’s concluding observations on the study suggest that online surveys can be a useful way of gathering data on comparative drafting styles, even if not definitive as to whether one is necessarily better than another, and that users of legislation have abundant feedback to offer.<sup>30</sup>

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22 Ibid 42.

23 Ibid 41.

24 Ibid 30.

25 Ibid.

26 Ibid 47.

27 Ibid 45.

28 Ibid 46.

29 See [88]–[100] below.

30 Bertlin (n 17) 48–49.



## The potential for further research

24. The ALRC's first Interim Report will discuss how data-driven research can offer important insights into legislative complexity and the potential for improvement. Given the complexity of drafting legislation and the importance of a drafter's judgement in performing the task,<sup>31</sup> it is perhaps not surprising that there has been limited empirical research on navigability.

25. While anecdotal evidence may be useful in formulating improvements to legislative drafting, the efficacy of improvements would ideally be assessed by empirical analysis, and that analysis used to generate further improvements. Reflecting on the 2010 OPC Survey, Peter Quiggin PSM, former First Parliamentary Counsel of OPC, hoped that OPC would be able to undertake further research in the future.<sup>32</sup> The United Kingdom study demonstrates the potential to use a website, such as the Federal Register of Legislation in Australia, to obtain user feedback and data from a wider range of legislation users than the 2010 OPC Survey. The potential for further research will be discussed in the ALRC's first Interim Report.

## Aids to navigation

26. This section discusses the range of features and techniques that may be used to make legislation more navigable. In the Australian context, this means legislation as published on the authoritative Federal Register of Legislation. Although it is not an authoritative source, Australian legislation is also available on the website of the Australasian Legal Information Institute ('AustLII').<sup>33</sup> The drafting features and techniques discussed here are largely drawn from literature on legislative drafting as well as official guidance for drafters issued in Australia, New Zealand, Canada and the United Kingdom. This section does not focus on non-authoritative, commercially produced versions of legislation, but highlights useful features of those publications where relevant.

27. At the Commonwealth level in Australia, there is a range of guidance available to legislative drafters. This includes the publicly available OPC Drafting Manual, Drafting Directions, Plain English Manual, and Guide to Reducing Complexity in Legislation, as well as internal resources that are not published more widely.<sup>34</sup> While the majority of these materials take the status of guidance, Drafting Directions are described as 'an authoritative series of pronouncements on a range of drafting issues ... issued by First Parliamentary Counsel [FPC] after consultation with all drafters and editorial staff'.<sup>35</sup> These, and other documents described as having the 'status of a Drafting Direction', contain 'rules that should be followed by drafters unless they obtain an exemption in a particular case from FPC'.<sup>36</sup> Guidance, both Australian and international, otherwise frequently recognises that it is just that — guidance — and that most design choices are matters for a drafter's judgement.

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31 See, eg, 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.

32 Quiggin (n 16) 102.

33 Australasian Legal Information Institute, 'Australasian Legal Information Institute' <[www.austlii.edu.au/](http://www.austlii.edu.au/)>.

34 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [1]–[13].

35 *Ibid* [3].

36 *Ibid* [5].

28. In some places, this Paper makes particular reference to OPC Drafting Direction 1.8, entitled ‘Special rules for Tax Code drafting’.<sup>37</sup> This Drafting Direction recognises the unique nature of the several pieces of legislation comprising the Tax Code, including the *Income Tax Assessment Act 1997* (Cth) (*ITA Act 97*). The *ITA Act 97* is currently the longest Commonwealth Act, and the only Act longer than the *Corporations Act*.

29. The *ITA Act 97* and other legislation comprising the Tax Code are products of the Taxation Law Improvement Project (‘TLIP’) which was established in 1993 with the aim of rewriting and simplifying Australian taxation legislation.<sup>38</sup> In some respects, the TLIP is incomplete because large portions of taxation legislation, including the *Income Tax Assessment Act 1936* (Cth), have not undergone the rewriting and simplification process. Nevertheless, Drafting Direction 1.8 recognises that the ‘features of design, drafting style and presentation’ of the Tax Code distinguish it from other legislation.<sup>39</sup> As will be discussed further below and in the ALRC’s first Interim Report, some of those features and the guidance contained in Drafting Direction 1.8 may be applicable to legislation more generally.

30. Many of the specific aids discussed in OPC guidance are not directed solely at navigability, but rather the more general aims of making legislation easier to read and to understand. The OPC Drafting Manual, for example, groups several features under the heading ‘Readability Aids’.<sup>40</sup> This observation underscores the interrelationship between the navigability and readability of legislation, as well as the importance of a drafter’s judgement in pursuing these goals.

31. In terms of legal effect, navigability aids fall into one of the following categories:

- Parts of the text of a statute, and therefore part of the law. This would include, for example, cross-references or signposts that are part of the text of a provision.
- Features that do not form part of the operative text of a provision, but still form part of an Act and therefore have interpretive effect. By virtue of s 13 of the *Acts Interpretation Act 1901* (Cth) (*Acts Interpretation Act*), this would include the vast majority of aids to navigability and readability, such as headings, notes and examples.
- Features that affect the presentation, as distinct from the drafting, of legislation and that do not form part of an Act. This may include technological aids, such as hyperlinks that are applied when legislation is published in electronic form and after being passed by the Parliament.

### Aids most relevant to the use of definitions

32. The ALRC’s first Interim Report will focus on the use of definitions in corporations and financial services legislation. The use of defined terms unavoidably makes legislation less navigable, because a reader must look somewhere other than the text they are reading to give the defined term meaning. For this reason, particular mention is made of definitions throughout this Background Paper. This section focuses on techniques that can be used

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37 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0, Issued May 2006).

38 For a brief discussion of the Taxation Law Improvement Project, see Smith and Richardson (n 9).

39 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0, Issued May 2006) [3].

40 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) 32.

to lessen the impact that defined terms have on navigability. Potential reforms will be discussed in greater detail in the ALRC's first Interim Report.

### *Identifying terms when they are defined and tagging concepts*

33. Commonwealth legislation uniformly uses bold and italic formatting to identify when a term is being defined by a statutory provision.<sup>41</sup> This is the case regardless of whether the term is defined as part of a dictionary or interpretation provision, or in a standalone section. Other techniques used in conjunction with bold and italic formatting include the use of general definitions sections at the start of an Act<sup>42</sup> and using the word 'definition' in a section heading if the whole section is devoted to defining a single term.<sup>43</sup> While the words 'meaning of' have commonly been used in section headings to indicate that a term is defined, current guidance suggests that the word 'definition' is to be preferred.<sup>44</sup>

34. Bold and italic formatting is also used for 'tagged concepts', which create a defined term for a limited part of an Act, usually only the narrative of the section or subsection containing the tagged concept.<sup>45</sup> Tagged concepts, sometimes referred to as 'labels' by OPC guidance,<sup>46</sup> can be distinguished from defined terms because they are not treated as having a meaning independent of the narrative in which they are contained.<sup>47</sup> OPC Drafting Direction 1.8 acknowledges that a tagged concept may be used in more than one section provided the text of a later section helps a reader to find where the label is applied to that concept.<sup>48</sup>

35. Results of the 2010 OPC Survey showed that 82% of respondents were satisfied with the usefulness of the tagging of concepts.<sup>49</sup> An example of the use of tagged concepts in the *Corporations Act* is below.

#### ***Example: Tagged concepts***

##### **588ZA Employee entitlements contribution orders**

###### *Making of employee entitlements contribution order*

(1) The Court may make an order under subsection (2) (an ***employee entitlements contribution order***) in relation to an entity (the ***contributing entity***) if the Court is satisfied that:

(a) a company (the ***insolvent company***) is being wound up; and

41 It should be noted, however, that not all concepts created by Commonwealth legislation are necessarily treated as being defined and therefore bold and italicised. See, for example, s 200A of the *Corporations Act* which specifies 'when [a] benefit is given in connection with retirement from an office or position'. Although s 200A creates the concept of 'a benefit given in connection with a person's retirement', which is used in ss 200F and 200G, the concept is not formatted in the same manner as a defined term or tagged concept.

42 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, Reissued May 2019) 5.

43 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [149].

44 Ibid.

45 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, Reissued May 2019) [22]; Office of Parliamentary Counsel (Cth) (n 10) 47.

46 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, Issued May 2006) Attachment B [42].

47 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [24].

48 Ibid [45]; Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, Reissued May 2019) [22].

49 Office of Parliamentary Counsel (Cth) (n 10) 48.

- (b) an amount (the ***unpaid entitlements amount***) of the entitlements of one or more employees (within the meaning of Part 5.8A) of the insolvent company that are protected under Part 5.8A has not been paid; and
- (c) the contributing entity is a member of the same contribution order group (see subsection (6)) as the insolvent company; and
- (d) the contributing entity has benefited, directly or indirectly, from work done by those employees; and
- (e) that benefit exceeds the benefit that would be reasonable in the circumstances if the insolvent company and the contributing entity were dealing at arm's length; and
- (f) it is just and equitable to make the order.

...

### **Dictionaries, indexes and the location of definitions**

36. The location of defined terms and lists of those terms can affect navigability. The typical approach is to include a general definitions section near the start of an Act containing either a full definition of terms used in the legislation or a 'signpost definition' indicating where the term is fully defined.<sup>50</sup> In this way, the dictionary should provide a complete list of terms that are defined in the legislation as well as acting as a 'map' to where defined terms are located. In the case of long legislation, the OPC Plain English Manual suggests including an alphabetical index at the end of the statute, identifying all key concepts.<sup>51</sup>

37. Ideally, there should be only one dictionary in an Act, or where multiple dictionaries are used, a single index that lists all defined terms used in an Act. This is not the case for the *Corporations Act*. Section 7 of the *Corporations Act* (which appears in Part 1.2 headed 'Interpretation') provides:

#### **7 Location of other interpretation provisions**

- (1) Most of the interpretation provisions for this Act are in this Part.
- (2) However, interpretation provisions relevant only to Chapter 7 are to be found at the beginning of that Chapter.
- (3) Also, interpretation provisions relevant to a particular Part, Division or Subdivision may be found at the beginning of that Part, Division or Subdivision.
- (4) Occasionally, an individual section contains its own interpretation provisions, not necessarily at the beginning.

While this section has limited utility in terms of actually directing readers to the location of other interpretation provisions, it at least alerts readers to the fact that defined terms are spread throughout the Act.

50 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, Reissued May 2019) [6].  
 51 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [169].

38. OPC drafting guidance recognises the utility of ‘just in time’ definitions.<sup>52</sup> A ‘just in time’ definition is one placed in or near to the provision to which it is most relevant. An example from the *Corporations Act* is below, where the term ‘restructuring relief period’ is defined immediately before a provision that uses the term. It can be observed that notwithstanding OPC guidance that ‘definition’ is to be used in a section heading that defines a term in preference to the expression ‘meaning of’,<sup>53</sup> the following example employs the expression ‘meaning of’.<sup>54</sup>

**Example: ‘Just in time’ definition**

Division 7 of Part 5.3B *Corporations Act*

**458D Meaning of *restructuring relief period***

In this Act:

***restructuring relief period*** means the period:

- (a) beginning on 1 January 2021; and
- (b) ending on 31 March 2021.

**458E When is a company *eligible for temporary restructuring relief*?**

*When is a company eligible for temporary restructuring relief?*

- (1) A company is ***eligible for temporary restructuring relief*** if:
  - (a) before the end of the restructuring relief period, the directors of the company:
    - (i) make a declaration in writing that sets out the matters mentioned in paragraphs (b), (c) and (d) and, if there is a prescribed form for the declaration, is in the prescribed form; and

...

39. ‘Just in time’ definitions can be used to assist the narrative flow of legislation or to ensure that if a reader consults only one part of an Act an important defined term is brought to their attention. Using hyperlinking or a ‘hover box’ to display the definition of a term could effectively convert all defined terms into ‘just in time’ definitions in electronically published legislation, reducing the need for using the current ‘just in time’ method. A ‘hover box’ or ‘hover over’ feature is a feature that can be embedded into websites to produce a ‘pop-up box’ containing text when a cursor is placed above certain text or that text is clicked on. These and hyperlinking are discussed further under the heading ‘Technological aids’ below.<sup>55</sup>

40. OPC Drafting Direction 1.8 states that for Tax Code legislation there is a policy ‘to use “just in time” definitions wherever possible: in other words, to find the point in the narrative where the definition is most useful to the reader’.<sup>56</sup> The primacy given to ‘just in

<sup>52</sup> Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, ‘Definitions’ (Document release 4.0, Reissued May 2019) [13].

<sup>53</sup> Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [149].

<sup>54</sup> *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) Sch 2 Item 2.

<sup>55</sup> See [126]–[132] below.

<sup>56</sup> Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0,

time' definitions is complemented by other drafting features that aid navigability in the Tax Code legislation, discussed further below.<sup>57</sup>

41. Drafting guidance issued by the United Kingdom Office of the Parliamentary Counsel also acknowledges that the significance of a definition can influence its location. It suggests that a definition 'that is key to understanding a provision will often be best up front, either where it is first used or in introductory material', while a definition that is 'merely clarificatory will often be left to the end so that the reader can get on with reading the main story before getting bogged down in the definitional detail'.<sup>58</sup> It may not always be straightforward, however, to distinguish between a significant and 'merely clarificatory' defined term.

42. The ALRC agrees with commentary on this approach that such a distinction may be difficult to maintain.<sup>59</sup> In any event, the UK guidance agrees that a comprehensive list of all defined terms should include a 'signpost' for where each definition is located.<sup>60</sup>

43. Canadian guidance suggests that definitions 'should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case, they should be placed at the beginning of the passage in question'.<sup>61</sup> It does not comment on the option of including a comprehensive index, dictionary or glossary.

44. Another advantage of having a comprehensive alphabetical list of defined terms with signposts to full definitions is that the full definitions can then be structured thematically, so that readers can be directed to a suite of key definitions relevant to a particular topic. See, for example, Part 15 of the *Native Title Act 1993* (Cth), and Part 1.2 of the *Social Security Act 1991* (Cth), each of which sets out defined terms in both alphabetical and thematic orders.

45. Some guidance and commentators express views on whether a dictionary or index provision should be towards the start or towards the end of a piece of legislation. The ALRC does not consider that either of these alternatives is clearly preferable to the other. For some readers, definitions may be more helpfully visible if included in early provisions. However, there may also be advantages in allowing readers to engage first with key substantive provisions, leaving more 'technical' matters such as definitions until later provisions. Given the increasing popularity of electronic and online versions of legislation, the location of a dictionary provision is less likely to have an impact, as long as readers can be effectively and efficiently directed to it.

### Identifying defined terms when they are used

46. The desirability of identifying a defined term when it is used in the text of an Act has been recognised for some time. Writing in 1988, Robert Eagleson lamented the inability of legal drafters to identify defined terms in the body of an Act, meaning 'that readers have in effect to memorise the definitions section or continually refer to it'.<sup>62</sup> The OPC Plain

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Issued May 2006) Attachment B [26].

57 See [48]–[50] below.

58 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [4.1.20]–[4.1.21].

59 Bilika Simamba, 'The Placing and Other Handling of Definitions' (2006) 27(2) *Statute Law Review* 73, citing G.C. Thornton, *Legislative Drafting* (4th ed, Butterworths, 1996).

60 Office of the Parliamentary Counsel (UK) (n 58) [4.1.22].

61 Uniform Law Conference of Canada, 'Canadian Legislative Drafting Conventions' (No date) [8] <ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>.

62 Robert D Eagleson, 'Legislative Lexicography' in EG Stanley and TF Hoad (eds), *Words: For Robert Burchfield's Sixty-Fifth*



English Manual also recognises the value of identifying defined terms, but acknowledges that

So far we haven't found a way of marking them without distracting the eye from the main text or causing other problems. Until we do, consider alerting the reader to the most important definitions by putting notes beneath the relevant provisions.<sup>63</sup>

47. In consultations with the ALRC, stakeholders expressed concern at there being no simple way to identify whether a term in legislation is defined or not. From the perspective of navigability, identifying a defined term has the benefit of alerting a reader that they may need to look elsewhere to fully understand a provision, without the reader having to memorise or continually refer to the dictionary.

48. Aside from notes, one technique used to a limited extent in Commonwealth legislation is marking defined terms with an asterisk on the first occasion a defined term is used within a subsection. This technique is not widely used other than in Tax Code legislation and the *Aged Care Act 1997* (Cth), with OPC guidance suggesting that is not a technique of general application.<sup>64</sup> According to OPC Drafting Direction 1.8, using asterisks rather than notes to signpost definitions in the Tax Code legislation 'has led to a big reduction in the number of notes required' in rewriting the legislation.<sup>65</sup>

49. Even in Acts in which asterisks are used, defined terms that are used very extensively throughout the legislation are not asterisked, with each piece of legislation containing a section setting out the terms that are defined but not asterisked.<sup>66</sup> As the example further below shows, the current approach of placing an asterisk only at the beginning of a defined term (and not also at the end of that term) means that it is not apparent whether the term comprises one word or several.

50. Both the *ITA Act 97* and the *Aged Care Act 1997* (Cth) contain a footer that tells a reader where they can find the definitions of asterisked terms. In both Acts, that location is a single dictionary located towards the end of the Act. According to OPC Drafting Direction 1.8, 'This footer is the first stage in signposting from the asterisked defined term to the actual definition',<sup>67</sup> with the aim being 'for the reader to find the defined term in the Dictionary as easily as possible'.<sup>68</sup> The example from the *ITA Act 97* below includes the text of the footer used in that Act. This type of footer, however, will only be apparent on a copy of the Act downloaded and viewed in either document or printed form; it does not appear when the text of the legislation is viewed online via the Federal Register of Legislation. In the latter case, a reader needs to rely on s 2-10 of the *ITA Act 97* which explains the use of asterisks and location of the Dictionary.

51. OPC guidance acknowledges that markings can be visually distracting.<sup>69</sup> In addition, it is unclear what impact asterisks may have for a visually-impaired person who may use

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*Birthday* (DS Brewer, 1988) 81, 89 extracted in *The Loophole: The newsletter of the Commonwealth Association of Legislative Counsel* 2(4), 31.

63 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [147].

64 Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, 'Asterisking to identify defined terms' (Document release 1.1, Reissued September 2020).

65 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, Issued May 2006) [25].

66 *Ibid* [34]-[35]. See, for example s 2-15 of the *Income Tax Assessment Act 1997* (Cth).

67 *Ibid* Attachment B [24].

68 *Ibid* Attachment B [28].

69 Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, 'Asterisking to identify defined terms' (Document release 1.1,



text-to-voice software to access legislation. Presumably, it may vary by software or user preferences whether an asterisk is read aloud, but its effect from the listener's perspective may either be distracting or welcomed as an aural signal that a term is defined.

52. AustLII operates an online, freely accessible database of legal resources. The database includes extensive collections of Australian legislation, case law and commentary. The AustLII website uses automated 'markup' software to hyperlink much of the content it publishes.<sup>70</sup> In legislation, for example, defined terms and references to subsections appear in blue underlined text, with a hyperlink to the defined term or subsection. The AustLII website notes, however, that due to the automated nature of the software and the nature of the English language, links may occasionally be incorrect or out of context.<sup>71</sup>

53. An example of each technique (note, asterisks and AustLII hyperlinking) is below.

**Example: Note**

Section 208 *Corporations Act*

**208 Need for member approval for financial benefit**

- (1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:
  - (a) the public company or entity must:
    - (i) obtain the approval of the public company's members in the way set out in sections 217 to 227; and
    - (ii) give the benefit within 15 months after the approval; or
  - (b) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note 1: Section 228 defines *related party*, section 9 defines *entity*, section 50AA defines *control* and section 229 affects the meaning of *giving a financial benefit*.

Note 2: For the criminal liability of a person dishonestly involved in a contravention of this subsection, see subsection 209(3). Section 79 defines *involved*

**Example: Asterisk**

Section 15-2 *Income Tax Assessment Act 1997* (Cth)

**152 Allowances and other things provided in respect of employment or services**

- (1) Your assessable income includes the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums \*provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you (including any service as a member of the Defence Force).

Reissued September 2020) [13].

70 Australasian Legal Information Institute, 'Frequently Asked Questions' <[www.austlii.edu.au/faq.html](http://www.austlii.edu.au/faq.html)>.

71 Ibid.

- (2) This is so whether the things were \*provided in money or in any other form.
- (3) However, the value of the following are not included in your assessable income under this section:
- (a) a \*superannuation lump sum or an \*employment termination payment;
  - (b) an \*unused annual leave payment or an \*unused long service leave payment;
  - (c) a \*dividend or \*nonshare dividend;
  - (d) an amount that is assessable as \*ordinary income under section 65;
  - (e) \*ESS interests to which Subdivision 83AB or 83AC (about employee share schemes) applies.

Note: Section 23L of the *Income Tax Assessment Act 1936* provides that fringe benefits are nonassessable nonexempt income.

\*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

### **Example: AustLII Hyperlinking**

Section 171 *Corporations Act*

#### **Register of debenture holders**

- (1) The [register](#) of [debenture holders](#) must contain the following [information](#) about each [holder](#) of a [debenture](#):

- (a) the [debenture holder](#)'s name and address;
- (b) the [amount](#) of the [debentures](#) held.

Note: See [subsection](#) 168(2) for the coverage of [debenture](#) .

- (2) A [company](#)'s failure to comply with this section in relation to a [debenture](#) does not affect the [debenture](#) itself.

54. In the AustLII example immediately above, the term 'holder' links to the definition of the term 'hold' in s 9. However, 'hold' is a relational definition; that is, it is a term that only takes on its legislatively defined meaning *in relation to* particular subject matter.<sup>72</sup> The term 'hold' only takes on its defined meaning if used in relation to a 'copy of a licence'. This means that the definition is not applicable in s 171 and the hyperlink in s 171 is out of context.

55. This highlights a potential challenge for any system of identifying and hyperlinking to defined terms. Namely, decisions need to be made and parameters established regarding

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72 Relational definitions will be discussed in greater detail in the ALRC's first Interim Report.

the extent to which defined terms should be identified in legislation. Furthermore, these parameters need to be clearly communicated to readers. There are five main issues in this respect.

56. The first issue is whether every instance of a defined term should be identified or only instances of terms being used in their defined sense, with the latter requiring an element of interpretive judgment. In the AustLII example above, this would be a choice between whether the term ‘holder’, as a derivative part of speech of the defined term ‘hold’, should be identified as a defined term or not. OPC guidance on asterisking acknowledges this issue with regard to relational definitions, noting that if a term is defined in a relational way then ‘it should only be asterisked in the legislation when the term is used in a context that attracts the defined meaning’ and not when used in its ordinary meaning.<sup>73</sup> The absence of an asterisk cannot, however, be relied upon by a reader to conclude that any term that is *not* asterisked is *not* being used in a defined sense. Section 950-100(2) of the *ITA Act 97* provides, for example:

The asterisks used to identify defined terms form part of this Act. However, if a term is *not* identified by an asterisk, disregard that fact in deciding whether or not to apply to that term a definition or other interpretation provision.

57. OPC guidance suggests inserting a provision to this effect in any legislation that uses asterisks to identify defined terms. This is a necessary consequence of the practice of only asterisking the first use of a defined term in a subsection and not subsequent uses. The OPC has indicated that it may be appropriate at some stage to include a similar provision in the *Acts Interpretation Act* so as to apply across all Commonwealth Acts.<sup>74</sup>

58. A second issue, also illustrated by the example of the term ‘holder’ noted above, is whether different grammatical forms of defined terms should be underlined when they are used. In the case of asterisking in the Tax Code legislation, OPC guidance advises drafters to include signpost definitions for different grammatical forms of defined terms and to mark them with asterisks in accordance with the usual rules for using asterisks.<sup>75</sup> As Drafting Direction 1.8 notes, this is not legally necessary because s 18A of the *Acts Interpretation Act* provides that other parts of speech and grammatical forms of a defined term have corresponding meanings. However, doing so ‘promotes the aim of helping the reader to match the definition with occurrences of the defined term’.<sup>76</sup>

59. A third issue is whether only terms defined in (or by) the same Act should be marked in *that Act*, or whether terms that are defined by other legislation should also be identified. In the case of the *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’), for example, s 5(2) effectively provides that terms not defined in the *ASIC Act* but defined or used in the *Corporations Act* have the same meaning in the *ASIC Act*.

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73 Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, ‘Asterisking to identify defined terms’ (Document release 1.1, Reissued September 2020) [18].

74 Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, ‘Asterisking to identify defined terms’ (Document release 1.1, Reissued September 2020) [33]–[34].

75 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0, Issued May 2006) 25; Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, ‘Asterisking to identify defined terms’ (Document release 1.1, Reissued September 2020) [30].

76 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0, Issued May 2006) 25.

60. Some terms are also defined in generally applicable interpretation legislation, such as the *Acts Interpretation Act*, which defines terms for the purposes of all Commonwealth Acts. The question then arises whether terms defined by the *Acts Interpretation Act* should be identified in other legislation. If this were not done, but other defined terms were marked up, then a reader may be given a false sense of security that only marked terms are defined, and overlook the need to consider *Acts Interpretation Act* interpretive provisions. Two other factors would complicate marking terms defined by the *Acts Interpretation Act*. The *Corporations Act* is one of eight Commonwealth Acts to which (in whole or in part) a point-in-time version of the *Acts Interpretation Act* applies, as opposed to the currently in force *Acts Interpretation Act*.<sup>77</sup> The effect of s 5C of the *Corporations Act* is to apply the *Acts Interpretation Act* as in force on 1 January 2005, meaning different Acts may require different annotations. Further, some terms that are defined by the *Acts Interpretation Act* may be defined differently for the purposes of particular Acts, with the effect that the *Acts Interpretation Act* definition is overridden.

61. Even if legislation does not indicate the use of defined terms (as is the case for most Commonwealth legislation), interpretation legislation still presents a challenge: readers are assumed to be aware of the existence of the *Acts Interpretation Act* and its implications. It is likely, however, that only legally trained readers would be aware of the *Acts Interpretation Act*. In some jurisdictions, such as Queensland, notes are sometimes used to alert readers to the existence of an important defined term in the applicable interpretation legislation. An example from the Queensland Criminal Code<sup>78</sup> is below.

**Example: Cross reference to interpretation legislation**

Section 119A *Criminal Code* (Qld)

**119A Meaning of *family***

(1) Each of the following is a member of a person's *family*—

- (a) a spouse of the person;
- (b) a child of the person;
- (c) a parent, grandparent, grandchild or sibling of the person, including—
  - (i) if the person is an Aboriginal person, a person—

(A) who is recognised under Aboriginal tradition as a member of the Aboriginal person's family; and

*Note—*

'Aboriginal tradition' is defined under the *Acts Interpretation Act 1954*. See schedule 1 of that Act.

(B) with whom the Aboriginal person has a relationship like that between an individual and a parent, grandparent, grandchild or sibling of the individual; or

<sup>77</sup> The other Acts are: the *ASIC Act*, the *Mutual Recognition Act 1992*, the *Trans-Tasman Mutual Recognition Act 1997*, the *Criminal Code Act 1995*, the *Water Act 2007*, the *Fair Work Act 2009* and the *Personal Property Securities Act 2009*.  
<sup>78</sup> *Criminal Code Act 1899* (Qld) Sch 1.

(ii) if the person is a Torres Strait Islander, a person—

(A) who is recognised under Island custom as a member of the Torres Strait Islander's family; and

*Note—*

'Island custom' is defined under the *Acts Interpretation Act 1954*. See schedule 1 of that Act.

...

62. A fourth issue is whether, and the extent to which, markings should be applied in delegated legislation. Delegated legislation uses defined terms, including terms defined by the instrument in question and terms defined by enabling (or other) Acts. At the Commonwealth level, not all delegated legislation is drafted by OPC (although regulations, a particular type of delegated legislation, are uniformly drafted by OPC). Achieving consistency in identifying defined terms would require significant coordination and potentially sharing of technology across Commonwealth departments and agencies. If consistency were not achieved, then there is a risk that readers may be misled by delegated legislation that differs from the approach taken in Acts.

63. A fifth question is whether the markings to identify defined terms should form part of the legislative text itself as passed by Parliament, or be applied only when publishing the legislation. Markings in the Act as passed by Parliament would form part of the Act by virtue of s 13 of the *Acts Interpretation Act* and therefore potentially have interpretive effect. Section 950-100(2) of the *ITA Act 97*, referred to at [56] above, recognises this.

64. There appears to be no published empirical research or user testing of aids designed to identify defined terms, and no recognised best practice around the world. Bertlin notes that as part of the user-testing sessions in the 2013 UK study a prototype 'hover over' feature for highlighting definitions was tested, however the findings are not discussed.<sup>79</sup>

65. As OPC guidance recognises, one of the main challenges to identifying defined terms when they are used in legislative text is finding a method that does not distract the reader. This suggests that a solution may lie in the presentation, rather than drafting, of legislation. While an authoritative version of the legislation could be produced without markings identifying defined terms, technology could be used to publish both that version and an electronic version containing identifiers. If this was done, then it would be necessary to inform readers that the markings made in publishing the text do not form part of the law itself, and that to the extent there are any errors arising from the involvement of human judgement or technology, then the original version of the legislation would prevail. While this may detract from the utility of the marked-up version, the use of hyperlinks or a 'hover box' containing a definition (for example) could provide a reader with an accessible way to view a full definition and verify that the term is in fact both defined and used in its defined sense. It should be noted that a technological solution would still face many of the issues outlined above when setting the parameters for identifying defined terms.

66. Drawing on the analysis contained in this Paper, the ALRC's first Interim Report will discuss potential options for reform aimed at improving the navigability of legislation that uses defined terms.

79 Bertlin (n 17) 45.

## Aids in drafting

67. This section focuses on aids to navigation that are ‘built in’ to an Act during the drafting process, and therefore form part of the Act itself.

### Short titles

68. The short titles to legislation can aid navigability across Acts by indicating the subject matter of legislation and contributing to the logical order of statutes.<sup>80</sup> In an article analysing the history of legislative titles and a trend towards the use of political ‘sloganeering’ in titles to Australian legislation, Professor Graeme Orr observed that

The descriptiveness of legislative titles is not therefore simply a citation handle and memory jog: it is a necessary part of any accessible and comprehensible scheme. It will assist cataloguers and those who build bibliographies and databases, as it should form a reliable, initial guide to classification. The classificatory instinct is often mocked or undervalued, but it is pivotal to both legal scholarship and practice. ... Similarly, those researching the law (essentially a process of de-classification) directly benefit from a well-described short title, since they can use it as the first hint as to which, out of thousands of pieces of legislation, are worth pursuing.<sup>81</sup>

69. The title of the *Corporations Act* offers little assistance to a person in search of Australian financial services law, the vast majority of which is contained in Chapter 7 of that Act. Similarly, a reader would not necessarily expect to find consumer and investor protection provisions in the *ASIC Act*, which primarily sets up, and describes the powers of, the Australian Securities and Investments Commission. This can be compared with the *Competition and Consumer Act 2010* (Cth), which as its title suggests contains both competition law and consumer law. That Act also contains provisions establishing the relevant regulatory body, the Australian Competition and Consumer Commission.

### Headings and tables of contents

70. Headings are arguably one of the most important features that help a reader to navigate within a statute. Few people ever have the need to read a statute from start to finish, so headings are the method a reader is most likely to use to find the parts of an Act relevant for their purposes. Even with the use of electronic word search functions, headings still play an important role. For example, a provision will likely be more relevant if the term being searched is in the heading of a provision, rather than the body of the provision alone. This is because, as discussed below, a heading should indicate the main topic or purpose of the section. In addition, one of the first things a reader sees when opening legislation on either the Federal Register of Legislation or AustLII is the table of contents which lists the number and heading of each section.

71. Headings are uniformly used to establish the structural elements of legislation: chapters, parts, divisions, subdivisions and sections. Headings may also be used for subsections. Ideally, legislation should be structured by grouping together provisions that deal with a common subject matter and using a heading to specify the topic that those provisions address.<sup>82</sup> Headings to a section should also indicate the substance of that section.

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80 Cormacain (n 1) 63.

81 Graeme Orr, ‘Names Without Frontiers: Legislative Titles and Sloganeering’ (2000) 21(2) *Statute Law Review* 188, 196.

82 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [107].



72. Headings from the level of chapters to sections are used to populate the table of contents at the beginning of an Act. A table of contents therefore operates as a basic ‘map’ of the legislation, with each heading acting as a signpost. The dual role of section headings is recognised by Gordon Stewart, who observed that individual headings should indicate the content of a section, and collectively they should indicate the contents of an Act.<sup>83</sup> The list of headings contained in the table of contents reproduce an Act’s structure. The separate but related role of structure in aiding navigation is discussed further below.<sup>84</sup>

73. Drafting guidance from New Zealand also emphasises the importance of headings, advising drafters to use them ‘liberally’.<sup>85</sup> The New Zealand Parliamentary Counsel Office publishes a Plain Language Standard and Checklist for the drafting of legislation. Part of the Checklist asks, ‘Are headings useful and do they aid navigation?’, advising drafters to check that headings:

- use key words placed early in the heading;
- clearly indicate specific topics or summarise main messages;
- work well together;
- appear frequently enough to help readers scan and find specific information easily’;
- are reasonably brief (no longer than one line); and
- have a clear and consistent hierarchy.<sup>86</sup>

### **Section headings**

74. Section headings ‘are presumed to help readers find what they need to know faster, and understand it more easily when they find it’.<sup>87</sup> Nick Horn has noted that there is little empirical research to test this proposition, but that studies in relation to educational documents have shown that headings:

- ‘can be an aid to recall, search, and retrieval’;<sup>88</sup>
- reduce search times in text;<sup>89</sup> and
- ‘are particularly effective for readers with prior knowledge of the subject matter of the text’.<sup>90</sup>

### **Subsection headings**

75. The OPC Plain English Manual suggests that subsection headings may be helpful in long sections of an Act.<sup>91</sup> After performing ‘usability testing’, Stewart concluded that subsection headings significantly reduced the time it took readers to locate relevant provisions compared to equivalent sections without subsection headings.<sup>92</sup>

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83 Gordon Stewart, ‘Legislative Drafting and the Marginal Note’ (1995) 16(1) *Statute Law Review* 21, 37.

84 See [83]–[86] below.

85 Parliamentary Counsel Office (New Zealand), ‘Principles of Clear Drafting’ <[www.pco.govt.nz/clear-drafting/](http://www.pco.govt.nz/clear-drafting/)>.

86 Parliamentary Counsel Office (New Zealand), ‘Checklist for Applying Our Standard’ <[www.pco.govt.nz/pco-plain-language-checklist/](http://www.pco.govt.nz/pco-plain-language-checklist/)>.

87 Nick Horn, ‘Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy’ (2011) 32(3) *Statute Law Review* 186, 186.

88 Ibid 192, citing James Hartley and Mark Trueman, ‘A Research Strategy for Text Designers: the Role of Headings’ (1985) 14 *Instructional Science* 99, 149–153.

89 Ibid 192, citing Marieke Kools et al, ‘The Effects of Headings in Information Mapping on Search Speed and Evaluation of a Brief Health Educational Text’ (2008) 34(6) *Journal of Information Science* 833, 842.

90 Ibid, citing Stephen Wilhite, ‘Headings as Memory Facilitators: The Importance of Prior Knowledge’ (1989) 81 *Journal of Educational Psychology* 116.

91 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [114].

92 Stewart (n 83) 58–59.



76. The 2010 OPC Survey found that 84% of respondents found subsection headings useful, with 88% agreeing that subsection headings made legislation easier to navigate.<sup>93</sup>

77. Some commercial publishers also include subsection headings where they are not used in the text of legislation. In its annual publication of Australian Corporations Legislation, for example, Thomson Reuters calls these subsection headings ‘side notes’, which are inserted in square brackets and bold formatting before the substantive text.<sup>94</sup>

78. Subsection headings may also assist in relatively short sections or when multiple subsections follow a repetitive format, meaning it is difficult to immediately distinguish between them. In the case of repetition, subsection headings help a reader scan a section to identify the most relevant information quickly. The example of s 798G of the *Corporations Act* at [Appendix A](#) demonstrates the helpful use of subsection headings in a relatively short section.

### **Questions as headings**

79. Through user-testing, Stewart also set out to test the usefulness of headings taking the form of questions. Stewart concluded from his research that although the benefits were not universal, redrafting statement headings to questions generally reduced the time it took readers to use legislation to answer a scenario-based question.<sup>95</sup> This suggests that headings framed as questions may assist navigability.

80. The 2010 OPC Survey found that 75% of respondents were satisfied that questions as headings made legislation easier to read and understand.<sup>96</sup> Comments by way of feedback suggested that questions as headings ‘could be off-putting for frequent users of legislation’ and there was a risk that a question may mislead a reader if not phrased correctly or lead a reader to overlook relevant information in other sections.<sup>97</sup> The OPC Plain English Manual appears to have drawn on this feedback, stating:

It looks friendly to put the occasional section heading in the form of a question. However, it can be overdone. The question form can be irritating, because it narrows the scope of the headings. On the other hand, the non-question form can use a key word or phrase that is capable of answering a variety of questions.<sup>98</sup>

### **Decentralised tables of contents**

81. Decentralised tables of contents are additional to the table of contents included at the start of an Act. They are intended to ‘aid in the navigability of large units of legislative text’.<sup>99</sup> Decentralised tables of contents are used extensively in the *ITA Act 97*.

82. The results of the 2010 OPC Survey showed that 70% of respondents were satisfied with the usefulness of decentralised tables of contents, and 82% agreed that they made legislation easier to navigate.<sup>100</sup>

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93 Ibid 57–58.

94 *Corporations Legislation 2020* (Thomson Reuters, 2020) ix.

95 Stewart (n 83) 56.

96 Office of Parliamentary Counsel (Cth) (n 10) 53.

97 Ibid 55.

98 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [167].

99 Office of Parliamentary Counsel (Cth) (n 10) 23.

100 Ibid 24–25.

## Structure and parallel structures

83. An organised and coherently structured Act should be easier to navigate. As Cormacain notes, in practice this means ‘that users can see at a glance the general thrust of the Act and see, again at a glance, which provisions are relevant to them’.<sup>101</sup> Cormacain summarises the contrasting approaches to structuring legislation suggested by two authors: Thring, who ‘suggested stating the law first and then how the law was to be administered’; and Xanthaki, who proposes a ‘layered approach’ whereby legislation is structured ‘in different layers, corresponding to the different users of it’.<sup>102</sup>

84. OPC guidance advises drafters to arrange provisions so that the relationship between them is as clear as possible.<sup>103</sup> OPC guidance also recognises that ‘poorly structured legislation can be a cause of complexity’, particularly if ‘important concepts ... are not stated as its central elements, but are obscured by other material such as procedural detail’.<sup>104</sup> Aspects of the *Corporations Act*, and Chapter 7 in particular, arguably suffer from this problem.

85. The OPC Guide to Reducing Complexity gives the example of Part 3-2 of the *Fair Work Act 2009* (Cth) as being structured in a clear way by introducing the key concept first (being a person who is ‘protected from unfair dismissal’), before describing when a person is ‘unfairly dismissed’, then the remedies for an unfair dismissal, and then procedural matters.<sup>105</sup> In the *Fair Work Act 2009* the administrative provisions that establish and govern various industrial bodies have been located towards the end of the Act, and after the provisions dealing with matters of greatest importance to most readers. This can be contrasted with its predecessor legislation which contained almost 100 pages dealing with the same matters at the start of that Act.<sup>106</sup>

86. Legislation may also be made more navigable by using parallel structures where that piece of legislation regulates multiple similar subjects in the same way.<sup>107</sup> Part 7.2, Part 7.3 and the first four Divisions of Part 7.6 of the *Corporations Act* demonstrate the use of parallel structures, as summarised at [Appendix B](#).

87. In its third Interim Report, the ALRC will address the question of how the provisions contained in Chapter 7 of the *Corporations Act* could be reframed or restructured to improve that legislation.

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101 Cormacain (n 1) 70.

102 Ibid 70–71, citing Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (Her Majesty's Stationery Office, 1877) and Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014).

103 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [102].

104 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [36].

105 Ibid [38].

106 Ibid [39]–[40].

107 Cormacain (n 1) 72.

## *Simplified outlines, guides and diagrams*

88. A simplified outline aims to give a reader a general understanding of what a piece of legislation is about.<sup>108</sup> Simplified outlines aid navigability by helping readers to ascertain relevance to their needs and giving an overview of coming provisions.<sup>109</sup> Simplified outlines also aid readers by making ‘the structure of legislation, sequence of events, nature of events and relationship of events clear to readers to permit faster movement through the legislation’.<sup>110</sup>

89. OPC Drafting Direction 1.3A notes that a variety of other labels such as ‘Guide’, ‘Simplified overview’ and ‘Overview’ have been used in the past, but that the single label ‘simplified outline’ is now to be used for consistency and clarity.<sup>111</sup> A key reason for this ‘is to emphasise to readers, including courts, that the outline represents a simplification of the relevant legislative scheme, which may be in the nature of a summary and may be incomplete’.<sup>112</sup>

90. The 2010 OPC Survey asked respondents about ‘overviews’ and ‘guides’, both of which it seems may now fall within the description of a simplified outline. Results showed that 80% of respondents were satisfied with the usefulness of both features.<sup>113</sup>

91. Drafting Direction 1.3A contains detailed guidelines on the use of simplified outlines, including:

- Almost all new principal Acts should contain a simplified outline.<sup>114</sup>
- Simplified outlines may be useful in both Acts and other instruments.<sup>115</sup>
- ‘In addition to a simplified outline for an Act, there should also be simplified outlines for at least one level of unit in the Bill (i.e. Chapter/Part/Division)’, and ‘a simplified outline must then be included at that level throughout the Bill’.<sup>116</sup>
- ‘Opening with a “theme statement” that states in very general terms what the operative provisions are about can be very helpful’.<sup>117</sup>
- Words like ‘object’ and ‘purposes’ should be avoided in simplified outlines to help distinguish them from objects provisions, which have a different role.<sup>118</sup>
- Simplified outlines may use a less formal writing style, including ‘a lighter or more conversational tone’ than substantive provisions.<sup>119</sup>
- Formatting devices that indicate a defined term should not be used in a simplified outline, and if necessary conventions that are widely used in the community should be used to explain terms.<sup>120</sup>

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108 Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, ‘Simplified outlines’ (Document release 1.2, Reissued November 2016) [19].

109 Ibid.

110 Ibid [20].

111 Ibid [32]–[33].

112 Ibid [34].

113 Office of Parliamentary Counsel (Cth) (n 10) 15–20.

114 Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, ‘Simplified outlines’ (Document release 1.2, Reissued November 2016) [9].

115 Ibid [14]–[18].

116 Ibid [36].

117 Ibid [25].

118 Ibid [57]–[59].

119 Ibid [48].

120 Ibid [55]–[56].

92. Like headings, simplified outlines form part of an Act and can be used when construing the Act.<sup>121</sup> Drafting guidance reminds drafters, and advises that

Everything in a simplified outline must have a substantive provision underlying it, and drafters should check carefully to ensure that simplified outlines do not conflict with, or detract from, substantive provisions. In particular, simplified outlines should never be used as quick fixes for poorly-drafted substantive provisions.<sup>122</sup>

93. The *Corporations Act* does not uniformly use simplified outlines or other forms of guide. In Chapter 7, s 760B is headed ‘Outline of Chapter’ and contains a table which briefly summaries the contents of each Part of the Chapter. Section 908AA contains a helpful simplified outline for Part 7.5B relating to the regulation of financial benchmarks. Section 908AA is copied at **Appendix C**. Examples of simplified outlines can also be found at the Part level outside of Chapter 7 of the *Corporations Act*.<sup>123</sup> The ALRC will consider the use of simplified outlines and guides in more detail in its third Interim Report examining how Chapter 7 of the *Corporations Act* could be reframed or restructured.

94. Section 717 of the *Corporations Act*, contained in Chapter 6D relating to corporate fundraising, contains a section described as an ‘overview’ which summarises the disclosure requirements for a person to offer securities. Part of s 717 is extracted at **Appendix D**. The ALRC invites stakeholder feedback on whether provisions such as s 717 are helpful and how they may best be presented.

95. OPC Drafting Direction 1.8 prescribes requirements for the use of ‘guides’ in most Tax Code legislation, advising a drafter that:

You must provide information at the start of each Division and Subdivision to give readers an idea of what to expect from the Division or Subdivision. This information must always include a table of Subdivisions or a table of sections (as appropriate). You should always include a Guide to a Division, unless there is good reason not to. You may choose to include a Guide to a Subdivision.

96. Drafting Direction 1.8 also expands on what is meant by a ‘theme statement’:

A theme statement is the text that you put in a box at or near the start of a Guide. As originally conceived, its true function is to state in one or 2 sentences (at most) what the Division or Subdivision is about...

A theme statement is meant to encapsulate rather than to summarise. In particular, it is meant to establish the relevance of the provisions to the reader. A theme statement is thus different from a simplified outline.<sup>124</sup>

97. As noted at [91] above, Drafting Direction 1.3A (which has been issued more recently than Drafting Direction 1.8) suggests that a ‘theme statement’ may form part of a simplified outline.

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121 *Gheko Holdings Pty Ltd v The Chief Executive Medicare* [2013] FCA 164 [30].

122 Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, ‘Simplified outlines’ (Document release 1.2, Reissued November 2016) [30].

123 See, for example, s 167AB (relating to Part 2B.8 and mutual capital instruments) and s 1550 (relating to Part 10.25 and transitional provisions relating to the Insolvency Practice Schedule).

124 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, ‘Special rules for Tax Code drafting’ (Document release 1.0, Issued May 2006) [59]–[60].

98. Part 1-2 of the *ITA Act 97* is headed 'A Guide to this Act' and contains information that aims to orientate readers, particularly new readers, to the Act.<sup>125</sup> Subdivisions 2-A and 2-B, which explain the structure of the Act, are reproduced at the example below.

99. The *ITA Act 97* is currently the longest Commonwealth Act, so it is perhaps not surprising that guides are used extensively. The findings of the UK study and Bertlin's observations discussed above,<sup>126</sup> however, suggest that navigation guides and other orientation materials may also aid readers of legislation that is shorter and less complex than the *ITA Act 97* as well.

### **Example: Guide**

Subdivisions 2-A and 2-B *Income Tax Assessment Act 1997* (Cth)

## **Subdivision 2A—How to find your way around**

### **21 The design**

This Act is designed to help you identify accurately and quickly the provisions that are relevant to your purpose in reading the income tax law.

The Act contains tables, diagrams and signposts to help you navigate your way.

You can start at Division 3 (What this Act is about) and follow the signposts as far into the Act as you need to go. You may also encounter signposts to several areas of the law that are relevant to you. Each one should be followed.

Sometimes they will lead down through several levels of detail. At each successive level, the rules are structured in a similar way. They will often be preceded by a Guide to the rules at that level. The rules themselves will usually deal first with the general or most common case and then with the more particular or special cases.

## **Subdivision 2B—How the Act is arranged**

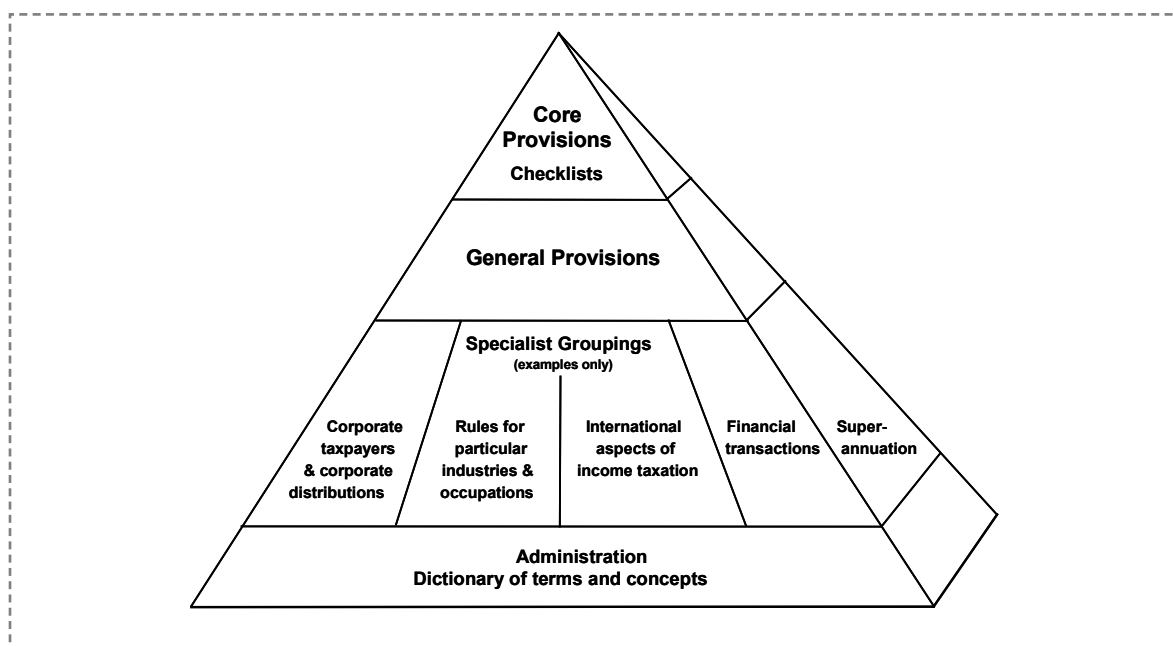
### **25 The pyramid**

This Act is arranged in a way that reflects the principle of moving from the general case to the particular.

In this respect, the conceptual structure of the Act is something like a pyramid. The pyramid shape illustrates the way the income tax law is organised, moving down from the central or core provisions at the top of the pyramid, to general rules of wide application and then to the more specialised topics.

125 Explanatory Memorandum, *Income Tax Assessment Bill 1996* (Cth) 21.

126 See [21] above.



100. The 2010 OPC Survey noted that diagrams, such as flow charts, may be used to give a simple overview of an Act and its structure, with 73% of respondents agreeing that diagrams made legislation easier to navigate.<sup>127</sup> The 2010 OPC Survey gave the example of s 3-6 of the *Aged Care Act 1997* (Cth), which is copied at **Appendix E**. That provision and diagram have subsequently been repealed and not replaced. Current drafting guidance does not appear to comment on the use of diagrams.

### Objects provisions

101. Though not specifically designed to aid navigability, objects provisions may achieve a similar effect to headings and overviews by indicating the general subject matter of an Act, or part of an Act, to a reader. Objects provisions were thought to be useful by 82% of respondents to the 2010 OPC Survey.

102. Objects provisions are commonly used when construing the words of a statute. While an objects provision cannot override otherwise clear words of a statute, they can be used to resolve uncertainty or ambiguity<sup>128</sup> and to ‘give practical content to terms such as “reasonable”, “justification” and “satisfactory”’ by interpreting such terms in light of an Act’s legislative purposes.<sup>129</sup> In this way, objects provisions may also be relevant when interpreting defined terms.

<sup>127</sup> Office of Parliamentary Counsel (Cth) (n 10) 68.

<sup>128</sup> *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78.

<sup>129</sup> *Russo v Aiello* (2003) 215 CLR 643 [5].



## Notes

103. Notes to legislative provisions can be used for a number of purposes, including for identifying defined terms. Notes may contain what have variously been described as ‘see’ references, cross-references and signposts, which all perform similar functions.<sup>130</sup> Notes aid navigation by alerting a reader to the existence of important information that is not otherwise apparent and indicating where that information can be found (whether within the same Act or another piece of legislation).

104. Though the 2010 OPC Survey did not ask respondents whether notes improved navigability, some respondents commented that they thought notes improved navigability and 87% of respondents were satisfied with the usefulness of notes.<sup>131</sup>

105. Notes form part of an Act and may be used as an aid to construction. Putting aside examples contained in notes, discussed below, notes are otherwise subordinate to substantive text and in the event of any conflict, the substantive text prevails.<sup>132</sup>

## Examples

106. Examples in legislation are primarily intended to illustrate the meaning of provisions.<sup>133</sup> Examples may also aid navigability, particularly where they perform the role of a cross-reference or potentially save a reader from needing to cross-refer to another legislative provision. Two illustrations of the use of examples that aid navigability in the *Corporations Act* are at **Appendix F**.

107. Though the questions asked did not include navigability, 80% of respondents to the 2010 OPC Survey indicated that they were satisfied with the usefulness of examples in legislation.<sup>134</sup>

108. Section 15AD of the *Acts Interpretation Act* provides that examples of a provision’s operation are not exhaustive and, since 2011, has provided that examples may extend the operation of the provision. By contrast, 15AD as in force on 1 January 2005, and therefore applicable to the *Corporations Act* and *ASIC Act*,<sup>135</sup> provided that if an example was inconsistent with a provision, then the provision prevailed. The Explanatory Memorandum explained the amendment of s 15AD as follows

If Parliament has enacted an example in a Commonwealth Act, this shows an intention that the example should be covered whether or not it strictly falls within the scope of the provision. However, the amended provision [s 15AD] will state that the example ‘may extend the operation of the provision’ so that a court can assess whether this is in fact appropriate when interpreting a particular provision that includes an example.<sup>136</sup>

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130 See, eg, Ross Carter and Matthew Green, ‘The Enactment Is Self-Explanatory ... or Is It?—Explanatory Provisions in New Zealand Legislation’ (2007) 28(1) *Statute Law Review* 1.

131 Office of Parliamentary Counsel (Cth) (n 10) 38–41.

132 *Director of Public Prosecutions v Walters* (2015) 49 VR 356 [50]; *Fair Work Ombudsman v Wongtas Pty Ltd* (2011) 195 FCR 55 [47].

133 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [159].

134 Office of Parliamentary Counsel (Cth) (n 10) 33.

135 *Corporations Act 2001* (Cth) s 5C; *Australian Securities and Investments Commission Act 2001* (Cth) s 5A.

136 Explanatory Memorandum, *Acts Interpretation Amendment Bill 2011* (Cth) [103].



## Format

109. Like structure, formatting plays a role in the readability and navigability of legislation. As part of the 2010 OPC Survey, respondents were asked to provide feedback on OPC's formatting and conventions. Compared with previous formatting, the 'new' format had the following features (which includes some already discussed above):

- wider left and right margins;
- greater line spacing between units;
- section numbers appearing before section headings;
- greater prominence given to section headings;
- standardised tables of contents for every Act;
- definitions appearing in bold, italicised font; and
- simplified enacting words in prominent text.<sup>137</sup>

110. The survey results showed that 88% of respondents agreed that the format made legislation easier to navigate.<sup>138</sup> Further, 91% and 72% agreed, respectively, that it made legislation easier to read and to understand.<sup>139</sup>

## Technological aids in publication and presentation

111. In addition to drafting techniques, there is scope for improving the navigability by applying aids to legislation as it is published on a publicly available website.

112. In Australia, it appears that the legislative drafting agencies of all jurisdictions are responsible for both the drafting and publication of legislation on the internet. At the Commonwealth level, for example, the OPC is responsible for maintaining the Federal Register of Legislation. This also appears to be common internationally. The United Kingdom is an exception, where the roles of drafting and publication are split between the United Kingdom Office of Parliamentary Counsel, responsible for drafting legislation, and the National Archives, which is responsible for maintaining the UK legislation website.

## Incorporating explanatory notes

113. The UK includes 'explanatory notes' with most Acts. These notes are 'created by the government department responsible for the subject matter of the Act (or Measure) to explain what the Act sets out to achieve and to make the Act accessible to readers who are not legally qualified.'<sup>140</sup> The content of these notes is analogous to some content that appears in Explanatory Memoranda in Australia (the UK does not use Explanatory Memoranda for Acts).

114. Explanatory notes are consolidated and integrated into the UK legislation website for each Act. This means a person does not have to review potentially hundreds of Explanatory Memoranda to the Principal Act and any amending legislation to understand the effect and purpose of each section, as is currently the case in Australia. Each section of an Act has an explanatory note, which summarises the effect and sometimes the

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137 Office of Parliamentary Counsel (Cth) (n 10) 81.

138 Ibid 83.

139 Ibid.

140 The National Archives (UK), 'Frequently Asked Questions' <[www.legislation.gov.uk/help](http://www.legislation.gov.uk/help)>.

purpose of the section. Such an aid could be particularly useful in locating explanatory material relevant both to provisions that define terms and provisions using those terms.

115. An explanatory note is included in each statutory instrument, but ‘is intended to give a concise and clear statement of the substance of the instrument’ rather than a detailed breakdown of each provision.<sup>141</sup>

116. Consolidated provision-specific explanatory notes arguably help to reduce complexity in navigating and reading legislation. This approach could be implemented in Australia given much of the material necessary for UK-like explanatory notes is already included in Explanatory Memoranda. The main limitation is the functionality of the Federal Register of Legislation, which has limited capability for section-specific linking and is focused on Act-level information such as Explanatory Memoranda for originating Bills, Act legislative instruments (which use Explanatory Statements), and Act-related Bills. There is no linking of information to specific sections, and it is necessary to read the relevant Explanatory Memoranda or Explanatory Statement to each amending Bill or legislative instrument to understand the sections they affect. A further challenge would be ensuring that Commonwealth departments and agencies, which are responsible for drafting Explanatory Memoranda and Statements, draft the materials in a way that would allow the OPC to efficiently and affordably integrate the materials into section-specific explanatory notes.

## Annotations

117. The UK National Archives, publisher of UK legislation, makes extensive use of post-publication annotations. Annotations

are notes that appear at the foot of a piece of legislative text on [legislation.gov.uk](http://legislation.gov.uk). They are mainly used to provide the authority for amendments or other effects on the legislation, but they may also be used to convey other editorial information.

Each annotation has a reference number and the nature of the information it contains is conveyed by the annotation type. For instance, F-notes identify amendments where there is authority to change the text, and I-notes contain information about the coming into force of a provision.<sup>142</sup>

118. These annotations can make clear where notional amendments have been made to a provision, when changes to a provision occurred, or whether delegated legislation has been authorised and created under the provision. For example, the following is an extract from the *Financial Services and Markets Act 2000* (UK), which includes extensive annotations.

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<sup>141</sup> Ibid.  
<sup>142</sup> Ibid.

### Example: UK legislation annotations

#### **[F1] 1L** Supervision, monitoring and enforcement

- (1) The FCA must maintain arrangements for supervising authorised persons.
- (2) The FCA must maintain arrangements designed to enable it to determine whether persons other than authorised persons are complying—
  - (a) with requirements imposed on them by or under this Act, in cases where the FCA is the appropriate regulator for the purposes of Part 14 (disciplinary measures), **F2**...
  - [F3]** (aa) with requirements imposed on them by the Alternative Investment Fund Managers Regulations 2013, or
  - (b) with requirements imposed on them by any qualifying EU provision that is specified, or of a description specified, for the purposes of this subsection by the Treasury by order.
- (3) The FCA must also maintain arrangements for enforcing compliance by persons other than authorised persons with relevant requirements, within the meaning of Part 14, in cases where the FCA is the appropriate regulator for the purposes of any provision of that Part.]

#### Textual Amendments

- F1** Pt. 1A substituted for Pt. 1 (24.1.2013 for specified purposes, 19.2.2013 for specified purposes, 1.4.2013 in so far as not already in force) by Financial Services Act 2012 (c. 21), ss. 6(1), 122(3) (with Sch. 20); S.I. 2013/113, art. 2(1)(b)(c)(2), Sch. Pts. 2, 3, 4; S.I. 2013/423, art. 3, Sch.
- F2** Word in s. 1L(2) omitted (22.7.2013) by virtue of The Alternative Investment Fund Managers Regulations 2013 (S.I. 2013/1773), reg. 1, Sch. 1 para. 3
- F3** S. 1L(2)(aa) inserted (22.7.2013) by The Alternative Investment Fund Managers Regulations 2013 (S.I. 2013/1773), reg. 1, Sch. 1 para. 3

#### Modifications etc. (not altering text)

- C1** S. 1L modified by S.I. 2002/1775, reg. 12(2) (as amended) (1.4.2013) by The Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) Order 2013 (S.I. 2013/472), Sch. 2 para. 77(7)(a)(i)
- C2** S. 1L(1) applied (with modifications) (26.7.2013 for specified purposes, 1.4.2014 in so far as not already in force) by The Financial Services Act 2012 (Consumer Credit) Order 2013 (S.I. 2013/1882), arts. 1(1), 3(2)(a)
- C3** S. 1L(2) applied (with modifications) (26.7.2013 for specified purposes, 1.4.2014 in so far as not already in force) by The Financial Services Act 2012 (Consumer Credit) Order 2013 (S.I. 2013/1882), arts. 1(1), 3(2)(b)
- C4** S. 1L(2)(3) excluded by S.I. 2018/1149, reg. 64 (as inserted (1.3.2019) by The Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 (S.I. 2019/405), regs. 1(2), 3)

119. The UK National Archives uses a range of note types, each of which uses a letter in the text of the legislation. The purpose of each note type is listed in **Appendix G**. For example, ‘F-Notes’ are used to indicate amendments to the text of the statute, such as amendments and repeals, and ‘C-Notes’ are ‘used to denote the effect when the meaning, scope or application of an Act or provision etc. is changed in some way, but without there being any authority to alter the text’.<sup>143</sup> These notes greatly assist a reader by not only alerting them to the existence of instruments that affect the operation of the provision, but also by hyperlinking to the instruments themselves.

120. In the Australian context, the equivalent to a ‘C-Note’ could be used to indicate where delegated legislation has modified or excluded the operation of the provision of an Act, as is frequently done in respect of the *Corporations Act*. The extent of modifications and other changes to the operation of the *Corporations Act* made by delegated legislation will be discussed in greater detail in the ARLC’s first and second Interim Reports.

121. The ‘legislative histories’ and ‘history notes’ published by the Office of the Queensland Parliamentary Counsel (‘OQPC’) offer precedents for a drafting office publishing annotations to a legislative text. Legislative histories and history notes record textual amendments made by the Parliament (or the delegated lawmaker in the case of subordinate legislation) and by the Parliamentary Counsel under the *Reprints Act 1992* (Cth). However, they do not record non-textual modifications such as those recorded in

143 The National Archives (UK), *Guide to Revised Legislation on legislation.gov.uk* (October 2013) 12.

C-Notes in the UK. Users can toggle in-line history notes on and off on the Queensland legislation website.

122. Several commercial publishers also make extensive use of post-publication annotations. Thomson Reuters and LexisNexis, for example, annually publish a title that consolidates the *Corporations Act*, *ASIC Act*, related legislation and regulations in a single publication. In addition to substantive commentary, those titles typically also include annotations after each section that contain cross-references to relevant regulations, other legislative instruments, ASIC Regulatory Guides, court rules, forms and section-specific amendment history.

### Conferral of powers

123. The UK legislation website includes a list for each Act of all sections that confer powers to make delegated legislation. This can be useful for accountability purposes and for identifying matters in relation to which future regulations or other statutory (legislative) instruments may be made. The Federal Register of Legislation has no analogous summary, but does include incomplete lists of instruments made under Acts and legislative instruments. These are available on the 'Series' page for a particular legislative text, under the tab 'Enables'.

### Consolidated legislative and guidance documents

124. The UK Financial Conduct Authority ('FCA') Handbook is an example of a document that integrates legislative materials such as regulations, regulator-made legal instruments, regulator guidance, and evidential provisions, in one location.<sup>144</sup> The FCA Handbook is designed in a way that makes it modular: it can be accessed in a hierarchical form that reflects the numbering of rules<sup>145</sup> or through a topic-based table of contents.<sup>146</sup> Functionality built into the online version of the Handbook also allows readers to 'switch on and off' rules, guidance, evidential provisions, and UK legislative material using check-boxes under the heading 'Content Options'. An example screenshot is below. The example also includes an arrow symbol with the label 'Legal Instruments', which allows a reader to select whether to display the symbol within text to indicate the existence of, and hyperlink to, relevant legal instruments. The 'Deleted' check-box gives an option to display deleted provisions. This functionality allows a reader to generate a more tailored version depending on their needs, such as if they just wish to view rules rather than guidance.

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144 An evidential provision is a 'rule, contravention of which does not give rise to any of the consequences provided for by other provisions of the Act; and which provides' either or both that 'contravention may be relied on as tending to establish contravention of such other rule as may be specified; or compliance may be relied on as tending to establish compliance with such other rule as may be specified': Financial Conduct Authority (UK), *FCA Handbook* ('evidential provision').

145 See, eg, [www.handbook.fca.org.uk/handbook](http://www.handbook.fca.org.uk/handbook).

146 See, eg, [www.handbook.fca.org.uk/handbook/browse-topics/](http://www.handbook.fca.org.uk/handbook/browse-topics/).

### Example: FCA Handbook 'Content Options'

125. ASIC has trialled consolidating regulatory guidance and enforceable rules in Regulatory Guide 271 *Internal dispute resolution* (July 2020). This single document includes a number of 'enforceable paragraphs', made enforceable through *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98*, interspersed with guidance on complying with the standards and requirements in the Regulatory Guide. A similar outcome could be achieved by making rules (in a legislative instrument) more informal and guidance-like. It would seem there is little to be achieved by only consolidating guidance and enforceable rules on an ad-hoc basis as readers may not fully appreciate that what otherwise appears to be guidance may occasionally also contain rules carrying the force of law.

### Hyperlinking

126. A hyperlink is a 'piece of text in a hypertext document which, when selected or clicked onscreen, causes another related object... to be displayed or activated'.<sup>147</sup> Hyperlinks are generally clearly identified, such as by colouring, italicisation, underlining, or highlighting. Hyperlinks frequently use URLs to link to webpages, including to internal parts of a particular webpage. Hyperlinks are useful for improving user experience in navigating long documents.

127. Hyperlinks are used in tables of contents on the Federal Register of Legislation, but they are not used in the text of legislation itself. Hyperlinked tables of contents are not available for every Act or instrument. Further, the utility of hyperlinked tables of contents is limited by the fact that a person must first identify the level of an Act (such as Chapter) in which the provisions they are searching for are situated so as to expand the correct drop-down elements of the table of contents. In the case of the *Corporations Act*, this also means knowing which of its seven volumes contains the relevant provisions. An example screenshot using the *Corporations Act* is at [Appendix H](#). (A list at the beginning of each volume of the *Corporations Act* shows the span of numbered sections contained in each volume of the Act. This list only aids a reader if they are aware of the section number they are searching for, and the section numbers are not hyperlinked.)

128. Hyperlinks are a useful way to manage cross-references in legislation and are used in a number of jurisdictions domestically and internationally:

<sup>147</sup> Oxford English Dictionary (online at 7 July 2021) 'hyperlink, *n.*' (def 1).



- New Zealand legislation website: Hyperlinks are used for cross-references to provisions within the same legislation (internal cross-references) and to provisions in other legislation (external cross-references). They also inconsistently hyperlink to other Acts that are mentioned in the text of an Act or instrument. Hyperlinks are identified through blue text of the same font and size as other text.
- New South Wales legislation website: Hyperlinks are used for external cross-references to Acts and instruments, but these links do not link directly to the section that is cross-referenced. Hyperlinks are identified in blue text.
- Queensland legislation website: Hyperlinks are used for internal and external cross-references, including directly to the particular provision that is cross-referenced. Hyperlinks are identified in blue text.
- The United Kingdom legislation website: Hyperlinks are not used for cross-referenced provisions in the text of legislation. However, the National Archives, the publisher of legislation, hyperlinks internal and external cross-references that appear in annotations to the text (discussed above). This includes links to provisions in Acts or instruments that amended the text of a provision or that modify the effect of a provision through a notional amendment. These hyperlinks are identified through blue text of the same font and size as other text in annotations.
- The UK FCA Handbook website: All internal and external cross-references to a provision are hyperlinked to the location of the cross-referenced provision. Hyperlinked provisions are italicised and in blue text.<sup>148</sup>
- The US Codes: Through XML, some external cross-references are hyperlinked. This is then converted to XHTML for more user-friendly viewing.<sup>149</sup>

### Hyperlinking, 'hover boxes' and defined terms

129. As discussed above and illustrated by the AustLII example,<sup>150</sup> hyperlinking can be used to improve the navigability of legislation by both highlighting as well as taking a reader to the definition of a term. In the AustLII example, when a person clicks on the hyperlink they are taken to the provision that defines the term and, if the provision contains more than one term (such as in a dictionary), the location of the term within it. If a reader wishes to return to the provision they were reading then they need to use their internet browser to navigate back.

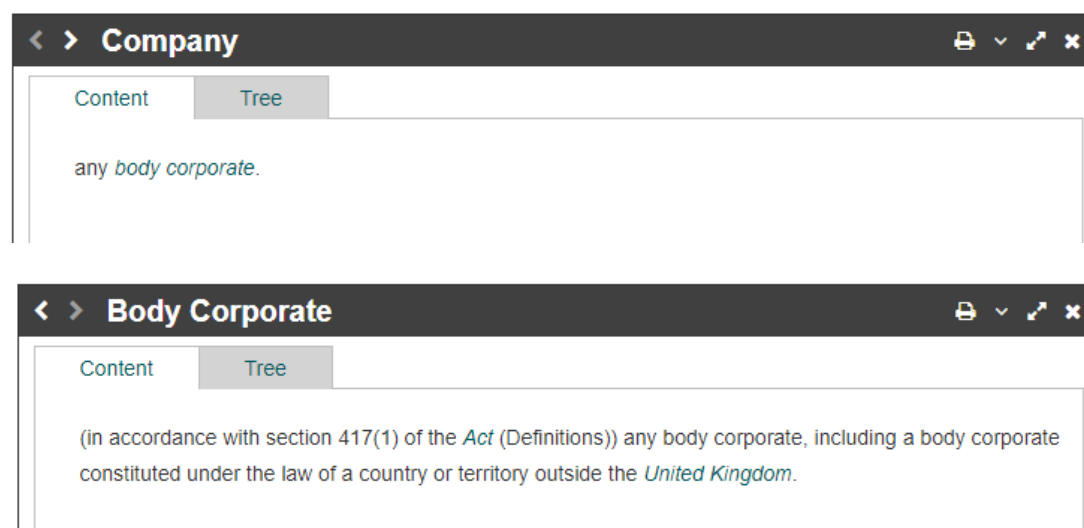
130. The UK FCA Handbook demonstrates how hyperlinks need not take readers away from the text they are reading. All uses of a defined term in the Handbook are hyperlinked to the text of the definition, and when the hyperlink is clicked a small window appears that shows the defined term and a 'tree' of defined terms relevant to the term that was hyperlinked. Defined terms that appear within the first hyperlinked term are also hyperlinked (identifiable by the same italic formatting and blue text). The example screenshots below show the small window that appears after clicking first on the term 'company' and then the defined term 'body corporate' within the definition.

<sup>148</sup> See, for example, Financial Conduct Authority (UK) (n 144), COBS 2.1 Acting honestly, fairly and professionally: [www.handbook.fca.org.uk/handbook/COBS/2/?view=chapter](http://www.handbook.fca.org.uk/handbook/COBS/2/?view=chapter).

<sup>149</sup> See, for example, US Code Title 12 (Banks and Banking) as published online: <https://uscode.house.gov/view.xhtml?path=/prelim@title12&edition=prelim>.

<sup>150</sup> See [52]–[54] above.

**Example: Definition hyperlink result in the UK FCA Handbook**



131. One further option is the use of ‘hover boxes’, which differ from hyperlinks in that the text need not be clicked on to produce the pop-up box; the box instead appears when a cursor is placed (or ‘hovers’) above the linked word. This type of functionality (sometimes called a ‘tooltip’) is not widely used in legislation, but is used in other types of internet publications.<sup>151</sup>

132. Terms with more than one meaning in the same piece of legislation would present a difficulty for any functionality that links from a defined term to its definition. To function, either both definitions would need to be contained in the same location or the existence of multiple definitions be made apparent to the reader in some other way. In the case of the UK FCA Handbook, where a term has more than one meaning (such as in different parts of the Handbook) all definitions of the term appear when it is clicked on, regardless of location.

### Point-in-time versions

133. Point-in-time analysis is frequently necessary in litigation and to understand rights and obligations. The Federal Register of Legislation allows a person to access historical versions of Acts and instruments. However, some websites facilitate this more easily. For example, the New South Wales legislation website allows a person to enter a date and the website generates the version of legislation in force at that time. The Queensland legislation website has similar functionality, offering users a timeline setting out all point-in-time versions for the legislation. A user can enter a specific date to call up the relevant version of the legislation at that date. The timeline also allows the user to generate ‘on-the-fly’ comparisons between different point-in-time versions, though this functionality only works between XML-based versions of legislative texts (i.e. those published since about 2015). This generates a version of the legislative text with either traditional tracked

<sup>151</sup> See, for example, the Wikipedia entry for ‘Tooltip’, which demonstrates the functionality itself: <https://en.wikipedia.org/wiki/Tooltip>.



changes (underlined insertions, struck-through omissions) or colour-coding (green insertions, red omissions).

134. The Queensland legislation website also publishes indicative reprints of selected principal Acts that would be amended by Bills before Parliament. These show the effect of proposed amendments contained in the Bill. Like ‘on-the-fly’ comparisons described above, indicative reprints show changes according to the user’s selection in traditional track changes or colour-coding. Indicative reprints offer improved understanding and scrutiny of proposed amendments, and can ensure that the effect of amendments on the existing legislative text and scheme are fully appreciated by lawmakers and other interested persons. In consultation, the OQPC advised the ALRC that indicative reprints were developed and published in response to needs identified by stakeholder representatives. This further demonstrates the adaptability of using XML.

135. While the Commonwealth website allows only historical versions of the whole Act, the UK legislation website also allows a person to easily identify and access point-in-time changes to particular sections (or Part or Chapter). It does this by showing a timeline of changes to a section when the person is viewing that section, with hyperlinks to the historical versions. The website also gives viewers the option of viewing historical versions of the whole Act.

136. Some commercial providers offer similar functionality. TimeBase, for example, publishes a large number of legislative items across all Australian jurisdictions offering access to point-in-time versions of whole Acts, and individual sections.<sup>152</sup> Additional functionality offered by TimeBase includes ‘red-line’ comparisons and links to amending legislation.

### Tracking enabled instruments

137. It is important to identify instruments that may be relevant to complying with an Act or other instrument. The Federal Register of Legislation website is a leader in this regard. It includes a hyperlinked table for each piece of legislation with the instruments that are enabled under that legislation. However, the ALRC has identified that this appears incomplete in some cases — with instruments that are enabled not always listed under the enabling Act or instrument. The UK annotation system, while not providing a consolidated list of enabled instruments, allows a person to see where an instrument has been made under a particular provision (P-notes).<sup>153</sup>

138. As noted above, commercial publishers also use annotations to list legislative instruments relevant to particular provisions of the *Corporations Act*.

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<sup>152</sup> TimeBase, ‘TimeBase Point-in-Time’ <[www.timebase.com.au/products/Point-in-Time.html](http://www.timebase.com.au/products/Point-in-Time.html)>.

<sup>153</sup> Note, however, that the *Guide to Revised Legislation on [legislation.gov.uk](http://legislation.gov.uk)*, extracted at Appendix G, suggests that P-Notes may only be used for commencement instruments and not necessarily more generally.

## XML – Extensible markup language

### What is XML?

139. XML means ‘extensible markup language’. XML is a language comprised of ‘character data’ and ‘markup’. For example, character data in the below is in plain text, while markup is in bold.

```
<section Id="section-1A">  
<num>1A</num><heading>Prohibition on misleading and deceptive conduct</heading>  
<subsection>  
    <content>A corporation must not engage in misleading or deceptive  
conduct</content>  
</subsection>  
</section>
```

140. If the markup was removed, the character data would simply say:

1A Prohibition on misleading and deceptive conduct

A corporation must not engage in misleading or deceptive conduct

141. XML allows for the marking up of documents so that they can be read by a computer in a meaningful way. Without markup, a computer has no way to know whether the document is an Act, a judgment, or a string of random characters. It also cannot break a document up into semantically meaningful parts without markup — all the computer sees in a non-marked-up document is a string of characters. XML is a non-proprietary language and is easy to modify.

142. There are generally two types of markup: structural and semantic.<sup>154</sup> Structural markup ‘refers to the categorisation of different parts of a document based on their functionality’.<sup>155</sup> In legislative texts this includes, for example, breaking up text into Chapters, Parts, Divisions, Sections and Subsections. Semantic markup

identifies parts of the document (e.g., headings, names, references, provisions). In this way the ‘meaning’ of the different parts can then be ‘understood’ by machines as well, in the sense that a machine will be able to distinguish such parts and consequently to process them accordingly.<sup>156</sup>

143. Markup is principally comprised of ‘elements’ (eg <section>) which can have ‘attributes’ (eg Id=“section-1A”). Attributes can also be used to modify the appearance of the character data when it is published (eg Font=“Arial” Size=“12”). Elements can be used within elements, as is the case in the earlier example: <subsection> appears within the <section> element. Elements must have a start tag (eg <section>) and an end tag (eg </section>). End tags are indicated through the presence of the forward slash (/), but are otherwise identical to the start tag.

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154 Fabio Vitali, ‘A Standard-Based Approach for the Management of Legislative Documents’ in Giovanni Sartor et al (eds), *Legislative XML for the Semantic Web Principles, Models, Standards for Document Management* (Springer, 2011) 39.

155 Ibid.

156 Ibid.

144. All XML must have a ‘root element’ in which all other elements appear. This means that XML is a hierarchical language, with cascading levels of elements possible. This makes it ideal for representing legislation, which is hierarchical in its nature, following the structure: Chapter, Part, Division, Section, Subsection, Paragraph and so on.

145. As noted, elements can have ‘attributes’. The below example is extracted from the XML for the *Mental Health Act 2016* (Qld), with elements in bold and attributes in italics.

**Example – XML elements and attributes**

```
<act title="Mental Health Act 2016" bill.title="Mental Health Bill 2015" year.  
introduced="2015" year.passed="2016" year.assent="2016" no="5" publication.  
date="2021-03-08">
```

146. This provides for the inclusion of ‘metadata’ about elements. For example, the above tells a computer information about the Act element, including its title, the originating Bill, as well as its year of introduction, passage and assent. In UK legislation, this information is included in a ‘<meta>’ element that makes it clear it is metadata relating to the whole Act rather than one single element.

147. What makes XML particularly useful is its ‘extensibility’. Elements and attributes can be developed in any way to create a ‘vocabulary’ (eg <section> means section of a legislative text) and ‘schema’ that is subject matter-specific. A schema is a collection of hierarchical elements and attributes (eg <section> appears below <act> and can have certain attributes) that can form the basis of an XML document.

148. Schema can be validated against a Document Type Definition (‘DTD’) document, which provides the ‘grammar’ of elements and attributes permitted in an XML document.<sup>157</sup> A DTD also specifies the permitted hierarchy of elements and the permitted relationships that elements and attributes can have to each other. For example, a DTD might specify that a ‘<subsection>’ element must appear below a ‘<section>’, and that a ‘<section>’ element must have the attribute ‘ID’ (eg ‘ID=“Section-12D”’). DTDs offer a way of ensuring that XML documents are validly created, which ensures they will be consistently machine-readable. Other markup languages, such as HTML, do not necessarily have these processes to ensure they are ‘well-formed’,<sup>158</sup> and many HTML documents will be inconsistently formatted.

149. The extensibility of XML has allowed drafting offices to develop legislation-specific vocabularies and schema. The UK, New Zealand and the USA have all developed their own XML vocabularies and schema for writing and publishing legislation.<sup>159</sup> Likewise, Queensland, South Australia, New South Wales, Tasmania and Western Australia have all developed different schema for their publication of legislation in XML.<sup>160</sup>

<sup>157</sup> World Wide Web Consortium, ‘Extensible Markup Language (XML) 1.1 (Second Edition)’ <[www.w3.org/TR/xml11/](http://www.w3.org/TR/xml11/)>.

<sup>158</sup> Ibid.

<sup>159</sup> The United States has developed ‘US Legislative Markup (USLM)’ as a derivative of the LegalDocML (Akoma Ntoso) standard: see <https://www.govinfo.gov/features/beta-uslm-xml>. The UK has developed its own scheme (see <https://www.legislation.gov.uk/schema/legislation.xsd>) but also makes all its legislation available in Akoma Ntoso.

<sup>160</sup> Michael Rubacki, ‘Free Access Online Legislation in a Federation: Achievements of Australian Governments and Issues Remaining’ (Research Paper No 2013–28, UNSW Law, May 2013) 7.

150. An international standard XML schema for legal documents has been developed in the form of LegalDocML (Akoma Ntoso).<sup>161</sup> The schema was developed to allow

information to be described and classified in a uniform and organized way so that content is structured into meaningful elements that can be read and understood by software applications, so that the content is made “machine readable” and more sophisticated applications than on-screen display are made possible.<sup>162</sup>

151. According to the Inter-Parliamentary Union, 67% of parliaments with legislative management systems use XML for at least some of their work, of which 40% use XML to publish legislative materials such as Acts and Bills.<sup>163</sup>

### **The Federal Register of Legislation**

152. The Federal Register of Legislation does not currently use XML. However, the Federal Register of Legislation does make effective use of HyperText Markup Language (HTML), which is used to create webpages. HTML is also a markup language, however it uses a preset list of elements and so is limited in its extensibility.

153. The Federal Register of Legislation uses the ‘class’ attribute for HTML elements to include useful markup on the semantic content of Acts and Regulations (both of which are drafted by the OPC). For example, Federal Register of Legislation identifies headings (eg ‘SubsectionHead’, ‘ActHead5’), provision types (eg ‘subsection’, ‘paragraph’), and definitions (eg ‘Definition’, ‘definition’). This markup appears to be an accidental consequence of the Word formatting that the OPC uses and not all markup is intuitive for other users (eg ActHead5). Unlike XML, HTML used on the Federal Register of Legislation is not structured hierarchically and identification of defined terms does not always include the whole text of the definition (unlike in jurisdictions that use XML). There is currently little useful markup in Commonwealth legislation other than Acts and regulations, because other instruments are not generally drafted using the OPC template.<sup>164</sup>

### **What are the benefits of XML?**

154. XML supports the move to the ‘semantic web’:

This means that the legal information available over the Internet is increasingly processed according to its content (or meaning), and not only as a pure text (as a sequence of words, to be read by a human). This result is usually achieved by embedding in the natural language text special computer readable specifications, which can be processed in various ways: for retrieving the document, for accessing related information, for determining the legally binding content of the document, for applying the rules it includes, and so on. XML tagging is normally used to embed such meta-textual information in legal documents... Ways of specifying derogations and modifications in legal documents have been devised, which allow legal texts currently in force to be automatically constructed.

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161 United Nations Department of Economic and Social Affairs, ‘Akoma Ntoso: XML for Parliamentary, Legislative & Judiciary Documents’ <[www.akomantoso.org/](http://www.akomantoso.org/)>.

162 United Nations Department of Economic and Social Affairs, ‘What It Is’, *Akoma Ntoso: XML for parliamentary, legislative & judiciary documents* <[www.akomantoso.org/?page\\_id=25](http://www.akomantoso.org/?page_id=25)>.

163 Inter-Parliamentary Union, *World E-Parliament Report* (2018) 54.

164 Some delegated legislation, such as some legislative instruments made by ASIC, appear to use the OPC template.

XML provides a metalanguage enabling individuals and communities to define tags for expressing the structure of documents, and for including further information (metadata) in the documents, so that they can be automatically processed according to such structure and additional information.<sup>165</sup>

155. By making legislation machine-readable, XML is also a useful but not sufficient step for the development of a range of regulatory technologies (sometimes referred to as 'RegTech') and eventually, if desirable, 'rules as code'.<sup>166</sup> RegTech can support innovation that underpins more effective compliance, including through simpler development of business rules for staff. This is the practical side of implementing legal obligations and developing compliance systems for firms.

156. Several consultees have told the ALRC that developing and maintaining systems for compliance with financial services regulation imposes a considerable burden on their business. Frequent legislative amendment presents a particular challenge for maintaining compliance systems. Updating compliance systems can take some time, and notwithstanding consultation between industry and lawmakers, stakeholders report that they sometimes find it challenging to implement changes to compliance systems before new laws commence. Making legislation machine-readable and more amenable to RegTech may help to reduce the burden of developing and maintaining compliance systems, particularly in the event of any substantial reforms.

157. Publishing legislation in XML format also lowers the barriers to entry for those engaged in developing RegTech. This is principally because it saves the additional step of taking the currently formatted legislation and converting it into something more amenable to machine-reading. At present, the need to do this may act as a significant barrier or disincentive.

158. Because XML vocabularies and schemas are extensible, they can be developed with as much or as little 'markup' and metadata as desired. This also means basic structural and semantic markup can be provided by, for example, the Federal Register of Legislation, which can then be supplemented by more extensive semantic markup by private publishers or RegTech developers.

159. Common semantic markup included by public authorities include cross-references to other provisions within the legislation or in other legislative texts (which supports hyperlinking), identifying defined terms, dates of amendments and changes to the text of a provision (including notional amendments), and identifying basic semantic features such as headings and provision numbers.

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165 Giovanni Sartor, 'Legislative Information and the Web' in Giovanni Sartor et al (eds), *Legislative XML for the Semantic Web: Principles, Models, Standards for Document Management* (Springer, 2011) 13. 16.

166 For a brief introduction to the concept of 'rules as code', see the New South Wales Government's *Emerging Technology Guide: Rules as Code*: <https://www.digital.nsw.gov.au/digital-transformation/policy-lab/rules-code>.

160. However, the potential list of elements or attributes is limitless. For example, campaigners in the USA have pointed to the adoption of XML as paving the way for

a transformation of methods to track federal dollars. XML tags could be used to identify appropriation line items and assess their impact on the overall budget. Once appropriations were enacted... the legislative data could be mapped with executive branch data sources to give a picture of the end-to-end lifecycle of federal spending — from budget to allocation to disbursement to award to sub-award.<sup>167</sup>

161. Likewise, XML could be used to markup obligations and prohibitions in an Act, or civil penalty and offence provisions. This could look like either of the following (very simplified XML):

Option A: Using elements to indicate an offence provision

```
<section>
  <offenceprov>
    <content>A corporation must not engage in misleading or deceptive conduct</
content>
  </offenceprov>
</section>
```

Option B: Using attributes to indicate an offence provision

```
<section provtype="offence">
  <content>A corporation must not engage in misleading or deceptive conduct</content>
</section>
```

162. The use of XML markup also enables more granular search functionality across whole legislation databases. The advanced search function of the Federal Register of Legislation allows users to search across three content types: 'Full text including title and brief description', 'Title and brief description', or 'Title only'.<sup>168</sup> By contrast, the legislation websites of Queensland and New South Wales, which use XML formatting, allow for searching across seven content types: 'All Content', 'Title', 'All Headings', 'Part/Division Headings', 'Schedule Headings', 'Defined Terms', or 'Historical Title'.<sup>169</sup> The Tasmanian legislation website, another jurisdiction that uses XML, offers 11 content types in its search function.<sup>170</sup>

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167 Adam Mazmanian, 'Congress Posts U.S. Code in XML', *Federal Computer Week* <[www.fcw.com/articles/2013/08/02/us-code-xml.aspx](http://www.fcw.com/articles/2013/08/02/us-code-xml.aspx)>.

168 Australian Government, 'Advanced Search', *Federal Register of Legislation* <[www.legislation.gov.au/AdvancedSearch](http://www.legislation.gov.au/AdvancedSearch)>.

169 Queensland Government, 'Search', *Queensland Legislation* <[www.legislation.qld.gov.au/search/inforce](http://www.legislation.qld.gov.au/search/inforce)>; New South Wales Government, 'Search', *New South Wales Legislation* <[www.legislation.nsw.gov.au/search](http://www.legislation.nsw.gov.au/search)>.

170 Tasmanian Government, 'Search', *Tasmanian Legislation* <[www.legislation.tas.gov.au/search](http://www.legislation.tas.gov.au/search)>.



163. Finally, XML also brings benefits for drafters. In consultation with the ALRC, the OQPC suggested that their move to XML, in addition to broader changes introduced through their eLegislation project

enabled [OQPC] to rationalise and repurpose resources to other areas of the business, and remove repetitive, mundane, and non-rewarding manual tasks, processes and steps. It also enabled [OQPC] to rationalise legislation production workflows and interactions (touch-points) within OQPC, streamlining the production processes to meet tighter turn-around times required by government....

It also enabled increasing interoperability and data-sharing opportunities between other jurisdictions using XML and validating DTDs offering standardised formats and readable document structures.<sup>171</sup>

164. The OQPC's experience of introducing XML is consistent with that of other drafters. Michael Rubacki, a drafter of 30 years, has written that XML-adoption supports 'streamlining of in-house processes for both drafting and publishing', as well as the 'portability, inter-usability and longevity of data'.<sup>172</sup> XML can easily be converted into PDF or HTML for publication on the web, and carries across much of its markup to these human-readable document types (eg hyperlinked cross-references). The OQPC publishes all its legislation in XML, PDF and HTML, having previously published only in PDF. Victoria is now the only state or territory to publish its legislation only in PDF or Microsoft Word, though the Northern Territory does not use meaningfully marked-up HTML.

165. While XML may bring benefits for users of legislation, drafters, lawmakers, and RegTech developers, there are necessarily costs in transitioning to XML. Drafting offices need to be supported to make the transition, including by way of necessary funding. Regarding its own transition, the OQPC noted that

Intensive training was undertaken to transition all staff from unstructured to structured document creation and understanding validation of documents. This was conducted with third-party trainers who assisted with the DTD and EDD documents development. All drafters were able to transition to the new drafting format and systems.<sup>173</sup>

166. OQPC's transition to XML came as part of a broader eLegislation project, which was specifically funded

to simplify duplication and manual processes in the drafting, development, and publishing of Queensland legislation and in the process of updating statute book documents to a more universal store format with document format longevity.<sup>174</sup>

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171 Office of the Queensland Parliamentary Counsel, Advice Correspondence (23 September 2021).

172 Rubacki (n 160) 8.

173 Office of the Queensland Parliamentary Counsel, Advice Correspondence (23 September 2021).

174 Office of the Queensland Parliamentary Counsel, Advice Correspondence (23 September 2021).

### *The potential for reform and steps towards interoperability*

167. The Australasian Parliamentary Counsel's Committee ('APCC') consists of the heads of legislation drafting offices in all Australian jurisdictions and New Zealand.<sup>175</sup> The APCC 'provides a forum for discussion about the development of legislation and the management of those drafting offices, and an IT Forum for those drafting offices', as well as for coordinating Australian national uniform law schemes.<sup>176</sup>

168. As discussed above, several Australian jurisdictions and New Zealand currently publish legislation in XML format. The APCC, and its IT Forum, may therefore be an appropriate forum to assist the OPC if it were to move to publishing legislation in XML format.

169. It may also be desirable in the long-term to standardise XML markup schema for legislative texts in Australia, or to ensure that XML can easily be translated between jurisdictions. For example, the UK publishes legislation in both its own bespoke XML schema (UKML) and the internationally recognised LegalDocML (Akoma Ntoso) schema. Publishing legislation in a common schema means that laws from multiple jurisdictions are able to be processed by a computer program designed to read only that common schema (Akoma Ntoso). Commonwealth, state and territory legislation in Australia generally adopts a similar structure and share similar semantic features, so translating between schema adopted by different Australian jurisdictions should be possible.

170. Uniformity in schema or guaranteed ability to translate between schemas in Australia would bring benefits for those developing technologies to process legal texts, such as to create RegTech products. Ensuring at least interoperability of legislative texts for machine-reading programs could be a potential focus of the APCC, and may be a useful consideration if the OPC were to adopt XML at the Commonwealth level.

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175 Australasian Parliamentary Counsel's Committee, 'About Us', *Australasian Parliamentary Counsel's Committee* <[www.pcc.gov.au/about.html](http://www.pcc.gov.au/about.html)>.

176 Ibid.

# Appendices

## Appendix A

### ***Example: Subsection headings***

#### **Section 798G *Corporations Act***

#### **798G Market integrity rules**

- (1) ASIC may, by legislative instrument, make rules (the ***market integrity rules***) that deal with the following:
  - (a) the activities or conduct of licensed markets;
  - (b) the activities or conduct of persons in relation to licensed markets;
  - (c) the activities or conduct of persons in relation to financial products traded on licensed markets.

Note: The market integrity rules will not apply in relation to all licensed markets: see subsection 798H(2).

- (3) ASIC must not make a market integrity rule unless the Minister has consented, in writing, to the making of the rule.

#### ***Emergency rules***

- (4) Despite subsection (3), ASIC may make a market integrity rule without the consent of the Minister if ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products.
- (5) However, if ASIC does so, ASIC must:
  - (a) provide the Minister, on the following day, with a written explanation of the need for the rule; and
  - (b) amend or revoke the rule in accordance with any written directions of the Minister.

#### ***Minister's instruments are not legislative instruments***

- (6) None of the following is a legislative instrument:
  - (a) a consent given under subsection (3);
  - (b) a direction given under paragraph (5)(b).

**Return to in-text discussion at 78** 

## Appendix B

<b>Example: Parallel structure</b>		
Part 7.2—Licensing of financial markets	Part 7.3—Licensing of clearing and settlement facilities	Part 7.6—Licensing of providers of financial services
Division 1—Preliminary		Division 1—Preliminary
Division 2—Requirement to be licensed	Division 1—Requirement to be licensed	Division 2—Requirement to be licensed or authorised
Division 3—Regulation of market licensees Subdivision A—Licensee’s obligations Subdivision B—The market’s operating rules and procedures Subdivision C—Powers of the Minister and ASIC	Division 2—Regulation of CS facility licensees Subdivision A—Licensee’s obligations Subdivision B—The facility’s operating rules and procedures Subdivision C—Powers of the Minister, ASIC and the Reserve Bank in relation to licensees	Division 3—Obligations of financial services licensees
Division 4—The Australian market licence Subdivision A—How to get a licence Subdivision B—The conditions on the licence Subdivision C—When a licence can be varied, suspended or cancelled	Division 3—The Australian CS facility licence Subdivision A—How to get a licence Subdivision B—The conditions on the licence Subdivision C—When a licence can be varied, suspended or cancelled	Division 4—Australian financial services licences Subdivision A—How to get a licence Subdivision B—The conditions on the licence Subdivision C—When a licence can be varied, suspended or cancelled
Division 5—Other matters	Division 4—Other matters	

Return to in-text discussion at 86



## Appendix C

### **Example: Simplified outline**

Section 908AA *Corporations Act*

#### **908AA Simplified outline of this Part**

Administrators of significant financial benchmarks must be licensed under this Part. Administrators of other financial benchmarks may voluntarily opt in to the same licensing scheme.

Licensees are subject to certain obligations.

ASIC may make financial benchmark rules that apply in relation to licensees and the financial benchmarks they administer.

ASIC may also make compelled financial benchmark rules to deal with circumstances such as the failure of a licensee to administer a significant financial benchmark specified in its licence.

Offences and civil penalty provisions apply to conduct that could unduly manipulate a financial benchmark.

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## Appendix D

### **Example: Overview**

Section 717 *Corporations Act*

#### **717 Overview of procedure for offering securities**

The following table summarises what a person who wants to offer securities must do to make an offer of securities that needs disclosure to investors under this Part and gives signposts to relevant sections:

<b>Offering securities (disclosure documents and procedure)</b>			
	<b>Action required</b>	<b>Sections</b>	<b>Comments and related sections</b>
1	Prepare disclosure document, making sure that it: <ul style="list-style-type: none"><li>· sets out all the information required</li><li>· does not contain any misleading or deceptive statements</li><li>· is dated</li></ul> and that the directors consent to the disclosure document.	710 711 712 713 713C 713D 713E 714 715 716	Section 728 prohibits offering securities under a disclosure document that is materially deficient.  Section 729 deals with the liability for breaches of this prohibition.  Sections 731, 732 and 733 set out defences.
2	Lodge the disclosure document with ASIC	718	Subsection 727(3) prohibits processing applications for nonquoted securities for 7 days after the disclosure document is lodged.
...			

Return to in-text discussion at 94 

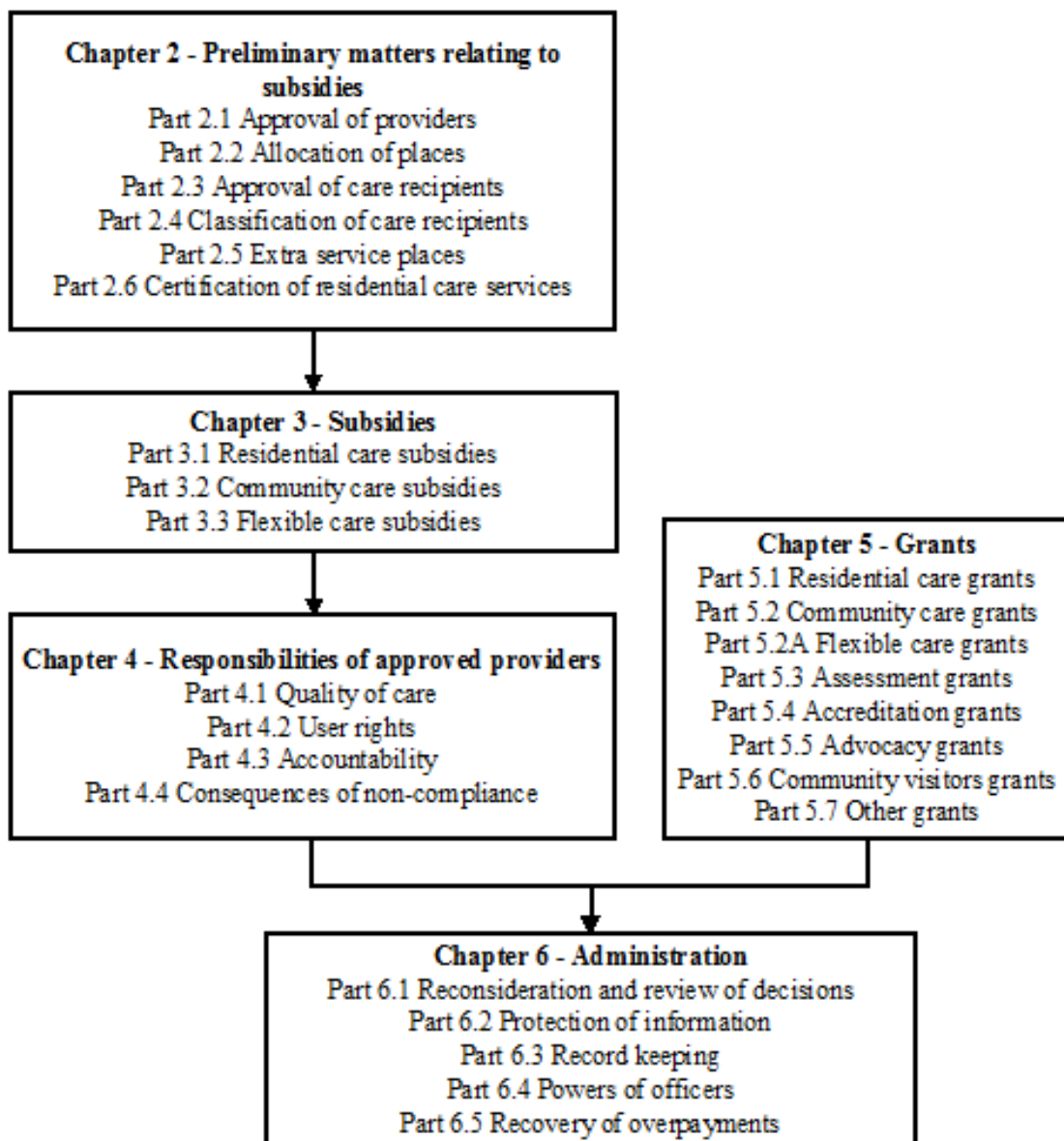


### Example: Diagram

Section 3-6 *Aged Care Act 1997* (Cth) (now repealed)

#### 3-6 The structure of this Act

This diagram sets out the basic structure of this Act.



[Return to in-text discussion at 100](#) ➔

**Example 1: Examples**

Section 51F *Corporations Act*

**51F Meaning of *PPSA retention of title property***

*Definition*

- (1) Property is ***PPSA retention of title property*** (short for Personal Property Securities Act retention of title property) of a corporation if:
- (a) the property is personal property; and
  - (b) the property is used or occupied by, or is in the possession of, the corporation; and
  - (c) the corporation does not have title to the property; and
  - (d) a PPSA security interest is attached to the property, within the meaning of the *Personal Property Securities Act 2009*; and
  - (e) the corporation is the grantor in relation to the PPSA security interest, within the meaning of that Act.

Examples: The following personal property is ***PPSA retention of title property*** if a PPSA security interest attaches to the property by virtue of the transaction concerned, and the grantor is a corporation:

- (a) property that is the subject of an agreement to sell subject to retention of title, or a hire purchase agreement, that secures the payment or performance of an obligation (see subsection 12(2) of the *Personal Property Securities Act 2009*);
- (b) property that is the subject of a lease, or a consignment agreement, that secures the payment or performance of an obligation (see subsection 12(2) of the *Personal Property Securities Act 2009*);
- (c) goods that are the subject of a commercial consignment (see subsection 12(3) of the *Personal Property Securities Act 2009*);
- (d) goods that are leased or bailed under a PPS lease (see subsection 12(3) of the *Personal Property Securities Act 2009*).

*References to property of a corporation*

- (2) A reference in this Act to the property of a corporation does not include a reference to any PPSA retention of title property of the corporation, unless provided otherwise expressly or by necessary implication.

Note: See also the definition of ***property*** in section 9.

## **Example 2: Examples**

### **111M Member approval**

(1) This section applies if:

- (a) a provision of this Act provides that one or more conditions must be satisfied for there to be member approval (however described) in relation to the body corporate; and

Example: Division 3 of Part 2E.1.

- (b) the governance standards (within the meaning of the *Australian Charities and Notforprofits Commission Act 2012*) provide that one or more conditions must be satisfied for there to be such member approval.

(2) Paragraph (1)(a) does not apply to a condition that a person give to another person particular information that relates to the matter that is the subject of the member approval.

Example: Paragraph 218(1)(b).

- (3) The provision mentioned in paragraph (1)(a) has effect, in relation to the body corporate, as if it, instead of providing for the conditions mentioned in that paragraph, provided for the conditions mentioned in paragraph (1)(b).

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## Appendix G

### **UK Legislation Annotation types — Extract from the Guide to Revised Legislation on [legislation.gov.uk](http://legislation.gov.uk) (October 2013)**

- **C-notes - Modifications etc (not altering text)**

‘C’ stands for ‘Cross-notes’, so called because of the way in which they were presented in the hard copy predecessors to the revised content on [legislation.gov.uk](http://legislation.gov.uk). This annotation type is used to denote the effect when the meaning, scope or application of an Act or provision etc. is changed in some way, but without there being any authority to alter the text. Typical expressions of effects of this kind are ‘modified’, ‘applied’, ‘excluded’, ‘extended’, ‘restricted’, etc.
- **E-notes – Geographical Extent information**

This annotation type contains information about the geographic extent of the Act or relevant part of it.

E-notes are at present used very sparingly, mainly to indicate some complexity or change in the extent which is not adequately reflected in the extent provision of the Act (although they have been used more extensively in the past). They are also used where there are multiple versions of a provision created for different geographical extents.
- **F-notes - Amendments (Textual)**

‘F’ stands for ‘Footnotes’. This annotation type is used for amendments, including repeals, where there is authority to change the text.
- **I-notes - Commencement information**

‘I’ stands for ‘In-force’. This annotation type contains information about the coming into force of a provision and will typically state whether it is partly or wholly in force, give the date or dates of commencement and cite relevant provisions of the Act and any commencing instruments.

At present, I-notes are used only if there is some complexity in the commencement. If the provision came into force on one day for all purposes, no I-note will be created and the in-force date will be the same as the start date of the earliest version of the provision.
- **M-notes - Marginal citations**


This annotation type is so called because it used to appear in the margin of the Queen’s Printer’s copy of primary legislation. M-notes recite the year and number of an Act or instrument mentioned in the text.
- **P-notes - Subordinate legislation made**

‘P’ stands for ‘Power exercised’. Where a provision of primary legislation confers power to make subordinate legislation and that power is exercised (i.e. an instrument is made in pursuance of it), that exercise may be recorded in a P-note. The annotation will cite any instruments made under that power.

At present, the P-note annotation type is used only in respect of the making of commencement orders (distinguished by a ‘C’ series number after the number of the instrument) or other exercises of a power to appoint a day.

- X-notes - Editorial information

The X-note annotation type is used sparingly to alert users to anything they may need to be aware of in using the text. They have been used, for example, to explain potential difficulties arising from variations in pre-SLD [Statute Law Database] editorial practice over the years or to point to uncertainties in the text of very old Acts.

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## Appendix H

### Example: Federal Register of Legislation Table of Contents

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