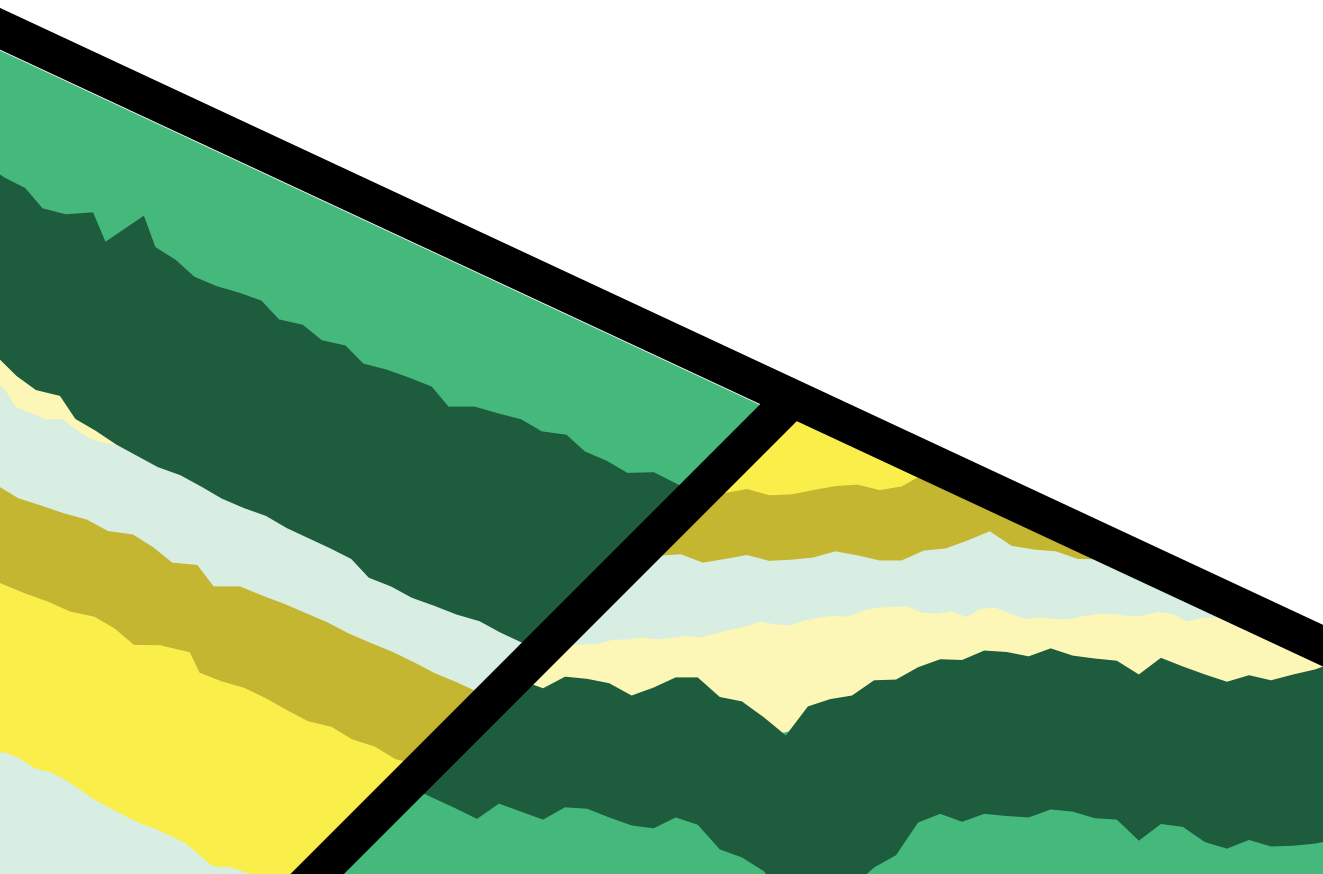
Australian Government
Australian Law Reform Commission

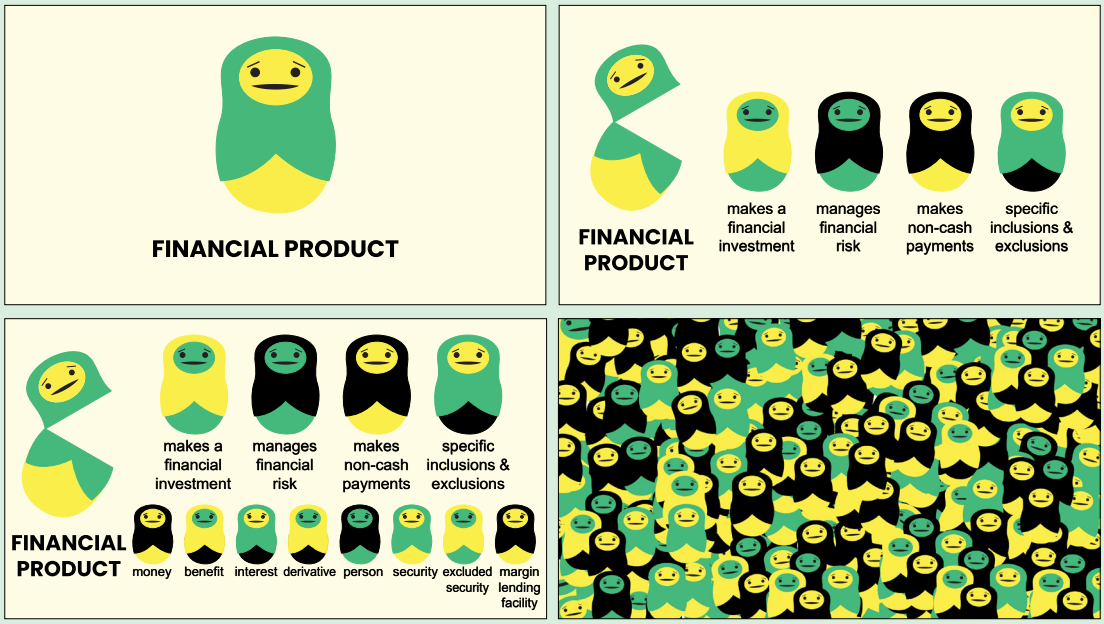
REPORT A: SUMMARY

FINANCIAL SERVICES LEGISLATION

ALRC Report 137
November 2021



Legislative definitions and Russian dolls

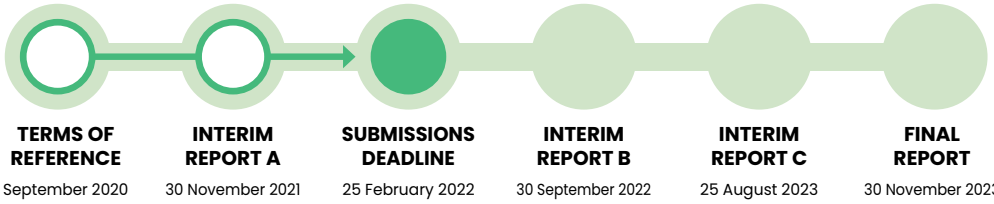


Understanding key definitions in corporations and financial services legislation can be like unpacking a series of Russian dolls, because the definitions contain terms that are themselves defined. Some of those defined terms then rely on yet more defined terms, and so on. This creates long ‘chains’ of interconnected definitions that must be read together in order to understand the first definition. For suggestions to reduce reliance on interconnected definitions, see especially Chapter 6, Chapter 7 (Proposal A5), and Chapter 11 (Proposal A13), in Interim Report A.

CONTENTS

INTRODUCTION

1. Interim Report A contains recommendations, proposals, and questions in relation to the reform of corporations and financial services legislation. The recommendations in Interim Report A relate to matters of consensus at this stage in the process and are accordingly in a form that may be implemented prior to the conclusion of this Inquiry, if accepted by the Australian Government. In respect of the proposals and questions, the ALRC is seeking written submissions from stakeholders. Submissions, together with further consultations, surveys, workshops, and seminars, will form part of the evidence base for subsequent Interim Reports and the Final Report. **Submissions are invited until 25 February 2022.**



Making a Submission

2. The ALRC invites submissions on 16 proposals and 8 questions in relation to:

- definitions, concepts, and standards in corporations and financial services legislation; and
- the empirical and principled basis for reforms.

3. The proposals and questions focus on areas of potential reform that merit further engagement with, and rely on feedback from, stakeholders. They do not represent a firm or settled view of the ALRC. Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed (PDF preferred) to financial.services@alrc.gov.au.

4. The ALRC also welcomes input from stakeholders on any additional matters relevant to the Terms of Reference for this Inquiry, including challenges in understanding obligations and entitlements in relation to financial products and services.

5. Table A below sets out the basis on which the ALRC has divided its reform suggestions into recommendations, proposals, and questions.

Table A: The use of recommendations, proposals, and questions

Recommendations	Proposals	Questions
Policy implications		
The ALRC has made recommendations in relation to more technical simplification issues that do not appear to have significant policy implications.	The ALRC has made proposals in relation to simplification issues where the ALRC has identified a potential solution that may have some policy implications. A proposal is a reform idea — it does not represent a settled position.	The ALRC has asked questions in relation to simplification issues that are likely to have significant policy implications.
Subsequent Interim Report topics		
Recommendations relate specifically to the use of definitions and have less relevance to Topics B and C in the Terms of Reference.	Proposals have arisen out of an examination of definitional issues, but may also be relevant to Topics B and C in the Terms of Reference.	Questions have arisen out of an examination of definitional issues, but have particular relevance for Topics B and C in the Terms of Reference.
Level of consensus		
The ALRC has consulted on these issues and they do not appear contentious.	The ALRC has consulted on these issues and stakeholders have expressed divergent views.	The ALRC has consulted on these issues and stakeholders have expressed divergent views.

Recommendations	Proposals	Questions
Feedback sought		
The ALRC is not specifically seeking feedback on its recommendations.	The ALRC is particularly seeking feedback on its proposals.	The ALRC is particularly seeking feedback and further ideas in relation to its questions.
Status		
All recommendations made in Interim Reports in this Inquiry are expected to be consolidated into the Final Report.	Based on submissions and further research, the ALRC will consider whether and how to convert its proposals into recommendations in the Final Report.	Based on submissions and further research, the ALRC will consider whether and how to convert its questions into proposals and recommendations in subsequent reports.
Numbering		
Recommendations are numbered in the order they appear in Interim Report A: 1, 2, 3 ...	Proposals and Questions are numbered in the order they appear in Interim Report A: A1, A2, A3 ...	

Scope of Inquiry

6. On 11 September 2020, the ALRC received Terms of Reference to consider whether the *Corporations Act 2001* (Cth) ('*Corporations Act*') and the *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') could be simplified and rationalised, particularly in relation to:

A. the use of definitions in corporations and financial services legislation;

B. the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards; and

C. how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured.

7. The Terms of Reference require each of these three major themes to be the subject of a separate Interim Report (in November 2021, September 2022, and August 2023) with a Final Report due in November 2023.

Context

8. The Inquiry is set against the background of the Australian Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and, in particular, the Government's acceptance of the Royal Commission's call for simplification of the law so that its intent is met.[1] The Royal Commission emphasised in its Final Report that the 'more complicated the law, the harder it is to see unifying and informing principles and purposes'.[2]

9. The Terms of Reference for this Inquiry require the ALRC to survey the gamut of corporations and financial services legislation and make recommendations for simplification, with the aim of promoting meaningful compliance with the substance and intent of the law, and laying the foundations for an adaptive, efficient, and navigable regulatory framework.

1 Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Implementation Roadmap* (2019) 38.

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

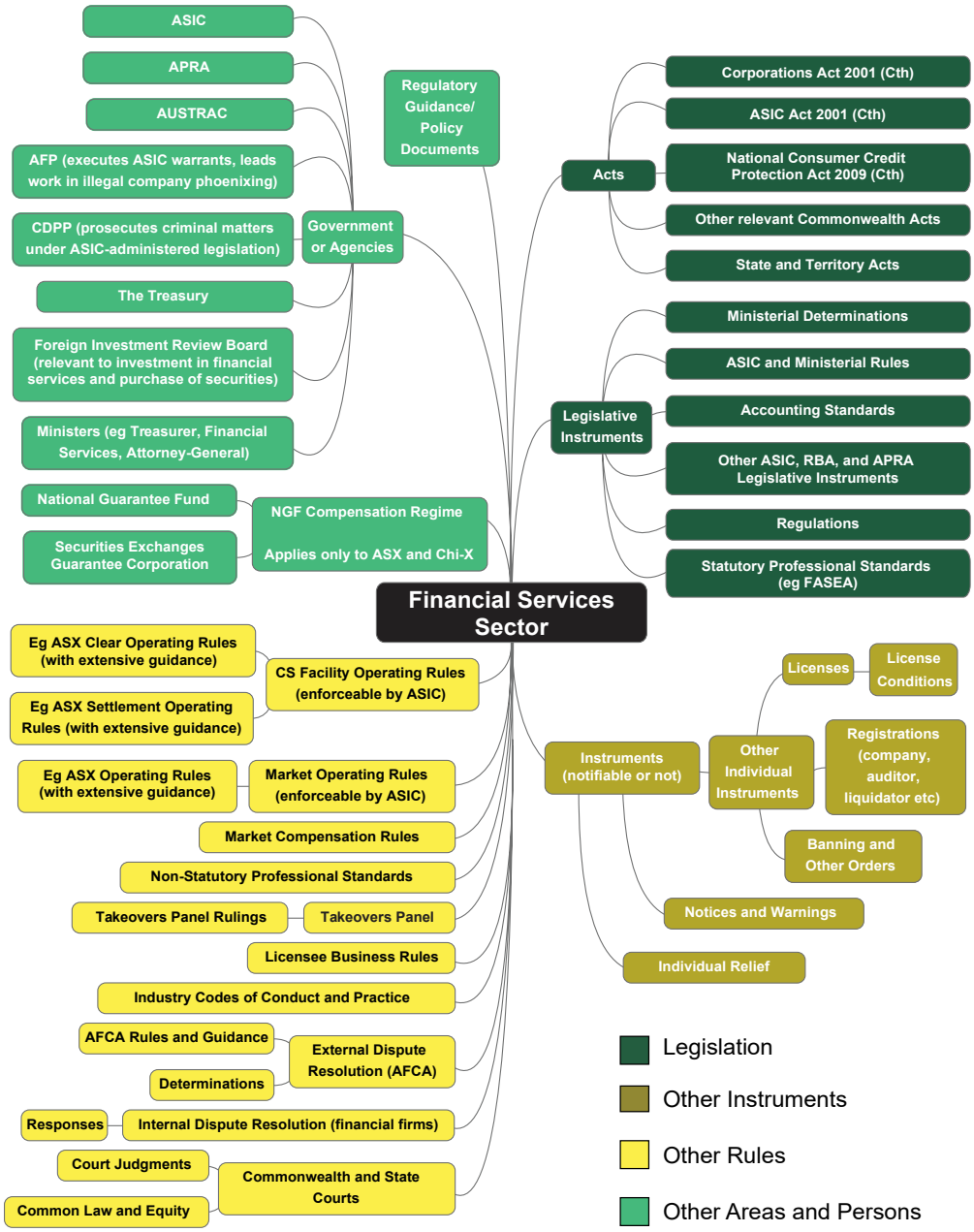
The ALRC's task is not simply to 'tidy up' the legislative framework in service of theoretical objectives. At the core of this Inquiry is the importance of ensuring the law is fit for purpose for industry, recognising the dynamic nature of the financial services sector and its significant contribution to the Australian economy. Further, the regulatory framework must meet the needs of consumers of financial products and services in understanding and navigating the law to protect their legal entitlements. Finally, legislative simplification could reduce the amount of time and money that public institutions necessarily spend on administration, enforcement, and dispute resolution under the law.

Unnecessary complexity

10. The *Corporations Act* together with the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'), which provide much of the consumer protection framework in relation to financial services, are core to the financial services regulatory ecosystem. In addition, the regulation of consumer credit — including in relation to licensing, disclosure and conduct — occurs pursuant to its own separate regime, contained in the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCP Act*').

11. This legislation is supplemented by numerous additional statutes. The *Banking Act 1959* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth), *Insurance Act 1973* (Cth), and *Life Insurance Act 1995* (Cth) are fundamental to the licensing and regulation of prudentially regulated entities, and to the financial safety of the Australian financial system as a whole. In addition, the *Superannuation Industry (Supervision) Act 1993* (Cth) also plays an important consumer protection role in relation to superannuation. Other institutional legislation such as the *Reserve Bank Act 1959* (Cth) and *Australian Prudential Regulation Authority Act 1998* (Cth) also play a significant role, together with more specialised regulatory regimes such as that established by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). Furthermore, Commonwealth legislation forms just one part of the broader regulatory ecosystem for financial services (see Figure B below).

Figure B: Financial services regulatory ecosystem map



12. While the intricacy of the regulatory ecosystem inevitably presents challenges for industry, consumers and others, it is the content and structure of the law that has been raised by stakeholders as a source of particular concern. There has been a level of consensus among stakeholders that the law in this area is 'too complex' and in need of simplification. Acknowledging that a degree of legal complexity is necessary to regulate complex and evolving industries, most stakeholders nevertheless suggest that some aspects of complexity are unnecessary and unhelpful.

13. Many stakeholders have identified the navigability of the law as a key concern — it is too difficult to locate relevant parts of the law, and even experienced lawyers cannot always be confident that they are taking into account all relevant provisions and instruments on a particular issue without 'missing something'.

Some stakeholders have described the wording of key statutory definitions as '**impenetrable'**. Many have urged that relevant provisions on a particular topic should be grouped together '**in one place**' to the extent possible, rather than spread unpredictably across different levels of the legislative hierarchy (including regulations and other legislative instruments). The ALRC has also been urged to consider carefully **how principles and norms can be helpfully integrated and balanced with more detailed and prescriptive rules** that are also often required.

14. Observations such as these go to the heart of the topics raised in the Terms of Reference and have guided the ALRC's approach to the Inquiry. The ALRC's data analysis both confirms stakeholders' views as to the exceptional complexity of the *Corporations Act,* and provides unique insights.

15. On a variety of complexity metrics, such as structural intricacy, obligations, conditional statements, potentially duplicative provisions, prescription, language, and thematic diversity, the *Corporations Act* often stands in a class of its own. The number of definitions the *Corporations Act* contains, and the frequency with which it uses defined terms, make it the second-most definition-dense Commonwealth Act. In addition, the *Corporations Act* has over 14,500 internal cross-references. Although this number is not necessarily excessive relative to the size of the Act, it does mean that readers of the Act can be led through a lengthy maze of provisions in seeking answers to even ostensibly basic questions like whether a particular product is a 'financial product'.

16. The legislation contains a large number of exclusions and exemptions, which can contribute to complexity and obscure policy goals. However, it also contains a large number of exceptions to those exclusions and exemptions. For example, 'securities' are generally excluded from the application of Part 7.9 of the *Corporations Act*. However, securities are expressly included in the application of particular provisions of Part 7.9 (see s 1010A). The effect is to create a cascading series of conditional statements that must be navigated to determine whether or not a particular provision applies. The ALRC has mapped the many conditional statements that determine whether or not particular licensing and disclosure obligations apply in a given situation. Using application provisions (rather than changing defined terms) to determine scope, as proposed in Chapters 7 and 10 of the Interim Report, would make the existence of cascading conditional statements more transparent and facilitate efforts to further simplify the law by reducing their prevalence.

17. The sheer scale of the existing legislative framework is also relevant to complexity. The *Corporations Act* is voluminous — comprising 3,930 pages and 3,539 sections across 30 chapters, 242 parts, 382 divisions, 262 subdivisions, and 3 schedules. It is accompanied by the *Corporations Regulations* — comprising 1,311 pages and 1,418 regulations across 25 chapters, 198 parts, 193 divisions, 74 subdivisions, and 29 schedules. Together, these two pieces of legislation are situated within a complex and diverse legislative regime that includes: over 270 legislative instruments (2,800 pages) made under the *Corporations Act* by the Australian Securities and Investments Commission ('ASIC'); more than 191 other *Corporations Act* legislative instruments (5,300 pages); over 200 regulatory guides (of more than 7,500 pages); over 20,000 ASIC instruments; and over 677 ASIC reports (together more than 22,500 pages). Taken together, the total number of pages is 43,341. This poses significant challenges for locating, comprehending, and interpreting the law relevant to financial services.

A particularly challenging feature of the *Corporations Act* is that the regulator, ASIC, is given the power to make notional amendments to the Act by legislative instrument in certain circumstances. ASIC has frequently exercised this power in approximately 100 legislative instruments. Notional amendments in legislative instruments make the law deeply inaccessible. A person reading the *Corporations Act* or *Corporations Regulations* cannot be confident that the provision they are examining has effect as it is written. The provision may have been notionally omitted or amended, or an additional provision may have been inserted. Such changes may apply only in certain circumstances, or may apply universally.

18. It is unusual for an Act of Parliament to empower an executive agency (such as a regulator) to notionally amend an Act. Neither the Financial Conduct Authority (UK) nor the Financial Markets Authority (New Zealand) has power to notionally amend the legislation it administers. The Securities and Exchange Commission (US) and regulators under some other Commonwealth Acts do have highly constrained powers, rarely exercised, to notionally amend legislation. ASIC's relatively unconstrained powers are therefore notable.

19. When considering the extent of reliance on legislative instruments and notional amendments, the *Corporations Act*, and particularly Chapter 7, are the most complex on the Commonwealth statute book. With more legislative instruments than the vast majority of other Commonwealth Acts, and a set of regulations that is longer than all but seven Commonwealth Acts, the *Corporations Act* represents just the 'tip of an iceberg': underneath the Act sits a vast and constantly evolving body of law.

20. The *Corporations Act* is also frequently cited in litigation. More Federal Court of Australia judgments relate to the *Corporations Act* than almost any other Commonwealth Act. Consequently, the complexity of the *Corporations Act* likely has a **significant effect on businesses, consumers, legal professionals, and the judiciary**.

21. ALRC data on two comparable jurisdictions, the United Kingdom and New Zealand, as well as on other Commonwealth regulatory Acts, suggests that the complexity of the *Corporations Act* is not inevitable or unavoidable. Instead, the complexity appears to be a product of particular legislative drafting and policy approaches, as well as the historical development of the regime, in a way that is unique to Australia. The ALRC invites stakeholder

feedback on whether there is any additional data that would inform its proposals for reform (Question A1).

High-level analysis

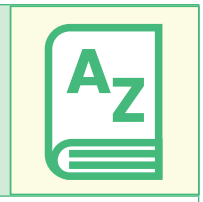
22. In summary, the initial views of stakeholders, together with analysis undertaken by ALRC, reveal the following key problems:

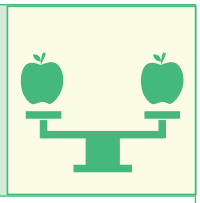
- **Problem One**: Incomplete understandings of legislative complexity.
- **Problem Two**: Complex use of definitions.
- **Problem Three:** Difficulties navigating definitions.
- **Problem Four:** Overly prescriptive legislation.
- **Problem Five**: Obscured policy goals and norms of conduct.
- **Problem Six**: Difficulties administering complex legislation.

23. The next section of this summary report sets out the ALRC's recommendations, proposals, and questions in relation to the reform of corporations and financial services legislation. The six problems identified above are not, in the ALRC's assessment, amenable to 'quick fixes'. The ALRC has been encouraged to suggest **realistically implementable reforms** and the ALRC is conscious of the challenges of implementing the reforms outlined. The proposals and questions, in particular, foreshadow extensive legislative reform. There would inevitably be significant transition costs in implementing the recommendations and proposals. However, in the ALRC's assessment, the extensive compliance costs on industry occasioned by the current regime and the difficulty for consumers in understanding their rights and entitlements suggest corporations and financial services legislation requires urgent and significant reform. Moreover, the extent to which the *Corporations Act* is amended by regulations and instruments which are difficult to locate and interpret raises broader rule of law concerns.

24. The implementation of the reforms set out in Interim Report A would significantly reduce the regulatory burden on industry while clarifying the expected behaviours of industry participants towards consumers. As set out in Interim Report A, the ALRC considers that the reforms proposed could be implemented in a staged manner enabling the efficacy of the proposed solutions to be tested and refined in target areas of corporations and financial services legislation.

RECOMMENDATIONS

When to Define Chapter 4		
Recommendation	1	Section 5(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove reference to non-existent Part 1.3 of the *Corporations Act 2001* (Cth).
Recommendation	2	The definitions of all words and phrases that are not used as defined terms in the *Corporations Act 2001* (Cth) should be removed from that Act.

Consistency of Definitions Chapter 5		
Recommendation	**3**	Section 9 of the *Corporations Act 2001* (Cth), and ss 5 and 12BA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), should be amended to remove all qualifications that definitions or rules of interpretation apply unless a 'contrary intention appears'.
Recommendation	**4**	Section 9 of the *Corporations Act 2001* (Cth) should be amended to remove the definitions of 'for' and 'of'.
Recommendation	**5**	Section 5C of the *Corporations Act 2001* (Cth) and s 5A of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.
Recommendation	**6**	All definitions that duplicate existing definitions in the *Acts Interpretation Act 1901* (Cth) should be removed from the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Design of Definitions Chapter 6		
Recommendation	7	The *Corporations Act 2001* (Cth) should be amended to include a single glossary of defined terms.
Recommendation	8	Section 7 of the *Corporations Act 2001* (Cth) should be replaced by a provision that lists where dictionary provisions appear and the scope of their application.
Recommendation	9	The *Corporations Act 2001* (Cth) should be amended so that the heading of any provision that defines one or more terms (and that does not contain substantive provisions) includes the word 'definition'.
Recommendation	10	The Office of Parliamentary Counsel (Cth) should develop drafting guidance to draw attention to defined terms each time they are used in corporations and financial services legislation.

Design of Definitions

Chapter 6

Recommendation	**11**	The Office of Parliamentary Counsel (Cth) should investigate the production of Commonwealth legislation using extensible markup language (XML).
Recommendation	**12**	The Office of Parliamentary Counsel (Cth) should commission further research to improve the user-experience of the Federal Register of Legislation.

Licensing

Chapter 8

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

PROPOSALS AND QUESTIONS

Empirical Data

Chapter 3

Question	**A1**	What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand: a. legislative complexity and potential legislative simplification; b. the regulation of corporations and financial services in Australia; and c. the structure and operation of financial markets and services in Australia?

When to Define

Chapter 4

Question	**A2**	Would application of the following definitional principles reduce complexity in corporations and financial services legislation? *When to define* (Chapter 4): a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation. b. To the extent practicable, words and phrases with an ordinary meaning should not be defined. c. Words and phrases should be defined if the definition significantly reduces the need to repeat text. d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes. *Consistency of definitions* (Chapter 5): e. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act. f. Relational definitions should be used sparingly. g. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation. *Design of definitions* (Chapter 6): h. Interconnected definitions should be used sparingly. i. Defined terms should correspond intuitively with the substance of the definition. j. It should be clear whether a word or phrase is defined, and where the definition can be found.

Definitions of 'financial product' and 'financial service'

Chapter 7

Proposal	**A3**	Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms 'financial product' and 'financial service'.
Proposal	**A4**	In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to: a. remove specific inclusions from the definition of 'financial product' by repealing s 764A of the *Corporations Act 2001* (Cth) and omitting s 12BAA(7) of the *Australian Securities and Investments Commission Act 2001* (Cth); b. remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the *Corporations Act 2001* (Cth) and s 12BAB(1)(h) of the *Australian Securities and Investments Commission Act 2001* (Cth); c. remove the ability for regulations to deem conduct to be a 'financial service' by amending ss 766A(2) and 766C(7) of the *Corporations Act 2001* (Cth), and ss 12BAB(2) and (10) of the *Australian Securities and Investments Commission Act 2001* (Cth); d. remove the incidental product exclusion by repealing s 763E of the *Corporations Act 2001* (Cth); e. insert application provisions to determine the scope of Chapter 7 of the *Corporations Act 2001* (Cth) and its constituent provisions; and f. consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'.

Definitions of 'financial product' and 'financial service'

Chapter 7

Proposal	**A5**	The *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove the definitions of: a. 'makes a financial investment' (s 763B *Corporations Act 2001* (Cth) and s 12BAA(4) *Australian Securities and Investments Commission Act 2001* (Cth)); b. 'manages financial risk' (s 763C *Corporations Act 2001* (Cth) and s 12BAA(5) *Australian Securities and Investments Commission Act 2001* (Cth)); and c. 'makes non-cash payments' (s 763D *Corporations Act 2001* (Cth) and s 12BAA(6) *Australian Securities and Investments Commission Act 2001* (Cth)).
Proposal	**A6**	In order to implement Proposal A3: a. reg 7.1.06 of the *Corporations Regulations 2001* (Cth) and reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) should be repealed; b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the *Corporations Act 2001* (Cth) and in s 12BAA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth); and c. a definition of 'credit' that is consistent with the definition contained in the *National Consumer Credit Protection Act 2009* (Cth) should be inserted in the *Corporations Act 2001* (Cth) and in the *Australian Securities and Investments Commission Act 2001* (Cth).

Disclosure

Chapter 9

Proposal	**A7**	Sections 1011B and 1013A(3) of the *Corporations Act 2001* (Cth) should be amended to replace 'responsible person' with 'preparer'.
Proposal	**A8**	The obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act 2001* (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.

Exclusions, Exemptions, and Notional Amendments

Chapter 10

Proposal	**A9**	The following existing powers in the *Corporations Act 2001* (Cth) should be removed: a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.
Proposal	**A10**	The *Corporations Act 2001* (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.
Question	**A11**	In order to implement Proposals A9 and A10: a. Should the *Corporations Act 2001* (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'? b. Should any such power be granted to the Australian Securities and Investments Commission?
Proposal	**A12**	As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the *Corporations Act 2001* (Cth) made by delegated legislation.

Definition of 'Financial Product Advice'

Chapter 11

Proposal	**A13**	The *Corporations Act 2001* (Cth) should be amended to: a. remove the definition of 'financial product advice' in s 766B; b. substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and c. incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.
Proposal	**A14**	Section 766A(1) of the *Corporations Act 2001* (Cth) should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.
Proposal	**A15**	Section 766B of the *Corporations Act 2001* (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

Definitions of 'Retail Client' and 'Wholesale Client' Chapter 12		
Question	**A16**	Should the definition of 'retail client' in s 761G of the *Corporations Act 2001* (Cth) be amended: a. to remove: i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or b. in some other manner?
Question	**A17**	What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the *Corporations Act 2001* (Cth)?

Conduct Obligations

Chapter 13

Question	**A18**	Should Chapter 7 of the *Corporations Act 2001* (Cth) be amended to insert certain norms as an objects clause?
Question	**A19**	What norms should be included in such an objects clause?
Proposal	**A20**	Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by: a. separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs; b. replacing the word 'efficiently' with 'professionally'; and c. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.
Proposal	**A21**	Section 912A(1) of the *Corporations Act 2001* (Cth) should be amended by removing the following prescriptive requirements: a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa)); b. to maintain the competence to provide the financial services (s 912A(1)(e)); c. to ensure representatives are adequately trained (s 912A(1)(f)); and d. to have adequate risk management systems (s 912A(1)(h)).

Conduct Obligations

Chapter 13

Proposal	**A22**	In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.
Proposal	**A23**	In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be consolidated into a single provision.
Question	**A24**	Would the *Corporations Act 2001* (Cth) be simplified by: a. amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and b. repealing ss 961C and 961D?

ANALYTICAL SUMMARY

25. This section provides a brief overview of the context and analysis underpinning the recommendations, proposals, and questions.

Definitions

26. Chapters 4, 5, and 6 of Interim Report A suggest guiding principles for the use of definitions in legislation. The principles discussed in these chapters relate to: when to use definitions (Chapter 4); consistency of definitions (Chapter 5); and the design of definitions (Chapter 6). The ALRC seeks stakeholder views as to whether application of the proposed principles set out in Question A2 would reduce complexity in corporations and financial services legislation.

27. In Chapter 4, the ALRC discusses the function of definitions in legislation. Broadly speaking, the primary purpose of definitions should be to make legislation more readable. Accordingly, the key consideration when determining how and when to use definitions in legislation should be their benefits for readers. The ALRC makes two recommendations in Chapter 4, which involve removal of redundant provisions and definitions from the *ASIC Act* and the *Corporations Act* (Recommendations 1 and 2).

28. Chapter 5 discusses issues in relation to consistency of defined terms within legislation. Notably, in the *Corporations Act*, a large number of defined terms take on a different meaning in different provisions. In total, 579 defined terms in the *Corporations Act* are defined more than once, meaning that defined terms often adopt different meanings throughout the Act. For example, 'property' has a general definition, which is then 'affected by' 10 different provisions in relation to 9 different parts and one schedule of the Act (see s 9 definition). 'Property' is also then defined 17 times in the *Corporations Act*, making it the most frequently defined word or phrase in the Act. In contrast, 'property' has only one meaning in the *ASIC Act*, and is not defined in the *Personal Property Securities Act 2009* (Cth) (although several sub-categories of property are defined) nor in the *NCCP Act*.

29. In addition, 'securities' has five different defined meanings (see s 92): one general definition (subject to all others), one relational definition ('in relation to a body'), and three definitions for specific parts or chapters of the *Corporations Act*. In addition, 'marketable securities' is separately defined (s 9), as is 'security' in Chapter 7 (s 761A, including an altered definition

that applies only in Part 7.11). In contrast, the term 'excluded security' has a consistent meaning throughout the Act.

30. Thus a key theme encountered by the ALRC in its examination of definitions in corporations and financial services legislation is the lack of consistency in the use of many common terms. This was highlighted as problematic by a number of stakeholders. Accordingly, the ALRC suggests there is a strong argument that all defined terms should have only one meaning throughout an Act. This should extend to all delegated legislation made under an Act. More broadly, there would be advantages in achieving greater consistency in the use of terms and concepts between related Acts. Instead of repeatedly altering definitions, dedicated 'application provisions' could be used to tailor the scope of particular provisions.

31. In Chapter 5, the ALRC makes recommendations to strengthen consistency by removing unnecessary and confusing qualifications on definitions and removing the definitions of 'for' and 'of' in the *Corporations Act* (Recommendations 3 and 4). Two further recommendations in Chapter 5 relate to consistent application of the Acts Interpretation Act *1901* (Cth) (Recommendations 5 and 6).

32. In Chapter 6, the ALRC discusses principles for the effective design of definitions including:

- limiting the use of interconnected definitions;
- using 'intuitive labels' for defined terms;
- making clear whether definitions are exhaustive or inclusive; and
- appropriate references to technology in definitions.

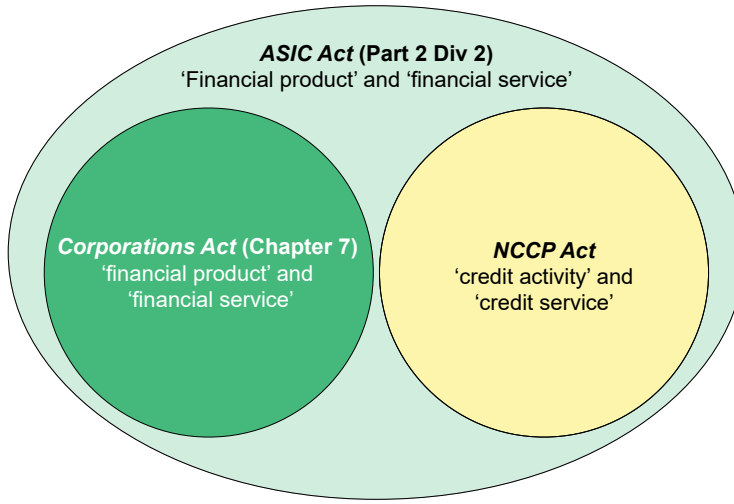
33. Chapter 6 concludes with recommendations for reform to enhance the navigability of definitions within legislation, including the addition of a comprehensive glossary of defined terms, signposting the location and application of dictionary provisions, incorporating the word 'definition' in the headings of dedicated definitional provisions, and drawing attention to the use of defined terms (Recommendations 7–10). It is further recommended that the use of XML technology to enhance navigability of legislation be investigated (Recommendation 11). The final recommendation is to conduct user research that could enable further improvements to the Federal Register of Legislation (Recommendation 12).

Definitions of 'financial product' and 'financial service'

34. In Chapter 7 of Interim Report A, the ALRC makes proposals to reduce the complexity of the defined terms 'financial product' and 'financial service', including by simplifying their definitions and use in both the *Corporations Act* and the *ASIC Act*.

35. 'Financial product' and 'financial service' currently set the outer boundary of the financial products and services regulatory regime in each of the *Corporations Act* and *ASIC Act*. If a product or service does not meet those definitions, then it is not regulated by a range of important provisions in those Acts. To the extent that the boundaries vary for specific regulatory requirements (such as licensing and disclosure), the current practice is to vary the definitions themselves. This makes it very difficult for readers to keep in mind the meaning of these terms in any given provision, and therefore for readers to appreciate the legislative scope of the provision. The inclusion of products and services relating to credit within the *ASIC Act* definitions also creates overlap with the separate regulatory regime for consumer credit contained in the *NCCP Act*. Figure C below illustrates the overlapping regulation created by Chapter 7 of the *Corporations Act*, Part 2 Div 2 of the *ASIC Act*, and the *NCCP Act*.

Figure C: The overlapping financial products and services legislation



36. Defined terms that are nested within the definitions of 'financial service' and 'financial product' are also used to determine the application of other provisions of the Act. For example, Chapter 6D (Fundraising) applies to a tailored definition of 'securities' (s 700), which are a financial product. Likewise, Part 7.5A applies to 'derivatives' that are covered by a Ministerial determination (s 901B). Derivatives are, in turn, financial products by virtue of s 764A(1)(c).

37. Both 'financial product' and 'financial service' are also used in obligations and regulatory powers that do not primarily use the term to determine the scope of regulation. In total, 'financial service' is used as a defined term in 126 sections and 423 times in the text of the *Corporations Act*, while 'financial product' is used in 278 sections and 1,316 times.

The defined terms 'financial product' and 'financial service' are complex because so many provisions — in the Act and in delegated legislation — list specific inclusions and exclusions for particular purposes. As a result, the **definitions change repeatedly** making the application of any provision difficult to ascertain.

38. The ALRC proposes to retain the functional definition of 'financial product' but in a manner that relies less on nested defined terms and specific inclusions (Proposals A3 to A6). The existing practice of supplementing the functional definition with inclusions adds complexity and does not appear to aid the underlying policy that functionally similar markets and products should be regulated alike. Eliminating specific inclusions in the definition of 'financial product' therefore removes one source of complexity.

39. The ALRC proposes that application provisions should be used to accommodate the varying scope of regulation in a more transparent, navigable, and simpler way than is presently the case. An application provision describes the products, services, persons, and circumstances to which provisions within an Act, regulation, or other legislative instrument apply. Application provisions determine scope without altering any definitions. Current examples in Chapter 7 of the *Corporations Act* include ss 900A, 961, and 1019D.

40. In accordance with the Terms of Reference for this Inquiry, Proposals A3 to A6 aim to ensure:

- the consistent use of terminology to reflect the same or similar concepts;
- that defined terms support the coherence of the regulatory design and hierarchy of laws;
- a clear, coherent, and effective legislative framework; and
- that legislative complexity is kept to a minimum and can be appropriately managed over time.

Licensing

41. In Chapter 8 of Interim Report A, the ALRC discusses the nature and structure of the Australian financial services licensing regime, the core obligation in s 911A of the *Corporations Act* to hold a licence, and particular aspects of the regime that create complexity and challenges to navigability. These aspects include the extensive use of exemptions and the use of complex defined terms.

42. The licensing regime is a core component of the financial services regulatory ecosystem. Licensing regimes regulate the conduct of industry participants by requiring a licence to operate. In this way, licensing acts as a barrier to entry and aims to ensure that only appropriate persons are permitted to engage in the regulated categories of conduct. Licensing also regulates conduct by imposing conditions and obligations upon licence holders, and creating consequences for breach.

43. Much of the complexity created by the numerous carve-outs from the Australian financial services licensing regime may be significantly reduced and better managed through the use of application provisions and a principled legislative hierarchy. There is also considerable scope for clarifying the policy goals of financial services licensing and the norms of conduct it seeks to promote. Uniform definitions of 'financial product' and 'financial service' (Proposal A3) also provide an opportunity to consider whether to consolidate the licensing regimes for financial services and for credit. Chapter 8 includes Recommendation 13 to remove a redundant regulation from the *Corporations Regulations*.

Disclosure

44. Chapter 9 considers the application and content of financial services and product disclosure requirements as governed by key definitions, standards, and concepts in the *Corporations Act*.

45. Key elements of the disclosure framework for Chapter 7 of the *Corporations Act* include Financial Services Guides, Statements of Advice, general advice warnings, and Product Disclosure Statements. There are further disclosure obligations beyond Chapter 7, including the prospectus requirements for securities (Part 6D.2), continuous disclosure obligations to the market (Chapter 6CA), and bidder's statements and target's statements for takeovers (Part 6.5). Additional disclosure requirements for financial products are imposed by other Acts, including the *Insurance Contracts Act 1984* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth), and the *NCCP Act*.

46. Determining when particular disclosure obligations apply, and to whom, requires reference to various definitions, including, for example, the definitions of 'financial product' (and specific types of products), 'financial service', 'responsible person', and 'regulated person'. The content of disclosure documents is, in turn, regulated by reference to certain 'standards' of disclosure, including 'clear, concise and effective' and 'information that a person would reasonably require'.

47. Disclosure accounts for a significant proportion of the *Corporations Act*, *Corporations Regulations*, ASIC legislative instruments, and individual relief instruments. As at 30 June 2021, there were 295 in force ASIC instruments on the Federal Register of Legislation, excluding ASIC rules. Forty percent of ASIC instruments were disclosure-related. The ALRC has identified 'granting relief' as the primary purpose of the vast majority (81%) of disclosure-related ASIC legislative instruments. Twenty-five of those legislative instruments provide for 'conditional exemptions'; that is, they impose additional or alternative requirements on persons who rely on relief granted by the instrument. In addition, a number of regulations provide exemptions from disclosure requirements, or impose tailored disclosure requirements for particular circumstances.

48. Large numbers of individual relief instruments have been made under s 741(1) (approximately 2,481) relating to Chapter 6D disclosure, and s 1020F(1) (approximately 2,404), which relates to Part 7.9 financial product disclosure. In comparison, there were approximately 269 individual relief instruments made under s 951B(1) in relation to Part 7.7 (financial services disclosure).

49. Locating and understanding applicable disclosure requirements requires financial service providers to refer to multiple sources and, in many cases, to 'read in' notional amendments to provisions of the Act. The number of conditional exemptions being granted suggests that the regimes currently in force are not working effectively for a range of products and circumstances.

The volume of disclosure-related regulation reflects the high level of prescription in disclosure requirements, and the extent of notional amendments to, and exemptions from, standard requirements. Yet it is **unclear whether this volume of regulation hinders or enhances the primary policy objective** of providing retail clients and investors with the information necessary to make informed decisions.

50. Although there are inherent limitations on the capacity of disclosure to enhance consumer decision making, it is generally accepted that prescribed disclosure remains a necessary component of financial services regulation. However, commentators and stakeholders have raised concerns that the existing regulatory framework for disclosure is overly complex and fails to facilitate effective disclosure to consumers.

51. The proposals in Chapter 9 aim to reduce unnecessary complexity in Chapter 7 of the *Corporations Act*, improve the navigability of the law, and promote meaningful compliance with the substance and intent of the law by:

- introducing **an alternative label for 'responsible person'** in Part 7.9 to **more accurately reflect the substance of the definition and limit potential confusion** with the concept of 'regulated person', particularly in circumstances where they overlap (Proposal A7); and
- coupling the obligation to give financial product disclosure with an **outcomes-based standard that reflects the fundamental policy objective**, in order to provide **greater flexibility** in the application and design of disclosure requirements (Proposal A8).

52. This chapter also invites initial stakeholder feedback on reform opportunities that will be explored further in Interim Reports B and C, including

restructuring Part 7.9 of the *Corporations Act* to achieve greater coherence in the scope of provisions, and reducing unnecessary inconsistency and duplication between the prospectus and PDS regimes.

53. The ALRC also invites comments on the potential implications or application of the proposed reforms in relation to disclosure obligations outside Chapter 7 of the *Corporations Act.*

Exclusions, exemptions, and notional amendments

54. Chapter 10 illustrates how an alternative approach to the legislative architecture of financial services legislation (Proposals A9 and A10 and Question A11) could:

- **simplify the way Chapter 7 of the *Corporations Act* establishes its regulatory boundaries** and uses the defined terms 'financial product' and 'financial service';
- **better accommodate exclusions and exemptions** in the Australian financial services licensing regime;
- **make it easier to find and understand existing prescriptive rules** for particular products, persons, or circumstances; and
- **simplify the disclosure regime** for financial products and services.

55. Thus Chapter 10 brings together a number of themes from Chapter 7–9 and outlines a proposed legislative architecture that aims to facilitate:

- significant simplification;
- greater transparency and navigability; and
- an appropriate means of organising principles and prescription.

Currently, the various powers to create exclusions, grant exemptions, and notionally amend Chapter 7 of the *Corporations Act* provide for necessary flexibility and adaptivity in an otherwise highly prescriptive legislative regime. Exclusions, exemptions, and notional amendments are problematic, however, for three main reasons:

- First, they make the law **difficult to navigate**. This is because the exclusions and exemptions are located in different places and take different forms, and notional amendments are spread across approximately 100 ASIC legislative instruments and dozens of regulations in the *Corporations Regulations*.
- Secondly, they make the regulatory regime **opaque**. This is because the various exclusions and exemptions are not arranged systematically, and because the text of a notionally amended Act or legislative instrument does not reflect the effect of the law.
- Thirdly, they **reduce the coherence** of the legislation. This is because exclusions and exemptions are made on a case-by-case basis, and not by reference to governing principles or policies.

56. Together, exclusions, exemptions, and notional amendments compound the existing level of complexity in the legislative regime, including in relation to definitions.

57. The ALRC's proposals in this chapter would replace all existing exemption and exclusion powers with a sole power for either ASIC or the Minister to make exemptions and exclusions in a single legislative instrument. All powers to omit, modify, or vary provisions of Chapter 7 of the Act through notional amendments would be replaced by a single power to make 'rules' in legislative instruments regarding specified matters. These rules would:

- preserve the flexibility currently achieved by broad exemption, exclusion, and notional amendment powers;
- consolidate prescriptive detail currently spread across the Act, the Regulations, and ASIC legislative instruments;
- adapt to emerging business models, technologies, and practices; and
- support a navigable, transparent, and principled legislative architecture.

58. Implementing the legislative architecture proposed in this chapter would be a significant program of work. The ALRC considers that it could be implemented in phases, and over a number of years. Each phase might see a particular subject matter within Chapter 7 of the *Corporations Act* reformed so as to be consistent with the proposed architecture. Based on stakeholder feedback, Interim Reports B and C will explore in detail how any new legislative architecture could be implemented.

59. Recognising the implementation challenges, the ALRC also sets out a range of interim measures that may help manage the complexity of the existing legislative architecture, pending implementation of any new architecture (Proposal A12).

Definition of 'financial product advice'

60. In Chapter 11, the ALRC makes proposals to simplify, clarify, and improve the navigability of concepts relating to 'financial product advice'. The definition of financial product advice and the underlying definitions of 'general advice' and 'personal advice' act as gateways to the application of a number of provisions, including a range of conduct and disclosure obligations in Chapter 7 of the *Corporations Act*. The provision of financial product advice also constitutes a 'financial service', for which an Australian financial services licence will be required in the prescribed circumstances.

61. The regulation of financial advice has been the subject of significant debate in recent years. There have been recent calls from financial advice industry associations for substantive reforms to reduce the cost and complexity of providing financial advice. Notably, in April 2021 the Australian Government announced that it would conduct the Quality of Advice Review in 2022, although at this stage no formal terms of reference have been announced. The ALRC anticipates that it will be able to consider the findings of that review before making recommendations in this Inquiry's Final Report in 2023.

62. This chapter proposes a number of potential reforms, including to:

- **distinguish more clearly between different regulatory regimes** by decoupling the concepts of 'personal advice' and 'financial service';
- **eliminate an unnecessary and unhelpful intermediary concept** by removing the defined term 'financial product advice';
- **convey more clearly the subject of regulation** by renaming the concepts of 'general advice' and 'personal advice'; and
- **simplify the structure of exemptions** for 'financial product advice' (Proposals A13–A15).

63. These reforms may have implications when considering broader reforms of the regulation of financial advice, including in relation to:

- individual licensing of financial advisers and moves towards greater 'professionalisation' of the sector; and
- clarifying the regulatory perimeters of personal advice and general advice.

64. These policy issues are not the subject of ALRC proposals in this chapter, but it is suggested that these issues may merit further consideration.

Definitions of 'retail client' and 'wholesale client'

65. Chapter 12 examines the definitions of 'retail client' and 'wholesale client'. The distinction between these two categories is pivotal to the operation of Chapter 7 of the *Corporations Act* as it determines when particular protections are available (to 'retail clients') and when a less protective regime applies (to 'wholesale clients'). A key question canvassed in this chapter is whether the definition of retail client should be amended to:

- achieve greater consistency with the fundamental policy settings; and
- simplify the application of the definition of retail client to general insurance products, superannuation products, retirement savings account (RSA) products, and traditional trustee company services; or
- otherwise achieve greater clarity and coherence (Question A16).

66. The ALRC also invites views on the conditions or criteria in respect of the 'sophisticated investor' exception in s 761GA of the *Corporations Act* (Question A17).

67. Various obligations are triggered when a financial service, such as financial product advice, is provided to a retail client, or when a financial product is offered to a retail client. These obligations include: the compensation obligations under Part 7.5; conduct obligations, such as the 'best interests' obligations that apply to the provision of financial product advice under Part 7.7A; the design and distribution obligations in Part 7.8A; the disclosure obligations under Part 7.9; and the external dispute resolution obligations under Part 7.10A. In addition, ASIC has power under Part 7.9A to make product intervention orders in circumstances where a financial product may result in significant detriment to retail clients.

The definition of 'retail client' is subject to various exclusions. Ongoing debate about the appropriateness of these exclusions casts some doubt on the terms used, the definitions of those terms, and whether the definitions are the best means of giving effect to legislative intent.

68. Case law and commentary, including preliminary feedback from stakeholders, suggest that this policy rationale underpinning the definitions of 'retail client' and 'wholesale client' particularly in relation to certain categories of investors could be reflected in simpler, more comprehensible, legislative provisions.

69. This chapter additionally notes connections with securities disclosure requirements under Chapter 6D of the *Corporations Act,* and the consumer protection provisions set out in Division 2 of Part 2 of the *ASIC Act*. The alignment of related concepts in these and other elements of the regulatory framework is addressed in part in this chapter, but will be considered further as part of Interim Reports B and C.

Conduct obligations

70. Lastly, in Chapter 13, the ALRC considers reforms to key conduct obligations imposed on Australian financial services licensees and other entities involved in the financial services ecosystem.

71. Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* regulate the conduct of financial service providers through the imposition of a range of obligations. Most significantly these include:

- an obligation to act 'efficiently, honestly and fairly' in the provision of licensed services, and to comply with various prescriptive requirements (both pursuant to s 912A of the *Corporations Act*); and
- prohibitions on engaging in unconscionable conduct, or making representations that are false, misleading or deceptive (pursuant to a number of provisions in both the *Corporations Act* and *ASIC Act*, discussed below).

72. The *Corporations Act* also imposes obligations on personal advice providers to act in the 'best interests' of clients, and to prioritise their interests in the event of a conflict (pursuant to s 961B and 961J).

The sweeping scope and indeterminate nature of the 'efficiently, honestly and fairly' obligation, the prescriptive compliance obligations currently provided, the proliferation of overlapping prohibitory provisions, and drafting which promotes a 'tick a box' approach to compliance, all give rise to unnecessary complexity in this area of law, and detract from meaningful compliance with the law. This makes understanding and complying with the law more difficult than it needs to be.

73. The focus of proposals in this chapter is on the appropriate use of concepts to promote 'robust regulatory boundaries, understanding and general compliance with the law', in accordance with the Terms of Reference for Interim Report A.

74. The ALRC invites feedback on whether Chapter 7 of the *Corporations Act* should be amended to expressly flag the fundamental norms that underlie existing conduct regulation law through the inclusion of certain norms as an objects clause (Questions A18 and A19).

75. With the aim of clarifying the 'efficiently, honestly and fairly' standard for the conduct of Australian financial services licensees pursuant to s 912A(1)(a) of the *Corporations Act*, the ALRC proposes amendments to:

- **make clear that the constituent terms are standalone obligations**, which is currently the subject of some uncertainty;
- **replace the word 'efficiently' with 'professionally'**, in accordance with the meaning established by the case law; and
- **include examples of conduct that is likely to be unfair**, in order to clarify what is otherwise an open-ended and uncertain obligation (Proposal A20).

76. The ALRC makes further proposals that aim to simplify and rationalise the law (such as by reducing duplication and redundancy), and to ensure 'the consistent use of terminology to reflect the same or similar concepts' (in accordance with the Terms of Reference for Interim Report A). To this end, the ALRC proposes to:

- **repeal prescriptive obligations** imposed on Australian financial services licensees that are already captured within the requirement to act 'efficiently' in s 912A(1)(a) of the *Corporations Act* (Proposal A21);
- **repeal prescriptive prohibitions on unconscionable conduct** contained in s 991A of the *Corporations Act* and s 12CA of the *ASIC Act*, while retaining the broadest prohibition on such conduct contained in s 12CB of the *ASIC Act* (Proposal A22); and
- **consolidate** the many provisions that broadly relate to **misleading or deceptive conduct and false or misleading representations** into a single provision (Proposal A23).

77. These proposed amendments aim to simplify the law by reducing unnecessary particularisation and removing overlapping provisions that are subject to different and highly technical thresholds, promoting meaningful compliance through a more navigable framework.

78. Finally, in relation to the best interests duty on providers of personal advice to retail clients in s 961B of the *Corporations Act*, the ALRC invites feedback on:

- **amending the 'safe harbour'** by recasting the relevant sub-sections as indicative behaviours of compliance, to which a court must have regard when assessing compliance with the duty; and
- **repealing two unhelpful definitional provisions** (ss 961C and 961D) that do not meaningfully assist in understanding this duty (Question A24).

79. These changes may assist to emphasise the primacy of the best interests duty and discourage a 'tick a box' approach to compliance, while still providing guidance on how to satisfy the duty.

APPENDIX A

Terms of Reference

Review of the Legislative Framework for Corporations and Financial Services Regulation

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

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

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

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

B. The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine:

- how legislative complexity can be appropriately managed over time;
- how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and
- how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.

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

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

Scope of the reference

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

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

Consultation

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

Timeframe for reporting

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

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

This Summary Report reflects the law as at 1 November 2021.

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).

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

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